THE

ONTARIO WEEKLY REPORTER

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RIDDELL, J. DECEMBER 16TH, 1907.

TRIAL.

CANADIAN PACIFIC R. W. CO. v. FALLS POWER CO.

Injunction—Electric Poles and Wires—Placing in Public Highway of Town—Dangerous Proximity to Poles and Wires already in Position—Leakage of Current—Commercial Necessity—Approval of Town Council—Power and Authority—Statutes—Interference with Property of other Electric Companies.

Action for an injunction to restrain the defendants from erecting and maintaining poles and stringing and maintaining wires along the east side of Hellems avenue, in the town of Welland. See ante 983. The Bell Telephone Co. were added at the trial as plaintiffs.

E. D. Armour, K.C., and Angus MacMurchy, for the original plaintiffs.

E. H. Ambrose, Hamilton, for the Bell Telephone Co.

W. E. Middleton, for defendants.

RIDDELL, J.:—This case furnishes an example of the speed with which a case may be disposed of if the parties really desire it and if there are no difficult facts requiring prolonged inquiry. The questions for decision arose about two weeks ago in the town of Welland.

Several years ago the Bell Telephone Company, incorporated under 43 Vict. ch. 67 (D.), introduced their system into that town, and strung wires upon poles erected by them upon several of the streets, amongst them Hellems avenue. This they had the right to do without the consent of the town: City of Toronto v. Bell Telephone Co., [1905] A. C. 52.

The Canadian Pacific Railway Company, incorporated by 44 Vict. ch. 1 (D.), are by sec. 16 of that Act authorized to construct and maintain a line of telegraph connected with the line along their railway, and use this for commercial purposes. At least as early as 1887 they had constructed a line of telegraph so connected which ran through Welland, and, amongst other streets, on Hellems avenue. This was and is one of the main channels of communication between Toronto, Buffalo, and Detroit. No question is raised by the defendants as to the right of these two companies to use the streets as they have done.

For convenience the two companies have been and are using each other's poles on the east side of Hellems avenue. At the point in question in this action the poles belong to the Canadian Pacific Railway Company; they each have 4 cross arms, the upper two carrying 4 wires each of the Canadian Pacific and the lower two the Bell Telephone Company's wires, 10 and 4 respectively—the poles being about 38 ft. 6 in. high out of the ground.

About two weeks ago the defendant company, a company buying power and distributing it, having received permission from the town (by-law 244) to erect and place a transmission line along and over the streets of Welland, began a line of poles along the east side of Hellems avenue as far as Grove street, along which street it was intended to turn east to another street running south. The intention was to run two sets of wires, the upper carrying 12,000 volts and the lower 2,200 volts, either being admittedly a dangerous current. In doing so they erected two poles about 53 feet high, having three gains cut therein for cross arms, and these poles actually touch the wires of the plaintiffs.

An interim injunction was applied for by the Canadian Pacific Railway Company, and granted by the Chancellor;

this I continued on 5th December, upon terms that the parties should proceed to trial in a week (ante 983). The case accordingly came before me for trial at the non-jury Court at Toronto on the 12th inst. At the trial the Bell Telephone Company were added as parties plaintiffs.

A very considerable quantity of evidence was given on either side; and, upon such of the evidence as recommends itself to me, I find that even if the construction go no further, the poles as they stand will almost certainly cause a leakage of the current in some of the wires of both plaintiff companies, and will, therefore, be a substantial injury to the plaintiffs. This may not be continuous, but will almost certainly happen whenever the poles become moist by rain, etc. Nor can the poles be so placed in their present sockets, or between the wires of the plaintiffs, as that in case of wind the poles will not touch some of the wires, and if the wind is accompanied by rain there will result substantially interference with the business of the plaintiffs.

I find further that, it being necessary for linemen of the defendants from time to time to ascend these poles (about once a month is suggested by the superintendent of operations, Houston), it is to be anticipated that these workmen will or may (quite unintentionally) interfere with the wires of the plaintiffs and cause the plaintiffs serious injury.

But these are of comparative insignificance, in my view, compared with the serious danger of damage to the plant of the plaintiffs, and still more of death or injury to their employees and to the public, the customers of the telephone company.

The actual construction proposed by the defendants is satisfactory enough, the wire is intended to be good, and the insulators as good as are in actual commercial use. But, however good these may be, the high voltage current will from time to time—e.g., in a driving rain—leak and find its way to the wires of the plaintiffs with more or less disastrous results.

Wire which has passed the tests of the manufacturer and which is apparently sound in all respects has broken many times, and other causes are suggested for wires falling; such

an occurrence is one that must be expected as at least possible. So much is this the case that hundreds of thousands of dollars are being spent in the adjoining republic in providing safeguards against the effect of such an accident. If the wire carrying such a current were to fall, in an instant immense damage might—almost certainly would—be done to the property of the plaintiffs, and many lives might be sacrificed—lives of employee or customer. Moreover, as soon as the wires are strung and the current turned on, it will be dangerous to the lives of employees of the plaintiffs engaged on the poles, and just such an accident will be likely to occur as was the subject of the action of Randall v. Ottawa Electric Co., 6 O. L. R. 619, 2 O. W. R. 1022, 34 S. C. R. 698.

I know it is not unusual to scoff at the likelihood of such a calamity; and those who desire to guard against it are called alarmists, especially by those who would be called upon to spend money. In my humble judgment, one of the worst features of our modern Canadian civilization (I do not say anything of other countries) is the too common disregard of precaution against danger to human life and limb —and I have no doubt that if any one had in advance of the "accidents" which horrified the country during the summer just past, raised his voice against the practices which resulted in these tragedies, his warning would have been laughed at, and "crank" would have been the mildest epithet fastened on him. The plaintiffs, nevertheless, have a right to see that their employees and their customers shall not be placed in peril of their lives. It must be obvious, too, that custom would be quickly lost, if the customer, actual or intended, were to know that at any time a live wire might fall upon that of the company and death and destruction follow.

"Commercial necessity" is pleaded by the officers of the defendants for this course. "Commercial necessity" not uncommonly is synonymous with "financial parsimony"—and it plainly is so in this case. An expenditure of not more than $2,500—I should judge much less—would insure a perfectly safe method of construction under ground.

But it is said that the construction has been approved by the town council, and that the town council is the final

authority. If the law is so, it must be given full effect—the town council is a statutory body, having duties defined by the legislature, and no one may interfere if the limits of such duty be not transgressed. If the law be as contended, though it give the council of Welland the right to direct a construction which may result in death anywhere within a radius of 50 miles or more, the responsibility is cast upon the council, and the Court cannot divest it of that responsibility. One might venture with some confidence to say that such a direction could not have been given with a full appreciation of the possible consequences; and probably all will agree that the safeguarding of human life is of more importance than the beauty of the streets; but, if the legislature has made the council the final judge, all must submit. Before, however, such a far-reaching claim can be allowed, there must be the clearest expression of intention by the legislature in that sense. Into this we must now inquire. In Bell Telephone Co. v. Belleville Electric Light Co., 12 O. R. 571, the facts were that the telephone company had erected their poles upon the streets of Belleville, and two years thereafter the Belleville Electric Co. erected theirs. The plaintiffs, alleging that the defendant's wires were placed so near to their own that it was dangerous when the instruments were working or in electric storms, brought their action. The defendants contended that they had placed their poles where they had been directed by the city engineer, but the Court held that the "city council had not the right to destroy or prejudice the privilege they had already granted the plaintiffs:" p. 581. I do not think that there can be any difference in principle whether the "privilege" of the plaintiffs were granted by the municipality or by the Dominion of Canada—and I think the judgment of the Court would have been the same had the Court considered this privilege a statutory one rather than as granted by the city.

It is contended, however, that the legislature has, by the statute of 1906, 6 Edw. VII. ch. 34, sec. 20, given this power to the municipality. That section amends sec. 559 of the Consolidated Municipal Act, 1903, so as to make sec. 559 read thus: "By-laws may be passed by the councils of the municipalities, and for the purposes in this section respectively mentioned, that is to say: . . . . By the councils of cities, towns, and villages . . . . 4. For

permitting and regulating the erection and maintenance of electric light, power, telegraph, and telephone poles and wires upon the highways or elsewhere within the limits of the municipality." This is the same as the corresponding sub-section in the Act of 1903, except that the word " power " is introduced by the amendment of 1906.

The legislation in force at the time of the Belleville decision was 46 Vict. (O.) ch. 18, sec. 496 (47), whereby the power was given certain municipalities to pass by-laws " for regulating the erection and maintenance of telegraph and telephone poles and wires within their limits." This was consolidated as R. S. O. 1887 ch. 184, sec. 496 (39): the Act of 1891, 54 Vict. ch. 42, sec. 21, introduced the words " electric light " before the word " telegraph;" the amended section goes forward into the revision of 1892, 55 Vict. ch. 42, as sec. 496 (39); in the R. S. O. 1897 appears as sec. 559 (4) of ch. 223; and in 3 Edw. VII. ch. 19, as 559 (4). It is argued that the amendment of 1906 gives a power to the municipality which did not previously exist, and which is sufficient to enable the municipality by its fiat to entitle the defendants to act as they have done.

I do not think that a mere power given to permit the erection of electric power poles and wires gives or implies a right to confer upon an electric company the legal power to interfere with the property of others upon the streets—and the addition of the power to regulate such erection and maintenance confers no such right. It is argued that the section of the Act of 1906 which has been cited is a delegation to the municipality of all the powers of the legislature in respect of electric power poles and wires; and that the legislature must have meant that the municipality should have full power to permit the electric power companies to place their poles and wires where the municipality saw fit upon the streets; and that wherever the municipality should permit a pole to be planted, there it might legally go, no matter whose property might be destroyed, and that the power given to regulate makes this the more clear. There is no such express provision in the legislation, and I cannot find anything of the kind implied. The power is given to allow the power lines to be erected and maintained upon the streets, which power did not previously exist under the Muni-

cipal Act (I do not refer to the provisions of ch. 200 of R. S. O. 1897); but that does not mean more than it says—a company permitted to put its lines upon the streets is not a trespasser is not committing a common nuisance: Bonn v. Bell Telephone Co., 30 O. R. 696. But that permission would not justify an interference with private rights of those already there. If, indeed, it were not possible for a power company to exist and do business without interfering with the existing rights of others, there might conceivably be an argument that such an interference was impliedly authorized, but there is nothing of the kind here. The power to regulate can be to regulate only what can be rightfully permitted and upon being permitted rightfully be maintained.

If I had arrived at a different conclusion, it would have been necessary to consider whether in this case the power given to the municipality had been legally exercised. The by-law does not fix the exact position of the poles to be erected by the defendants, and it is argued that the resolution passed after the beginning of the action, approving the position, is not sufficient. If that be so, considering the very serious results which might follow from the proposed construction, I should think that the injunction should be granted; the council of the town would then have an opportunity, with full knowledge of the results to be anticipated, to dispose of the matter by the solemn act of passing, signing, and sealing a by-law.

I do not proceed upon this ground, however, but upon the ground that no power exists by which this municipality can in effect permit one company to interfere prejudicially with the property and threaten the lives of the employees of other companies, under circumstances like the present.

I have not found it necessary to consider at length the position of the Canadian Pacific Railway Company; but I think their rights are, in this case at least, on a par with their co-plaintiffs'.

An injunction will issue restraining the defendants from erecting or maintaining poles for the carriage of wires intended for conducting electricity along the east side of Hellems avenue between Division street and Grove street, in the town of Welland, in line with and between the poles of

the plaintiffs or either of them, and stringing wires thereon over or parallel to the wires of the plaintiffs, or either of them; and also directing the defendants forthwith to remove the poles already erected upon the said east side of Hellems avenue between Division and Grove streets and between the poles of the plaintiffs.

The defendants will pay the costs of the action.

Ontario Weekly Reporter

INDEX-DIGEST TO VOL. X (MAY TO DECEMBER, 1907.)

All the cases reported in Vol. X. of THE ONTARIO WEEKLY REPORTER, from 11th May to 21st December, 1907, are digested.

The digest includes all the cases decided at Osgoode Hall and other cases reported in THE ONTARIO WEEKLY REPORTER.

Where the case digested is reported in the Ontario Law Reports, a reference is added to the volume and page, thus :

Doe v. Roe, 8; 14 O. L. R. 6.

The figure "8" indicates the page of THE ONTARIO WEEKLY REPORTER, Vol. X.

The Supplement contains two cases reported in 1906 in Vol. VIII. of THE ONTARIO WEEKLY REPORTER, and many cases reported in the early months of 1907 in Vol. IX. of THE ONTARIO WEEKLY REPORTER, which have since been reported in the Ontario Law Reports.

AMENDMENT.

See Bills of Exchange and Promissory Notes, 3—Company, 9—Infant, 2—Judgment, 1 — Liquor License Act, 3—Particulars, 2—Pleading, 1, 2, 6, 7, 9—Principal and Agent, 1—Trusts and Trustees, 2.

ANIMALS.

See Railway, 1, 2.

ANNUITY.

See Costs, 7—Will, 2.

APPEAL TO COURT OF APPEAL.

1. Leave to Appeal from Judgment at Trial—Amount in Controversy — Action to Set aside Mortgages: Wade v. Elliott, 271; 14 O. L. R. 637.

2. Leave to Appeal from Order of Divisional Court—Absence of Special Grounds—Non-repair of Highway—Injury to Pedestrian—Action not Brought in Time — Misfeasance—Nuisance: Moor v. City of Toronto, 284.

3. Leave to Appeal from Order of Divisional Court — Amount Involved—Review of Judgments below — Chattel Mortgage—Renewal—Validity — Time — Computation of Year: McCann Milling Co. v. Martin, 1053.

4. Leave to Appeal from Order of Divisional Court—Important Questions—Special Reasons for Treating Case as Exceptional: Kirton v. British American Assurance Co., 754.

5. Leave to Appeal from Order of Divisional Court — Local Option By-law—Motion to Quash—Special Grounds for Permitting Second Appeal: *Re* Duncan and Town of Midland, 551.

6. Leave to Appeal from Order of Divisional Court — Special Circumstances — Amount in Controversy: Chicago Life Insurance Co. v. Duncombe, 465.

7. Leave to Appeal from Order of Divisional Court—Special Grounds—Assessment of Bridge—Assessment Act — Ultra Vires — Bridge Constructed under Dominion Legislation over Navigable Waters: Belleville Bridge Co. v. Township of Ameliasburg, 1080.

8. Order of Divisional Court Directing New Trial—Appeal from by Defendants — Increase in Amount Awarded to Plaintiffs without Cross-appeal — Judgment — Rule 817: Cavanagh v. Glendinning, 475.

See Bills of Exchange and Promissory Notes, 3—Company, 11—Conspiracy—Contempt of Court, 3 — Criminal Law, 1, 3, 10, 12—Crown, 2—Liquor License Act, 4—Lunatic—Receiver, 2.

APPEAL TO DIVISIONAL COURT.

1. County Court Appeal—Time—Delivery of Judgment Appealed against — Date of Notification to Parties: Allan v. Place, 603; 15 O. L. R. 148.

2. Division Court Appeal — Time — Division Courts Act, sec. 158 — Time when Decision Notified to Parties: Maxon v. Irwin, 537; 15 O. L. R. 81.

See Execution, 4.

APPEAL TO SUPREME COURT OF CANADA.

Extending Time for Appealing—Leave to Appeal—Necessity for—Powers of Court of Appeal: Hamilton Steamboat Co. v. McKay, 510.

APPEARANCE.

See Executors and Administrators, 4—Pleading, 8—Writ of Summons, 2.

APPORTIONMENT.

See Trusts and Trustees, 6.

APPRAISEMENT.

See Stay of Proceedings, 1.

ARBITRATION AND AWARD.

Voluntary Submission to Arbitration —Subsequent Agreement Varying Submission not Equivalent to New Submission — Arbitration Act — Award Made after Time Expired—Failure of Arbitrators to Extend —Invalidity of Award—Dismissal of Action to Enforce: Garside v. Webb, 235.

See Master in Chambers—Mines and Minerals, 4—Schools, 2—Stay of Proceedings.

ARCHITECT.

See Contract, 4.

ASSAULT.

See Criminal Law, 6, 10.

ASSESSMENT AND TAXES.

1. Express Company — Liability to "Business Assessment" — 4 Edw. VII. ch. 23, sec. 10—Construction —"Occupied or Used Mainly for the Purpose of its Business" — Wharf and Premises of Steamboat Company: Dominion Express Co. v. Town of Niagara, 513; 15 O. L. R. 78.

2. Income Tax — Mining Company — Surplus from Year's Operations after Paying Expenses —Distribution in Dividends — "Income Derived from the Mine"—Assessment Act, sec. 36 (3); *Re* Coniagas Mines Co. and Town of Cobalt, 1007.

3. Social Club — "Business Tax" — 4 Edw. VII. ch. 23, sec. 10 (e): Rideau Club v. City of Ottawa, 519; 15 O. L. R. 118.

4. Street Railway — Exemptions — Land Leased from Crown—Agreement with Municipality — Construction—Storage Battery — Real or Personal Property — Ejusdem Generis Rule — Fixtures — Constitutional Law — Assessment Act —Property of Dominion: Ottawa Electric R. W. Co. v. City of Ottawa, 138.

5. Tax Sale—Valid Assessment—Irregularities — Collector's Returns not Verified by Oath — Late Return — Non-compliance with Provisions of Assessment Act — Sale of Lands not Included in List Furnished by Treasurer to Clerk — Failure to Redeem within one Year after Sale—Curative Provision of Statute—Special Acts — Setting aside Sale: Laird v. Neelin, 429.

6. Toll Bridge over Navigable Water—Highway Connecting Municipalities — Interest of Bridge Company Assessable in Township in which one Half Situate: Belleville Bridge Co. v. Township of Ameliasburg, 571, 988, 1080.

ASSESSMENT OF DAMAGES.

See Costs, 13.

ASSIGNMENT OF CHOSE IN ACTION.

See Equitable Assignment — Parties, 2.

ASSIGNMENT OF MORTGAGE.

See Mortgage, 2, 3—Trusts and Trustees, 3.

ASSIGNMENTS AND PREFERENCES.

See Bankruptcy and Insolvency — Banks and Banking—Limitation of Actions, 5.

ASYLUM FOR INSANE.

See Lunatic.

ATTACHMENT.

See Contempt of Court, 1.

ATTACHMENT OF DEBTS.

See Division Courts, 1.

ATTORNEY-GENERAL.

See Crown, 2, 4.

AWARD.

See Arbitration and Award.

BAILMENT.

Machine—Repairs — Lien for — Contract — Rental of Machine—Reasonable Sum for — Possession — Implied Contract of Letting — Implied Contract to Pay for Value of Use — Amount Expended in Repairs: Barbeau v. Piggott, 715.

BANKRUPTCY AND INSOLVENCY.

1. Assignment by Insolvent for Benefit of Creditors — Action by Assignee to Set aside Chattel Mortgage and Land Mortgage made by Insolvent — Previous Agreement —Absence of Knowledge of Insolvency by Mortgagee — Imputed Knowledge: Wade v. Elliott, 206.

2. Assignment by Insolvent for Benefit of Creditors—Right of Creditor to Rank on Estate — Owner or Chattel Mortgagee of Insolvent's Business — Evidence — Representations — Conduct — Estoppel: Barthelmes v. Condie, 717.

See Bills of Sale and Chattel Mortgages — Limitation of Actions, 5 —Parties, 2.

BANKS AND BANKING.

Warehouse Receipts — Assignment to Bank — Promissory Note—"Negotiation" — Bank Act, secs. 86, 90 —Company — Formation of Joint Stock Company — Continuance of Business of Unincorporated Company under same Name — Title to Goods Warehoused — "Written Promise" — Parties — Company in Liquidation — Liquidator — Costs: Toronto Cream and Butter Co. Limited v. Crown Bank of Canada, 363.

See Bills of Exchange and Promissory Notes, 3 — Contract, 2—Guaranty, 2—Husband and Wife, 3 — Insurance, 1 — Landlord and Tenant, 1—Receiver, 1.

BARRISTER.

See Particulars, 5.

BENEFIT CERTIFICATE.

See Insurance, 4, 5.

BETTING.

See Criminal Law, 8.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Accommodation Note by Officers of Company to Secure Advances to Company — Consideration — Personal Liability — Guaranty: Bank of Nova Scotia v. Dickson, 742.

2. Alteration — Word "Renewal" in Margin Erased — Material Alteration — Bills of Exchange Act, sec. 145 — Alteration not Apparent—Holders in Due Course — Payment According to Original Tenor: Maxon v. Irwin, 537; 15 O. L. R. 81.

3. Discount by Payees with Bank — Action Brought by Payees while Bank Still Holders of Note — Note Taken up by Payees pending Action — Failure of Action — New Ground of Relief Urged in Court of Appeal—Right of Payees to Compel Maker to Indemnify them against Note—Leave to Amend Refused: Pure Colour Co. v. O'Sullivan, 313.

4. Procurement of, by False Representations — Conspiracy — Transfer of Notes to Plaintiff for Value — Bona Fides — Absence of Notice——Circumstances of Suspicion — Copy of Promissory Note—Actual Signature of Maker—Destruction of Part of Document Shewing it to be a Copy—Uttering of Copy as Note—Forgery—Defence to Action by Holder for Value—Negligence—Estoppel: Wilson v. Lockhart, 148.

5. Signing by Wife of Maker after Maturity — Promise — Consideration — Agreement not to Sue — Alteration of Note — Bills of Exchange Act — Release of Maker: Stack v. Dowd, 633.

See Banks and Banking — Executors and Administrators, 4—Fraud and Misrepresentation, 1 — Gift—Judgment, 5, 7—Sale of Goods, 5, 7.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. Chattel Mortgage—Action by Creditors to Declare Fraudulent and Void — Failure of Proof of Insolvency of Mortgagor — Defect in Chattel Mortgage — Affidavits of Bona Fides — Renewal—President of Incorporated Company — Necessity for Authority from Directors — Construction of Chattel Mortgage Act and Amendments —Seizure under Mortgage—Excess —Inventory — Waiver — Abatement of Action by Assignment of Plaintiffs pendente lite — Revivor in Name of Assignee — Right of Assignee to Question Validity of Mortgage: Universal Skirt Manufacturing Co. v. Gormley, 918.

2. Chattel Mortgage — Renewal — Time of Filing — Computation of Year — Validity — Assignment of Mortgage — Bankruptcy and Insolvency — Assignment for Benefit of Creditors — Sale of Stock in Trade by Assignee — Fraud — Delivery of Securities — Costs: McCann Milling Co. v. Martin, 264, 681, 1053.

3. Chattel Mortgage—Seizure under—Action by Mortgagor for Conversion and Trespass — Sale of Mortgaged Goods — Business Continued as Going Concern — Payment of Rent to Save Distress — Statement of Demand and Costs —R. S. O. 1897 ch. 75, sec. 15 — Account — Interest — Costs: Gormley v. Brophy Cains Limited, 913.

See Bankruptcy and Insolvency.

BOND.

See Guaranty.

BONDHOLDERS.

See Company, 7.

BOOKMAKERS.

See Criminal Law, 8.

BREACH OF PROMISE.

See Seduction.

BRIDGE.

See Assessment and Taxes, 6—Municipal Corporations, 3, 4—Railway, 4, 8.

BUILDING.

See Limitation of Actions, 4.

BUILDING CONTRACT.

See Contract, 4.

BUSINESS ASSESSMENT.

See Assessment and Taxes, 1, 3.

BY-LAWS.

See Company — Municipal Corporations.

CARRIERS.

Ship — Detention of Goods Carried—Replevin — Damages — Freight —Demurrage — Costs — Set-off: Osborne v. Dean, 192.

CAUTION.

See Crown, 4—Land Titles Act.

CEMETERY.

Right of Way to Burial Plots — Interference with — Way Shewn on Plan — Title to Lots—Injunction: McMartin v. Chisholm, 305.

CERTIORARI.

See Criminal Law, 3—Liquor License Act, 2.

CHAMPERTY.

See Solicitor, 1—Trusts and Trustees, 3.

CHARGE ON ESTATE.

See Will, 8.

CHARGE ON LAND.

See Execution, 2—Mortgage, 3—Will, 1.

CHARITABLE BEQUEST.

See Will, 4, 13.

CHATTEL MORTGAGE.

See Bills of Sale and Chattel Mortgages.

CHEQUES.

See Fraud and Misrepresentation, 1—Gift — Vendor and Purchaser, 9.

CHOSE IN ACTION.

See Equitable Assignment—Parties, 2.

CLASS SUIT.

See Pleading, 6.

CLOSE OF PLEADINGS.

See Notice of Trial, 3.

CLUB.

See Assessment and Taxes, 3.

COMMISSION.

See Principal and Agent.

COMMISSIONER.

See Municipal Corporations, 2.

COMMON BETTING HOUSE.

See Criminal Law, 8.

COMMON GAMING HOUSE.

See Criminal Law, 9.

COMMUNITY OF PROPERTY.

See Husband and Wife, 5.

COMPANY.

1. Directors — Breach of Trust—Sale of Machinery to Company—Consideration — Shares in Company —Fraud—Contract — Setting aside Transaction — Payment of Fair Value of Machinery: Boyle v. Rothschild, 696.

2. Directors — Election of — General Meeting of Shareholders — Proxies —Rejection — By-law — Invalidity — Companies Act — Voting —Majority — Evidence — New Election: Kelly v. Electrical Construction Co., 704.

3. Directors — Election of — General Meeting of Shareholders — Shareholders Prevented from Voting — Meeting Voting Shares to Directors as Remuneration for Services —7 Edw. VII. ch. 34, sec. 88 (O.) —By-law Authorizing Payment to Directors — Necessity for Passing by Board and Confirmation by Shareholders — Consideration for Shares Voted — Abandonment of Appeal in Previous Action—Validity—Directors Lending Money to Company — Repayment—Illegality—Costs: Beaudry v. Read, 622.

4. Directors — Issue of New Shares—Allotment by Directors to themselves at Par — Shareholders — Rights of Minority—Voting Power —Ultra Vires — Ratification—Statutes — Fraud — Injunction — Costs: Martin v. Gibson, 66.

5. Directors — Managing Director — Salary — By-law of Board of Directors—Approval by Shareholders —Money Expended for Company —Action by Assignee—Addition of Assignor as Plaintiff — Set-off—Misrepresentations — Payment for Stock Allotted to Managing Director for Services—Voluntary Winding-up — Reference—Costs: Benor v. Canadian Mail Order Co., 899, 1091.

6. Directors — Sale of Mining Properties to Company—Acquisition by Director — Agent or Trustee for Company — Secret Profits — Affirmance of Contract by Company — Return of Notes and Shares — Costs: Ruethel Mining Co. v. Thorpe, 222.

7. Receivers — Bondholders — Priorities—Scheme for Re-arrangement —Bondholder Attacking — Leave to Bring Action against Receivers: Re Diehl and Carrett, 403.

8. Shares—Sale of Shares in Mining Company—Vendors Interfering to Prevent Registration of Transfer—Resale by Purchaser—Loss of Profit — Damages — Obligation to See that Purchaser Registered as Owner: Boultbee v. Wills & Co., 993.

9. Shares — Subscription — Increase of Capital Stock — Agreement to Take Shares before Issue of Supplementary Letters Patent — Amendment — Rights of Defendant under Contract: Port Hope Brewing and Malting Co. v. Cavanagh, 531.

10. Winding-up — Effect of Order—Companies Winding-up Act—Order gations of Company — Lease of Lands—Option of Purchase—Covenant in Lease — Breach after Winding-up Order — Defence of Liquidators — Sale of Property without Knowledge of Plaintiff—Damages for Breach: McCarter v. York County Loan Co., 165; 14 O. L. R. 420.

11. Winding-up — Ontario Joint Stock Companies Winding-up Act—Order under—County Court Judge—Jurisdiction of—Action to Set aside Order—Fraud — Collusion—Jurisdiction of High Court—Appeal to Court of Appeal: Deacon v. Kemp Manure Spreader Co., 577; 15 O. L. R. 149.

See Banks and Banking—Bills of Exchange and Promissory Notes, 1—Conspiracy—Contempt of Court, 3—Contract, 9—Costs, 9 — Discovery, 2—Fraud and Misrepresentation, 3—Judgment, 2—Mortgage, 6—Sale of Goods, 6—Trusts and Trustees, 4—Will, 3, 16—Writ of Summons, 1.

COMPENSATION.

See Land Titles Act—Mortgage, 6—Municipal Corporations, 1.

CONDITION.

See Deed, 1.

CONDITIONAL APPEARANCE.

See Executors and Administrators, 4—Writ of Summons, 2.

CONSOLIDATION OF ACTIONS.

Cross-actions — Possession of Land—Specific Performance of Contract—Burden of Proof—Stay of one Action—Judicature Act, sec. 57, subsec. 12: Berry v. Hall, Hall v. Berry, 496.

See Defamation, 3.

CONSPIRACY.

Trade Competition—Procuring Incorporation of Company to Compete with Plaintiffs — Inducing Plaintiffs' Servants to Leave Employment—Using Information Obtained in Plaintiffs' Employment — Appropriation of Plaintiffs' Documents and Chattels — Master and Servant — Breach of Confidence—Injunction — Damages — Appeal Costs—Evidence: Copeland-Chatterson Co. v. Business Systems Limited, 819.

See Bills of Exchange and Promissory Notes, 4—Criminal Law, 2—Particulars, 2.

CONSTITUTIONAL LAW.

See Assessment and Taxes, 4.

CONTEMPT OF COURT.

1. Attachment—Disobedience to Judgment — Service of Judgment — Copy — Non-production of Original—Status of Plaintiffs as Applicants for Attachment — Parting with Interest in Part of Subject Matter of Action — Judgment Attacked by Subsequent Action: McLeod v. Lawson, 1093.

2. Breach of Injunction — Deliberate Act — Punishment — Imprisonment—Costs: Todd v. Pearlstein, 471.

3. Breach of Injunction — Wilful Contempt — Company — Sequestration—Effect of Appeal to Court of Appeal from Judgment Containing Injunction — Order of Judge of Court of Appeal Staying Operation of Injunction — Stay of Proceedings in Court below—Jurisdiction

to Entertain Motion for Sequestration—Process of Contempt—Securing Obedience to Injunction—Power to Punish—Locus Pœnitentiæ: Copeland-Chatterson Co. v. Business Systems Limited, 92.

See Extradition.

CONTRACT.

1. Advertising — Construction of Contract — Moneys Expended by Advertising Agent — Breach of Contract—Loss of Profit—Damages — Services — Remuneration—Quantum Meruit—Evidence — Credibility of Witnesses—Evasion in Taking Oath—Entire Contract—Failure in Part—Termination of Contract—Refusal to Pay: McKim v. Cobalt-Nepigon Syndicate, 1121.

2. Breach — Bank—Agreement to Advance Money—Authority of Agent of Bank — Restrictions — Knowledge of Borrower — Incomplete Agreement — Damages — Measure of—Proof of Damage: Cosgrave v. Bank of Hamilton, 956.

3. Breach — Supply of Gas—Value—Damages—Liability of Several Defendants — "Reservation"—Plant "Exception" — Judgment — Construction of Contract—Evidence as to Damages—Measurement of Gas—Computation — Reference — Report—Appeal—Costs: Carroll v. Erie County Natural Gas and Fuel Co., 1017.

4. Building Contract—Provisions of—Construction — Architect — Remuneration — Extra Work—Payment for, outside Contract — Increase in Cost — Knowledge and Acquiescence of Owner—Breach of Covenant — Damages — Cross-action—Stay of Execution: Mills v. Small, 499.

5. Construction — Advances — Share of Profits — Breach — Damages—Measure of—Possible Profits—Evidence—Rejection of—Impossibility of Performance—Option—Partnership — Warranty — Judgment: Battle v. Willox, 732.

6. Construction—Provision for Cancellation — Right of Administrators under—"Assigns"—Lease — Partnership: Deschenes Electric Co. v. Royal Trust Co., 311.

7. Goods to be Manufactured by Plaintiff—Refusal of Defendants to Accept — Statute of Frauds — Work and Labour: Dunstan v. Niagara Falls Concentrating Co., 441.

8. Promise to Convey Land on Marriage—Specific Performance—Statute of Frauds — Intended Marriage — Postponement on Account of Insanity of one of the Parties—Part Performance: Freel v. Royal, 258.

9. Sale of Assets and Goodwill of Company — Promise to Pay Purchase Money by Instalments—Release by New Agreement — Conflicting Evidence — Finding of Trial Judge — Appeal — Invalidity of Novation Contract—Illegal Consideration — Powers of President and General Manager of Companies—Acquisition of Shares of one Company by another—Ultra Vires—Delay of Plaintiff in Repudiating Novation Contract—Change of Position—Estoppel: Clark v. C. H. Hubbard Co. Limited, 675.

10. Sale of Goods — Provisions as to Payment of Price — Deferred Payments to be Agreed upon Subsequently — Incomplete Contract—Vendor not Entitled to Enforce—Purchaser Taking Possession of Goods to Test and Returning Same—Dismissal of Action — Costs: House v. Brown, 396; 14 O. L. R. 500.

11. Work and Labour—Construction—Rate of Payment — "Clear"—Wages — Waiver — Counterclaim—Damages — Reference — Costs: Hunton v. Coleman Co., 610.

12. Work and Services Rendered to Deceased Person—Promise to Pay for Services, but no Rate Fixed — Claim against Estate — Quantum Meruit—Evidence — Report Varied on Appeal by Reducing Amount Allowed: Dixon v. Garbutt, 838.

See Arbitration and Award — Bailment—Bankruptcy and Insolvency —Bills of Exchange and Promissory Notes—Company, 1—Consolidation of Actions—Criminal Law, 2—Division Courts, 2 — Equitable Assignment—Husband and Wife—Injunction, 3 — Limitation of Actions, 1, 2—Master and Servant, 1 —Mortgage—Notice of Trial, 3—Particulars, 3 — Pleading, 3, 9—Principal and Agent — Sale of Goods — Settlement of Actions—Solicitor — Trusts and Trustees—Vendor and Purchaser — Writ of Summons, 2.

CONTRIBUTION.

See Sale of Goods, 6.

CONTRIBUTORY NEGLIGENCE.

See Master and Servant, 4 — Negligence, 5, 6—New Trial—Railway, 5, 7—Street Railways.

CONVERSION.

See Parties, 3.

CONVICTION.

See Criminal Law—Habeas Corpus, 2 —Liquor License Act—Sunday.

COSTS.

1. Motion for Judgment on Report before Confirmation — Appeal from Report not Contemplated — No Costs of Motion: Reinhardt v. Jodouin, 648.

2. Motion for Leave to Discontinue without Costs—Payment of Plaintiff's Money Claim — Injunction—Rule 430 (4): Wallace v. Munn, 246.

3. Motion for Prohibition — Division Court—Territorial Jurisdiction—Cause of Action, where Arising—Action for Price of Goods Sold—Plaintiff Consenting to Transfer of Action after Motion for Prohibition Launched: Re Buchanan v. Brown, 393.

4. Motion to Quash By-law of Township Corporation Closing Road—Necessity for Confirmation by County Council—Statutes—Appeal to County Council — Exhausting other Remedies before Moving to Quash: Re Cameron and United Townships of Hagarty, Sherwood, Jones, Richards, and Burns, 357.

5. Payment out of Court—Money Paid in by Company for their own Convenience—Railway Act—Lands Acquired by Company—Vesting Order: Re Toronto and Niagara Power Co. and Webb, 402.

6. Scale of — Action for Injury to Land—Easement — Disturbance—Value of Land — Amount of Damages — County Courts Act—Jurisdiction of County Courts: Moffat v. Carmichael, 72; 14 O. L. R. 595.

7. Scale of — Amount Recovered—Ascertainment — Covenant—Amount Due under — Annuity—Deduction —Payment or Set-off — Division Court Jurisdiction: Osterhout v. Fox, 157, 241; 14 O. L. R. 553.

8. Scale of—Trespass — Title to Land —Pleading—Division Court Jurisdiction—Rule 1132—Set-off: Burns v. Hewitt, 757.

9. Security for Costs—Action Brought by Liquidator in Name of Company in Liquidation—Liability for Costs — Assets of Company — Undertaking of Liquidator: Toronto Cream and Butter Co. v. Crown Bank of Canada, 521.

10. Security for Costs — Slander—Chastity of Plaintiff — R. S. O. 1897 ch. 68, sec. 5, sub-sec. 3—Defence—Admission: Welburn v. Sims, 524.

11. Settlement of Action—Payment by Defendants of Plaintiffs' Solicitor's Costs — Practice — Consent — Motion—Præcipe Order for Taxation —Offer to Pay Sum for Costs—Reference to Taxation—Costs of: Marjoram v. Toronto R. W. Co., Re Solicitor, 562.

12. Taxation—Copy of Shorthand Evidence Taken in Master's Office—Allowance between Party and par-

ty—Counsel Fees—Subpœna—Letters, Attendances, and other Items: Plenderleith v. Parsons, 387, 658.

13. Taxation — Counsel Fee—Trial or Assessment of Damages — Interlocutory Judgment — Noting Pleadings Closed — Items of Tariff: Hamilton v. Hamilton, Grimsby, and Beamsville Electric R. W. Co., 197, 473; 15 O. L. R. 50.

14. Taxation of Mortgagee's Costs of Sale Proceedings — Jurisdiction of Local Registrar: Re Drinkwalter and Kerr, 511; 15 O. L. R. 76.

15. Third Part Proceedings—Dismissal of Action against Defendant at Trial — Discretion — No Costs: Wood v. Brown, 178.

See Banks and Banking — Bills of Sale and Chattel Mortgages, 2, 3—Carriers—Company, 3-6—Conspiracy—Contempt of Court, 2—Contract, 3, 10, 11—Criminal Law, 2, 5—Crown, 2 — Devolution of Estates Act — Dismissal of Action—Discovery, 1—Easement — Equitable Assignment, 1, 2—Evidence, 3, 5—Execution, 2, 4—Executors and Administrators, 2 —Fraud and Misrepresentation, 2—Gift — Husband and Wife, 5—Improvements —Infant, 1—Injunction, 4—Insurance, 1, 4 — Judgment, 1 — Landlord and Tenant, 3—Limitation of Actions, 1, 3 — Mortgage, 3, 6—Municipal Corporations, 8—Notice of Trial, 2—Parties, 1, 2—Partnership — Physicians and Surgeons—Receiver, 1, 2—Sale of Goods, 4, 5, 6—Schools, 1 — Settlement of Actions—Solicitor—Street Railways, 1—Trusts and Trustees, 6—Vendor and Purchaser, 1, 4—Venue—Way, 2—Will, 2, 7, 11, 19, 20.

COUNSEL FEES.

See Costs, 12, 13.

COUNTERCLAIM.

See Trusts and Trustees, 2.

COUNTY COURT APPEAL.

See Appeal to Divisional Court, 1.

COUNTY COURT JUDGE.

See Company, 11—Municipal Corporations, 2—Water and Watercourses, 2.

COUNTY COURTS.

See Costs, 6.

COURT OF APPEAL.

See Appeal to Court of Appeal—Appeal to Supreme Court of Canada—Criminal Law, 1, 3, 10, 12.

COURT OF RECORD.

See Criminal Law, 3, 4.

COURTS.

See Appeal to Court of Appeal—Appeal to Divisional Court—Appeal to Supreme Court of Canada—Division Courts—Execution, 4—Jury Notice, 1.

COVENANT.

Restraint of Trade—"Carry on or be Engaged in Business"—Assisting Another in Business — Suspicious Circumstances—Costs: Fricker v. Borman, 564.

See Company, 10—Contract, 4—Costs, 7—Landlord and Tenant, 3—Railway, 2.

CRIMINAL CONVERSATION.

See Husband and Wife, 2.

CRIMINAL LAW.

1. Carnal Knowledge of Girl under 14—Conviction—Motion for Leave to Appeal—Proof that Girl not Applicant's Wife—Testimony of Girl—Knowledge of Nature of Oath—Instruction for Purposes of Trial—Criminal Code, sec. 1003—Corroboration: Rex v. Armstrong, 508; 15 O. L. R. 47.

2. Conspiracy—Criminal Code, sec. 520 — Trade Combination — Illegal Agreements — Prices—Preference —Members of Associations — Pre-

venting Competition—Conduct and Participation in Illegal Agreements — Conviction — Penalty—Fine—Costs: Rex v. McMichael, 268.

3. Conviction—Leave to Appeal—County Court Judge's Criminal Court—Court of Record—Habeas Corpus and Certiorari — Proceedings Removed by Certiorari and not Returned when Sentence Pronounced—Application for Reserved Case—No Substantial Wrong or Miscarriage: Rex v. Harrison, 578.

4. Habeas Corpus — Conviction by Court of Record: Rex v. Harrison, 35.

5. Habeas Corpus — Issue of Second Writ—Change of Circumstances—Right of Appeal—Term of Imprisonment—Commencement from Day of Sentence—Magistrate Allowing Prisoner to go Free—Escape—Expiry of Term of Imprisonment—Discharge of Prisoner — Costs against Magistrate: Rex v. Robinson, 338; 14 O. L. R. 519.

6. Indictment for Robbery with Violence and Wounding — Verdict—Assault — Recording — Interpretation—Mistrial—New Trial: Rex v. Edmondstone and New, 1065.

7. Indictment of Railway Company—Nuisance — Carrying Dangerous Explosives—Fatal Injuries to Persons—Board of Railway Commissioners—Plea of Guilty — Punishment — Mitigating Circumstances—Imposition of Fine: Rex v. Michigan Central R. R. Co., 660.

8. Keeping Common Betting House—Peripatetic Bookmakers Making and Recording Bets on Racecourse of Incorporated Association — No Booth or other Structure—"House, Office, Room, or other Place"—Criminal Code, secs. 227, 228: Rex v. Moylett and Bailey, 803.

9. Keeping Disorderly House — Common Gaming House — Summary Trial—Jurisdiction of Police Magistrate — Right of Accused to Elect to be Tried by Higher Court—Provisions of Criminal Code: Rex v. Lee Guey, 1060.

10. Motion for Leave to Appeal from Conviction at Sessions and for a Reserved Case — Indictment for Robbery and Wounding — Verdict of Guilty of Assault — Recording Verdict — Interpretation: Rex v. Edmondstone and New, 581.

11. Murder—Death Sentence—Reprieve—Criminal Code, sec. 1063: Rex v. Capelli, 443.

12. Murder — Conviction—Application for Leave to Appeal and to Compel Trial Judge to State a Case—Limits of Jurisdiction of Court of Appeal — Provisions of Criminal Code—Evidence for Jury—Absence of Misdirection and of Improper Admission or Rejection of Evidence — Two Prisoners Tried together—Witness Named on Back of Indictment not Called by Crown, nor Present in Court—Failure of Crown to Procure Attendance of all Persons Present at Commission of Act — Prejudice—Application to Executive for New Trial: Rex v. Capelli, 637.

13. Murder — Evidence—Statement of Deceased — Dying Declaration—Expectation of Death — Threats made by Prisoner to Deceased—Admissibility — Threats by Prisoner to other Persons—Inadmissibility — No Substantial Wrong or Miscarriage — Crown Case Reserved—Conviction Affirmed: Rex v. Sunfield, 1010.

14. Murder—Judge's Charge—Evidence—Misdirection—New Trial: Rex v. Paul, 946.

See Extradition — Habeas Corpus—Liquor License Act—Sunday.

CROSS-APPEAL.

See Appeal to Court of Appeal, 8.

CROWN.

1. Government Railway—Liability for Nonfeasance—Destruction of Timber—Negligence: Gillies Brothers Co. Limited v. Temiskaming and Northern Ontario Railway Commission (No. 2), 975.

2. Mining Leases—Action by Attorney-General to Cancel — Improvidence —Misrepresentations—Affidavit as to Discovery — Untruth of — Evidence — Land Titles Act—Costs—Compensation for Improvements—Notice—Questions of Fact—Appeal —Duty of Appellate Court: Attorney-General for Ontario v. Hargrave, 319.

3. Patent Demising Crown Land—Derogation from Previous Grant—Description — Bed of River—Cancellation of Crown Lease: Kilgour v. Town of Port Arthur, 841.

4. Patent for Mining Land—Action for Trespass — Counterclaim to Set aside Patent—Issue by Error or Improvidence—Repeal of Patent—Scire Facias—Review of Legislation—Rule 241 — Jurisdiction of High Court—Fiat of Attorney-General — Certificate of Title — Land Titles Act—Bona Fide Purchaser for Value without Notice—Caution —Registration: Farah v. Bailey, 252.

See Assessment and Taxes, 4—Mines and Minerals, 1—Particulars, 1—Pleading, 1.

CROWN CASE RESERVED.

See Criminal Law.

CROWN LANDS.

See Timber.

CULVERT.

See Municipal Corporations, 4.

DAMAGES.

Fatal Accidents Act—Action by Married Woman for Death of Aged Father — Reasonable Expectation of Pecuniary Benefit from Continuance of Life — Reduction of Verdict — New Trial: Dewey v. Hamilton and Dundas Street R. W. Co., 535.

See Carriers — Company, 8, 10—Conspiracy — Contract, 1-5, 11—Costs, 6—Easement — Fraud and Misrepresentation, 3 — Husband and Wife, 2—Master and Servant, 4—Mines and Minerals, 7—Municipal Corporations, 10—Nuisance,—Particulars, 4 — Pleading, 10—Principal and Agent, 1—Railway, 3, 5, 8—Receiver, 1—Sale of Goods, 4, 7—Seduction — Street Railways, 1—Vendor and Purchaser, 4—Water and Watercourses, 1.

DECEIT.

See Sale of Goods, 5 — Vendor and Purchaser, 4.

DEED.

1. Conveyance of Land — Breach of Condition — Unauthorized Insertion of Condition after Execution and Delivery of Deed—Deed Operative to Pass Property notwithstanding Defective Description—Invalidity of Condition: Owen v. Mercier, 1; 14 O. L. R. 491.

2. Rectification — Conveyance of More Land than Vendor Intended—Unilateral Mistake no Ground for Relief — Fraud — Knowledge of Purchaser of Intention of Vendor—Importunity — Absence of Independent Advice: Stevenson v. Cameron, 432.

See Fraudulent Conveyance — Husband and Wife, 4 — Landlord and Tenant, 2—Limitation of Actions, 2—Parent and Child — Trusts and Trustees—Vendor and Purchaser, 3—Water and Watercourses, 3—Will, 1.

DEFAMATION.

1. Pleading — Statement of Claim—Irrelevant Allegations — Motion to Strike out: McAlpine v. Record Printing Co., 981.

2. Privileged Occasion — Evidence of Malice—Contradictory Statements —Evidence for Jury—Setting aside Nonsuit — New Trial: Woods v. Plummer, 759.

3. Several Actions against Different Defendants — Consolidation—R. S.

O. 1897 ch. 68, sec. 14—Identity of Libels — Trial: Perkins v. Fry, McDonald v. Record Printing Co., Currie v. Record Printing Co., 874, 954.

See Costs, 10—Particulars, 2.

DEMURRAGE.

See Carriers.

DEVISE.

See Will.

DEVOLUTION OF ESTATES ACT.

Sale of Land by Administrators—Consent of Official Guardian—Sale Free from Dower—Widow a Lunatic—Necessity for Order—Terms—Payment into Court for Benefit of Widow—Costs: Re Redman, 16.

DIRECTORS.

See Company.

DISCHARGE OF MORTGAGE.

See Mortgage, 3.

DISCONTINUANCE OF ACTION.

Rule 430 — Proceedings after Delivery of Defence—Leave to Discontinue —Terms—Costs—Stay of Action in Foreign Court: Schlund v. Foster, 1095.

See Costs, 2.

DISCOVERY.

1. Examination of Parties—Failure to Acquaint themselves with Facts—Motion for Re-examination — Substitution of Agent for Examination —Costs: Boisseau v. R. G. Dun & Co., 751.

2. Examination of Servants of Defendant Company — Examination of Conductor—Application for Leave to Examine Motorman — Special Grounds —Admissions—Evidence: Tinsley v. Toronto R. W. Co., 40.

See Evidence—Seduction.

DISCOVERY OF FRESH EVIDENCE.

See Evidence, 6.

DISMISSAL OF ACTION.

Want of Prosecution — Motion to Dismiss — Statute of Limitations — Leave to Proceed—Terms: Scott v. Hay, 262.

See Costs, 15 — Municipal Corporations, 7.

DISORDERLY HOUSE.

See Criminal Law, 9.

DISTRESS.

See Bills of Sale and Chattel Mortgages, 3.

DISTRIBUTION OF ESTATES.

See Executors and Administrators, 3.

DITCHES.

See Municipal Corporations, 1.

DIVISION COURTS.

1. Jurisdiction — Division Courts Act, sec. 190—Action Brought in Wrong Court as against Garnishees—Abandonment at Trial of Claim against Garnishees — Objection to Jurisdiction by Primary Debtor—Saw Logs Driving Act, sec. 16—Common Law Cause of Action—Decision of Division Court Judge —Right to Review: Re Boyd v. Sergeant, 377, 521.

2. Territorial Jurisdiction—Action on Contract—Provision in Contract as to Forum for Action — Waiver of Statute Making such Provisions Illegal—Effect of: Re Shupe v. Young, 185, 262.

See Appeal to Divisional Court, 2—Costs, 3, 7, 8—Sale of Goods, 1.

DIVISIONAL COURTS.

See Appeal to Court of Appeal, 8—Appeal to Divisional Court—Evidence, 6—Execution, 4 — Habeas Corpus, 2.

DIVORCE.

See Husband and Wife, 1—Insurance, 5.

DOWER.

Gift of Land by Father to Son—Mother Joining in Deed to Bar Dower—Absence of Consideration—Improvidence—Action by Mother against Son for Dower after Death of Father: Fretts v. Fretts, 613.

See Devolution of Estates Act—Vendor and Purchaser, 8.

DYING DECLARATION.

See Criminal Law, 13.

EARLY CLOSING.

See Municipal Corporations, 8.

EASEMENT.

Light—Obstruction of Access of Light to Windows of Dwelling-house—Inconvenience — Injunction — Delay in Applying—Estoppel—Damages—Reference—Costs: Simpson v. T. Eaton Co., 215, 569; 15 O. L. R. 161.

See Costs, 6—Limitation of Actions, 4—Mines and Minerals, 1 — Nuisance—Way.

EJECTMENT.

See Trusts and Trustees, 2—Will, 7.

ELECTION.

See Criminal Law, 9—Pleading, 6—Trusts and Trustees, 2 — Vendor and Purchaser, 11.

ELECTIONS.

See Company — Parliamentary Elections.

ELECTRIC RAILWAYS ACT.

See Railway, 1.

ELECTRIC WIRES.

See Injunction, 2, 4—Negligence, 2.

EQUITABLE ASSIGNMENT.

1. Gift of Moneys Arising from Contract — Voluntary Assignment — Death of Donor — Solvency—Mental Competence — Issue — Costs: Walker v. Clarke, 169.

2. Order for Payment of Moneys Payable under Contract to Creditors of Contractor—Validity as against Judgment Creditors of Contractor—Judicature Act, sec. 58 (5)—Assignment of Whole Debt—Security for Advances — Notice—Money in Custodia Legis—Interpleader Issue—Costs: Sovereign Bank v. International Portland Cement Co., 161; 14 O. L. R. 511.

ESCAPE.

See Criminal Law, 5—Extradition—Habeas Corpus, 1.

ESCROW.

See Vendor and Purchaser, 3.

ESTOPPEL.

See Bankruptcy and Insolvency, 2—Bills of Exchange and Promissory Notes, 4—Contract, 9—Easement—Husband and Wife, 3—Insurance, 5—Sale of Goods, 1, 2, 5.

EVIDENCE.

1. Attempted Examination of Plaintiff in Support of Motion by Defendant for Better Particulars—Refusal to be Sworn—Discovery: Arnoldi v. Cockburn, 641.

2. Direct Conflict — Appeal from Master's Report—Forgery — Perjury—Prosecution — Solicitor — Law Society: Hall v. Berry, 954.

3. Examination of Party as Witness on Motion for Security for Costs—Refusal to Answer Questions—Relevancy—Disclosing Defence: Stone v. Stone, 1088.

4. Motion for Better Affidavit on Production of Documents — Examination of Witnesses in Support of Motion — Appointment for, Set aside — Discovery: McLeod v. Crawford, 1042.

5. Motion for Interim Injunction—Examination of Witnesses in Support of—Refusal to Answer Questions—Rule 491—Relevancy of Questions—Full Disclosure—Party to Action—Duty to Prepare for Examination—Production of Documents—Duty of Examiner—Fraud—Privilege—Examination of Solicitor as Witness—Discovery—Costs: Clisdell v. Lovell, 203.

6. Motion to Divisional Court for New Trial — Discovery of Fresh Evidence — Examination of Witnesses on Pending Motion—Appointment for—Motion to Set aside — Rules 491, 498: Trethewey v. Trethewey, 684, 893.

See Bankruptcy and Insolvency, 2—Conspiracy — Contract, 1, 3, 12—Criminal Law, 1, 12, 13—Crown, 2—Defamation, 2 — Discovery, 2—Executors and Administrators, 1—Fraudulent Conveyance—Husband and Wife, 2 — Improvements—Insurance, 6—Landlord and Tenant, 2—Limitation of Actions, 3 — Liquor License Act, 1, 2—Mines and Minerals, 1, 3 — Money Paid—Nuisance—Particulars — Pleading, 2, 4 — Sale of Goods, 1, 3, 6 — Trusts and Trustees, 1, 3, 5—Water and Watercourses, 3 — Way, 2—Will, 11, 20.

EXAMINATION OF JUDGMENT DEBTOR.

See Judgment Debtor.

EXAMINATION OF PARTIES.

See Discovery—Evidence—Seduction.

EXAMINATION OF WITNESSES.

See Evidence — Municipal Corporations, 2.

EXECUTION.

1. Issue of Fi. Fa.—Regularity—Issue on same Day that Judgment Signed and before Entry — Practice—Rules of Court: Rossiter v. Toronto R. W. Co., 923.

2. Sale of Interest in Land under, by Sheriff — Action by Execution Debtor to Set aside—Purchase by Execution Creditor—Irregularities — Advertising — Inadequacy of Price — Resale by Purchaser to Wife of Plaintiff—Charge on Land—Declaration — Costs: McNichol v. McPherson, 844.

3. Sale of Land by Sheriff under—Purchase by Person who has Acquired Rights of Execution Creditor—Irregularities—Lis Pendens—Advertisement — Description of Land—Sale at Undervalue—No Interference in Conduct of Sale—Ratification of Sale by Execution Debtor—Participation in Proceeds: Steen v. Steen, 720.

4. Stay pending Appeal to Divisional Court—Rule 827—"Judge of Court Appealed to"—Trial Judge—High Court—Counterclaim—Grounds of Appeal — Removal of Stay as to Part—Costs: Mullin v. Provincial Construction Co, 1116.

See Contract, 4—Sale of Goods, 5.

EXECUTORS AND ADMINISTRATORS.

1. Action for Account of Documents and Property of Testator—Right of Action—Evidence — Fiduciary Relationship—Trover: Bartram v. Wagner, 41.

2. Legacy — Inoperative Direction to Invest Principal—Action for Legacy—Costs—Confinement to Costs of Summary Application — Executors Relying on Advice of Solicitor—Personal Liability of Executors—No Recourse against Estate: Willison v. Gourlay, 853.

3. Notice to Creditors and other Claimants against Estate of Intestate—Publication in Newspaper—One of Next of Kin not Heard of for Many Years — Presumption of Death without Issue—Distribution of Assets: Re Ashman, 250; 15 O. L. R. 42.

4. Renunciation of Probate—Previous Intermeddling—Action on Promissory Note Signed by Defendant as Executor — Personal Liability — Leave to Enter Conditional Appearance: Harcourt v. Burns, 786.

See Contract, 6, 11—Devolution of Estates Act—Judgment, 4—Mortgage, 2—Sale of Goods, 2—Trusts and Trustees, 1 — Vendor and Purchaser, 6—Will.

EXEMPTIONS.

See Assessment and Taxes, 4.

EXPLOSIVES.

See Criminal Law, 7.

EXPRESS COMPANY.

See Assessment and Taxes, 1.

EXPROPRIATION OF LAND.

See Railway, 4.

EXTRADITION.

Habeas Corpus—Motion for Discharge —Escape of Prisoner from Custody of Sheriff while Motion being Heard—High Contempt and Crime —Motion Retained Pending Rearrest and Proceedings against Prisoner for Escape: Re Bartels, 379.

See Habeas Corpus.

EXTRAS.

See Contract, 4.

FACTORIES.

See Master and Servant, 3.

FALSA DEMONSTRATIO.

See Vendor and Purchaser, 3.

FALSE REPRESENTATIONS.

See Bills of Exchange and Promissory Notes, 4—Frand and Misrepresentation.

FATAL ACCIDENTS ACT.

See Damages—Railway, 5, 7, 8.

FENCES.

See Railway, 1, 2.

FIDELITY BOND.

See Guaranty.

FIDUCIARY RELATIONSHIP

See Executors and Administrators, 1 —Fraud and Misrepresentation, 1.

FIERI FACIAS.

See Execution, 1.

FIRE.

See Pleading, 10—Timber.

FIRE INSURANCE.

See Insurance, 1, 2—Stay of Proceedings.

FIXTURES.

See Assessment and Taxes, 4.

FORECLOSURE.

See Mortgage, 1.

FOREIGN DIVORCE.

See Husband and Wife, 1—Insurance, 5.

FOREIGN JUDGMENT.

See Judgment, 2.

FORFEITURE.

See Landlord and Tenant, 3—Liquor License Act, 4.

FORGERY.

See Bills of Exchange and Promissory Notes, 4—Evidence, 2.

FRAUD AND MISREPRESENTATION.

1. Cheque Signed in Blank and Filled up for Large Sum—Procurement by Fraud — Unsound Mental Condition of Drawer—Gift—Confidential or Fiduciary Relationship: Stacey v. Miller, 879.

2. Purchase of Property—False Representations as to Business—Findings on Evidence — Dismissal of Action—Suspicious Circumstances —Costs: Lamont v. Winger, 190, 883.

3. Sale of Oil Leases to Syndicate—False Representations as to Value —Formation of Company — Assignment of Leases to — Secret Profits — Promoters — Account—Action by Company — Measure of Damages — Claims of Individual Members — Reservation of Rights: Alexandra Oil and Development Company v. Cook, 781.

See Bills of Exchange and Promissory Notes, 4—Bills of Sale and Chattel Mortgages, 2—Company, 1, 4, 5, 11—Crown, 2—Deed, 2—Evidence, 5—Husband and Wife, 3—Insurance, 1—Judgment, 6—Mortgage, 6—Sale of Goods, 5—Settlement of Actions—Trade Name — Trusts and Trustees, 3—Vendor and Purchaser, 3, 4, 5.

FRAUDULENT CONVEYANCE.

1. Action to Set aside — Absence of Knowledge of Fraudulent Intent on Part of Grantee: Webb v. Hamilton, 192.

2. Ante-nuptial Marriage Settlement—Action by Execution Creditor to Set aside—Fraudulent Intent of Settlor—Knowledge of Intended Wife of Claim of Execution Creditor—Bona Fides — Absence of Knowledge of Fraudulent Purpose — Letter of Intended Wife Demanding Settlement: Fallis v. Wilson, 121, 605; 15 O. L. R. 55.

3. Interest in Land under Agreement for Purchase — Assignment by Purchaser to Daughter — Action to Declare Daughter Trustee for Father — Evidence — Honest Transaction: Payne v. Tew, 776.

See Trusts and Trustees, 2.

FREIGHT.

See Carriers.

GAMING.

See Criminal Law, 9.

GARNISHEES.

See Division Courts, 1.

GAS.

See Contract, 3.

GIFT.

Fund Deposited with Trust Company by Settlor — Parting with Control — Dealings with Cheques for Income—Completed Gift — Rights of Beneficiaries — Trust — Interpleader Issue — Costs: Toronto General Trusts Corporation v. Keys, 86; 15 O. L. R. 30.

See Dower — Equitable Assignment, 1—Fraud and Misrepresentation, 1 — Husband and Wife, 4—Limitation of Actions, 3 — Will.

GOODWILL.

See Contract, 9.

GOVERNMENT RAILWAY.

See Crown, 1.

GROSS NEGLIGENCE.

See Highway.

GUARANTY.

1. Fidelity Bond — Agent of Insurance Company — Advances to Agent and Premiums not Paid over — Construction of Bond — Application to Existing Agreement between Agent and Company — Withholding from Surety Information as to Material Facts—Release: Chicago Life Insurance Co. v. Duncombe, 425.

2. Fidelity Bond — Security against Dishonesty or Negligence of Bank Clerks — Theft by One Clerk — Negligence of another Permitting Theft — Liability of Guarantor

Conveyance — Intention of Settlor — Life Estate: Jarvis v. Jarvis, 831.

5. Pre-nuptial Contract in Quebec—Law of Quebec — Community of Property — Land Situate in Ontario —Will—Distribution of Proceeds of Sale—Heirs of Wife—Heirs of Husband — Judgment—Petition to Set aside — Reference — Costs: Cadieux v. Rouleau, 1103.

See Contract, 8—Fraudulent Conveyance, 2—Insurance, 5 — Marriage —Particulars, 7.

IMPOSSIBILITY OF PERFORMANCE.

See Contract, 5.

IMPROVEMENTS.

Mistake in Title—Administration Proceeding — Life Tenant — Belief in Ownership in Fee Simple—Report—Reference back—Inquiry as to Improvements — Evidence — Costs: *Re* Coulter, Coulter v. Coulter, 342.

See Crown, 2—Limitation of Actions, 3—Pleading, 2—Trusts and Trustees, 5—Will, 7.

IMPROVIDENCE.

See Crown, 2, 4—Dower — Husband and Wife, 4.

INCOME TAX.

See Assessment and Taxes, 2.

INDEMNITY.

See Judgment, 5—Landlord and Tenant, 1—Mortgage, 2.

INDEPENDENT ADVICE.

See Husband and Wife, 3, 4—Parent and Child.

INDEPENDENT CONTRACTOR.

See Master and Servant, 4.

INFANT.

1. Custody—Issue between Parents—Welfare of Child—Custody Awarded to Mother—Terms—Access of Father — Costs — Direction for Sealing up of Papers: *Re* Argles, 801.

2. Purchase of Goods — Action for Price — Defence of Infancy—Alleged Ratification after Majority——Letter Acknowledging Account—Insufficiency — Claim for Value of Goods in Hand after Majority —Amendment: Louden Manufacturing Co. v. Milmine, 474; 15 O. L. R. 53.

See Master and Servant, 3—Negligence, 5 — Partnership — Railway, 9—Street Railways, 4—Will, 2.

INJUNCTION.

1. Business Morals — Publication of Testimonials in Garbled Form — Injury to Plaintiff: Warren v. D. W. Karn Co., 516; 15 O. L. R. 115.

2. Electric Poles and Wires — Placing in Public Highway of Town—Dangerous Proximity to Poles and Wires already in Position—Leakage of Current—Commercial Necessity — Approval of Town Council —Power and Authority — Status —Interference with Property of other Electric Companies: Canadian Pacific R. W. Co. v. Falls Power Co., 1125.

3. Interim Order — Contract — Prima Facie Right — Mining Operations —Interference — Threats — Dissolution of Injunction Obtained ex Parte: Lawson v. Crawford, 602, 871.

4. Motion for Interim Injunction — Electric Wires — Dangerous Proximity to Others — Danger to Employees of Electrical Companies—Danger to Public — Induction — Leave of Town Corporation — Prima Facie Case — Continuance of Injunction — Terms — Speedy Trial — Costs: Canadian Pacific R. W. Co. v. Falls Power Co., 983.

See Cemetery — Company, 4—Conspiracy—Contempt of Court, 2, 3—Costs, 2—Easement—Evidence, 5—Limitation of Actions, 4—Municipal Corporations, 1, 2—Receiver, 1—Water and Watercourses, 1, 3.

INNKEEPER.

Liability for Effects of Guest — Commencement of Relationship—Negligence — Notice—Special Place Provided for Leaving Effects: Fraser v. McGibbon, 54.

INSOLVENCY.

See Bankruptcy and Insolvency.

INSURANCE.

1. Fire Insurance — Actions on Policies — Defences — Statutory Condition, 10 (f) — "Gasoline Kept or Stored in the Building Insured" — Small Quantity of Gasoline in Store for Use — Defects in Proofs of Loss — Assignment by Assured of Policy to Bank—Adding Bank at Trial as Party Plaintiff ab Initio and nunc pro tunc—Absence of Notice of Assignment—Subsequent Insurance not Assented to by Prior Insurers—Statutory Condition 8—Substituted Insurance — Prior Insurance Undisclosed — Insurance Effected by Mortgagees without Knowledge of Assured—Fraud — Incumbrances Undisclosed — Immateriality — Costs — Technical Defences: Thompson v. Equity Fire Insurance Co., Thompson v. Standard Mutual Fire Insurance Co., 761.

2. Fire Insurance — Insured Buildings Destroyed by Fire from Railway—Compromise of Owner's Claim against Railway Company — Bona Fide Settlement — Claim against Insurance Company — Subrogation: Kirton v. British America Assurance Co., 498.

3. Life Insurance—Action on Policies — Question whether Policies in Force at Death of Insured — Construction of Policies — Payment of Premiums — "Annually" — Limits of Year: Pense v. Northern Life Assurance Co., 826; 15 O. L. R. 131.

4. Life Insurance — Benefit Certificate —Direction of Assured as to Disposition of Fund—Construction of Policy—Division among Wife and Children — Income — Corpus — Vested Interests — Application of Doctrine in Regard to Wills — Conflict of Authority — Following Known Decision — Judicature Act, sec. 81 (2)—"Deem"—Costs: *Re* Shafer, 409, 865.

5. Life Insurance—Benefit Certificate —Change of Beneficiary —Rules of Society — Wife of Member — Foreign Divorce — Validity—Estoppel — Re-marriage — Claim of Second Wife — Claim of Adopted Daughter — Right to Contest: *Re* Williams and Ancient Order of United Workmen, 50, 215; 14 O. L. R. 482.

6. Life Insurance — Preferred Beneficiaries — Designation by Will—Identification of Policy — One of Four in same Terms — Insurance Act — Bequest of "Policy" Held not to Include More than One — Evidence — Admissibility — Application for Insurance — Letter of Insured: MacLaren v. MacLaren, 835; 15 O. L. R. 142.

See Guaranty — Pleading — Stay of Proceedings.

INTEREST.

See Bills of Sale and Chattel Mortgages, 3—Judgment, 3, 4 — Mortgage, 4—Trusts and Trustees, 6.

INTERNATIONAL LAW.

See Judgment, 2.

INTERPLEADER.

See Equitable Assignment, 2 — Gift—Partnership.

INTOXICATING LIQUORS.

See Liquor License Act — Municipal Corporations, 5, 6.

INVENTORY.

See Bills of Sale and Chattel Mortgages, 1.

ISOLATION HOSPITAL.

See Municipal Corporations, 7.

JOINDER OF PARTIES.

See Parties.

JUDGMENT.

1. Amendment after Entry — Neglect to Provide for Interlocutory Costs Reserved for the Trial Judge — Disposition of Costs: Logan v. Drew, 643.

2. Foreign Judgment — Judgment Recovered in Circuit Court of Quebec against Company Domiciled in Ontario — Want of Jurisdiction — Nullity — 22 Vict. ch. 5, sec. 58 (C.) — Repeal by Subsequent Legislation — Rules of International Law: Vezina v. Will H. Newsome Co., 17; 14 O. L. R. 658.

3. Issue as to Validity of Default Judgment — Motion to Set aside Judgment after 15 Years—Service of Writ of Summons — "Signing Judgment" — Sufficiency — Form of Judgment — Special Indorsement of Writ — Price of Goods Sold — Stated Account — Interest —Nullity of Judgment — Irregularity — Setting aside Judgment —Terms: Green v. George, 292; George v. Green, 14 O. L. R. 578.

4. Summary Judgment — Rule 603 — Action against Executor for Interest on Legacy — Defence in Law: Down v. Kennedy, 627.

5. Summary Judgment — Rule 603 — Action on Promissory Note—Nominal Plaintiff — Defence — Renewal — Payment — Indemnity—Action in Foreign Court — Stay of Proceedings — Addition of Parties: Todd v. Labrosse, 772.

6. Summary Judgment — Rule 603—Mortgage — Possession — Defence —Fraud — Leave to Defend: Euclid Avenue Trust Co. v. Hohs, 474.

7. Summary Judgment — Rule 603 — Promissory Note — Action on — Defence — Indorsement by Defendants before Payees of Note — Authority of Previous Decisions: Williams v. Cumming, 561.

See Appeal to Court of Appeal, 8 — Appeal to Divisional Court, 1, 2—Contempt of Court, 1—Contract, 3, 5 — Costs, 1, 13—Execution, 1—Husband and Wife, 5—Limitation of Actions, 4—Mines and Minerals, 4—Mortgage, 5 — Pleading, 3 —Railway, 8 — Receiver, 2—Settlement of Actions—Vendor and Purchaser, 8—Will, 1.

JUDGMENT DEBTOR.

Examination of—Second Examination —Application for — Rule 900: Kingswell v. McKnight, 15.

JURISDICTION.

See Company, 11—Contempt of Court, 3—Costs, 3, 6, 7, 8, 14—Criminal Law, 9, 12—Crown, 4 — Division Courts — Habeas Corpus, 2 — Judgment, 2 — Liquor License Act, 1 — Marriage — Master in Chambers—Mines and Minerals, 4, 5— Municipal Corporations, 2 — Railway, 4 — Receiver 2—Settlement of Actions.

JURY.

See Defamation, 2—Master and Servant — Municipal Corporations, 1 —Negligence, 1, 3, 5, 6—New Trial —Railway, 5, 6, 7, 10—Street Railways—Trial, 1.

JURY NOTICE.

1. Irregularity — Cause Removed from Surrogate Court into High Court —Terms of Order Removing — Time for Filing Jury Notice: McKenzie v. Shoebotham, 1055.

2. Striking out—Separate Sittings for Jury and Non-Jury Cases — Practice — Discretion — Trial—Irregularity—Action for Equitable Relief: Clisdell v. Lovell, 609, 925.

3. Striking out — Discretion of Judge —Exercise before Trial—Place of

Trial outside of Toronto — Equitable Defence—Pleadings: Bryans v. Moffatt, 1027.

JUSTICE OF THE PEACE.

See Habeas Corpus, 2—Liquor License Act.

KEEPING COMMON BETTING HOUSE.

See Criminal Law, 8.

KEEPING DISORDERLY HOUSE.

See Criminal Law, 9.

LAKE.

See Water and Watercourses.

LAND TITLES ACT.

Registration of Cautions—Claims for Compensation — Bona Fides—Terminating Cautions: *Re* Kay and White Silver Co., 10.

See Crown, 2, 4—Way, 1.

LANDLORD AND TENANT.

1. Action for Rent—Claim for Indemnity — Agreement between Tenant and Bank — Disposal of Business —Authority of Agent of Bank — Assumption of Liabilities — Implied Obligation to Pay Rent — Transferees of Lease — Power of Bank to Carry on Business—Implied Obligation — Third Parties: Peterborough Hydraulic Co. v. McAllister, 694.

2. Action for Rent — Conveyance of Land — Reservation of "Life Interest" — Grantee Taking Possession — Occupation Rent — Release —Evidence — Rights of Executors of Grantor — Payment of Debts: Robertson v. Robertson, 968.

3. Lease — Right to Drill for Oil — Construction of Lease — Covenants — Breach — Commencement of Operations — Alternative Payment of Rent — Forfeiture — Relief — Ceasing to Operate — Payment into Court—Costs: Docker v. London-Elgin Oil Co., 1056.

LAW SOCIETY.

See Evidence, 2—Solicitor, 1.

LEASE.

See Company, 10—Contract, 6—Crown, 2, 3 — Fraud and Misrepresentation, 3—Landlord and Tenant — Pleading, 3—Sale of Goods.

LEAVE TO APPEAL.

See Appeal to Court of Appeal — Appeal to Supreme Court of Canada—Criminal Law, 1, 3, 10, 12.

LEAVE TO PROCEED.

See Dismissal of Action.

LEGACY.

See Executors and Administrators, 2 —Judgment, 4.

LIBEL.

See Defamation.

LIEN.

See Bailment—Limitation of Actions, 3—Receiver, 1—Vendor and Purchaser, 1.

LIFE ESTATE.

See Husband and Wife, 4.

LIFE INSURANCE.

See Insurance, 3-6.

LIFE TENANT.

See Improvements — Railway, 9 — Trusts and Trustees, 6.

LIGHT.

See Easement.

LIMITATION OF ACTIONS.

1. Claim for Payment for Services — Contract — Quantum Meruit — Solicitor — Acknowledgment — Correspondence — Costs: Segsworth v. DeCew, 575.

2. Real Property Limitation Act—Conveyance of Land — Security — Agreement — Default — Redemption — Sale — Possesion: Patterson v. Dart, 79.

3. Real Property Limitation Act—Title by Possession — Arrangement as to Working Land — Time of Commencement of Statutory Period—Payment of Rent — Onus — Actual Payment — Gift of Land — Evidence — Costs — Plaintiff Relieved from Liability — Right to Recover Costs against Defendant — Lien for Improvements: Calverley v. Lamb, 279.

4. Real Property Limitation Act — Title by Possession to Upper Storey of Building with outside Landing and Staircase—Declaratory Judgment — Injunction Restraining Defendants from Interfering with Possession of Portion of Building —Support and Means of Access—Easement: Iredale v. Loudon, 725.

5. Simple Contract Debt — Payments on Account Made by Assignee for Benefit of Creditors under Voluntary Assignment: Birkett v. Bissonette, 171; 15 O. L. R. 93.

See Dismissal of Action—Master and Servant, 1—Mortgage, 2—Municipal Corporations, 1—Pleading, 2—Railway, 3—Will, 7.

LIQUIDATOR.

See Costs, 9.

LIQUOR LICENSE ACT.

1. Conviction as for Second Offence—Sentence to 4 Months' Imprisonment — Motion for Discharge under Habeas Corpus—Right of Court to go behind Conviction Regular on its Face — Jurisdiction of Police Magistrate — Clerical Error in Date of Warrant of Commitment — No Recorded Evidence of Existence of Prior Conviction — Provision of Act Requiring Evidence to be Taken down in Writing — Admission of Defendant—Variance between Information and Conviction — Defendant not Allowed Fair Opportunity to make his Defence — Refusal of Adjournment: Rex v. Farrell, 790; 15 O. L. R. 100.

2. Conviction for Selling without License — Imprisonment of Defendant — Habeas Corpus — Certiorari — Right of Court to go behind Conviction and Look at Depositions — Absence of Evidence to Sustain Conviction — Justices' Notes of Evidence not Signed by Witnesses — Discharge of Prisoner: Rex v. Brisbois, 869.

3. Conviction of Hotel-keeper for Selling Liquor in Prohibited Hours—Subsequent Conviction of Bar-tender for same Offence — Invalidity of Late Conviction — Validity of Earlier — Statutory Exception in Regard to Sales in Prohibited Hours — Sales for Medicinal Purposes — Necessity for Negativing Exception in Conviction — Information — Burden of Proof — Amendment — Powers of Court — Appeal from Order Quashing Conviction: Rex v. Boomer, 978.

4. Order of Magistrate Directing Destruction of Liquors — Order of High Court Quashing — Right of Informant to Appeal to Court of Appeal under sec. 121 — Order Quashing, Right on Merits — Refusal of High Court to Protect Informant from Action—Discretion —Appeal: Rex v. Ing Kon, 544.

See Municipal Corporations, 5, 6.

LIS PENDENS.

Motion to Vacate—Cause of Action—Pleading — Statement of Claim—Guaranty — Payment into Court: Brock v. Crawford, 756, 879.

See Execution, 3 — Pleading, 6.

LOCAL OPTION BY-LAW.

See Municipal Corporations, 5, 6.

LOCAL REGISTRAR.

See Costs, 14.

LORD'S DAY ACT.

See Sunday.

LUNATIC.

Detention of Alleged Lunatic in Asylum for Insane — Authority — Medical Certificates—Informalities —Habeas Corpus — Motion for Discharge — Refusal — Appeal— Direction for Trial of Issue as to Sanity—Retention of Appeal pending Trial: *Re* Gibson, 542.

See Contract, 8—Devolution of Estates Act.

MAINTENANCE.

See Parent and Child—Sale of Goods, 2.

MALICIOUS PROSECUTION.

Want of Reasonable and Probable Cause — Functions of Judge and Jury — Nonsuit—Setting aside— New Trial: Still v. Hastings, 10; 14 O. L. R. 638.

MANDAMUS.

See Schools—Water and Watercourses, 2.

MARRIAGE

Action for Declaration of Nullity for Impotency of Wife—No Jurisdiction in Court to Entertain: T—— v. B——, 1030.

See Contract, 8—Husband and Wife —Insurance, 5 — Seduction.

MARRIAGE SETTLEMENT.

See Fraudulent Conveyance, 2—Husband and Wife, 5.

MASTER AND SERVANT.

1. Contract to Pay Wages — Adopted Son—Method of Payment —Quantum Meruit—Period of Services— Limitation of Actions: Chalk v. Wigle, 146.
2. Injury to Servant—Deck-hand on Lake Steamer — Seaman — Negligence of Mate — Findings of Jury — Workmen's Compensation Act: Frawley v. Hamilton Steamboat Co., 308.
3. Injury to Servant—Infant Employed in Factory — Negligence of Foreman — Dangerous Machines— Neglect to Caution Infant—Liability of Employers—Superintendence —Workmen's Compensation Act— Factories Act: Lawson v. Packard Electric Co., 525.
4. Injury to Servant — Negligence — Contractor — Sub-contractor — Independent Contractor — Foreman — Evidence — Partnership— Contributory Negligence — Damages: Kitts v. Phillips, 986.
5. Injury to Servant and Consequent Death — Negligence — Dangerous Employment—Primary Negligence of Servant Immediate Cause of Injury — Findings of Jury — Voluntary Assumption of Risk: Wilson v. Davies, 315.
6. Injury to Servant and Consequent Death — Negligence — Finding of Jury — Inconclusive Verdict — Failure to Establish Cause of Injury — Evidence — Dismissal of Action: Ede v. Canada Foundry Co., Lynn v. Canada Foundry Co., 629.
7. Injury to Servant and Consequent Death — Negligence — Railway— Person in Charge — Workmen's Compensation Act — Res Ipsa Loquitur: Warren v. Macdonnell 614.

See Conspiracy—Negligence, 3—Railway, 8—Street Railways, 6.

MASTER IN CHAMBERS.

Jurisdiction—Removal of Arbitrator— Arbitration Act — Reference of Motion to Judge in Chambers: Re Coleman and Union Trust Co., 245.

MASTER'S REPORT.

See Costs, 1.

MECHANICS' LIENS.

1. Statement of Claim—Computation of Time for Filing — Commencement of Action — Long Vacation —Statute and Rules of Court: Canada Sand Lime Brick Co. v. Ottaway, 686, 788; 15 O. L. R. 128,

2. Statement of Claim—Motion to Set aside — Affidavit Sworn before Plaintiff's Solicitor—Rule 522 — Expiry of Time for Filing Statement of Claim — Practice: Canada Sand Lime and Brick Co. v. Poole, 1041.

MESNE PROFITS.

See Will, 7.

MINES AND MINERALS.

1. Crown Grand of Mining Lands — Construction—Reservation of Railway Right of Way — Evidence—Description — Plan — Actual Exception of Strip of Land and not mere Easement — Title—Declaration: La Rose Mining Co. v. Temiskaming and Northern Ontario Railway Commission, 516.

2. Mining Claims — Contest—Decision of Mining Commissioner — Appeal —Weight of Evidence — Right of Claimant whose Claim has Failed to Appeal against Allowance of Rival Claim — "Any Licensee or Person Feeling Aggrieved"—Mining Act, secs. 52 (3), 75: Re Cashman and Cobalt and James Mines Limited, 658.

3. Mining Commissioner—Appeal from Decision of—Evidence—Re-inspection—Ex Parte Report of Government Inspector—Finding of Commissioner — Duty of Appellate Court: Re Rodd, 671.

4. Mining Commissioner — Award of, under Mines Act—Action to Enforce — Jurisdiction of Commissioner to Enforce — No Necessity for Action — Dismissal of Motion for Summary Judgment: Bassett v. Clarke Standard Mining Co., 752.

5. Ontario Mines Act, 1906—Application for Working Permit—Invalidity—Affidavit of Applicant — Adverse Claims—Knowledge of Applicant — Order of Mining Commissioner Cancelling Application —Want of Jurisdiction: Re Isa Mining Co. and Francey, 31.

6. Ontario Mines Act, 1906—Application to Record Staking out of Mining Claim — Duty of Mining Recorder to Receive—Ministerial Act—Result of Failure to Record —Rights of Applicants—Previous Adverse Claims Undisposed of—Bar to Recording Fresh Claims—Affidavit—Form—Construction of Act: Munro v. Smith, Mackie v. Smith, Richardson v. Smith, 97.

7. Railway—Right of Way—Encroachment — Statutes — Trespass — Damages: Temiskaming and Northern Ontario Railway Commission v. Alpha Mining Co., Right of Way Mining Co. v. La Rose Mining Co., 1110.

See Assessment and Taxes, 2—Company, 6, 8—Crown, 2, 4—Injunction, 3—Principal and Agent, 3, 4 —Pleading, 3—Vendor and Purchaser, 11.

MINING COMMISSIONER.

See Mines and Minerals.

MISDIRECTION.

See Criminal Law, 12, 14—New Trial.

MISREPRESENTATION.

See Fraud and Misrepresentation.

MISTAKE.

See Deed, 2—Improvements — Mortgage, 3—Vendor and Purchaser, 5 —Will, 7.

MISTRIAL.

See Trial, 1.

MONEY IN COURT.

See Costs, 5.

MONEY PAID.

Failure of Consideration — Action to Recover—Defence of Repayment—Conflicting Evidence—Credibility —Surrounding Circumstances: Davies Co. v. Weldon, 210.

MORTGAGE.

1. Action for Foreclosure—Failure to Make Lessees of Owner of Equity with Option of Purchase Parties—Final Order of Foreclosure—Motion by Lessees to Set aside after Expiry of Lease—Dismissal without Costs: Elmsley v. Dingman, 248.

2. Assignment — Agreement — Executors of Purchaser from Mortgagor —Liability for Mortgage Moneys —Statute of Limitations—Indemnity—Cause of Action—Payments on Mortgage: Carman v. Wightman, 135.

3. Discharge — Intention to Take Assignment — Mistake — Subrogation—Chargee of Land Joining in Mortgage as Surety for Owner—Extension of Time to Owner—Release of Surety — Declaration of Priority — Redemption — Costs: Quackenbush v. Brown, 850.

4. Redemption—Rate of Interest post Diem—Interest—"Liabilities" — 63 & 64 Vict. ch. 29 (D.): Plenderleith v. Parsons, 680; 14 O. L. R. 619.

5. Sale under Judgment of Court—Abortive Auction Sale — Subsequent Sale by Tender—Sufficiency of Price—Validity of Sale—Special Grounds for Impugning — Irregularities: Union Trust Co. v. O'Reilly, 618.

6. Transfers of Land—Releases—Company — Impeachment for Fraud and Collusion—Redemption — Account — Terms — Time for Redemption—Withdrawal of Charges of Fraud—Postponement of Mortgage—Agent for Care and Sale of Lands — Compensation — Costs: Saskatchewan Land and Homestead Co. v. Leadlay, 501.

See Costs, 14—Judgment, 6—Trusts and Trustees, 1, 3—Vendor and Purchaser, 1, 3.

MORTMAIN.

See Will, 13, 15.

MUNICIPAL CORPORATIONS.

1. Construction of Road Ditch—Negligence—Flooding Adjoining Lands —Findings of Jury — Depriving Land-owner of Access to Highway —Remedy — Compensation — Rights of Purchaser of Land Affected — Injunction — Statute of Limitations—Undertaking: Donaldson v. Township of Dereham, 220.

2. Investigation of Conduct of Municipal Officer—County Court Judge Appointed by Council to Conduct Inquiry—Powers of Commissioner —Municipal Act, 3 Edw. VII. ch. 19, sec. 324—Scope and Method of Inquiry—Proceedings Open to Public—Examination of Witnesses and Parties — Discretion of Commissioner — Injunction—Removal of Commissioner—Alleged Bias—Ex Parte Proceedings—Jurisdiction of High Court—Status of Officer Accused of Misconduct as Plaintiff in Action: Chambers v. Winchester, 909.

3. Liability of County for Maintenance of Bridge Crossing River—Width of River—Municipal Act, secs. 613, 616: Re Village of Newburgh and County of Lennox and Addington, 541.

4. Liability of County for Maintenance of Bridge over Stream—Bridge or Culvert — Definition of Culvert: County of Dufferin v. County of Wellington, 239.

5. Local Option By-law—Approval of Electors — Voters' Lists—Persons Entitled to Vote—Polling Places—Statutory Declarations of Secrecy —Municipal Act, 1903, secs. 348, 368: Re Wynn and Village of Weston, 1115; 15 O. L. R. 1.

6. Local Option By-law—Order Quashing because Third Reading and Final Passing Premature—Appeal from—Waiver by Council Purporting to Read By-law a Third Time after Notice of Appeal—Time for Finally Passing By-law—Necessity for Expiry of Two Weeks from Declaration of Result of Vote—No

Necessity for Declaration—Municipal Act — Liquor License Act—Repeal of By-law—Irregularities in Voting—Voters Depositing Ballots in a Box—Publication of Notice—Time for—Constitution of Council—Knowledge of Council of Approval of Voters—Voters' Lists—Names of Voters—Deputy Returning Officers—Appointment of—Poll Clerks — Illiterate Voters—Marking of Ballots — Irregularity—Effect on Result — Curative Provision of Statute—Form of Oath for Voters — By-law not Prohibiting Sale of Liquor in Places of Public Entertainment—Immaterial Omission: Re Duncan and Town of Midland, 345, 551.

7. Maintenance of Isolation Hospital—Liability for Negligence of Officers and Servants Employed—Death of Patient — Nonfeasance—Public Health Act — Pleading—Statement of Claim — Motion to Strike out as Disclosing no Reasonable Cause of Action—Rule 261—Summary Dismissal of Action: Butler v. City of Toronto, 876.

8. Ontario Shops Regulation Act—Early Closing By-law Affecting Class of Traders—Time for Passing—Application of Members of Class—Majority — Computation—Certificate of Clerk of Municipality—Withdrawal of Names of Applicants—Quashing By-law—Costs: Re Halliday and City of Ottawa, 46, 612; 14 O. L. R. 458; 15 O. L. R. 65.

9. Settlement of Action against—Resolution of Council Adopting Offer of Settlement—Absence of By-law and Corporate Seal — Settlement not Binding on Corporation—Rescission of Resolution—Unexecuted Consideration: Leslie v. Township of Malahide, 199; 15 O. L. R. 4.

10. Sewer — Overflow—Flooding Premises of Householder — Construction of Sewer — Insufficiency — Heavy Rainfall—Responsibility of Municipality—Damages: Roberts v. Town of Port Arthur, 1111.

11. Sewer — Sufficiency—Backing up Water into Cellar of House—Extraordinary Rainfalls—Absence of Negligence — Non-liability of Corporation: Faulkner v. City of Ottawa, 807.

See Assessment and Taxes—Costs, 4—Highway — Injunction, 2, 4—Negligence, 2 — Parties, 5—Railway, 4.

MURDER.

See Criminal Law, 11-14.

NAVIGABLE WATERS.

See Railway, 4—Water and Watercourses.

NEGLIGENCE.

1. Injury to Person—Findings of Jury—Judge's Charge—Nonsuit: Russell v. Bell Telephone Co., 892.

2. Injury to Person Using Highway—Municipal Corporation Operating Electric Light Plant under Statutory Authority — Spike on Post Charged with Electricity—Failure of Person Injured to Prove Negligence: Prue v. Town of Brockville, 359.

3. Master and Servant—Injury to and Death of Servant—Action by Widow for Damages — Findings of Jury—Accident — Cause of: Markle v. Simpson Brick Co., 9.

4. Pleasure Grounds — Injury to Person—Licensee—No Unusual Danger—Nonsuit: Downs v. Hamilton and Dundas R. W. Co., 657.

5. Street Railways — Injury to Infant—Contributory Negligence—Findings of Jury: Hackett v. Toronto R. W. Co., 582.

6. Street Railways—Injury to Motorman—Collision with another Car — Failure of Motive Power — Stranded Car — Neglect to Signal Approaching Car—Disobedience of Rules by Injured Motorman—Actual Cause of Injury — Contributory Negligence—Finding of Jury: Harris v. London Street R. W. Co., 302.

See Bills of Exchange and Promissory Notes, 4—Crown, 1—Guaranty, 2 — Highway — Innkeeper — Master and Servant — Municipal Corporations, 1, 7 — New Trial—Parties, 3 4, 5—Pleading, 10—Railway—Street Railways—Timber.

NEW TRIAL.

Misdirection — Reversing Order of Divisional Court Directing New Trial — Objection not Taken at Trial—Negligence — Street Railways—Injury to Person Crossing Track — Contributory Negligence —Ultimate Negligence — Rules of Street Railway Company — Substantial Wrong or Miscarriage: Brenner v. Toronto R. W. Co., 547.

See Appeal to Court of Appeal, 8—Criminal Law, 6, 12, 14—Damages —Defamation, 2 — Evidence, 6 — Malicious Prosecution.

NEWSPAPER.

See Executors and Administrators, 3.

NONFEASANCE.

See Crown, 1 — Municipal Corporations, 7.

NON-REPAIR OF HIGHWAY.

See Highway.

NONSUIT.

See Defamation, 2—Malicious Prosecution — Negligence, 1, 4 — Railway, 7, 10—Street Railways, 2, 5.

NOTICE.

See Bills of Exchange and Promissory Notes, 4—Crown, 2, 4—Equitable Assignment, 2—Innkeeper.

NOTICE OF ACCIDENT.

See Highway, 1.

NOTICE OF ASSIGNMENT.

See Insurance, 1.

NOTICE OF TRIAL.

1. Late Service of—Motion to Set aside —Failure of Applicant to Negative Service of Proper Notice: Johnston v. Tapp, 23.

2. Motion to Set aside—Irregularity—No Place of Trial named in Statement of Claim — Place of Trial named in Writ of Summons not Specially Indorsed—Waiver of Irregularity — Costs: Barrett v. Perth Mutual Fire Insurance Co., 464.

3. Regularity—Close of Pleadings—Action to Establish Will — Defence Setting up Agreement with Testator—Joinder: Russell v. Russell, 873.

NOTICE TO CREDITORS.

See Executors and Administrators, 3.

NOVATION.

See Contract, 9—Sale of Goods, 6.

NUISANCE.

Clanging of Heavy Gate — Jarring House Adjoining—Disturbance of Inmates — Damages — Obstruction of Highway — Erection of Fence—Disputed Boundary—Plan —Evidence — Possession — Counterclaim—House Leaning over upon Adjoining Land — Injury to Fence and Gate—Projecting Eaves —Easement — Prescription—Conflicting Evidence — Findings of Judge—Appeal: Foster v. Toronto Electric Light Co., 183.

See Criminal Law, 7.

OATH.

See Contract, 1—Criminal Law, 1—Municipal Corporations, 6.

OCCUPATION RENT.

See Landlord and Tenant, 2.

OFFICIAL GUARDIAN.

See Devolution of Estates Act—Vendor and Purchaser, 6.

OIL LEASES.

See Fraud and Misrepresentation, 3—Landlord and Tenant, 3.

ONTARIO SHOPS REGULATION ACT.

See Municipal Corporations, 8.

ONTARIO VOTERS' LISTS ACT.

See Parliamentary Elections.

OPTION.

See Contract, 5 — Vendor and Purchaser, 12.

ORDERS IN COUNCIL.

See Railway, 4.

PARENT AND CHILD.

Conveyance of Farm by Father to Daughters — Agrement for Maintenance — Action to Set aside Transaction — Understanding and Capacity of Grantor—Lack of Independent Advice — Absence of Undue Influence — Parties to Action — Status of Heir-at-law of Grantor as Plaintiff: Empey v. Fick, 144; 15 O. L. R. 19.

See Damages — Dower — Fraudulent Conveyance, 2—Infant, 1—Master and Servant, 1 — Pleading, 9—Trusts and Trustees, 3.

PARLIAMENTARY AGENTS.

See Solicitor, 2.

PARLIAMENTARY ELECTIONS.

1. Ontario Voters' Lists Act — Case Stated by County Court Judge—"General Question" — Specific Cases—Refusal of Court to Answer Questions: Re Norfolk Voters' Lists, 743; 15 O. L. R. 108.

2. Ontario Voters' Lists Act — Status of Appellant — Residence—Forms in Schedule to Act—Effect of: Re South Fredericksburgh Voters' Lists, 746.

PART PERFORMANCE.

See Contract, 8.

PARTICULARS.

1. Petition of Right—Commission on Sale of Treasury Bills and Bonds —Names of Purchasers—Dates of Sales—Prices Paid — Particulars for Pleading — Delay: Coates v. The King, 462.

2. Statement of Claim — Conspiracy—Libel and Slander — Affidavit—Amendment—Rule 268—Disclosing Evidence: Pherrill v. Sewell, 71.

3. Statement of Claim—Contract—Services Rendered — Sufficiency of Particulars: Pew v. Norris, 1006.

4. Statement of Claim — Injury to Plaintiffs' Pipes by Escape of Electricity from Defendants' Works—Defences — Damages: Consumers Gas Co. v. Toronto R. W. Co., 105.

5. Statement of Claim — Professional Services—Barrister and Solicitor —Claim for Lump Sum—Quantum Meruit — Defence of Criminal Charge—Other Services: Arnoldi v. Cockburn, 373.

6. Statement of Claim — Professional Services—Compliance with Previous Order — Pleading — Evidence: Arnoldi v. Cockburn, 774.

7. Statement of Defence — Action for Alimony—Defence Alleging Adultery of Wife — Times and Places: Switzer v. Switzer, 949, 1116.

See Evidence, 1—Pleading, 1.

PARTIES.

1. Addition of Defendant — Agent—Authority — Costs: Madgett v. White, 787, 923.

2. Assignment of Claims — Action Brought in Name of Assignors—Want of Substantial Interest—Insolvency—Motion to Dismiss Action—Security for Costs—Authority of Solicitors—Correspondence —Costs: Illsley and Horn v. Toronto Hotel Co., 196.

3. Joinder of Defendants—Pleading—Joint Cause of Action—Conversion—Negligence: Broom v. Town of Toronto Junction, 750.

4. Joinder of Defendants—Pleading—Joint Cause of Action—Negligence: O'Meara v. Ottawa Electric Co., 1068.

5. Joinder of Defendants—Pleading—Joint Cause of Action—Negligence—Dangerous Fence — Highway—Private Owner—Municipal Corporation: Prouse v. Township of West Zorra and Dawes, 682.

6. Joinder of Defendants—Pleading—Joint Cause of Action—Tort: Collins v. Toronto, Hamilton, and Buffalo R. W. Co., Perkins v. Toronto, Hamilton, and Buffalo R. W. Co., 84, 115, 263.

See Banks and Banking—Company, 5—Costs, 15 — Insurance, 1—Judgment, 5—Landlord and Tenant, 1—Mortgage, 1—Parent and Child—Sale of Goods, 6—Trusts and Trustees, 3, 4—Venue, 2.

PARTITION.

See Will, 10.

PARTNERSHIP

Ostensible Partnership — Infant Held out as Partner — Creditors of Ostensible Partnership—Creditor of Person Actually Carrying on Business — Priority — Costs — Interpleader: Codville Georgeson Co. v. Smart, 466.

See Contract, 5, 6—Master and Servant, 4 — Receiver, 2 — Sale of Goods, 6.

PASSENGERS.

See Street Railways.

PAYMENT.

See Money Paid—Mortgage, 2.

PAYMENT INTO COURT.

See Devolution of Estates Act—Landlord and Tenant, 3—Lis Pendens—Physicians and Surgeons—Railway, 9—Sale of Goods, 1.

PAYMENT OUT OF COURT.

See Costs, 5.

PERJURY.

See Evidence, 2 — Settlement of Actions—Vendor and Purchaser, 6.

PETITION OF RIGHT.

See Particulars, 1—Pleading, 1.

PHYSICIANS AND SURGEONS.

Services—Operations and Medical Attendance—Quantum Meruit—Poor Patients—Promise of Defendants to Pay for Services—Scale of Remuneration—Payment into Court—Costs: Gibson v. Mackay, 1081.

PLEADING.

1. Amendment — Petition of Right—Consent of Crown—Rules of Court—Particulars—Commission on Sale of Treasury Bills and Bonds—Names of Purchasers: Coates v. The King, 522, 628.

2. Amendment at Trial—Compensation for Improvements—Real Property Limitation Act — Additional Evidence: Watson v. Town of Kincardine, 1092.

3. Counterclaim—Motion to Strike out—Irregularity — Co-defendants—Convenience—Trial—Relief Asked—Setting aside Judgments — Declarations of Ownership — Mining Leases — Agreements: Armstrong v. Crawford, 381, 534.

4. Statement of Claim — Embarrassment — Multifariousness — Irrelevancy—Pleading Evidence: Piper v. Ulrey, 607.

5. Statement of Claim—Irregularity—Naming Place of Trial other than that Named in Writ of Summons—Waiver by Taking Proceedings in Action: Curry v. Star Publishing Co., 960.

6. Statement of Claim — Joinder of Causes of Action—Claim on Guaranty—Claim to Set aside Trans-

fers of Property — Class Suit—Election — Amendment—Lis Pendens: Brock v. Crawford, 587.

7. Statement of Claim — Specific Performance—Indefiniteness — Documents — Rules 275, 469—Amendment: Clarkson v. Jacobs, 65.

8. Statement of Claim—Time for Delivery—Rule 243 (b)—Several Defendants Appearing at Different Times: McKay v. Nipissing Mining Co., 30; 14 O. L. R. 457.

9. Statement of Claim—Undue Extension of Indorsement of Writ of Summons—Inconsistent Cause of Action—Action to Set aside Will—Contract of Testator with Child—Property Wrongfully Obtained from Testator in his Lifetime—Amendment: Mountjoy v. Samells, 605.

10. Statement of Defence—Motion to Strike out Paragraph—Action for Negligence Resulting in Destruction by Fire of Plaintiffs' Buildings—Insurance Moneys—Application in Reduction of Damages—Objection in Law: Methodist Church v. Town of Welland, 687.

See Costs, 8, 13—Defamation, 1—Jury Notice—Lis Pendens — Mechanics' Liens—Municipal Corporations, 7—Notice of Trial — Particulars—Stay of Proceedings, 2 — Trusts and Trustees, 2.

POLICE MAGISTRATE.

See Criminal Law, 9—Liquor License Act, 1.

POSTPONEMENT OF TRIAL.

See Trial, 2—Venue, 1.

POWER OF APPOINTMENT.

See Will.

PRACTICE.

See Appeal to Court of Appeal—Appeal to Divisional Court—Appeal to Supreme Court of Canada—Consolidation of Actions — Contempt of Court—Costs—Defamation—Devolution of Estates Act—Discontinuance of Action — Discovery—Dismissal of Action — Division Courts — Evidence — Execution, 1, 4—Extradition—Habeas Corpus—Infant, 1—Judgment—Judgment Debtor—Jury Notice—Lis Pendens—Lunatic—Master in Chambers—Mechanics' Liens — Mortgage, 1—Notice of Trial—Particulars—Parties — Pleading — Receiver — Seduction—Settlement of Actions—Solicitor — Stay of Proceedings—Trial — Venue — Writ of Summons.

PRE-NUPTIAL CONTRACT.

See Husband and Wife, 5.

PRESCRIPTION.

See Nuisance.

PRESUMPTION OF DEATH.

See Executors and Administrators, 3.

PRINCIPAL AND AGENT.

1. Agent's Commission on Sale of Land—Finding Purchaser — Sale by Principal to Another — Terms of Contract—Breach of Implied Contract to Accept Purchaser—Damages — Quantum Meruit—Amendment: Marriott v. Brennan, 159; 14 O. L. R. 508.

2. Agent's Commission on Sale of Mining Lands—Contract—Condition—Payment of Part of Price—Option—Abandonment: Wiley v. Blum, 565.

3. Agent's Commission on Sale of Mining Property — Negotiations for Purchase — Agent a Member of Purchasing Syndicate — No Contract Made — Subsequent Contract through another Agent—Introduction by Plaintiff: Murray v. Craig, 888.

4. Agent's Commission on Sale of Mining Lands — Percentage Rate—On what Amount Commission Payable—Change in Form of Transaction—Continuity of Transaction—Substitution of Purchaser: Cavanagh v. Glendinning, 475.

See Contract, 3.

PRINCIPAL AND SURETY.

See Guaranty—Mortgage, 3.

PRIVATE WAY.

See Cemetery—Way.

PRIVILEGE.

See Defamation, 2—Evidence, 5.

PRODUCTION OF DOCUMENTS.

See Evidence, 4, 5.

PROHIBITION.

See Costs, 3.

PROMOTERS.

See Fraud and Misrepresentation, 3.

PROXIES.

See Company, 2.

PUBLIC HEALTH ACT.

See Municipal Corporations, 7.

PUBLIC INQUIRY.

See Municipal Corporations, 2.

PUBLIC PARKS ACT.

See Will, 13.

PUBLIC SCHOOLS.

See Schools.

QUANTUM MERUIT.

See Contract, 1, 12 — Limitation of Actions, 1—Master and Servant, 1—Particulars, 5 — Physicians and Surgeons—Principal and Agent, 1.

QUEBEC LAW.

See Husband and Wife, 5.

RACECOURSE.

See Criminal Law, 8.

RAILWAY.

1. Animals Killed on Track—Electric Railways Act — Ontario Railway Act — Duty to Fence — Passing "along" a Public Highway—Negligence: Gunning v. South Western Traction Co., 285.

2. Animals Killed on Track — Negligence—Duty to Fence—Lease by Railway Company of Land Adjoining Railway—Escape of Horses therefrom—Covenant of Lessee to Erect and Maintain Fences—Owner of Animals using Lands under License from Assignee of Lessee—Escape of Animals Due to Negligence of Owner — Railway Act, 1903, secs. 199, 237: Beck v. Canadian Pacific R. W. Co., 644.

3. Damages "Sustained by Reason of the Railway" — Timber Cut for Construction of Railway—Limitation Clause in Railway Act—Action not Brought within Six Months: Lumsden v. Temiskaming and Northern Ontario R. W. Commission, 115.

4. Bridge over Highway Crossing—Protection of Public — Order of Railway Committee of Privy Council—Jurisdiction — Action — Injunction — Declaration — Existence of Highway—Harbour—Water Lots—Jus Publicum—Construction of Statutes, Patents, and Agreements — Municipal Corporation—Diversion of Highway—Expropriation of Lands — Compensation—Navigable Waters—Order in Council Sanctioning Order of Railway Committee—Time for Commencement and Completion of Work—Variation of Order without Appeal: Grand Trunk R. W. Co. v. City of Toronto, Canadian Pacific R. W. Co. v. City of Toronto, 483.

5. Injury to and Consequent Death of Engine-Driver—Intersecting Railway Lines—Collision of Trains—Negligence of Servants of Railway Company — Disregard of Rules—Signals — Findings of Jury — Judge's Charge — Contributory Negligence — Action under Fatal Accidents Act—Damages: McKay v. Wabash R. R. Co., 416.

6. Injury to and Consequent Death of Engine-driver—Collision of Trains —Negligence—Rules of Company—Disobedience of Deceased — Cause of Death — Action by Widow—Findings of Jury: Maycock v. Wabash R. R. Co. and Grand Trunk R. W. Co., 127.

7. Injury to and Consequent Death of Person Attempting to Cross Track —Negligence — Failure to Give Warning of Approach of Train—Findings of Jury — Admission of Deceased that he Ran into Train —Contributory Negligence—Action by Father and Administrator—Failure to Prove Pecuniary Loss —Nonsuit: Moir v. Canadian Pacific R. W. Co., 413.

8. Negligence — Death of Servant — Neglect to Keep Bridge in Repair —Fault of Railway Company or Officer—Criminal Responsibility—Suggested Intervention of Attorney-General—Civil Action by Widow of Servant to Recover Damages for Death—Fatal Accidents Act—Consent Judgment—Civil Remedy not Suspended—Approval of Court —Apportionment of Damages: Villeneuve v. Canadian Pacific R. W. Co., 287.

9. Purchase of Lands for Railway—Power of Tenant for Life to Convey — Order of Judge — Railway Act, R. S. C. 1906 ch. 37, secs. 184, 185—Infant Remaindermen—Payment of Purchase Money into Court: Re Canadian Pacific R. W. Co. and Byrne, 278; 15 O. L. R. 45.

10. Shunting Car—Injury to Conductor Crossing Track in Yard—Consequent Death — Proximate Cause of Injury—Accident—Conjecture—Findings of Jury—Motion for Nonsuit: Burley v. Grand Trunk R. W. Co., 857.

See Costs, 5 — Criminal Law, 7 — Crown, 1—Master and Servant, 7 —Mines and Minerals, 1, 7—Street Railways—Timber.

RAILWAY COMMISSIONERS.

See Criminal Law, 7.

RATIFICATION.

See Company, 4 — Execution, 3—Infant, 2—Sale of Goods, 5.

REAL PROPERTY LIMITATION ACT.

See Limitation of Actions, 2, 3, 4—Pleading, 2.

RECEIVER.

1. Action Brought by Receiver in his own Name — Seizure of Property in Hands of Receiver—Injunction — Damages — Bank — Lien — Timber — Bank Act — Practice—Costs: Craig v. Kinch, 28.

2. Motion for, after Judgment, when Appeal Pending — Jurisdiction of Court of Appeal — Partnership—Dissolution — Receiver not Asked for in Statement of Claim or at Trial—Grounds for Motion—Danger of Loss of Partnership—Assets —Costs: Embree v. McCurdy, 131; 14 O. L. R. 325.

See Company, 7—Will, 1.

RECTIFICATION OF CONTRACT.

See Vendor and Purchaser, 5, 11.

RECTIFICATION OF DEED.

See Deed, 2—Husband and Wife, 4—Will, 1.

REDEMPTION.

See Assessment and Taxes, 5—Limitation of Actions, 2—Mortgage, 3, 4, 6.

REGISTRY LAWS.

See Crown, 4—Land Titles Act.

RELEASE.

See Contract, 9—Guaranty, 1—Husband and Wife, 3—Landlord and Tenant, 2 — Mortgage, 3, 6—Vendor and Purchaser, 8.

RENUNCIATION OF PROBATE.

See Executors and Administrators, 4.

REPAIRS.

See Trusts and Trustees, 7.

REPEAL OF PATENT.

See Crown, 4.

REPLEVIN.

See Carriers.

REPORT.

See Costs, 1.

REPRIEVE.

See Criminal Law, 11.

RES IPSA LOQUITUR.

See Master and Servant, 7.

RES JUDICATA.

See Sale of Goods, 1.

RESIDENCE.

See Parliamentary Elections, 2.

RESOLUTION OF COUNCIL.

See Municipal Corporations, 9.

RESTRAINT OF TRADE.

See Covenant.

REVIVOR.

See Bills of Sale and Chattel Mortgages, 1.

RIPARIAN OWNERS.

See Water and Watercourses, 1.

RIVERS AND STREAMS.

See Crown, 3 — Municipal Corporations, 3, 4 — Water and Watercourses.

SALE OF GOODS.

1. Absence of Express Warranty — Implied Warranty — Quality of Hay—Opportunity for Inspection —Acceptance — Estoppel — Division Court Judgment — Evidence as to Opinion of Quality: Bouck v. Clark, 653.

2. Action for Price—Defence Based on Failure of Title to Goods—Implied Warranty of Title — Will — Provision for Maintenance of Testator's Children in Hotel — Sale of Furniture in Hotel — Right of Child to Object — Executor — Powers of — Conduct — Estoppel — Contract — Lease — Offer to Purchase: Clark v. Mott, 940.

3. Action for Price — Warranty — Failure to Establish — Onus — Evidence — Course of Dealing: Freeman v. Cooper, 1025.

4. Contract — Failure to Carry out — Resale by Vendor — Conversion — Possession — Purchase Money —Tender — Rescission — Damages —Costs: Brown v. Dulmage, 451.

5. Misdescription — Deceit — Agent of Vendor—Fraud — Contract — Proviso as to Representations — Knowledge of Defects—Estoppel—Ratification — Recovery on Notes Given for Price — Execution — Sheriff — Costs: Peacock v. Bell, 926.

6. Proposed Organization of Joint Stock Company — Liability of Promoters for Price of Goods Purchased for Proposed Company — Partnership — Agency — Agreement — Novation — Evidence — Joint Liability — Contribution — Parties — Costs: Howard Stove Manufacturing Co. v. Dingman, 127.

7. Threshing Outfit — Incapacity of Engine and Boiler Forming Part of Outfit — Contract — Warranty —Implied Warranty — Reduction in Purchase Money — Reference—Payment into Court — Promissory Notes — Damages: Bell v. Goodison Thresher Co., 445.

See Contract, 10—Costs, 3.

SALE OF LAND.

See Assessment and Taxes, 5—Devolution of Estates Act—Execution, 2, 3—Mortgage, 5—Principal and Agent—Trusts and Trustees, 6—Vendor and Purchaser.

SAW LOGS DRIVING ACT.

See Division Courts, 1.

SCALE OF COSTS.

See Costs, 6, 7, 8.

SCHOOLS.

1. Membership of High School Board of Village—Representative of Public School Board — Rural School Section — Union School Section—Village School Board — High Schools Act—Mandamus — Costs: Re Rockland Public School Board and Rockland High School Board, 1002.

2. Public Schools — Rural School Section — Acquisition of Site and Providing New School House — Award — Opposition to Site Selected — Meeting of Ratepayers — Refusal to Sanction Issue of Debentures — Mandamus — Public Schools Act, 1901, sec. 74—"May" —Mandamus to Trustees — Power to Change Site — Amendments to Act — Discretion—Interference of Court: Re McLeod and Tay (No. 11) School Trustees, 649.

SCIRE FACIAS.

See Crown, 4.

SEAL.

See Municipal Corporations, 9.

SECRET PROFITS.

See Company, 6—Fraud and Misrepresentation, 3.

SECURITY FOR COSTS.

See Costs, 9, 10—Evidence, 3—Parties, 2.

SEDUCTION.

Examination of Defendant for Discovery—Refusal to Answer as to Promise of Marriage — Irrelevant Question — Damages: Leroux v. Schnupp, 617; 15 O. L. R. 91.

See Criminal Law, 1.

SENTENCE.

See Criminal Law, 5, 11 — Liquor License Act, 1.

SEPARATION.

See Husband and Wife, 1.

SEQUESTRATION.

See Contempt of Court, 3.

SERVICE OF PAPERS.

See Contempt of Court, 1.

SERVICE OF PROCESS.

See Judgment, 3—Writ of Summons.

SET-OFF.

See Carriers—Company, 5—Costs, 7, 8.

SETTLEMENT.

See Fraudulent Conveyance, 2—Gift —Husband and Wife, 3, 4—Insurance, 2.

SETTLEMENT OF ACTIONS.

Agreement for Compromise—Summary Application to Enforce—Jurisdiction of High Court—Unperformed Terms of Agreement—Application Made after Final Judgment — No Agreement to Make Terms a Rule of Court — Terms not Included in the Relief Claimed in the Actions —Grounds upon which Motion Resisted—Perjury — Fraud — Concealment—Undue Pressure —Failure of Grounds—Costs of Application: McLeod v. Crawford, McLeod v. Lawson, 590.

See Costs, 11 — Municipal Corporations, 9.

SEWER.

See Municipal Corporations, 10, 11.

SHARES AND SHAREHOLDERS.

See Company—Trusts and Trustees, 4—Will, 3.

SHERIFF.

See Execution, 2, 3 — Extradition — Habeas Corpus, 1—Sale of Goods, 5.

SHIP.

See Carriers.

SHOPS REGULATION ACT.

See Municipal Corporations, 8.

SIDEWALK.

See Highway.

SLANDER.

See Costs, 10—Defamation.

SOLICITOR.

1. Contract with Client — Share in Fruits of Litigation — Illegal Bargain — Champerty — Contract to Pay Further Sum if Verdict Sustained on Appeal—Taxation of Bill —Deduction of Sums in Addition to Costs from Amount Recovered —Unprofessional Conduct — Intervention of Law Society: Re Solicitor, 226; 14 O. L. R. 464.

2. Taxation of Costs—Order for Obtained by Solicitors ex Parte — Services Rendered by Solicitors as Parliamentary Agents — Presumption as to Professional Character—Absence of Tariff—Nature of Services Rendered — Agreement for Fixed Remuneration — Conflict of Testimony — Reference to Taxing Officer — Costs: Re Solicitors, 951.

See Evidence, 2, 5 — Executors and Administrators, 2—Limitation of Actions, 1 — Particulars, 5—Parties, 2.

SPECIFIC PERFORMANCE.

See Consolidation of Actions—Contract, 8—Pleading, 7 — Vendor and Purchaser, 2, 3, 5, 6, 8, 9.

STATED ACCOUNT.

See Judgment, 3.

STATED CASE.

See Parliamentary Elections.

STATUTE OF FRAUDS.

See Contract, 7, 8—Trusts and Trustees, 1, 2—Vendor and Purchaser, 3.

STATUTES.

See Assessment and Taxes, 4, 5—Company, 4—Costs, 4—Division Courts, 2—Injunction, 2—Mines and Minerals, 7—Trial, 2.

STAY OF EXECUTION.

See Contract, 4—Execution, 4.

STAY OF PROCEEDINGS.

1. Action on Fire Insurance Policy—Variation of Statutory Condition, 16 — Not "Just and Reasonable" — Onerous Terms — Appraisement — Arbitration — Expiry of Time for Moving under Arbitration Act, sec. 6: Cole v. London Mutual Fire Insurance Co., 930.

2. Fire Insurance Policy—Action on—Arbitration Act, sec. 6—Waiver by Pleading — Time for Applying: Cole v. Canadian Fire Ins. Co., 906.

See Consolidation of Actions — Contempt of Court, 3 — Dismissal of Action—Judgment, 5.

STREAM.

See Water and Watercourses.

STREET.

See Highway.

STREET RAILWAYS.

1. Injury to Passenger—Negligence—Contributory Negligence—Passengen Projecting Body beyond Car — Injury from Striking Post — Question for Jury — Damages — Costs: Simpson v. Toronto and York Radial R. W. Co., 33.

2. Injury to Passenger Alighting from Car — Negligence — Contributory Negligence — Findings of Jury — Nonsuit: Cooledge v. Toronto R. W. Co., 739.

3. Injury to Person Attempting to Get on Car and Consequent Death — Negligence — Findings of Jury—Contributory Negligence — Ultimate Negligence — Dismissal of Action: Watkins v. Toronto R. W. Co., 170.

4. Injury to Person Crossing Track — Negligence — Contributory Negligence — Findings of Jury — Infant — Dismissal of Action: Hackett v. Toronto R. W. Co., 25.

5. Injury to Person Crossing Track — Negligence — Contributory Negligence — Nonsuit: Tinsley v. Toronto R. W. Co., 1077.

6. Injury to Person Falling from Car —Fare not Demanded by Conductor — Willingness to Pay Fare if Demanded — Status as Passenger —Duty of Conductor — Misconduct — Proximate Cause of Fall—Avoidance of Kick Aimed by Conductor at Passenger — Responsibility of Owners of Railway — Negligence — Contributory Negligence: Wells v. City of Port Arthur, 1098.

See Assessment and Taxes, 4—Negligence, 5, 6—New Trial.

SUBMISSION.

See Arbitration and Award.

SUBPOENA.

See Costs, 12.

SUBROGATION.

See Insurance, 2—Mortgage, 3.

SUMMARY APPLICATION.

See Executors and Administrators, 2 —Setlement of Actions—Will, 2, 5.

SUMMARY JUDGMENT.

See Judgment, 4-7.

SUMMARY TRIAL.

See Criminal Law, 9.

SUNDAY.

Lord's Day Act — Restaurant-keeper—Supplying Food — Candies and Oranges not Eaten on Premises—Conviction — Appeal: Rex v. Devins, 11.

SUPREME COURT OF CANADA.

See Appeal to Supreme Court of Canada.

SURGEON.

See Physicians and Surgeons.

SURROGATE COURT.

See Jury Notice, 1.

TAX SALE.

See Assessment and Taxes, 5.

TAXATION OF COSTS.

See Costs, 11-14—Solicitor.

TAXES.

See Assessment and Taxes.

TENDER.

See Mortgage, 5—Sale of Goods, 4—Vendor and Purchaser, 3, 9.

TERRITORIAL JURISDICTION.

See Costs, 3—Division Courts, 2.

TESTIMONIALS.

See Injunction, 1.

THEFT.

See Guaranty, 2.

THIRD PARTIES.

See Costs, 15—Landlord and Tenant, 1.

THREATS.

See Criminal Law, 13—Injunction, 3.

TIMBER.

Destruction by Fire—Crown Lands—Timber License—Renewal—Expiry of License — Timber Vested in Crown — Action by Licensees for Damages for Negligence in Operation of Railway: Gillies Brothers Co. Limited v. Temiskaming and Northern Ontario Railway Commission (No. 1), 971.

See Crown, 1—Railway, 3—Receiver, 1— Vendor and Purchaser, 5 — Water and Watercourses, 2.

TIME.

See Appeal to Divisional Court, 1, 2—Appeal to Supreme Court of Canada — Arbitration and Award — Bills of Sale and Chattel Mortgages, 2—Habeas Corpus, 1—Jury Notice, 1—Limitation of Actions, 3—Mechanics' Liens — Mortgage, 3, 6—Municipal Corporations, 6, 8—Notice of Trial, 1—Pleading, 8—Railway, 4—Stay of Proceedings—Vendor and Purchaser, 3, 9, 12—Will, 4.

TOLL BRIDGE.

See Assessment and Taxes, 6.

TOLLS.

See Water and Watercourses, 2.

TORT.

See Parties, 5.

TRADE COMBINATION.

See Criminal Law, 2.

TRADE COMPETITION.

See Conspiracy.

TRADE NAME.

Infringement — Similarity — Distinction — Advertisements — Absence of Fraud or Deception — Passing off Goods: National Casket Co. v. Eckhardt, 74.

TRESPASS.

See Costs, 8—Crown, 4—Mines and Minerals — Water and Watercourses—Way, 2.

TRIAL.

1. Jury—Answers to Questions — Inconsistent Findings — Mistrial: Nettleton v. Town of Prescott, 944.

2. Postponement — Action to Recover Possession of Mining Lands—Act of Provincial Legislature Passed Pendente Lite Validating Title of Defendants—Petition for Disallowance—Grounds for Postponement: Florence Mining Co. v. Cobalt Lake Mining Co., 38, 225.

See Costs, 13—Criminal Law—Defamation, 3—Jury Notice—Lunatic—New Trial — Notice of Trial—Pleading, 2, 3—Venue.

TROVER.

See Executors and Administrators, 1.

TRUSTS AND TRUSTEES.

1. Action against Executors to Establish Trust — Purchase by Second Mortgagee of Mortgaged Premises from First Mortgagee — Alleged Trust for Mortgagors — Failure of Evidence to Establish — Unexecuted Agreement — Corroboration — Statute of Frauds — Purchase of Chattels — Account: Bowman v. Silver, 811.

2. Action of Ejectment — Counterclaim for Declaration of Trust and to Set aside Conveyance as Fraudulent — Improper Joinder of Causes of Counterclaim — Amendment — Election — Statute of Frauds: Parker v. Tain, 36, 848.

3. Assignment of Mortgages by Father to Daughters — Alleged Trust in Favour of Assignor or all His Children — Action by Assignee of Father for Declaration of Trust—Parties — Addition of Assignor—Failure of Evidence to Establish Trust — Absence of Fraud — Champerty: Logan v. Drew, 334.

4. Company Shares Held in Trust for Several Persons — Action by one Cestui que Trust to Compel Transfer of his Portion—Parties—Interests of Remaining Cestuis que Trust—Terms of Trust—Discharge of Trustee Piecemeal: Bechtel v. Zinkann, 1075.

5. Land Conveyed to Son of Tenant—Agreement to Purchase—Declaration of Trusteeship — Improvements — Conflicting Evidence — Appeal — Duty of Appellate Court —Findings of Trial Judge: Bishop v. Bishop, 177.

6. Sale of Unproductive Land — Purchase Money — Apportionment — Tenant for Life — Income—Capital — Interest—Costs: Re Childs, 108.

7. Trust Estate—Expenditure of Principal on Repairs—Consent of Beneficiaries—Leave of Court: Re Heward's Trusts, 961.

See Fraudulent Conveyance—Gift — Will, 4.

ULTIMATE NEGLIGENCE.

See New Trial—Street Railways, 3.

UNDERTAKING.

See Costs, 9—Municipal Corporations, 1—Vendor and Purchaser, 9.

UNDUE INFLUENCE.

See Husband and Wife, 4—Parent and Child—Will, 20.

VACATION.

See Mechanics' Liens, 1.

VENDOR AND PURCHASER.

1. Contract for Sale of Land—Completion of Houses by Vendor—Purchaser to have Right, on Default of Vendor, to Complete and Deduct Price from Balance of Purchase Money—Payment of Balance of Cash — Refusal of Purchaser to Deliver Mortgage for Part of Price, Houses being Incomplete—Action for Declaration of Rights—Mandatory Order for Delivery of Mortgage — Lien — Costs: Cummings v. Doel, 331, 959.

2. Contract for Sale of Land—Condition — Representation — Agency—Non-compliance with Terms—Action for Specific Performance — Refusal of Court to Adjudge: Bowerman v. Fraser, 729.

3. Contract for Sale of Land—Construction — Time of Essence — Delay of Purchaser in Tender of Purchase Money and Deeds—Delay of Vendor — Preparation of Conveyance and Mortgage — Misrepresentation by Purchaser's Agent — Statute of Frauds — Misdescription of Lot in Contract — Falsa Demonstratio — Identity of Premises — Deed Held in Escrow — Specific Performance: Foster v. Anderson, 531, 998.

4. Contract for Sale of Land—Misrepresentations by Vendor Inducing Contract of Purchaser — Approbation after Discovery of Falsity —Rescission — Damages for Deceit — Possession — Costs: Webb v. Roberts, 962.

5. Contract for Sale of Land—Mistake as to Quantity — Reformation of Contract — Specific Performance —Absence of Misrepresentation—Removal of Timber by Vendor—Deduction from Purchase Money: McIntyre v. McLaughlin, 195.

6. Contract for Sale of Land—Offer in Writing—Acceptance — Administrator of Estate — Consent of Official Guardian — Binding Contract — Specific Performance — Perjury: McCullough v. Hughes, 691.

7. Contract for Sale of Land—Specific Performance — Correspondence — Offer — Quasi-acceptance—Agent: Bohan v. Galbraith, 143; 15 O. L. R. 37.

8. Contract for Sale of Land—Specific Performance—Oral Understanding as to Procuring Release of Claim for Dower — Addition to Written Contract of Words "if in his Power to do so"—Terms of Judgment for Conditional Specific Performance: Toole v. Newton, 322.

9. Contract for Sale of Land — Specific Performance — Undertaking of Purchaser to Build — Condition—Representation — Acts of Agent

of Vendor — Waiver —Acceptance and Retention of Cheque for Part of Purchase Money — Time for Making Payments — Time of the Essence of the Contract—Tender of Formal Agreement for Execution by Vendor: Bowerman v. Fraser, 229.

10. Contract for Sale of Land Made with Clerk of Vendor's Agent — Ignorance of Vendor of Position of Vendee—Right to Repudiate on Discovering Truth — Duration of Agency — Termination of Authority — Vendee Acting as Representative of Actual Purchaser: McGuire v. Graham, 370, 863.

11. Contract for Sale of Mining Property—Action to Recover Instalments of Purchase Money—Land not Conveyed to Purchaser but Possession Given—Terms of Agreement—Effect of Subsequent Agreement — Rectification—Action for Damages — Election to Treat Contract as Rescinded: Vivian v. Clergue, 186, 758.

12. Option to Purchase Land — Person Holding Option Offering Land for Sale by Auction — Vendors Notifying Auctioneer not to Proceed — Refusal of Auctioneer to Sell — Loss of Resale—Action for Damages — Loss of Option by Effluxion of Time—Right to Chattels: Bradley v. Bradley, 223; 14 O. L. R. 473.

See Deed—Principal and Agent.

VENUE.

1. Motion to Change—Convenience — Witnesses — View — Costs — Postponement of Trial: Pettypiece v. Town of Sault Ste. Marie, 536, 573.

2. Motion to Change — Residence of Parties—Nominal Plaintiff — Réal Plaintiff — "Party" — Preponderance of Convenience — Witnesses—Expense—Costs: Brigham v. McAllister, 117.

See Notice of Trial, 2—Pleading, 5.

VERDICT.

See Criminal Law, 6, 10.

VESTING ORDER.

See Costs, 5.

VOTERS' LISTS.

See Municipal Corporations, 5, 6 — Parliamentary Elections.

WAGES.

See Contract, 11—Master and Servant, 1.

WAIVER.

See Bills of Sale and Chattel Mortgages, 1—Contract, 11 — Division Courts, 2 — Habeas Corpus, 1 — Municipal Corporations, 6 — Notice of Trial, 2—Pleading, 5—Stay of Proceedings, 2 — Vendor and Purchaser, 9.

WAREHOUSE RECEIPTS.

See Banks and Banking.

WARRANTY.

See Contract, 5—Sale of Goods, 1, 2, 3, 7.

WATER AND WATERCOURSES.

1. Lands Bordering on Navigable Lake —Rights of Riparian Owner—Removal of Sand or Gravel from Shore — Trespass — Injunction—Damages: Servos v. Stewart, 528.

2. Logs Floated over Stream — Tolls —Summary Order Fixing — Past Tolls — Mandamus — County Court Judge — Refusal to Entertain Application to Fix Tolls: Re Beck Manufacturing Co., 711.

3. Navigable Waters — Hamilton Bay —Deed—Grant of Wharf on one Side of Slip — Derogation from Grant — Use of Slip so as to Prevent Access to Wharf — Evidence of Mode of User at Time of Grant —Admissibility—Injunction: Hamilton Steamboat Co. v. MacKay, 295.

See Crown, 3 — Municipal Corporations, 3, 4.

WAY.

1. Private Way — Easement — Extinguishment — Unity of Ownership

—Revival on Severance — Implication—Necessity for Fresh Grant —Land Titles Act: McClellan v. Powassan Lumber Co., 630; 15 O. L. R. 67.

2. Private Way — Trespass — Boundary — User — Evidence—Costs: Bickell v. Woodley, 7, 515.

See Cemetery—Highway.

WHARF.

See Assessment and Taxes, 1—Water and Watercourses, 3.

WILL.

1. Charge on Land—Declaratory Judgment — Reformation of Deed—Removal of Executor — Administration—Receiver: Patching v. Ruthven, 620.

2. Construction — Allowance to Guardian of Infants—Additional to Infants' Allowances for Maintenance —Income of Estate—Direction for Accumulation of Part — Annuities out of Surplus Income — Costs—Action Brought where Summary Application Sufficient: Hardy v. Sheriff, 1045.

3. Construction—Bequest of Shares in Company — Distinction as to Shares Held in Different Rights—Codicil — Direction that Legatee may Purchase Shares at Par: Davies v. Fox, 361.

4. Construction—Charitable Bequest—Gift of Income without Limitation of Time—Disposition of Corpus—Intention—Perpetuation of Trust: Re Chambers, Chambers v. Wood, 1089.

5. Construction—Devise — Determination of Nature of Estate—Summary Application — Rule 938—Scope of: Re Cafferty, 1119.

6. Construction — Devise — Estate—Fee Simple Subject to be Divested on Death of Devisee Leaving Children—Rule in Shelley's Case: Re Eagle, 995.

7. Construction — Devise—Life Estate —Estate in Fee or Tail—Devise of Remainder to Children after Express Devise for Life — Rule in Shelley's Case — Purchaser from Mortgagee of Life Tenant—Title by Possession—Limitation of Actions — Ejectment — Defence — Mesne Profits—Improvements under Mistake of Title—Reference—Costs: Bullen v. Nesbitt, 119.

8. Construction — Devise—Life Estate —Power of Appointment to Children in Fee—Debts Due by Devisee of Life Estate Charged against Property Devised—Charge against Life Estate only: Re McRae, 689.

9. Construction — Devise—Life Estate Power of Sale—Disposition of Proceeds: Re Silverthorn, 798; 15 O. L. R. 112.

10. Construction—Devise—Life Estate to Widow with Power of Appointment by Will—Power of Sale given to Executors with Consent of Widow—Quit Claim by Executors to Widow—Conveyance by Widow to Child—Will of Widow — Consent Shewn by Acceptance of Quit Claim — Conveyance of Widow's Estate in Another Parcel — Exercise of Power of Appointment—Partition: Burrows v. Allen, 179.

11. Construction—Devise of Farm and House with "Curtilage and Outbuildings thereof"—Extrinsic Evidence to Shew Meaning—Intention of Testator — Barn and Barnyard — Whether Included — Action — Costs: Thompson v. Jose, 173.

12. Construction — Estate during Widowhood—No Devise over—Widow Taking in Fee Subject to Bequests in the Event of Re-marriage: Re Morton, 211.

13. Construction — General Legacies—Insufficiency of Estate — Abatement Ratably — Exceptions—Legacies to be Paid in Full—Bequest of Half a Share of Stock—Direction for Sale of One Share—Charitable Bequest — Benefit of Poor Devise of Land to Municipal Corporation for a Public Park—Pu

lic Parks Act — Mortmain and Charitable Uses Act — Amending Act of 1902—Construction — Exemptions: Re Battershall, 933.

14. Construction — Gift of Real and Personal Property to Widow for Life "and then to Heirs"—Fee Simple—Absolute Interest in Personalty—Rule in Shelley's Case: Re Newbigging, 213.

15. Construction — Gifts to Religious Bodies — Statutes of Mortmain—Legislation Permitting Societies to Take Gifts in Mortmain—Validity of Gifts—Provision for Accumulation—Right of Legatees to Immediate Payment — Application of Rule to Charities—Lapsed Gifts—Division as upon Intestacy: Re Youart, 373.

16. Construction — Joint Stock Companies — Dividends — Income — Revenue — Accumulation — Capital: Toronto General Trusts Corporation v. Hardy, 43.

17. Construction—Pecuniary Legacies —Specific Bequests—Identification of Moneys—Recourse to General Personal Estate: Re Moyer, 3.

18. Construction — Specific Bequest to Wife — Lapse by Predecease of Wife—Residuary Clauses—Conflict —Declaration of Intestacy: Re Coy, 884.

19. Execution—Procurement by Importunity — Influence Exercised by Sister over Dying Man — Setting aside Will — Establishment of Earlier Will — Construction—Action — Costs: Roman Catholic Episcopal Corporation v. O'Connor, 76; 14 O. L. R. 666.

20. Execution—Undue Influence—Testamentary Capacity — Evidence—Demeanour of Principal Witness —Credibility—Character Evidence —Residuary Bequest to Church—Alleged Procurement by Minister —Dismissal of Action—Costs—Solicitor and Client — Defendants Making Common Cause with Plaintiffs—Executors' Costs: Madill v. McConnell, 672.

See Executors and Administrators—Husband and Wife, 5—Insurance, 4, 6—Notice of Trial, 3—Pleading, 9—Sale of Goods, 2.

WINDING-UP.

See Company.

WITNESSES.

See Contract, 1—Criminal Law, 12—Municipal Corporations, 2—Venue.

WORDS.

"Annually"—See Insurance, 3.
"Any Licensee or Person Feeling Aggrieved"—See Mines and Minerals, 2.
"Assigns"—See Contract, 6.
"Business Assessment"—See Assessment and Taxes, 1.
"Business Tax"—See Assessment and Taxes, 3.
"Carry on or be Engaged in Business"—See Covenant.
"Curtilage and Outbuildings thereof"—See Will, 11.
"Deem"—See Insurance, 4.
"Exception"—See Contract, 3.
"Gasoline Kept or Stored in the Building Insured"—See Insurance, 1.
"General Question"—See Parliamentary Elections, 1.
"House, Office, Room, or other Place"—See Criminal Law, 8.
"Income Derived from the Mine"—See Assessment and Taxes, 2.
"Liabilities"—See Mortgage, 4.
"May"—See Schools, 2.
"Negotiation"—See Banks and Banking.
"Occupied or Used Mainly for the Purposes of its Business" — See Assessment and Taxes, 1.
"Party"—See Venue, 2.
"Reservation"—See Contract, 3.
"Signing Judgment"—See Judgment, 3.
"Sustained by Reason of the Railway"—See Railway, 3.
"Written Promise"—See Banks and Banking.

WORK AND LABOUR.

See Contract.

WORKMEN'S COMPENSATION ACT.

See Master and Servant.

WRIT OF SUMMONS.

1. Service on Defendant Company—Regularity — Rules 146, 159—Service on Clerk at Company's Office —Service Brought to Knowledge of Company: Eastwood v. Harlan, 460.

2. Service out of Jurisdiction — Contract to be Performed in Ontario —Rule 162 — Conditional Appearance: Clarkson v. Crawford, 1043.

See Judgment, 3—Notice of Trial, 2 —Pleading, 5, 9.

SUPPLEMENT.

The following cases reported in Volumes VIII. and IX. of the Ontario Weekly Reporter are now reported in the Ontario Law Reports :—

Amendment: Stuart v. Bank of Montreal, 9 O. W. R. 741, 822, 14 O. L. R. 487.

Amendment: Faulkner v. Greer, 9 O. W. R. 773, 14 O. L. R. 360.

Appeal to Court of Appeal: Cronkhite v. Imperial Bank of Canada, 9 O. W. R. 684, 14 O. L. R. 284.

Appeal to Court of Appeal: Copeland-Chatterson Co. v. Business Systems Limited, 9 O. W. R. 390, 14 O. L. R. 337.

Appeal to Court of Appeal: Embree v. McCurdy, 9 O. W. R. 961, 14 O. L. R. 284.

Arbitration and Award: Re Baker and Kelly, 9 O. W. R. 136, 14 O. L. R. 623.

Arbitration and Award: Re Brown and Town of Owen Sound, 9 O. W. R. 727, 14 O. L. R. 627.

Arbitration and Award: Re Cavanagh and Canada Atlantic R. W. Co., 9 O. W. R. 842, 14 O. L. R. 523.

Assessment and Taxes: Re J. D. Shier Lumber Co. and Township of Lawrence, 9 O. W. R. 605, 14 O. L. R. 210.

Assignment of Chose in Action: Mills v. Small, 9 O. W. R. 421, 14 O. L. R. 105.

Bigamy: Rex v. Brinley (or Brinkley), 9 O. W. R. 457, 14 O. L. R. 434.

Cheque: Re Sturgis, Sturgis v. Van-Every, 9 O. W. R. 663, 14 O. L. R. 77.

Chose in Action: Mills v. Small, 9 O. W. R. 421, 14 O. L. R. 105.

Church: Re Archer, 9 O. W. R. 652, 14 O. L. R. 374.

Company: Manes Tailoring Co. v. Willson, 9 O. W. R. 209, 14 O. L. R. 89.

Company: Monarch Life Assurance Co. v. Brophy, 9 O. W. R. 151, 14 O. L. R. 1.

Company: National Malleable Castings Co. v. Smith's Falls Malleable Castings Co., 9 O. W. R. 165, 14 O. L. R. 22.

Company: Re Ottawa Cement Block Co., Macoun's Case, 9 O. W. R. 409, 14 O. L. R. 389.

Company: Re Peterborough Cold Storage Co., 9 O. W. R. 850, 14 O. L. R. 475.

Conspiracy: Rex v. Master Plumbers and Steam Fitters' Co-operative Association Limited and Central Supply Association of Canada Limited, 9 O. W. R. 450, 14 O. L. R. 295.

Conspiracy: Metallic Roofing Co. of Canada v. Jose, 9 O. W. R. 786, 14 O. L. R. 156.

Constable: Thomas v. Canadian Pacific R. W. Co., Bush v. Canadian Pacific R. W. Co., 8 O. W. R. 93, 14 O. L. R. 55.

Constitutional Law: Rex v. Brinley (or Brinkley), 9 O. W. R. 457, 14 O. L. R. 434.

Constitutional Law: Crawford v. Tilden, 9 O. W. R. 781, 14 O. L. R. 572.

Constitutional Law: Rex v. Chisholm, 9 O. W. R. 914, 14 O. L. R. 178.

Contract: National Malleable Castings Co. v. Smith's Falls Malleable Castings Co., 9 O. W. R. 165, 14 O. L. R. 22.

Contract: Monarch Life Assurance Co. v. Brophy, 9 O. W. R. 151, 14 O. L. R. 1.

Contract: Mercier v. Campbell, 9 O. W. R. 101, 14 O. L. R. 639.

Contract: Gould v. McCrae, 9 O. W. R. 626, 14 O. L. R. 194.

Costs: Re Sturgis, Sturgis v. Van Every, 9 O. W. R. 663, 14 O. L. R. 77.

Costs: Rex v. Holmes, 9 O. W. R. 750, 14 O. L. R. 124.

County Court Appeal: Mercier v. Campbell, 9 O. W. R. 101, 14 O. L. R. 639.

Covenant: Carpenter v. Carpenter, 9 O. W. R. 862, 15 O. L. R. 9.

Covenant: Anderson v. Ross, 9 O. W. R. 681, 14 O. L. R. 683.

Criminal Law: Rex v. Colahan, 9 O. W. R. 661, 14 O. L. R. 379.

Criminal Law: Rex v. Master Plumbers and Steam Fitters' Co-operative Association Limited and Central Supply Association of Canada Limited, 9 O. W. R. 450, 14 O. L. R. 295.

Criminal Law: Rex v. Brinley (or (Brinkley), 9 O. W. R. 457, 14 O. L. R. 434.

Criminal Law: Rex v. O'Gorman, 9 O. W. R. 928, 14 O. L. R. 102.

Criminal Law: Rex v. Hays, 9 O. W. R. 488, 14 O. L. R. 201.

Crown Patent: Drulard v. Welsh, 9 O. W. R. 491, 14 O. L. R. 54.

Damages: Faulkner v. Greer, 9 O. W. R. 773, 14 O. L. R. 360.

Damages: Muma v. Canadian Pacific R. W. Co., 9 O. W. R. 475, 14 O. L. R. 147.

Devolution of Estates Act: Re Stainsby, 9 O. W. R. 839, 14 O. L. R. 468.

Discovery: Right of Way Mining Co. v. La Rose Mining Co., 9 O. W. R. 678, 14 O. L. R. 80.

Division Courts: Re Errington v. Court Douglas No. 27 Canadian Order of Foresters, 9 O. W. R. 675, 14 O. L. R. 75.

Dower: Re Smithers, 9 O. W. R. 819, 14 O. L. R. 536.

Dower: Jones v. Shortreed, 9 O. W. R. 705, 14 O. L. R. 142.

Easement: Ruetsch v. Spry, 9 O. W. R. 696, 14 O. L. R. 233.

Eating Houses: Re Campbell and City of Stratford, 9 O. W. R. 115, 345, 14 O. L. R. 184.

Estoppel: Gentles v. Canadian Pacific R. W. Co., 9 O. W. R. 601, 14 O. L. R. 286.

Evidence: Howland v. Macdonald, 9 O. W. R. 337, 14 O. L. R. 110.

Evidence: Re Hamilton Terminal R. W. Co. and Whipple, 9 O. W. R. 463, 14 O. L. R. 117.

Evidence: Cuff v. Frazee, 9 O. W. R. 691, 14 O. L. R. 263.

Factories Act: Jones v. Morton Co., 9 O. W. R. 500, 14 O. L. R. 402.

Fixtures: Cronkhite v. Imperial Bank of Canada, 9 O. W. R. 326, 14 O. L. R. 270.

Husband and Wife: Faulkner v. Greer, 9 O. W. R. 24, 773, 14 O. L. R. 360.

Infant: Louden Manufacturing Co. v. Milmine, 9 O. W. R. 829, 14 O. L. R. 532.

Injunction: Copeland-Chatterson Co. v. Business Systems Limited, 9 O. W. R. 390, 14 O. L. R. 337.

Inspection of Mine: Right of Way Mining Co. v. La Rose Mining Co., 9 O. W. R. 678, 14 O. L. R. 80.

Insurance: Pense v. Northern Life Assurance Co., 9 O. W. R. 646, 14 O. L. R. 613.

Insurance: Re Kemp, Johnson v. Ancient Order of United Workmen, 9 O. W. R. 899, 14 O. L. R. 424.

Insurance: Hawthorne & Co. v. Canadian Casualty and Boiler Insurance Co., 9 O. W. R. 809, 14 O. L. R. 166.

Insurance: Boulter-Davies Co. v. Canadian Casualty and Boiler Insurance Co., 9 O. W. R. 809, 14 O. L. R. 166.

Insurance: Re Canadian Order of Home Circles and Smith, 9 O. W. R. 738, 14 O. L. R. 322.

Interest: Re Sturgis, Sturgis v. Van-Every, 9 O. W. R. 663, 14 O. L. R. 77.

Judgment: Hyslop v. Ostrom, 9 O. W. R. 933, 14 O. L. R. 136.

Jury Notice: Nixon v. Mundett, 9 O. W. R. 400, 14 O. L. R. 343.

Justice of the Peace: Rex v. Hudgins, 9 O. W. R. 298, 376, 14 O. L. R. 139.

Justice of the Peace: Rex v. Holmes, 9 O. W. R. 750, 14 O. L. R. 124.

Landlord and Tenant: Cronkhite v. Imperial Bank of Canada, 9 O. W. R. 326, 14 O. L. R. 270.

Landlord and Tenant: Morris v. Cairncross, 9 O. W. R. 918, 14 O. L. R. 544.

Life Insurance: Re Kemp, Johnson v. Ancient Order of United Workmen, 9 O. W. R. 899, 14 O. L. R. 424.

Life Insurance: Pense v. Northern Life Assurance Co., 9 O. W. R. 646, 14 O. L. R. 613.

Life Insurance: Re Canadian Order of Home Circles and Smith, 9 O. W. R. 738, 14 O. L. R. 322.

Light: Ruetsch v. Spry, 9 O. W. R. 696, 14 O. L. R. 233.

Limitation of Actions: Iredale v. Loudon, 8 O. W. R. 963, 14 O. L. R. 17.

Limitation of Actions: Drulard v. Welsh, 9 O. W. R. 491, 14 O. L. R. 54.

Liquor License Act: Rex v. Hudgins, 9 O. W. R. 298, 376, 14 O. L. R. 139.

Liquor License Act: Re Frawley and Town of Orillia, 9 O. W. R. 365, 14 O. L. R. 99.

Local Improvement Rates: Re Taylor and Martyn, 9 O. W. R. 666, 14 O. L. R. 132.

Local Option By-law: Re Cleary and Township of Nepean, 9 O. W. R. 406, 14 O. L. R. 392.

Local Option By-law: Re Rickey and Township of Marlborough, 9 O. W. R. 563, 930, 14 O. L. R. 587.

Local Option By-law: Re Armour and Township of Onondaga, 9 O. W. R. 833, 14 O. L. R. 606.

Malicious Arrest and Prosecution: Thomas v. Canadian Pacific R. W. Co., Bush v. Canadian Pacific R. W. Co., 8 O. W. R. 93, 14 O. L. R. 55.

Mandamus: Re Robertson and Grand Trunk R. W. Co., 9 O. W. R. 629, 14 O. L. R. 497.

Master and Servant: Gould v. McCrae, 9 O. W. R. 626, 14 O. L. R. 194.

Master and Servant: Bradd v. Whitney, 9 O. W. R. 656, 14 O. L. R. 415.

Master and Servant: Jones v. Morton Co., 9 O. W. R. 500, 14 O. L. R. 402.

Master and Servant: Cuff v. Frazee, 9 O. W. R. 691, 14 O. L. R. 263.

Machanics' Liens: Crawford v. Tilden, 9 O. W. R. 781, 14 O. L. R. 572.

Mechanics' Liens: Dunn v. McCallum, 9 O. W. R. 33, 315, 756, 14 O. L. R. 249.

Money in Court: Re Sturgis, Sturgis v. Van Every, 9 O. W. R. 663, 14 O. L. R. 77.

Mortgage: Jones v. Shortreed, 9 O. W. R. 705, 14 O. L. R. 142.

Mortgage: Re Taylor and Martyn, 9 O. W. R. 666, 14 O. L. R. 132.

Mortmain: Re Archer, 9 O. W. R. 652, 14 O. L. R. 374.

Municipal Corporations: Re Frawley and Town of Orillia, 9 O. W. R. 365, 14 O. L. R. 99.

Municipal Corporations: Re Campbell and City of Stratford, 9 O. W. R. 115, 345, 14 O. L. R. 184.

Municipal Corporations: Re Rickey and Township of Marlborough, 9 O. W. R. 563, 930, 14 O. L. R. 587.

Municipal Corporations: Re Armour and Township of Onondaga, 9 O. W. R. 833, 14 O. L. R. 606.

Municipal Corporations: Rex v. Chisholm, 9 O. W. R. 914, 14 O. L. R. 178.

Municipal Corporations: Soulsby v. City of Toronto, 9 O. W. R. 871, 15 O. L. R. 13.

Municipal Corporations: Re Brown and Town of Owen Sound, 9 O. W. R. 727, 14 O. L. R. 627.

Municipal Corporations: Re Cleary and Township of Nepean, 9 O. W. R. 406, 14 O. L. R. 392.

Municipal Elections: Rex ex rel. Armstrong v. Garratt, 9 O. W. R. 636, 14 O. L. R. 395.

Municipal Elections: Rex ex rel. Armour v. Peddie, 9 O. W. R. 393, 14 O. L. R. 339.

Negligence: Yeates v. Grand Trunk R. W. Co., 9 O. W. R. 423, 14 O. L. R. 63.

Negligence: Jones v. Morton Co., 9 O. W. R. 500, 14 O. L. R. 402.

Negligence: Soulsby v. City of Toronto, 9 O. W. R. 871, 15 O. L. R. 13.

Negligence: Wallingford v. Ottawa Electric R. W. Co., 9 O. W. R. 495, 14 O. L. R. 383.

Negligence: Muma v. Canadian Pacific R. W. Co., 9 O. W. R. 475, 14 O. L. R. 147.

Negligence: Bradd v. Whitney, 9 O. W. R. 656, 14 O. L. R. 415.

Negligence: Cuff v. Frazee, 9 O. W. R. 691, 14 O. L. R. 263.

New Trial: Cuff v. Frazee, 9 O. W. R. 691, 14 O. L. R. 263.

New Trial: Clarke v. Union Stock Underwriting Co. of Peterborough, 9 O. W. R. 486, 14 O. L. R. 198.

Parliamentary Elections: Re Port Arthur and Rainy River Provincial Election, Preston v. Kennedy, 9 O. W. R. 347, 14 O. L. R. 345.

Parties: Mills v. Small, 9 O. W. R. 421, 14 O. L. R. 105.

Parties: Faulkner v. Greer, 9 O. W. R. 773, 14 O. L. R. 360.

Pleading: Stuart v. Bank of Montreal, 9 O. W. R. 741, 822, 14 O. L. R. 487.

Police Magistrate: Rex v. Holmes, 9 O. W. R. 750, 14 O. L. R. 124.

Principal and Agent: Gentles v. Canadian Pacific R. W. Co., 9 O. W. R. 601, 14 O. L. R. 286.

Prison: Rex v. Colahan, 9 O. W. R. 661, 14 O. L. R. 379.

Private Way: Re Hamilton Terminal R. W. Co. and Whipple, 9 O. W. R. 463, 14 O. L. R. 117.

Railway: Rex v. Hays, 9 O. W. R. 488, 14 O. L. R. 201.

Railway: Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co., 9 O. W. R. 158, 14 O. L. R. 41.

Railway: Thomas v. Canadian Pacific R. W. Co., Bush v. Canadian Pacific R. W. Co., 8 O. W. R. 93, 14 O. L. R. 55.

Railway: Yeates v. Grand Trunk R. W. Co., 9 O. W. R. 423, 14 O. L. R. 63.

Railway: Re Cavanagh and Canada Atlantic R. W. Co., 9 O. W. R. 842, 14 O. L. R. 523.

Railway: Muma v. Canadian Pacific R. W. Co., 9 O. W. R. 475, 14 O. L. R. 147.

Railway: Re Robertson and Grand Trunk R. W. Co., 9 O. W. R. 629, 14 O. L. R. 497.

Railway: McKenzie v. Grand Trunk R. W. Co., Dickie v. Grand Trunk R. W. Co., 9 O. W. R. 778, 14 O. L. R. 671.

Railway: Crawford v. Tilden, 9 O. W. R. 781, 14 O. L. R. 572.

Restraint of Trade: Anderson v. Ross, 9 O. W. R. 681, 14 O. L. R. 683.

Restraint of Trade: Carpenter v. Carpenter, 9 O. W. R. 862, 15 O. L. R. 9.

Sale of Bread: Rex v. Chisholm, 9 O. W. R. 914, 14 O. L. R. 178.

Sale of Goods: Louden Manufacturing Co. v. Milmine, 9 O. W. R. 829, 14 O. L. R. 532.

Settlement: Howland v. Macdonald, 9 O. W. R. 337, 14 O. L. R. 110.

Solicitor: De Santis v. Canadian Pacific R. W. Co., 9 O. W. R. 331, 14 O. L. R. 108.

Specific Performance: Crabbe v. Little, Moses v. Little, 9 O. W. R. 551, 14 O. L. R. 631.

Specific Performance: Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co., 9 O. W. R. 158, 14 O. L. R. 41

Statute of Frauds: Gould v. McCrae, 9 O. W. R. 626, 14 O. L. R. 194.

Statute of Frauds: Mercier v. Campbell, 9 O. W. R. 101, 14 O. L. R. 639.

Stay of Proceedings: Embree v. McCurdy, 9 O. W. R. 961, 14 O. L. R. 284.

Street Railways: Wallingford v. Ottawa Electric R. W. Co., 9 O. W. R. 495, 14 O. L. R. 383.

Timber: Faulkner v. Greer, 9 O. W. R. 241, 773, 14 O. L. R. 360.

Trade Union: Metallic Roofing Co. of Canada v. Jose, 9 O. W. R. 786, 14 O. L. R. 156.

Vendor and Purchaser: Crabbe v. Little, Moses v. Little, 9 O. W. R. 551, 14 O. L. R. 631.

Vendor and Purchaser: Mercier v. Campbell, 9 O. W. R. 101, 14 O. L. R. 639.

Vendor and Purchaser: Re Taylor and Martyn, 9 O. W. R. 666, 14 O. L. R. 132.

Venue: Rex v. O'Gorman, 9 O. W. R. 928, 14 O. L. R. 102.

Voters' Lists: Re Port Arthur and Rainy River Provincial Election, Preston v. Kennedy, 9 O. W. R. 347, 14 O. L. R. 345.

Waiver: Faulkner v. Greer, 9 O. W. R. 241, 773, 14 O. L. R. 360.

Waste: Morris v. Cairncross, 9 O. W. R. 918, 14 O. L. R. 544.

Way: Re Hamilton Terminal R. W. Co. and Whipple, 9 O. W. R. 463, 14 O. L. R. 117.

Will: Re Janson, 9 O. W. R. 278, 14 O. L. R. 82.

Will: Re Livingston, 9 O. W. R. 333, 14 O. L. R. 161.

Will: Re Moir, 9 O. W. R. 858, 14 O. L. R. 541.

Will: Re Quay, 9 O. W. R. 823, 14 O. L. R. 471.

Will: Re Miles, 9 O. W. R. 555, 14 O. L. R. 241.

Will: Re Stainsby, 9 O. W. R. 839, 14 O. L. R. 468.

Will: Re Archer, 9 O. W. R. 652, 14 O. L. R. 374.