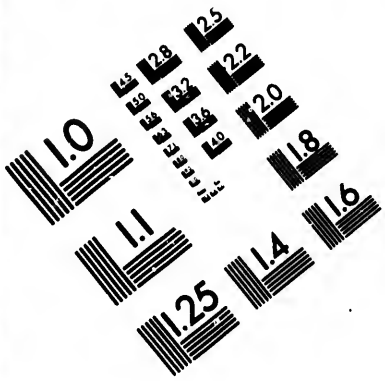

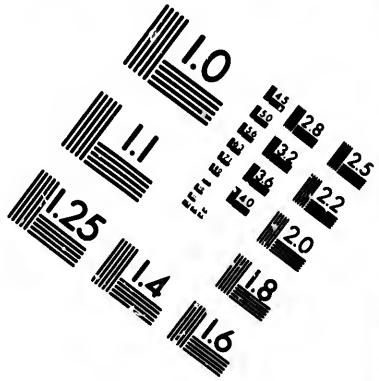

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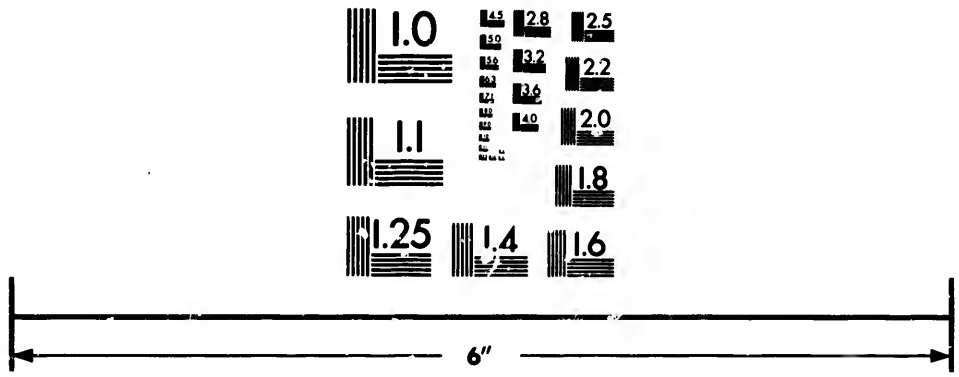

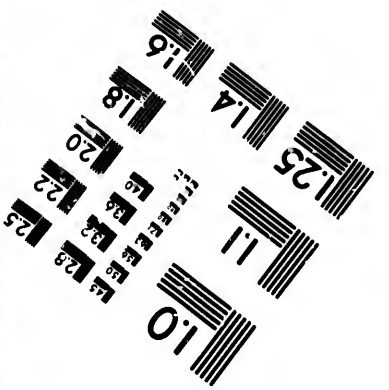

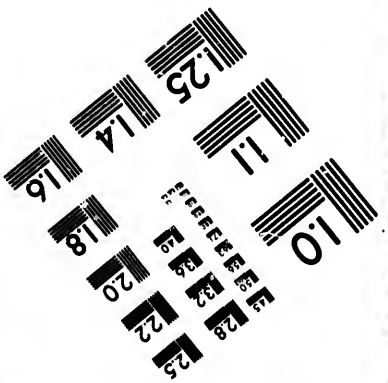

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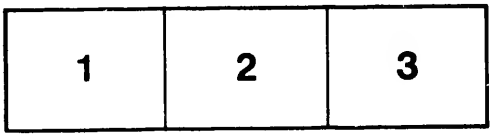

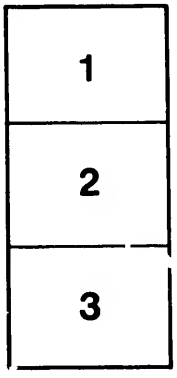

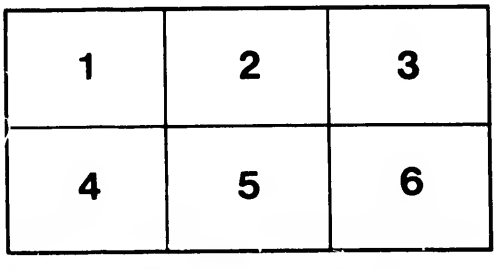

CONSOLIDATED DIGEST

OF THE

DECISIONS OF THE COURTS

OF THE

PROVINCE OF QUEBEC.

FROM THE COMMENCEMENT DOWN TO AND INCLUDING VOL. 3 OF THE OFFICIAL REPORTS (Q. B. 1894), AND VOL. 6 OF THE OFFICIAL REPORTS (S. C. 1894).

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QUEBEC
CONSOLIDATED DIGEST.

A.

ABANDONMENT OF PROPERTY.

See Insolvency.

Arts. 763a, 764, 768, 773, of the Code of Civil Procedure, relating to abandonment of property, are amended by ch. 47, 55-56 Vic. (1892), and Art. 772 had a new section thereby added.

ABDUCTION.

See Criminal Law.

ABSENCE.

I. Absence as a Presumption of Death.

II. "Absentee." 1-2.

III. Absentee Companies—See Service.

IV. Accounting.

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I. ABSENCE AS A PRESUMPTION OF DEATH.

The absence of plaintiff's husband for 20 years, coupled with information that he had been drowned, was sufficient to establish his death. *McKercher* vs. *Mercier*, S. C., 1888, M. L. R., 4 S. C. 334.

II. "ABSENTEE."

1. Meaning of Word.—The term "absentee," used in Art. 615 of the Code of Civil Procedure, is not used in the restrictive sense of Art. 86 of the Civil Code, but applies to all persons who are not in the province and who have no domicile therein, either fictitious or real. *Banque de Quebec* vs. *Bryant, Powis & Bryant*, C. R., 1892, 1 Que. 53.

2. —— —— The absence mentioned in Art 180 C. C. is not identical in meaning with that of Art. 86 C. C., and does not necessarily include, the conditions therein mentioned. *Turcotte* vs. *Nolet*, C. R., 1893, 4 Que. 438.

III. ABSENTEE COMPANIES.

See Service.

IV. ACCOUNTING.

Art. 90 C. C.—Curator.—Any creditor of an absentee can sue the curator to such absentee in an action to account, such curator being the mandatary of all the creditors. In such an action it is not necessary to call in the absentee by notice in the newspapers, the service of the curator being sufficient. (1) *Murphy* vs. *Knapp*, S. C., 1853, 4 L. C. R. 94, 4 R. J. R. Q. 97.

(1) "A distinction is to be observed between this case and that of *Whitney* vs. *Brewster (infra* No. X.), which was a direct action against the curator of an absentee, to pay the amount of the debt. On the principle enunciated in the present case, that the curator is the mandatary of all the creditors, an action lies against him for an account as against any other agent, but no action lies directly against the curator for the payment of the debt, because, as was held in the case cited, the statute (12 Vic. ch. 38) has appointed a special mode of proceeding against the absentee himself." (Note by Editor of Report at p. 96, Vol. 4, L. C. R.)

V. ACTIONS AGAINST ABSENTEE.

1 Jurisdiction.— (Art. 68 C. P. C., 29 C. C.) When the jurisdiction of the Court over absentees depends upon the possession by an absentee of property in the district in which he was summoned, such possession must be alleged in the declaration, and proved. (1) *Savey* vs. *Lizotte*, C. R., 1889, 15 Q. L. R. 320.

2. —— —— (Art. 68 C. P. C.) An absentee cannot be legally summoned by advertisement on the ground that he has property in this district, when the evidence shows that such property consists merely of a *bon*, not produced nor proved to be in the possession of the defendant. (1) *Poirier & Larcau*, 21 L. C. J. 48, Q. B., 1876.

3. —— —— Absent defendants who have had no domicile in Lower Canada must possess real or personal property within the district where the suit is instituted, to give jurisdiction to the Court; and property of the defendants within the district of Quebec held by a resident within the district of Montreal is not property of the defendants within the district of Montreal. (1) *Frothingham* vs. *Brockville & Ottawa Ry. Co*, S. C., 1859, 3 L. C. J. 252.

4. —— —— (Arts. 68-69 C. P. C., 29 C. C.) An action against an absentee residing in the United States, and who has not been personally served, will be dismissed on declinatory exception, if the plaintiff fails to prove that the defendant has property within the jurisdiction of the Court. (1) *Redfield* vs. *Hardie*, S. C., 1884, 13 R. L. 42.

5. —— —— (Art. 68 C. P. C.) Defendant being sued in Montreal declined the jurisdiction, on the ground that the right of action did not originate there, that he had not been personally served there, and that he was not domiciled there but in New York. The Superior Court maintained the exception, but in Review the judgment was reversed, on the ground that the defendant had property and money within the jurisdiction. (1) *MacDonald* vs. *Mackay*, C. R., 1879, 2 L. N. 301, and Q. B., 1880.

6. —— —— (Art. 69 C. P. C.) Action for recovery of debt incurred in Ontario. Both plaintiff and defendant were domiciled in that province. Plaintiff took action in Province of Quebec, alleging that defendant had property therein, and had defendant personally served in Ontario. Defendant pleaded declinatory exception and issue joined on said exception which was dismissed with costs. (1) *Cuddie* vs. *Cassidy*, S. C., 1879, 2 L. N. 346. See also in same sense, case of *Guimont* vs. *Proulx*, decided 31st Dec., 1878, S. C. No. 263.

7. —— —— (Art. 69 C. P. C.) The Courts in the Province of Quebec have no jurisdiction in matters purely personal, over persons residing in the Province of Ontario, when they have no property in the Province of Quebec, when the cause of action did not arise therein, and they have not been personally served within the territorial jurisdiction of such Courts. (1) *Guest* vs. *Carle*, C. Ct. 1887, 10 L. N. 156.

8. —— —— **Choice of.**—(Arts. 68, 69 C. P. C.)—**Debt.**—Where an absentee has contracted a debt abroad, his creditor can either sue him before the Court of the district or circuit where he had his domicile, or before that of the district or circuit where his property is situated. *Paradis* vs. *Cuesteau*, S. C., 1883, 9 Q. L. R. 117.

9. Summons.—(68 C. P.) The only mode of impleading an absentee is by calling him in by an advertisement, under the provisions of the 91th section of the Jurisdiction Act. 12 Vic., Cap. 38. *Whitney* vs. *Brewster*, S. C., 1852, 3 L. C. R. 431, 4 R. J. R. Q. 29.

10. —— —— **Transfer.**—(1571 *(a)* C. C.) The signification of a transfer upon an absentee debtor, by leaving a copy thereof with his agent, is insufficient, the law prescribing another mode by art. 5814 R. S. Q. (1571 *(a)* C. C.) *Dessert* vs. *Robidoux*, C. R., 1890, 16 Q. L. R. 118.

11. —— —— **Bailiff's Return—Summons by Newspaper.**—(68 C. P. C.) A bailiff's return on a writ of summons, stating "that he has taken the necessary steps to find the defendant in order to serve the writ upon him, and that he was informed that the defendant had left the Province of Quebec, and that he no longer had his domicile within the limits of the town of Sorel where he can serve him," is not sufficient (the writ stating that the defendant was heretofore of the town of Sorel, and is now absent from the Province of Quebec, but owns real estate in the town of Sorel) to authorize a summons by newspaper, and in such case the action will be dismissed on exception to the form. *Corporation de Sorel* vs. *Newton*, C. Ct., 1871, 3 R. L. 394.

(1) It is no longer necessary, under Arts. 68 or 69 C. C. P. as amended, that an absentee should have property in this province to give the courts jurisdiction over him. (*Racette* vs. *Bate*, S. C., 1893, 4 Que. 391.)

12. —— —— (69 C. C. P.) Leave to serve a writ of summons in Ontario, under art. 69 C. C. P., is sufficient, if annexed to the writ in a separate sheet, without being endorsed in writing upon the writ. *Kilburn* vs. *Ward*, C. R., 1880, M. L. R., 3 S. C. 176.

13 —— —— **Bailiff's Return.**—A return of service setting forth the absence of the defendant is irregular when the bailiff certifies that he made the service at the office of the Prothonotary; it should have read that he had deposited a copy of the action in the office of the Prothonotary. But this irregularity is sufficiently covered by the order of the Court permitting the regular summons of defendant by newspaper. *Carbonneau* vs. *Vallée*, S. C., 1892, 2 Que. 274.

14. —— ——(69 C. C. P.) Where service is authorized to be made in Ontario, a personal service in accordance with the law of that Province as proved in the cause is valid. *Pinsonnault* vs. *Commee*, S. C., 1888, M. L. R., 4 S. C. 252, 16 R. L. 636.

VI. ACTION BY HEIR OF ABSENTEE.

Attachment in Revendication.—An action in revendication cannot be maintained by the presumptive heir to the estate and succession of an absentee, if he be not curator to the estate of such absentee, or entitled to the possession thereof by virtue of an order for provisional possession, or the death of the absentee. *Gauvin* vs. *Caron*, K. B., 1819, 2 Rev. de Leg. 277.

VIII. CURATOR.

See also CURATORSHIP.

1. Appointment.—The measures provided by law for the protection of the property of absentees, and notably the appointment of a curator, are of a conservatory nature and essentially favorable to the absentee. Therefore the knowledge on the part of a relative who did not assist at the family council, that the absentee still exists, is not alone sufficient to dispense with conservatory measures. It is the duty of the Court to maintain these measures provisionally where it judges it best in the interest of the absentee. Further, the absentee always has it in his power to put an end to the effects of these measures by returning or by sending a power of attorney; but so long as he does not see fit to do so, they must be maintained. *Chaput* vs. *Chaput*, C. R., 1893, 3 Que. 135.

2. —— —— **Absent Son— Mother.**—The mother may be appointed curatrix to her absent son. *Ex parte Emelia Valiquette*, S. C. in Chambers, 1884, 7 L. N. 70.

3. —— —— (C. C. 684, C. P. C. 331.) Where a person, domiciled and residing abroad, dies there, leaving property in the Province of Quebec, and nobody comes forward to claim it, and he has no known heirs, his estate in regard to such property will be declared vacant, and upon demand of a creditor a curator will be appointed to such property. *Dechêne* vs. *Beaulieu*, S. C., 1894, 6 Que. 8, confirmed in Review 25 May, 1891.

4. Action by—Certificate of Death of Absentee.—In an action by such curator against a debtor, in this province, of the succession, the following certificate of burial is sufficient to establish the decease of the absentee, viz.:

"This certifies that I, William Kerr, *sexton* of the City of Calais, attended the interment of the remains of the late Edward C. Goodnow, and the following is a true copy of the *record* as kept by me, to wit:

"Mr. Edward C. Goodnow, interred in Calais Cemetery, Febr. 17, 1891, aged 39 years 3 months. Lot 9 Northwest, 20 feet from main avenue.

"WILLIAM KERR, *Sexton*."

5. *Quære:* Is the act of curatorship a presumption of death? (*ib.*)

6. —— ——**Petitory Action.**—A curator to an absentee cannot bring a petitory action, the result of which might be to cause the absentee to lose his rights in the immovable claimed by the action. He can only bring such actions as relate to the administration of the property. *Parent* vs. *St Jacques*, S. C., 1867, 2 R. L. 91.

7. —— —— **Liability of—Petitory Action.**—A curator to an absentee who brings a petitory action in his quality as curator, which action is dismissed because it is a real action and therefore beyond his powers, can be made personally liable for the costs of such action. *St. Jacques* vs. *Parent*, C. Ct., 1868, 2 R. L. 95; and see *Whitney* vs. *Brewster*, 4 L. C. J. 298, S. C., 1855.

X. DEBTS OF

An action does not lie against a curator to an absentee for a debt due by such absentee. (1) *Lepage* vs. *Monier*, C. R., 1886, 12 Q. L. R. 9; *Whitney* vs. *Brewster*, 3 L. C. R. 431, 4 R. J. R. Q. 29.

(1) See *Supra* No. IV.

XI. EFFECT OF.

1. Insolvency.—An absentee over whose property a guardian has been appointed, under Art. 780 C. C. P., is insolvent in the sense of the last paragraph of Art. 1998 C. C. *Duhaime* vs. *Pratte*, C. R., 1890, 16 Q. L. R. 258.

2. Succession.—(104 C. C.) A person who is an absentee at the time of the opening of a testamentary succession in favor of himself and other co-heirs, and who is still absent cannot share in the partition of the estate—neither can his presumptive heirs avail themselves of his share. *Lawlor* vs. *Lawlor*, S. C., 1892, 2 Que. 532.

XII. HYPOTHECATION OF PROPERTY OF ABSENTEES. (1)

XIII. PROVISIONAL POSSESSION OF ESTATE OF ABSENTEE.

1. As to Time of.—(94, 95 C. C.) The period at which the heirs of an absentee are entitled to an order for possession must be determined by the legal direction of the Court according to circumstances. *Exp. Bellet*, 2 Rev. de Lég. 277, K. B. 1817.

2. Married Woman—Absentee Husband.—A wife common as to property, whose husband has been absent for 10 years, cannot sue in her name for moveable property specially given to her during her husband's absence; such property falls into the community, and the wife cannot bring an action to recover it, even with a judicial authorization, until she has been put in provisional possession of the property of her absentee husband. *Dasylva* vs. *Lizotte*, C. Ct., 1881, 13 Q. L. R. 262.

3. —— —— But the wife of an absentee husband whose whereabouts is unknown, can be authorized by a judge to institute proceedings in regard to injuries against her, such as libels against her character, although strictly speaking the damages recovered in such cases are assets of the community. *Turcotte* vs. *Nolet*, C. R., 1893, 4 Que. 438, and see *Dasylva* vs. *Lizotte*, 13 Q. L. R. 262.

4. Petition—Security.—The petition for provisional possession must contain a statement setting forth not only the property of the succession in which the absentee has a share, but also the share of the property accruing to the absentee, so that the Court can determine the amount of security to be given by the petitioner for his administration. *Ex parte Degroshois*, S. C., 1872, 4 R. L. 389.

5. Security—Heirs.—Where several presumptive heirs have been put in possession, on condition that they furnish security, and some of them refuse to put up their share, those who do furnish the security will alone be put in possession. *Durocher* vs. *Lauzon*, S. C., 1880, 12 R. L. 403.

(1) The property of absentees, so long as it is only provisionally held, cannot be hypothecated otherwise than in virtue of judgments, or for the causes and subject to the formalities established by law. C. C. Art. 2039.

ACCESSION.

See OWNERSHIP.

ACCOUNTS, ACCOUNTING.

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III. ACCOUNTS, CONTESTATION OF—SPECIFICATION OF ITEMS.
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I. ACCOUNTS, ACTION ON.

1. Balance of Account.—Although there may be a doubt about the kind of action to be brought against a debtor, yet the plaintiff can recover on a balance of account admitted by the defendant to be due him. *Miller* vs. *Snell*, S. C. 1863, 7 L. C. J. 228.

2. Particulars.—A party bringing suit for recovery of the amount of an account stated and settled, will, notwithstanding his declaration that he relies altogether upon the acknowledgment, be obliged to furnish further particulars. *Labbé* vs. *McKenzie*, 10 L. C. R. 77, C. C. 1860.

3. Service of Copy—(Art. 99 C. C. P.) In an action on an account, it is not necessary to serve a copy of the account with the action, it being sufficient to produce such copy when the action is returned into court. *Moffatt* vs. *Ouimet*, C. C. 1875, 6 R. L. 744.

II. ACCOUNTS, ACQUIESCENCE IN.

1. By Payments.—Where a debtor has bills or accounts rendered to him, showing certain amounts as due by him to his creditors, and remits sums of money from time to time on account of the amount claimed, without questioning the correctness of such accounts, he thereby acquiesces in the same, and cannot afterwards dispute them. *Dudley* vs. *Darling*, Q. B. 1886, 30 L. C. J. 309, M. L. R., 2 Q. B. 458; *Williams Manufacturing Co.* vs. *Malo*, Q. B. 1888, 32 L. C. J. 66. See also *Mottz* vs. *Moreau*, P. C. 1859, 13 Moore P. C. 376, 10 L. C. R. 84, No. VI. 53, *infra*.

2. —— —— Question of acquiescence in accounts as sued upon, by payments and other acts of recognition at various periods. *Williams Mnfg. Co.* vs. *Malo*, Q. B. 1888, 32 L. C. J. 66.

III. ACCOUNTS, CONTESTATION OF —SPECIFICATION OF ITEMS.

When an agent or testamentary executor, in rendering an account, charges amounts for repairs of the property administered, the party contesting must specify in his contestation of account which items he admits and which he contests. *Mayer* vs. *Leveillé*, S. C. 1885, M. L. R., 1 S. C. 162.

IV. ACCOUNTS, RENDERING.

1. Costs of.—Charges of $75 for an inventory, and $75 for an account before a notary, of a succession where the amount is small, but the documents are long and detailed, are not excessive. *Mayer* vs. *Léveillé*, S. C. 1887, M. L. R., 3 S. C. 190.

2. Form.—Appeal was taken from a judgment of the Court, condemning the appellant to render an account to the respondent under an agreement to advance money for the building of a ship, to be reimbursed out of the proceeds of the sale of the ship, together with expenses and charges, etc. *Held*, that such an account need not be in the form of an account of tutorship, but may be made in the usual commercial form. *Symes* vs. *Lampson*, 5 L. C. R. 17, Q. B. 1854, 4 R. J. R. Q. 270.

3. —— —— (Art. 523 C. C. P.) An account rendered and fyled under a judgment of the Court will be rejected as irregular, if it does not exhibit the three heads of receipts, disbursements, and what remains to be recovered. *Curé, etc., de Beauharnois* vs. *Robillard*, S. C. 1877, 21 L. C. J. 122.

4. —— —— **Written in Lead Pencil.**—An account, written in lead pencil, on a number of unauthenticated sheets, will on motion be struck from the record as informal and insufficient. *Archer* vs. *Pacaud*, S. C. 1886, 12 Q. L. R. 108.

5. —— —— *Held*, that a person ordered to render account of his administration can do so either by private writing or by notarial instrument, and charge accordingly for the same in his account. *Mayer* vs. *Léveillé*, S. C. 1887, M. L. R., 3 S. C. 190.

6. Formalities—Tutor.—Where a tutor was condemned to give up possession of a certain immoveable property, and to render an account of the rents and revenues thereof. *Held*, that such account should be rendered under oath, and the person who renders it should take therein the same quality that he or she has in the action. *Pilon* vs. *Brunette dit l'Etang*, C. R. 1880, 11 R. L. 149.

7. Sale, when Equivalent to Rendering of Account —A sale by a minor, emancipated by marriage to her father and ex-tutor (without any account being rendered, but after the making of an inventory of the community existing between her father and mother), of her share in her mother's succession,—said sale containing a valuation of what was coming to her from her tutor—should be considered as equivalent to an account accepted and discharge granted. *Grégoire* vs. *Grégoire*, Q. B. 1886, M. L. R., 2 Q. B. 228; confirmed in Supreme Ct., 13 Can. S. C. R. 319; see also *St. Aubin* vs. *St. Aubin*, Q. B. 1878, 1 L. N. 116.

8. Shares—Transfer of.—In an action to render an account, in which defendant is condemned to pay plaintiff one-third of such balance as may be in his hands, and wherein the defendant renders an account, acknowledging to have a certain balance on hand in cash and a number of shares in a mining and smelting company, he cannot be condemned, *quoad* such shares, to do more than transfer the third thereof to plaintiff, and, in default of so doing, to pay an amount equivalent to their par value. *Foley* vs. *Stuart*, Q. B. 1875, 20 L. C. J. 183.

9. To Party Entitled.—(Art. 522 C. C. P.) The account must be rendered nominately to the party entitled to it. *Voght* vs. *Richter*, S. C. 1889, 17 R. L. 610.

10. Vouchers in hands of Plaintiff.—Action to account between quondam partners. Plea, that it was for plaintiff to render an account, as he had in his possession the books and papers of the partnership. Plea overruled, and defendant condemned to render an account. *Powell* vs. *Jones*, S. C. 1879, 2 L. N. 325.

11. —— —— In an action to account, in which an account had already been rendered but not accepted, and plaintiff had all the papers and vouchers in his possession, defendant was ordered to account in three weeks from the time plaintiff should produce the papers. *Tremblay* vs. *Jodoin*, S. C. 1881, 4 L. N. 359.

12. Vouchers in Possession of Third Parties.—An account unsustained by vouchers will not be rejected on motion, when it is established by affidavit that the vouchers are in the possession of third parties. *Chevalier* vs. *Cuvillier*, S. C. 1877, 21 L. C. J. 308.

13. Vouchers — Tutor—Oath. — (Art. 522 C. C. P.) In an action to account against a tutor, the oath of the defendant as to petty expenses is a sufficient voucher. *Racine* vs. *Racine*, K. B. 1810, 1 Rev. de Lég. 351, 2 R. J. R. Q. 51.

V. ACCOUNTS, SETTLEMENT OF.

1. Evidence.—In an action on account, the defendant tendered $60, and the plaintiff in reply produced a settlement between the parties, by which the amount sued for was shewn to be what the parties had agreed upon as the proper balance due by defendant—*Held*, on the evidence, that the settlement would be maintained. *Duhaime* vs. *Agotte*, 3 L. N. 273, Q. B. 1880.

2. Date of Receipt.—Where to an action for a balance of account the defendant pleaded that the account was settled by being receipted across the face of it, to which the plaintiff answered that there was no date to such receipt, but the party who signed it was brought up and swore as to the date—*Held*, sufficient, and plaintiff's action dismissed. *Wishaw* vs. *Gilmour*, 1 L. C. L. J. 69, S.C. 1865.

VI. ACTION TO ACCOUNT.

1. Account not Contested—Res judicata.—(Art. 530 C. C. P.) An interlocutory judgment, adopting without opposition the account of a succession prepared by its order, passes *in rem judicatam*, and it is not competent for the representatives of a minor, who was legally a party to the suit, to revive the proceedings, and contest any particular items in the account. The Court, however, may rectify any error of calculation. *Pfenderleath* vs. *McGillivray*, K. B. 1831, Stuart's Rep. 470, 1 R. J. R. Q. 360. See also *Wilson* vs. *McClure*, 1 Rev. de Lég. 351, K. B. 1809.

2. —— —— (530 C. C. P.). When the account asked for by an action to account is filed in the case, and the plaintiff's neglect to contest it within fifteen days thereafter, the plaintiffs are held to have admitted the correctness of such account. *Hart* vs. *Hart*, Q. B. 1879, 24 L. C. J. 161, 3 L. N. 24.

3. Administration of Sec.-Treas. of School Commissioners.—An account of the administration of the secretary-treasurer of school commissioners must be rendered before action can be brought for balance due him. *Dorais* vs. *School Commissioners of Warwick*, Q. B. 1877, 9 R. L. 161.

4 Balance of Account—Costs.—(Art. 526 C. C. P.) Where the account rendered shows a balance in favor of the plaintiff, the party rendering it cannot prevent the party demanding it from exacting the provisional payment of the balance, and the defendant cannot retain it until the Court adjudge upon the costs of the action for the purpose of applying it to the payment of such costs. *Girard* vs. *Prevost*, S. C. 1889, 18 R. L. 34.

5. Churchwardens — Bishop. — The Roman Catholic bishop has no authority to compel the churchwardens of a parish to render an account of their gestion in office; but an action to account can be maintained for that purpose by the *Fabrique*. *Fabrique de St. Jean Port Joly* vs. *Chouinard*, K. B. 1820, 1 Rev. de Lég. 352, 2 Rev. de Lég. 276, 2 R. J. R. Q. 241.

6. Compulsion.—(Arts. 9 & 521 C. C. P., 2273 C. C.) In an action to account—*Held*, that the defendant may be compelled to render an account either by pecuniary condemnation or by coercive imprisonment. *Hayes* vs. *David*, 3 Rev. de Lég. 215, 2 R. J. R. Q. 287; *Corp. County of Chambly* vs. *Lonpret*, S. C. 1859, 4 L. C. J. 125, Q. B. 1848.

7. Corporation—Stockholders.—(1890 C. C.) A stockholder in a joint-stock company may bring an action to account against the corporation, and thereby contest the validity of a by-law made by its board of directors. *Keys* vs. *The Quebec Fire Assurance Co.*, K. B. 1830, Stuart's Rep. 425, 1 R. J. R. Q. 339.

8 Donor and Donee—Rectification of Account.—The appellants, by deed of donation, gave to the respondent their mother, five pieces of property, subject to the charge of paying hypothecs to the amount of $5,000, and to the appellants a life rent of $288. This continued till the 2nd of February, 1881, when, by another deed, the donation was annulled. Respondent rendered an account of the administration of appellants' property, which they accepted, *reserving to themselves the right to verify the receipts then produced by the respondent, and to claim from the latter the amount of all errors or omissions in their favor.*

The appellants brought an action of debt and to rectify the account. *Held*, by the Superior Court, that the respondent was not the mandatary of the appellants when she rendered the account, and owed them no account, and that therefore an action for rectification did not lie against her. This was confirmed by the Queen's Bench. *Darveau* vs. *Darveau*, Q. B., Que., 8th May, 1884 (not reported).

9. Demand for New Account.—Where an account has been rendered and accepted, the tutor cannot be called upon to render another account without a demand to have the first account set aside. *Desgroseilliers* vs. *Riendeau*, Q. B. 1873, Ramsay's Digest 6, 24 L. C. J. 170.

10. —— —— An action to account will be dismissed on demurrer, if it appears by the allegations of the declaration that the defendant has accounted, and that there has been a settlement, if there be no conclusions to set the settlement aside. *Chevalier* vs *Cuvillier*, Q. B. 1879, Ramsay's Dig. p. 6, 2 L. N. 239.

11. —— —— Where an administrator has rendered an account to his ward, and paid over the balance apparently due to her, which account and balance have been accepted by her, she cannot sue for a new account without conclusions to set aside the former account. *Pierce* vs. *Butters*, Q. B. 1879, Ram. Dig. 6, 3 L. N. 28, 24 L. C. J. 167.

12. —— —— When a tutor, whose tutorship has been annulled, has rendered an account of his administration to the new tutors who succeeded him, and who received from him the vouchers and the balance of account, as stated by him, he is not bound to render another account judicially; and the new tutors who did not accept the account rendered to them, with the necessary legal formalities, can only debate and reform the account presented, and cannot bring an action to account. *Méthot* vs. *Dufort*, Q. B. 1883, 3 Dorion, Q. B. 262.

13. Discharge—Effect of.—An action to account will not lie against a secretary-treasurer who has rendered an account and received a discharge. If there be error in such account, the remedy is an action to rectify the account. *School Commissioners of Chambly* vs. *Hickey*, S. C. 1857, 1 L. C. J. 189.

14.—— —— Where a principal, during a long course of years, has accepted without any objection the accounts rendered by his agent of his administration, he is not entitled to sue for

a complete account of the entire period of administration. Where errors in the accounts rendered are discovered subsequently, the proper proceeding is an action to rectify the account, asking that such errors be corrected, and that the balance due be paid. *Stephens & Gillespie*, M. L. R., 3 Q. B. 167, and Supreme Court, 1885, 14 S. C. R. 709.

15. —— —— The principal, who has amicably accepted from his agent a verbal statement of his administration with vouchers, can not subsequently exact from him a regular account; but if he discovers an error, must proceed by way of action to rectify the account. *Carreau* vs. *Bonneau*, S. C. 1893, 3 Que. 282; and see *Dorion* vs. *Dorion*, 20 Can. S. C. R., at p. 437, Taschereau, J.

16. —— —— Where an agent has rendered accounts of his gestion and administration to his principal, and such accounts have been duly received by the principal, without any objection being made thereto, an action to account will not lie. *Cumming* vs. *Taylor*, S. C. 1856, 4 L. C. J. 306.

17. —— —— Where a discharge has previously been given, an action to account cannot be brought without an allegation of fraud or error. *School Commissioners* vs. *Bastien*, S. C. 1859, 4 L. C. J. 123.

18. —— —— Where the account rendered by a tutor, or one acting as a tutor, was irregular, and rendered without vouchers, he may be compelled to account anew, by an action seeking to set aside the former account as irregular and fraudulent, although there may be a notarial discharge. *Miller* vs. *Coleman*, Q. B., June, 1875, Ram. Dig. 8.

19. —— —— The plaintiff in his action alleged that he represented S. D., one of the substitutes, in virtue of a deed of release and subrogation, by which it appeared he had paid to S. D.'s attorney, for and on behalf of the defendant, a sum of £417 7s. 6½d., the defendant having in an action to account settled by notarial deed of settlement with the said S. D., for the sum of $4,000, which he agreed to pay, and for which amount the plaintiff became surety. *Held*, that as the notarial deed of settlement gave the defendant a full and complete discharge of all liability to account as curator or administrator of the estate, the plaintiff could not claim a further account of these particular sums. *Dorion* vs. *Dorion*, Supreme Court 1891, 20 Can. S. C. R. 430.

20. —— —— The plaintiff also claimed that he represented F. D. and E. D., two other institutes under the will, in virtue of two assignments made to him by them on the 21st Jan., 1869, and 15th Nov., 1869, respectively. In 1865, after the defendant had been sued in an action to account, the said F. D. and E. D. by a deed of settlement, agreed to accept as their share in the estate the sum of $4,000 each, and gave the defendant a complete and full discharge of all further liability to account.

Held, affirming the judgment of the Court below (18 R. L. 645, Q. B.), that the defendant could not be sued for a new account, but could only be sued for the specific performance of the obligation he had contracted under the deed of settlement. (*ib.*)

21. Executors—Parties to the Suit.—All joint executors who have acted must, in an action to account against them, be made parties to the suit. *Dame* vs. *Gray*, K. B. 1812, 1 Rev. de Lég. 352, 2 R. J. R. Q. 48; *McPhee* vs. *Woodbridge*, Q. B. 1865, 11 L. C. J. 100, 1 L. C. L. J. 86.

22. Heir at Law—Executor.—(Arts. 919-920 C. C.) The heir at law can maintain an action to account against the executor of the will of a testator. *McLean* vs. *McCord*, 2 R. J. R. Q. 52, 1 Rev. de Lég. 352, K. B. 1820.

23. Indivisibility of Account.—An action to account is by its nature indivisible. P. A. A. D. (respondent), as representing the institutes and substitutes under the will of the late J. D., brought an action against J. B. T. D. (appellant), who was one of the institutes, and had acted as administrator and curator of the estate for a certain time, for an account of three particular sums, which the plaintiff alleged the defendant had received while he was curator.

Held, reversing the judgment of the Court below (18 R. L. 645), that an action did not lie against the appellant for these particular sums apart from and distinct from an action for an account of his administration of the rest of the estate. *Dorion* vs. *Dorion*, Supreme Ct. 1891, 20 Can. S. C. R. 430.

24. —— —— An account must be accepted or rejected in its entirety. *Paré* vs. *Paré*, Q. B. 1893, 2 Que. 489. (Reversed in Supreme Ct., 23 S. C. R. 243, on other grounds); and see *Bilodeau* vs. *Renaud*, C. R. 1887, 13 Q. L. R. 181; confirmed in Appeal 4th Feb., 1888.

25. Judgment to Account—Execution.—A judgment to account within thirty days does not become executory *de plano* by the lapse of thirty days. *Curé de Beauharnois*

vs. *Robillard*, Q. B. 1879, Ram. Dig. 11, 2 L. N. 236.

26. Lessor and Lessee.—Where the rent was to be determined by the value of the articles manufactured in the premises leased—*Held*, that the lessor could not maintain an action to account. *Young* vs. *Meiklejohn*, 2 R. J. R. Q. 54, 1 Rev. de Lég. 351, K. B. 1809.

27. —— —— Where a farm is leased, and the rent is to be half of the annual proceeds and is to be paid and delivered to the landlord, an action to account can be maintained against the tenant. *Bainbridge* vs. *Demers*, 2 R. J. R. Q. 54, 1 Rev. de Lég. 352, K. B. 1819.

28. Partners—Breach of Contract.—An action to account cannot be maintained by a person claiming a right to share in a partnership, in virtue of an agreement whereby he is to receive a certain portion of the profits in lieu of salary, when he has virtually broken the contract by withdrawing himself from the partnership before the expiration of the time stipulated in the agreement, and before the business of the same has been closed. *Miller* vs. *Smith*, Q. B. 1860, 10 L. C. R. 304.

29. —— —— **Books.**—Where the books of a partnership are kept in such a condition that it is impossible to render an account thereof, and plaintiff kept the books: on action by plaintiff against his partner to account, after dissolution of the partnership, the Court ordered the debts due to the firm to be divided equally between the two partners, each paying his own costs. *Powell* vs. *Robb*, Q. B. Montreal, 16th June, 1876. (DeBellefeuille C. C., Art. 1898, No. 10.)

30. —— —— Where one partner sues another in an action to account, he is not bound to allege that he has himself rendered an account; or that he is not obliged to render an account; it is sufficient to allege that the defendant has in his possession property or sums of money belonging to the partnership existing between them, an account of which has not been rendered. *Roy* vs. *Gauthier*, Q. B. 1880; 1 *Dorion*, Q. B., Rep. 96; *Gauthier* vs *Roy*, *ib.*, p. 149.

31. Procedure—Contestation of Accounts—Where in an action to account, the defendant admits his obligation to render an account, and produces an account with his plea, and the plaintiff, in spite of the irregularity of the account, declares he will not contest its form; but proceeding in answer to the plea, debates the account and contests certain items therein; and where defendant does not reply to such contestation, but proceeds to proof, the Court can pronounce upon the merits of the action at the same time as on the contestation of the account. *Armour* vs. *McIver*, C. R. 1891, 21 R. L. 353.

32. —— —— Although in an action to account the proper and legal method of procedure requires that, upon the production of the account by the party rendering it, the plaintiff demanding the account must, if he refuses the account rendered, produce a contestation of account; yet where the plaintiff, instead of filing such contestation answers the plea, denies its allegations, and concludes for its dismissal, and the parties thereupon consent to go to proof, the Court will proceed to render judgment and establish an account between the parties, as though they had proceeded regularly. *Thomas* vs. *Cowie*, S. C. 1889, M. L. R., 6 S. C. 175.

33. —— —— Where a defendant sued in an action to account for the administration of real estate, and for a sum claimed on the sale of the said property under a special agreement, pleads to the first part of the action that he has never been put in default to render an account, but has always been ready to do so, and produces an account with his plea; and pleads to the second part of the action, that he owes nothing under the agreement alleged, the account produced will not be rejected on motion as irregularly and prematurely filed; such account will not be rejected on motion before *enquête*, because the chapter of expenses contains items which do not appear to have any connection with the administration of the property, this being only a question to be determined on a contestation of account. *Dorion* vs. *Dorion*, Q. B. 1884, M. L. R., 1 Q. B. 65.

34. —— —— In an action to account, if the parties do not first proceed to judgment on the question of the liability of the defendant to render an account, but go on to contest it, the Court will adjudicate on the pretensions of the parties as submitted. *Darocher* vs. *Lauzon*, S. C. 1883, 12 R. L. 403.

35. —— —— The defendant, being sued in an action to account, pleaded that he had already rendered an account to the plaintiff, and produced one again with the plea. The plaintiff, instead of asking for judgment as to the obligation of the defendant to render an ac-

count, proceeded to contest the account filed. Judgment proceeded on the merits of the action at the same time as on the contestation of the account, and was confirmed in appeal. *Davis* vs. *Cushing*, Q. B. 1864, 12 R. L. 522, confirming S. C., 13 L. C. R. 217.

36. —— ——**Contra.**—In an action to account where the defendant pleads that he has previously accounted, and files with his pleas copies of his accounts alleged to have been previously rendered, and the issues are so joined, the plaintiff cannot file a contestation of account until the said issues shall have been previously decided, and the contestation filed by the plaintiff may be rejected by motion on the part of the defendant to that effect. *Cumming* vs. *Taylor*, S. C. 1854, 4 L. C. J. 301.

37. —— ——*Held*, that when the defendant pretends that he is not bound to render an account, but files one with his plea, the Court should decide first as to the obligation of the defendant to render an account, and order that an account be filed as demanded by the action, and a judgment which decided at the same time the obligation to render an account and the merits of the account filed was reversed in review. *McAdam* vs. *Wilson*, S. C. 1882, 12 R. L. 523.

38. Pleading—Contradictory Averments in Plea—Effect of—Unsworn Account.—*Held*, reversing Q. B. (11 Q. L. R. 342), dismissing the plaintiff's action, and restoring the judgment of the Court of Review (13 Q. L. R 129), that although the parties had joined issue and heard witnesses to prove certain items of the unsworn account produced, the plaintiff was first entitled to a judgment of the Court, ordering the defendant to produce a sworn account supported by vouchers, and, therefore, his action has been properly dismissed. *L'Heureux* vs. *Lamarche*, Supreme Ct. 1886, 12 S. C. R. 460.

39. —— —— And where a tutor is sued by his ward, when of age, to render an account, and he pleads that he has always been willing to do so, but asks that the action be dismissed with costs, and at the same time prays *acte* of the production of an account filed with the plea, the plea will be dismissed, and the defendant be ordered to file his account purely and simply in due term. *Wood* vs. *Wilson*, C. R. 1882, 27 L. C. J 149.

40. Pleading.—In an action to account, the defendant must not file an account, but must plead to the action; and if he do not, the plaintiff on motion will obtain leave to proceed *ex parte*. *Charron* vs. *Lizotte*, K. B. 1818, 1 Rev. de Lég. 352, 2 R. J. R. Q. 54.

41. —— —— **Tender of Account before Action.**—A tutor, sued in an action to account, may plead that he has rendered an account before the bringing of the action, renew his account in Court, and conclude that his said account be declared good and valid, and the plaintiff condemned to costs. *Trudelle* vs. *Roy*, S. C. 1853, 4 L. C. R. 222, 4 R. J. R. Q. 168.

42. —— —— **Tender of Account before Action.**—*Held*, not competent for the defendant to plead that he had acknowledged himself bound to render an account, and that, further, he had rendered an account by which he acknowledged to owe a certain balance for which he confessed judgment. *Aubin* vs. *Lislois*, S. C. 1854, 4 L. C. R. 225, 4 R. J. R. Q. 170

43. Principal and Agent—Employer and Employee.—A clerk and manager of a sheriff, who received and paid, in that capacity, various sums of money, in the course of the business of the office, is not liable to an action or bill for account. *Ermatinger* vs *Gugy*, Privy Council 1844, 5 Moore P. C. 1.

44 Proceeds of Sale of Timber—Right to Apply to repay Advances.—Appellant sued respondent for an account of a raft sold for him by respondent, who answered that he had no account to render, as the raft belonged to one Bannerman, to whom he had accounted, and that he owed nothing. Appellant's pretension is that the receipt he gave respondent for an advance was in these words: "Please hold, subject to the order of Messrs. Ross & Co., *my* raft now lying at your cove, and oblige, Signed, John Doran." If this stood alone, it would be conclusive, but the whole transaction is proved. It is established that whatever was the nature of the transactions between Bannerman and Doran, Ross knew no one but Bannerman, and that the money was given to Ross on Bannerman's credit, and there can be no doubt Ross understood the raft was Bannerman's, and that Doran left him two years under that impression, during which time Ross settled with Bannerman, without any knowledge of Doran's claim to the raft. The word *my* raft, in the ordinary language of the people, does not necessarily imply property but possession. *Doran & Ross*, Ram. Dig. 10, Q. B. 1883, confirming

S. C. Both confirmed by Supreme Ct. 1884, Cassel's Dig., p. 829.

45. Remedy—Joint-Adventure for Purchase of Real Estate—There was a joint-adventure for the purchase of certain real estate in the name of the appellant. The partners were, on certain conditions, each to have a share. It appears they left the appellant to bear the amount of the acquisition, and he afterwards sold the property for his own profit. Respondent sued for his share of the price of the sale. The appellant tendered an account of his transaction. The action should have been to account, but the appellant having tendered an account covered the irregularity. *Brewster* vs. *Lamb*, Q. B., 22nd Dec., 1879, Ram. Dig. 8.

46. —— —— Joint Transaction.—The appellant brought suit against the respondent, alleging a purchase by them jointly of certain promissory notes and securities which the respondent collected for their common profit, the appellant's share acknowledged by the respondent being $713.75. The appellant added the common assumpsit counts, and prayed for an account in the usual form with vouchers, and that in default the respondent should be condemned to pay the said sum of $713.75. *Held*, on demurrer, that the demand for an account was not warranted by the allegations of the plaintiff's declaration, and was not the proper remedy for the cause of complaint therein stated. *Michaud* vs. *Vézina*, Q. B. 1880, 6 Q. L. R. 353.

47. —— —— Partners.—When between co-partners a balance has been struck, an action of assumpsit or of debt will lie for the amount, but if no balance has been struck, the action will be to account. *Robinson* vs. *Riffenstein*, K. B. 1821, 1 Rev. de Lég. 352, 2 R. J. R. Q. 156.

48. —— —— Principal and Agent.—A principal may sue his agent to account, or for moneys had, at his election. *Dubois* vs. *Roy*, 1 Rev. de Lég. 352, 2 R. J. R. Q. 55, K. B. 1818: *Joseph* vs. *Phillips*, 19 L. C. J. 162, Q. B. (1)

49. —— —— Monies had and received.—Where various sums have been received by a defendant, and the facts are such that the creditor may sue him to account, still, if he sees fit, he may bring his action for money had and received, for in his action the plaintiff takes the *onus probandi* on himself, and of this the defendant cannot complain. *Leclerc* vs. *Roy*, 1 Rev. de Lég. 351, K. B. 1817, 2 R. J. R. Q. 54.

50 Tutor.—A tutor cannot avoid rendering an account because he claims to have had in his hands only a very small sum of money which he has disbursed to the knowledge of the minor, since become of age, and performed other acts of administration since ratified by the minor. *Pelletier* vs. *Pelletier*, S. C. 1879, 10 R. L. 470.

51. —— —— (Art. 312 C. C. and 531 C. C. P.) A pupil become of age may refer to the decision of arbitrators any difference between him and his tutor concerning the account rendered by the latter, and this reference need not be absolute, but in the interests of the minor in order to protect his rights as against the tutor. *Laporte* vs. *Laporte*, S. C. 1871, 3 R. L. 37.

52. —— —— An account rendered by a tutor to a minor must be detailed and accompanied by vouchers, and an account rendered *en bloc* without vouchers is *ipso jure* null. *Ducondu* vs. *Bourgeois*, S. C. 1858, 2 L. C. J. 104.

53. —— —— A settlement between a tutor and his wards, based on an incorrect inventory made while the children were yet young, will not be set aside if the transaction has been confirmed by subsequent transactions between the parties at a period when the minors are of full age, have ceased to be under the control of their tutor, and have acknowledged that the inventory was incorrect. *Motz* vs. *Moreau*, P. C. 1860, 10 L. C. R. 84, 13 Moore P. C. 376; *Banque Jacques Cartier* vs. *Pinsonnault*, S. C. 1884, M. L. R., 1 S. C. 18.

54. Where Defendant fails to Render Account.—(Arts. 521, 533 C. P. C.) In an action to account, if the defendant does not render his account, the plaintiff cannot *de plano* obtain judgment for the sum he demands; he must prove what is due to him, or move for an attachment. *Wilson* vs. *McClure*, 1 Rev. de Lég. 351, 2 R. J. R. Q. 54, K. B. 1809.

55. —— —— (Arts. 523-533 C. C. P.) Upon default of the defendant to render an account within the delay fixed by the judgment ordering him to account, the plaintiff can proceed to have one made out as provided by Arts. 523-533 C. C. P., or he can, according to the practice in use before the Code, have the defendant condemned either to pay him a certain sum provisionally, or by way of

(1) But see *Dorion* vs. *Dorion*, Taschereau J., in Supreme Court 1892, 20 S. C. R. at p. 445; and *Hunt* vs. *Taplin*, 24 S. C. R. at p. 50.

penalty, until he renders the account, or a sum certain in place of the balance of account, in the discretion of the Court. *Gauthier* vs. *Roy*, Q. B. 1880, 1 Dorion Q. B., Rep. 149, 10 R. L. 443. To same effect *Bertrand* vs. *Sarrasin*, C. R. 1885, 29 L. C. J. 290.

56. When Premature.—An action to account is premature if taken before the enterprise of which it asks an account is terminated. *Berger* vs. *Métivier*, Q. B. 1881, 1 Dorion's Rep. 327.

57. Where Account à l'Amiable not Accepted.—The rendering of an account *à l'amiable* which has not been accepted does not relieve a party accounting from the obligation of rendering an account judicially, but the defendant will not be condemned to pay costs. (1) *Muldoon* vs. *Dunne*, S. C. 1884, 7 L. N. 239. Reversed in Review as to Costs.

ACQUIESCENCE.

I. By Failure to Object in due time.
II. Covers Irregularities of Procedure. 1-3.
III. Fraud.—and see No. VI *infra*.
Deed. 1.
Insurance Policy. 2.
Sale. 3.
IV. In Judgment.—See also Advocates and Attorneys.
Amended Order—New Declaration. 1.
Error. 2.
Exception to the Form—Pleading to the Merits. 3.
Execution. 4-5.
Jurisdiction. 6-7.
Payment. 8-12.
Proof in Appeal. 13-14.
V. Lessor and Lessee.
VI. Liquidators—Bank.
VII. Operates as a Release.
VIII. Plea of Tender and Payment—Effect of.
IX. What is. 1-2.—See also No. IV. 7.
See also Account, Agency, Waiver.

I. BY FAILURE TO OBJECT IN DUE TIME.

In an hypothecary action, based on a judgment, enregistered with notice to the registrar, and against a married woman, as being separated, as to property, from her husband, and against her husband assisting her, she, assisted by her husband, having declared, in the deed of acquisition of the immoveable then subject to that legal hypothec, that they were so separated as to property, the proof of the proper notice having been given to the registrar, consisting of the fact that, in his certificate, on the authentic copy of the judgment, the registrar states that the immoveable in question is charged with the hypothec resulting from the judgment; and no objection having been taken in either court, either as to the insufficiency of the proof of the notice having been so given, or of the proof of such separation as to property—*Held*, that, in accordance with a well settled jurisprudence in all courts of appeal, this Court will hold such objections to have been waived; and, that, as to the proof of such notice to the registrar having been given, article 738 C. C. P. is *primâ facie* evidence of that fact. *Pacaud* vs. *Brisson*, C. R. 1886, 9 L. N. 236.

II. COVERS IRREGULARITIES OF PROCEDURE.

1. A plaintiff joining issue with a defendant who raised a dilatory plea by peremptory exception, and proceeding to trial without complaining of such irregularity, is held to have acquiesced therein, and cannot raise an objection thereto at the hearing on the merits. *Leclerc* vs. *Martin*, C. R. 1890, 17 Q. L. R. 177; *Beauchamp* vs. *Letourneau*, Q. B. 1884, Ram. Dig. 13; *Letourneux* vs. *St. Jean*, C. R. 1886, M. L. R., 2 S. C. 362.

2. Where there were irregularities in the proceedings of arbitrators, and one of the parties to the submission took advantage of the award, knowing of these irregularities, he will be held to have acquiesced in the proceedings. *Lepine* vs. *Fiset*, Q. B. 1879, 10 R. L. 153, Ram. Dig. 11.

3. —— —— Although an appeal cannot be brought in the name of a dead person, if the representatives have come in and continued the suit without the objection, the irregularity will be covered. *Hagarty* vs. *Morris*, Q. B. 1874, 19 L. C. J. 103.

III. FRAUD.

1. Deed.—The ratification of a deed obtained by fraud, by the party deceived, after he was informed of the facts, prevents him

(1) As to question of costs, see *Wood's* vs. *Watson*, 27 L. C. J. 145.

from complaining of the fraud. *Banque Ville Marie* vs. *Montplaisir*, Q. B. 1889, 18 R. L. 153.

2. Insurance Policy.—An insurance company cannot, after agreeing with other companies upon the proportion to be paid by each on a claim, refuse to settle the claim of the insured, under pretext of fraud, false representations, etc.; such grounds could only be taken advantage of by demanding the cancellation of the policy. *Sovereign Fire Ins. Co. of Canada* vs. *Pruneau*, Q. B. 1885, 14 R. L. 362, and cases there cited.

3. Sale.—A court of justice will not give its aid to a person seeking to set aside his own solemn deed of sale if it appear that he has acquiesced in it for years, lying by, until, by labor and expenditure of capital, the subject-matter of the deed has greatly increased in value, and new interests have been created in it. *Lemoine* vs. *Lionais*, P. C. 1874, 6 R. L. 123, 2 L. C. L. J. 163.

IV. IN JUDGMENT.

1. Amended Order—New Declaration.—Motion to reject an appeal on the ground of acquiescence. The appellant was condemned by the Court below to pay a certain debt, he not having made his declaration as garnishee in time. In fact, he was domiciled in another district, and had there made a declaration that he owed nothing, within the proper delay. He then moved the Court in Arthabaska to revise this judgment, and to allow him to make his declaration anew. The Court granted the petition, but condemned him to all costs. Appellant moved for leave to appeal, but in the meantime so far conformed himself to the amended order as to make a new declaration—*Held*, that this was not an acquiescence. *Marquis* vs. *Van Courtlandt*, Q. B. 1878, 1 L. N. 278.

2. Error.—There is no acquiescence when the amount of a judgment tendered to a party has been accepted by him through error. *Jones* vs. *Warminton*, C. of R. 1869, 14 L. C. J. 61, 2 R. L. 188.

3. Exception to the Form—Pleading to Merits.—Pleading over to the merits of an action is such an acquiescence in a judgment dismissing an exception to the form that leave to appeal will be refused. *Coté* vs. *McGreevy*, Q. B. 1875, Ram. Dig. 13.

4. Execution.—Where a plaintiff, who had succeeded in part, inscribed in Review, and then took proceedings in execution of the judgment, it was held that such proceedings were an acquiescence in the judgment, and the inscription in Review was rejected on motion. (1) *Jones* vs. *Moodie*, M. L. R., 4 S. C. 110, C. R. 1888, 32 L. C. J. 117.

5. Execution.—The fact of entering into negotiations as to the execution of a judgment constitutes an acquiescence in the judgment. *Murphy* vs. *Williams*, S. C. 1892, 2 Que. 161.

6. Jurisdiction.—(Art 42 C. C. P.) A cause which should have been tried in one district was removed to another on account of the recusation of the judge. The defendant appeared, and pleaded, filing *inter alia* an inscription *en faux*, but finding no fault with the jurisdiction—*Held*, that the question of jurisdiction could not be raised afterwards in Review. *Dufour* vs. *Beaugrand*, 2 L. N. 180, S. C. 1879.

7. —— —— In order to constitute acquiescence or waiver, it must be shown that the party said or did something to give the Court a jurisdiction it did not possess. A mere respectful submission to the ruling of a Court or of a judge is not an acquiescence in the legal sense. *Beaudry* vs. *Mayor of Montreal*, Privy Council, 1858, 11 Moore P. C. 400, 8 L. C. R. 101.

8. Payment.—The fact of one of several appellants having paid part of the taxed costs appealed from did not raise a presumption of acquiescence on his part, although he had made no reservation or protest at the time of payment. *Woodman & Genier*, Q. B. 1866, 16 L. C. R. 452.

9. —— —— A party who pays the amount of judgment, without special protest, after his arrest and while in prison, will not be held by such payment to have acquiesced in such judgment, so as to take away his right of appeal, particularly where he had given instructions to institute appeal. *Ouimet* vs. *Lafond*, Q. B. 1871, Ram. Dig. 13.

10. —— —— The voluntary payment of part of the judgment appealed from is an acquiescence, and the fact may be established by affidavit. *Charbonneau* vs. *Davis*, Q. B. 1875, 20 L. C. J. 167.

11. —— —— **Motion to Quash Appeal—Effect of Acquiescence of one Defendant on his co Defendant.**—(Art. 1130 C. C. P.) A letter written by one of the defen-

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(1) Leave to appeal from this judgment was refused by the Court of Appeal, thereby affirming the decision of the Court of Review.

dants in an hypothecary action to the plaintiff's attorneys, after the rendering of the judgment, which condemned them as joint undivided owners of an immoveable to abandon it or pay the plaintiff's claim, and before the institution of the appeal, asking for delay until said defendant could get his warrantors to pay the claim, and promising to settle with the plaintiff if the warrantors did not, constituted an acquiescence in the judgment *a quo* on the part of said defendant, and his appeal would be dismissed on motion. *Dickson* vs. *Galt*, 1885, M. L. R., 1 Q. B. 373.

12. The other defendant was not bound by this acquiescence, as it did not appear that any partnership existed between him and his co-defendant (beyond the joint ownership of the immoveable in question), or that he had authorized the writing of the said letter. *(Ib.)*

13. Proof in Appeal.—Proof of acquiescence in judgment appealed from will be ordered in appeal. *Jordan* vs. *Jetté*, Q. B. 1875, Ram. Dig. 13.

14. —— —— Where a petition has been filed, praying the dismissal of an appeal on the ground of acquiescence, and affidavits are filed in support and against the application of a contradictory character, leave will be granted to cross-examine the deponents. *Hotte* vs. *Champagne*, Q. B. 1882, 25 L. C. J. 227, 2 Dorion's Q. B. Rep. 127, Ram. Dig. 14.

V. LESSOR AND LESSEE.

Where the lease prohibits subletting, the acceptance of rent by the lessor from the subtenant, and giving the latter receipts therefor, in his own name, constitutes an acquiescence on the part of the lessor in the sub-lease, but does not discharge the original lessee from his obligations under the lease. *Joseph* vs. *St. Germain*, S. C. 1894, 5 Que. 61.

VI. LIQUIDATORS—BANK.

Where a manager of a bank has made entries in the books of the bank, so as to represent the bank as a debtor, in respect of a sum which he had borrowed for his own purposes, the acquiescence and ratification by the silence of the subsequent liquidating authorities would not render the bank liable to pay a debt which it never owed, as the liquidators could not bind the bank by their acquiescence. The doctrine of the Court below overruled. ***Banque Jacques Cartier*** vs. ***Banque d'Epargne,*** P. C. 1887, 13 App. Cas. 111; 11 L. N. 66.

VII. OPERATES AS A RELEASE IN TRANSACTIONS BETWEEN TUTOR AND MINOR.

A settlement by a minor with his tutor, based on an inventory incorrectly made, accounts illegally rendered, although voidable, cannot be set aside if evidence shows that subsequent transactions had taken place between the minor and tutor, after the former was of age. *Motz* vs. *Moreau*, P. C. 1859, 13 Moore P. C. 376, 10 L. C. R. 84.

The fact that such assignments and dealings had not been impugned by the minor, when of age, until after the death of the tutor, speaks strongly against the claim of the minor for an account and inventory, and to set aside the assignments. *(Ib.)*

VIII. PLEA OF TENDER AND PAYMENT.

By their plea of tender and payment into Court, the defendants had acknowledged their liability to the plaintiffs, although such tender and deposit had been made "without acknowledging their liability." *Victor Hudon Cotton Co.* vs. *Canada Shipping Co.*, Supreme Ct. 1886, 13 S. C. R. 402.

IX. WHAT IS.

1. In its widest sense acquiescence is an adhesion of a person to a thing done. It seems, however, it is only usual to apply it to certain contracts which expressly recognize a state of things as binding. Technically, therefore, it is for the most part applied to an implied assent. The liability to be incurred by acquiescence can only be established by such proof as would establish an obligation for a like matter. An acquiescence which would have the effect of resiliating another contract, or creating a new obligation, can only be proved as a contract can be proved. But a right may sometimes be lost by acquiescence in a state of things incompatible with the continued existence of such right. Pleading over to the merits of an action is such an acquiescence in a judgment dismissing an *exception à la forme* that leave to appeal will be refused. *Coté* vs. *McGreevy*, Q. B. 1875, Ram. Dig. 12.

2. The payment by the borrower of three instalments of interest on the entire amount of the loan as expressed in the deed does not establish acquiescence on his part in the placing of the amount of the loan by the lender in the hands of a third person, so as to make

the borrower liable the default of such third person to apply the money as directed. *Knox* vs. *Boivin*, S. C. 1893, 4 Que. 311.

ACTION.

(*a*) *Actions generally.*
(*b*) *Cumulative and Incompatible.*
(*c*) *En Dénonciation de Nouvel Œuvre.*
(*d*) *Form of.*
(*e*) *Interest in.*
(*f*) *Joint.*
(*g*) *Nature of.*
(*h*) *Notice of.*
(*i*) *Privity of.*
(*j*) *Suspension of.*
(*k*) *Union of Causes.*
(*l*) *Where it may be brought.*

(*a*) ACTIONS GENERALLY.

I. Change of.
II. Civil Remedy not affected by Criminal.
III. Effect of Reservation in.
IV. Issue of.

I. ACTION.

Change of.—The parties cannot by consent change the nature of the action, so as to render the action one of an entirely different character from that originally instituted. *Richard* vs. *Denison*, Q. B. 1856, 4 L. C. J. 42.

II. CIVIL REMEDY NOT AFFECTED BY CRIMINAL.

Art. 504 of the Criminal Code enacts that after the commencement of the act putting the same into force, "no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence."

III. EFFECT OF RESERVATION IN.

Where the plaintiff reserved his subsequent recourse against the defendant in the event of its being adjudged in another cause then pending between the parties, that he, the plaintiff, was entitled to an additional sum, such reservation was held not to vitiate the action, especially as the effect of it was to avoid two contestations concerning the same object. *Tétu* vs. *Garneau*, Q. B. 1875, 1 Q. L. R. 355.

IV. ISSUE OF.

An action is considered issued so as to carry costs, by the mere issue of the summons without service thereof, and a tender of the plaintiff's demand, without costs, is insufficient, although made before actual service of the writ. *Boucher* vs. *Lemoine*, S. C. 1860, 4 L. C. J. 300.

(*b*) ACTIONS CUMULATIVE AND INCOMPATIBLE. Art. 15 C.P.C.

I. Action on Account—Rent.
II. Action to recover Penalty — Amount Defrauded.
III. Annulling several Elections by one Writ of Quo Warranto.
IV. Damages—Boundary.
V. Damages—Assault and Battery, etc., etc.
VI. Damages—Fine. 1-2.
VII. Damages—Freight.
VIII. Damages — Slander — Personal Wrongs.
IX. Damages—Réintegrande.
X. Déclaration de Paternité—Aliments.
XI. Demand for Continuance of Suit—Execution of Judgment.
XII. Demand in Declaration of Judgment—Usufructuary Legatee.
XIII. Delivery of Land—Payment of Penalty.
XIV. Directors of Company—Returns.
XV. Disqualification of Mayor—Action to void Election.
XVI. Fraud—Defendants—Conclusions.
XVII. Hypothecary Creditor—One Action—Several Defendants.
XVIII. Petitory and Possessory. 1-2.
XIX. Petitory Action—Demolition of Works.
XX. Penalties under Election Act.
XXI. Pleading—Dilatory Exception.
XXII. Private and Public Capacity of Justice of the Peace.
XXIII. Resiliation of Sale—Attach. in Revendication.
XXIV. Resiliation of Sale—Payment of Price—Option.
XXV. Sale—Action to have Encroachments removed—To fill up Excavation.
XXVI. Several Counts—Conclusions.

I. ACTION ON ACCOUNT—RENT. ART. 15 C. C. P.

The appellant sued the respondent on a lease, and joined with the action a count for goods sold. The defendant pleaded by dilatory exception that the action was founded upon incompatible grounds, and that the plaintiff should be held to make option between the different demands—*Held*, that Article 15 of the Code of Procedure had added nothing to the old law; it did not pretend to alter it in any way. It laid down the rule that several causes of action may be joined in the same suit, provided they are not incompatible or contradictory, that they seek condemnations of a like nature, that their joinder is not prohibited by some express provision, and that they are susceptible of the same mode of trial. The joinder in this case was not open to any form of objection. The demands were clearly susceptible of the same mode of trial, and there was no incompatibility. Judgment reversed. *Mullin & Gray Creek Dairy Co.*, Q.B., Montreal, Sept., 1876, Ram. Dig. 23.

II. ACTION TO RECOVER PENALTY AND AMOUNT FRAUDULENTLY OBTAINED.

In an action against a school commissioner, for having fraudulently procured a sum of money from the Government on a false certificate, plaintiff concluded that defendant be found guilty of the fraud, and condemned to refund the sum fraudulently procured, and to a fine of $40.

In the Circuit Court the action was dismissed because the issues were held to be incompatible (15 L. C. R. 205, C. Ct. 1865). But the Court of Queen's Bench reversed this decision, the majority of the Court apparently holding that although the defendant could not be condemned by this action to refund the amount fraudulently obtained, yet the failure of the plaintiff to choose one of the above conclusions will not prevent the Court from condemning the defendant to pay the fine of $40.00. That in such an action there is no cumulation prohibited by law. (1) *Pacaud* vs. *Roy*, Q. B. 1866, 12 L. C. J. 65.

(1) Taschereau J., diss., held that the grounds of action were incompatible, and that upon default of plaintiff to choose one of the grounds on which to proceed, the Court could not do so for him. (p. 66.)

Aylwin J., while agreeing with the majority of the Court that the grounds of action were not incompatible, went further in holding that the Court should have condemned defendant to refund the amount fraudulently obtained. (p. 72.)

III. ANNULLING SEVERAL ELECTIONS BY ONE WRIT OF QUO WARRANTO.

The annulling of the election of several municipal councillors cannot be demanded by one writ of quo warranto.

In such a cumulation of actions, the plaintiff will be ordered to declare against which one of the defendants he intends to proceed against, and his action as to the other defendants will be dismissed. *Bourbonnais* vs. *Filiatrault*, S. C. 1892, 2 Que. 517.

IV. DAMAGES, ETC.—BOUNDARY.

A demand for damages or compensation for fruits, issues and profits cannot be included in an action of boundary. *Lavell* vs. *McAndrew*, S. C. 1887, 11 L. N. 362.

V. DAMAGES—ASSAULT AND BATTERY—DEFAMATORY LANGUAGE—THROWING STONES WITH INTENT TO INJURE.

The plaintiff brought action for damages, setting up, by way of declaration, assault and battery, defamatory language, and throwing stones with intent to injure; and the defendant pleaded by way of demurrer, that the declaration contained several causes of action which could not be joined in the same suit, and asked that the plaintiff be held to choose between the said causes of action—*Held*, that the different causes of action referred to were not contradictory or even incompatible, and were properly laid in the declaration. *Tremblay* vs. *Legault*, S. C. 1873, 5 R. L. 519.

VI. DAMAGES—FINE.

1. An action of damages, which is a purely civil remedy, is incompatible with an action for a fine, and the two cannot be joined, except when expressly authorized by statute; but where cattle came on plaintiff's property, and caused damage, such joinder was perfectly justified by C. S. L. C., ch. 26, sec. 8, which had not been repealed by the Municipal Code (except as to corporations created thereafter) under which the action was brought. *Daoust* vs. *Proulx*, Mag. Ct. 1875, 7 R. L. 317.

2. But in another case, in which the plaintiff asked for damages and a fine under Art. 381 of the Municipal Code, for nuisance on

a public road caused by wood which the defendant had placed there, the cumulation was held not to be authorized, and the demand for damages rejected. (1) *Labelle* vs. *Gratton*, Mag. Ct. 1874, 7 R. L. 325.

VII. DAMAGES—FREIGHT.

Freight and $60 damages, owing to illegal seizure of plaintiff's barge, may be claimed in and by the same action. *Dufresne* vs. *Bergeron*, Q. B. 1875, Ram. Dig. 23.

VIII. DAMAGES—SLANDER—PERSONAL WRONGS.

A party may, by one suit, claim damages for slander and for personal wrongs. *Paquette* vs. *Globenski*, Q. B. 1856, 6 L. C. R. 185.

IX. DAMAGES—RÉINTEGRANDE.

Judgment of *réintegrande* and of damages may be asked and awarded in one and the same action. *Coté* vs. *Riome*, K. B. 1818, 1 R. de. L. 505.

X. DÉCLARATION DE PATERNITÉ—ALIMENTS.

An action *en déclaration de Paternité*, and also claiming an alimentary allowance for the child, may be joined to a demand by the mother for damages arising from the seduction, the grounds of action being neither incompatible nor contradictory. *Kingsborough* vs. *Pound*, Q. B. 1878, 4 Q. L. R. 11, 1 L. N. 115. *Contra Mullin* vs. *Bogie*, C. R. 1893, 3 Que. 34 S. C., wherein *Kingsborough* vs. *Pound* is criticized.

XI. DEMAND FOR CONTINUANCE OF SUIT—EXECUTION OF JUDGMENT.

A demand for continuance of suit on a proceeding in execution of judgment against the representatives of the party condemned, and a demand that the judgment be declared executory against them, are a necessary consequence the one of the other, and are not incompatible or contradictory, but tend only to the same condemnation. *D'Estimauville* vs. *Tonsignant*, S. C. 1874, 1 Q. L. R. 52.

(1) This case did not come under the Agricultural Abuses Act., C. S. L. C., ch. 26, s. 8, as was the case with the previous decision, 7 R. L. 317.

XII. DEMAND TO DECLARE JUDGMENT EXECUTORY—LEGATEE—USUFRUCT.

Held:—That a demand made against the representatives of a universal usufructuary legatee, for the purpose of having declared executory a judgment rendered against the latter, and also against the universal legatees vested with the ownership of the property in question, condemning them to pay to a particular legatee the capital and interest of his legacy, and a demand against the representatives of the said usufructuary legatee praying for a condemnation for the whole amount of the capital and interest of such particular legacy, founded on the allegation that the revenues and value of the usufruct have largely exceeded the amount in capital and interest of such legacy, are distinct; that they cannot both be brought before the Court on the same evidence, and that they represent two incompatible methods of legal recourse. (*ib.*)

XIII. DELIVERY OF LAND—PENALTY.

In a contract for the sale of land with a penalty clause added, where also the vendor may exercise his faculty of *redemption*, the purchaser cannot, upon breach of the contract, in the same action, conclude for the delivery to him of the land and payment of the penalty. *Cadieux* vs. *Jean Baptiste* alias *Debien*, Q. B. 1868, 28 L. C. J. 327.

XIV. DIRECTORS OF COMPANY—RETURNS.

The directors of a joint-stock company, incorporated under chap. 63 C. S. C., may be sued with the company for a debt due to plaintiff, if they have neglected to make the return required by the 13th sec., 13 & 14 Vic., c. 28. *Henderson Lumber Co.* vs. *Ward*, Q. B., 7th Sept., 1874, Ram. Dig. 23.

XV. DISQUALIFICATION OF MAYOR—ACTION TO VOID ELECTION.

Where the petitioner by his petition alleged that the person elected and holding the position of Mayor of Montreal was, at the time of this election, disqualified from being so elected, and was therefore illegally occupying the position; and alleged also by the same petition, that the election in question was null and void, for reasons therein stated—*Held*, on

dilatory exception, that such allegations and conclusions were incompatible within the meaning of the provisions of the C. C. P. *Beaudry* vs. *Workman*, S. C. 1868, 13 L. C. J. 15.

XVI. FRAUD—DEFENDANTS—CONCLUSIONS.

It is not an improper joinder of actions to charge one of the defendants accused, of participation in fraud with the other defendants, although it appears that part of the conclusions do not affect him, if the whole matter be to some extent connected. *McCulloch* vs. *Griffin*, Q. B., Montreal, June, 1874, Ram. Dig. 23.

XVII. HYPOTHECARY CREDITOR.

The hypothecary creditor cannot sue in one action several persons who have a divided proprietary interest in the property hypothecated. *Panet* vs. *Laurin*, K. B. 1832, 1 R. de L. 232, 2 R. J. R. Q. 22.

XVIII. PETITORY AND POSSESSORY. —ART. 948 C. C. P.; ART. 15 C. C. P.

1. A possessory and a petitory action cannot be joined; and if this has been done, the vice cannot be cured by consent of the parties. *Trépanier & Dupuis*, K. B. 1810, Pyke's Reports, p. 24, & 1 Rev. de Lég. 351, 1 R. J. R. Q. 64.

2. If the plaintiff state in the declaration that he is proprietor and possessor of a certain lot of land, but concludes *en complainte* only, this is not a cumulation of the petitory with the possessory action. *Bouchette* vs. *Taché*, K. B. 1820, 1 Rev. de Lég. 351, 2 R. J. R. Q. 53.

XIX. PETITORY ACTION—DEMOLITION OF WORKS.

Demolition of works may be demanded in a petitory action. *Joyce* vs. *Hart*, 1877, Supreme Ct., 1 Supreme Ct. Rep. 321.

XX. PENALTIES UNDER ELECTION ACT.

Suits under the Dominion Election Act of 1874, to recover penalties for bribery, are civil suits for the recovery of debt, controlled by the procedure governing actions in the Province in which they are instituted, and, in consequence, in this Province seven distinct and separate penalties for contravention of the Dominion Election Act may be cumulated, as to amount, in one and the same action. *Joyal* vs. *Safford*, S. C. 1881, 25 L. C. J. 166, and see *Larivière* vs. *Choquet*, S. C. 1882, M. L. R., 1 S. C. 461.

XXI. PLEADING ART. 120 (6) C.C.P.

A cumulation of actions should be pleaded by a dilatory exception. *Bélanger* vs. *Desjardins*, K. B. 1816, 3 Rev. de Lég. 70; *Méthot* vs. *Perrin*, S. C. 1874, 5 R. L. 695.

XXII. PRIVATE AND PUBLIC CAPACITY OF JUSTICE OF THE PEACE.

In an action of damages against an individual in his private capacity—*Held*, confirming S. C., that acts committed by him in such capacity cannot be joined with other acts committed in his capacity as a justice of the peace. *O'Neill* vs. *Atwater*, Q. B. 1857, 9 L. C. R. 442, 7 R. J. R. Q. 310.

XXIII. RESILIATION OF DONATION—ATTACHMENT IN REVENDICATION.

An attachment in revendication may be joined with an action for the resiliation of a deed of donation. *Méthot* vs. *Perrin*, S. C. 1874, 5 R. L. 695.

XXIV. RESILIATION OF SALE—PAYMENT OF PRICE—OPTION.

An unpaid vendor is not entitled at the same time to pray for the resiliation of the sale, and also that the goods be sold and that he be paid by privilege from the proceeds; but he is entitled to pray for the resiliation of the sale and the return of the goods without offering the buyer the option of paying the price.

So, where the plaintiff prayed for the resiliation of the sale, and also that he be paid the price out of the proceeds of the goods, it was held that such conclusions were incompatible, and the defendant, under C. C. P. 120, might, by dilatory exception, have called upon him to declare his option; but a demurrer to the action generally, with conclusions for its dismissal, was held bad because the demand for

the resiliation of the sale was well founded. *Wylie* vs. *Taylor*, S. C. 1884, M. L. R., 2 S. C. 374.

XXV. SALE—ACTION TO HAVE ENCROACHMENTS REMOVED—TO FILL UP EXCAVATION—DAMAGES, ETC.

Where the plaintiff by his declaration set up a deed of sale by him to the defendant, and complained of the defendant for having encroached upon his property, asking that he be condemned to remove such encroachment, and also that he be condemned to fill up an excavation which he had made, and remove the trap door, and to lower the passage, so that it could be conveniently used, and to pay $250 damages:—*Held*, that these conclusions contained three different and incompatible actions, and, although arising out of a deed of sale from him to defendant, the same could not be joined. *Robertson* vs. *Stuart*, S. C. 1863, 13 L. C. R. 462, 11 R. J. R. Q. 461.

XXVI. SEVERAL COUNTS—CONCLUSIONS.—ART. 15 C. P. C.

Several counts in a declaration for £100, each founded on premises which are within the scope of one and the same action, but with conclusions for £100 only, is a good and valid form of action. *Casey* vs. *Brown*, 3 Rev. de Lég. 39, R. J.

(c) ACTION EN DENONCIATION DE NOUVEL ŒUVRE.

1. The action *en dénonciation de nouvel œuvre* may be taken at any stage in the erection of the works complained of. *Crawford* vs. *Protestant Hospital for the Insane*, 1888, M. L. R., 4 S. C. 215. Confirmed in Appeal, M. L. R., 7 Q. B. 57.

2. Action was brought asking damages and the destruction of a wharf which the defendant had erected on the opposite side of a navigable river, thereby altering the course of the river, and injuring the plaintiff—*Held*, confirming the judgments of the Queen's Bench and Superior Court, that such an action would not lie, inasmuch as it could only be brought by a party claiming protection against a work commenced, and still in progress, and by which, if completed, he would suffer injury. *Brown* vs. *Gugy*, P. C. 1864, 14 L. C. R. 213, and Q. B., 11 L. C. R. 401.

(d) ACTION—FORM OF.

I. Allegation.

Contract. 1.
Promissory Note. 2.

II. Money advanced in Consideration of Transfer.

III. Restraining Commission of Illegal Act.

I. ALLEGATION.

1. Contract.—Respondent by a verbal agreement undertook to repair a house for the appellant, and he also made several repairs to another building. He sued the appellant on a simple account. The plea was that the repairs to the first house were made under a verbal contract, and that the plaintiff should have set out this contract. But the plaintiff asked just what the defendant acknowledged to owe, except that he said the repairs had not been done as they should have been. The Court below reduced the account by some $13. It would be too technical to reverse the judgment upon the ground that the plaintiff ought to have alleged the contract in his action. Judgment confirmed. *Springle* vs. *Genereux*, Q. B., Montreal, Sept., 1876.

2. Promissory Note — Suppletory Oath.—In an action containing no allegation of indebtedness, except that based on a promissory note by defendant for value received, upon proof that the note was not signed by him nor by any other person by him authorized, the defendant cannot be condemned to pay a debt not alleged in the action, but which under suppletory oath defendant acknowledged to owe to plaintiff. *Gilbert* vs. *Gilbert*, C. R. 1886, 12 Q. L. R. 94.

II. MONEY ADVANCED IN CONSIDERATION OF TRANSFER.

Where the plaintiff had advanced a hundred dollars, in consideration of a transfer to be made to him by the defendant, and the agreement was never carried out, and the plaintiff brought action simply for the recovery of the amount advanced—*Held*, on the defendant's demurrer that the action should be one of damages, that the action was properly brought, and the demurrer was dismissed. *Bougie* vs. *Leduc*, S. C. 1874, 5 R. L. 548.

III. RESTRAINING COMMISSION OF ILLEGAL ACT.

An order can be obtained from the Court to prohibit a person from committing an illegal act without having recourse to the writ of *mandamus*. *Bourgoin* vs. *Malhiot*, S. C. 1876, 8 R. L. 396.

(c) ACTION—INTEREST IN. Art. 19 C. C. P.

I. As-ignment—Right of Assignee or Trustee to bring Action in respect of the Property assigned to him. 1-8.

II. Attorney General. 1-2.

III. Crown—Pleading Rights of.

IV. Insurance—Rights of Insurers.

V. Mortgage Creditors.

VI. Municipal Corporation.

VII. Principal and Agent—(See also under title Agency.)

VIII. Promissory Note—Insolvency.

IX. Receivers—Foreign Law. 1-2.

X. Transferee of Plaintiff's Rights.

XI. Tutor—Opposition by.

See also Affreightment—Demurrage—Power of Master of Vessel to sue for; also Freight—Power of Master of Vessel to sue for.

I. ASSIGNMENT—RIGHT OF ASSIGNEE OR TRUSTEE TO BRING ACTION IN RESPECT OF THE PROPERTY ASSIGNED TO HIM.

1. Assignment—Trustees—Assent of Creditors.—Art. 19 C. P. C. is applicable to mere agents or mandataries. It is not applicable to trustees in whom the subject of the trust has been vested in property and possession for the benefit of third parties, and who have duties to perform in the protection or realization of the trust estate.

Overruling *Browne* vs. *Pinsonneault* (1) (3 Sup. Ct. Rep. 102), and *Burland* vs. *Moffatt* (2) (11 Sup. Ct. Rep. 76).

Therefore an assignee, under a voluntary deed of assignment by a debtor for the benefit of his creditors, can, as such assignee, sue and be sued in respect of the estate and property assigned to him.

In the present case, the trustees having derived their title, with assent of all the creditors, from the official assignee appointed to an insolvent estate under the Insolvent Act 1875, were assignees of his rights, and were entitled to enforce a contract entered into with them in respect of the trust property in their possession. (3) *Porteous* vs. *Reynar*, Privy Council 1887, 11 L. N. 9, 13 App. Cas. 120.

2. —— —— Trustees — Registered Deed.—*Held*, affirming the judgment of the Court below, that Art. 19 C. C. P. is not applicable to trustees in whom property has been vested by a registered deed, and to which deed the defendant was a party. (*Burland* vs. *Moffatt*, 11 Can. S. C. R. 76 and *Browne* vs. *Pinsonneault*, 3 Can. S. C. R. 102, distinguished); *Mitchell* vs. *Holland*, Supreme Ct. 1889, 16 Can. S. C. R. 687, 12 L. N. 348.

3. —— —— Assignees—Non-Assent of Creditors.—An insolvent trader assigned to three persons for the benefit of his creditors, *but without their assent*, and on a seizure of his effects by a creditor who was not a party to the assignment, the assignees intervened. *Held*, that they had no interest to plead on behalf of others whom they did not represent, and that their intervention to that effect would be dismissed with costs against them person-

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(1) In *Browne* vs. *Pinsonneault*, one S. transferred his interest under a certain lease and in certain furniture to appellants, "acting as trustees for and on behalf of divers persons and firms, creditors of the said S., under a certain paper writing or memorandum of agreement made and entered into by and between the said S. and his creditors, and hereunto annexed"—*Held*, in an action by appellants, in their quality of "trustees duly named of the creditors of S.," that they had no right or standing to appear as such before a court of Justice.

And in *Dougall* vs. *Brun* (30 L. C. J. 24, C. R. 1885), it was held that an opposition to the seizure of the effects of an insolvent debtor filed by a trustee or assignee under a voluntary assignment by said debtor, even though it alleges the acquiescence of the plaintiff therein, will be dismissed on a demurrer, on the ground that the opposant has no standing, and shows no right or title to the said property, being only the mandatary of the creditors.

In *May* vs. *Fournier* (29 L. C. J. 190, S. C. 1885), it was held that an assignee, acting in his quality as trustee and in the interest of the estate, cannot, since the abolition of the Insolvent Act, sue on behalf of the creditors of the estate.

(2) In *Burland* vs. *Moffatt*, it was held that an assignee holding property under a voluntary assignment to him by an insolvent, for the benefit of creditors, parties to the deed of assignment, is not entitled to plead in his own name in reference to such property. Such an assignment merely enables him to represent the assignor and to exercise the assignor's actions and not those pertaining to creditors alone.

(3) Their Lordships fully adopted the reasoning of Chief Justice Dorion in *Moffatt* vs. *Burland*, reported in the 4th volume of Dorion's cases, where, at p. 76, he describes the Canadian authorities as an unbroken chain of precedents, going as far back as 1811, and adds "that the jurisprudence of a country on any given case when certain is not only the best, but the sole authentic evidence of what the law now is on the subject."

ally. (1) *Tourangeau* vs. *Dubeau*, S. C. 1884, 10 Q. L. R. 92.

4. —— ——**Assignee.**—The case of *Prevost* vs. *Drolet*, Q. B. 1874, 18 L. C. J. 300, reported as holding "that an assignee, under an assignment to him by an insolvent for the general benefit of his creditors, *not made under the provisions of the Insolvent Act*, has no quality to sue in his own name for anything connected with such assignment," is incorrectly reported, as is noted by Dorion C. J. in *Moffatt* vs. *Burland*, 4 Dorion 75. In the Superior Court, Badgley J. allowed the action of the assignee as such. On appeal the holding of Loranger J. dissented from this view. But the judgment of the Court below was confirmed by the majority of the judges in appeal.

5. —— —— An English commission of bankruptcy operates in Canada as a voluntary assignment by the bankrupt, and therefore the assignees may sue for debts due to the bankrupt, or for his property. *Bruce* vs. *Anderson*, Q. B. 1818, Stuart's Rep. 127.

6. —— —— Assignees in their sole quality as such have in Lower Canada no quasi corporate or representative capacity. (2) S. C. 1861, *Chevalt* vs. *De Chantal*, 8 L. C. J. 85.

7. —— —— Where a commercial firm placed in the hands of defendants, as security for their claim, four boxes of tobacco, and shortly afterwards, becoming insolvent, made an assignment of their estate to the plaintiff as assignee —*Held*, that the plaintiff was entitled to revendicate the four boxes of tobacco in his own name, after having fulfilled the conditions on which it was agreed with the insolvent firm that the appellants were to deliver up the tobacco. (3) *Starke* vs. *Henderson*, Q. B. 1865, 9 L. C. J. 238.

8. —— —— The assignee has the right of suing in the name of his assignor for the recovery of the claim transferred. *Cremazie* vs. *Cauchon*, S. C. 1863, 16 L. C. R. 482.

(1) See *Gates* vs. *Miller*, No. 346, Oct., 1828, cited by Dorion C. J. in *Moffatt* vs. *Burland*, Dorion Rep., at p. 68-71, where it was held (in the Gates case) that such an assignment as the above vested the debt thereby transferred in the assignee (so far as the assignor is concerned), who may thereon bring action in his own name. Of such an assignment and actions thereunder none but the creditors of the insolvent could complain. And see *Gates et al.* vs. *another*, 1 Rev. Crit. 481, to same effect.

(2) Chief Justice Dorion cites this as the only case which disturbs the long and unbroken chain of precedents holding the contrary at that date. 4 Dorion Q. B. at p. 76. But see *Whitney* vs. *Badeaux*, 12 R. L. 518.

(3) In this case defendant was a party to the deed of assignment.

II. ATTORNEY GENERAL.

1. On an exception to the form to an information signed "Moreau, Ouimet & Moreau, attorneys for Attorney General, pro Regina"—*Held*, that such information would be dismissed with costs, as the Attorney General in appearing for Her Majesty could not appear by attorney. *Cartier* vs. *Laviolette*, S. C. 1862, 6 L. C. J. 309; contra *Casgrain* vs. *La Cie. de Carosserie*, S. C. 1895, 9 Que. 383

2. The Attorney General of the Province of Quebec has the right to appear on behalf of and to represent Her Majesty's interest in all suits pending in the Courts of said Province. In any event this is a question the Court cannot consider at the instance of a private individual, the opponent of the Crown, inasmuch as to decide it adversely to the Attorney General's appearance would effect a virtual disavowal of his action, without that being asked for in the regular mode. *Monk* vs. *Ouimet*, Q. B. 1874, 19 L. C. J. 71.

III. CROWN—PLEADING RIGHTS OF.

Where a petitory action was taken against the holder of an immoveable—*Held*, that he could not plead that the grant of the Crown to the plaintiff had lapsed owing to the fact that the plaintiff and those from whom he derived had not conformed to the conditions of the letters patent. *Robert* vs. *Leblanc*, C. R. 1882, 11 R. L. 193.

IV. INSURANCE—RIGHTS OF INSURERS.

Action to recover the value of a cargo of peas lost on the scow "Marie Joseph," in consequence of a collision with a steamboat belonging to the defendants in Lachine canal. Plea, that plaintiff had been paid the value of the peas by the insurers, for whom plaintiffs were a mere *prête-nom*, and had no interest—*Held*, confirming the judgment of the Court below, that notwithstanding the payment by the insurers, the latter had no right to sue until notice of the transfer and subrogation, and that the action was properly brought. *Richelieu & Ontario Navigation Co.* vs. *Lafrenière*, Q. B. 1879, 2 L. N. 204.

V. MORTGAGE—CREDITORS.

The appellant was collocated on the proceeds of the estate of one Lemieux, insolvent, for the

amount of a mortgage. The respondent contested the collocation, on the ground that the mortgage was given in fraud of the rights of the creditors of the mortgagor, who was insolvent at the time the mortgage was given. *Held*, overruling the decision of the Court below, that as the contestants were not shown to have been creditors of the mortgagor at the time the mortgage was given, they were without right and interest to contest on that ground, and the collocation was maintained. *Dufresne* vs. *Mechanics Bank*, Q. B. 1879, 3 L. N. 26.

VI. MUNICIPAL CORPORATION.

A municipal corporation can only sue under the name given to it by law. For such corporation to sue in the name of another is an absolute nullity on grounds of public interest, which cannot be derogated from even by agreement of the parties. Such an action should be dismissed even without an exception to the form, but without costs. *Corporation of Ste. Marguerite* vs. *Migneron*, Mag. Ct. 1875, 29 L. C. J. 227.

VII. PRINCIPAL AND AGENT.

An attorney or agent, in the interests or for the preservation of the rights of his principal, cannot bring an action in his own name, even when there is an agreement to that effect between his principal and the other contracting party. *Nesbitt* vs. *Turgeon*, 2 R. de L. 43, 2 R. J. R. Q. 141, Q. B. 1845; *Allsop* vs. *Huot*, K. B. 1817, 2 R. de L. 79.

VIII. PROMISSORY NOTE — INSOLVENCY.

The defendant was sued on a promissory note, and pleaded that the note had been made by him in favor of a commercial firm since insolvent, that it had passed into the hands of the assignees of the said firm, that it did not appear that the insolvent had ever legally recovered possession of it, and that the plaintiff had no interest, but was merely a *prête-nom* for the creditors to whom it belonged. *Held*, that the defendant could not plead the rights of the creditors, but was bound to pay the amount of the note to the holder. *Lemay* vs *Boissinot*, S. C. 1883, 10 Q. L. R. 90.

IX. RECEIVERS—FOREIGN LAW.

1. Where an action was brought in the Province of Quebec, by the plaintiff as receiver to a corporation in liquidation domiciled in Ontario, and it was proved by the production of the Ontario Statute that the plaintiff, as receiver, was duly authorized to represent the corporation in judicial proceedings, he may also appear in his quality of receiver in judicial proceedings before the Courts of the Province of Quebec. *Giles* vs. *Jacques*, Q. B. 1887, M. L. R., 7 Q. B. 456, 31 L. C. J. 266, reversing M. L. R., 1 S. C. 166; *Giles* vs. *Lalumière*, C. C. 1884, 28 L. C. J. 287; *Giles* vs. *Faucuf*, M. L. R., 1 S. C. 322.

2. But where the foreign law is not proved, it is taken for granted that it is the same as that of the Province of Quebec, and the foreign receiver in such case could not sue here in his quality of receiver. *Primeau* vs. *Giles*, Q. B. 1887, M. L. R., 7 Q. B. at page 467; *Giles* vs. *Gariépy*, 29 L. C. J. 207; *Giles* vs. *Giroux*, 13 R. L. 652.

X. TRANSFEREE OF PLAINTIFF'S RIGHTS.

Where from the record it appears that the plaintiff has transferred his rights, and is merely the *prête-nom* of the transferee, the defendant can on motion have the proceedings suspended until the transferee, the real plaintiff, has been made party to the action. *Boudy* vs. *Valois*, S. C. 1885, M. L. R., 1 S. C. 236.

XI. TUTOR—OPPOSITION BY.

The appellant produced an opposition, in his quality of tutor to his minor son, to the seizure of an immoveable in his possession, on the ground, *inter alia*, that the immoveable in question formed part of the community between himself and his wife deceased—*Held*, that he was without interest to oppose the seizure. *Lefebvre* vs. *Turgeon*, Q. B. 1880, 3 L. N. 20.

(*f*) ACTION, JOINT.

Art. 15 C. P. C.

I. By two Persons not Partners—Promissory Note.
II. By two Persons not Partners—Contract.
III. Common Complaint—Procès-Verbal—Water-Course.
IV. Contestation of Elections.
V. Insurer and Insured.
VI. Several Petitions for Injunction.
VII. When Allowed.

See Action, Union of Causes.

I. BY TWO PERSONS NOT PARTNERS, —PROMISSORY NOTE.

A joint action on a promissory note brought against the maker by two persons, to whom it is made payable by endorsement of the payee, is good, although it is not alleged that the plaintiffs are co-partners or had the right to sue jointly. *Stevenson* vs. *Bisset*, S. C. 1858, 8 L. C. R. 191, 6 R. J. R. Q. 206.

II. BY TWO PERSONS NOT PARTNERS —CONTRACT.

In an action by two persons not co-partners, on a verbal agreement, by which the defendant and another man agreed to furnish a certain quantity of cordwood to be delivered in a certain place, and the plaintiffs advanced money for the purpose, but the defendants failed to carry out their contract—*Held*, that the action was properly brought, and judgment was rendered for plaintiffs accordingly. *Trudeau* vs. *Menard*, S. C. 1858, 3 L. C. J. 52, 7 R. J. R. Q. 355.

III. COMMON COMPLAINT—PROCÈS-VERBAL—WATER-COURSE.

1. *Held* (reversing judgment of Superior Court) that parties having a common complaint arising from a *procès-verbal* legalizing a water-course and apportioning the costs thereof, whose right of action proceeds from the same source, and whose conclusions are identical, can unite their actions, such joinder tending to promote the ends of justice, and being prohibited by no law. (1) *Barrette* vs. *Corp. de St. Barthélémi*, Q. B. 1893, 2 Que. 585.

2. Where parties have a right of action, they cannot unite their actions in demanding the suppression of obstructions and encroachments in a road and claiming damages arising therefrom. *Bourdon* vs. *Bénard*, Q. B. 1870, 15 L. C. J. 60. (Badgley J., at p. 64.)

3. But they could unite in demanding alone the suppression of obstructions in the road. *Bénard* vs. *Bourdon*, S. C. 1869, 13 L. C. J. 233; *Johnson* vs. *Archambault*, Q. B. 1864, 8 L. C. J. 317.

IV. CONTESTATION OF ELECTIONS.

(Art. 316 Mun. Code.) The election of six municipal councillors, who have been elected as such at the same time, may be contested by a single petition, even though the grounds of such contestation are separate and different as to each of the councillors. (2) *Lawford* vs. *Robertson*, C. C. 1872, 16 L. C. J. 173.

V. INSURER AND INSURED.

The insurers who have paid part of the loss, and are subrogated *pro tanto*, and the owner of the buildings destroyed, may sue jointly in damages for their respective claims. *North Shore Ry. Co.* vs. *McWillie*, Q. B. 1889, M. L. R., 5 Q. B. 122.

VI. SEVERAL PETITIONS FOR INJUNCTION.

Several petitioners for an injunction can unite causes in demanding the annulling of a *procès-verbal* ordering the change of a highway, and all proceedings thereunder, and to enjoin the municipality from opening or making the road upon the respective properties of the petitioners. *Laferté* vs. *Corp. de St. Aimé*, S. C. 1886, 14 R. L. 476.

VII. WHEN ALLOWED.

Joinder of actions will be allowed where it promotes the ends of justice, the actions being otherwise identical. *North British & Mercantile Fire & Life Ins. Co.* vs. *Lambe*, S. C. 1882, 27 L. C. J. 222; *Barrette* vs. *Corp. de St. Barthélémi*, Q. B. 1893, 2 Que. 585.

(*g*) ACTION, NATURE OF.

I. Action to Enforce Purchase of Land and Execution of Deed.
II. Action to have Register of Mortgage changed — Payment of Claim.
III. Action to set aside Deed of Sale.
IV. Damages caused by Mill-Dam—Demolition.
V. Damages— Railroad — Performance of Necessary Works.
VI. Lease—Promise of Sale.
VII. Possession of Church Pew.
VIII. Rescission of Sale—Resolutory Condition.
IX. Resolution of Contract.
X. Tithes.
XI. Trespass on Real Estate—Action by Non-Proprietor.

(1) Overruling *Fraser & Fraser* vs. *Gravelle*, Montreal Condensed Reports 95; *Simard* vs. *Perrault*, 1 L. C. J. 249, 1857. See Mathieu Mun. Code (1894), p. 159, Notes 4, 5, 6.

(2) This decision was based on the particular wording of the Municipal Code and the election law, but on general principles Ramsay J. denied the right of joinder of actions of different persons in one suit, though standing in the same relative position (p. 178).

I. ACTION TO ENFORCE PURCHASE OF LAND AND EXECUTION OF DEED.

Action to compel the defendant, resident in the district of Beauharnois, to carry out a promise, which the plaintiff alleged had been made by correspondence and telegrams, to purchase certain immoveable property situated in the District of Terrebonne, and to execute a deed of sale, which had been duly tendered to defendant, — the plaintiff asking by the conclusions of his declaration that the judgment should avail in place of the deed in default of defendant's executing the same. The defendant was personally served in the District of Montreal, and denied the jurisdiction of the Court by a declinatory exception, alleging that the action was a real or mixed one, involving the title to lands in another district, and contending that he should have been summoned before the Court of his domicile, or of the district where the immoveable was situate under Art. 37 of the Code of Procedure—*Held*, that the action was purely personal, and exception dismissed. *McMartin* vs. *Walsh*, (1) S. C. 1882, 5 L. N. 402.

II. ACTION TO HAVE REGISTER OF MORTGAGE CHANGED—PAYMENT OF CLAIM.

An action by which the plaintiff alleges that defendant collusively made and registered a mortgage before the mortgage given to plaintiff, and asks that the order of registration be changed, or defendant be condemned to pay the indebtedness, is a mixed action. *Faucher* vs. *Painchaud*, S. C. 1880, 3 L. N. 316.

III. ACTION TO SET ASIDE A DEED OF SALE.

The plaintiff, a judgment creditor of one of the defendants, brought action in the district of Montreal to set aside a deed of sale of real estate situated in the district of Iberville, from the judgment debtor to the other defendant — *Held*, on declinatory exception, that such action was a purely personal one. *Scriver* vs. *Stapleton*, S. C. 1879, 2 L. N. 190.

IV. DAMAGES CAUSED BY MILL-DAM —DEMOLITION OF.

An action for damages caused by a mill-dam, which also concludes for the demolition of the dam in default of payment, is a real action and within the exclusive jurisdiction of the Superior Court, and plaintiff has a right to costs of a Superior Court action. *Houle* vs. *Poitras*, C. R. 1894, 5 Que. 89; and *Doreal* vs. *Chevalier*, 14 L. C. J. 263.

V. DAMAGES—RAILROAD—PERFORMANCE OF NECESSARY WORKS.

Where the plaintiff sued the defendant, a railway company, for damages alleged to have been caused to the property of the defendant by the construction of the road, and asked that the defendant be condemned to perform certain works to put an end to such damages for the future—*Held*, in review, that such action was not a real action. *Dessaint* vs. *The Grand Trunk Railway of Canada*, C. R. 1865, 16 L. C. R. 49.

VI. LEASE—PROMISE OF SALE.

An action under a lease with promise of sale is a personal action, and may be brought in lessor and lessee court. *Menzies* vs. *Bell*, S. C. 1880, 3 L. N. 159.

VII. POSSESSION OF CHURCH PEW.

An action by a parishioner against a church corporation claiming possession of a pew is not a real action, the right of property being in the *Fabrique*. *Tremblay* vs. *Les Curés et Marguilliers de l'Œuvre et Fabrique de la Paroisse St. Irénée*, C. R. 1887, 10 L. N. 181, 13 Q. L. R. 26. Confirming S. C., 10 L. N. 82.

VIII. RESCISSION OF SALE—RESOLUTORY CONDITION.

An action to rescind a sale of immoveables, based upon a contract containing a resolutory condition, is a mixed action; and where the price of sale is under $400, the party inscribing in Review need deposit but $20. *Houde* vs. *St. Pierre*, C. R. 1890, 16 Q. L. R. 268.

IX. RESOLUTION OF CONTRACT.

An action by the purchaser to rescind a contract of sale of an immoveable because the vendor cannot give him a good title, and demanding the reimbursement of the amounts paid on the price of sale, is a personal action, and can be brought before the court of the place where the contract was passed. *Rough* vs. *Eastern Townships Bank*, S. C. 1884, 29 L. C. J. 131.

(1) A motion by defendant to be allowed to appeal from this judgment was rejected by the Court of Appeals, 28th Nov., 1882.

X. TITHES.

An action for tithes is a mixed action. *Roy* vs. *Bergeron*, C. Ct. 1867, 2 R. L. 532.

XI. TRESPASS ON REAL ESTATE.—ACTION BY NON-PROPRIETOR.

The remedy for acts of trespass on real estate by a person not pretending to have any right of any kind to the property trespassed on is a personal and not a real action. *Bourget* vs. *Morin*, S. C. 1875, I Q. L. R. 191. Confirmed in Review (30th Nov., 1875).

(*h*) ACTION, NOTICE OF. Art. 22 C. C. P.

I. Montreal Street Ry. Co.
Waiver of Notice. 1.
What the Notice must State. 2.

II. Municipal Corporations.
Application of Art. 793 Mun. Code. 1.
Construction—Recovery of Penalty. 2.
Pleading Want of Notice. 3.
Waiver of Notice. 4.
When Entitled to Notice. 5-6.

III. Public Officers.
Pleading Want of Notice. 1-3.
Procedure—Declaration. 4.
What the Notice must State. 5-7.
When Entitled to Notice:
Bona fides of Officer. 8-10
Collector of Customs. 11-13.
Officer Remunerated by Fees. 14.
Omitting to do what the Law requires. 15.
When Officer ceased to be Public Officer. 16.
Where Damages are Subsidiary to other Demands. 17-19.
Where Action Discontinued. 20.
Who are Entitled to Notice:
Army Officer. 22.
Bailiffs. 23.
Board of School Commissioners. 24-25.
Catholic Priest. 26.
Church Constables. 27.
Constables. 28.
Municipal Corporations. 29.
Municipal Councillors. 30.
Registrars. 31.
Road Inspectors. 32-21.
Sheriffs. 33-34.
Special Superintendent. 35.

I. MONTREAL STREET RY. CO.

1. Waiver of Notice.—The notice required to be given to the Montreal Street Ry. Co. by 30-31 Vic., c. 39, sec. 7, is not a matter of public order, and may be waived by the defendant's failure to invoke the absence of notice by their pleadings and by their admission of liability. *Kelly* vs. *Cie. de Chemin de Fer Urbain de Montréal*, S. C. 26th March, 1888. Reported 16 R. L. 490 (note).

2. What the Notice must State.—By 30-31 Vic., c. 39, sec. 7 (Que.) the Montreal Street Ry. Co. is entitled to a month's notice of action for all loss or damage caused by it. Such notice to be in writing and served upon the secretary of the company, at its chief office in the city of Montreal, with a detailed statement of such costs or damages.

It was proved: 1st. That on the 15th July, a letter from Ramsay & Son was addressed to and received by the secretary, setting out the accident, charging the company's servants with gross carelessness and holding it responsible for the cost of replacing a pane of glass, as per a detailed and enclosed account;

2nd. That a letter from plaintiff's attorney was addressed to and received by the secretary, threatening suit if the claim was not paid;

3rd. That upon the 12th September, Mr. Lighthall, notary, personally went to the office and chief place of business of the company, where, speaking to a clerk in said office, he signified unto the company a transfer from Mr. Graham to the plaintiff of all his rights in respect of said loss, and also served a copy of the transfer, which set forth details of the loss, its cause and amount; and the notary further then and there served a copy of the notification upon the company, in which it was forbidden to pay any other person than plaintiff, and was notified that he would take legal proceedings to recover the sums so transferred.

The secretary admitted that this signification reached him in the office. The plaintiff's action was not taken until the 11th Oct. following.—*Held*, sufficient compliance with statute. *Ramsay* vs. *Montreal Street Ry. Co.*, C. C. 1887, 11 L. N. 2.

II. MUNICIPAL CORPORATIONS.

1. Application of Art. 793 Mun. Code.—That the notice of suit required by Art. 793 of the Municipal Code, as amended by 45 Vic. (Q.), ch. 35, s. 26, and by 48 Vic. (Q.),

ch. 28, s. 15, applies not only to actions for the penalty therein enacted, but also to actions for damages resulting from the non-execution of the *procès-verbaux* and by-laws. *Charron* vs. *Corp. de St. Hubert*, C. R. 1888, M. L. R., 1 S. C. 431, 32 L. C. J. 304; *Senécal* vs. *Corp. of St. Bruno*, S. C. 1890, M. L. R., 6 S. C. 338; *Ribeau* vs. *Corp. de St. François du Lac*, C. C. 1889, 17 R. L. 704.

Contra, *Corp. of Township of Douglas* vs. *Maher*, Q. B. 1885, 11 Q. L. R. 294, 14 R. L. 45; *Turner* vs. *Corp. de St. Louis de Ha! Ha!* S. C. 1889, 16 Q. L. R. 260; *Lauria* vs. *Corp. de Sault au Recollet*, C. C. 1884, 7 L. N. 318; *Boudreau* vs. *Corp. of Sherbrooke*, S. C. 1886, M. L. R., 2 S. C. 189.

2. Construction—Recovery of Penalty.—Penal statutes must be strictly construed, and, therefore, in an action to recover the penalties prescribed by Arts. 793 and 417-418 Municipal Code, the formalities prescribed therein must be strictly adhered to. *Leduc* vs. *Vigneau*, C. C. 1881, 12 R. L. 214; *Perrault* vs. *Corp. de St. Esprit*, C. C. 1882, 12 R. L. 148.

3. Pleading Want of Notice.—When a municipal corporation, sued in damages under Art. 793 Mun. Code, does not plead want of notice, it cannot raise the objection at the hearing on the merits. *Corp. Township of Douglass* vs. *Maher*, Q. B. 1885, 14 R. L. 45, 11 Q. L. R. 294; *Charron* vs. *Corp. de St. Hubert*, Ct. Rev. 1881, 16 R. L. 490.

4. Waiver of Notice.—Such notice is not a matter of public order, and may be waived by the defendant's failure to invoke the absence of notice by their pleadings and by their admission of liability. *Charron* vs. *Corp. de St. Hubert*, C. R. 1888, M. L. R., 4 S. C. 431; *Kelly* vs. *Cie. de Ch. de Fer Urbain de Montréal*, S. C., 26th March, 1888, reported 16 R. L. 490. (Note)

5. When Entitled to Notice.—The notice is also necessary when the action is of another kind joined to an action in damages. *Senécal* vs. *Corp. de St. Bruno*, S. C. 1890, M. L. R., 6 S. C. 338.

6. —— —— But in another case it was held that under Art. 22 C. C. P. notice of action in warranty against a municipal corporation is not necessary, although damages are also demanded. (1) *Bailey vs. Boon*, C. R. 1874, 19 L. C. J. 10.

(1) See *Irwin* vs. *Boston*, infra, p 29, and notes thereto.

III. PUBLIC OFFICERS.

1. Pleading Want of Notice—Demurrer.—Want of notice is not a ground of demurrer, but should be pleaded to the merits, in order to establish the good or bad faith of the public officer in the exercise of his functions. *Jodoin* vs. *Archambault*, S. C. 1885, M. L. R., 1 S. C. 323; *McNamee* vs. *Himes*, S. C. 1859, 3 L. C. J. 109; *Dronin* vs. *McKay*, C. R. 1887, 31 L. C. J. 286. Contra *Leclerc* vs. *Corp. de St. Joachim*, C. Ct. 1862, 7 L. C. J. 83, see *infra* No. 8.

2. —— —— *Held*, in an action against a public officer for the return of goods seized, *preuve avant faire droit* will be ordered upon a demurrer alleging the omission of one month's notice. *Bathgate* vs. *Delisle*, S. C. 1870, 15 L. C. J. 250; *Pacaud* vs. *Quesnel*, Q. B. 1866, 10 L. C. J. 207.

3. —— —— Want of notice of action to a public officer should be pleaded by preliminary exception, and, therefore, if an action be dismissed for want of such notice, on a plea to the merits, costs will only be allowed as on a preliminary plea. *Legault* vs. *Lee*, S. C. 1881, 26 L. C. J. 28.

4. Procedure—Declaration.—When a statute requires that notice of action be given before suit, it is not necessary to mention in the declaration that such notice has been given. *Simard* vs. *Tuttle*, S. C. 1854, 4 L. C. R. 193, 4 R. J. R. Q. 150; *Davies* vs. *Maguire*, S. C. 1854, 4 L. C. R. 347, 4 R. J. R. Q. 189.

5. What the Notice must State.—Where the defendant, a constable, received notice of action under 14 and 15 Vic., c. 54, sec. 2, and C. S. L. C., c. 101 (sec. 22, C. C. P.), for malicious arrest and imprisonment, which omitted to mention the place where the party was arrested and imprisoned—*Held*, confirming the judgment of the Court below, that such notice was insufficient, and the action was dismissed. *Butterworth* vs. *Hough*, Q. B. 1866, 10 L. C. J. 184, 16 L. C. R. 419.

6. —— —— —— The Superior Court (Mackay J., 2 L. N. 354) —*Held*, that under the C. C. P., Art. 22, and Consol. Stat. L. C., c. 101, s. 1, the respondent was entitled to a notice of action, and that the notice given was insufficient in not stating the place where the alleged arrest was effected, and also in not stating the name and residence of plaintiff's attorney or agent. The action was in consequence dismissed.

This judgment was confirmed by the Court

of Queen's Bench (2 Dorion, Q. B. R. 497, 4 L. N. 393) ; but that Court went further, and *Held*, that the defendant was properly arrested, being a member of an illegal association.

On appeal to the Supreme Court of Canada, *Held* that the notice of action was insufficient, for the reasons given by the Court below, and also because the cause or causes of action, as set out in the declaration, were not sufficiently stated in the notice. *Grant* vs. *Beaudry*, Supreme Court 1883, Cassel's Dig. (new edit.) 581.

7. —— —— The notice of action ought to specify and indicate to the officer sued whether the complaint relates to an act done by him, or to an act done by one for whom he is responsible. Proof of fault on the part of the latter will not sustain an action against the former upon a fault stated to be personal to him. *Pacaud* vs. *Barwis*, C. R. 1886, 12 Q. L. R. 99.

8. When Entitled to Notice—Bona Fides of Officer.— A public officer is not entitled to the notice mentioned in Art. 22 of the Code of Procedure when sued for damages on account of bad faith. *Ferland* vs. *Latour*, S. C. 1874, 6 R. L. 77; *Com. d'Ecoles de Ste. Marthe* vs. *St. Pierre*, S. C. 1879, 2 L. N. 343; *Bernatchez* vs. *Hamond*, C. C. 1881, 7 Q. L. R. 25; and *Drouin*, or *Dercuin*, vs. *Mackay*, C. R. 1887, 15 R. L. 441, 31 L. C. J. 286; *Ferland* vs. *Latour*, S. C. 1874, 6 R. L. 77; *Pacaud* vs. *Quesnel*, Q. B. 1866, 10 L. C. J. 207. Contra, *Leclerc* vs. *Corp. of St. Joachim*, C. Ct. 1862, 7 L. C. J. 83.

9. —— —— **Bona Fides of Officer.**—A party, *bona fide*, and reasonably believing himself to be authorized by a Statute, though he be not, is entitled to a month's notice of action under 4 and 5 Vic., c. 25, and 14 and 15 Vic., c. 54. *McNamee* vs. *Himes*, S. C. 1859, 3 L. C. J. 109, R. J. R. Q. 383.

10. —— —— **Elections.**—Where the presiding officer of a municipal election had refused to grant a poll, and in consequence there was no election held. On action of damages brought—*Held*, on authority of *Pacaud* vs. *Quesnel* (10 L. C. J. 207), that, as he had acted in bad faith, he was not entitled to a month's notice of action. *Bernatchez* vs. *Hamond*, C. C. 1882, 7 Q. L. R. 25.

11. —— —— **Collector of Customs.**—In an action against the collector of customs, to recover back costs which had been paid to him—*Held*, that he was entitled to a month's notice of action. *Grant* vs. *Percival*, K. B. 1816, 1 R. de L. 351, 2 R. J. R. Q. 53.

12. —— —— But *Held*, that in an action against the collector of customs, to recover back money exacted by him as fees of office, he is not entitled to one month's notice of action.(1) *Price* vs *Percival*, K. B. 1824, Stuart's Rep. 179, 1 R. J. R. Q. 201.

13. —— —— *Held*, under C. S. C., c. 17, sec. 91, that money paid to a collector of customs as duty upon goods to be imported, upon the condition that a certain portion of the money so paid shall be remitted by him, in the event of the goods arriving before a rise of duty takes place by virtue of an act about to come into force, is not in the nature of a deposit placed in the hands of a private individual, but is so paid to him in his capacity of collector, in the performance of his duty as such, and therefore in such case the above section applies, and the collector is entitled to a month's notice. *Stephens* vs. *Bouthillier*, Q. B. 1864, 9 L. C. J. 309.

14. —— —— **Officer remunerated by Fees.**—Notice of action against a public officer for damages, for acts done by him in the performance of his functions, is due equally to the officer whose remuneration is by fees, as to him who receives a salary from the government, or who performs gratuitous or honorary duties. *Pacaud* vs. *Barwis*, C. R. 1886, 12 Q. L. R. 99.

15. —— —— **Omitting to do what the Law requires.**—A public officer is not entitled to notice of action under Art. 22 C. C. P., where the action is for a penalty for failing or omitting to do what the law requires him to do. *Jodoin* vs. *Archambault*, Q. B. 1886, M. L. R., 3 Q. B. 1, 31 L. C. J. 7, affirming S. C., M. L. R., 1 S. C. 323. (For full written opinion of Ramsay J. in this case, see 12 L. N. 78.) *Normandin* vs. *Berthiaume*, Q. B. 1878, 15 R. L. 3.

16. —— —— **When Officer Ceased to be Public Officer.**—In an action in which a municipal corporation called in its councillors as guarantors, but neglected to give a month's notice— *Held*, that a public officer is entitled to a month's notice of action, although, at the time of the institution of the action, he had

(1) The distinction between this case and *Grant* vs. *Percival* (*supra*) is that the exaction of fees by the customs officer in *Price* vs. *Percival* was for his own fees, and not as public property, and being unwarranted by law the defendant had no right to the protection of notice of action. (See remarks of Badgley J. in *Stephens* vs. *Bouthillier*, Q. B. 1864, 9 L. C. J. 16-317.)

ceased to be such public officer. *Leclerc* vs. *Corp. de St. Joachim de Pointe Claire*, S. C. 1862, 7 L. C. J. 83; *Morisseth* vs. *Corporation of Village de Bienville* and *Corporation of Village of Bienville* vs. *Nadeau*, C. C. 1879, 5 Q. L. R. 362.

17. —— —— Where Damages are Subsidiary to other Demands.—In an action to regain possession of an immoveable where damages are also prayed for, the notice of one month referred to by Art. 22 C. C. P. is not necessary. *Dugas* vs. *Corporation of St. Joseph*, Q. B. 1873, 17 L. C. J. 293.

18. —— —— —— —— *Held*, that under Art. 22 C. C. P., notice of action of warranty against a municipal corporation is not necessary, although the action concludes for damages, *Bartley* vs. *Boon*, C. R. 1874, 19 L. C. J. 10.

19. —— —— —— —— Contra. in an action in distu:bance where damages are also prayed for, the notice of one month referred to by Art. 22 C. C. P. is necessary.(1) *Hough* vs. *Corporation d'Irlande*, Q. B. 1885, 13 R. L. 581; see also *Senécal* vs. *Corp. de St. Bruno*, S. C. 1890, M. L. R., 6 S. C. 338, supra p. 26.

20. Where Action Discontinued.—(Art. 22 C. C. P.) Notice must be renewed before commencing a new action. *Demers* vs. *McCarthy*, S. C. 1886, M. L. R., 2 S. C. 128.

21. Who are Entitled to Notice—Laborer Acting for Road Officer.—In action for trespass by making an Overing a road on the plaintiff's farm, where the defendant pleaded that he did so by order of the road surveyor, and was entitled to a month's notice, the plea was dismissed. *Esiuhart* vs. *McQuilkan*, Q. B. 1855, 6 L. C. R. 456, 5 R. J. R. Q. 133; *reversing* S. C.; *Holton* vs. *Aikins*, Q. B. 1875, 3 Q. L. R. 289.

22. —— —— Army Officer.—The commanding officer of a British regiment, who is sued by a retired corporal of the regiment for damages alleged to have been caused by his arrest and imprisonment by the colonel, whilst in the regiment, illegally, maliciously, and without probable cause, cannot invoke the want of one month's notice of action provided for in Art. 22 of the Code of Civil Procedure, even when it is proved that he acted, in reality, legally, without malice, and with reasonable or probable cause. *Barnes* vs. *Mostyn*, S. C. 1872, 17 L. C. J. 288, 4 R. L. 542.

(1) The latter case is in conflict with other decisions containing similar issues. See *infra*, p. 29 the case of *Irwin* vs. *Boston* (Remarks of Chief Justice) and notes thereto,

23. —— —— Bailiffs.—A bailiff is not a public officer entitled to notice of action under Art. 22 of Code of C. P. *Major* vs. *Boucher*, C. C. 1877, 21 L. C. J. 304; *Major* vs. *Charbrand*, C. C. 1877, 21 L. C. J. 303; *Michon* vs. *Venne*, C. R. 1886, M. L. R., 2 S. C. 367; and see *Irwin* vs. *Boston*, Q. B. 1857, 2 L. C. J. 171, 4 R. J. R. Q. 392, *infra* No. 33.

24. —— —— Board of School Commissioners.—A Board of School Commissioners is entitled to notice of action of damages against them for acts done in the performance of their public duties. (2) *Busin* vs. *Commissaires d'Ecole de St. Anselme*, C. R. 1874, 3 R. L. 454, 1 R. C. 480.

25. —— —— And if acting in good faith. *Commissaires d'Ecoles* vs. *St. Pierre*, S. C. 1879, 2 L. N. 346.

26. —— —— Catholic Priest.—A Catholic priest, who, in the exercise of his public functions, celebrates a marriage, is entitled to a month's notice of action when being sued in damages for having married a minor without the consent of her parents. *Robert* vs. *Bean*, Q. B. 1869, 1 R. L. 150, 13 L. C. J. 225.

27. —— —— Church Constable.—A church constable, sued for damages arising out of an act done by him in the performance of his official duty, is entitled to notice of action under Art. 22 of the Code of C. P. *Wilhelmy* vs. *Brisebois*, C. C. 1883, 27 L. C. J. 175, 12 R. L. 424, 6 L. N. 276.

28. —— —— Special Constable.—Also a special constable. *Legault* vs. *Lee*, S. C. 1881, 26 L. C. J. 28.

29. —— ——Municipal Corporation.—A municipal corporation is not an officer or person filling the duties of such, or possessing public functions in the sense of Art. 22 C. C. P., so as to entitle it to a month's notice of action (3) *Blain* vs. *Corp. of Granby*, C. R. 1873, 5 R. L. 180, 18 L. C. J. 182; *Bell* vs. *Corp. of Quebec*, S. C. 1876, 2 Q. L. R. 305;

(2) It was held in *Blain* vs. *Corp. of Granby* (Ct. Rev. 1873, 18 L. C. J. 182), that a corporation is not entitled to one month's previous notice of action under Art. 22 C. C. P.; but Johnson J. pointed out that "corporations also may be conceivably treated as public officers, because they execute duties imposed upon them individually. In this sense it is reported in the Revue Critique, page 480, where the Court held a Board of School Commissioners entitled to notice."

(3) Contra, *Craig* vs. *Corporation of Leeds*, C. R. 1871, 3 R. L. 444.

For the recovery of the penalty stated in Art. 793 of the Municipal Code, as amended by Art. 6169 R. S. Q., fifteen days notice of action must be given in writing to the Secretary-Treasurer of the corporation, which notice may be given by registered letter, and shall be at the cost of the person giving it. See "Action—Notice of—Municipal Corporation."

Bartley vs. *Boon*, C. R. 1874, 19 L. C. J. 10; *Dupras* vs. *Corp. du Village d'Hochelaga*, C. S. 1881, 12 R. L. 35. But see note to No. 24 *supra*.

30. —— —— Municipal Councillor.—A municipal councillor sued in damages for having, as a member of the sidewalks committee, constructed a sidewalk on the plaintiff's property, is entitled to a month's notice of action. *Filiatrault* vs. *Methot*, C. R. 1890, 18 R. L. 525.

31. —— —— Registrar.—In an action against a registrar, for error in certificate of registration of hypothec. *Held* to be a public officer and entitled to notice of action, and the return of such notice not having been regularly signed, would, in itself, be fatal to the action. *Grenier* vs. *Roudeau*, C. R. 1882, 8 Q. L. R. 323.

32. —— —— Road Inspector.—An inspector of roads and ditches is a public officer, and is entitled to a month's notice of action, when sued in damages for acts within the scope of his duty. *Jetté* vs. *Choquette*, Q. B. 1857, 7 L. C. R. 63, 5 R. J. R. Q. 177, 1 L. C. J. 148.

33. ———— Sheriffs.—(and see *supra* No. 23). A sheriff, sued in an action of revendication, coupled with a demand of damages for neglecting to obey the order of the Court to deliver up the property, cannot claim the notice of action prescribed by 14 and 15 Vic., ch. 54 (Art. 22 C. C. P.), because that statute only applies where that officer is acting within the line of his duties, or is at least under a reasonable and *bona fide* opinion that he is so acting. And (by the Chief Justice) the statute only applies in actions to recover *damages* from the officer, arising from acts performed in the course of his public functions, and not to actions wherein the demand for damages is only accessory to the principal demand based upon the inexecution of an obligation imposed by law or by stipulation. (1) *Irwin* vs. *Boston*, Q. B. 1857, 2 L. C. J. 171, 7 L. C. R. 433, 4 R. J. R. Q. 392.

34. ————————.—In the present case a sheriff was held not entitled to notice of action for damages for using coarse and insulting language, and for refusal to communicate to the plaintiff the name of a bailer upon certain immoveable property seized at the suit of plaintiff, because in using such language he was not *conscientiously* under the belief that he was thus performing his official duty, and it was not doubted by any of the judges that sheriffs are public officers within the meaning of the statute. *Pacaud* vs. *Quesnel*, Q. B. 1866, 10 L. C. J. 207.

35. —— —— Special Superintendent.—An action in disturbance and for damages against a special superintendent under the Municipal Code will be dismissed if the superintendent has not received notice of action as required by Art. 22 C. C. P. (2) *Hough* vs. *Corporation d'Irlande*, Q. B. 1885, 13 R. L. 581.

(*i*) ACTION, PRIVITY (LIEN DE DROIT).

I. Book Debts Advertised for Sale but withdrawn before Sale—Damages.
II. Cheques—Usage of Trade.
III. Contract Transferred. 1-3.
IV. Insurance Agent—The Assured.
V. Interfering in Contract.
VI. Notary—Fees—Adjudicataire.
VII. Physician—Services—Donor.
VIII. Principal and Agent.
IX. Recovery of Goods taken out of hands of Guardian. 1-2.
X. Recovery of Property illegally sold by Pledgee.
XI. Rights of Creditors of Insolvent against Parties indebted to the Estate.
XII. Sale of Immoveable—Warranty—Second Purchaser.
XIII. Stipulation in favor of Another.

(1) This holding of the Chief Justice's is sustained by the case of *Price* vs. *Percival* (K. B. 1824, 1 R. J. R. Q. 201—Stuart Rep. 179), where it was held that in an action against a collector of customs, to recover back money exacted by him as fees of office, he is *not* entitled to one month's notice of action under 28 Geo. 3rd, ch. 37, sec. 25 (Imperial). See also *supra* p. 27 note (1)

In an English case based upon a statute similar to our law in respect of notice of action, it was held that "where the principal object of an action against a local board of health is an injunction to restrain an immediate injury, it is not necessary to give a month's notice of the cause of action." *And it makes no difference that damages are claimed by way of subsidiary relief.* *Flower* vs. *Local Board of Low Leyton*, Ct. App. 1877, 5 Ch. D. 347.

Jessel M. R. said that the action was intended to apply to an action at law for damages, and its object was to give an opportunity to a local authority to make payment or tender of compensation for the damage sustained. (at p. 352).

And in *Bateman* vs. *Poplar District Board of Works*, it was held on the authority of the above case that notice, under sec. 106 of the Metropolis Local Management Act 1862, was not necessary in an action for an injunction to restrain a nuisance. C. A. 1886, 33 Ch. D. 361.

Also in *Foat* vs. *The Mayor, etc., of Margate*, Q. B. 1883 (11 Q. B. D. 239), it was held that sec. 264 of the Public Health Act 1875 (38 & 39 Vic. c. 55), which enacts that no writ or process shall be sued out against any local authority for anything done or intended to be done under the provision of this Act until one month after written notice of action, etc., and that any person to whom any such notice of action is given may tender amends to the plaintiff within one month after the service of such notice—does not apply to an action for the recovery of land.

(2) But see Contra *Doyon* vs. *Corporation de la Paroisse de St. Joseph*, 17 L. C. J. 193. No. 17 *supra*.

I. BOOK DEBTS ADVERTISED FOR SALE BUT WITHDRAWN BEFORE SALE—DAMAGES.

The defendant, in his quality of assignee to the insolvent estate of one D., advertised for sale in a newspaper the stock, book debts, etc., of D.'s estate. The plaintiff relying upon the advertisement came to St. Albans to bid upon the book debts. Said book debts had, however, been largely collected before the date of sale, and were therefore not put up at auction. Thereupon the plaintiff sued the defendant to recover from him the amount of his expenses in going to St. Albans. *Held*, that there was no privity of contract between the parties. *Dussault* vs. *Bélard*, C. C. 1885, 11 Q. L. R. 69.

II. CHEQUES—USAGE OF TRADE.

There is a privity of contract created by the usage of trade between banks and the holders of cheques drawn on them. *Mosher* vs. *Molson's Bank*, S. C. 1879, 2 L. N. 166.

III. CONTRACT TRANSFERRED.

1. Where two butchers make a contract, by which one cedes to the other a contract he has to supply meat, and such contract is terminable at the will of the party to be supplied, no action will lie against the transferor if the contract is terminated by the party to be supplied. *Bayard* vs. *Versailles*, Montreal, Q. B., Dec., 1875, Ram. Dig. 18.

2. Where a contract to supply flour was transferred to another firm, and they agreed to carry on the business, on condition of cash on delivery or security on draft at 30 days, no action will lie by the party giving the order against the second party for insisting on these conditions, there being no privity between them, and no ratification by the former. *Tourigny* vs. *Wheeler*, Q. B. 1884, Ram. Dig. 552, in appeal from Ct. of Review, 9 Q. L. R. 198.

3. An agreement by several persons with the proprietor of a cheese factory, to supply the proprietor with milk under certain conditions, does not give to the transferee of the cheese factory with all rights appurtenant thereto, a right of action against any of the said milk suppliers for breach of contract. *Beaubien* vs. *Bernatchez*, Q. B. 1886, 14 R. L. 193, reversing S. C. 1885, 13 R. L. 281, reported *sub. nom. Bernatchez* vs. *Beaumont*.

IV. INSURANCE AGENT—THE INSURED.

There is no privity of contract between an agent of an insurance company and a person who, through the medium of such agent, takes out a policy in the company he represents. *Duerlay* vs. *Renault*, S. C. 1890, M. L. R., 6 S.C. 205.

V. INTERFERING IN CONTRACT.

One M., carrying on the business of packing meat under the name of the North American Packing Co., made a contract with P. of Paris, for the delivery of about 150,000 kilograms of boiled meet, and he shipped to P. late in February, 1876, about 50,000 kilograms, of the value of $16,143. The respondents then discounted for him a draft on P. for $13,943.30, taking as security the bill of lading of the meat so shipped, thus leaving an estimated margin reverting to M. of $2,200. P. refused acceptance of the draft, and the beef was, in October, 1876, sold for the benefit of the bank as holder of the bill of lading, realizing an amount insufficient to pay the advance made by respondent to M. Before the sale the respondents claimed payment of the entire draft from the appellant, offering back to him the meats they held as security for the draft. The appellant refused to pay it, on the ground that he had never undertaken to pay the draft, and had nothing to do with it, his interest being only in the margin of the shipment of the meat after the draft had been paid out of it.—*Held*, reversing the judgment of the first Court, that he was not liable. *Hood* vs. *Bank of Toronto*, Q. B. 1880, 3 L. N. 234.

VI. NOTARY—FEES—JUDICIAL SALE.

A stipulation made in the conditions of sale connected with the judicial disposal of immoveables, that the purchaser shall be obliged to pay, in addition to the price of adjudication at the time of the execution of the deeds of sale, to the notary superintending the same as *commis*, a commission of four per cent., creates no privity of contract between the notary and the purchaser so as to give rise to a right of action in favor of the former. *Doucet* vs. *Pinsonneau*, Q. B. 1878, 23 L. C. J. 163.

VII. PHYSICIAN—DONOR.

Where a doctor attends a donor, he has a direct action against the donee for the value of

his services where the latter has by the deed of donation undertaken in the event of the donor's illness to call a doctor and pay his fees. *Laporte* vs. *Gravel*, S. C. 1889, 17 R. L. 164.

VIII. PRINCIPAL AND AGENT.

(See also under title AGENCY.)

By the Judgment of the Supreme Court in this case, which was, however, decided on other grounds, it was held by Fournier and Henry J.J., that a valid action could not be instituted by an undisclosed principal against third parties contracting with the former's representatives; Strong J. held that such action could be taken. *Hudon* vs. *Can. Shipping Coy.* 13 Can. S.C.R. 402 (1886).

The affirmative was also maintained by Davidson J. in *Mackill* vs *Morgan*, 1 Que. (S.C.) 535, which was reversed in appeal on another point.

IX. RECOVERY OF GOODS TAKEN FROM GUARDIANS.

1. Action by plaintiff, alleging that defendants had unlawfully sold, and converted to their own use, certain effects which the plaintiff had caused to be seized in another case under an attachment for rent, and which the guardian had placed temporarily in the charge of the present defendants; and praying that they be condemned to pay the value of such effects to the extent of the balance due to plaintiff on the judgment maintaining the attachment. *Held*, reversing, that plaintiff had a right of action against defendant. *Morris* vs. *Miller*, C. R. 1886, M. L. R., 2 S. C. 476, 31 L. C. J. 209.

2. When a third party unlawfully takes away a sewing machine which was under seizure, thereby preventing its sale by authority of justice, the party who made the seizure has a right of action against him for the return of the machine to the guardian or payment of its price. *Savage* vs. *Singer Manufacturing Co.*, C. C. 1886, 9 L. N. 203.

X. RECOVERY OF PROPERTY ILLEGALLY SOLD BY PLEDGEE.

An obligation having been transferred merely by way of collateral security for a debt, the pledgee sold the obligation so transferred to the defendant, who, with knowledge of all the facts, collected the full amount thereof from the debtor.

Held, that the sale by the pledgee was a nullity under C. C. 1487, and that the pledgee might maintain an action against the defendant to recover the amount received by him in excess of the debt secured by the pledge. *Lelue* vs. *Giroux*, C. R. 1886, M. L. R., 2 S. C. 170.

XI. RIGHTS OF CREDITOR OF INSOLVENT AS TO PARTIES INDEBTED TO THE ESTATE.

The plaintiff sued, setting up that he was a creditor of the insolvent firm of H. H. & Co., and alleging that the defendants had in their possession large sums arising from the sale of collateral security deposited with them for paper discounted for that firm before its insolvency, and which was not met at maturity; that the firm of H. H. & Co. had become insolvent, and had assigned in trust all its rights and assets to one Stevenson, in which assignment the plaintiff and defendants had acquiesced, and plaintiff prayed that an account might be rendered to him or the assignee, and the balance due H. H. & Co.'s estate paid in for the benefit of the creditors as their common pledge. The defendants demurred to this declaration on the grounds that no privity of contract between plaintiff and defendants was alleged; that the only party entitled to sue was the firm of H. H. & Co., or their legal representative, it not being alleged that plaintiff was such; that the alleged insolvency and assignment did not prevent the firm of H. H. & Co., or the assignee bringing suit; nor did the assignment give plaintiff any greater rights than he would have had otherwise; that there was no fraud alleged, and that therefore no ground or right of action on plaintiff's behalf was disclosed. At the argument it was submitted on behalf of the defendants that the plaintiff must either sue in his own right or as representing his debtors, H. H. & Co. As to his own rights he had none as against defendants, between whom and himself there was no privity or legal right of action. The rights of H. H. & Co. he did not pretend to be subrogated in, and moreover he expressly alleged that they were all vested in the assignee. C. C. 1031 differs from the Code Napoléon, Art. 1166, the last paragraph of which does not include the words, "when to their prejudice he refuses or neglects to do so." The essentiality of the allegations of the debtor's neglecting or refusing to exercise his rights to the creditor's prejudice was a question even in France under the Code Napoléon as it stands, and no doubt can exist

(1) As to the English law on this point, see *Browning* vs. *Provincial Ins. Co. of Canada*, 5 P. C. App. at p. 272.

in Quebec, inasmuch as our Code expressly lays it down. If it were possible for plaintiff to obtain the money or an account without pretending that he was exercising H. H. & Co.'s rights, it could only be done by a seizure in the hands of third parties. Authorities in support of these positions are found under Art. 1031 C. C. The plaintiff's counsel in reply urged that he was exercising his own rights, privity being entirely unnecessary. Art. 1981 of the Civil Code provides that the goods of a debtor are the common pledge of his creditors, and plaintiff was exercising his rights in this respect. That defendants had got into their possession property of the firm of H. H. & Co., in which plaintiff was entitled to share as creditor, and that in their refusal to recognize his rights he was entitled to bring an action against them to compel them to do so. The demurrer was dismissed. (C. C. 1981, and 7 L. N. 271. *Boisseau & Thibaudeau*, discussed and followed.) *Thompson* vs. *Molsons Bank*, S. C. 1885, 8 L. N. 363, confirmed in Q. B. and Supreme Court, 16 Can. S. C. R. 664, 1889.

XII. SALE OF IMMOVEABLE—WARRANTY—SECOND PURCHASER,—ART. 1023 C.C.

The purchaser of an immoveable has no action against a second purchaser of the same immoveable, founded on the allegation that the second purchaser undertook, by a counter-letter, to warrant the vendor against the claims of the first purchaser. *Houle* vs. *Melançon*, S. C. 1891, M. L. R., 7 S. C. 275.

XIII. STIPULATION IN FAVOR OF ANOTHER.

Held, that one in whose favor a stipulation is made by another may bring an action to enforce it, though himself not a party to the contract. *Brisbin* vs. *Campeau*, S. C. 1877, 21 L. C. J. 16.

(*j*) ACTION, SUSPENSION OF.

I. By Death. 1-2.
II. In Criminal Matters—Civil Action Pending.
III. To Determine Issue Common to Several Actions.
IV. Until Costs of Former Action Paid. See under title "Costs".
V. Until Issue in Another Case Decided.

I. BY DEATH OF PARTY—EXPERTISE.

1. If one of the parties die pending an inquiry by experts, their proceedings must be staid until there is a continuance of the suit. *Tuché* vs. *Levasseur*, K. B. 1810, 3 R. de L. 358.

2. An action *ex delicto*, which is joint and several against several persons, is not suspended as to the survivors by the suggestion of the death of one of the defendants, as such action may be brought against any one or more of the persons jointly and severally liable. *Allan* vs. *McLagan*, Q. B. 1877, 1 L. N. 4.

II. IN CRIMINAL MATTERS—CIVIL ACTION PENDING.

Art. 534 of the Criminal Code now enacts that "after the commencement of this Act no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence."

III. TO DETERMINE COMMON ISSUE.

Where several plaintiffs are each claiming a right against the same defendant, or where several defendants are sued separately by the same plaintiff, and it appears that there is but a single question on the determination of which all the suits must depend, the Court may, in its discretion, grant an injunction to stay proceedings upon the several contestations until the question involved therein shall be determined in an action brought specially for the purpose of testing it. *North British & Mercantile Fire & Life Ins. Co.* vs. *Lambe*, S. C. 1882, 27 L. C. J. 222.

IV. UNTIL COSTS OF FORMER ACTION PAID. (See under title "Costs.")

V. UNTIL ISSUE IN ANOTHER CASE DECIDED.

Motion by defendants, to suspend the proceedings in this cause until the decision of the issues in the cause of *Arnoldi et al.* against *Tiffin*. It is alleged that in the last named suit the defendants seek to set aside or modify the deeds invoked by the plaintiffs in this suit. The declaration in the suit of *Arnoldi et al.* against *Tiffin et al.* is produced, and shows in effect that the representatives of the late Mr. Furniss are questioning the deeds invoked in this case, and there can be very little doubt

that they have a right to urge their pretensions in an answer to the plaintiffs; but the question is, whether they have sought the right remedy. There seems to be no question that at an earlier stage of this case he might have obtained leave to call on the parties to this deed to come into this suit to hear the deeds declared null. But he never sought this permission. He took out a new action, and some time afterwards he asked leave to reunite the later case to this one. Leave was refused both by the Court below and here. Defendants now wish this cause to be suspended till the other is decided. I think there is no ground for such a proceeding. *Directors of St. Bridget's Asylum* vs. *Arnoldi*, Q. B. 1878.

(*k*) ACTION, UNION OF CAUSES.

I. Attachments — Simple, and in the Hands of Third Parties.

II. Causes in Different Districts.

III. Lease—Sale—Review—Appeal.

IV. Qui Tam Actions—Elections.

V. Questions in Dispute, and Evidence same in Several Cases.

VI. When allowed. 1-2.

I. ATTACHMENTS—SIMPLE AND IN THE HANDS OF THIRD PARTIES.

After the hearing on the merits, the plaintiff took attachments, both simple and in the hands of third parties, for the same debt as sued for in the first instance. The defendant moved to discharge the *délibéré*, with a view to having the two cases or proceedings united. Motion granted. *Watson* vs. *Thompson*, S. C. 1879, 2 L. N. 142.

II. CAUSES IN DIFFERENT DISTRICTS.

The Superior Court sitting in one district has no authority to order that the record of a cause pending in such district be transmitted to another district, to be joined to the record of a cause therein pending. *Cie. du Chemin de Fer Baie des Chaleurs* vs. *MacFarlane*, S. C. 1891, M. L.R., 7 S. C. 272.

III. LEASE—SALE—REVIEW—APPEAL.

The appellant sued the respondent under the provisions of the Lessor and Lessees Act for rent, and in ejectment from certain premises leased to respondent by appellant. The respondent met this application by a plea, in which he in effect set forth that the deed of lease resulted from a deed of sale made on the same date, of the house mentioned in the deed, and of other property, and which he was induced to make by the fraud of appellant; that the deed of sale ought to be declared null, and that, in being declared null, the lease also must fail, and with it appellant's demand for rent and in ejectment. Respondent also brought a direct action to set aside the deed of sale as regards all the property so sold by him to appellant, alleging the same facts. Both cases were in the Superior Court, and both came at the same time before the same judge, the case under the Lessor and Lessees Act on the merits, and the suit to set aside the deed of sale on a demurrer to a plea of *lis pendens*. *Held*, that they were properly united. *Chrétien* vs. *Crowley*, Q. B. 1882, 5 L. N. 268, & 2 Q. B. R. 385.

And where two cases have been united in the Court of first instance, the party who considers himself aggrieved by the judgment thereon cannot again separate them for the purpose of bringing one to review and one to appeal, but must inscribe them together either in review or in appeal. *Ib.*, 1 Q. B. R. 391, 1881.

IV. QUI TAM ACTIONS—ELECTION ACT.

There is connexity between several *qui tam* actions taken for different offences arising under the Election Act, but during the same election; such actions can therefore be united by order of the Court. *Larivière* vs. *Choquet*, S. C. 1882, M. L. R., 1 S. C. 461.

V. QUESTIONS IN DISPUTE, AND EVIDENCE SAME IN SEVERAL CASES.

Where the questions in dispute and the evidence are substantially the same in several actions, and the respondents are identical, such actions can be united on motion. *Garth* vs. *Banque d'Hochelaga*, Q. B. 1886, 14 R. L. 548.

VI. WHEN ALLOWED.

1. Two causes may be united, on the demand of one of the parties, when there is sufficient connection between them. *Hébert* vs. *Quesnel*, S. C. 1866, 10 L. C. J. 83.

2. The joinder of two causes cannot be allowed when it would have the effect of uselessly complicating the procedure and retarding the trial.* *Evans* vs. *Evans*, S. C. 1889, M. L. R., 5 S. C. 414.

(*l*) ACTION—WHERE IT MAY BE BROUGHT.

I. Cases holding that the *Whole* Cause of action must have arisen outside the District of Defendant's Domicile to give Jurisdiction in such Outside District. 1-23. (See also cases under No. IV.)

II. Cases holding that Defendant can be made to appear where Right of Action has been perfected, where Breach of Contract arises, or where the Wrong is done. 1-12.

Same.—Where Defendant resides outside the Province. 1-7. (See also under title "Absence."

III. Public Officers (See Action—Notice of—Public Officer.)

IV. Where Document Sued on Dated, or declared to be Made and Signed, at other than the Real Domicile of Defendant. 1-6.

V. Where Note or other Promise to Pay made Payable, there the Action may be taken. 1-8.

VI.—Where several Defendants. 1-3. See also "Service".)

I. CASES HOLDING THAT THE WHOLE CAUSE OF ACTION MUST HAVE ARISEN OUTSIDE THE DISTRICT OF DEFENDANT'S DOMICILE TO GIVE JURISDICTION IN SUCH OUTSIDE DISTRICT.

1. General Principles.—**Art. 34 C. C. P.**—To give a right of action in a district other than that in which the defendant has his domicile, everything which constitutes the right of action must have taken place in such district, and several actions or causes of action belonging to different districts cannot be joined in order to bring the defendant from the jurisdiction of his domicile. *Archambault* vs. *Bolduc*, Q. B. 1881, 2 Dorion's Rep. 110; and *Faucher* vs. *Brown*, Q. B. 1881, 2 Dorion's Rep. 168.

2. ——**——**In an action against a defendant residing in another district than that in which the action is taken, the plaintiff must, upon declinatory exception, prove that the right of action arose in this district. *McCready* vs. *Prefontaine*, C. Ct. 1889, 18 R. L. 118.

3. Goods Ordered by Telegram.—Where a merchant, domiciled at S., asks by telegram from a merchant domiciled at M., a quotation for certain goods to be delivered at S., to which the merchant at M. telegraphs in reply, offering certain quantities at certain prices, and the merchant at S. thereupon responds, accepting the prices, but changing the quantities, upon which the merchant at M. ships in accordance with the last telegram, no complete right of action arises in the District of M., and an action brought in such District will be dismissed. *McFee* vs. *Gendron*, 1889, M. L. R., 5 S. C. 337.

4. ——**——**——**Letter.**—A sale effected by correspondence between the plaintiff and the defendant, residing in different districts, and delivery made in the plaintiff's district, payment to be by note payable in defendant's district, does not constitute a right of action arising in the plaintiff' district. *Warren* vs. *Kay*, 6 L. C. R. 492, R. J. R. Q. 153, S. C. 1856.

5. ——**——Through Travelling Agent.**—When goods are sold by the traveller of a Montreal merchant, by sample, at Isle Verte, Kamouraska, subject to ratification by the principal, and the sale is ratified by him, the cause of action arose at Isle Verte. (1) *Gault* vs. *Bertrand*, Q. B. 1881, 25 L. C. J. 340, confirming S. C., 24 L. C. J. 9.

* In *Foley* vs. *Turratt* (2 L. C. J. 108, 15 L. C. R. 245, Q. B. 1865), it was held by the Court of Appeal that while the courts have jurisdiction to consolidate causes on sufficient cause shown, yet where it was sought to consolidate four cases on promissory notes, all of which were due, and the pleas were identical, in order, among other reasons, to save the expense of issuing four commissions to examine witness instead of one, the Court refused to do so where the plaintiff resisted the application. (See also *Lafleurié* vs. *Chenard*, 6 Q. L. R. 12.) And in *Simard* vs. *Perrault*, it was held not competent to unite two causes together, on the ground that the matters and things in contest, in both cases, are identical. 1 L. C. J. 249 (S. C. 1857), 4 R. J. R. Q. 477.

(1) Judge Papineau in the Superior Court held that the right of action did not wholly arise in either of the districts, but partly in each. That Art. 34 of the C. C. P. has not changed the old law, which used the term "cause of action." To give the Montreal Court jurisdiction over defendant, the *locus droit* must have been completely formed in this district. (Confirmed unanimously by Queen's Bench.)

The case of *Clark* vs. *Etchey*, S.C. 1863, 9 L. C. J. 234, 14 L. C. R. 48, gives a conclusion directly contrary to that of *Gault* vs. *Bertrand*, but for the reason that the judge thought that in the case of an order given in Toronto, partly by letter and partly through a travelling agent, for goods in Montreal, the whole cause of action arose in Montreal. The learned judge remarked, that had he taken the view that part of the cause of action had arisen in Toronto, he would have held that the Montreal Courts had not jurisdiction.

6. —— —— —— —— —— ——. The plaintiffs, merchants doing business in Montreal, sued the defendant in the district of Montreal for a balance of $86.96 for goods sold and delivered. The defendant was described in the writ as of New Edinburgh, in the Co. of Carleton, Ontario; and he was served personally in the city of Ottawa. The goods had been sold on an order obtained from defendant at his domicile by a travelling agent of plaintiffs, and ratified by them in Montreal. Defendant excepted to the jurisdiction—*Held*, following *Gault* vs. *Bertrand*, that the right of action was not in Montreal, and action dismissed. *Desmarteau* vs. *Mansfield*, S. C. 1880, 3 L. N. 136.

7. —— —— Where goods are bought in one district and delivered in another, the purchaser cannot be sued in the district where the purchase was made if it is not his domicile and he was not personally served in the said district. *Ricard* vs. *Leduc*, C. Ct. 1862, 6 L. C. J. 116.

8. **Subscription to Stock.**—When a subscription to the capital stock of an incorporated company, having its head office in the district of Montreal, is made by a defendant domiciled in another district, and who has subscribed to this stock in such other district, the defendant cannot be summoned to appear in the district of Montreal. (2) *National Ins. Co.* vs. *Paige*, Q. B. 1879, 24 L. C. J. 187, 2 L. N. 93.

9. —— —— ——. Where a person, in the district of Kamouraska, signed an application to a company in Montreal, for shares, and the directors allotted the shares to him at Montreal—*Held*, in an action for calls, that the whole cause of action did not arise in the district of Montreal. *Ross* vs. *Roulcau*, C. R. 1885, M. L. R., 1 S. C. 424.

10. —— —— ——. Where shares in a company were subscribed for in a district other than that in which the company had its head office, the cause of action originated in the district where the shares were subscribed to. The allotment by the Company being in one district, and the consent of the subscriber being obtained in another, the whole cause of action could not be said to have originated at the place where the company had its head office. *Ross* vs. *Fontaine*, C. R. 1885, 30 L. C. J. 297.

(2) Dorion J. remarked: "The appellants say that the stock was allotted by the directors here in Montreal. We think the whole cause of action did not arise here—part of the cause was the promise to pay which was given in the District of St. Francis."

11. **Meaning of Term "Cause of Action."**—The words "cause of action" mean the whole cause of action—that is "everything that is requisite to show the action to be maintainable." *Connolly* vs. *Brannan*, S. C. 1875, 1 Q. L. R. 204.

12. —— —— —— —— —— ——. "—Where a party is sued in a district other than that in which he resides, on the ground that the cause of action arose in such a district, it is necessary that the whole cause of action should have arisen therein. *Sénécal* vs. *Chenevert*, Q. B. 1861, 6 L. C. J. 46.

13. **Contract of Hire and Lease of Work.**—R. agreed verbally with H., at Nicolet, to tow his raft from Nicolet to Quebec, upon which H. telegraphed to his agent in Quebec, to instruct the agent of R. in Quebec to send up R's steamboat from Quebec to perform the towage in question, which was done, and the raft towed to Quebec accordingly—*Held*, that the cause of action did not arise in Quebec so as to give the court there jurisdiction; the cause of action means the whole cause of action or all the circumstances connected with the transaction which gave rise to the action. *Rousseau* vs. *Hughes*, S. C. 1857, 8 L. C. R. 187, 6 R. J. R. Q. 203.

14. —— —— —— —— —— ——. —A suit brought in the District of Quebec against a defendant residing at Moisic, in the District of Saguenay, for work done there under a verbal hiring at Quebec, will be dismissed on declinatory exception. *Trudel* vs. *Duval*, S. C. 1878, 4 Q. L. R. 180.

15. —— —— —— —— —— —— —— ——.—The Defendant, domiciled at Montreal, wrote to the plaintiff, a resident of Arthabaska, requesting him to take charge of his, the defendant's, lands at the latter place, and promising to indemnify him for his services—*Held*, that an action for the value of such services brought in the district of Arthabaska was properly dismissed on declinatory exception. *Cloutier* vs. *Lapierre*, C. R. 1878, 4 Q. L. R. 321.

16. **Damages—Breach of Contract.**—Where the action is in damages for failure to perform a contract, the debtor may be sued at the place where the contract is made, though the failure to perform occurred in another district. *Quebec Steamship Co.* vs. *Morgan*, Q. B. 1883, 6 L. N. 324.

17. —— —— **Goods Ordered—Sale—Action of Damages.**—*Held*, where both the contract of sale and the delivery of the goods

are made and completed in Ontario, where the vendor's domicile is, the purchaser's right of action in respect of such contract arises there; and the fact that the purchaser, who is domiciled in another province, subsequently complains of inferiority of quality, and claims damages, does not entitle him to implead the vendor before the court of the plaintiff's domicile, where the demand is not served upon the defendant personally within such jurisdiction. *Vipond* vs. *Grimmon*, S. C. 1893, 3 Que. 536.

18. —— —— Libel.—In an action of damages for libel, in order to give jurisdiction to a court outside the district of the defendant's domicile, it is necessary to limit the allegation of libel and damages to the district in which it is sought to make the defendant appear, so as to make the whole cause of action arise there. *Blumhart* vs. *Larue*, Q. B. 1885, 11 Q. L. R. 252; *Barthe* vs. *Rondbard*, C. R. 1891, 17 Q. L. R. 26; *Tremblay* vs. *White*, S. C. 1877, Dec. 24, Stuart J.

19. —— —— In Two Districts.—In an action of damages for overflow of water caused by a dam erected across a river dividing two districts, and which was therefore situated in two districts, the defendant could not be sued in that one of the above districts in which he was not domiciled, the whole cause of action not having originated in that district. *Corporation de Lambton* vs. *Milliken*, C. R., 26th Feb., 1889.

19*a*. —— —— —— —— ——. Where plaintiff bought a sleeping-car ticket from New York to Montreal, and being expelled from the sleeping-car while on the New York side of the boundary line, took a place in an ordinary car until he arrived at Montreal—*Held*, that although the expulsion took place beyond the province line, yet, as it continued until the plaintiff reached Montreal, the whole cause of action arose in this province. *New York Central Sleeping Car Co.* vs. *Donovan*, Q. B. 1882, M. L. R., 4 Q. B. 392.

20. Advances to Get Out Timber.—Action issued in the district of Quebec, and served on the defendant at his domicile in the district of Aylmer. Defendant filed a declinatory exception, setting up that the whole cause of action did not arise at Quebec. The original contract, which was for advances to get out timber, was made at Quebec. It being found advantageous to sell the timber in England, the parties subsequently agreed that the plaintiff should send the timber there to be sold, the plaintiff paying the expenses at Quebec and in England. Exception dismissed and leave to appeal refused. *Conroy* vs. *Ross*, Q. B. 1883, 6 L. N. 154.

21. Obligation—Place of Payment.—Obligation executed by the defendant at Montreal, where he then resided. No place stipulated in deed for payment. When it fell due defendant resided in district of St. Francis, where he still resided at time action was taken—*Held*, that the right of action for the recovery of the debt originated at Montreal, and not at the place where demand of payment had to be made. *Duchesney* vs. *Lavergne*, C. R. 1880, 25 L. C. J. 228.

22. Transfer of Shares—Notarial Demand of Retransfer Made at Another Place.—The declaration alleged a transfer by plaintiff to defendant, at Quebec, of certain railway shares, which the latter, by *contre-lettre* signed and dated there, undertook to return within two months, upon payment of $50,000. It further alleged a notarial demand of retransfer, accompanied by tender of the amount named, made upon the defendant at Montreal, and his refusal to return the shares, and that, in fact, he had sold and converted them to his own use. Conclusion for $200,000 damages. The writ issued from the Superior Court at Quebec, and was served upon the defendant in Montreal, his domicile, and he declined the jurisdiction. *Held*, that the cause of action had arisen in the District of Quebec, and declinatory exception dismissed with costs. *McGreevy* vs. *McDougall*, S. C. 1886, 12 Q. L. R. 110.

23. Insurance Policy.—Where a Life Insurance Co., having its home office in New York, its principal office for the Province of Quebec in Montreal, and a local office in Quebec, had, upon application made in Quebec, issued a policy to a person residing in that city, and being sued for the amount of such policy, was required by process, served at the Montreal office, to appear and plead before the Superior Court at Quebec, and declined the jurisdiction—*Held*, that it was incumbent on the plaintiff to show that the policy had been executed in the district of Quebec; that the proof adduced was insufficient for that purpose; that on the contrary there was reason to presume that the policy had been made and executed at the home office in New York, and that the declinatory exception must in conse-

quence be maintained. (1) *Vezina* vs. *The New York Life Insurance Co.*, 1 Q. L. R. 207, S. C. 1876; and *Banque d'Ontario* vs. *Cie. d'Assurance le Standard*, 15 R. L. 380.

II. CASES HOLDING THAT DEFENDANT CAN BE MADE TO APPEAR WHERE RIGHT OF ACTION HAS BEEN PERFECTED, WHERE BREACH OF CONTRACT ARISES, OR WHERE THE WRONG IS DONE.

1 **Goods Ordered by Letter.**—A person residing in another district may be sued in Montreal, for the price of goods, the greater part of which were bought by him in Montreal, and the remainder ordered by letter. *Cartwright* vs. *McCaffrey*, S. C. 1890, M. L. R., 7 S. C. 41.

2. —— —— **through Travelling Agent.**—Where the order for the goods which formed the consideration of the notes sued on was obtained in another district by the travelling agent of a Montreal firm, subject to the approval of his principals, and the order was accepted by the firm in Montreal, and the goods were delivered at the railway station there to the purchaser, who paid the freight, the right of action originated in Montreal. *Guardinger* vs. *Portrand*, S. C. 1879, 24 L. C. J. 8.

3. —— —— —— —— —— Where an order for goods has been given at Kamouraska to a travelling clerk leaving commission to act from various houses in Montreal (including that of the vendor), and has been accepted afterwards by one of such houses, and the goods delivered at the station in Montreal of the G. T. R. and forwarded by that route to the purchaser residing at Kamouraska, the right of action originated at Montreal. *Lapierre* vs. *Gauvreau*, C. of R. 1873, 17 L. C. J. 241.

4. —— —— —— —— —— When an order for goods has been given at Kamouraska to a travelling agent of a mercantile house in Montreal, on the exhibition of samples, and has been afterwards accepted by the Montreal house, and the goods forwarded by railway, according to the instructions of the purchaser, who paid the freight, the right of action originated at Montreal. *Thompson* vs. *Dessaint*, S. C. 1870, 14 L. C. J. 184.

5. —— —— —— —— —— Where a party in Quebec gave an agent of the plaintiff there an order for goods, to be supplied by the plaintiffs in Montreal, according to a sample exhibited by the agent, and the order was filled, and the goods supplied at Montreal, the right of action arose in Montreal. *Joseph* vs. *Paquet*, C. C. 1870, 14 L. C. J. 186.

6. —— —— **of Resident Agent of Foreign Company.**—G., absconding from Canada, and since domiciled in New York, was arrested at Quebec on a writ of capias upon a visit to Canada. G. had bought goods at Montreal from the resident agent of a Boston company, and the invoices were sent to the agent, so that the defendant G. could not have had the goods from the custom-house in Montreal without applying to the agent, but they were at defendant's risk the moment they were placed on the railroad at Boston. It was held that the cause of action arose in Montreal. *Gregory* vs. *Boston Glass Company*, Q. B. 1865, 9 L. C. J. 134.

7. **Breach of Contract—Damages.**—Plaintiff was hired at Montmagny to work on the Canadian Pacific Railway, in Ontario. He sued the Canadian Pacific Railway in Montmagny, for wages, loss of time and damages for breach of contract—*Held* (confirming the judgment of Superior Court), that the act which gave the plaintiff his cause of complaint was not the contract made in Montmagny, but the alleged breach which occurred in Ontario; that the right of action arose in Ontario, where the parties had agreed to act and where the wrong was done; and that the declinatory plea should be maintained. *Meserrier* vs. *Canadian Pacific Railway Co.*, C. R. 1885, 11 Q. L. R. 161.

8. **Newpaper Subscriptions.**—The proprietor of a newspaper can sue subscribers for the recovery of their subscriptions in the district where the newspaper is published and is mailed to subscribers. That is where the right of action arises. *Le Nouveau Monde* vs. *Lafferrière*, C. Ct. 1877, 7 R. L. 543.

9. —— The same was held in *Foote* vs. *Freer*, C. Ct., 15 L. C. R. 46, but no subscription, either actual or implied, was proved, and action was dismissed.

10. **Shareholder—Action against by Creditor of Company.**—In an action by a

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1. But see *O'Mally* vs. *Scottish Commercial Ins. Co.*, 4 Q. L. R. 226. In this case, however, the policy was made payable at Quebec, and for that reason, the holding that the action could be taken at Quebec, would now certainly apply, in view of Art. 85 C. C., as amended 52 Vict., c. 18. And *Mutual Fire Ins. Co. of Joliette* vs. *Desrosiers*, 4 L. N. 220, where the policy was dated at Montreal, which would be equivalent to election of domicile there.

creditor of a railway company against a shareholder in such company, to recover the amount unpaid on his shares, the cause of action arose at Montreal, where the Company had its principal office, and where judgment was rendered for the debt due by the company, and execution was also issued, and not at Bedford, where the shareholder subscribed for his shares. *Welch* vs. *Baker*, S. C. 1876, 21 L. C. J. 97.

11. Conservatory Attachment-Fraud.—Notwithstanding that the defendant resides in a different district to that in which a conservatory attachment has issued, the proceeding is nevertheless legal, if the fraudulent circumstances which gave rise to the attachment occurred there. *Coulombe* vs. *Lemieux*, S. C. 1865, 9 L. C. J. 73.

12. Attachment in Revendication.—Where the plaintiff, domiciled in the district of M., revendicates as his property goods in the possession of a defendant domiciled in another district, and alleged to be illegally detained by him therein, the action being based on defendant's possession of the goods, should be brought in the district of his domicile. *Goldie* vs. *Rasconie*, 1 Que. 385 (Q. B. 1892, confirming M. L. R., 6 S. C. 195.

Same.—WHERE DEFENDANT RESIDES OUTSIDE THE PROVINCE.

1. *By articles 68 and 69 of the Code of Civil Procedure, as amended R. S. Q. Art. 5867, and 53 Vic. c. 55, s. 3, it is no longer necessary that the defendant should have property in the Province of Quebec, in order to give the Courts there jurisdiction over him. It is only necessary that the "cause of action" should have arisen there, and this whether the defendant resides in a foreign country or in one of the other Provinces of Canada.* (1)

Racette vs. *Bate*, S. C. 1893, 1 Que. 391.

2. Goods sold.—*Held:* An action for the price of goods sold and delivered at Montreal may be brought in the District of Montreal, though the defendant be domiciled in the province of Ontario and be served therein; and since the amendment of Arts. 68 and 69 by 53 Vic. c. 55, it is no longer necessary in such case that the defendant should have property in the Province of Quebec. *Racette* vs. *Bate*, 4 Que. 391, S. C. 1893.

3. —— **Ordered by letter.**—Where goods are ordered by letter written in the Province of Ontario, and addressed to a merchant in the city of Montreal, and the goods are shipped by the vendor at Montreal, addressed to the purchaser in Ontario, a declinatory exception will not lie to an action instituted at Montreal for the recovery of the price. *Gamma* vs. *Sauvé*, 10 L. N. 211, C. C. 1887, and *Gratton* vs. *Brennan*, S. C. 1887, 15 R. L. 713; M. L. R. 3, S. C. 95.

4. —— —— **Overdraft.**—Where a consignee in Montreal, of goods consigned to him from Upper Canada, accepts a draft drawn by the consignor in Upper Canada, in anticipation of product of sale, which subsequently proves to be less than the acceptance, the cause of action to recover back the excess of the amount paid under the acceptance over the net product of sale, arises in Montreal. *O'Connor* vs. *Raphael*, Q. B. 1867, 11 L. C. J. 123.

5. —— —— **Through Broker.**—Where goods had been sold by a broker in Toronto, and ratified and shipped in Montreal, the right of action arose in Montreal. *Prevost* vs. *Jackson*, C. C. 1880, 3 L. N. 136.

6. **Contract of Partnership abroad.**—In an action *pro socio* arising out of a partnership contracted in the Island of Jersey, and having its head office there, but carrying on its principal business and owning property in the District of Gaspé, the defendants who had never been domiciled in the said district were summoned through the newspapers to appear and plead thereto and declined the jurisdiction. *Held*, confirming court below, that the declinatory exception was well taken. *Gosset* vs. *Robin*, Q. B. 1876, 2 Q. L. R. 91. *See next case.*

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(1) It is noticeable that the term here used is "cause of action," not "right of action," as under Art. 34 C. C. P. Ramsay, J., in *Dreidz* vs. *Lapeyre*, 1 Dorion's Q. B. Rep. at p. 369, remarked: that it has been a question whether the change from "cause of action arose" before the Code to "where the right of action originated," really altered the law, or was merely another way of saying the same thing. He reviews the authorities on the point, and arrives at the conclusion that "cause of action" cannot seriously be contended as synonymous with "right of action," and holds that a "right of action" arises where there is a breach of the contract, where the parties have agreed to act, and where the wrong is done. The above cases appear to be in accordance with that doctrine. But when we come to cases decided expressly under Art. 69 or its equivalent, using the term "cause of action," we still find the Courts holding the same as under "right of action" in Art. 34. But those decisions which are cited under the heading "Cases holding that the whole cause of action must have arisen outside the district of defendant's domicile to give jurisdiction to such outside district." In so far as they are based on the law prior to the Code, must be regarded as the most consistent with the term used, viz., "cause of action," for those words undoubtedly mean—and have been so held from the earliest times in England—every fact which is material to be proved to enable the plaintiff to succeed. (Annual Practice, Eng., 1889-90, p. 396, *Cooke* vs. *Gill*, 8 C. P. 116; *Buckley* vs. *Hann*, 5 Exch. 43; *Boston* vs. *Wade*, 1 Q. B. D. 423; *Read* vs. *Brown*, 22 Q. B. D. 131.)

7. —— **Hiring abroad.**—Declinatory exception on the ground that the contract of hiring was not made as alleged in this Province, but in the Province of Ontario, and that the service, which was a personal service in Montreal, did not bring the defendant before the Court so as to give it jurisdiction. The defendant relied on *Gossel* vs. *Robin* (*supra*). *Per Curiam*, "*Gossel* vs. *Robin* was an action *pro socio* where the service depended upon the domicile of the party, and it was pretended that in such a case as that where the action was not purely personal, as it is here, that the defendants being absentees, and having their principal place of business in Jersey, where their property might have been liable to division under the judgment of Court, could be called in by advertisement, because they had property in Gaspé. Such a case as that is of course clearly distinguishable from this. Here the action is purely personal, as required by Art. 34 of the Code of Procedure, not mixed as it was there, and the terms of the judgment in that case leave no doubt of the ground upon which it rested. A personal action, however, follows the person, and a personal service in Montreal in such a case gives us under Art. 34 jurisdiction over it." *Lafrance* vs. *Jackson*, S. C. 1881, 4 L. N. 60.

IV. WHERE DOCUMENT SUED ON DATED OR SIGNED, ETC., AT OTHER THAN REAL DOMICILE OF PARTY
85 C. C.,—52 V. (Q.), c. 48.

1. *Held*:—Affirming the decision of Davidson, J. (1 Que. [S. C.] 360), Where a deed or writing, *whether commercial or civil* in its nature, is dated, or declared therein to be made and signed, at a place other than the real domicile of the party sought to be charged thereunder, he is considered to have made election of domicile at such place (if there be no indication of a place of payment), and an action based on the writing may be brought against him before the Court of his elected domicile. *Leclaire* vs. *Beaulac*, Q. B. 1892, 1 Que. 351. (1)

2. ——.—Where action was taken at Quebec on a promissory note purporting to have been signed at Quebec, though in fact signed at St. Luce in Rimouski. *Held*, that the defendant in signing the note and transmitting from St. Luce to Quebec to the plaintiffs, accepted the jurisdiction mentioned in said note, and the action originated at Quebec. *Danjou* vs. *Thibaudeau*, S. C. 1880, 6 Q. L. R. 351, Q. B. 1880, 1 Dorion, Q. B. 98.

3. ——.—Action on note dated Quebec made in another district. *Held*, following *Danjou* vs. *Thibaudeau* (*supra*), that action could be taken at Quebec. *Thibaudeau* vs. *Wright*, S. C. 1888, 14 Q. L. R. 134. To same effect, *Guaedinger* vs. *Bertraud*, Q. C. 1879, 2 L. N. 377.

4. ——.—The cause of action arises where the policy is dated and application accepted, and at the place where the head office of the company is situated, and not where the deposit note and application are made. *Mutual Fire Ins. Co.* vs. *Desrousell's*, S. C. 1881, 4 L. N. 220.

5. ——.—Where a sale of goods took place in a district other than the domicile of defendant, and was evidenced by a writing made at defendant's domicile but dated at place of sale, the right of action originated where the sale took place. *Riopelle* vs. *Flewry*, S. C. 1883, 12 R. L. 85.

6. ——.—An action may be brought in the district of Montreal, for recovery of the amount of a promissory note dated at Montreal, but which was in fact signed in the district of Ottawa where the promissor has his domicile. The promissor, in dating the note at Montreal, makes as it were an election of domicile at Montreal, and consents that the action for the recovery of the note be brought there. *Banque du Peuple* vs. *Prévost*, 1890, M. L. R., 6 S. C. 88: also *Leclaire* vs. *Beaulieu*, S. C. 1889, M. L. R., 5 S. C. 95.

V. WHERE NOTE MADE PAYABLE, THERE THE ACTION MAY BE TAKEN.

1. *Art.* 85 *of the Civil Code as amended makes the indication of a place of payment in any note or writing* (*wherever it is dated*) *equivalent to an election of domicile at the place so indicated* (52 *Vic., c.* 48). (1)

(1) The contrary decisions are *Railway & Newspaper Advertising Co.* vs. *Hamilton*, S. C. 1875, 20 L. C. J. 28. Where the contract, though bearing date at Montreal, is proved to have been made at Toronto, in Ontario, the cause of action arose in Ontario—Declinatory exception maintained.

Shupe vs. *Vasey*, S. C. 1878, 23 L. C. J. 295. Where goods are bought by sample at Richmond, the domicile of the purchaser, and an order therefor signed there (although dated at Montreal), and the goods forwarded by rail to Richmond, the cause of action will be held to have originated in Richmond.

(1) Thus rendering nugatory the following decisions: *Lockerby* vs. *Weir*, Mathieu, J., 1890 (S. C.), M. L. R. 6 S. C. 285, 19 R. L. 256. A bill of exchange made and dated at Montreal and payable there, but accepted by defendants at Cornicook, cannot be recovered on at Montreal. The action should be brought at the place where the bill was accepted.

Mulholland vs. *La Cie. de Fonderie*, 21 L. C. J. 114,

2. By dating and making payable a note at Montreal, though signed elsewhere, the promissor constructively makes for the purposes thereof an election of domicile at Montreal and submits himself to the jurisdiction of the courts there, although the debt be contracted outside of such district. *Leclaire* vs. *Beaulieu*, S. C. 1889, M. L. R., 5 S. C. 95.

3. The promissor of a note can be sued at the place where it is payable, although he resides in another district and has not been personally served in the district where the action was taken. *Robillard* vs. *Finn*, C. Ct. 1885, 8 L. N. 79.

4. Action on note dated in one district and payable in another can be brought in the district where the note is payable. *Claxton* vs. *McLean*, S. C. 1873, 4 R. L. 654.

5. The Court at Montreal has no jurisdiction to compel a defendant to answer a suit on a draft made at Montreal, but payable at St. Hyacinthe and accepted accordingly. *Greene* vs. *Blanchette*, S. C. 1876, 20 L. C. J. 196.

6. Action at Montreal on note dated and payable at Montreal, made in St. Francis and defendant served there. Declinatory exception dismissed. *Lacaille* vs. *Connolly*, C. Ct. 1888, 11 L. N. 44.

7. Action on a premium note in a Mutual Insurance Co. The application was made in the district of Bedford to a company having its head office in Sherbrooke, in the district of St. Francis. The note was made payable at Sherbrooke and the policy issued there—*Held*, that the action was properly brought in Sherbrooke. *Mutual Fire Insurance Company of Stanstead* vs. *Galipat*, (1) 3 L. N. 239, C. R. 1880.

8. Where an insurance policy issued by a Montreal Company, and dated at Montreal, has been sent to the insured at Quebec through the company's agent there, by virtue of a risk agreed upon at the office of their agent in Quebec, and where the policy is made payable at Quebec.—*Held*, that the company could be sued at Quebec. (2) *O'Malley* vs. *The Scottish Commercial Ins. Co.*, S. C. 1878, 4 Q. L. R. 226, and see *Tourigny* vs. *Ottawa Agricultural Ins. Co.*, 3 L. N. 196.

VI. WHERE SEVERAL DEFENDANTS, ART. 38 C. C. P.

1. In matters purely personal, if there are several defendants in the same action residing in different districts, they may all be brought before the court of the district in which one of them has been summoned, provided that such summons be not made with the intention of withdrawing the real parties from the courts which would otherwise have jurisdiction. (3) *Davis* vs. *Kimp.* , Q. B. 1870, 2 R. L. 118. *Robillard* vs. *Banque Jacques Cartier*, Q. B. 1888, 32 L. C. J. 231. *Ford* vs. *Auger*, S. C. 1874, 18 L. C. J. at p. 297. *Wilkes* vs. *Marchand*, S. C. 1876, 21 L. C. J. 118. *Baxter* vs. *Martin*, S. C. 1884, 7 L. N. 78.

2. If several defendants *reside in the same district*, service of process on one of them, in another district, does not render the other defendants amenable to the jurisdiction of the court in the last mentioned district. *Lemessurier* vs. *Garon*, S. C. 1874, 1 Q. L. R. 88. *De la Ronde* vs. *Walker*, S. C. 1876, 20 L. C. J. 297. Contra, *Bouchard* vs. *Morrison*, C. Ct. 1882, 10 L. N. 239.

3. A defendant can only be deprived of his natural jurisdiction by the regular service of his co-defendant with a writ of summons by the proper officer in another district, and where the latter merely endorsed the writ of summons, "*reçue copie pour tenir lieu de signification*," without the place where such "*reçue copie*" was so endorsed, a declinatory exception on the part of the co-defendant will be maintained. *Pacaud* vs. *Howard*, C. R. 1885, 12 Q. L. R. 111.

Papineau, J. (S. C.) 1877. An action on a promissory note dated at St. Hyacinthe, and payable at Montreal, should be brought in St. Hyacinthe.

Lepage vs. *Billy*, (C. Ct.) 1878, 4 Q. L. R. 383. The defendant gave to one R. at Rimouski a cheque on the Bank of Montreal for $20, dated at Quebec. R. came to Quebec, endorsed the cheque and passed it to plaintiff. Plaintiff presented it at the Bank, and on refusal of payment sued on it before the Circuit Court at Quebec. *Held*, on declinatory exception, that the action should have been brought at Rimouski.

National Ins. Co. vs. *Cartier*, C. Ct. 1878, 22 L. C. J. 336. Note dated and payable Montreal signed at Sorel. *Held*, action should have been taken at Sorel.

Jackson vs. *Cowerthy*, S. C. 1862, 12 L. C. R. 416. Obligation passed at Quebec payable in London, (Eng.). *Held*, that action must be taken in Quebec.

Wurtele vs. *Langham*, S. C. 1874, 1 Q. L. R. 61. A debtor is liable to be sued at the place where the debt was contracted, but not at the place where it was made payable merely on account of the debt having been made payable there.

Eastern Townships Mutual Fire Ins. Co. vs. *Bienvenu*, C. Ct. 1879, 2 L. N. 363. An insurance company sued for assessments on premium note in the District of Bedford, where their head office was, and where the assessments were made payable, but the defendant was served at his domicile in the district of Montreal—Declinatory exception maintained.

(1) (2) Art. 34 of the Code of Procedure provides (as amended by R. S. Q. 5861) that in such cases the courts of the district where the insured moveables or immoveables were burnt, and in case of life insurance where the insured has had his domicile, have jurisdiction. Draft New Code of Procedure, art. 90, "had or has his domicile."

(3) Draft New Code of Procedure, art. 93.

ACTS OF PARLIAMENT.

See Statutes.

ADJUDICATAIRE.

See Sale—Judicial.

ADOPTED CHILD.

REMOVAL BY PARENTS—CLAIM FOR MAINTENANCE.

Held:—Where a person undertakes the support and maintenance of a child of unknown parents, with the object of bringing it up as his own child, and this purpose is frustrated by the parents, who subsequently appear and claim the child, he is entitled to recover from them a reasonable allowance for the maintenance of the child during the time it was under his care. *Gingue* vs. *Giroux*, S. C. 1892, 2 Que. 255.

ADULTERY.

See also Dower.
See also Separation de Corps.
See also Marriage Covenants.

ACTION BY HUSBAND AGAINST ACCOMPLICE—EVIDENCE.

Evidence of adultery in a civil action by a husband against his wife's accomplice can be proved by parole testimony, and by indications and presumptions. In order to establish the offence it is not necessary that the guilty parties should have been surprised *in ipsa turpitudine*, but it can be established by very strong presumptions based on well-established acts and the behaviour of the parties which leave no doubt in the mind as to their guilt. Adultery proved in the present case and judgment of Superior Court awarding $500 damages confirmed. *St. Laurent* vs. *Hamel*, Q. B. 1892, 1 Que. 438.

ADMISSIONS.

I. Divisibility of.—General Principles. 1-2.
II. Cases under Art. 1243 C. C.
1st. *Where the Admission was held to be not Dirisible.* 1-4.
2nd. *Where the Admission was held to be Dirisible.* 1-11.
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IV. In Pleadings. 1-19.
V. Must be Express.
VI. Of Agent.
VII. Of Partners. 1-2.
VIII. Of Third Parties.
IX. Retraxit.
X. Retroactive Effect.
XI. Status (Questions of).

See also "Attachment by Garnishment,—Declaration of Garnishee," "Articulation of Facts," "Confession of Judgment," "Evidence—Commencement of Proof in Writing;" "Interrogatories on Articulated Facts."

DIVISIBILITY OF.

1. General Principles—It is a general rule that a judicial avowal or admission cannot be divided. (1) It is only in exceptional circumstances, and for special reasons, that Courts will allow the answer of a party to be divided. (2). *Fulton* vs. *McNamee*, Supreme Ct. 1878, 2 Can. S. C. R 471.

2. Art. 231 of the Code of Procedure provides for the divisibility of answers to interrogatories upon articulated facts, under certain conditions. The provisions of Art. 1243 C. C cannot be qualified by the application to it of the dispositions of Art. 231 C. C. P (3) (*ib.*).

DIVISIBILITY OF.

II. CASES UNDER ART. 1243 OF THE CIVIL CODE.

1st. Where the Admission was held to be not Divisible.

1. Admissions contained in a plea cannot be divided, but must be taken entire. *Holland* vs. *Wilson et al.*, 1 L. C. R. 60, 2 R. J. R. Q. 403, Q. B. 1851.

2. In an action to recover the value of the use and occupation of a certain property, in which the plaintiff replied specially to defendant's plea of payment that true it is "that money "was paid, as alleged by defendant, but not "at the request of the party deceased, but was "paid by defendant merely to place such "party, who is his daughter, on the same "footing as his other children." *Held*, that the admission contained in such answer could not be divided, and that plaintiff was entitled to judgment. *Lefebvre* vs. *DeMontigny*, 2 L. C. J. 279 and 9 L. C. R. 233, S. C. 1858.

(1) Art. 1243 C. Code.
(2) (3) Per *Fournier J.* for majority of court at pp. 479, 489.

3. The lessee, by one of his pleas, having admitted that he had to pay £180 rent, and assessments, the Court, which maintains the demand of the lessor for £250 of rent, will not also allow him for the assessments, which are only admitted or proved by such plea. In a word, the Court will not divide the admission in the plea. *Viger* vs. *Bellhreau*, Q. B. 1863, 7 L. C. J. 199.

4. In February, 1876, a writ of attachment under the Insolvent Act, 1875, was issued against F. C. and S. J. M., carrying on business as printers and publishers at Montreal, and appellant was appointed assignee to the estate of the firm, as well as to the individual estates of each partner. In March, 1876, the respondents presented a petition to the Superior Court, praying that the appellant, as assignee of C. & M., be ordered to deliver to them certain plant and machinery, which respondents claimed to be their property in virtue of a deed of sale in their favor by the insolvent C. passed before a Notary Public on the 3rd May, 1875. In their petition the respondents alleged, "That the said purchase was made by your petitioners in good faith, and that they paid for the said articles above enumerated the sum of $5000, but that the said deed erroneously states the price to have been $7,148.40." Appellant in his answer admitted the sale, but alleged that the price stated in the deed and schedule annexed was the real price of the articles sold, and that the respondents were only entitled to the goods on the payment of $2,188.40, the difference between the amount paid and the price mentioned in the deed. In order to establish that the amount mentioned in the deed had not been paid, appellants had to rely on the answers of respondents. *Held*, that the appellant could not divide the respondent's answer in order to avail himself of what was favorable and reject what was unfavorable, and judgement of court below confirmed. *Fulton* vs. *McNamee*, Supreme Ct. 1878, 2 Can. S. C. R. 470.

2nd. Where the admission was held to be divisible.

1. Admission in a plea can be divided where pleas are incompatible. *McLean* vs. *McCormick*, 1 L. C. R. 369, C. Ct. 1851, 3 R. J. R. Q. 42.

2. The appellant was sued for $105, money lent. On being examined as a witness he admitted he had borrowed $100. In cross-examination, however, he stated that he had since returned the money, and at the time the action was instituted owed defendant nothing. On re-examination he said the amount was included in a larger amount paid to a third person. *Held*, that as he had not told the same story throughout, his admissions were divisible. *Colnoir* vs. *Parenteau*, Q. B. 1880, 3 L. N. 213.

3. Where the admission of a defendant that he received part of the sum said to be loaned him, but had since paid it, is in contradiction to his pleadings, it may be divided, unless he pleads payment. *Barré* vs. *Loiseau*, C. R. 1888, 32 L. C. J. 193, 20 R. L. 326.

4. In an action for the price of transfer of a tavern license, the defendant, being called as a witness, admitted that he had not paid plaintiff the price stipulated, but added that one C. was to do so. In the deed of transfer the plaintiff acknowledged receipt of the consideration. *Held*, 1. That the accessory statement, in the defendant's answer, having relation to a fact wholly distinct from the principal fact mentioned in the first part of the answer, the answer was divisible. 2. (Johnson, C. J., *diss.*) The defendant having admitted in his evidence that he had not paid the plaintiff, it was for the defendant to show that some one else had, and he was not relieved from making this proof by the plaintiff's declaration, contained in the deed of transfer, that he had received payment. *St. Amour* vs. *St. Amour*, C. R. 1892, 2 Que. 243.

5. An admission, whether judicial or extra-judicial, cannot as a rule be divided, so as to make proof by a part thereof against the party making such admission. *Sauré* vs. *Denis*, Q. B. 1880, 24 L. C. J. 308, 3 L. N. 75. *Christin* vs. *Valois*, Q. B. 1879, 3 L. N. 59.

6. A judicial admission cannot be divided, and, therefore, an admission that the price of sale was not really paid, as stated in the deed, coupled with the statement that the deed was really a donation, and not a sale, cannot be divided. *O'Brien* vs. *Molson*, S. C., 21 L. C. J. 287, confirmed in Q. B. 1879, and *O'Brien* vs. *Thomas*, 24 L. C. J. 43.

7. The admission of a party to a cause cannot be divided against him. *McNichols & Badeau* vs. *Canada Guarantee Co.*, 3 L. N. 133, S. C. 1880, and *Johnson* vs. *Longtin*, 3 L. N. 86, and 24 L. C. J. 292, C. C. 1880.

8. An admission contained in a plea that the plaintiff was entitled to half profits, but as a salary, cannot be divided and is not a *commencement of proof*. *Pratt* vs. *Berger*, Q. B. 1884, 7 L. N. 235 and 28 L. C. J. 192.

9. Action for $300, money lent. The plea admitted the debt but set up matters in compensation and in payment. The only evidence of the loan was the admission in the plea, and of the defendant examined as a witness. In his deposition, the defendant admitted having received the $300 as a loan, but said he had since paid it. It was also in evidence that subsequently to these transactions, the mother of plaintiff and wife of defendant had died, and a partition of the property of the community had been made in which the plaintiff claimed nothing on account of the loan.

Held, that when the admission is coupled with a plea of compensation only, it may be divided, but when with a plea of payment it is indivisible. Action dismissed. *Marmen* vs. *Marmen*, S. C. 1884, 10 Q. L. R. 32.

10. An admission by a defendant under oath that he received a voluntary deposit but had delivered it as requested, cannot be divided, and verbal evidence is not admissible to contradict the accessory statement of delivery in a case where proof of the deposit could not be made by witnesses. *Dubuque* vs. *Dubuque*, C. R. 1883, 7 L. N. 32.

11. Where the defendant, in his plea to an action against him for a sum of money which the plaintiff alleges to have lent him, admits the loan, but declares that it was agreed on the occasion of the loan that the capital should only be returned on the death of the lender, and adds that he had paid all interest due before the institution of the suit; such admission cannot be divided even to form a commencement of proof in writing. *Farret* vs. *Phaneuf*, C. R. 1892, 1 Que. 19, confirming M. L. R. 7, S. C. 282.

DIVISIBILITY OF.

III. CASES UNDER ART. 231 OF CODE OF PROCEDURE.

1. The defendant interrogated on articulated facts had answered thus — "The note is in my handwriting, but it was in part an usurious contract for compound interest." The Court held the signature to the note proved, but would not receive the defendant's declaration of usury as evidence, the question being merely: "Did you sign the note?" *Hart* vs. *Barlow*, Q. B. 1876, 3 Rev. de Leg. 354.

2. A judical admission may be divided, when one part of the answer is combatted by indications of fraud and simulation, or does not agree with the pleadings of the party interrogated. *Goudreault* vs. *Poisson*, Q. B. 1866, 13 L. C. J. 235.

3. The answer of a party to interrogatories on articulated facts may be divided according to circumstances in the discretion of the Court, when the part of the answer objected to is improbable. *Legault dit Deslauriers* vs. *Vinn*, C. C. 1869, 14 L. C. J. 56.

4. Answers of a party may be divided in certain cases. The action was to recover from the defendant $100 alleged to have been confided by plaintiff through one S. J. (since dead) to defendant, to be deposited in the Savings Bank in the name of plaintiff. The complaint was that defendant had converted this sum to his own use, and paid interest on it for two years. Plea, general denial. Defendant on interrogatories admitted receiving the sum in question, but said that he had returned it to her, save $2 and a few cents. He admitted also that the deposit was made in his own name as he had so made them before. Futher explanations given by defendant were contradicted by other witnesses, to such an extent that the Court was of opinion that there was no reliance to be placed on the answers of defendant, and that he had committed perjury. *Held* (following *Goudreault* vs. *Poisson*, *Supra* No. 2), that the admissions in such cases could be divided, and also where the statement under oath did not agree with the pleading. *Montpetit* vs. *Pelardeau*, 4 L. N. 146, S. C. 1881.

5. The admission of the defendant upon articulated facts which the plaintiff requires only as a commencement of proof in writing, cannot be divided so as to allow of parole evidence of an amount greater than that admitted, and of other amounts alleged in part to be repaid, when the exceptions of Art. 231 are not applicable to the case. *Fournier* vs. *Morin*, Q. B. 1885, 11 Q. L. R. 98, reversing C. R. 1884, 10 Q. L. R. 129.

6. The admission of a party who admits the receipt of a sum of money sued for, but who pretends that he received it as a gift and not as a loan, may be divided when such pretension appears wholly improbable in view of the circumstances of the case and the character of the parties. The admission thus divided may serve as a commencement of proof in writing to establish the real facts. *Raymond dit Lajeunesse* vs. *Latraverse*, Q. B. 1885, M. L. R. 1 Q. B. 321, 29 L. C. J. 180, 19 R. L. 681.

IV. IN PLEADINGS.

1. A woman sued as the widow of A B admits her marriage and the death of her husband if she does not raise by exception her misdescription as to quality. *Gesseron* vs. *Canac*, K B. 1820, 2 Rev. de Lég. 334.

2 Under 12 Vic., cap. 28, sec. 85, it is necessary, in a plea to the merits, to expressly deny every fact alleged in the plaintiff's declaration, otherwise such facts will be held to be admitted. *Copps* vs. *Copps*, Q. B. 1851, 2 L. C. R. 105.

3. In an action to rescind a verbal promise of sale of an immovable, which was admitted by the defendant, but with different conditions from those alleged by the plaintiff—*Held*, reversing the judgment of the court below, that the plaintiff, though adducing no evidence, was entitled to judgment in conformity with such admissions. *Lacroix* vs. *Lambert*, Q. B. 1862. 12 L. C. R. 229.

4. A plea of payment or compensation is a sufficient admission of the plaintiff's demand, but a plea of prescription alleging payment, accompanied by a general denial, is not such an admission. *Thayer* vs. *Wilsam*, Q. B. 1864, 9 L. C. J. 1.

5. In an action brought by an assessor against the city of Montreal for the value of his services—*Held*, reversing the judgment of the court below, that the plea in the cause, which admitted that the sum of £107 18s. 1d., with interest and costs, was due to the plaintiff, praying *acte* of a deposit of that sum in court, and also praying that the plaintiff's action for the surplus be dismissed entirely, entitles the plaintiff to a judgment for the sum tendered. *Bonbanger* vs. *The Mayor, &c., of Montreal*, Q. B. 1859, 9 L. C. R. 363

6. The defendant was convicted of selling liquor without a license. There was a plea of *autrefois acquit*, and then there was the general issue. Subsequently the defendant withdrew the plea of *autrefois acquit*, and, there being some difficulty about the identity of the man, the case was dismissed in the court below. The revenue inspector, however, brought it before the Superior Court, contending that the plea of *autrefois acquit* was an admission of identity—*Held*, maintaining this view, that the identity was established. *Durocher* vs. *Capitol*, S. C. 1867, 3 L. C. L. J. 20.

7. In an action of damages for assault, the fact that the defendant pleaded guilty to the charge of assault before the Recorder's Court, is an admission that he did actually commit the assault, of which admission the plaintiff may take advantage in the civil action. *Fortier* vs. *Sauré*, S. C. 1888, M. L. R. 4, S. C. 30.

8. Admissions contained in a *factum* in Review are binding upon the party filing the same. *Carden* vs. *Lennan*, C. R. 1872, 16 L. C. J. 336, 2 R. C. 232.

9. The allegations of a declaration founded upon notarial deeds of sale, and seeking to fasten a personal liability upon defendant towards plaintiff, will not be proved by a declaration made by defendant in another deed to a third party; no privity of contract is thereby created between plaintiff and defendant. *Pelletier* vs. *Ratelle*, S. C. 1874, 18 L. C. J. 75.

10. A pleading or part of a pleading cannot be abandoned in order to get rid of an admission. *Lasalle* vs. *Hart*, Q. B. Que., 6 Sept., 1877.

11. The failure by plaintiffs to answer a plea denying that the proper formalities have been observed in respect of calls on shares in a company, cannot be regarded as an admission of the allegations of the plea under C. C. P. 144. *Stadacona Ins. Co.* vs. *Trudel*, C. R. 1879, 6 Q. L. R. 31.

12. Art. 144 C. C. P. does not imply that where a party is in default to answer or reply to an affirmative plea, he admits what it contains; but only that when he answers such plea, and fails expressly to deny the existence of a fact alleged, he is held to admit it. *Beaulieu* vs. *Therrien*, Q. B. Que., 4 Dec., 1883.

13. The allegation of a defendant, who, in an action against him on a note, alleges in his plea that there was no consideration for the note, is held to be admitted unless formally denied according to art. 144 C.C. P. *Baxter* vs. *Brunet*, S. C. 1884, 17 R. L. 360.

14. A defendant, who, in answer to an action on a verbal lease, pleads a claim for damages as set-off, admits the existence of the lease. *Walsh* vs. *Howard*, Q. B. 1886, 12 Q. L. R. 295, 15 R. L. 8.

15. The defendants by their pleadings not having expressly denied an allegation as to the existence of a separation as to property, must be held, under article 144 C. C. P., to have admitted the existence of such a separation. *Pacaud* vs. *Brisson*, C. R., 1886, 9 L. N. 236.

16. Where defendants, sued as partners, plead a denial of the facts alleged but do not specially deny the existence of the partner-

ship and their relation as partners as stated in the action, and only plead that they owe nothing to the plaintiff, the quality in which they are sued must be taken as admitted. (Art. 144 C. C. P.) *Reinhardt* vs. *Davidson*, Q. B. 1887, 15 R. L. 42.

17. Compensation pleaded under reserve is no admission of liability. *Singleton* vs. *Knight*, Q. B. 1887, 14 Q. L. R. 39.

18. To an action to recover the value of a mare killed on the defendants' line, the defendants pleaded specially that the fences on each side of their railway were good and sufficient; that there was no negligence; and that they had never been put in default with respect to the repair of such fences. This was followed by a general denial. In the course of the trial there was evidence which indicated that the locality where the accident occurred was not on the defendants' railway line, but on that of the Grand Trunk Company, which controls the defendants' line. On defendants offering evidence on this point, the Court below maintained the objection to the testimony on the ground that there was no contestation raised as to the road on which the accident occurred. *Held*, That the defendants having pleaded specially, without raising any question as to their ownership of the road, the plaintiff was not obliged to prove the truth of an allegation which had not been specially denied, and which must therefore be taken as admitted. *Cie du Ch. de Fer Champlain* vs. *St. Marie*, 1888, M. L. R. 4 Q. B. 283.

19. Art. 144 C. C. P. Every fact, the existence or truth of which is not expressly denied in the pleadings of the parties, is held to be admitted. *Banque Union* vs. *Gagnon*, Q. B. 1888, 15 Q. L. R. 31.

V. MUST BE EXPRESS.

No admission of facts can be inferred from the contents of a plea, in order to serve as evidence: such admission must be express. *Brochu* vs. *Bourgo*, 2 Rev. de Lég. 280, K. B. 1811.

VI. OF AGENT.

The principal is not bound by the admission of an agent after his agency has terminated. *Pinsonneault* vs. *Desjardins*, Q. B. 1879, 24 L. C. J. 100, 3 L. N. 29; *Knox* vs. *Boivin*, S. C. 1893, 4 Que. 311.

VII. OF PARTNERS.

1. In an action to recover a sum of money alleged to have been charged twice in an account rendered some years previous by defendants while co-partners, the issue was confined to the question, whether the amount was charged twice or not, and it was admitted by one of the defendants in answer to interrogatories on articulated facts that such was the case. *Held*, that the admission thus made after the dissolution of the partnership was binding on all the members of the firm. *Fisher* vs. *Russell*, S. C. 1858, 2 L. C. J. 191. (1)

2. A judgment rendered on the confession of one partner, in the name of the partnership, may be set aside by the other partner or partners, especially if there be reason to suspect collusion on the part of the person who makes the confession. *Moore* vs. *O'Leary*, S. C. 1865, 9 L. C. J. 164.

VIII. OF THIRD PARTY.

An acknowledgment by one person that an admission of a certain fact had been made to him by another, is not an evidence of the existence of such fact. *Lagueux* vs. *Lambert*, Q. B. 1891, 17 Q. L. R. 335.

IX. RETRAXIT.

The defendant, who, in the course of the trial, to avoid costs and in view of a compromise, had filed a written admission that corrupt acts of a nature to annul the election had been committed by his local agents, but without his personal knowledge, might subsequently withdraw such admission when the petitioner, without accepting or rejecting it, declared his intention of continuing the case for personal disqualification; and after such

(1) In Lindley on Partnership, p. 129 it is stated that the answer of one partner to interrogatories cannot be read against the others unless they have an opportunity of contradicting it.

In an English case, *Wood* vs. *Braddick* (1 Taunt 104) Mansfield, C. J., said: "Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred since their separation; but the power of partners with respect to rights created *pending the partnership remains after the dissolution*. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it that, from the moment it is dissolved, his account of their joint contracts should cease to be evidence, and that those who are to-day as one person in interest should to-morrow become entirely distinct in interest in regard to past transactions which occur ed while they were so united."

In the United States the contrary doctrine is generally held, commencing with *Hackley* vs. *Patrick* (3 Johns 536), although there are several decisions following the above English case. (Bates on Partnership, §699, 700, 701.)

retraxit such admission will cease to have any effect. *Faille* vs. *Lussier*, S. C. 1888, M. L. R. 4, S. C. 139.

X. RETROACTIVE EFFECT.

A writing, signed by the defendant after the institution of the action, and in which he acknowledges that he is indebted to the plaintiff, and promises to pay the amount sued for, has not a retroactive effect, and is not sufficient evidence in itself whereon to obtain judgment in an action previously instituted. *Baxter* vs. *Graw*, S. C. 1888, M. L. R., 4 S. C. 446.

XI. STATUS.

Questions of status cannot be affected by admissions of the parties, whether voluntary or forced. Therefore, the admission by the defendant—against whom an action to annul her marriage had been taken—to the effect that she was married at the time of entering into her second marriage has no value as evidence, whether made in her plea to the action or by deposition under oath. *Harvey* vs. *Young*, S. C. 1893, 4 Que. 446.

ADVOCATES AND ATTORNEYS.

(See also Costs—Action continued for; Costs—Distraction of; Contempt of Court; Prescription; Service.

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VIII. Death of, etc.—See Substitution of.

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X. Engagement of Services. 1-6.

XI. Evidence of Engagement and Services. 1-2.

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XXIII. Withdrawal.

I. ACTION AGAINST.

1. An action may be instituted by an officer of the court against an attorney, by petition, because he is always in court. But all the rules of law and practice which would govern the case and proceedings in ordinary actions must afterwards be observed. *Perrault & Ross* vs. *Vallières*, K. B. 1816, 2 Rev. de Lég. 471.

2. A practising attorney is properly sued by petition without writ. *Perrault & Ross* vs. *Plamondon*, K. B. 1816, 2 R. de L. 470.

II. APPEARANCE.

1. Authorization.—Where two attorneys *ad litem* have appeared in the same case and for the same defendant, the Court will not hear the case until it is decided which attorney represents the defendant. *Giguère* vs. *Beauparlant*, C. Ct. 1873, 4 R. L. 686.

2. —— An attorney who appeared in a case for a defendant upon whom process had not been regularly served, and who denies that he employed such attorney, is bound to show that he was authorized to appear, before he can recover costs. Disavowal in such case is not necessary. *Felton* vs. *Asbestos Packing Co.*, C. R. 1880, 7 Q. L. R. 265.

3. —— Where an advocate is authorized by a party to represent him in a suit, he does not require a special authorization to continue to represent such party upon execution of the judgment obtained by him, and upon distribution of the funds collected. *Foisy dit Frenière* vs. *Wurtele*, Q. B. 1889, 18 R. L. 577.

4. —— The only way a party can get rid of the appearance of his attorney is by disavowal according to Art. 192 and following of the C. C. P. Where no such disavowal is made, he must be taken to have waived, by the appearance filed in his name, all the irregularities in the service and even the entire absence of service. *Dawson* vs. *Macdonald*, 10th June, 1880; Cassel's Digest (last edit.), p. 587, and see *Fournier* vs *Trépannier*, S. C. 1894, 5 Que. 129.

5. Power of Attorney.—An attorney filed an appearance for a defendant, upon whom process had not been served, and no special power of attorney was produced. The attorney for the plaintiff moved for the rejection of the appearance, and the motion was granted. *Gleason* vs. *Moss*, S. C. No. 47, 8th Feb., 1837.

6. —— —— In another case where the defendant had left the Province, and the service was made at the place of his last domicile in the Province, an appearance was filed for him by an attorney, which the plaintiff ignored, and after having called in the defendant by advertisement the former proceeded *ex parte*—*Held*, in appeal, that all the proceedings had must be set aside, as the service was covered by the appearance which the plaintiff had no right to question. *McKercher* vs. *Simpson*, Q. B. 1856, 5 R. J. R. Q. 115, 6 L. C. R. 311; *Dawson* vs. *Macdonald*, Supreme Ct., 10th June, 1880, Cassel's Digest 587 (last edit.).

7. —— —— An attorney *ad litem* is not bound to produce his authorization upon demand of the adverse party, even when appearing for a corporation.

Neither is it necessary for him to produce a resolution of a county council authorizing him to appear, and to take an appeal. Questions as to the existence of the resolution could only arise between the corporation and the attorney representing it. *Durernay* vs. *Corp. de St. Barthélemy*, Q. B. 1868, 1 R. L. 711.

8. —— —— Where the plaintiffs, an insurance company, described themselves as "a body politic and corporate," duly incorporated according to law, and having its head office and principal place of business in New York, one of the United States of America, and having an office and doing business in the city and district of Montreal.—*Held*, that they were obliged to file a power of attorney under Art. 120 C. C. P. *Globe Mut. Life Ins. Co.* vs. *The Sun Mutual Life Ins. Co.*, S. C. 1878, 1 L. N. 139, 22 L. C. J. 38.

9. —— —— A foreign plaintiff is not bound to give notice of the filing by him of a power authorizing his attorney *ad litem* to act for him, in order to save himself from costs of a dilatory exception. *Bank of Commerce* vs. *Papineau*, S. C. 1876, 20 L. C. J. 307.

10. —— —— Where a proceeding by a foreign plaintiff is begun by the plaintiff's affidavit, no power of attorney is necessary. *McLaren* vs. *Hall*, S. C. 1879, 2 L. N. 178.

11. —— —— The defendant is entitled to have the proceedings in a suit suspended until a power of attorney specially authorizing the suit is produced on behalf of one of the plaintiffs who resides without the Province. *Howard* vs. *Yule*, S. C. 1880, M. L. R., 4 S. C. 420.

12. —— —— An attorney *ad litem* in possession of papers is not required to justify or prove his authority, but the presumption is that he has a general mandate from the party for whom he acts. *Moss* vs. *Ross*, S. C. 1865, 9 L. C. J. 328.

13. —— —— The production of a general authorization to sue for debts due to an absentee is a sufficient compliance with Art. 120 C. C. P., and it is not necessary that the attorney *ad litem* be named therein. *Major* vs. *Paris*, S. C. 1884, 7 L. N. 266, 28 L. C. J. 104.

14. —— —— The application for production of power of attorney must be made within four days from the return of the writ of summons. *Melles* vs. *Swales*, C. S. 1878, 22 L. C. J. 271.

15. —— A foreign plaintiff is not bound to give notice of the filing by him of a power of attorney authorizing the suit in order to save himself from costs of a dilatory exception when such power is filed at the return of the action. *Bank of Commerce* vs. *Papineau*, S. C. 1876, 20 L. C. J. 306.

16. —— —— Where the power of attorney is not filed before the dilatory exception demanding it, costs will be awarded on the exception. *Westcott* vs. *Archambault*, S. C. 1877, 21 L. C. J. 307.

17. —— It is not necessary that the power of attorney mentioned in article 120 C. C. P. should be given by the plaintiff to his attorney *ad litem*, nor that it designate in a specific manner the cause of action. *Major* vs. *Paris*, S. C. 1884, 28 L. C. J. 104.

18. —— —— A power of attorney may be demanded from one of several joint and several creditors, not constituting a single ideal person, who is absent. *Laframboise* vs. *D'Amour*, S. C. 1872, 23 L. C. J. 290.

III. AS SURETIES.

6th Rule of Practice of S. C.

1. A practising attorney or barrister cannot become bail or surety in any proceeding cognizable by the Superior Court. *Routier* vs. *Gingras*, S. C. 1852, 3 L. C. R. 57, 3 R. J. R. Q. 423.

2. A practising attorney cannot become bail or surety in appeals from the Superior Court, without contravening the 6th rule of that Court; the practice of their becoming bail is consequently irregular and must be discontinued. *Lemelin* vs. *Larue*, Q. B. 1860, 10 L. C. R. 190.

3. A bond in appeal by an attorney is valid, notwithstanding the 6th rule of practice, and assuming that rule to be applicable to such a bond. *Fournier* vs. *Cannon*, Q. B. 1861, 6 Q. L. R. 228.

IV. AS WITNESSES IN THE CASE.

1. An attorney is a competent witness for the party in whose behalf he is conducting a suit, so also a counsellor for the party for whom he is advocating a cause.

The objection to an attorney or counsellor appearing as a witness in such cases rests upon his bias and favor towards his client. It goes to his credit, not to his competency.

The practice of attorneys and counsellors testifying for clients in suits in their charge is reprobated. It is an evil which will work its own cure in the loss of character of those indulging in it. (New York case.) *Little* vs. *McKeon*, S. C. 1548. Reported 3 R. de L. 366.

2. The attorney of record, even in a non-commercial case, may be heard as a witness on behalf of his client if parole evidence be admissible. *Rév. Dames Ursulines* vs. *Egan*, C. Ct. 1879, 6 Q. L. R. 38.

3. *Held*, that an advocate employed as attorney *ad litem* in a cause cannot testify as a witness in it. *Boisvert* vs. *Bernier*, S. C. 1878, 9 R. L. 509; *Lee* vs. *Huot*, Q. B. 1846, 3 R. de L. 370; *Cary* vs. *Ross*, No. 1236 S. C. 1851; *Leresque* vs. *Laviolette*, Sept., 1857, S. C.

4. And in appeal, said to be a great abuse for lawyers to give evidence in their own cases whenever it can be avoided. *Molson* vs. *Carter*, 3 L. N. 258, Q. B. 1880; *Waldron* vs. *White*, M. L. R., 3 Q. B. 375.

5. The attorney of record is only allowed to offer his testimony in favor of his client under exceptional circumstances; and the introduction of the evidence of the defendant's attorney, as to a private conversation between himself and the plaintiff, was, under the circumstances, improper, and such testimony would be rejected by the Court. *Rielle* vs. *Benning*, M. L. R., 4 S. C. 219; confirmed in appeal, M. L. R., 6 Q. B. 365 (1890).

6. Where the attorney *ad litem* is witness for his own client in a cause, and an objection is taken by the other side to a question put to the witness on his examination, the witness cannot himself appear before the court to maintain the pertinency and relevancy of the question, but the client must be represented before the Court by another counsel. *Angers* vs. *Lozeau*, S. C. 1868, 12 L. C. J. 214.

V. CEASING TO PRACTICE.

1. A court cannot take cognizance of itself of the fact that an advocate has ceased to practice. *Day* vs. *Decousse*, S. C. 1861, 12 L. C. J. 265.

VI. DISAVOWAL.

1. Acts of Agent.—Where a creditor hands over an account to a collecting agent with instructions not to sue thereon or incur any expenses in regard thereto; and where such agent, notwithstanding such instructions, hands over the account to a lawyer, and suit is taken and judgment obtained thereon; the creditor must, if he wishes to avoid the liability of paying the costs of the action, renounce the judgment, and disavow the attorney who obtained it. *Bernard* vs. *Lalonde*, Mag. Ct. 1889, 12 L. N. 275.

2. Agent—Action in name of.—An agent who has not authorized the use of his name in an action at law can disavow the attorney *ad litem* charged with the case by his principal. *Meunier* vs. *Corp. de Québec*, C. R. 1886, 12 Q. L. R. 134.

3. After final Judgment—Suspension of Execution.—Execution of final judgment should be suspended until a disavowal and petition to revoke judgment is decided upon. *Dawson* vs. *Macdonald*, Supreme Ct., 12th Jan., 1885, 11 Q. L. R. 181.

4. —— —— But such execution cannot be suspended without an order by the Court or a judge. *Union Bank* vs. *Dawson*, C. R. 1885, 11 Q. L. R. 329; *Dawson* vs. *Macdonald*, Q. B. 1883.

5. Effect of.—Disavowal by a party is equivalent, as regards the other side, to a discontinuance of his demand, even if the disavowal is rejected as to the attorney of the petitioner. *Duffy* vs. *Chisholm*, C. R. 1892, 1 Que. 62.

6. Exception of.—194 C. C. P. A party who pleads by way of disavowal must state that the disavowal was made by him personally, or with the aid of his attorney, or by his attorney's legal substitute. *Hart* vs. *Hart*, S. C. 1851, 1 L. C. R. 307; 3 R. J. R. Q. 15.

7. In appeal.—Where a disavowal was raised in a case pending before the Court of Appeal—*Held*, that the Court could order the taking of evidence on the issue raised. *Curé et Marguilliers de l'Œuvre et Fabrique de la Paroisse de Ste. Anne de Varennes* vs. *The Roman Catholic Bishop of Montreal*, Q. B. 1861, 4 R. L. 127.

8. Notice.—A proceeding in disavowal does not require ten days previous notice. *MacClanaghan* vs. *Harbour Commissioners*, S. C. 1879, 23 L. C. J. 324, 2 L. N. 300.

10. Parties.—Where a petition in disavowal has been served on all parties to the suit, and is only contested by the attorney whose authority to act is denied, the latter cannot on an appeal complain that all parties interested in the result are not parties to the

appeal. *Dawson* vs. *Dumont*, Supreme Ct. 1891, 20 Can. S. C. R. 710.

11. Prescription of.—The only prescription available against a petition in disavowal is that of thirty years. *McDonald* vs. *Dawson*, Supreme Ct., 12 Jan., 1885, 11 Q. L. R. 181; *Dawson* vs. *Dumont*, Supreme Ct., Nov. 6, 1891, 20 Can. S. C. R. 709.

12. Procedure.—Where an action was dismissed, and the plaintiff, on execution being issued by the attorneys for defendant, came in by opposition, and disavowed all the proceedings.—*Held*, that the opposition should have been contested by the attorney disavowed, and not by the attorneys for the defence, and the record was sent back for that purpose. *Sicotte* vs. *Brazeau*, C. R. 1881, 4 L. N. 350.

13. Right of—General Principles.—A party will not be allowed to disavow his authorized attorney unless he has been injured in his suit by the procedure of the latter. *Fosy* vs. *Wurtele*, Q. B. 1889, 18 R. L. 577; *Seguin* vs. *Gaudet*, Mag. Ct. 1889, 12 L. N. 266.

14. —— —— And it is for the court alone to determine whether the party has been so injured. *Seguin* vs. *Gaudet*, Mag. Ct. 1889, 12 L. N. 266.

15. —— —— Absence of Party from Province.—Where a party authorizes an attorney to appear in a case for him, he cannot afterwards disavow such attorney on the ground that he was absent from the Province when the action was taken, and that pleadings were introduced which he had not authorized. *Dawson* vs. *Union Bank of Lower Canada*, Q. B. 1886, 14 R. L. 401, 13 Q. L. R. 20.

16. —— —— Action in Separation from Bed and Board—Reconciliation—Costs.—Where the plaintiff had taken an action against her husband, in separation from bed and board, and after inscription for proof the parties were reconciled and plaintiff's attorneys continued the action for their costs in opposition to the plaintiff's wishes—*Held*, that the plaintiff had a right to disavow them, as the action was extinguished by the reconciliation. *Gerard* vs. *Lemire & St. Pierre*, C. R. 1879, 2 L. N. 255.

17. —— —— Authorization.—(See also —Advocate—Appearance, Authorization).

An attorney *ad litem* in possession of papers is not required to justify or prove his authority, but the presumption is that he has a general mandate from the party for whom he acts.

And where proceedings in disavowal are brought against such attorney, the plaintiff must prove all the allegations of his declaration, and particularly that no authority or power to act was conferred by him upon the attorney. *Moss* vs. *Ross*, S. C. 1865, 9 L. C. J. 328. *Contra* where attorney has not possession of papers. *Lajeunesse* vs. *Augé*, M. L. R., 7 S. C. 459.

18. —— —— Evidence of Authorization.—Action was brought in 1866 against two brothers, J. S. D. and W. McD. D. One copy of the summons was served at the domicile of J. S. D. at Three Rivers; the other defendant, W. McD. D., then residing in the State of New York. On the return of the writ the respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874, when judgment was taken, and in December, 1880, upon the issue of an alias writ of execution, the appellant, having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowed attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by J. S. D., saying: "Be good enough as to file an appearance in the case to which the enclosed has reference, etc.," and also prescription, ratification and insufficiency of the allegations of the petition of disavowal.

Held, that there was no evidence of authorization given to the respondent or of ratification by appellant of respondent's act, and therefore the petition should be maintained. *Dawson* vs. *Dumont*, Supreme Ct., Nov. 6, 1891, 20 Can. S. C. R. 709.

19. —— —— Instructions to Discontinue Proceedings—Continuation.—Where an attorney receives instructions from his client to discontinue his suit, which the latter believes to be before the Court, but which, from a defect of form, has been rejected, said attorney is acting within his mandate when he pays the costs of the first action, and brings a new one which he conducts to the point where the first one was supposed to be when he received the instructions from his client.

And the attorney, being compelled by the other side to proceed, and having notified his client thereof, was not exceeding his mandate in continuing the case, and therefore could not be disavowed after final judgment dismissing the action. *Gignère* vs. *Cie. de Ch. de Fer Q. M. & C.*, C. R. 1893, 3 Que. 405.

20. —— —— Res Judicata.—The right of disavowal is not lost because the party demanding it has had recourse to other measures to

revoke the final judgment against him. *Dawson* vs. *Macdonald*, Supreme Ct., 12th Jan., 1885, 11 Q. L. R. 181.

21. When Necessary.—Disavowal by petition is not necessary when the attorneys *ad litem* disavowed produce a written acknowledgment that they were not authorized to appear. *Cooke* vs. *Caron*, Q. B. 1884, 11 Q. L. R. 268.

VII. DISBURSEMENTS.

1. An advocate is not bound to advance moneys as disbursements in a cause; and where he does so, he is not obliged to await the result of the suit before he is entitled to sue for the reimbursement of such advances. *Loranger* vs. *Filiatrault*, S. C. 1892, 2 Que. 356.

VIII. DEATH OF, ETC. (See SUBSTITUTION OF.)

IX. ELECTION OF DOMICILE. (See also under title "SERVICE.")

1. Service on an attorney must be made at his elected domicile, but he is bound to have some one in charge of it; in default of which service can be made at the prothonotary's office. *Aimbault* vs. *Bates*, S. C. 1869, 13 L. C. J. 139; *Lemay* vs. *Gingras*, S. C. 1886, 12 Q. L. R. 17.

3. A personal service on an attorney resident in a district adjoining that in which the suit is proceeding is good, notwithstanding his special election of domicile in the latter district. *McCallum* vs. *Harwood*, S. C. 1878, 22 L. C. J. 279.

4. Where an attorney has made no election of domicile, service upon him is properly made at the prothonotary's office. *Robertson* vs. *Marlow*, S. C. 1879, 2 L. N. 181.

X. ENGAGEMENT OF SERVICES.

1. Where a lawyer is employed through the intermediary of a third party, he can recover his fees from his client who has benefited by his services. *Bernard* vs. *Elliott*, Mag. Ct. 1889, 12 L. N. 146; *Tousignant* vs. *Badeau*, C. R. 1885, 11 Q. L. R. 349; *Globensky* vs. *DeMontigny*, S. C. 1879, 2 L. N. 178.

2. But the contrary was held in a case where an attorney in Quebec, receiving instruction from an attorney in Ontario to take action on behalf of his client, was not allowed to look to the client of his correspondent for his fees. *Keller* vs. *Watson*, C. Ct. 1879, 2 L. N. 400. See remarks on this case *ib.* at p. 393.

3. But the general principle above stated has been adhered to where the parties reside in the Province. Thus where A. was employed through the instrumentality of W., by divers persons who had signed a petition for the purpose of obtaining letters-patent for the incorporation of a company and the parties failed to pay for the services of A., who issued an action to recover the amount.

Held:—Confirming the judgment of the Superior Court, that the parties signing the petition were benefited by the services of plaintiff, and were liable for the value of such services. *Atwater* vs. *The Importers & Traders Co.*, C. R. 1886, 31 L. C. J. 52; *Anger* vs. *Corneillier*, Q. B. 1892, 2 Que. 293.

4. And the same has been held in the case of municipal corporations; that such corporations are liable to the advocates who rendered services in securing their incorporation, although at the time the services were called into requisition there was no body corporate to contract with, the engagement having been made by the rate-payers interested. *DeBellefeuille* vs. *Municipality of Mile End*, S. C. 1880, 25 L. C. J. 13.

5. *Held* also, that where certain tax-payers had engaged a lawyer for the purpose of having a village made a town corporation, and others had retained another lawyer to have the bill amended and watch its progress through the Legislature, such second lawyer working at Quebec in conjunction with the first lawyer, and the bill being passed, was entitled to look to the new corporation for his remuneration, *Burroughs* vs. *Corp. de Lachute*, S. C. 1894, 6 Que. 393.

6. The Crown is liable to a counsel for his fees as in other cases. *Reg.* vs. *Doutre*, P. C. 1884, 28 L. C. J. 209.

XI. EVIDENCE OF ENGAGEMENT OF SERVICES.

1. Oath — Retroactive Effect of 54 Vic., ch. 32, s. 2.—By 54 Vic., ch. 32, s. 2 (amending Art. 3597 R. S. Q), "The oath of the advocate makes proof as to the services rendered by him having been required, and as to the nature and duration thereof, but such oath may be contradicted in the same way as any other evidence." This has been held

to apply to services rendered before the passing of said Act. (1) *Beaubien* vs. *Allaire*, C. R. 1892, 1 Que. 275; *Chagnon* vs. *St Jean*, S. C. 1893, 3 Que. 459; *Burroughs* vs. *Corp. de la Ville de Lachute*, S. C. 1894, 6 Que. 393.

2. —— Commencement of Proof in Writing.—No commencement of proof in writing is required to admit parole evidence of the requisition of a lawyer's services, (2) the latter being allowed to prove such requisition by his own oath. *St Pierre* vs. *Lepage*, S. C. 1894, 6 Que. 511.

XII. FEES AND REMUNERATION.

(See also under titles "Costs," "Prescription.")

1. **Action for.**—An action for professional fees and disbursements is not an action "founded upon detailed accounts" within the meaning of Art. 91 C. C. P. *Langlois* vs. *St. Pierre*, C. R. 1883, 9 Q. L. R. 95.

2. Illegal Agreements.—An agreement between attorney and client, to the effect that the attorney shall be paid a proportion of the amount which may be recovered in the suit, in addition to his taxed costs, is null and void, and a deed of transfer of the client's claim based on such an agreement is equally null and void. *Dorion* vs. *Brown*, Q. B. 1879, 27 L. C. J. 47, 2 L. N. 214. See note on this case 2 L. N. at p. 209.

3. —— —— Art. 1485 C. C.—An agreement, whereby a lawyer undertakes an action of damages for his client, on the understanding that he will not charge him anything if he should not succeed, and that if he did succeed the amount recovered should belong to him (he having acquired the claim), is null and void on the face of it, and the lawyer cannot recover for his fees where such action was successfully brought. *Leblanc* vs. *Beauparlant*, Q. B. 1889, 18 R. L. 21, 33 L. C. J. 243.

4. —— —— .—An agreement by a lawyer with his client that he will not charge the latter for fees in any event is illegal (but not proved in this case). *Bernard* vs. *Elliott*, Mag. Ct. 1889, 12 L. N. 146.

5. Joint and Several.—Where an advocate presents a petition to the Court, on behalf of a number of bailiffs, and conducts the same to judgment, he has no right of action for his fees against one of the signers of the petition (on the ground of *solidarité* of liability), in the absence of proof that such signer ever employed the attorney to act for him. *Doutre* vs. *Dempsey*, C. Ct. 1865, 9 L. C. J. 176.

6. —— —— .—But *Held*, that clients defended by an advocate in the same case and by one defence are jointly and severally liable towards such advocate. (Routhier J. remarking: "How, then, could Monk J. in *Doutre* vs. *Dempsey* arrive at the decision he did in view of the authorities cited. That decision appears to me, to be grounded on no valid reasons.) *Frénette* vs. *Bédard*, S. C. 1889, 12 L. N. 362.

7. Right to—General Principles.—An advocate of the Province of Quebec, being by law and the custom of his profession entitled to recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, express or implied, be held to have employed him upon the usual terms according to which such services are rendered. *Regina* vs. *Doutre*, P. C. 1884, 28 L. C. J. 209; *Ramsay's Dig.*, p. 1045, 7 L. N. 242; *Devlin* vs. *Tumblety*, S. C. 1858, 2 L. C. J. 182; *Amyot* vs. *Guyy*, (3) Q. B. 1876, 2 Q. L. R. 201.

8. —— —— Independent of the Tariff.—And the same held to be the case irrespective of the tariff, where the value of the services is proved. (4) *Christin* vs. *Lacoste*, Q. B. 1893, 2 Que. 142; *Desjardins* vs. *Ducasse*, S. C. 1879, 2 L. N. 270; *Beaudry* vs. *Ouimet*, C. R. 1865, 9 L. C. J. 158.

9. —— —— —— —— .—An attorney *ad litem* to be entitled to receive his fees and disbursements from his own client need not produce a taxed bill of costs. *Cherrier* vs. *Titus*, Q. B. 1851, 1 L. C. R. 402, 3 R. J. R. Q. 62; *Lebœuf* vs. *Lanzon*, C. Ct. 1885, 14 R. L. 23.

10. —— —— —— —— .—In the absence of a special agreement between advocate and client, there is a presumption that the tariff shall govern as to the advocate's remuneration; but this presumption may be rebutted by evi-

(1) The Statute 54 V., c. 45, s. 2, amending Art. 251 C. C. P., allowing the parties to give evidence in their own favor in commercial cases, has been interpreted in a contrary sense. See *Platt* vs. *Drysdale*, S. C. 1892, 2 Que. 282.

(2) Thus negativing *Longpré* vs. *Pattenaude*, S. C. 1875, 20 L. C. J. 28; *Ethier* vs. *Barteau*, S. C. 1888, M. L. R., 4 S. C. 36.

(3) In this case an action by one lawyer against another for services rendered in a case was disallowed, as the idea of an implied contract was repelled by the relation of the parties as *confrères*.

(4) Contra *Grimard* vs. *Burroughs*, Q. B. 1867, 11 L. C. J. 275; *Larue* vs. *Loranger*, 3 L. N. 284, Q. B.

dence as to the unusual or unexpected importance or duration of the litigation. *Christin* vs. *Lacoste*, 2 Que. 142, Q. B. 1893.

11. — — — — .—Amongst the professional services for which fees and remuneration may be charged are included travelling, attendance, written and verbal consultations and the examination of papers and documents. (1) Art. 3597 R. S. Q. (Bar Act).

12. — — — — .—A lawyer may recover for consultation and advice given outside of his office. Defendant was held liable in this case where the advice was given during a casual consultation with the lawyer on a train, and it was proved that the defendant was at the time on his way to Montreal to obtain advice on the point concerning which he consulted the plaintiff. *Cooke* vs. *Penfold*, C. Ct. 1884, 7 L. N. 176.

13. — — Advocate Arguing his own Case.—An advocate who conducts his own case, and describes himself on the face of the proceedings as attorney of record, accepts all the duties and responsibilities imposed on atterneys acting for ordinary clients, and is entitled to his fees for services performed in the cause as an attorney. *Gugy* vs. *Brown*, P. C. 1867, 2 L. C. J. 222, 11 L. C. J. 141, 17 L. C. R. 33 (overruling *Gugy* vs. *Ferguson*, 11 L. C. R. 409, Q. B.).

14. — — — —in Supreme Ct.—In the Supreme Court, advocates arguing their own case are not allowed fees. *Langlois* vs. *Valin*, Supreme Ct. 1880, 3 L. N. 336.

15. — — Arbitration under Railway Act.—A judge of the Superior Court may, in his discretion, allow fees to counsel on an arbitration to fix the indemnity to be paid for lands taken by a railway company under 43 and 44 V., c. 43, s. 9, pars. 20 and 37. *Montreal & Sorel Railway Co.* vs. *Vincent*, Q. B. 1884, Ram. Dig. 172, 17 R. L. 36.

16. — — Contract for Services—Status.—The contract is not dependent upon the law of the place where the services are to be given, but upon the status of the person employed. *Reg.* vs. *Doutre*, P. C. 1881, 28 L. C. J. 209.

17. — — Demurrer.—In an action dismissed upon demurrer, the fee is the same as if the action had been dismissed after proof and final hearing on the merits. *McNicholl* vs. *Laberge*, S. C. 1884, 10 L. N. 186; *Normand* vs. *Huot*, S. C. 1859, 9 L. C. R. 405, 7 R. J. R. Q. 297.

18. — — Depositions.—Where depositions taken in one case are filed in another case as if taken in that case, the attorney of the adverse party is entitled to the same fees as if the depositions had been taken in the case in which they are so filed. *Banque d'Hochelaga* vs. *Ewing*, M. L. R., 7 S. C. 40, 1890.

19. — — Deprivation of.—In an action by a lawyer for fees and disbursements —*Held*, that to deprive an advocate of his fees, it is necessary to prove that he has acted with fraud or with gross ignorance of the duties of his profession, and where the law permits the taking of an action before either the Superior Court or the Circuit Court, the advocate cannot be deprived of his fees because, without instructions to the contrary, he took it before the Superior Court. *Davidson* vs. *Laurier*, Q. B. 1881, 1 Dorion's Q. B. R. 366.

20. — — Exchequer and Supreme Court.—In proceedings before the Exchequer and Supreme Courts, there being no tariff as between attorney and client, an attorney has the right in an action for his costs to establish the *quantum meruit* of his services by oral evidence. *Paradis* vs. *Bossé*, Supreme Ct. 1892, 21 Can. S. C. R. 419.

21. — — Factum.—An advocate and attorney at law has the right to claim from his client the cost of a factum made for such client and submitted to the judge, such costs not being provided for in the tariff. (2) *Vandale* vs. *Gauthier*, C. Ct. 1873, 5 R. L. 132.

22. — — In action of $100.—In cases where the judgment is for exactly $100, the attorney's fees should be taxed as in an appealable action of $100 to $200. *Varieur* vs. *Rascony*, S. C. 1889, M. L. R., 5 S. C. 126.

24. — — Lawyer's Letter.— An advocate is entitled to add to the amount of an action the fee usually chargeable for a lawyer's letter. *Lighthall* vs. *Jackson*, C. C. 1879, 3 L. N. 37; and *Héroux* vs. *Clément*, C. C. 1880, 10 R. L. 589. (3)

25. — — .—Where a letter has been written by a lawyer, in pursuance of instructions from a client, to a debtor of the latter, requesting payment of a debt, and the debtor settles the claim, the sum of $1.50 may be

(1) Thus negativing *Devlin* vs *Tumblety*, S. C. 1858, 2 L. C. J. 182.

(2) Supported by French case reported 5 R. L. 104.

(3) This question is now settled by the new tariff allowing a stated fee for letter in different classes of action. See also note 3 L. N. 37.

claimed by the lawyer from the debtor, as the fee for such letter, and he may sue therefor in the name of his client. *Michaels* vs. *Plimsoll*, 6 L. N. 61, and 27 L. C. J. 29; and *Lennox* vs. *Thom*, C. C. 1883, 6 N. L. 8. (1)

26. —— —— —— Held, in extenuation of the above cases, that where the debtor has no direct dealings with the lawyer who wrote the letter, but pays the debt to the creditor, the lawyer cannot recover the costs of the letter from the debtor. (2) *Ouimet* vs. *Gravel*, C. Ct. 1884, 7 L. N. 383.

27. —— —— —— A lawyer cannot recover for the costs of a letter written to the defendant, where the latter settles the debt with the creditor, even though he promises the creditor he will pay the costs of letter; such promise could not bind him toward the lawyer, for he was not legally bound to pay to him the debt. (3) *Larcau* vs. *Leclerc*, C. Ct. 1885, 8 L. N. 344; *Desmarcnais* vs. *Doyle*, C Ct. 1887, 10 L. N. 131.

28. —— —— **Licitation.**— Where the plaintiff, attorney in licitation, had been paid the sum of forty dollars, mentioned in Art 61 of the tariff, for all proceedings on a licitation of one succession or more after judgment rendered, by the purchaser of the first immoveable sold.—*Held* that he had additional a right to the same fee on the immoveables, the sale of which had been retarded by opposition. (4) *Brunet* vs. *Peloquin*, S. C. 1875, 6 R. L. 726.

29. —— **of Counsel at Enquete.**—Action on a promissory note. Being inscribed for *enquête*, the parties contented themselves with an admission of certain facts signed by the attorneys of the plaintiff and the counsel at *enquête* of defendants, and countersigned by the attorneys of the defendants. The action was dismissed with costs. The prothonotary having refused to grant a fee for the defendants' counsel at *enquête*, the defendants appealed from the taxation of the prothonotary, and their pretension was maintained. (5) *Corporation of Quebec* vs. *Piton*, S. C. 1879, 5 Q. L. R. 239; and *Banque d'Hochelaga* vs. *Ewing*, M. L. R., 7 S. C. 40.

30. —— —— —— .—This case was inscribed on the roll for *enquête* and merits. The plaintiff failing to proceed, his action was dismissed with costs. In the bill of defendants' attorneys, taxed against plaintiff, was an item of $10 for counsel fee at *enquête*. The plaintiff moved to revise the taxation, objecting to the item, on the ground that no *enquête* having been made, a counsel fee could not be taxed against him.—*Held*, maintaining the taxation, that the case having been inscribed upon the roll, the fee was properly taxable. (6) *Thayer* vs. *Ross*, S. C. 1881, 8 L. N. 90; and *Laliberté* vs. *Paris*, S. C. 1880, 6 Q. L. R. 201 Contra.

31. —— —— —— .—The production of an admission of facts in a case inscribed for proof and hearing is not equivalent to an examination of witnesses. *Larmonth* vs. *Moreau*, S. C. 1886, 9 L. N. 386.

The *enquête* fee allowed by Art. 29 of the tariff of advocates' fees is only chargeable when counsel other than the attorney of record conducted the *enquête*. *Ib.*

A counsel who does not conduct an *enquête*, but merely countersigns an admission of facts, is therefore not entitled to the fee. *Ib.* (7)

32. —— —— **on Taxation of Bill of Costs.**—An attorney has from the service of notice of taxation a right to a fee of $3 on the taxation of his bill of costs. (8) *Durocher* vs. *Sebastian*, S. C. 1891, 21 R. L. 83.

33. Recovery of, when Paid.—No action can be maintained to recover a fee paid to a barrister. *Bergeron* vs. *Panet*, K. B. 1809, 2 Rev. de Lég. 471.

34. —— —— **Rehearing.**—On a motion to revise the prothonotary's taxation of the defendant's bill of costs.—*Held*, that no fee for rehearing would be allowed unless the rehearing took place by special order of the court and to enable the court to be more fully informed of the case. *Boswell* vs. *Lloyd*, S. C. 1862, 13 L. C. R. 18.

35. —— —— The fee for rehearing will be allowed when the *délibéré* is discharged without the fault of the attorneys, and a rehearing ordered. *Grosleau* vs. *Quebec N. S. T. Road Trustees*, S. C. 1878, 4 Q. L. R. 203.

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(1) (2) (3) This question is now settled by the new tariff allowing a stated fee for letter in different classes of action. See also note 3 L. N. 37.

(4) This decision is one rendered under the tariff of fees in force in 1875.

(5) By the present tariff, in force since May 1st 1894, no provision is made for any fee to Special Counsel at Enquete.

(6) (7) See *supra* note 5.

(8) The tariff of fees in force since May, 1st, 1894, makes no provision for a fee on taxation of bill of costs.

36. —— —— Reprise d'Instance.—The fees of the petitioners' advocate upon a petition in continuance of suit, dismissed on a peremptory exception other than a plea to the merits, are governed by Art. 36 of the tariff. (1) *Guilbault* vs. *Desmarais*, S. C. 1890 18 R. L. 517

37. —— —— Retainer for fixed per iod —An attorney for legal business is a mandatary and like all agents, his services may be dispensed with at any time by the principal, saving his rights. So if an attorney be retained by a general retainer, and at a fixed rate and for a fixed period, and if his services are dispensed with before the expiration of that period, he is entitled to payment for his services to the end of the period fixed.

And where part of his remuneration consists of the fees in cases in which he shall be successful, he is entitled to those fees in cases then unfinished, and he cannot be made to wait for the issue of the suit for payment. The presumption as against the party is that he is right in his pretensions, and that he will therefore succeed in the suit; and under any circumstances the attorney cannot be held responsible for the issue over which he is no longer to have control.

Such an attorney may recover extra pay for services rendered by him in connection with expropriation matters because these were not strictly speaking professional services, *Derlin* vs. *City of Montreal*, Q. B., 13 March 1878.

38. —— —— Second Counsel.—The fee for a second counsel provided by Art. 25 of the tariff of the Court of Appeal must be demanded before taxation of the bill of costs and payment of the same by the adverse party. *Ritchot* vs. *Cardinal*, Q. B. in Chambers 1893, 3 Que. 73.

39. —— —— —— —— A special bargain between an attorney and his client is binding. *Holton* vs. *Anderson*, Q. B. 1876, Ram. Dig 29.

40. —— —— —— Tariff—Retroactive Effect.—The new tariff of fees is applicable to procedure subsequent to the 1st September, 1891, the date of its coming into force, even where the case commenced before that date and was then pending. (2) *Quebec Bank* vs. *Powis*, S. C. 1892, 1 Que. 100. Contra, 1 L. C. R. 105, 2 R. J. Q. 418, C. Ct. 1895; *Tunstall* vs. *Robertson*, S. C. 1851, 1 L. C. R. 476, 3 R. J. Q. 73; *Delery* vs. *Quig*, S. C. 1851, 1 L. C. R. 493, 3 R. J. R. Q. 80.

(1) Art. 39 New Tariff 1894.

(2) And see *supra*, p. 51, "Evidence of Services—Oath."

41. —— —— Where it Arises—Withdrawal from Suit—Action for Fees.—An advocate has no right of action for his fees until the cause wherein he claims them has been terminated by judgment, settlement or discontinuance, or until his client has withdrawn his mandate from him. *Loranger* vs. *Filiatrault*, S. C. 1892, 2 Que, 356.

—— —— —— —— —— .—An advocate cannot withdraw from a cause without the permission of the court or judge; and even where such withdrawal is regularly made, it does not give the advocate a right of action against his client for his fees before the termination of the cause. *Ib.*

—— —— —— —— —— .—The fact that the client retained another lawyer in another case in which he was concerned, and did not respond to a notice by his attorney to inform him what he intended to do in the case in which he represented him, does not justify an advocate in withdrawing from a case, or give him a right of action for his fees before the termination of the suit. *Ib.*

42. —— —— —— —— —— .—An attorner at law has no right of action against his client for costs of suit, until the suit is ended. *Atwell* vs. *Browne*, Q. B. 1865, 9 L. C. J. 155; *Moloney* vs. *Fitzgerald*, C. Ct. 1877, 3 Q. L. R. 381.

43. —— —— —— —— —— .—But it is not necessary that there should be a judgment declaring the case ended before giving a right to fees; it is sufficient if the suit has been terminated by settlement out of Court. *O'Farrell* vs. *Reciprocity Mining Co.*, C. R. 1869, 4 Q. L. R. 198.

44. —— —— Where Action Settled before Return.—A lawyer whose client has promised a retainer, in consideration of services expected of him in the action which he has instituted, cannot recover the amount of such retainer, beyond his fees, where the action was settled before the return day. *Mousseau* vs. *Picard*, S. C. 1873, 5 R. L. 480.

45. —— —— Where the Tariff is Silent.—Cases where the tariff omits to provide for prothonotary's and attorney's fees should be decided in accordance with analogous cases provided for by the tariff. *Corporation des Huissiers* vs. *Caisse*, S. C. 1890, M. L. R. 6 S. C. 32.

XIII. INJURIOUS REMARKS CONCERNING, MADE BY OTHER SIDE.

ART. 9 C. C. P.

A party to an action has no right to identify the attorney of the opposite party with the dispute involved in the case, nor to make injurious or insulting remarks concerning him. *Manseau* vs. *Manseau*, S. C. 1890, 19 R. L. 134.

XIV. LIABILITY OF.

1. Error or Want of Skill. (1)—An attorney at law is not liable for damages, when the suit he has been conducting is dismissed for failure to proceed during three years, in default of proof of negligence on his part. *Beaudry* vs. *Ouimet*, C. R. 1865, 9 L. C. J. 158.

2. An advocate, who, in the belief that the writ was null, advises his client to resist execution even by force, cannot be incriminated for such advice. *Reg* vs. *Morrisson*, Q. B. 1872, 3 R. L. 525.

3. Although an attorney, grossly deficient in integrity, care or skill, to the injury of his client, is answerable for the loss he occasions by such deficiency, he is not answerable for neglect when merely presumed, nor for want of skill in cases of reasonable doubt. *Vallières* vs. *Bernier*, K. B. 1820, 2 Rev. de Leg. 471; *Trenholme* vs. *Mitchell*, S. C. 1890, 20 R. L. 355.

4. No action for damages lies against an attorney *ad litem* for registering a judgment in favor of his client, when the registration is made by him in his professional capacity as acting for such client. *Seymour* vs. *Seymour*, S. C. 1890, 21 R. L. 39.

5. Liability of, for Sheriff's Fees.—Attorneys are personally liable to the sheriff for his fees and disbursements on writs of execution issued on the *fiat* of such attorneys. *Boston* vs. *Taylor*, Q. B. 1857, 1 L. C. J. 60.

6. —— —— for Bailiff's Fees.—Attorneys are personally liable to a bailiff for his fees. *Derlin* vs. *Bibeau*, Q. B. 1864, 30 L. C. J. 101.

7. —— —— —— —— .—An attorney *ad litem* employing a bailiff to execute a writ, and making a special agreement with him as to charges, without stipulating that he is not contracting for himself, becomes personally liable towards the bailiff. *Panneton* vs. *Guillet*, C. Ct. 1880, 7 Q. L. R. 250.

(1) See 1 R. de L. 499.

8. —— —— —— —— .—Unless there is an agreement to that effect, or the attorney has received the money from his client, he is not personally liable to the bailiff for his fees for services. (2) *Gélinas* vs. *Dumont*, C. Ct. 1880, 10 R. L. 229; *Theroux* vs. *Pacaud*, C. R. 1879, 6 Q. L. R. 14.

9. —— —— for Guardian's Salary.—An attorney is not liable to a bailiff for the remuneration of the guardian appointed by the latter. *Plante* vs. *Cazeau*, S. C. 1875, 1 Q. L. R. 203.

10. —— —— For Injurious Statements.—An advocate is not responsible in damages for making, in a case, injurious statements concerning a witness under examination, unless the words complained of are foreign to the case in which he is at the time engaged. (3) *Ganthier* vs. *St. Pierre*, S. C. 1884, 28 L. C. J. 16, 7 L. N. 44.

11. —— —— For Money Collected—Direct Action.—An attorney is liable in a direct action for the recovery of a specific sum alleged to have been collected by him, as a dividend in an insolvent estate, and the principal in such a case is not limited to the mere *actio mandati*. *Phillips* vs. *Joseph*, S. C. 1871, 15 L. C. J. 335, Q. B. 1875, 19 L. C. J. 162.

12. —— —— —— —— Interest on.—A lawyer is not obliged to pay interest on sums of money received at different times, and belonging to his client, when the latter has not put him in default, or when there has been no accounting between them. *Chagnon* vs. *St. Jean*, S. C. 1893, 3 Que. 459.

13. —— —— Joint and Several.—Professional attorneys who carry on business under a firm name are jointly and severally liable toward a client, whom they have represented *ad litem*, for moneys collected by the firm. *Ouimet* vs. *Bergevin*, Q. B. 1878, 22 L. C. J. 265.

14. —— —— —— .—And this, even where the money has been received after judgment rendered in the case. *Julien* vs. *Prevost*, C. Ct. 1884, 8 L. N. 143.

15. —— —— For Indemnity of Witnesses.—An attorney *ad litem* is not liable for the indemnity of a witness whom he summoned at the request of his client. *Laroche* vs. *Holt*, C. Ct. 1853, 3 L. C. R. 109, 3 R. J. R. Q. 453.

(2) It is pointed out in *Gélinas* vs. *Dumont*, that the services of sheriffs are compulsory as are those of bailiffs in France, but that in this province the services of bailiffs are not compulsory, hence the distinction between *Boston* vs. *Taylor* (*supra*) and this case.

(3) Following the English case of *Munster* vs. *Lamb* (49 L. T. Rep. [N. S.] 253), 6 L. N. 394.

XV. POWERS.

1. To Certify Copies of Election Petitions, etc.—The attorney of the petitioner in an election case can certify copies of the original petition, receipts and all other documents of the record, with the same effect as the prothonotary. *Julien* vs. *de St. George*, S. C. 1882, 8 Q. L. R. 361.

2. To Compromise.—An attorney *ad litem* has no power to bind his client by a compromise, and therefore a "transaction" entered into between a defendant and the plaintiff's attorney, and revoked by the defendant after the lapse of a reasonable time for its ratification by the plaintiff, is no longer binding on the defendant. (1) An attorney can, however, bind his client (until disavowed) by any proceeding in the cause, though taken without his client's authority or even in defiance of his prohibition. *King* vs. *Pinsonneault*, P. C. 1875, 22 L. C. J. 58, 6 R. L. 703.

3. To Give Discharge.—An attorney *ad litem* cannot, while acting in that quality, give a valid discharge for a debt for which his client has obtained judgment.

And supposing that by present usage the mandate of the attorney *ad litem* permits him to collect the moneys for the recovery of which he has brought action, yet in the present case the mandate of the attorney having expired at the time the money was collected, after judgment, such usage could no longer have application, and he could not give a valid discharge.(2) *Cloran* vs. *McClanaghan*, S. C. 1885, M. L. R., 1 S. C. 331.

4. To Renounce Appeal.—Per Taschereau, J. An attorney *ad litem* has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken. *Société Can. Française de Construction* vs. *Daveluy*, Supreme Ct. 1891, 20 Can. S. C. R. 449.

5. To Renounce Defective Act of Procedure.—An attorney *ad litem* can, by virtue of his mandate, desist from an act of procedure void for defect of form, and replace it by another. *Séguin* vs. *Gaudet*, Mag. Ct. 1889, 12 L. N. 266.

6. To Renounce Judgment.—Art. 477 C. C. P. The attorney of one of the parties in a case cannot, as such, renounce the whole or part of the judgment given in his favor, but such renunciation, to be valid, must be signed by the party himself or by his attorney *ad hoc*. (3) *Préfontaine* vs. *Brown*, C. R. 1875, 1 Q. L. R. 60

(1) See English Case of *Matthews* vs. *Munster*, Ct. of Appeal 1887, Reported 11 L. N. 6.

(2) See as to termination of mandate *Société Can. Française* vs. *Daveluy*. Taschereau J. at p. 462, 20 S. C. R ; and *Booth* vs. *Larroix*, 21 L. C. J. 307.

(3) See 11 L. N. pp. 1 and 6, remarks re this case.

XVI. PRIVILEGED COMMUNICATIONS.

(See Libel and Slander—Privileged Communications.)

1. Art. 275 C. C. P.—An attorney may be called on to declare the residence of his client, but he cannot be compelled to answer, though it would be no breach of professional etiquette for him to do so. *Ransom* vs. *Corporation of Montreal*, S. C. 1866, 1 L. C. L. J. 94.

2. Art. 275 C. C. P.—The attorney *ad litem* of a party examined as a witness may refuse to answer a question tending to disclose a communication made to him by his client professionally, and not arising out of the examination in chief. *Forsyth* vs. *Charlebois*, S. C. 1868, 12 L. C. J. 261.

3. But such communication is not privileged where the attorney is himself a party to the transaction as well as adviser. *Ethier* vs. *Homier*, S. C. 1873, 18 L. C. J. 83.

4. An advocate and attorney, *tiers saisi* in a cause, cannot refuse to declare what moneys he may have in his hands belonging to a defendant in the cause, on the ground that his doing so would be a betrayal of professional confidence. *Mackenzie* vs. *Mackenzie*, S. C. 1864, 9 L. C. J. 87.

5. On a charge of perjury, alleged to have been committed in an affidavit made by the defendant in order to obtain a writ of capias, the counsel for the accused, plaintiff in the capias suit, was asked to prove the identity of accused, as the person who signed and swore to the affidavit.

Held, that this was not a private or confidential matter, and further that the fact that the witness was also retained for the accused in the perjury case did not excuse him from answering. *Ex parte Kavanagh*, Q. B. 1884, 7 L. N. 316.

7. Communications between solicitor and client are privileged, and accordingly it was Held, that the managing director of a company could not be forced to produce letters written to him by the solicitor of the company touching the suit in which said company was defendant. *Ex parte Abbott*, S. C. 1884, 7 L. N. 318.

8. The right of privilege as to what has been communicated to an advocate by his friend does not extend to conversations in the presence of another party which had nothing of the character of secrecy about them, and could not be considered confidential. *Bulman* vs. *Andrews*, S. C. 1883, 12 R. L. 332.

9. An advocate, summoned as a witness, cannot be compelled to reveal communications made to him by his client, or to relate acts performed by such advocate on the latter's behalf, if these communications and acts relate in any way to the mandate with which he has been charged by the client, and if it is established that without a mandate of this nature such communications would not have been made, or such services required for the acts which it is desired to prove. S. C. 1887, 15 R. L. 63.

XVII. PROFESSIONAL CONDUCT.

1. Where a lawyer caused himself to be sworn as a constable, and with others acted in the arresting of persons whom he was engaged in prosecuting and conducting them to gaol, and ill-treated them, thus uniting the functions of attorney and constable at the same time—*Held*, confirming the judgment of the Superior Court, that this disclosed no offence derogatory to the discipline and honor of the bar. *O'Farrell* vs. *The Council of the Bar for the District of Quebec*, Q. B. 1875, 1 Q. L. R. 154.

2. An attorney guilty of contempt in the face of the court may be indicted instanter. *Binet Exp.*, K. B. 1818, 2 Rev. de Lég. 471.

XVIII. PURGATION OF.

1. On a rule against the prothonotary or clerk of the Court, for contempt in the non-production of a record, the parties will be ordered to purge themselves of all knowledge in the matter. *Morgan* vs. *Valois*, C. Ct. 1865, 9 L. C. J. 169.

2. Where the Court has ordered all the parties to purge themselves on oath regarding a missing document in a record, all the members of a legal firm appearing as attorneys *ad litem* must so purge themselves, and this notwithstanding that the document has been found in the interim. *McCarthon* vs. *McCarthon*, S. C. 1873, 17 L. C. J. 329.

XIX. PROMISE TO.

Where an endorser of a note promised the plaintiff's lawyer to pay the note, though released by non-protest, and afterwards pleaded that such promise was not binding—*Held*, that a promise to the lawyer of the party was just as binding as if made to the party himself. *Johnson et al.* vs. *Geoffrion*, 7 L. C. J. 125, and 13 L. C. R. 161, C. C. 1863.

XX. RIGHTS OF.

Where an attorney *ad litem*, on the word of the adverse party that the case would be settled, discontinued his *enquête*, and was foreclosed in his absence and an inscription for hearing served on him—*Held*, on motion to set aside the foreclosure, that the attorney in a case is *dominus litis* with regard to the procedure, and the attorney foreclosed should not have suspended his *enquête* on the word of the adverse party. *O'Connell* vs. *The Corporation of Montreal*, 4 L. C. J. 56, and 10 L. C. R. 19, S. C. 1859.

XXI. RIGHTS OF PARTNERS AFTER DISSOLUTION.

1. Upon the dissolution of a firm of lawyers, one of the partners can only collect from a debtor to the old firm his share of the indebtedness. Where he collects the whole debt, and gives a receipt therefor, the other partner can ignore such discharge, and force the debtor to pay him his share even by executing against his moveables. *DeMontigny* vs. *DeBellefeuille*, S. C. 1886, 30 L. C. J. 299; *D'Amour* vs. *Bertrand*, C. Ct. 1882, 26 L. C. J. 136.

2. And where one of the members of a dissolved firm gives a discharge to one of its debtors. In an action against such debtor by another member of the firm for his share of the indebtedness, such debtor cannot set off against such demand a current account due by the other member to him, nor set up that the other member had agreed to accept payment of the fees of the firm in goods, etc. *D'Amour* vs. *Bertrand*, C. Ct. 1882, 26 L. C. J. 136.

3. Actions confided to one member of the firm, but instituted in the firm name, become partnership property, and the fees resulting therefrom are to be equally divided among the partners. Ib.

XXII. SUBSTITUTION OF.

1. Effect of Death, Absence, Withdrawal or Promotion.—Where one of two or more attorneys of a firm dies or is removed, the party for whom they act is held to be repre-

sented, to all intents, by the surviving attorney or attorneys. *Dubois* vs. *Dubois*, S. C. 1855, 5 L. C. R. 167, 4 R. J. R. Q. 322; *Tidmarsh* vs. *Stephens*, Dec., 1856, S. C., 1 L. C. J. 16, 6 L. C. R. 194, 5 R. J. R. Q. 65; *McCarthy* vs. *Hart*, Q. B. 1859, 9 L. C. R. 395; *Tassé* vs. *Laberge*, Feb., 1871, S. C.; *Valin* vs. *Anderson*, S. C. 1871, 2 R. C. 110; *Morin* vs. *Henderson*, S. C. 1876, 21 L. C. J. 83; *Dawson* vs. *Macdonald*, March, 1879, Q. B., 10 R. L. 640; *Stearns* vs. *Ross*, Q. B. 1889, M. L. R., 5 Q. B. 1; *Brunelle* vs. *McGreevy*, S. C. 1885, 12 Q. L. R. 85, *Richardson* vs. *Tabb*, S. C. 1872, 4 R. L. 388; *Charby* vs. *Charby*, C. R. 1889, 17 R. L. 374; *Gignère* vs. *Cie. de Chemin de Fer Q. M. & C.*, C. R. 1893, 3 Que. 405.

2. Appeal.— Where an attorney, other than the attorney of record, filed the *factum* in appeal, and the respondent moved to have it rejected from the record and the appeal declared deserted, the motion was rejected with costs. *Bell* vs. *Stephens*, Q. B. 1865, 16 L. C. R. 141.

3. —— ——.—A motion for leave to appeal may be signed by one of the attorneys who appear of record in the court below without a substitution. *Board of Temporalities, etc., vs. Minister, etc., of St. Andrew's Church*, Q. B. 1880, 3 L. N. 379.

4. —— ——.—Where a case was inscribed in review, and the party inscribing died before hearing, a motion to stay proceedings until the instance should be taken up was granted. *Rice* vs. *Libby*, C. R. 1881, 4 L. N. 350.

4*a* —— ——.—A case can be inscribed in Review by other than the attorney of Record and without substitution. *Desrosiers* vs. *McDonald*, C. R. 1871, 3 R. L. 145.

5. Débats de Compte.—An attorney in a demand for the rendering of an account has power to represent the party demanding the account upon the contestation thereof, and another attorney cannot appear on the contestation until there has been a substitution. *Poirier* vs. *Laberge*, S. C. 1885, M. L. R., 1 S. C. 199.

6. Effect of.—*Held*,—confirming S. C., that the substitution of a new attorney by a party in place of the one who previously represented him was an acquiescence in all the proceedings of the first attorney, there being no disavowal, and that such was the case notwithstanding any irregularity in the proceeding. *Burroughs* vs. *Molson et al.*, 8 L. C. R. 494, 6 R. J. R. Q. 317, Q. B. 1858.

7. Formalities.—A motion for substitution of attorneys made by consent of all parties interested may be granted as a matter of course without any adjudication upon the motion. *Aubdjo* vs. *Prentice*, Q. B. 1881, 1 Dorion's Report 125.

8. ——.—Substitution of attorneys can not take place in a cause without leave of the Court or a judge. A petition presented by an attorney substituted without leave will not be received. *Ross* vs. *Kerby*, 1885, M. L. R., 6 S. C. 101.

9. ——.—A substitution of attorneys will not be granted, unless there be a full revocation of the authority of the attorney of record. *Mann* vs. *Lambe*, S. C. 1861, 5 L. C. J. 98.

10. —— ——.—Where the attorney of one of the parties has ceased to act, the opposite party can properly demand the nomination of a new attorney by motion (after previous notice), and is not obliged to proceed by rule *nisi*. *Boudreau* vs. *Lanctot*, C. R. 1868, 12 L. C. J. 215.

11. —— ——.—When the attorneys in a case consent to a substitution of attorneys, the substitution is complete on notice given to the opposite counsel, no adjudication being necessary. *Huot dit Dulude* vs. *McGill*, S. C. 1863, 7 L. C. J. 123.

12. —— ——.—Where an attorney *ad litem* has represented a party in a cause, subsequent to judgment, another attorney *ad litem* cannot regularly take proceedings on behalf of such party without a substitution in place of the first attorney; and that the motion of the first attorney, as on behalf of such party, that all proceedings of the second attorney in the name of such party be rejected from the record, will be granted. *Gillespie* vs. *Spragg*, S. C. 1861, 6 L. C. J. 28.

13. Party addressing the Court.—A party who has appeared in a case by an attorney *ad litem* can only address the Court through his attorney, unless another has been substituted, and the substitution allowed by the Court. *Jones* vs. *Prince*, S. C. 1886, 16 R. L. 554.

14. Promotion of Attorney—Art. 200. After the appointment of an attorney as stipendiary magistrate, no proceeding can be had in the cause in which he acted as such attorney, until the party for whom he was acting has been called upon to appoint another attorney, and has made default to do so. *Maillet* vs. *Séré*, C. C. 1873, 17 L. C. J. 139.

15. Preliminaries to.—Art. 205 C. C. P. The rule contained in Art. 205 of the Code of Civil Procedure, viz., that "a party's revocation of the powers of his attorney will not be received unless he pays him his fees and disbursements, taxed after hearing, or notice given to the party," must be construed strictly; and cannot be extended so as to include retainer, or disbursements, not taxable against the other party, but for which the attorney may have a valid claim against his own client. *McClanaghan* vs. *Gauthier*, S. C. 1893, 4 Que. 72.

16. ——— .—On a demand for substitution of attorneys, the party making the same is only bound under Art. 205 C. C. P. to pay his attorneys, who had also replaced others during the proceedings in the case, their fees and disbursements earned by them from the time they took up the case; and they cannot claim in addition the bill of costs of their predecessors although it appears that they have not been paid. *Winteler* vs. *Davidson*, S. C. 1885, 9 L. N. 11.

This point was also similarly decided, but incidentally, in *Montrait* vs. *Williams*, Q. B. 1879, 24 L. C. J. 144.

17. ——— .—Where a suggestion of the death of one of several defendants was filed of record, a motion to compel the remaining defendant to substitute an attorney in the place of the attorneys of record, one of whom had been elevated to the bench, will not be granted until such suggestion is removed or disposed of. *Sauvageau* vs. *Robertson*, S. C. 1859, 9 L. C. R. 224.

XXIII. WITHDRAWAL.

It is in the discretion of the Court to allow an attorney *ad litem* to withdraw from the the case, on giving notice to the adverse party and his own client. *Archambault* vs. *Westcott*, Q. B. 1875, 23 L. C. J. 293; *Loranger* vs. *Filiatrault*, S. C. 1892, 2 Que. 356.

AFFIDAVIT.

I. Affidavits as Evidence. 1-3.

II. Jurat.

Failure to notice Erasures, etc., in Affidavit. 1-2.

Must show where Affidavit was sworn. 3-4.

Must show before whom the Affidavit was sworn. 5.

Regularity of. 6-7.

Signature of. 8-11.

III. Prothonotaries—Powers of to make.

See also Attachment, Capias, Insolvency, Opposition, and other particular titles.

I. AFFIDAVITS AS EVIDENCE.

1. Affidavits to procure revendication, capias or attachment are completely exhausted by the issue of the writ, and are of no value as proof in the case. (1) *Crehen* vs. *Hagerty*, C. C. 1877, 3 Q. L. R. 322.

2. An affidavit of the death of a person out of Lower Canada, purporting to be sworn before a foreign notary, does not make proof of its contents. *Quinn* vs. *Dumas*, Q. B. 1874, 23 L. C. J. 182.

3. An affidavit of a deceased person is not admitted as evidence on a contestation of account. *Gagnon* vs. *Prince*, Supreme Ct. 1882, 7 Can. S. C. R. 386.

II. JURAT.

1. Failure to Notice Erasures in Affidavit.—An affidavit will not be declared invalid by reason of the failure to mention in the jurat the erasure of certain immaterial words. *City Bank* vs. *Hunter*, Q. B. 1847, 2 R. de L. 171.

2. ——— .—Nor will an affidavit be vitiated by the omission to approve a certain number of words forming part of an affidavit, provided that it be good without the words approved of. *Lauzière* vs. *Lebel*, S. C. 1883, 9 Q. L. R. 337.

3. Must show where Affidavit was Sworn.—*Robertson* vs. *Fontaine*, S. C. 1876, 20 L. C. J. 195.

4. ——— .—*Held*, that the words "at Quebec" were a sufficient indication of the place where the deponent had been sworn, and that the day of the month and year being written in figures was sufficient. *Berry* vs. *May*, S. C. 1859, 13 L. C. R. 1.

5. Must show before whom the Affidavit was Sworn.—Thus "assermenté dans la Cité de Montréal ce douzième jour 1878, signé Hubert, Honey & Gendron," is insuffi-

(1) In this case the Court pointed out that *Bergevin* vs. *Vermilion*, reported in same volume at p. 134, is wrongly represented in the head note, the judgment being based upon the writing *sous seing privé* produced in that cause

cient. (1) *Tate* vs. *Smith*, S. C. 1878, 12 R. L. 438; *Robertson* vs. *Atwell*, C. Ct. 1872, 7 L. C. J. 48; *Heugh* vs. *Ross*, Q. B. 1861, 8 L. C. J. 96.

6. **Regularity of.**—Where the office of prothonotary was occupied by two persons, and the jurat to an affidavit was stated to have been taken "before me"—*Held*, that the writ would not be quashed on that ground. *City Bank* vs. *Hunter*, Q. B. 1847, 2 R. de L. 171.

7. —— —— .—In an affidavit for capias—*Held*, that the words "maketh oath and saith" were a sufficient averment that the deponent had been sworn, and that it was consequently unnecessary to say that he had been duly sworn. *Berry* vs. *May*, S. C. 1859, 13 L. C. R. 1.

8. **Signature of.**—The letters G. C. C. following the signature of the clerk of the Court are a sufficient indication of the quality of the officer signing the jurat of the affidavit which precedes the institution of the action. *Paradis* vs. *Poirier*, C. R. 1885, 11 Q. L. R. 82.

9. —— —— .— The initials "C. C. S.," appended to the signature of an officer receiving an affidavit to be used in a district other than that in which it is sworn, are insufficient. *Leclerc* vs. *Blanchard*, C. C. 1868, 12 L. C. J. 236.

10. —— —— .— **Contra.** The words "Commissioner S. C." are a sufficient indication of the quality of the commissioner. It is not necessary to add thereto the name of the district where such commissioner exercises his calling. *Wood* vs. *Ste. Marie*, C. Ct. 1877, 21 L. C. J. 306; *Vezina* vs. *Gibeau*, C. Ct. 1884, 8 L. N. 2; *Launière* vs. *Lebel*, S. C. 1883, 9 Q. L. R. 337.

11. —— —— .—In the jurat of an affidavit the quality of the person receiving it is sufficiently indicated by terms which enable the court to recognize its officers. *Montgomery* vs. *Lyster*, C. R. 1882, 8 Q. L. R. 375.

III. PROTHONOTARIES—POWERS OF, TO MAKE.

The joint prothonotaries have a right to receive an affidavit to make proof in another district, in the same way that a judge of the S. C. might receive such affidavit. *Traham* vs. *Gagnon*, C. R. 1873, 17 L. C. J. 333.

(1) *Held*—To same effect in Supreme Ct. in a case from Nova Scotia. *Archibald* vs. *Hubley*, 18 Can. S. 116.

AFFREIGHTMENT.

I. Bills of Lading (see also Freight, *infra No. IV.*)
- *As Evidence.* 1.
- *Law governing.* 2.
- *Negotiability.* 3.
- *Right to.* 4.
- *Second Carrier.* 5.
- *Transfer.* 6.

II. Charter Party.
- *Dead Freight.* 1.
- *Dead Freight or Demurrage.* 2.
- *Deviation—Extra Insurance.* 3.
- *Liability of Master of Vessel.* 4.
- *Liability under.* 5.
- *Rejection of Contract.* 6 10.
- *Rights of Charterer against another Vessel doing Damage.* 11.
- *Sub-Lessor—Liability of.* 12.

III. Demurrage.
- *By whom Payable.* 1-2. (See also title "Agency," Liability of Agent.
- *Delay caused by Disease among Horses.* 3.
- *Delay caused by Lack of Coal to Load—Taking turn.* 4-5.
- *Delay caused by Loading "Bunker Coal."* 6.
- *Delay caused by Second Carrier.* 7.
- *Computation of.* 8.
- *Liability of Purchaser of Cargo.* 9.
- *Lien for.* 10.
- *Power of Master of Vessel to sue for in his own name.* 11-12. (See Freight Charges, *infra No. V.*—2.)
- *Rate of Discharge.* 13.
- *When Due.* 14.

IV. Freight.
- *Contribution for General Average.* 1.
- *Damages—Cattle—Delay in Sailing.* 2.
- *Damages—Cattle—Force Majeure.* 3.
- *Damages—Conditions of Bill of Lading.* 4.
- *Damages—Condition of Goods when Shipped.* 5.
- *Damages—Delay—Customs.* 6.
- *Damages—Delay in Transhipment.* 7.
- *Damages—Deviation from Voyage.* 8.
- *Deck Load.* 9.
- *Delivery.* 10-11. (See also Freight Charges, *infra No. V.*—5-8.)
- *Dispute as to Quantity Shipped.* 12.
- *Dispute as to Terms of Bill of Lading—Refusal to Deliver Bill of Lading.* 13.

Proof of Condition of Goods when Shipped. 14.
Right to Refuse Freight coming alongside too late—Usage of Trade. 15.
Storage. 16.

V. FREIGHT CHARGES.

Pleading non-performance of Charter-Party in Action for. 1.
Power of Master of Vessel to sue for. 2. (See Demurrage, *supra No. III.*—11-12.)
Right to. 3-4.
Payment—Delivery—Lien. 5-8.
Where part Cargo delivered Damaged or Lost. 9-13.
Who Liable for. 14-18. (See also title "AGENCY"—Liability of Agent.)

See also CARRIERS, LIABILITY OF, etc.

I. BILLS OF LADING.(1)

1. As Evidence.—A bill of lading, as between the parties thereto, may be explained by parol testimony. *Fowler* vs. *Stirling*, S. C. 1858, 3 L. C. J. 103, 7 R. J. R. Q. 376.

2. Law Governing.—A bill of lading made in England by the master of an English ship is a contract to be governed and determined by English law. *Moore* vs. *Harris*, P. C. 1876, 2 Q. L. R. 147.

3. Negotiability.—The negotiability of a bill of lading cannot be put upon precisely the same footing as a bill of exchange. An advancer on a bill of lading should exercise reasonable diligence as regards the cargo it purports to represent. *St. Lawrence & Chicago Forward. Co.* vs. *Molson's Bank*, Q. B. 1884, M. L. R., 1 Q. B. 75.

4. Right to.—By the usage of trade a shipper is entitled to bills of lading of the goods shipped. *McCulloch* vs. *Hatfield*, Q. B. 1863, 7 L. C. J. 229.

5. Second Carrier.—Wheat was carried by a schooner from a port in the United States to Kingston, Ont., under a bill of lading requiring its delivery there to the defendants, subject to the order of the shipper, and was accepted from the schooner, and a receipt therefor given on the duplicate of the bill of lading, and forwarded by the defendants to Montreal, and there delivered without the order of the shippers and without the surrender or presentation of the bill of lading The question was whether the appellants, the Forwarding Company, were held to the same obligations as if they had been signers of the original bill of lading, which the respondents contended had force and effect until the cargo reached its destination in Montreal, and whether the appellants as forwarders were bound to have demanded and secured the surrender of the original bill of lading on delivery by them of the cargo to the consignees.—*Held*, reversing the decision of the Superior Court (5 L. N. 6 and 25 L. C. J. 324), that the bill of lading was fulfilled and became effete by the delivery of the wheat at Kingston, prior to the assignment of the bill of lading to the respondents. *St. Lawrence & Chicago Forwarding Co.* vs. *Molson's Bank*, 7 L. N. 367, and 1 M. L. R., Q. B. 75, 1884, 4 Dorion, Q. B. 16, 28 L. C. J. 127.

And the alleged usage of trade imposing the obligations incurred under the first bill of lading upon the carrier who accepts a cargo carried to an intermediate port, to forward to its final destination by an additional transit so as to require such ultimate carrier to procure the surrender of the original bill of lading, to free himself from responsibility, could not alter the established significance of the documents used, or the legal relations of the parties according to the facts of the case, or make liability depend upon obtaining surrender of a document after it had exhausted its efficiency and ceased to have any operation. *Ib.*

6. Transfer.—A bill of lading may be transferred by delivery without endorsement. *Fowler* vs. *Stirling*, S. C. 1858, 3 L. C. J. 103, 7 R. J. R. Q. 376.

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(1) By 52 Vic., c. 30, it is enacted that: 1st. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or indorsement, shall have and be vested with all such rights of action and be subject to all such liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2nd. Nothing in this act contained shall prejudice or affect any right of stoppage *in transitu*, or any right of an unpaid vendor under the Civil Code of Lower Canada, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee, by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.

3rd. Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel or train, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading has actual notice of the time of receiving the same that the goods had not in fact been laden on board, or unless such bill of lading has a stipulation to the contrary. Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fault of the shipper, or of the holder, or of some person under whom the holder claims.

II. CHARTER PARTY.

1. Dead Freight.—Art. 2439 C.C. The freighter who does not load the vessel to its full capacity, as agreed upon, must nevertheless pay for the entire freight of the vessel, according to Art. 2439 C.C., and will also be liable for damages, should any occur in consequence. *Lomer* vs. *Cox*, S.C. 1881, 11 R. L. 339.

2. —— Demurrage.—By charter party the appellants agreed to load the respondent's ship at Montreal with a cargo of wheat, maize, peas or rye, "as fast as can be received in fine weather," and ten days' demurrage were agreed on over and above lying days, at £40 per day. Penalty for non-performance of the agreement was estimated on amount of freight. Should ice set in during loading, so as to endanger the ship, master to be at liberty to sail with part cargo, and to have leave to fill up at any open port on the way homeward for ship's benefit. The ship was ready to receive cargo on the 15th of November, 1880, at 11 a.m., and the appellants began loading at 2 p.m. on the 16th November. After loading a certain quantity of rye in the forward hold, as it would not be safe to load the ship down by the head any further, the captain refused to take any more in the forward hold. No other cargo was ready, as the respondent would not put the rye anywhere except in the forward hold, and they stopped loading. At 8 a.m. on the 19th the loading recommenced, and continued night and day until 6 a.m. on Sunday, the 21st, at which time the vessel sailed, in consequence of ice beginning to set in. When she sailed, she was 214½ tons short of a full cargo. The respondent sued appellants because the ship had not received a full cargo, and claimed 2½ days (15th, 16th and 17th November), and freight on 214½ tons of cargo not shipped. The appellants contended that the delay was not due to them, but to the ship in not supplying baggers and sewers to bag the grain; that the time lost on the first week was made up by night work, and that mere delay in loading could not sustain claim for dead freight. The Superior Court, Montreal, gave judgment for the respondent for the dead freight, but refused to allow demurrage. This judgment was affirmed by the Court of Queen's Bench (*Vide* M. L. R., 1 Q. B. 445).—*Held*, affirming the judgment of the Court below, that as there was evidence that the vessel could have been loaded with a full and complete cargo without nightwork before she left, had the freighters supplied the cargo as agreed by the charter party, the appellants were liable for damages. *Lord* vs. *Davidson*, 9 L. N. 170, and 13 Can. S. C. R. 166, Su. Ct. 1885.

That the days' demurrage mentioned in the charter party referred to, are over and above the lying days, and have no reference to the loading of the ship. *Ib.*

3. Deviation—Extra Insurance.—The charter party described the voyage in writing as being from Havana, Cuba, "to Montreal direct *via* the river St. Lawrence." A printed clause declared that the steamship should "have liberty to tow and be towed, and to assist vessels in all situations, *also to call at any port or ports for coals or other supplies*"—*Held* (reversing the judgment of the Court below), that the fact that the steamship called at the port of Sydney, C.B., for coal, in the course of the voyage, was not a deviation therefrom other than permitted by the charter party, and that the increased premium of insurance paid by the charterers in consequence of the vessel calling at Sydney could not be deducted from the freight. *Peters* vs. *Can. Sugar Ref. Co.*, 1886, M. L. R., 2 Q. B. 420, 31 L. C. J. 72.

4. Liability of Master of Vessel.—Persons engaging a vessel under a charter-party, in which they reserve to themselves the right to employ a stevedore for the loading of the vessel, have no recourse against the master or captain for damages incurred during the voyage and caused by bad loading or absence of ballast.

And a remark made by the captain of the vessel to the stevedore, who asked for more ballast to put in the vessel, to the effect that he need not bother himself, that the vessel was staunch, and that he could go on with his loading, does not infer any responsibility on the part of the captain with respect to the loading and ballasting of the vessel, if the stevedore was himself satisfied with his answer, and continued the loading. The fact that the captain has signed the bill of lading, acknowledging that the goods were received in good order, will not prevent him from showing that the goods were damaged by the persons employed in loading. *Bozzo* vs. *Moffatt*, S. C. 1881, 11 R. L. 41.

5. Liability under Charter Party.—In a charter party *les avaries de la mer et de la saison* were excepted from a general covenant of responsibility for the chartered vessel, and the charterer was held not to be answerable for her loss by ice. *Fougère* vs. *Boucher*, K. B. 1821, 2 Rev. de Lég. 78.

6. Rejection of Contract.—A charter party provided that the vessel was to receive cargo at Quebec "on or before the 10th August next, or this charter is cancelled." The vessel arrived in port, in ballast, only on the morning of the 10th, and no ballast was discharged on that day. On the same afternoon the ship's agent notified the charterer, by protest, that the ship was ready for loading, and demanded a cargo, which the latter refused to give, alleging that the said ship was not ready to receive cargo according to agreement—*Held*, that the charter party had become cancelled according to its terms, the ship not being ready to receive cargo or fulfil its obligations either literally, substantially or according to the usage of trade at Quebec. *Patterson* vs. *Knight*, S. C. 1878, 4 Q. L. R. 187.

7. —— ——.—The appellant, in January, 1879, agreed to charter a steamship for the carriage of live cattle to England, and the conditions of the charter-party were that the steamship should proceed to Montreal with all convenient speed, to arrive there "between" the opening of navigation in 1879, and thereafter to run regularly between Montreal and London, and to be dispatched from Montreal in regular rotation with other steamers to be chartered up to 1st October, 1879. Navigation opened at Montreal about 1st May, but the steamship did not arrive there until 5th June, when the appellant refused to load.—*Held*, that there was not a substantial compliance with the contract on the part of the ship, and that the appellant was entitled to throw up the charter-party. *McShane* vs. *Henderson*, 1884, M. L. R., 1 Q. B. 264, reversing S. C., 5 L. N. 196.

8. —— ——.—The appellant, in January, 1879, agreed to charter a steamship, for the carriage of live cattle to England, and the conditions of the charter-party were that the ship should proceed to Montreal with all convenient speed, to arrive there "between" the opening of navigation of 1879, and thereafter to run regularly between Montreal and London, and to be dispatched from Montreal in regular rotation with other steamers under charter of the same charterer, to be chartered up to 1st October, 1879. Navigation opened at Montreal about 1st May, but the steamship did not arrive there until 18th May, when the appellant refused to load.—*Held* (following *McShane & Henderson*, M. L. R., 1 Q. B. 264), that there was not a substantial compliance with the contract on the part of the ship, and the appellant was entitled to throw up the charter-party. *McShane* vs. *Hall*, 1885, M. L. R., 2 Q. B. 42, reversing S. C., 27 L. C. J. 187, 6 L. N. 195.

9. —— —— —. Where a charter-party provided that a steamer should arrive in the Port of Montreal "*between* the opening of navigation of 1879," arrival on the 18th of May was not a substantial compliance with the stipulation, it being proved that navigation opened about the 1st of May;

2. That respondents, having failed substantially to perform their obligation under the charter-party, as aforesaid, appellant was at liberty to repudiate the contract. *McShane* vs. *Milburn*, Q. B. 1885, 29 L. C. J. 274.

10. —— ——.—A cattle shipper on the 29th April engaged the cattle space of a steamship then on her way out from Great Britain to Montreal, for the transportation of cattle from Montreal to England, one of the stipulations of the contract being, "vessel to sail about 15th of May next." The ship arrived at Montreal on the 10th May, and on the 16th the ship's agent formally notified the cattle shipper that the vessel would be ready to load the cattle on the 21st May.

A contract between the same parties in the previous year contained these clauses: "Shipper guarantees to deliver animals without delay any time after six days' notice, provided vessel is ready for them, or pay for detention of steamer. Steamer guarantees to pay expenses and cost of keep of animals, not exceeding £40 sterling per day, in case of delay beyond six days' notice of readiness to receive." The terms of the previous year's contract, with certain exceptions, were made part of the contract now in question.

Held (reversing the judgment of Davidson J., 1 Que. S. C. 535), that to entitle a charterer to put an end to the contract, the delay of the ship owner must be such as would frustrate the object of the voyage. In the present case time was of the essence of the contract only after the expiry of the notice when the ship would be ready to receive cattle. The arrival of the ship on the 10th May, and the notification on the 16th May of readiness to load the cattle on the 21st May, was a sufficient compliance with the contract on the part of the steamship owners to exclude the shipper from the right of terminating it, the delay not being such as to frustrate the object of the voyage, and the redress of the shipper (if any) for such delay being in the form of damages. *Mackill* vs. *Morgan*, Q. B. 1894, 3 Que. 365.

11. Rights of Charterer against another Vessel doing Damage.—Where a ves-

sel under charter was injured by collision caused by another vessel, the charter-party providing that in case of damage the hiring should cease until she could be repaired,—*Held*, that an action by the charterers against the offending ship for the detention would lie. The Nettlesworth, C. V. A. 1883, 9 Q. L. R. 359.

12. Sub-Lessor—Liability of.—By 2408 C. C., the sub-lessor of a ship is liable as if he were owner. *Stoddard* vs. *Gosset*, Q. B. 19 March, 1877.

The appellants chartered the steamer "Livorno" from the Italian Lloyds Navigation Company for the voyage from Liverpool, where she was lying, to Montreal, and back to some port in the United Kingdom, or on the continent between Havre and Hamburg. The ship was consigned to S., appellants' agent in Montreal. S. rechartered the steamer in Montreal to R., G. & Co., at an advance of threepence sterling per quarter. R., G. & Co., for the consideration of $550.87 paid down, transferred by indorsement their rights in said charter party to respondent, and he was accepted by appellants in place of R., G. & Co., and respondent promised to pay appellants the freight at the rate of 9s. 3d. sterling per quarter to S. on the arrival of the ship at her port of destination. On certain misrepresentations of the captain, who was in charge of the vessel when first chartered to appellants, and owing to some wrong-doing on his part, respondent suffered considerable damage. Respondent, it seems, paid the owners the original freight—that is, 3d. less than R., G. & Co. promised to pay appellants, but he refused to pay the other 3d., saying that it was compensated by these damages. Appellants sued for the extra 3d. per quarter, and respondent set up his damages in compensation. The damages were proved to have been suffered, but it was contended that appellants were not liable, but the owners who placed the captain on board and who had control of the ship, and that the respondent knew that appellants were charterers and not owners. Question whether the charterers were owners of the ship *pro tempore*. By the Court: "I cannot see that there is the variance in the jurisprudence which Abbott insists on. It appears to me that Sergeant Shee's note to the 8th edition of Abbott, p. 45, clears up the supposed inconsistency. But it is unnecessary here to enter into the intricacies of these cases, further than to observe that if there is any particular difficulty, the decision must turn on the interpretation of the charter party. This rule is precisely what Pothier has laid down (Ch. Partie, Part 1, Sect. 5, No. 103). It is the lease of the ship or it is the lease of work—the obligation to carry goods; but Pothier says that this distinction is of no consequence in French practice as regards the master or the merchant, and he does not attempt to establish that this distinction has any practical effect as regards other parties. We need not therefore consider this distinction. But the difficulty raised in the English books, which do not, we must always keep in mind, lay down our law on the matter, motived the introduction of an absolute disposition of our Code, which if it be not absolutely the rule of the old law is now our rule of law, and it appears to me to be decisive that, in the sub-lease of a ship, the sub-lessor is liable as if he were owner." (*Ibid.*)

III. DEMURRAGE.

1. By whom Payable.—A consignee, who is not the freighter's recognized agent, and who receives goods under a bill of lading, which undertakes their delivery to the consignee on payment of freight and the fulfilment of all other conditions of the charter party, among which are stated the number of lay-days and the price for each additional day; such consignee is liable for all demurrage occurring in the unloading of the goods.

All such demurrage can be recovered by the captain of the vessel who signed the bill of lading. *Knudson* vs. *Lightbound*, S. C. 1885, 11 Q. L. R. 39.

2. —— —— (Arts. 2458, 2454 C. C.) Charges for demurrage or special damages arising from delay to unload the vessel are payable by the freighter or by the consignee where the latter is chargeable with the freight. *Shorah* vs. *Canada Sugar Co.*, S. C. 1885, 29 L. C. J. 154.

3. Delay caused by Disease among Horses.—(2457 *et seq.* C. C.) The prevalence of a disease among horses, such as that of October, 1872, which rendered a large number for a time unserviceable, is no defence to a claim by a vessel against the consignee for demurrage. *Lacroix* vs. *Jackson*, S. C. 1873, 17 L. C. J. 329.

4. —— —— Lack of Coal to load—Taking turn.—A charter-party was entered into, by which a steamer was to take on board a cargo of coal at the port of Sydney, Cape Breton. In the charter-party was this stipulation: "Taking her turn with other steamers, and taking precedence of sailing vessels, and

receiving prompt despatch in loading and unloading." Sydney is a coaling port, and the coal is brought straight from the pit to the vessels loading. There were a number of vessels waiting to load, and the steamer did not get her cargo until seventeen days after the captain protested the freighters—*Held*, reversing the judgment of the Q. B. (5 L. N. 124, 27 L. C. J. 30, 2 Q. B. R. 337), that want of diligence on the part of of the lessees (defendants) was established, the delay which occurred in loading the vessel being caused by the deficiency of coals at the port, and not by the necessity of taking turn according to the custom of the port. *Lord* vs. *Elliott*, P. C. 1883, 6 L. N. 146, 52 L. J. P. C. 23.

5. —— —— —— —— But in a similar case the plaintiff's action was dismissed in the Queen's Bench, the Court saying: Probably in this case the same question could not arise, for the charter-party contains a stipulation not to be found in the other, namely: That the "Tagus" should load in the usual manner with a full and complete cargo of coals, which was to be *brought alongside, as is customary at ports of loading and discharge*. There is also no evidence to establish that the facilities of the pier were greater than the production of the mine, or that there was any lack of coal at the pier. *Lord* vs. *Dunkerly*, Q. B. 1884, 7 L. N. 102, 28 L. C. J. 88 (reversing S. C., 3 L. N. 170.)

6. —— —— **Loading "Bunker Coal."**— Where the charter-party stipulates that a vessel shall load in turn, subject to the "regulations of the International Coal & Railway Company," and it appears that it is one of their regulations that steamers shall have precedence to take "bunker coal,"—that is, coal for their own use in navigating,—any loss of time in giving such precedence will not give rise to demurrage. *Allan* vs. *Carbray*, Q. B., 14th June, 1879.

7. —— —— **Second Carrier.**— Action was brought by the owners of a vessel against the owners and consignees of a quantity of grain, for damage occasioned by delay in receiving the cargo. The grain was brought by the plaintiffs' vessel from Chicago to Kingston, where the defendants employed a forwarding house to receive it and carry it to Montreal. Defendants' pretension was that these second carriers were ready to receive it, and that the delay was occasioned by the captain of the plaintiffs' vessel, which was not proved—*Held*, that the defendants were liable, notwithstanding that the delay was occasioned by the carriers employed by defendants to receive and convey it forward on their account. *Henderson* vs. *Caverhill*, S. C. 1862, 13 L. C. R. 77.

8. **Computation of.**—Where a rate for demurrage was stipulated in the charter party, —*Held*, that only working days should be counted in estimating the demurrage. *Hart* vs. *Beard*, S. C. 1878, 1 L. N. 260.

9. **Liability of Purchaser of Cargo of Coal.**—The purchaser of a cargo of coal is liable in damages for the demurrage incurred by the ship, owing to the purchasers not being ready to receive the coal according to the rate at which it should be delivered. *Brow* vs. *Harl*, Q. B., 14th June, 1879.

10. **Lien for.**—Under the defendant's bill of lading, a lien upon the goods carried was created as well for demurrage as for freight. *Murray* vs. *G. T. Ry. Co.*, C. Ct. 1874, 5 R. L. 746.

11. **Power of Master of Vessel to sue for, in his own name.**—The master of a vessel has no right as master to sue for demurrage, unless there be an express or implied contract to pay him the same. *Chandler* vs. *The Sydney & Louisbourg Coal & Ry. Co.*, S. C. 1886, M. L. R., 2 S. C. 319.

12. —— —— —— —— The master of a vessel has no right to sue on a contract of affreightment unless it is made in his name; but he has a right to sue for all matters arising out of the bill of lading signed by him. *Knudson* vs. *Lighthound*, S. C. 1885, 11 Q. L. R. at p. 39.

13. **Rate of Discharge.**—According to the provisions of C. S. L. C. cap. 160, the consignee is not bound to discharge the cargo of a sailing vessel, if such cargo consists of grain, at a greater rate than two thousand minots per diem. (1) *Marchand* vs. *Renaud*, S. C. 1862, 6 L. C. J. 119.

14. **When due.**—(Arts 2457 and 2460 C. C.) Demurrage is due without a stipulation to that effect when actual damage is proved to have been suffered by the owners of the vessel in consequence of the delay. *Seymour* vs. *Sincennes*, Q. B. 1869, 1 R. L. 716; *Marchand* vs. *Renaud*, S. C. 1862, 6 L. C. J. 119.

(1) By amendment to the Civil Code (Art. 2457), by Art. 5708 R. S. Q.

A cargo of a vessel consisting of coal shall be discharged at the rate of forty chaldrons *per diem*;

A cargo of metal, the freight of which is estimated by the ton, at the rate of at least sixty tons daily;

A cargo of salt or grain, at the rate of ten thousand minots daily;

A cargo of salt in sacks, at the rate of at least one thousand sacks daily;

A cargo of sawed lumber, at the rate of at least fifty thousand feet daily;

And a cargo of bricks, at the rate of at least twenty thousand daily.

IV. FREIGHT.

1. Contribution for General Average.—It is for the master at his diligence to establish the contribution for a general average; and where he has not done so, he cannot demand the deposit of a sum of money arbitrarily fixed by him as the probable amount of the contribution before delivering the goods, but must be satisfied with a sufficient security bond. *Pearson* vs. *Wurtele*, 5th June, 1876, Q. B.

2. Damage to Cattle—Delay in Sailing.—(Art. 2426 C. C.) T. and others were cattle exporters, who shipped 100 head of cattle on board a steamer belonging to A. and others, the defendants, to be conveyed from Montreal to Glasgow in Scotland. The cattle were ordered on board by the vessel's authorities about daybreak on the 9th July, 1885, it being understood that the vessel should sail before eight o'clock in the morning. Owing to the lading of the vessel not having been completed, she did not sail until the afternoon of the said 9th July, and on account of the intense heat 21 head of the cattle died, and the remainder were deteriorated in quality, and sold at a lower price than they would otherwise have brought. T. brought an action against A. to recover the price of the cattle which had died and the amount of loss sustained through the deterioration of the others.—*Held*, that A. *et al.* were responsible for the acts of the master and other authorities of the vessel, in ordering the said cattle on board as they did, before the vessel was ready to sail, and that the said master and other authorities of the vessel were guilty of gross negligence, which caused the death of the cattle which were suffocated. *Thompson* vs. *Allan*, 32 L. C. J. 69; S. C. 1887.

The defendants were liable for the price of the cattle which were suffocated, but the loss from the deterioration of the remainder of said cattle had not been proved to have been caused by the delay of said vessel in sailing. (*Ib.*)

3. —— —— Cattle — Force Majeure.—(2427 C. C.) The plaintiff shipped cattle on a steamship of defendants, the latter agreeing to supply them with water. On the 9th day of the voyage from Portland to Liverpool, the ship's rudder broke, and the vessel only reached Liverpool after 49 days' voyage. The captain, to economize coal, stopped condensing water for use of cattle, and a large part of plaintiff's cattle died in consequence, the remainder being also rendered of little value.—*Held*, that the accident to the rudder was caused by perils of the seas, and under the circumstances, the stopping of water and plaintiff's consequent loss were the result of inevitable accident, *force majeure*, and that defendants were not liable therefor. *Kelly* vs. *The Mississippi & Dominion Steamship Co.*, S. C. 1886, 31 L. C. J. 42.

4. —— —— Conditions of Bill of Lading.—Where, under a bill of lading, goods were "to be delivered from the ship's deck where the ship's responsibility shall cease, at Montreal, unto the Grand Trunk Railway Company, and by them to be forwarded thence by railway to Toronto, and there delivered" to plaintiff; the provision "no damage that can be insured against will be paid for, nor will any claim whatever be admitted, unless made before the goods are removed,"—*Held*, to apply to the removal from the ship at Montreal, and to be strictly binding on the consignees, and such a condition is not an unreasonable one, and covers all damage latent as well as apparent. And if any limitation of the condition could be implied, it could not reasonably go further than to exclude such damage only as could not have been discovered on an examination of the goods, conducted with proper care and skill, at the place of removal. But a delay of several weeks in making a claim for damage done to goods on the ship would not of itself (and apart from the above stated condition) be a sufficient answer to the action. *Moore* vs. *Harris*, P. C. 1876, 2 Q. L. R. 147.

5. —— —— Condition of Goods when shipped.—In an action of damages done to a cargo of tea in the voyage from London to Montreal—*Held*, that as to proof of the condition of the goods when shipped there was no general rule of law or evidence, and it must depend on the circumstances of each case how far such proof is necessary, and when the case is to be regarded as insufficiently proved without it. *Moore* vs. *Harris*, P. C. 1876, 2 Q. L. R. 147.

6. Damage to — Delay — Customs.—The respondent, as master of a vessel, had brought from Liverpool a quantity of galvanized metal, to be delivered at the port of Quebec "to order or assignees," and no assignee being found, the respondent sent, among others, to the appellant to ascertain if he were the importer. The latter answered that he expected a quantity of metal, but not having received any advice of its arrival he would not take it. The statute regulating the

customs requires that importers shall, within five days after the arrival of the vessel, land the goods, and pay the duties thereon, and that, in default thereof, it shall be lawful for the officer of customs to convey such goods to the customs warehouse. The metal was kept on board for twelve days after arrival, and was then landed by authority of the collector of customs, conveyed in an order to the officer of that department on board, instructing him to land the metal and convey it to the customs warehouse. The metal was landed on the wharf, where it lay for some days exposed to the rain and weather, by the action of which it was damaged. On action by the appellant for the value of such damage,—*Held*, confirming judgment of court below, that the respondent had fully complied with the terms of the bill of lading, and that there was no neglect or carelessness on his part, and that he was not responsible for the damages. *Scott* vs. *Hescroff*, 2 L. C. R. 477, S. C., and 5 L. C. R. 274, Q. B. 1852, 4 R. J. R. Q. 350, 3 R. J. R. Q. 326.

7. —— —— Delay in Transhipment.—Where a bill of lading for goods placed on board a lighter in Montreal for transhipment at Quebec, on board the ocean steamer there, contains a clause, that if from any cause the goods shall not go forward on the ship the same shall be forwarded by the next steamer of the same line, the carrier is not liable for loss arising from a delay in transhipment, owing to the steamer being already full. *Torrance* vs. *Allan*, Q. B. 1863, 8 L. C. J. 57, S. C., 6 L. C. J. 190.

8. —— Deviation from Voyage.—(Art. 2426 C. C.) The law implies a duty on the owner of a vessel, which carries freight, to proceed without unnecessary deviation in the usual course.

It is the duty of ship-masters to aid and assist ships in distress at sea, and, for that purpose, a vessel may go out of her regular course, and it is not considered a deviation; but having succored those on board, the ship-master has no right to risk his own freight to render salvage services.

No wrong-doer can be allowed to apportion or qualify his own wrong, and when loss has happened which is attributable to his wrongful act of deviation, the ship-master cannot set up as an answer to the action the possibility of a loss, if his wrongful act had never been done. *Tarr* vs. *Desjardins*, S. C. 1863, 13 L. C. R. 394.

9. Deck Loads.—(Art. 2425 C. C.—36 V., c. 56.) Where the defendant in an action for a balance of freight, set up, by way of incidental demand, a claim for loss on the merchandise conveyed, which had occurred during the voyage by reason of the plaintiff carrying a portion of the cargo on deck, and the plaintiff pleaded a custom to that effect—*Held*, confirming decision of the court below, that there was no custom of trade justifying the plaintiff in carrying a part of the cargo on the deck of the vessel, and exempting him from loss arising thereby. *Gaherty* vs. *Torrance*, 4 L. C. J. 371, S. C., and 6 L. C. J. 313, and 13 L. C. R. 401, Q. B. 1862.

10. Delivery. — (Art. 2430.) (See also Freight Charges—Payment.)

If goods are put on shore by the master of a ship, and are lost, he is not answerable for their loss or damage, unless it appears that the loss was occasioned by some neglect on his part of the regular and common duties of ship-master. *Rivers* vs. *Duncan*, 2 R. de L. 75; *Juson* vs. *Aylward*, Q B. 1862, 14 L. C. R. 164; *Scott* vs. *Hescroff*, S. C. 1852, 2 L. C. R. 477.

11. —— The ship owner is bound to deliver the whole cargo received, unless it has diminished from causes for which he is not liable, such as the shrinkage of oats from heating, to the extent of three per cent. *Seymour* vs. *Sincennes*, Q. B. 1869, 1 R. L. 716.

12. Dispute as to Quantity shipped—Bill of Lading.—(Art. 2424 C. C.) An afreighter cannot proceed by way of revendication, as in the case of an unlawful detainer, against the master of a ship, when such afreighter and master cannot agree as to the quantity of the goods shipped, and as to the bill of lading to be signed. *Gordon* vs. *Pollock*, Q. B. 1849, 1 L. C. R. 313; 3 R. J. R. Q 17.

13. —— —— Terms of Bill of Lading—Refusal to deliver Bill of Lading.—(Art. 2424 C. C.) Where plaintiffs shipped a quantity of flour on board a vessel of which defendant was master, and the defendant refused to sign or deliver bills of lading therefor—*Held*, that, according to the usage of trade, a shipper was entitled to bills of lading of the goods shipped, and an attachment in revendication in this case would lie. *McCulloch et al.* vs. *Hatfield*, Q. B. 1863, 7 L. C. J. 229.

14. Proof of Condition of Goods when shipped.—There is no general rule of law or evidence on the subject; it must depend on the circumstances of each case how far such proof

is necessary, and the case is to be regarded as insufficiently proved without it. *Moore* vs. *Harris*, P. C. 1876, 2 Q. L. R. 147.

15. Right to refuse Freight coming alongside too late—Usage of Trade.—Where no time is fixed for the bringing of freight alongside the ship, the carrier, according to the usage of trade in the port of Montreal, has a right to call for the freight when he needs it, in order to complete loading of cargo in time for the regular sailing of the ship. So, where a steamship was to take a barge load of deals, and fair warning was given that 7 a.m., on a day named, would be the latest time permitted for the barge to come alongside, and the barge did not come alongside till half past one in the afternoon, at which time the ship was preparing to take cattle on board to complete her cargo preparatory to sailing, it was held that the carrier was justified in refusing to take the deals. *Taylor* vs. *Can. Shipping Co.*, 1838, M. L. R., 4 S. C. 371.

16. Storage.—A ship master is only bound as to storage, to follow the rules and custom of the port where he takes his cargo, unless there be an arrangement to the contrary. *Winn* vs. *Pelissier*, S. C. 1871, 1 R. C. 246.

V. FREIGHT CHARGES.

1. Pleading non-performance of Charter-Party in Action for.—The non-performance of a stipulation contained in a charter-party, which does not amount to a condition precedent, cannot be pleaded as an answer or bar to an action of *indebitatus assumptis* for the freight. *Coltman* vs. *Hamilton*, K. B. 1819, 2 R. de L. 74.

2. Power of Master of Vessel to sue for.—(See DEMURRAGE *supra*, Nos. 11-12.) In an action by the master of a ship, for freight, where it was not pleaded that the action could not be brought in the name of the master (the contract being signed by the agents of the ship-owners)—*Held*, that the objection could not be urged afterwards. *Biekerdike* vs. *Murray*, Q. B. 1882, 27 L. C. J. 320.

2*a*. An action for freight may be brought in the name of the captain alone if the contract be made with him. *Batcheldor* vs. *Bellefeuille*, Q. B. 1877, 19th March.

3. Right to Freight Charges.—*Held* (reversing the decision of the Superior Court, M. L. R., 3 S. C. 424), that where there are two distinct hirings of a vessel, the voyage under each hiring is a separate transaction, and freight upon the first hiring is earned by the vessel's arrival and readiness to deliver at the port of destination thereunder, although by the second hiring she may be engaged to convey her cargo to another port without unshipping the same at the first port. *Pickford* vs. *Dart*, Q. B. 1888, M. L. R., 4 Q. B. 70.

4. —— —— —— Freight so earned may be collected by the master of the vessel, he being also principal owner, and may be applied by him in payment of an antecedent debt owed by him. (*Ib.*)

5. Payment—Delivery (Art. 2453 C.C.)—**Lien.**—The payment of freight and the delivery of the cargo are concomitant acts, which neither party is bound to perform without the other being ready to perform the correlative act, and therefore the master of a vessel cannot insist on payment in full of his freight on a cargo of coals, before delivering any portion thereof. *Beard* vs. *Brown*, C. R. 1871, 15 L. C. J. 136.

6. —— —— —— The carrier has a right to retain possession of the goods carried until the whole freight be paid, even where the freight is at a fixed rate per package, and the goods not all ready for delivery. *Brewster* vs. *Hooker*, S. C. 1857, 1 L. C. J. 90.

7. —— —— —— Goods or freight when landed on a wharf are delivered, but they cannot be removed without the master's consent, until the freight be paid, up to which time he has a lien for such freight upon the whole of the cargo. *Patterson* vs. *Davidson*, K. B. 1810, 2 Rev. de Lég. 77.

8. —— —— —— Where the plaintiffs claimed for damages suffered by goods which had been delivered on the wharf at Quebec, after they had notified the defendants that they wished to have them delivered into a lighter provided by themselves, but which the defendants refused to do before payment of the freight—*Held*, reversing judgment of court below, that the master or owner of a vessel could not be compelled to deliver goods into a lighter before payment of freight, and that the delivery on the wharf was a good delivery. *Juson* vs. *Aylward*, Q. B. 1862, 14 L. C. R. 164.

9. Where part Cargo delivered, damaged or lost.—If a part of a cargo have been delivered and accepted, an action for freight *pro tanto* will lie. *Oldfield* vs. *Hutton*, K. B. 1812, 3 Rev. de Lég. 200.

10. —— —— —— —— —— If under a charter party, in which a gross sum is stipulated for the freight, part of the cargo is delivered and accepted, an action will lie *pro tanto* for the freight; and damages for the non-delivery of the residue of the cargo cannot be set up against such action; they must be claimed by an incidental cross demand or a new and distinct action. *Guay* vs. *Hunter*, K. B. 1810, 2 Rev. de Lég. 77.

11. —— —— —— —— —— The abandonment by the shipper to the insurers, of a cargo in greater part damaged, in consequence of the vessel sinking in shallow water, by reason of an accident, and the acceptance of such abandonment by the insurers, will not entitle the shipper to recover back freight advanced by him to the master.

Under the circumstances above related, the shipper must pay freight on the damaged portion of the cargo *pro rata itineris peracti*, and full freight on the undamaged portion, if the master offers to carry it to the end of the voyage, after raising his vessel. *Tourville* vs. *Ruehle*, C. R. 1870, 15 L. C. J. 29.

12. —— —— —— —— —— The freight for cattle is payable, even where they are all lost (without the fault of the carrier), when the contract specifies that the freight shall be paid in such a case. *Bickerdike* vs. *Murray*, Q. B. 1882, 27 L. C. J. 320, 5 L. N. 149.

13. —— —— —— —— —— The captain of a vessel has the right to recover freight on a cargo delivered, although such cargo be partially damaged. *Hulcrow* vs. *Lemesurier*, Q. B. 1884, 10 Q. L. R. 239.

14. Who liable for.—(Art. 2454 C. C.) A consignee who has received goods shipped to be delivered on payment of freight may be sued for the amount of such freight, and can support an incidental cross demand for damages occasioned to such goods by the master's neglect. *Oldfield* vs. *Hutton*, K. B. 1812, (1) 2 Rev. de Lég. 77; *Guay* vs. *Hunter*, 2 Rev. de Lég. 77.

15. —— —— The party who receives the goods from a ship under a bill of lading becomes the party to its stipulations respecting freight, and the ship must look to him, and not to the original consignee who has assigned the original bill of lading to him. (2) *Bickford* vs. *Kerr*, Q. B. 1873, 18 L. C. J. 169; *Fletcher* vs. *Bickford*, Q. B. 1875, Ram. Dig. 308.

16. —— —— And so held where the party receiving the freight was in possession of a duplicate bill of lading which had not been endorsed to him. (3) *Fowler* vs. *Meikleham*, Q. B. 1857, 7 L. C. R. 367, 5 R. J. R. Q. 303.

17. —— —— The vendor of merchandise who is named the consignor in the bill of lading is nevertheless not liable for the freight of such merchandise which he had delivered to vendee's agent before shipment, according to contract and to the knowledge of the ship's agent. *Fowler* vs. *Stirling*, S. C. 1858, 3 L. C. J. 103; 7 R. J. R. Q. 376.

18. —— —— The consignee of goods under a bill of lading declaring the freight payable by the consignee cannot, after receipt of the goods, refuse to pay the freight thereon under the pretence that the consignor was his debtor and should pay the freight. (4) *Gosselin* vs. *Prefontaine*, S. C. 1892, 2 Que. 308.

AGENCY.

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I. AGENCY.

What Constitutes.—See *infra* Nos. 113-130.

II. AGENT.

1. Evidence of, after Termination of Mandate.—The evidence of an agent after his mandate is at an end will not be considered as an admission by the defendant, and so where limitation was pleaded, and the plaintiff pre-

tended that there was a recognition of the debt and a promise to pay it, the evidence of the agent of the former defendant will not be admitted to prove such recognition. *Pinsonneault* vs. *Desjardins*, Q. B., 17th December, 1879.

2. Lien of.—A mercantile house at Newry directs a house at Quebec to contract for the building of a ship for which they, the Newry house, would send out the rigging. The Quebec house enter into a contract with some ship builders accordingly. The Newry house then direct their correspondent at Liverpool to send out the rigging. He did so, and it having been actually delivered to the Quebec house—*Held*, that the property in it vested in the Newry house, but that the Quebec house had a right to retain it against the Liverpool correspondent on account of their lien on it for advances made to the builders and for payment of custom house expenses, although previous to the delivery they had obtained a transfer of the ship to themselves from the builders, and had registered it in the name of one of the partners of their house. *Royerson* vs. *Reid*, Privy Council 1830, Stuart's Rep. 412, 1 R. J. R. Q. 330, 1 Knapp 362.

3. —— —— An agent for a stranger has the right to refuse to deliver effects in his charge until he has been indemnified for any trouble and expense he may have incurred in regard to them; and an agent resident in this country who acts and makes disbursements for another resident has the same right. *Downie* vs. *Barrie*, S. C. 1879, 9 R. L. 517.

4. —— —— A person who has boarded and cared for and trained a horse at the request of the owner has a lien on the animal for the amount of his claim. *Brazier* vs. *Léonard*, M. L. R., 1 S. C 419.

5. —— —— An agent has a lien upon each portion of goods in his possession for his general balance, as well as for charges arising on these particular goods. *G. W. R. Co.* vs. *Crawford*, S. C. 1880, 6 Q. L. R. 160.

6. Concert Tickets.—A person who undertakes to sell concert tickets for another, and receives a certain number to dispose of, must account for them either by remitting their value in money or returning those unsold, unless the latter have been lost through *force majeure*. *Granger* vs. *David*, Mag. Ct. 1889, 13 L. N. 307.

7. Liability of, etc.—Exceeding Limits of Mandate—Bank Clerk giving Money instead of Cheque as ordered.—An agent who has only a limited authority, and who by going beyond his authority, even while acting in good faith, causes his principal to suffer a loss, is obliged to pay the loss. And so, where a person instructed a bank clerk to give a cheque for the amount of a certain account, and the clerk, late at night, gave the party the money instead, thereby preventing his principal from rectifying an error which existed in the account, it was held that the clerk could not recover from his principal the amount paid in excess of what was really due. *Shea* vs. *Prendergast*, 1887, M. L. R., 3 Q. B. 439.

8. An agent who ...ves money from his principal to be employed for a certain purpose, but who employs it for another object, is liable to repay the same to his principal. *Moodie* vs. *Jones*, Q. B. 1890, 19 R. L. 516, M. L. R., 6 Q. B. 354; confirmed in Supreme Ct. 1891, 19 Can. S. C. R. 266.

9. —— —— **For Contract made in his own Name—Assignee.**—Action by one assignee in insolvency against another, to recover the amount of an undertaking in the following terms: "Dear Sir,—Please place to the credit "of the estate N., V. & Co., the enclosed "demand note for $700, with the note of V. "for amount as collateral. In consideration "of this discount I hereby promise to place "you in funds for the amount from the first "sales of the stock of castings now on hand. "Yours, A. B. Stewart, Trustee."—*Held*, following *Brown* vs. *Archibald* (Q. B. 1879, 24 L. C. J. 85), that the defendant was personally bound, not having disclosed that he signed for a principal or for an estate bound by his signature. *Court* vs. *Stewart*, S. C. 1880, 3 L. N. 414.

10. —— —— —— —— —— **Brokers—Transfer of Shares.**—Where shares are purchased on which calls are pending, they cannot be transferred until such calls are paid, and the brokers purchasing are not liable for failure to transfer. *Farrell* vs. *Ritchie*, S. C. 1877, 1 L. N. 76.

11. —— —— —— —— —— **Committee—Printing.**—Four persons, assuming to act as representatives of the Seigniors of Lower Canada, ordered certain work to be executed for them. The names of their principals individually were unknown, and the agents did not act under a power of attorney.

Held, that the agents were personally liable, inasmuch as they did not disclose the

names of their principals; their liability being joint but not several. *Lovell* vs. *Campbell*, S. C. 1867, 11 L. C. J. 317, 2 L. C. L. J. 131.

12. — — — — — In Trust.—Where an adjudicataire at an assignee's sale of real estate added after his signature in the sale book the words "in trust"—*Held*, on petition for *folle enchère*, that as he had not within three days disclosed the name of his principal, if he had any, that he was personally liable. *Bénard* vs. *Dupuy*, C. R. 1880, 3 L. N. 93.

13. — — — — — Part Disclosure of Agency.—An agent buying goods in his own name, without disclosing his agency, is personally liable; and the fact that he gave in payment notes signed by a firm name, composed of his own name "et Cie.," was not such a disclosure of his agency as to relieve him from personal responsibility. *Pratte* vs. *Maurice*, S. C. 1885, M. L. R., 1 S. C. 364.

14. — — — Public Officer.—Action for work and labor done for a public officer about the building in which the office was situated. Plea, that the Government should pay, and to it they should apply—*Held*, that as the plaintiff had contracted solely with the defendant, that the defendant was liable. *Vien* vs. *Sicotte*, S. C. 1879, 2 N. L. 270, 9 R. L. 539.

15. — — — But one who contracts as agent for the public is not personally responsible. *Perrault* vs. *Baillargé*, K. B. 1816, 2 R. de L. 207.

16. — — — President of Company.—Under the terms of the following letter, the signer intended to make himself and is personally liable:

"Messrs. Ritchie & Borlase, Gentlemen:—We, the undersigned, acting as director and secretary of the Montreal Omnibus Co., hereby agree to see the account that Brown & St. Charles have against the company duly settled, provided the said account shall be made out and agreed upon as either the Court or arbitrators appointed shall decide. Signed, R. Kerr, as President of the Mont. Omnibus Company."

Although the above letter was evidently incomplete, having been intended to be signed by more than one individual, yet the signer waived the right he might have had to treat it as an incomplete document, by signing and delivering it to the plaintiff's agents. *Kerr* vs. *Brown*, Q. B. 1878, 23 L. C. J. 227.

17. — — — Trustees.—Where several persons, trustees of an insolvent estate under a deed of composition, which gave them no power to draw or accept bills, signed promissory notes with the words "Trustees to estate C. D. Edwards," after their signatures, they were personally and jointly and severally liable. *Archibald* vs. *Brown*, Q. B. 1879, 24 L. C. J. 85, 3 L. N. 43; confirming S. C., 22 L. C. J. 126, 1 L. N. 327. See *supra* No. 9.

18. —— Action by a livery stable keeper for $273, amount of an account for hire of horse and buggy. The debt was incurred by one M., and the question was as to the personal responsibility of the two defendants, who were trustees of the Protestant Union Church and school house at Cote St. Luc for whom M. was acting. The demand was based chiefly on the following letter written by the defendants to the plaintiff: "Montreal, "July 27, 1878. By a motion passed at a "meeting of the trustees of the Protestant "Union Church and school house, at Cote St. "Luc, it was proposed by XX (one of the "defendants) and seconded by XX (the other "defendant) that M. W. is hereby instructed "to open an account with M. S. (the plain-"tiff) for hire of horse and buggy. Mr. S. "being requested to include the account "already incurred by M. in that against the "trustees. In the face of that resolution, "we hereby request you will supply Mr. M. "with a suitable horse and buggy, at the "rate already agreed upon, the payment of "your account being made by the trustees "about the middle of September next, when "the collection of the subscriptions will be "made." The letter was signed by the defendants without any addition to their names. The defendants pleaded they were not personally responsible, but one of them offered $60 in settlement—*Held*, that they were not personally responsible, and even if they were it could only be each for his share, and the $60 was sufficient. *Starr* vs. *McDonald*, S. C. 1881, 4 L. N. 301.

19. — — — — When the defendant is sued on a *bon* or writing executed by him, and he pretends that he was acting as the agent of a third party, he is bound to prove that the plaintiff knew that he was acting as such agent at the time the *bon* was delivered. *Menard* vs. *Leroux*, C. R. 1887, M. L. R., 3 S. C. 70.

20. —— —— —— —— —— (Art. 1716 C. C.) An agent contracting in his own name is liable toward the third parties with whom he contracts, without prejudice to the rights of such third parties against the principal. *Huot* vs. *Dufresne*, C. R. 1890, 19 R. L. 360; *Wilson* vs. *Benjamin*, S. C. 1888, M. L. R., 5 S. C. 18.

21. —— —— —— —— —— **For Loss of Goods consigned to him.**—Loynachan sent a carload of potatoes to Graham, at Montreal, for sale on commission; at the same time he drew on Graham for $120 on account, which draft Graham accepted. Graham received the car on the track at Montreal on Thursday; on Friday he made efforts to sell the potatoes, which he did on Saturday at 65 cents per bag. On Saturday night the potatoes were frozen in the car, and the buyer refused to receive them: they were subsequently taken by Graham to his own premises, and sold for $10. Graham brought assumpsit action against Loynachan for $85 98, the difference between the amount of the draft and the amount realized from the sale of the potatoes, and some expenses of sorting, etc., after the potatoes were frozen. Defendant pleaded a general denial. After plea filed, plaintiff produced the draft and some correspondence, and notified defendant that he had filed his exhibits, and required him to plead within the delays allowed by law. Defendant filed a supplementary plea without further stamps. Plaintiff moved to reject said plea from the record. *Held*,—By His Honor Mr. Justice Mathieu, that the plaintiff had proceeded irregularly, and the motion to reject said plea must be dismissed with costs. *Held*,—(on the merits) by Mr. Justice Ouimet, that the plaintiff was responsible for the loss of the potatoes, and that the action must be dismissed with costs. *Graham* vs. *Loynachan*, C. Ct. 1889, 34 L. C. J. 76.

21*a*. —— **For Moneys stolen.** — An agent entrusted with a sum of money, and who pretends it was stolen from him, must show by conclusive evidence that he was dispossessed of his charge, and without fault on his part, or he will be condemned to pay the money to his principal. *Gravel* vs. *Martin*, Q. B., June, 1874, Ram. Dig. 436; confirmed in Privy Council, May 5, 1876; *Beauchamp*, P. C. 108, 22 L. C. J. 272.

21*b*. —— —— —— But if the principal admits that the money was stolen, or condones the negligence, he cannot subsequently oppose in compensation to a claim by his clerk for wages the money so lost. *Thompson* vs. *Watson*, Q. B. 1880, 3 L. N. 203; confirming S. C., 2 L. N. 387.

22. —— —— **For Injurious Acts to Third Parties.**—An agent committing an injurious act toward a third party is directly and personally liable to the injured party, even where the act was done in the *bona fide* execution of his principal's orders, if such orders were illegal. *Holton* vs. *Aikins*, Q. B. 1875, 3 Q. L. R. 289.

23. —— —— —— —— —— —— But in such case when the action brought by the injured party against the agent was a possessory action coupled with a demand of damages, it was held not to lie. *Dubeau* vs. *La Fabrique de Deschambeault*, Q. B. 1868, 2 Q. L. R. 6.

24. —— —— —— —— —— —— The action was in damages for the sum of £500, against the defendant, for having, in his capacity of agent or attorney, made affidavit upon which a writ of attachment issued to seize a schooner alleged to have been the property of the plaintiff—*Held*, that in the case submitted, the defendant was liable. *Warren* vs. *Noad*, S. C. 1857, 8 L. C. R. 177, 6 R. J. R. Q. 198.

25. —— —— —— —— —— —— This was an action of damages brought under the following circumstances: The plaintiff in March, 1882, bought a piece of land from La Fabrique of St. Constant, and shortly after began to build upon it. A large number of the parishioners thereupon protested against the Fabrique, the curé and the plaintiff, in order to have the building operations stopped and the building demolished. The plaintiff continued to build, and an action was instituted to set aside the deed and have the building demolished. Judgment was rendered, declaring the deed of sale null, and ordering the demolition of the building. Thereupon the plaintiff brought an action for $2,000 against the curé—*Per curiam*. The question is whether a mandatary is responsible for the acts committed by him under his mandate. The plaintiff alleges that the curé is personally responsible for his acts. I do not find that he is personally responsible. The price of the land was fixed by the Fabrique, and when the deed of sale was executed, the resolution authorizing the sale was set out in the deed. The mandatary who discloses his mandators does not bind himself personally, but only his mandator, so long as he does not exceed the powers entrusted to him. B. sold for the Fabrique. The purchaser had full knowledge

of the power under which he acted. The deed of sale was submitted to the bishop, and he approved of it under a condition that it should be submitted for the approval of the parishioners. It was submitted to them, and a resolution was adopted, but the resolution was null, so that it was not in reality sanctioned, and the deed was set aside because the resolution was null. Under the circumstances I find the Fabrique had no right to sell. If the sale is not legal it is an error of law for which the defendant is not responsible. The other point is whether the defendant, the curé, is not responsible for the act of the Fabrique. On this point there is considerable proof, but it is evident that this proof is not positive, and under the circumstances I consider that the plaintiff has not made out his case against the defendant and therefore the action is dismissed. *Gagette* vs. *Bélard*, S. C. 1884.

26. —— —— **For Interest.**—An agent who receives money from his principal for remittance to a third party in extinguishment of a debt due by the principal, will, where the debt carries interest, be liable for an amount of the interest proportionate to the delay, where he has been dilatory in remitting the money. *Dubuc* vs. *Robidoc*, Q. B. 1885, 14 R. L. 359.

27. —— —— (Art. 1714 C. C.) An agent is bound to pay interest upon the money of the principal which he employs for his own use. *Buchand* vs. *Bisson*, S. C., 12 R. L. 11; *Josephs* vs. *Phillips*, 22nd March, 1875. Noted in De Bellefeuille's C. Code at p. 473.

28. —— —— **Government Agent—Money received from Government.**—Where an agent acting for the government discloses his agency, he is not personally liable until he has received funds to pay the amount due. But to make the agent liable, it is not necessary that he should have received a sum of money to pay the particular claim sued for, it is sufficient if he has received money to pay accounts of that kind. And in the present case, the evidence of his having funds was insufficient. *Quesnel* vs. *Béland*, Q. B. 1886, 12 Q. L. R. 129.

29. —— —— Where a commissioner notoriously acts as an agent for the government, his office excludes the presumption of credit being given to him personally, and he is not liable for the contract into which he enters in his public capacity, although there be no other person against whom an action lies to enforce the contract which he has entered into. But if he has received the money from the government, which is to be paid to the person with whom he contracted, an action for money had and received may be maintained. *Larue* vs. *Crawford*, K. B. 1819, Stuart 141.

30. —— —— **Part Execution of Mandate—Loan—Departing from Terms of Mandate.**—Where a broker was employed to borrow the sum of $1,500, and secured a loan of $800 which was refused by the borrower as insufficient for her purpose, and who refused to sign the deed relating thereto. In an action by the broker for his commission and expenses —*Held*, that an agent who only partly executes the mandate which he has undertaken does not thereby bind his principal, and is guilty at the same time of a fault, and he alone is responsible towards those with whom he has contracted. *Normandeau* vs. *Langevin*, C. Ct. 1885, 8 L. N 116.

31. —— —— **Where Acting for Foreign Principal—Commission Agent.**—Commission agents, whose principals resided abroad, held personally liable on contract signed by them in their own name, though the contract showed their quality of commission agents, and it was known to the other party that they were selling goods to arrive from foreign principals. *Evans* vs. *McLea*, Q. B. 1881, 1 Dorion, Q. B. Rep. 201, 4 L. N. 76 (reversing S. C., 2 L. N. 370).

32. —— —— —— —— —— —— —— (Art. 1738 C. C.) The above case is distinguished from the present in that in the present case the name of the principal was declared in the contract, and the agents signed as "commission agents," to show that they did not intend to bind themselves personally, and the agents, not having the goods in their possession or under their control, could not be considered "factors" under Art. 1738 C. C., but merely brokers, and were thus not personally liable. *Crane* vs. *Nolan*, Q. B. 1875, 19 L. C. J. 309 (reversing S. C. 1872, 4 R. L. 657).

The term "commission agent" is not synonymous with factor. (*Ib.*)

The definition of "broker" and "factor" in Arts. 1735 and 1736 C. C. are not to be interpreted literally as establishing a strict rule, but as general comprehensive definitions, subject to interpretation and extension according to the ordinary distinctions applied to these two classes of agents.

The possession or control of the goods of the principal by the factor distinguishes him from a broker. This distinction is the real foundation of the exceptional liability which

attaches to a factor when contracting for a foreign principal. The broker, like other mercantile agents, incurs no personal liability, if he does not exceed his instructions; the factor, on the contrary, acting for a foreign principal, is personally responsible as if he were principal. Although the personal liability of a factor or *commissionnaire* is by law presumed when he acts for a foreign principal, yet he may always free himself from such liability by the contract itself, or destroy the legal presumption by the circumstances attending the transaction. (*Ib.*)

33. —— —— —— —— —— Factor—(Art. 1738 C. C.) A party who signs an agreement for services to a vessel stranded in the Gulf, as "agent by Captain R.'s telegrams," is not liable under Art. 1738 C. C. as a factor of a foreign principal. *Kaine* vs. *Gunn*, C. R. 1889, 16 Q. L. R. 237.

34. —— —— —— —— A merchant in Quebec acting as the agent of a principal in Ontario, and as such receiving goods subject to freight and demurrage, held personally liable for such charges, although the master of the vessel knew that the merchant so receiving the goods was acting as an agent.

But the contrary would be held if the merchant were acting for a home principal. *Thwaites* vs. *Coulthurst*, C. R. 1874, 3 Q. L. R. 104

35. —— —— —— —— —— Factor—Sub-Agents. (See Agent—Power of Delegation).—The agent employed by a factor acting for a foreign principal is not personally liable on a transaction made by him in the name of his local principal although in possession of the goods. *Dixon* vs. *Etu*, Q. B. 1884, 7 L. N. 213; over-ruling *Lemire* vs. *Dixon*, C. Ct. 1882, 11 R. L. 323.

36. —— —— —— —— "In another Country."—(Art. 1738 C.C.) If the principal resides in any of the other provinces of Canada, he is held to reside in another country. *Thwaites* vs. *Coulthurst*, C. R. 1874, 3 Q. L. R. 104.

37. —— —— —— —— Legal Services rendered to Foreign Principal.—The defendant brought and introduced to the law firm, to which the plaintiffs at that time belonged, a person from the United States, who wished to institute an action against a person in Quebec. At the time of giving the instructions, the principal gave money to the plaintiffs to cover disbursements. Subsequently the defendant called upon the plaintiffs on several occasions, to learn how the suit was progressing, and report to the principal in the case, who had returned to the United States, and with whom he had business transactions. On one occasion he paid money to plaintiffs on behalf of the principal in the United States. The action was taken, judgment obtained and execution issued, but nothing was realized. After waiting some time, plaintiff demanded payment of his bill of costs, which amounted to something over a hundred dollars. Defendant pleaded that he was in no way responsible, that he had only acted on behalf of the other, whom, from the first, plaintiff had accepted as the principal in the matter. At the trial, plaintiff's argued that, as representing a principal resident in a foreign country, defendant was liable under Art. 1738 C. C. Defendant replied that the article applied only to factors who differed from ordinary agents, and cited *Crane* vs. *Nolan* (*Supra* No. 32)—*Held*, that defendant did not come under the article in question, and action dismissed. *Doutre* vs. *Ste. Marie*, S. C. 1877.

38. Powers and Rights of Action against Principal.—Anyone who has acted as agent for another has an action to force his principal to receive a rendering of account, and where the mandate is a general one, the agent's remedy is the *actio mandata contraria* with a tender of his account. *Hunt* vs. *Taplin*, Supreme Ct. 1894, 24 Can. S. C. R. 37.

39. —— —— Action by Agent in his own Name (Art. 1736 C.C.)—**Factor** (See Actions, Interest in).—An agent cannot sue in his own name as a factor on a contract made with a foreign principal. So in an action to recover the price of books supplied by a Paris firm through their agent in Montreal, the agent had the control of the goods, but the contract was made in the name of the principal. Action in name of agent dismissed (1) *Dansereau* vs. *Keller*, S. C. 1880, 3 L. N. 240; and *Doutre* vs. *Dansereau*, Q. B. 1880, 3 L. N. 22.

40. —— ——But in another case (the report of which seems to be incomplete and unsatisfactory) action was brought on a deed purporting to be a deed of sale from the manufacturing firm of the B. Manufacturing Company, acting by its agent H. B., to the municipal council of the incorporated village of L'Assomption, acting by one of its councillors, of a Babcock fire engine. Plea *inter alia*, that the deed was between the municipal council and the B. Manufacturing Company, and con-

(1) See title, "Action—Interest in.—Principal and Agent."

sequently that plaintiff had no interest to bring the action—*Held*, that H. B. had a right to bring such action in his own name *Corp. of L'Assomption* vs. *Baker*, Q. B. 1881, 4 L. N. 370.

41. —— —— —— —— —— An agent who insures for another, with his authority, may sue for the sum assured in his own name *Provincial Ins. Co.* vs. *Leduc*, P. C. 1874, 19 L. C. J. 281.

42. —— —— **Auctioneer.**—An auctioneer is bound to deliver to his principal the notes he may have received or the goods he has sold, whether he guarantees the sale or not. If he sells goods for his principal on purchaser's notes, he has no right to accept from the purchaser a note in which the price of goods belonging to another party is combined. *Sinclair* vs. *Leeming*, Q. B. 1861, 5 L. C. J. 247.

43. —— —— **Broker—Action for Damages against Customer—Proof.**—A broker's authority, by his own writing and signature, and by the delivery of bought and sold notes, to bind as between themselves the purchaser and seller making a transaction through him, has no application to, and cannot dispense him with the necessity of making proof by writing when he himself seeks to recover damages against his own customer, in respect of an alleged purchase and re-sale for and on account of the party from whom he has received an order to purchase. In such case he has two things to prove: first, his own authority to make the transaction; and secondly, a purchase and re-sale. The first may be proved by verbal testimony, but the second, under Art. 1235 C. C., in order to bind the party towards himself, requires a writing when the sum or value involved exceeds $50. *Trenholme* vs. *McLennan*, Q. B. 1879, 24 L. C. J. 305.

44. —— —— **Insurance Broker.**—(1735 C. C.) The defendant, an insurance broker, was the agent of two insurance companies, one of which instructed him to cancel a certain risk in Montreal. After asking for a reconsideration, and the order being repeated, he complied, and then transferred the insurance to the other company for which he was agent. He did this without the knowledge of the insured. The same day a fire occurred, and the loss was paid by the company to which the insurance was transferred. In an action by the latter against the agent, for fraudulently making them responsible for the loss—*Held*, that the transfer of the insurance was made by the defendant in good faith, and in accordance with the custom of insurance brokers in Montreal, and although not authorized by the insured, it was competent for the agent to act as the manufacturer of the company and of the insured. *Connecticut Fire Ins. Co.* vs. *Kavanagh*, S. C. 1889, M. L. R., 5 S. C. 262, affirmed by Q. B. 1891, M. L. R., 7 Q. B. 323, and Privy Council [1892] App. Cas. 473.

45. —— —— **Power of Attorney—General Principles.**—A power of attorney, whether bestowed by a written instrument, or inferred from a train of circumstances and acts, must be construed strictly. *Bryant, Powis & Bryant* vs. *Banque du Peuple; ib.* vs. *Quebec Bank*, S. C. 1891, 17 Q. L. R. 103; confirmed in Privy Council 1892 [1893] App. Cas. 170. See page 177.

46. —— —— An agent who is authorized by his power to make contracts of sale and purchase, charter vessels, and employ servants, and as incidental thereto to do certain specified acts, including endorsement of bills and other acts for the purpose therein mentioned, but not including the borrowing of money, cannot borrow on behalf of his principal or bind him by contract of loan, such acts not being necessary for the declared purposes of the power. (*Ib.*)

47. —— —— Where an agent accepts or indorses "per pro," the taker of a bill or note so accepted or indorsed is bound to inquire as to the extent of the agent's authority; (1) where an agent has such authority, his abuse of it does not affect a *bonâ fide* holder for value. (*Ib.*)

48 —— —— But a power of attorney "to draw, accept and indorse bills of exchange, promissory notes, bills of lading, delivery orders, dock warrants, bought and sold notes, contract notes, charter parties, etc.," includes the power to *make and sign* promissory notes, more particularly where the whole tenor of the document shows the intention to confer powers of general agency. *Quebec Bank* vs. *Bryant, Powis & Bryant*, S. C. 1891, 17 Q. L. R. 78.

49. —— —— Action was brought on a promissory note signed by F. B., agent of M. S. F. B. was the brother of M. S., the defendant, to whom the latter, being about to leave for Europe, gave a power of attorney to manage and administer her property during her absence, particularly the Seigniory of Lasalle; also to sell, concede and exchange all her property, including the Seigniory, and all her land

(1) Sec. 25 Bills of Exchange Act 1890.

in Lower Canada, except certain houses in Montreal; with power to pay all debts, submit claims to arbitration or to compound the same, to institute and defend all actions, and also with a general power to do all matters and things relative to her estate as if she were personally present—*Held*, that under such power the agent was an *administrator omnium bonorum* but with no power to borrow except for purposes within the limits of his administration, which did not extend to signing and discounting the promissory note in question. *Castle* vs. *Baby*, S. C. 1851, 5 L. C. R. 111, 1 R. J. R. Q. 459.

50. —— —— (Arts 1704, 1727 C. C.) In an action on a promissory note, where want of consideration and want of knowledge of the existence of the note before the institution of the action were pleaded, it appeared that the note had been signed by the agent of the defendant in settlement of an account between defendant and plaintiff, but the defendant actually knew nothing of its existence—*Held*, that the agent being under a special power, which did not give him authority to make and sign a note in settlement between the parties, and as defendant had never in any way acknowledged it, that the action should have been dismissed. *Messier* vs. *Davignon*, Q. B. 1867, 3 L. C. L. J. 67.

51. —— —— A general power of attorney to manage and administer the personal property of the mandator does not authorize the agent to go security for third persons, and to endorse notes so as to bind the principal, in matters foreign to the administration with which the agent has been entrusted. *Poirier* vs. *Jobin*, S. C. 1881, 12 R. L. 64; *Jodoin* vs. *Lauthier*, Q. B. 1887, 31 L. C. J. 111.

52. —— —— A general authority to contract for the cultivation of the sugar beet does not include power to purchase beet. *Jarry* vs. *Sénécal*, S. C. 1885, M. L. R., 1 S. C. 400.

53. —— —— A notarial power of attorney to manage and administer the affairs of the constituent generally, and in so doing to hypothecate the constituent's property, is not an authority to sign promissory notes in the name of the constituent. *Serre dit St. Jean* vs. *Metropolitan Bank*, Q. B. 1876, 21 L. C. J. 207

54. —— —— The statements made by the agent, to the effect that he had full authority to sign notes for his principal, cannot make evidence against the principal, his power being governed by the terms of the written power of attorney. (1) (*Ib.*)

55. —— —— Where a party gives a power authorizing another to make and endorse promissory notes for all matters "arising out of transactions connected with the business of the constituent only," such restriction does not cast on a banker receiving such notes in the ordinary course of business and in good faith, the obligation to enquire and know whether the agent had misused his trust and given the notes for other consideration. *Molson's Bank* vs. *Bank of Commerce*, Q. B., 21st Dec., 1878.

56. —— —— The writing or letter produced in this case was held a sufficient power of attorney for the sale of the lands therein mentioned. *Cummings* vs. *Quintal*, Q. B. 1857, 7 L. C. R. 139.

57. —— —— A power of attorney to "bring suit or otherwise settle and adjust any claim which I may have for salvage services rendered to the Banque de Quebec" does not authorize the attorney to receive payment of the sum awarded. *Churchill & Sons* vs. *McKay*, Supreme Ct. 1892, 20 Can. S. C. R. 472.

58. —— —— Where a husband, after transferring his real property, by means of a third person, to his wife, gave her a power of attorney to sell, transfer and dispose of her immoveable property, etc., under which she mortgaged it—*Held*, in an action on the mortgage, that although the mandate be general, the special reference of the power may be fixed by referring to the facts proved, and it then becomes what our law recognizes as a *mandat exprès par le fait*. *Buchanan* vs. *McMillan*, S. C. 1874, 20 L. C. J. 105.

59. —— —— Our law recognizes a tacit express mandate as of equal authority with a written express mandate. (*Ib.*)

60. —— —— The power to sell, transfer and dispose of includes the power to mortgage. (*Ib.*)

61. —— —— **Criminal Law—Abusing Power of Attorney.**—The power of attorney mentioned in section 78 of 32 and 33 Vic., ch. 21, must be a written power of attorney, and

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(1) But Judge Ramsay remarks in his Digest, p. 54: "This holding goes rather beyond the report. The judgment does not expressly say that where there is a written power there can be none other; nor do I think it implies it. The conditions were these: there was a written power on which the agent acted, he gave very bad explanations as to the extent of the power, to which the bank trusted and these explanations were untrue. The bank chose to trust the agent, and did so at its own risk."

oral testimony of a verbal power of attorney will not bring the defendant's act within the scope of that statute. (1) *Reg.* vs. *Chouinard*, Q. B. 8th Sept., 1874, 4 Q. L. R. 220.

62. —— —— —— Executed Abroad.—A petitory action was dismissed, on the ground that the notarial deed to plaintiff of the land in question being made under power of attorney, executed before witnesses in England, and affirmed before the Lord Mayor of London, was not proven. *Purington* vs. *Higgins*, (2) S. C. 1856, 6 L. C. R. 181, 5 R. J. R. Q. 117.

63. —— —— And in another case of the same kind, where the plaintiff's title purported to have been executed in virtue of a power of attorney annexed to the original minute of the deed in the office of the notary before whom it was passed, and where the power of attorney had been executed under private signature and seal before two witnesses, one of whom was a notary public of Upper Canada, and was accompanied by an attestation of the notary under seal, and likewise by a certificate in the usual form by the administrator of the government of that province with regard to the official character of the notary, all of which were duly produced and filed at the trial—*Held*, confirming judgment of court below, that there was no sufficient proof of the execution of the power of attorney, and the action was dismissed. *Nye* vs. *McDonald*, (3) P. C. 1870, 7 Moore (N.S.) 131; S. C. 1867, 2 L. C. J. 109.

64. —— —— —— —— (1250 C. C.) A power of attorney passed before a notary in New York, authenticated by the clerk of the Superior Court of the same place, and deposited with a notary in Lower Canada, is valid under Art. 1250 (5); and such notary can produce copies thereof in Court with the same effect as an authentic act. *Marston* vs. *Pelletier*, C. R. 1885, 11 R. L. 251, confirmed in appeal Q. B. 1885, 14 R. L. 256, 29 L. C. J. 335.

65.—— ——A power of attorney executed abroad, to be valid as evidence in this Province, must have been authenticated by the mayor or other public officer of the place where it is made, and then deposited with a notary of this Province to have notarial copies made thereof. *Duguay* vs. *Banque Jacques Cartier*, S. C. 1893, 4 Que. 198.

66. —— —— —— Conflict of Laws.—Question as to whether a power of attorney given in a foreign country, but acted under in England, is to be construed according to the law of the country where it was given, or according to the law of the country where it was put in force?

Held in the English Court of Appeal (Q. B. D.)[1891], 1 Q. B. 79, affirming judgment of Divisional Court (see 13 *Legal News*, p. 319), that the law governing the power of attorney depends upon the intention of the document; and if the intention appeared to be that the authority should be acted on in England, the extent of the authority, so far as transactions in England were concerned, must be determined by English law.

67. —— —— In Action must be Produced.—A creditor who sues on an obligation signed by power of attorney must produce the power of attorney, or the action will be dismissed, even where the defendant makes default. *Farwell* vs. *Lacaillée*, Q. B. 1876, 7 R. L. 611.

68. —— —— Validity of.—A power of attorney by a president, cashier or manager of a bank, to a person not an employee of the bank, is invalid in the absence of anything to show the power of such officers to grant the same. *In re Binning*, S. C. 1877, 4 Q. L. R. 26.

69. —— —— Profits—Accounting for.—(Art. 1713 C. C.) The plaintiff, Minister of Justice and Attorney General of Canada, alleged that the defendant, an employee of the Government stationery department, had, in abuse of his position, received perquisites as a secret consideration for orders received through him and to purchase his influence with the Government. It was not alleged that the Department had paid more than the value of the goods purchased through the defendant.

Held, that the Government could compel defendant to render an account of such perquisites. *Thompson* vs. *Sénécal*, Q. B. 1894, 3 Que. 455, reversing S. C., 3 Que. 297.

70. In such case the agent could not set up his own dishonesty by way of relief from rendering an account of the unlawful profits received by him. (*Ib.*)

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(1) See now Arts 309-310 Crim. Code.

(2) (3) But see now Art. 1220 C. C., § 5, and *Duguay* vs. *Banque Jacques Cartier*, *infra No.* 65.

Quære as to whether deposit with notary should be formal or whether it may be incidental to the passing of a deed of sale before such notary?

71. And in demanding such accounting from the agent, the principal was not bound to repudiate the contract on account of which the perquisites were received, nor to allege that he sustained a loss or was prejudiced by reason of the donation of perquisites to his agent. (*Ib.*)

72. —— —— Revocation of Prior to Sale.—(Art. 1758 C.C.) In action to set aside a deed of sale in the name of plaintiff, made by another under a power of attorney which had been revoked prior to the sale—*Held*, that as to third persons, ignorant of the revocation, the acts of the agent would bind both himself and his principal; but, in this case, there being clear evidence of bad faith on the part of the parties to the deed, the action would be maintained, and the deed set aside. *Aylmer* vs. *Maher et al.*, S. C. 1878, 1 L. N. 232; confirmed in appeal, 4 L. N. 143.

73. —— —— When part executed.—Authority given to an agent to sell cannot be revoked when in part executed, and therefore, where goods have been sent to a commission merchant for sale, the principal cannot revoke the authority of the agent after the latter has sold the goods for a specified price, with option to the buyer to accept the sale within one week, which period has not elapsed at the time of the revocation; but the proof of such sale cannot be made in the absence of a memorandum in writing signed by the agent before the revocation of his authority. *Lynn* vs. *Nirin*, Q. B., June, 1874, 23 L. C. J. 235; and see *Stubb* vs. *Lord*, 22nd March, 1875, Q. B., Ram. Dig. 413.

74. —— —— —— Right of Agent to Indemnity.—The appellants, commission agents, obtained the selling agency for the product of the respondents' cotton mill. As a condition of receiving the agency, they were required to subscribe $10,000 of the capital stock of the company, respondents. No term was fixed, and after the lapse of a year and some months the agency was withdrawn from the appellants. In an action for indemnity by the agents—*Held* (affirming the decision of Johnson, J., M. L. R., 3 S. C. 9, 30 L. C. J. 135), that a mandate for which no term has been stipulated is revocable at will, even where the agent has given a consideration for the agency.

The revocation, however, is subject to the obligation on the part of the principal to indemnify the agent for any actual loss suffered by him by reason of the revocation of the mandate. The agent's claim to indemnity cannot be extended so as to include loss of profits which he would have made if the agency had been continued, but merely such expenses as he incurred in order to carry on the business, and which, in the particular circumstances of the case, may be seen to have been contemplated at the time the appointment was made. *Cantlie* vs. *Coaticook Cotton Co.*, 1887, M. L. R., 4 Q. B. 441, 15 R. L. 524, 31 L. C. J. 151; *Dillon* vs. *Borthwick*, Q. B., 15th June, 1880; *Bell Telephone Co.* vs. *Skinner*, Q. B. 1889, 17 R. L. 350.

75. Power to Accept Payment.—A canvasser employed by a newspaper to solicit for advertisements has not power to collect for same. *Bouillard* vs. *Marcotte*, Mag. Ct. 1889, 12 L. N. 259.

76. —— to Accept Terms of Payment.—An agent cannot agree to take payment of his principal's money in supply of goods to persons in the employment of the principal. So where an agent of an advertising company agreed to take payment for advertisements in furnishings to persons in the employment of the company, *Held*, confirming the judgment of the Superior Court, that the company could recover the amount from the party advertising, there being no acquiescence on the part of the company in the arrangement, and that it was no evidence of the acquiescence of the company that they had accepted *bons* of their work-people on account. *Ste. Marie* vs. *The Rly. & Newspaper Advertising Co*, Q. B., 18th Sept., 1877.

77. —— —— —— —— —— The agent of an insurance company has no power to insure a house against fire and to give delay for the payment of the premiums.

In a case where a promissory note was given for the premium of a fire policy, and the building was destroyed by fire after the note had become due and dishonored, the judicial committee held that the insured could not recover, as the powers of the agent, being public, must be taken to have been known to the insured, and the acts of the agent in the transaction were *ultra vires* and void, not being within the scope of his general authority as agent, and, therefore, not binding upon the assurance company. *Montreal Assurance Co.* vs. *McGillivray*, P. C. 1859, 13 Moore 87, 9 L. C. R. 488. (1)

(1) Head note incorrect in Report, 9 L. C. R. 488. See 13 Moore 87.

78. **To accept Terms of Payment.**—A travelling agent taking orders for his employer cannot make terms as to payment for goods sold by him. For instance, he cannot agree to take out payment in board for himself. *Marcotte* vs. *Guilbault*, Mag. C't. 1889, 12 L. N. 267.

78*a*. —— —— —— —— —— So where a traveller sold cigars on such conditions, and the cigars were delivered to the purchaser in the name of the principal, the traveller called back to state he could not take payment in board, and the cigars were returned to him. In an action by the principal, for the price of the cigars, against the purchaser—*Held*, that he was liable for them, as he could not return or pay for the cigars to the agent who had no authority to receive payment. (*Ib.*)

79. —— —— —— —— —— The agent of an insurance company has no authority to accept an insurance and give a receipt for the premium in exchange for a receipt for his individual debt to the person insuring, and such action his part will not bind the company. *Citizens Ins. Co.* vs. *Bourguignon*, Q. B. 1886, M. L. R., 2 Q. B. 22.

80. **To advertise—Insurance Agent.**—The agent at Quebec of an insurance company, the company itself having its principal office at Montreal, caused an advertisement to be published in the respondent's paper for a considerable period, incurring a bill of $116.40. The agent, on being asked for payment, referred the respondent to the company as his principal, and the latter denied all knowledge of the advertising, and all power on the part of the agent to order it—*Held*, confirming court below, that the special power to publish advertisements was inherent in the office of an agent appointed to take risks and receive premiums; that such authority was to be presumed; that the advertising was intended to promote the appellant's business, and that proof of custom, usage or sanction on the part of the company was unnecessary. *Commercial Union Insurance Company* vs. *Foote*, Q. B. 1872, 3 R. C. 40.

81. **To alter Contract.**—An architect acting as an agent for a person having alterations and repairs made on a building has no implied authority to alter the contract. *Miller* vs. *Shaw*, Q. B., March, 1875, Ram. Dig. 435.

82. —— —— —— Where the defendant purchased from the plaintiff a quantity of futtocks to be of a certain size or sizes set forth in a written contract between them, and further agreed to send a man to superintend the getting out of the futtocks, agreeing to receive everything marked off for her by the man she would select; but, on the plaintiff tendering a quantity which were of inferior size and quality to those set out in the contract, she refused to accept, and the plaintiff brought action—*Held*, reversing the judgment of the court below, that the man sent to mark off the futtocks had no power to bind the defendant by marking off futtocks that were of an inferior size and quality to those stipulated in the contract. *Vanfelson* vs. *Mann*, Q. B. 1865, 16 L. C. R. 243.

83. **To delegate his Powers.**—Where the power given by one party to another by an instrument in writing is of such a nature as to require its execution by a deputy, by the law in force in Lower Canada, the party originally authorized as the agent may appoint a deputy. *Quebec & Richmond Ry. Co.* vs. *Quinn*, Privy Council, 1858, 12 Moore P. C. 232; and see *Lemire* vs. *Dixon*, C. C. 1882, 11 R. L. at page 330.

84. —— —— —— —— So contractors for constructing a railway in Canada, who resided in England, had power to appoint by power of attorney an agent with full power to construct on their behalf the said railroad and settle claims for land, where the contract between the railway company and the contractors provided that the latter should provide the funds for construction and pay all claims which might be made against the company, and the powers vested in the company were to be exercised by the contractor.

And—*Held*, that the contractors under their contract with the company had power to delegate to an agent powers similar to those vested in them by the company, and that under the power of attorney executed by the contractors, the agent possessed the same powers of acting and rendering the company liable as the contractors themselves had under the contract. *Quebec & Richmond Ry. Co.* vs. *Quinn*, P. C. 1858, 12 Moore, P. C. 232.

85. **Special Powers—To give Receipt and Discharge—Clerk.**—The plaintiffs, hearing that one of their country debtors was fraudulently making away with his property, sent a clerk to the place to make inquiries, but without special instructions or power. The clerk took the debtor's note for five shillings in the pound, which was refused by the plaintiffs, and sent back—*Held*, in an action for the original debt in which such settlement was pleaded, that the receipt and discharge were

not binding on the plaintiffs, the clerk having exceeded his authority. *Seymour* vs. *Woodbury*, S. C. 1860, 11 L. C. R. 71.

86. To give Receipt and Discharge—Agent in possession of Bill of Lading.—(Arts. 1739, 1751 C. C.) The purchaser of a car load of barley paid the price thereof to the vendor's agent, from whom he received the grain, and who was, moreover, named in the bill of lading as the consignee—*Held*, that the bill of lading constituted a written authority to the consignee to control the consignment, and, having delivered it, to receive the price; and his receipt was a valid discharge to the purchaser. *Lambert* vs. *Scott*, 1886, M. L. R., 2 Q. B. 340.

87. Power to pledge Goods—Factor.—(1718 C. C.) The agent, a factor, pledged goods to defendant for his own private purposes. Defendant being in good faith, plaintiff the principal could not revendicate them. *Clark* vs. *Lower*, S. C. 1861, 4 L. C. J. 30; confirmed in appeal *sub nom*, *Johnson* vs. *Lower*, Q. B. 1861, 6 L. C. J. 77.

88. —— —— —— —— in Payment of Expenses.—A commercial traveller whose principal has neglected to meet a draft drawn on him for the travelling expenses of the former according to agreement, may pledge the samples in his hands for necessary expenses. *Kennedy* vs. *Cornell*, Q. B., 17 Dec., 1879.

89. —— to sell Real Estate.—The right of an agent to sell real estate cannot be gathered from acts of agency of a different character. *Stewart* vs. *White*, Q. B., 6th Sept., 1871.

90. Promise to.—A special undertaking to pay a note of hand, negotiable but not endorsed, to the agent of the payer, in consideration of his forbearance for a time, is sufficient to enable the agent to support an action *ex contractu* in his own name for the amount of the note. *Leferin* vs. *Cuttenden*, K. B. 1820, 2 B. & Ald. 125.

91. Remuneration of—General Principles.—Although in commercial matters agency is presumed to be onerous, a party may nevertheless be held to be not entitled to a commission, if he undertook to act by a synallagmatic contract which established a presumption that the commission was part of the consideration of the contract. *Renaud* vs. *Walker*, S. C. 1868, 13 L. C. J. 180.

92. —— —— —— —— ——A merchant, in compliance with instructions from the commissioner of public works, purchased lands for them under 13 & 14 Vic., cap. 13, and on his claim for remuneration for such services being denied, sued out a writ of mandamus to compel the commissioner to refer his claim to arbitration under the eighth section of such act. On the hearing of such writ of mandamus—*Held*, that he had a right to be paid for his services, and that the mandamus would lie. *Young* vs. *Lemieux*, S. C. 1858, 9 L. C. R. 13.

93. —— —— Broker.—Generally, a broker employed to sell cannot claim brokerage unless he effects a sale. *Stubbs* vs. *Conroy*, S. C. 1871, 2 Q. L. R. 53; *Campbell* vs. *Chabot*, S. C. 1879, 2 L. N. 248, 9 R. L. 550.

94. —— The plaintiff was employed as a broker by the *auteur* of the defendant to sell a quantity of pine timber belonging to him. The plaintiff did all he could to effect a sale, and succeeded in obtaining an offer of ninepence per foot, which the principal declined. The result was that at the close of the season the timber remained unsold, and the principal, in a letter to plaintiff, withdrew the specifications for the purpose of raising advances on them to continue the next season's business, but assuring plaintiff, at the same time, that he should not have his trouble for nothing, but that the specifications would be returned to him in the spring for the purpose of renewing the transaction. In the spring the principal died, and his representatives, the defendants, sold the timber themselves without reference to the plaintiff, who then claimed his brokerage on the strength of the letter he had received—*Held*, the plaintiff could not recover. *Stubbs* vs. *Conroy*, 2 Q. L. R. 53.

95. —— —— When a broker or agent has negotiated a sale of property between his principal and a purchaser whom he has procured, and an agreement for carrying out the transaction is entered into between the parties, he is entitled to his commission, notwithstanding that the agreement may have fallen through by reason of bad faith in one or other of the parties to the contract. *Lighthall* v. *Coffrey*, S. C. 1883, 6 L. N. 202.

96. —— But where the agreement fell through because one of the parties could not convey a perfect title to the property, the broker was held not entitled to commission. (1) *Martin* vs. *Labelle*, Q. B. 1889, 31 L. C. J. 28,

(1) So says head note. [illegible] judgment [illegible] Q. B. not reported [illegible] only judgment of Superior Ct., which is *Contra*.

97. —— For securing Contract—Contract defective.—The plaintiff by deed agreed to obtain security for the defendant, in order to enable him to obtain a certain contract from the Quebec government, and the defendant agreed to pay him therefor a commission of seven per cent. on $11,784, the price of the contract, the said commission to be payable semi-annually until the discharge of the obligation. After some negotiations, it was found that defendant had failed to comply with all the formalities prescribed by the Act authorizing the contract, and on this ground the action of plaintiff for his commission was dismissed in the court below (3 L. N. 232); but in Review this judgment was reversed, on the ground that plaintiff had carried out his agreement and earned the money. *Derlin* vs. *Bernier*, C. R. 1880, 4 L. N. 59.

98. —— —— —— Payment of Claim against Government—Evidence of Services rendered.—Defendant had a claim against the Government, and plaintiff, who was a notary, represented to defendant that he would go to Ottawa and negotiate a settlement for $200 commission. A writing was made, to the effect that, if plaintiff succeeded in effecting a transmission of the money from the Government, he was to get the $200. Action for the $200 and plea denying that plaintiff had got the money for defendant. Action dismissed for want of evidence. *Derlin* vs. *Wilson*, C. R. 1883, 6 L. N. 59.

99 —— For procuring Loan—Loan secured too late.—This was an action by the plaintiff to recover the sum of $150, alleged to be due by the defendant as commission for procuring for him a loan of $13,000. The defendant required a loan of $13,000. He accordingly entered into a written agreement with the plaintiff, in which the conditions were specially set forth, and the earning of a commission of one per cent. was made dependent on the loan being obtained by the plaintiff. The plaintiff, it appears, spoke to two notaries about the matter, without the negotiations resulting in anything; and finally, when it was probably too late for the purposes of the defendant, he spoke to Mr. W., and Mr. W. agreed to furnish the money on getting $10 commission. The cheque for the $10 has never been presented, and it was payable at the plaintiff's office. In the meantime, however, the defendant got the money in another quarter, and he did not take the loan from Mr. W. The plaintiff's action is for a commission for procuring a loan. If the defendant had interfered with him in getting the loan, as he pretends, he might have brought an action of damages. Instead of that, he sues on a contract for a commission. He has earned no commission in the proper sense; and the action must, therefore, be dismissed. *Hetu* vs. *Brodeur*, S. C. 1882, 6 L. N. 59.

100. For Advances on Ship—Sub-Agent.—A party making advances for the building of a ship, over and above his commission of 5 per cent., is entitled to charge the commission of his attorneys or agents in England who effected the sale of the ship, at 4 per cent., which is proved to be the usual charge, and which is payable on the whole price of the sale made at credit, although part was paid within a few days after the transaction; and also a bank commission of ¼ per cent. charged by the sub-agent, and which is usual in England on similar transactions. *Symes* vs. *Lampson*, Q. B. 1851, 5 L. C. R. 17, 4 R. J. R. Q. 270.

101. For procuring Subscription to Stock—Payment after first call.—Respondent had been employed to procure subscriptions of stock in the projected "Banque St. Jean Baptiste," of which appellant was president. He was to get one per cent. on stock subscribed by persons outside of the city, and ½ per cent. on stock subscribed by persons within the city limits. The commission was to be payable after the first call, there being a *post scriptum* to the agreement as follows: "*This commission will be due after the first payment.*" A call was made, but very few paid it, and the scheme was abandoned. Respondent claimed a commission to the amount of $375—*Held*, that respondent was entitled to his commission as soon as a call had been made. *Hubert* vs. *Banque St. Jean Baptiste* (Q. B. 1885), 24 L. N. 224.

102. For Sale of Land—Commission on Land sold by Principal.—Where plaintiff had entered into a contract with defendant, by which the latter agreed to give him the sole of certain lots belonging to him at Longue-Pointe, and to allow him so much as commission per lot, and brought action for commission on lots sold by defendant, he having sold none himself under the contract—*Held*, that the respondent (plaintiff) was something more than a mandatary, as he had an interest in the sale, and having been to some trouble and expense in having plans made, etc., was entitled to his commission. *Dillon* vs. *Borthwick*, Q. B. 1880, 3 L. N. 202.

103. —— —— —— —— —— —— And the following case goes still further; the appellant charged the respondent with the sale in his behalf of certain real property, and it was agreed that he should have three months to effect a sale. A few days before the expiration of the three months the appellant exchanged the property for another, owned by his brother-in-law, receiving $1,200 in addition, and the brother-in-law sold the same property for $10,700—*Held*, that the property having been alienated by the appellant before the expiration of the three months, the respondent was entitled to the usual commission of ½ per cent. on the value obtained, although it did not appear that he had done anything to facilitate the disposal of the property.

The exchange being an alienation equivalent to sale, the respondent was entitled to his commission upon the whole value, $10,703, and not merely upon the $1200, received additionally. *Cork* vs. *Parent*, Q. B. 1889, M. L. R., 5 Q. B. 451, 17 R. L. 122.

104. —— —— —— —— **Lease of Land by Principal - Revocation of Agent's authority.**—*Held*, where the owner of real property has authorized an agent to sell the same on his account for a stipulated commission, within a specified period, and before the expiration of the term the owner leases the same property with option of purchase, such agreement is equivalent to a revocation of the agent's authority, but the latter is only entitled to actual damages; and where it appeared that he had taken no steps whatever to procure a purchaser, and the term of his agency had nearly expired when his agency was interfered with as above mentioned, and that the lessee did not in fact become a purchaser, it was held that no damages were proved, and that his action for the stipulated commission could not be maintained. *Blondin* vs. *Duff*, C. R. 1892, 1 Que. 256. (1)

106. —— —— —— —— —— —— —— **Revocation of Agent's Authority.**—M. employed T. a real estate agent, to sell certain property. T. advertised the property, and negotiated with several persons, one of whom, G., he sent to M., who shortly afterwards notified T. that they could not agree on a price, and that he wished to withdraw the property from T.'s hands and occupy it himself. T. thereupon rendered M. his account for advertising the property for sale, which M. paid. Two days afterwards M. sold the property to G., upon which T. brought an action to recover his commission of 2½ per cent. on the price—*Held*, that M. was liable to T. for the said commission on the price of sale. *Thomas* vs. *Merkley*, S. C. 1885, 32 L. C. J. 207.

107. —— —— —— —— —— —— A principal who agrees to pay a commission to an agent for the sale of his manufactured goods, stipulating at the same time that the agent shall cease to manufacture the same article as he had previously done, and who secretly undersells his agent, cannot complain that the agent has not used due diligence, and therefore cannot refuse to pay him the commission on the goods the agent did sell. *Joseph Hall Manufacturing Co.* vs. *McDougall*, Q. B. June, 1874.

108. —— **Election Agent.**—(Art. 1702 C. C.) An election agent has no action against his principal to recover a sum of money as the value of his services as such agent, without a special undertaking by the principal to pay. *Girouard* vs. *Bramley*, C. C. 1858, 3 L. C. J. 1.

109. —— **Quantum Meruit - No Agreement.** The plaintiff was a man who had a good deal of experience in acting for companies in obtaining rafts of timber and other objects of towage. F., the agent of the defendants, proposed to give L. five per cent. on the amount of business done. The plaintiff declared at once that he would not work for a commission at all, but he offered to work for $800 for the season. F. said he would report to the head office at Quebec. No agreement was come to, but the plaintiff went on and did the work, and now he brought his action to be paid for his services. The plea was that there was no contract, and that five per cent. on the work done that was productive would be enough. But the plaintiff performed services where he did not succeed in getting any contract. The majority of the court were of opinion that he was entitled to a *quantum meruit* for all the services performed, and not merely for the services which were productive. The services were worth $400, of which $80 had been paid. Judgment would go for $320. *Lemay* vs. *St. Lawrence Steam Nav. Co.*, S. C. 1884.

110. —— **Del Credere Commission.** The plaintiff had appointed the defendants his agents for the purpose of collecting a debt of £350, due by certain persons resident in Upper Canada. The defendants, as such agents,

(1) This judgment is quite in keeping with the Privy Council decision in McDougall v. McGreevy, P. C. 1889, 12 L. N. 359.

accordingly took steps to collect the amount from the debtors of the plaintiff, or from one of them then in Quebec, and to further the matter took payment for part of the debt and the note of one of the debtors for the balance, payable to their own order, which note eventually proved worthless—*Held*, that a charge of five per cent. commission for the collection of the debt did not necessarily imply a warranty of the note on the part of the agent. *Glass* vs. *Joseph*, Q. B. 1847, 3 Rev. de Lég. 22.

111. — — — — An agreement that a certain rate of commission shall be *del credere* may be inferred from the fact that, according to the usage of trade, the rate charged is such as is usually charged as a guarantee or *del credere* commission. *Rankin* vs. *Foley*, Q. B. 1861, 6 L. C. J. 156.

112. — — — Where an authority, subsequent to the sale, agreed for an extra commission to guarantee the sales—*Held*, that as he had taken notes payable to himself in settlement, the most reasonable interpretation of such agreement was that he should endorse the notes so received in settlement of the sales, though in the present case it was not proved that such was the custom of trade. *Sinclair* vs. *Leeming*, Q. B. 1861, 6 L. C. J. 217.

113. Who are. Plaintiff attached a quantity of goods in the Custom House in satisfaction of a judgment against defendant who carried on business as "J. B. W. & Co." Intervenants claimed the goods seized as their property, alleging that defendant was merely their agent in carrying on the business, and in support filed a deed *sous seing privé*, by which it was agreed that the intervenants should establish a store under the name of J. B. W. & Co., to be managed by defendant as their agent; that they were to supply him with all goods required, and charge the store with all goods imported and with a commission of five per cent. for buying; that defendant was to carry on the business for the benefit of intervenants, and was not to make purchases. All this intervenants alleged was carried into effect; that the goods seized were purchased for the business by them; that the plaintiffs' claim was incurred long previous to the agreement and was unconnected with the business in question. On proof intervention was maintained and seizure discharged. *Greene* vs. *Wilkins*, S. C. 1881, 4 L. N. 186.

114. — — — — The plaintiffs were trustees under a deed of assignment from insolvents, with authority to carry on the business until it should be wound up, which was to be completed within two or three years. The business was not wound up in that time, but was carried on by the plaintiffs on an extensive scale, with funds raised on their own credit, and large losses were incurred—*Held*, by the majority of the Court, in an action by the plaintiffs against creditors who had signed the trust deed to oblige them to repay the amount of such losses, that the plaintiffs were not, under the circumstances, agents of the creditors, so as to make the latter liable for the result of their operations. *Chinic* vs. *Garneau*, Q. B. 1884, 7 L. N. 210.

115. Where it is proved that the amount of a loan was placed in the hands of a third party to pay off hypothecs and perfect the title, the presumption is that such third party was acting as the agent of the lender, and it is for the latter to prove that the borrower got the money, or was benefited thereby. *Knox* vs. *Boivin*, S. C. 1893, 4 Que. 311.

116. As to what constitutes proof of agency sufficient to authorize the institution of action on behalf of another. See *Davidson* vs. *Hunter*, Q. B. 1855, 1 Dorion's Q. B. R. 360.

117. Where the transferee of a debt, after signifying to the debtor the transfer of the debt, receives from the transferor a part of the debt, and subsequently demands from him payment of the balance, these facts do not constitute such transferor his implied agent to collect from the debtor. In order to give rise to an implied agency, the court must consider the intention of the parties, rather than their actions. *Gibb* vs. *Macadam*, Q. B. 1888, 16 R. L. 425.

118. Action to recover $348.20 for work and labor done, and materials furnished by plaintiff in the repair of a house belonging to defendant which had been burnt. The defence was that the work was not for the defendant, nor authorized by him, but was for one B. B. was the tenant, and after the fire called upon the defendant to restore the premises to proper condition, when the defendant told him to get it done, and send him, the defendant, the account. He also repeated this authorization on a subsequent occasion. It was also proved that the house was insured by defendant, and he had received the insurance arising from the fire—*Held*, that the authorization was sufficiently proved, and that the defendant was liable. *Sulte dit Vadeboncœur* vs. *Bell*, Q. B. 1878, 8 R. L. 535.

119. The plaintiff, a workman, was engaged by contractors for the construction of a railway. The railway company acted as bankers for the contractors, and paid the wages of the workmen, cost of transport to the place where they were engaged, etc.—*Held*, that the company were the real principals, and that they had given the plaintiff reasonable cause for believing that the contractors were their agents, and therefore the company were liable for a breach of the contract. *Lapointe* vs. *The Canadian Pacific Ry. Co.*, C. Ct. 1883, [illegible].

120. The banks, creditors of B. Bros., who required extension of time, agreed together to grant it, and make further advances to them, declaring it a matter of common cause—*Held*, that the stipulation in the agreement that A. K., to whom the funds for renewal were handed, should supervise the affairs of B. Bros. during the period covered by the agreement, did not constitute him the agent of the banks. *Union Bank* vs. *Quebec Bank*, Q. B. 1887, 14 Q. L. R. 69.

121. A deed of sale of rights to real estate ostensibly for valid consideration, followed by a *contre-lettre*, in which it was admitted that no consideration was paid, and arranging how the proceeds of the sale of the property, if any were recovered, should be distributed, amounts to a contract of agency and it may be rescinded by the principal if the agent does not use due diligence, subject to the expenses he may have incurred. *Thurber* vs. *Holland*, Q. B., 22 June, 1877.

122 A holder of shares "in trust" is not a mandatary, as he holds subject to a prior title on the part of some person undisclosed. *Bank of Montreal* vs. *Sweeney*, P. C. 1887, 10 L. N. 250.

123. —— —— **Brokers—Evidence.**—In a suit by a broker to recover damages against his own customer for alleged breach of contract made through him, his authority to make the contract may be proved by oral evidence, but the purchase and re-sale cannot be so proved when the value exceeds $50. *Trenholme* vs. *McLennan*, Q. B. 1879, 24 L. C. J. 305.

124. —— —— (Art. 1735 C. C.) A broker, assuming to be the mutual agent of buyer and seller, and accordingly signing bought and sold notes, will not be presumed in law to be such mutual agent from the mere fact of his being a broker; and, in the absence of sufficient evidence of his being authorized by both parties to sign such notes, they will not constitute a valid memorandum in writing within the Statute of Frauds. *Sgme* vs. *Howard*, S. C. 1856, 1 L. C. J. 19.

125. —— —— **Who are—For Purposes of Taxation.**—Under a by-law imposing a tax on brokers and commission merchants—*Held*, not to include ship agents. *Thompson* vs. *City of Montreal*; *Shaw* vs. *City of Montreal*; *Sidey* vs. *City of Montreal*, C. C. 1881, 1 L. N. 327.

126. —— **Factors—Who are.**—A person acting as agent in Montreal for a book-house in Paris, and taking subscriptions and rendering accounts in the name of such house is not a factor (1). *Doutre* vs. *Dansereau*, S. C. 1879, 3 L. N. 22.

127 —— —— **Pledge.**—Barrow was a leather merchant in London. Bonnell was a tanner in Canada. Barrow agreed to pay Bonnell 1½c per pound for every hide tanned by Bonnell in the mode of the country, and Bonnell was to procure freight, and send back the hides; they were tanned, and freight was procured for them, but, in the meantime, Bonnell had obtained from the Toronto Bank, bank advances on his own account on bills, and hypothecated the hides to the bankers, as security for such advances, engaging to hand over to them the bills of lading if his bills of exchange were not duly honored. They were not duly honored, and the bankers (who had acted in entire ignorance of the transactions between Barrow and Bonnell) claimed to retain the bills of lading and the hides until their demands were satisfied—*Held*, that, under the circumstances of the case, Bonnell could not, under any law, English or Canadian (P. Q.), claim to be a factor or agent of Barrow entitled to pledge Barrow's goods. *City Bank* vs. *Barrow*, House of Lords, 1880, 5 App. Cas. 664.

128. Holding out as Agents.—The appellants set up a firm of "J. H. Wilkins & Co.," which was in reality their own business, with J. H. Wilkins as manager; but to the public the business was that of "J. H. Wilkins & Co." This firm bought goods from respondent, the price of which was claimed by the present action—*Held*, that the appellants were liable for the obligations of the firm of J. H. Wilkins & Co., and for the acts of J. H. Wilkins, who was entrusted with the management. *Lewis* vs. *Osborne*, Q. B. 1886, M. L. R., 2 Q. B. 353.

(1) See remarks on this case, 3 L. N. at p. 17.

129. —— —— —— —— An insurance company, which authorizes a person to solicit and effect insurance in its name, holds out such person as its agent. *Ansley* vs. *Waterloo Ins. Co.*, C. R. 1888, 14 Q. L. R. 183.

130. The appellants, W. F. L. and J. L. L., who were carrying on an ordinary business in Montreal under the firm of W. F. L. & Co., also appointed one J. L. Wilkins as their agent and manager, to carry on a business on their own account and under the name of J. H. Wilkins & Co. It was proved that Wilkins was in the habit of endorsing bills receivable with the name of the firm, and that he sometimes drew bills on customers. The respondent discounted one of these bills in good faith, in the same manner as he had discounted similar bills previously—*Held*, that the fact of Wilkins' name being given to the business and its being conducted by him, whether he was a partner or not, was sufficient to hold him out to the world as a general agent, and appellants were liable to the respondent for the amount of the draft so discounted, whatever might be the use to which Wilkins, without respondent's knowledge, applied the proceeds. *Lewis* vs. *Walters*, Q. B. 1888, M. L. R., 4 Q. B. 256, 16 R. L. 610 (and see *supra*, No. 128).

III. PRINCIPAL.

1. Action by undisclosed Principal in his own Name.—*Quære*: Can a principal bring an action upon a contract made by an agent acting in his own name and without disclosing his principal?

Affirmative: *Read* vs. *Birks*, C. Ct., Mondelet J., 1858, 2 L. C. J. 161; *Labelle* vs. *Patris*, C. Ct., Loranger J., 1873, 1 R. L. 530 (but plaintiff held to pay costs of both sides); *Canada Shipping Co.* vs. *Victor Hudon Cotton Co.*, Q. B. 1882, Dorion & Ramsay dissenting, 27 L. C. J. 14, 5 L. N. 309, 2 Dorion's Rep. 356. In Supreme Ct. majority of judges held it was not necessary to decide this point for the purposes of the present case, but Strong J. maintained the affirmative, while Fournier and Henry J. J. maintained the negative, 13 Can. S. C. R. 401. *MacKill* vs. *Morgan*, S. C. 1892, 1 Que. 535.

Negative: *Canada Shipping Co.* vs. *Hudon*, Mackay J., S. C. 1880, 3 L. N. 170, which being reversed in appeal (see *supra*), Dorion J. and Ramsay J. maintained the negative. And in Supreme Court, Fournier J. and Henry J. maintained the negative, although the majority of the Court did not pass upon the point, 13 Can. S. C. R. 401. *Meunier* vs. *La Corp. de Quebec*, C. R. 1886, 12 Q. L. R. 131; *Wilson* vs. *Benjamin*, Tellier J. vs. C. 1888, M. L. R., 5 S. C. 18.

In this last case it was held that the plaintiff should have obtained a transfer of and judicial subrogation in the rights of his agent, or should have discharged the defendant from all liability toward the agent. But as in this case the evidence of the agent had established that the goods in question were the property of the plaintiff, and that he acted as agent in procuring their sale, the defendant was no longer in a position to object to action on the part of the plaintiff, who was thereby disclosed as principal in the matter.

2. But in regard to marine insurance policies (Art. 2492 C. C.), it has been *Held* by the Privy Council, that the undisclosed principal can sue in his own name on a contract of marine insurance made by and in the name of his agent, subject to any defences or equities which without notice may exist against the agent. *Browning* vs. *Provincial Ins. Co. of Canada*, P. C. 1873, L. R., 5 P. C. 263; *Anchor Marine Ins. Co.* vs. *Allan*, Q. B. 1886, 13 Q. L. R. 1.

3. —— —— —— —— **in Name of Agent.**—The principal without the consent of his agent cannot sue in the latter's name, on a contract made by the agent in his own name and without disclosing his principal. In such case the principal can only take action by becoming subrogated in the rights of the agent. *Meunier* vs. *Corp. de Quebec*, C. R. 1886, 12 Q. L. R. 131.

4. Action by Principal where he contracted apparently as Agent.—A person who sells goods in reality for himself, but apparently as agent for another person, whom the agent, in the receipt signed by him, declares to be the owner and vendor, is not entitled to sue on the contract as principal. *Hall* vs. *McBean*, S. C. 1893, 3 Que. 242.

5. Action by Principal against Agent.—(*See under title "Accounts, Accounting."*)—Where the mandate is for the collection of a certain sum of money, the mandator has a direct action against the mandatary for monies collected and not paid over, and the mandator is not obliged to resort to the *actio mandati*. (1) *Joseph* vs. *Phillips*, Q. B. 1875, 19 L. C. J. 162, confirming S. C., 15 L. C. J. 335.

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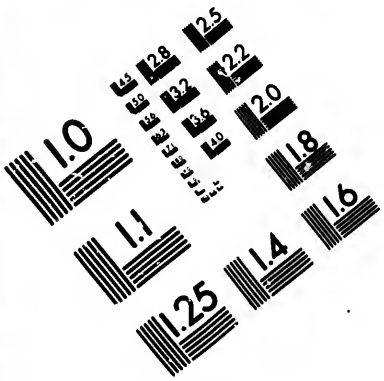
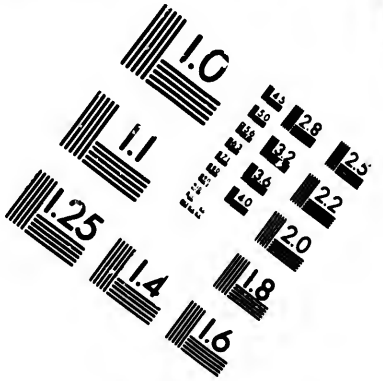
(1) See 20 Can. S. C. R. at p. 115, per Taschereau J.





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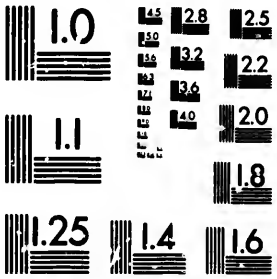

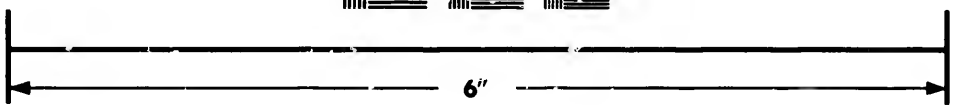

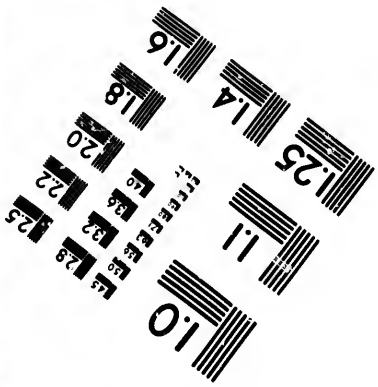

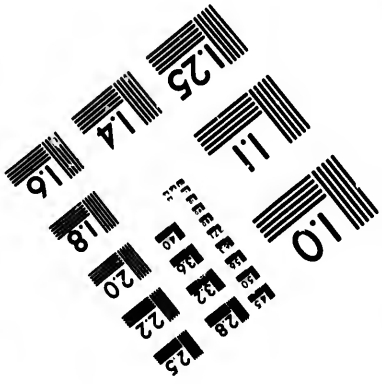

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6. But where the agency is for the general management of the principal's business, the action by the principal must be for an accounting of the whole administration. *Dorion* vs. *Dorion*, Taschereau J., 20 Supreme Ct. Rep. 445; *Hunt* vs. *Taplin*, 24 Supreme Ct. Rep. at p. 50 (1895).

6a. Knowledge of Acts of Agent.—A principal is bound to know the transactions of his agent, and where on the submission of interrogatories he alleges ignorance of his own business, the interrogatory will be taken as confessed. *McGreevy* vs. *Paille*, 4 June, 1880, Q. B.

7. Liability of—For Acts of Agent acting in his own Name.—The undisclosed principal is subject, in regard to his agent acting in his own name, to all the exceptions which can be set up against the latter by the parties with whom he deals; and hence is bound by a set-off pleaded by the purchaser. *Duplessis* vs. *Dufant*, Q. B. 1865, 30 L. C. J. 75.

8. —— —— —— ——Acting within scope of his Apparent Authority.—Where wines were ordered by the secretary-treasurer of a club, who had apparent authority to purchase supplies for the club, and the wines were invoiced and consigned to the club, the latter were held liable for the price. To establish a defence in such case, it would be necessary to show not only that the act of the agent was unauthorized, but that the party dealing with the agent had notice thereof. *Gourd* vs. *Fish & Game Club*, 1890, M. L. R., 6 S. C. 480.

9. —— —— —— Cashier of Bank.—Where money had been deposited with the cashier of a bank in his individual capacity as attorney of the firm for whom the money was paid, and was immediately transferred by draft to the firm and drawn out by one of the partners—*Held*, on a contestation of the declaration of the manager of the bank, under a writ of garnishment some six months afterwards, that it had no funds in its hands belonging to the said firm; that money deposited with the cashier of the bank, acting individually and not on behalf of the bank, did not constitute the bank the attorney of the parties to whom the money was due. *Lynch* vs. *McLennan*, 3 L. C. J. 84 & 9 L. C. R. 257, 7 R. J. R. Q. 222, S. C. 1858.

10. —— —— Corporation.—(356 C. C.) Corporations are bound by the acts of their agents in the same way as private individuals, and to the same extent. *Ferrie* vs. *The Wardens of the House of Industry*, 1 Rev. de Lég. 27, Q. B. 1845.

11. —— —— —— Corporation. — A corporation is liable for the cost of goods sold in good faith to persons acting as its agents, and whose authority was not repudiated by the Corporation. *Cassidy* vs. *Montreal Fish & Game Club*, S. C. 1889, M. L. R., 6 S. C. 229.

12. —— —— —— Effecting Insurance—Premium Notes.—The agent of a railway company gave his own individual notes to an insurance company for premiums of marine insurance, and took the policy of insurance in his own name, and afterwards gave the notes of the firm for the same debt—*Held*, that the railway company is nevertheless liable in a direct action for the amount of the premiums, and that, on an intervention by the firm, the renewal notes filed in the case be declared inoperative as against the intervening parties, and be ordered to be delivered up to them. *Montreal Fire Insurance Company* vs. *Stanstead, Shefford & Chambly Railway Company*, S. C. 1863, 13 L. C. R. 233.

13. —— —— —— Fraud.— The fraud of the agent is imputable to the principal (1) where the latter has received a benefit from the fraud of his agent, acting within the scope of his authority. *Lighthall* vs *Chrétien*, S. C. 1882, 11 R. L. 402.

14. And where an agent in making a contract suppressed a material fact within his knowledge, his principal cannot profit by the fraud, although he was himself ignorant of the fact suppressed. *Chrétien* vs. *Crowley*, Q. B. 1882, 5 L. N. 268, 2 Dorion's Rep. 385.

15. —— —— —— In another Province.—The purchase of goods by a person acting publicly in Montreal as the general agent of an insurance company, whose chief place of business is elsewhere, will bind the company for such supplies as may have been furnished the agent in good faith for the purposes of the insurance business, although by the arrangement between the agent and the company, it was understood the agent was to take a commission on the business done by him to cover all expenses. *Morton* vs. *Niagara District Mutual Fire Insurance Company*, 13th March, 1878, Q. B.

(1) See also *Mackay* vs. *Commercial Bank of New Brunswick*, Privy Council 1874, L. R., 5 P. C. 394. (Beauchamp's Jurisprudence of the Privy Council, p. 649.)

16. —— —— —— For Acts of Agent—Notary—Money deposited by Lender with—Responsibility for default of Notary—Evidence.—Where the amount of a loan was deposited by the lender with her notary, with instructions to hold it until the obligation to be given for it was executed and registered, that the responsibility for the default of the notary to pay over a portion of the money must fall upon the lender; and it made no difference whether the notary was to pay over the amount to the borrower, or (as in the present case) was to apply it to the discharge of certain debts in accordance with a list furnished to him by the borrower. *Webster* vs. *Dufresne*, 1887, M. L. R., 3 Q. B. 43.

The borrower's acknowledgment in the deed, that he had received the whole amount, might be contradicted by the lender's admission that she had paid the money to her notary, and the notary's admission that he had not paid over a portion of the amount.

17. —— —— —— Notary.—Where a testamentary executrix employs an agent as attorney, she is bound to supervise his management of the matters entrusted to him, and to take all due precautions, and cannot escape liability for the misappropriation of funds committed by such agent, although he was a notary public of excellent standing prior to the misappropriation. *Low* vs. *Gemley*, Supreme Ct. 1890, 18 S. C. R. 685, *confirming* M. L. R., 5 Q. B. 186, and M. L. R., 4 S. C. 92.

18. —— —— —— Receipt given by Agent in his own name — Absconding with funds.—H. was the agent of P., and managed her affairs generally; he also acted occasionally for L. in finding investments for her money, and on one occasion he represented to L. that P. required a loan of $20,000 for a certain purpose, which sum was handed H. by L., who received from him the receipt.

H. paid over a part of this sum for the purpose for which it was loaned, and applied the balance to his own use. Some time afterwards H. absconded, and L. brought action against P. to recover the balance which H. had misappropriated.

Held, confirming the judgment of the Court below, that there was nothing on the face of the receipt to bind P., and that she was not liable to L. for the amount in question. *Low* vs. *Bain*, Q. B. 1886, 31 L. C. J. 289.

18a. —— —— —— Signing Deed of Composition.—A deed of composition signed by a mandatary without any authority to accept a composition is not binding on his principal. *Bolt Iron Co. of Toronto* vs. *Gougeon*, S. C. 1884, 7 L. N. 10.

Unless ratified by the silence of the principal who has had notice thereof. *Nield* vs. *Vineberg*, S. C. 1882, 5 L. N. 118.

19. —— —— —— For Act of Sub-Agent.—See *supra* AGENT—POWER OF DELEGATION.

20. —— —— —— Sub-Agent—Default of.—(Art. 1711 C. C.) On counter-appeals from the judgment of the court below, condemning, on the one hand, the defendant to account under an agreement by which the plaintiff advanced money to build a ship to be reimbursed out of the proceeds of the sale of the ship, which he, the plaintiff, was authorized to send to his friends in Liverpool or London, and for this purpose to appoint and substitute attorneys and agents—*Held*, that the defendant was not liable by reason of the bankruptcy of the substitutes for moneys due by them, and that the principal should bear the loss, inasmuch as, under the circumstances, the substitutes were his own attorneys and agents, there being no evidence that the agent was not justified in appointing the said sub-agent. *Symes* vs. *Lampson*, Q. B. 1854, 5 L. C. R. 17, 4 R. J. R. Q. 270.

21. —— —— —— For Acts of Party not bona fide Agent.—Where a plaintiff authorized one Beaudry so to act as to lead the public reasonably to conclude that he had power to bind his principal by contracts of alienation, and both he (Beaudry) and intending purchasers dealt in good faith on that footing—*Held*, that the case would fall within the principle expressed in Art. 1730 of the Civil Code, which is a plain principle of justice and common to all systems of law. *Price* vs. *Nault*, P. C., 13 Q. L. R. 286, affirming Q. B. 1884, 11 Q. L. R. 309; *Leclaire* vs. *Landry*, S. C. 1890, 19 R. L. 342.

22. —— —— —— For Money paid to Agent by Mistake.—A principal is not liable for money paid to his agent by mistake, in excess of an amount actually due, unless it be shewn that the principal has either received or otherwise benefited by such payment. *City Bank* vs. *Harbour Commissioners of Montreal*, S. C. 1857, 1 L. C. J. 288.

23. Ratification of Agent's Acts—All facts denoting approbation and even silence upon the part of the mandator knowing the acts of the mandatary involve ratification, and are equivalent to express ratification, *Buchanan* vs. *McMillan*, S. C. 1874, 20 L. C. J. 105.

24. Ratification is retroactive and covers all that has been done by the mandatary. (*Ib.*)

25. —— —— —— During the plaintiff's absence from Montreal, his bookkeeper and principal clerk signed in his behalf an agreement of composition with a debtor, and in pursuance thereof collected from the assignee the dividend realized from the estate. The plaintiff was informed by his clerk by letter of what he had done, and did not object at the time; but on his return to Montreal in the following month, he claimed the whole debt from the debtor, crediting the dividend as a payment on account—*Held*, that under the circumstances there was a ratification of the clerk's act. *Niehl* vs. *Finchery*, S. C. 1882, 5 L. N. 118.

26. Where ratification cannot be the object of verbal evidence. *Bolt & Iron Co. of Toronto* vs. *Gougeon*, S. C. 1884, 7 L. N. 40.

27. —— —— —— —— That the tacit approbation of the company generally given to an act of its president and secretary-treasurer with reference to a delegation of payment accepted by the former, and the failure on the part of the company to repudiate the same during the course of four years after their obtaining a knowledge of the fact, binds the company in so far as such act is concerned. *Société de Construction du Comté d'Hochelaga* vs. *Gauthier*, Q. B. 1885, 29 L. C. J. 141.

28. —— —— —— —— —— **Banks — Manager.**—Appellant and respondent are banks,—the latter being a savings bank. On the 13th September, 1875, appellant's cashier, C., obtained a loan in his own name from the respondent bank on the security of shares of the appellant bank standing also in his own name, and the loan was also renewed in the same way. The appellant bank stopped payment 15th June, 1875, and its new executive officer or administrator (who was also manager of the respondent bank) on the 23rd June, 1875, altered the books of appellant, so that the loan appeared to be a transaction of appellant and not of C. personally, and on the 29th July, 1875, the pass-book between appellant and respondent was altered in accordance with the same pretension. In September, 1875, the respondent's manager ceased to have any authority in the appellant bank, but the entries made by him, or by his direction, were not repudiated by the appellant's new board until 5th August, 1876—*Held*, reversing the judgment of the Court of Queen's Bench, (Montreal, M. L. R., 2 Q. B. 64), that the failure of the new administration of the appellant bank to repudiate the entries until 5th August, 1876, did not operate as a ratification of the unauthorized act of the respondent's manager while acting as administrator of the appellant bank, and in any case the ratification of an act of such a nature would be *ultra vires* of the board representing the appellant bank after its stoppage. *Banque Jacques Cartier* vs. *Banque d'Epargne de la Cité et du District de Montréal*, P. C. 1887, 11 L. N. 66.

29. Rights of — Consignee taking Goods at fixed Prices, Profits over these Prices to be his—Rights of Consignor.—The fact that an agent to whom goods are consigned for sale is to have for himself all that he can get over a schedule price, does not make him the owner of the goods, and the price, when collected by his assignee after his insolvency, does not fall into his estate, except such portion thereof as represents the agent's profit. And so, where an agent took over a stock on consignment, under an agreement in writing by which he was to account for goods sold as per price list supplied to him by the consignor, the profits over this price to belong to the agent—it was *Held*, that the consignor was entitled to be paid in full, per price list, for goods sold by the agent before his insolvency, but the price of which was collected by his assignee subsequently. *Schlbach* vs. *Stevenson*, 1887, M. L. R., 3 Q. B. 391.

IV. THIRD PARTIES.

1. Liability of.—(And see AGENT—POWERS OF, *supra*; and see PRINCIPAL,—ACTION BY.) A party who purchases from an agent without knowledge of his agency, but who receives the goods direct from the principal with the invoice in the latter's name, has sufficient notice that he has purchased from the principal to allow the latter to bring an action against him for the price of the goods. *Higgins vs. Lavigne*, S. C. 1889, 12 L. N. 194.

2. Rights of—Action against Agent—Title to Property.—While a creditor has a right of action against the agent of his debtor, in whose name real estate of the debtor is registered, to have it declared that such property really belongs to the debtor, yet where it appears that the action is unnecessary, the judgment maintaining it will be confirmed without costs in either Court. *Schwob* vs. *Baker*, 1886, M. L. R., 3 Q. B. 191.

3. —— —— **Contracting with Agent personally.**—A third person who has contracted with an agent personally, without disclosure of principal, is entitled to protect himself until discharged from the obligation contracted towards the agent, by the subrogation of the principal in the rights of the agent. *Wilson* vs. *Benjamin*, S. C. 1888, M. L. R., 5 S. C. 18.

4. —— —— **Fraudulent Sale by Agent.**—A party employed as agent to sell property cannot accept in payment his own indebtedness, and a sale for the consideration of the release of his own liability will be set aside as fraudulent. *Maher* vs. *Aylmer*, Q. B. 1880, 1 Dorion Rep. 106.

5. —— —— **Goods ordered in Name of Agent.**—A party who takes delivery of goods ordered by another person in his name and shipped to his address, on the understanding that the sellers should draw on such party for the amount of invoice, cannot retain the goods and refuse to accept the draft or pay the amount thereof. *Poulin* vs. *Williams*, Q. B. 1877, 22 L. C. J. 18.

6. —— —— **Transferee of Shares "in Trust."**—A holder of shares "in trust" is not a *mandataire*, as he holds subject to a prior title on the part of some person undisclosed. Such holding not being forbidden by the law of Canada, a transferee from such holder is bound to enquire whether the transfer is authorized by the nature of the trust, or he takes it at his own risk. *Bank of Montreal* vs. *Sweeney*, Privy Council 1887, 12 App. Cas. 17, 10 L. N. 250.

7. —— —— **Undisclosed Principal.**—The principal who profits by a purchase made for his account by his agent, or clerk, is liable to the vendor, although at the time of the sale the vendor was ignorant of the fact that the agent was not the principal. *Coté* vs. *Paquet*, Q. B., 7th Sept., 1875.

AGRICULTURAL SOCIETIES.

BY-LAWS WITH REGARD TO.

1. On a petition to set aside certain resolutions and by-laws of a County Council—*Held*, that the declaration prescribed by 32 Vict., c. 15, s. 41, with reference to the organization of agricultural societies, is only required for the formation of the society. The signature of forty persons at the date of formation is sufficient to give the society a legal existence, and it is not necessary that persons becoming members subsequently should sign the declaration. *Martin* vs. *Corporation d'Argenteuil*, C. C. 1884, 7 L. N. 139.

2. The choice of a place for exhibitions of an agricultural society, within the meaning of 37 Vict., c. 5, s. 2, does not imply that the particular site for the permanent buildings must be determined at the meeting of members; *e. g.*, a resolution choosing "Lachute, in the parish of St. Jérusalem d'Argenteuil," is sufficient. (*Ibid.*)

3. It is not necessary that the resolutions and by-laws passed at a meeting of a municipal council should be written out at length and signed by the presiding officer at the time of the meeting. (*Ibid.*)

4. A by-law of a county council, fixing a permanent place at which all exhibitions of an agricultural society shall be held, is not a by-law within the meaning of articles 100 and 698 of the Municipal Code. (*Ibid.*)

AGRICULTURAL ACT.

On appeal from a conviction of two justices of the peace under the Agricultural Act—*Held*, that the action should have been taken in the form of *qui tam*. *Houde* vs. *Martin* C. C. 1874, 6 R. L. 75.

ALIENATION.

I. Of Aliments.—See Aliments.

II. Of Property donated.—See Donation.

III. Of Property bequeathed.—See Wills—Legacy.

IV. Prohibition to Alienate—Application of Article 970 C. Code.

Art. 970, which says that the prohibition to alienate things sold or conveyed by purely onerous title is void, only applies to sale or a title equivalent to sale and not to a legacy. *Wells* vs. *Gilmour*, Q. B. 1894, 3 Que. 250.

V. What is.

1. A lease for nine years does not constitute an alienation. *Valois* vs. *Gareau*, S. C. 1870, 2 R. L. 131.

2. A legacy to a stranger is an alienation, but it is otherwise with a legacy to the testator's heir. *Pénisson* vs. *Pénisson*, S. C. 1877, 6 Q. L. R. 239.

ALIEN.

1. Rights of.—Under the Act 12 Vic., c. 197, (1) which enacts that every alien shall have the same capacity to take, recover, and transmit "real estate" in all parts of this Province, as natural born or naturalized subjects, the alien is placed in the same position as the natural born subject, and can claim, conjointly with a naturalized heir, both real and personal property; although moveable property be not mentioned in the 12th sec. of the Act, it must be taken to be included in the larger term "real estate." *Corse* vs. *Corse*, C. R. 1854, 4 L. C. R. 310.

2. —— —— If an alien dies without issue, his lands belong to the Crown: but if he leaves children, some born in Canada, and others not, the former exclude the Crown, and then all the children inherit as if they were natural born subjects. (2) *Donegani* vs. *Donegani*, P. C. 1835, Stuart's Rep. 605. 3 Knapp. 63, 1 R. J. R. Q. 433.

3. —— —— Where an alien has a son who is also an alien, the children of the latter inherit from the grandfather to the exclusion of their father. (*Ib*) (3)

4. Who is an Alien.—Who is an alien is a question to be decided by the law of England; but when alienage is established, the consequences which result from it are to be determined by the law of Canada. (4) *Donegani* vs. *Donegani*, P. C. 1835, Stuart's Rep. 605. 3 Knapp P. C. Rep. 63, 1 R. J. R. Q. 433.

ALIMENTS.

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I. ACTION FOR.

1. Jurisdiction.—The obligation to furnish aliment is purely personal, and the dispositions of Art. 34 C. C. P. are not applicable to demands of this nature. Hence a natural son is not entitled to bring suit at Montreal against the administrator of his father's estate, appointed and domiciled in Ontario, for the purpose of having his relationship judicially declared, and further praying for an alimentary allowance, on the ground that his father before his death was domiciled in the district of Montreal, where the succession became open. *Dion* vs. *Gervan*, S. C. 1890, M. L. R., 6 S. C. 329.

2. Petition.—What it must allege.—(Art. 169 C. C.) In a petition claiming an alimentary allowance from children and grand-children, where it is neither alleged in the petition nor established by the affidavits produced in support of it that the defendants are in a position to pay the alimentary allowance claimed, or any part thereof, such petition will be rejected, saving the petitioners recourse by further proceeding. *Lévesque* vs. *Plourde*, S. C. 1892, 2 Que. 259.

(1) See now Art. 25 C. C.
(2) (3) See now Art. 25 and 609 C. C.
(4) See remarks of Day J. in *Corse* vs. *Corse*, 4 L. C. R. at p. 316.

3. In an action by a mother against her children issue of her marriage with her husband, she must allege that the husband, the father of her children, is unable to support himself and his wife *Bernard* vs. *Bernier*, S. C. 1885, 9 L. N. 182.

II. ALIENATION.

1. A clause in a deed declaring certain objects or things unseizable is distinct from one of inalienability; and an alimentary allowance which is unseizable may be alienated. *Persillier* vs. *Brunet*, Q. B. 1890, 19 R. L. 523, confirming S. C., M. L. R., 4 S. C. 455; *Berlinguet* vs. *Prevost*, S. C. 1871, 16 L. C. J. 55, 3 R. L. 380; *Armstrong* vs. *Dufresnay*, S. C. 1871, 3 R. L. 366. *Faribault* vs. *Guay*, S. C., 4 Que. 143.

2. Where the usufruct of a property is bequeathed as alimentary allowance, with a substitution in favor of a third person, the prohibition to alienate or hypothecate such bequest does not prevent the institute from hypothecating for the purpose of protecting himself against any effort to deprive him of it; and the validity of such hypothec is not affected by the failure of the means employed for that purpose, nor can the curator to the substitution contest such hypothec, on the ground that the property was bequeathed in usufruct, and was declared inalienable and unattachable, in order to insure the alimentary allowance. *Wilson* vs. *Leblanc*, C. R. 1872, 16 L. C. J. 197.

3. And the *grevé de substitution* of the property so bequeathed may legally mortgage the property to persons becoming security for him, on an appeal instituted to preserve the property, whether such appeal be successful or not. *Wilson* vs. *Leblanc*, C. R. 1872, 16 L. C. J. 207, 209.

4. The legatee of an immoveable, "à titre d'aliments et soutien de la vie sans qu'il puisse aucunement etre assujetti et arrêté par aucun de ses créanciers présents et futurs," can alienate it and consequently hypothecate it to raise funds for its improvements and additions thereto. And the hypothecary creditor can seize the rents due by the lessees of the property in satisfaction of arrears of interest.

The legatee contesting such seizure can at least only demand its partial nullity, and a ventilation to establish the values of the immoveable bequeathed, and the improvements made by means of the loan, the proportion of rent due by reason of such improvements being clearly seizable independently of the conditions in the legacy. *Faribault* vs. *Guay*, C. Ct. 1893, 4 Que. 143.

III. COMPENSATION.

An alimentary allowance declared under the terms of a will to be unseizable, is not liable to be compensated by a debt due by the legatee to the testator, so long as such allowance is payable by way of aliment. *Muir* vs. *Muir*, P. C. 1874, 18 L. C. J. 96, 5 R. L. 637, confirming Q. B., 15 L. C. J. 309; and see *Millot* vs. *Millot*, S. C. 1884, 30 L. C. J. 328.

IV. EXECUTION OF JUDGMENT FOR.

1. Where judgment has been rendered ordering payment of alimentary allowance, it should be executed in the ordinary manner; the creditor cannot bring an action to recover instalments. *David* vs. *Dupaul*, C. Ct. 1885, 13 R. L. 425.

2. Where attachments have issued to attach an alimentary allowance payable monthly by the debtor, the latter cannot obtain an order from the Court to restrain the alimentary creditor from taking execution for the future payment of his allowance until the Court orders otherwise.

To prevent such execution the debtor should deposit in Court the instalments of the allowance as they become due. *Francis* vs. *Clement*, Q. B. 1886, 31 L. C. J. 26, reversing Superior Court judgment 1886; and *Francis* vs. *Clement*, S. C. 1889, 17 R. L. 386.

3. The Court of Appeals will not grant an order to execute a judgment for aliment during the delay granted to the tutor to obtain authorization to appeal, that requirement having been neglected. If, as argued, the judgment for aliments was executory notwithstanding the appeal, it would be unnecessary for the Court to interfere, and if not, the Court would not feel justified in making a special order under the circumstances. *Clement* vs. *Francis*, Q. B. 1883, 6 L. N. 325.

V. EXEMPTION OF FROM SEIZURE.

1. An alimentary allowance which is not made gratuitously, but for a certain consideration, is not exempt from seizure. *Vignault* vs. *Bone*, C. R. 1890, 19 R. L. 185; *Grenier* vs. *Kerr*, C. R. 1893, 3 Que. 409.

2. Art. 558 C. C. P.—Aliments, whether by disposition of the law or of man, are favored, and by law are unseizable for debt; therefore a clause in a will declaring aliments unseizable is legal. *Muir* vs. *Muir*, Q. B. 1871, 15 L. C. J. 309, Privy Council 1871, 18 L. C. J. 96.

3. And so of an alimentary allowance due *ex officio pietatis*. *Millot* vs. *Millot*, S. C. 1884, 30 L. C. J. 328.

4. And so of rent of house bequeathed by will as aliment. *Irwin* vs. *Boyer*, S. C. 1877; *Molson* vs. *Carter*, Q. B 1883, 3 Dorion's Rep. 279.

5. Where by a will a testator has declared the property bequeathed unseizable, the property remains so even against a mortgagee, and even where the debtor is in possession under a deed of sale from the executors of the testator, such a deed being considered in this case as a partition and not a sale. *Carter* vs. *Molson*, P. C. 1885, 10 App. Case 661, 8 L. N. 281, confirming Q. B., 3 Dorion 279, 6 L. N. 372.

6. Dividends on shares of bank stock, not identified as part of respondent's share of his father's estate, were seizable. *(Ib.)*

7. Alimentary Debt.—(Art. 558 C. C.) An alimentary allowance, granted by the Court to a wife in an action against her husband for separation from bed and board is an "alimentary debt" within the saving of Art. 558 C. C. P; and an alimentary allowance payable to the husband under the will of his father may be seized therefor, though declared unseizable by the will. *F.* vs. *C.*, Q. B. 1834, 1 R. de L. 81; *Maguire* vs. *Huot*, S. C. 1882, 5 L. N. 374; *Perrault* vs. *Masson*, S. C. 1891, M. L. R., 7 S. C. 120; *Bélair* vs. *Séminaire*, S. C. 1892, 2 Que. 226.

8. —— —— And *Held*, that a *provisional* allowance granted to a wife during pendency of suit is an "alimentary debt." *Perrault* vs. *Masson*, S. C. 1891, M. L. R., 7 S. C. 120.

9. —— —— Also that the usufruct of moveable property inherited by a husband, and declared by the testator to be unseizable, is subject to seizure for such alimentary debt. *Maguire* vs. *Huot*, S. C. 1882, 5 L. N. 374.

10. —— —— Also the usufruct of substituted immoveables so held and bequeathed. But in this case, before final decision, the Court ordered an expert estimate of the revenue of the property to be made, and the wife's claim (principal, interest and costs) to be raised on the revenues of the immoveables which exceed the amount necessary to maintain the husband and children, and when there is no excess, she to share concurrently with them. *F.* vs. *C.*, Q. B. 1834, 1 R. de L. 81.

11. —— —— The defendant petitioned to set aside an attachment issued against him, on the ground that the things seized were under his father's will declared unseizable. Plaintiff answered that the things were not exempt, inasmuch as the claim was for provisions sold to the defendant for the subsistence of himself and family—*Held*, as the claim generally was for aliments, that the seizure must be maintained under the last paragraph of Art. 558 C. C. P., and petition rejected. *Deland* vs. *Desrivières*, 1 L. N. 40, S. C. 1881; *Prescott* vs. *Thibault*, S. C. 1885, M. L. R. 1 S. C. 187, 8 L. N. 101.

12. —— —— A question came up whether an alimentary allowance could be seized. The defendant had an alimentary allowance of $13 a month, and the plaintiff seized it for a sum due for rent—*Held*, that the allowance might be seized for a debt due for *aliments*, such as rent or lodging, but it would not be proper to allow the whole sum to be seized. The parties would, therefore, be sent to proof as to the proper proportion which should be allowed for rent. *Sears* vs. ——, S. C. 1879.

13. —— —— Where, in execution of a judgment obtained for the amount of a promissory note, an alimentary allowance payable to the defendant is seized by garnishment, and the defendant contests the seizure, on the ground that an alimentary allowance is not seizable, the plaintiff may, by his answer, plead that the consideration for the note was an alimentary debt, and that the claim was within the exception of C. C. P. 558; but the plaintiff in this case failed to prove the truth of the answer. *Downie* vs. *Francis*, 1887, M. L. R., 3 S. C. 371.

VI. LIABILITY TO FURNISH.

1. Of Children.—(Art. 166 C. C.) An indigent person can maintain an action against his or her children for alimentary allowance. *Parent* vs. *Dubuc*, 1 Rev. de Lég. 504, K. B. 1812; *Connor* vs. *Laforme*, Ib. 1819; *Robin* vs. *De Varennes*, Ib. 1821; *Lauzon* vs. *Connoissant et vir.*, 5 L. C. J. 99, C. C. 1860.

2. —— —— Case where indigent father received $20 annual Government pension. Sons were poor *habitants*, but had not shown

that they were unable to pay their father alimentary allowance. They were ordered to contribute jointly $3 per month to his support. *Dumoulin* vs. *Dumoulin*, S. C. 1879, 2 L. N. 178.

3. —— —— Action by a father against two of his children for an alimentary allowance. The children pleaded *in forma pauperis*, and severed in their defence. *Per curiam*. The plaintiff has established a right of action, but the difficulty is the extreme poverty of the defendants. The children offer to board the father at their own table; but the case is complicated by the fact that the father now has his third wife, and what is to be done with the stepmother or second stepmother? The case is somewhat of a puzzle. I doubt whether the Court has power to order the father to go and live with the children; but even if the Court does possess this power, I am not disposed to think it should be exercised under the circumstances of this case. The plaintiff's demand is moderate, being only for six dollars per month. The Court will order one of the children to pay 75 cents per week, and the other 50 cents per week. *Labranche* vs. *Labranche*, S. C. 1882, 6 L. N. 60

4. —— —— In a similar case the Court ordered one child to pay fifty cents and three others forty cents each. No costs. *Lafon* vs. *Lafon*, 6 L. N. 84, S. C. 1883.

4*a*. —— —— The obligation of children to maintain their father, mother and other ascendants who are in want (C. C. 166) does not cease when the necessitous condition of the parent is caused by his own fault. The intemperance of an aged father does not constitute a valid ground for refusing to maintain him. *Arless* vs. *Arless*, C. R. 1887, M. L. R., 3 S. C. 13; *Lafon* vs. *Lafon*, *supra*.

5. **Of Grand-children.**—Where there are children, and grand children, issue of a deceased child, the grand-children are liable with the children for the maintenance of the grand-parents, even though the children have means of supplying the aliments by themselves. *Reeve* vs. *Mongeau*, S. C. 1882, 5 L. N. 373.

6. —— —— —— But *Held*, that where the father is in a position to support his parents, his children will only be subsidiarily liable to do so. *Lévesque* vs. *Plourde*, S. C. 1892, 2 Que. 259.

7. **Of Mother-in-law.**—A mother-in-law is bound to furnish aliment to a daughter-in-law who is incapable of earning her own living and that of her child.

Where a feeling exists which would prevent them from living comfortably together, the mother-in-law will be condemned to pay an alimentary pension, including a provision for the education of the child. *Mulligan* vs. *Patterson*, S. C. 1890, M. L. R., 6 S. C. 29.

8. **Of Son-in-law.**—A person is bound to maintain his mother-in-law who is in want, she not being re-married, and daughter through whom the affinity exists being still alive. *Turnbull* vs. *Browne*, 1890, M. L. R., 6 Q. B. 435.

9. —— —— —— The son-in-law may be sued alone for the alimentary debt, without his wife being in the cause. (*Ib.*)

10. **Of Daughter in-law.**—An alimentary debt cannot be claimed from a daughter-in-law, after the death of her husband without children, even where the debt arose and was agreed upon in writing by her husband when alive. *Mallette* vs. *Labulippe*, C. Ct. 1889, 12 L. N. 97.

11. **Of Parents.**—A father can, according to circumstances, be compelled to pay to a third party their outlay for the support of his children who left home on account of a dispute but who eventually returned again. *Cousins* vs. *Bouchard*, C. Ct. 1887, 15 R. L. 578.

12. —— —— A father is not bound to support and educate his children at his own expense where they have a sufficient revenue of their own. *Anctil* vs. *Martin*, S. C. 1887, 10 L. N. 297.

13. **Of Husband—Support of Step-children—Separation de Corps.**—A husband sued for separation from bed and board by his wife cannot be made to furnish an alimentary allowance to the children of his wife by a former marriage. *Desjardins* vs. *Boyer*, S. C. 1886, 14 R. L. 506.

14. **To Municipality for Support of Insane.**—Where the revenues of a person's property are barely sufficient for her support, she is not liable to the corporation of her parish for the maintenance of her insane child in an asylum, under 43-44 Vict., ch. 14. *Corporation of Ancienne Lorette* vs. *Voyer*, C. Ct. 1888, 14 Q. L. R. 337.

14*a*. Art. 169 C. C. and following Arts. 170, 171 and 172 seem so worded as to leave it in great measure to the discretion of the Court to decide in what circumstances and to what extent a party is to be held to give such maintenance. (*Ib.*)

15. —— —— —— —— —— The abovementioned Act merely subrogates the municipality in the rights of the insane person against those by whom aliment is legally due; that in the case where the Court orders the party by whom an alimentary allowance is due to receive the individual mentally affected in his house, the municipality can only recover the actual value of such care and lodging. *Corporation de l'Ancienne Lorette* vs. *Voyer*, C. Ct. 1883, 9 Q. L. R. 282.

VII. OBLIGATION TO FURNISH.

1. Divisibility of.—Children who are bound to furnish aliments are jointly and severally responsible, and any one of them, therefore, may be sued to supply it. *Lauzon* vs. *Connoissant*, C. C. 1860, 5 L. C. J. 99.

2. —— —— The debtor of an alimentary pension, condemned alone to pay it, has a right to sue any other party equally liable with himself, and to cause him to be condemned to pay his share of the pension and of the costs already incurred. *Labelle* vs. *Labelle*, S. C. 1870, 15 L. C. J. 81.

3. —— —— Where four defendants, condemned to pay an alimentary allowance to plaintiff, are not able to pay a greater sum than two dollars and fifty cents each per month, the court will not condemn them jointly and severally for the aggregate amount. *Crevier* vs. *Crevier*, S. C. 1877, 9 R. L. 313; *Leblanc* vs. *Leblanc*, S. C. 1878, 23 L. C. J. 10, 1 L. N. 618.

4. —— —— The obligation to furnish aliments is indivisible, and therefore joint and several, saving the right of action of the person from whom aliment is sought against all who may in law be responsible with him for the providing of such aliment. But the solidarity ceases where those who are obliged, no longer have the means. This is a question of fact, and cannot be raised on demurrer. *Valiquette* vs. *Valiquette*, S. C. 1884, M. L. R., 1 S. C. 129.

5. —— —— Although the obligation to furnish aliments is not indivisible or joint and several, in the ordinary meaning of the terms, yet the person from whom aliment is sought has a right to call into the cause all who may be in law responsible with him for the providing of such aliment. *Mainville* vs. *Corbeil*, 1889, M. L. R., 5 Q. B. 90, 18 R. L. 30, 33 L. C. J. 179.

6. How fulfilled.—(Art. 171 C.C.) Where the father demands in his own name, and for himself, an alimentary pension, the Court cannot refuse to the child the option of receiving his father in his house because the latter has married a second wife. *Bachand* vs. *Bachand*, Q. B. 1881, 28 L. C. J. 155, 12 R. L. 38.

7. —— —— Where a feeling exists which would prevent a mother-in-law and her daughter-in-law from living harmoniously together, the mother-in-law, who is bound to support her indigent daughter-in-law, will be held to pay her an alimentary pension, including a provision for the education of her child. *Mulligan* vs. *Patterson*, S. C. 1890, M. L. R., 6 S. C. 29.

8. Transmissibility to Heirs.—A wife, universal legatee of her husband, is not bound to pay an alimentary debt which her husband acknowledged to owe to a relative in his lifetime. *Mallette* vs. *Latulippe*, C. Ct. 1889, 12 L. N. 97.

9. —— —— —— But in the case of a natural child claiming alimentary allowance, it was *Held* that although the defendants inherited their respective shares before the birth of the child, the obligation of the father for maintenance (Art. 240 C. C.) devolved upon them as his heirs, and as having accepted his succession. The obligation in this respect was not joint and several.

Mathieu J. thought that the obligation to furnish aliment does not extend beyond what the heirs respectively have received from the succession. *Miller* vs. *Lépitre*, C. R. 1889, M. L. R., 5 S. C. 346, 33 L. C. J. 280.

10. —— —— *Held* (reversing the judgment of Davidson J., 4 Que. [S. C.] 117),—The obligation to furnish aliment being founded on relationship, and the nature of the obligation not being changed by the fact that a judgment has been rendered against the debtor to enforce its fulfilment, the obligation is not transmitted to the heirs or legal representatives of the person subject to it; nor does such obligation, even when established by judgment against him before his death, constitute a charge on his estate. *Turner* vs. *Mulligan*, Q. B. 1894, 3 Que. 523.

VIII. PAYMENT OF.

1. How Payable.—The payment of alimentary allowance to one imprisoned cannot be made by the creditor in American money. *Saurette* vs. *Scott*, S. C. 1855, 4 R. J. R. Q. 367, 5 L. C. R. 337.

2. —— —— .—Alimentary allowance awarded to a defendant arrested under *capias ad respondendum* cannot be paid in American gold dollars. *Brunneau* vs. *Miller*, S. C. 1858, 2 L. C. J. 189.

3. —— —— .—Nor in English coin defaced or stamped (by bending or stamping). *Warner* vs. *Fyson*, S. C., 2 L. C. J. 105.

4. When Payable.—An alimentary allowance, stipulated as the consideration of a deed of donation, is payable, and may be claimed at the commencement of the year from which it will become due. *Serigny* vs. *Crochetierre*, Q. B. 1865, 15 L. C. R. 473.

IX. RIGHT TO.

1. During Pendency of Action. In an action brought by the curator of a person interdicted for insanity to have annulled a deed consented to by the person interdicted at a time when he was incapable of giving a valid consent, the court will allow such curator to take out of the property transferred by the above deed a sufficient sum for the maintenance of the person interdicted during the suit. *Pron'e* vs. *Proulx*, S. C. 1890, 20 R. L. 403.

2. Fault of the Party Demanding.—The intemperance of the party demanding an allowance does not constitute a valid ground for refusing to maintain him. *Arless* vs. *Arless*, C. R. 1887, M. L. R., 3 S. C. 43; *Lafon* vs. *Lafon*, S. C. 1882, 6 L. N. 84.

3. For past period.—Aliments only become legally due when they are demanded by the person who has a right to claim them for present and future needs, and where a person has a right to demand an alimentary allowance, but continues a certain time without claiming it, he can only claim it for the future and not for the period prior to making the demand. *Whelan* vs. *Whelan*, S. C. 1893, 3 Que. 442.

4. But while such is the rule, the Court may, in its discretion, ante-date the pension—for instance, where the mother of an illegitimate child is suing for an allowance for its support, and the Court may grant arrears for a short period during which it is probable the mother has contracted debts for this purpose. *Poissant* vs. *Barrette*, Q. B. 1879, 3 L. N. 12.

5. Increase of Allowance.—Where a person to whom aliments are due compromises with his debtor after having taken action against him to recover an alimentary allowance, and accepts a fixed annual sum, he cannot subsequently sue his debtor for an increased allowance unless he claims and establishes that his position has since changed and that his needs have increased since the date of the compromise. *Coulombe* vs. *Nadeau*, Q. B. 1888, 19 R. L. 374.

6. Married Woman.—A wife who has obtained separation from her husband because he failed to maintain her properly, and because his conduct rendered it unsafe for her to remain with him, can sue him, or (in the case of his interdiction) his curator, for an alimentary allowance, and that independently of her recourse in an action for separation from bed and board. *Samson* vs. *Lemelin*, S. C. 1890, 2 Que. 190; *Beaudry* vs. *Starnes*, 2 Que. (S. C.) 396; *Conlon* vs. *Clarke*, Q. B. 1872, 25 L. C. J. 96; reversing C. R., 3 R. L. 448, 15 L. C. J. 263; *Lachapelle* vs. *Beaudoin*, S. C. 1878, 1 L. N. 581; *Hughes* vs. *Rees*, S. C. 1880, 3 L. N. 220.

6a. —— —— .—(Arts. 175 and 202 C. C.) If a husband turn his wife out of doors, she can maintain an action for alimentary allowance. *Chamland* vs. *Jobin*, K. B. 1814, 1 Rev. de Lég. 504.

7. —— —— .—In such case the wife can sue for her children as well as for herself, and without being appointed tutrix to her minor children. *Beaudry* vs. *Starnes*, S. C. 1892, 2 Que. 396.

8. —— —— .—And where a husband withdraws himself from the matrimonial domicile, and, notwithstanding the willingness of the wife to continue to reside there with him, refuses to provide her with a fit and proper residence, and with support and maintenance according to his means, the wife may sue the husband for maintenance simply. *Conlon* vs. *Clarke*, Q. B. 1872, 25 L. C. J. 90.

9. —— —— .**—Infidelity of wife—Separation.**—Where the judgment maintains a demand for separation from bed and board, based on the desertion of the husband and his refusal to support his wife, the infidelity of the wife does not deprive her of the right to an alimentary allowance. *Desmarais* vs. *Gagnon*, 1887, M. L. R., 3 S. C. 377.

10. —— —— —— —— .—A wife sued in an action *en séparation de corps*, who has no means of her own, has a right to a provisional alimentary allowance, although she is guilty of adultery. *Sabourin* vs. *Fortin*, S. C. 1887, 16 R. L. 56; *Nunensynski* vs. *Pilnik*, S. C. 1893, 3 Que. 63.

11. —— —— . — **Amount of.** — The amount of will be regulated on the fortune of the husband and of the condition of life of the parties; and where the amount awarded by the Court of first instance is excessive, it will be reduced in appeal. *Garcau* vs. *Vincent*, Q. B., June, 1875.

12 —— —— . — **Effect of Reconciliation.**—Where a husband separated judicially from his wife grants her by deed an alimentary allowance, their subsequent reconciliation renders the deed of no effect. *Smith* vs. *Daris*, Q. B. 1893, 2 Que. 109.

13. —— —— .—**During Pendency of Action.**—Where a petition was presented for an alimentary allowance during the pendency of an action against an executor to account, the court granted the allowance, notwithstanding the declaration of the executor that he had no funds in his hands. *Hart* vs. *Molson*, S. C. 1851, 4 L. C. R. 127, 4 R. J. R. Q. 105.

14. —— —— .—A wife has a right to an alimentary allowance during the pendency of action against her for separation from bed and board, even where she has sued her husband in the Criminal Court for refusing to maintain her. *Nunensynski* vs. *Pilnik*, S. C. 1893, 3 Que. 63.

15. —— —— —— .—Where in an action for separation as to bed and board, an order for an alimentary allowance in favor of the wife having been given during the pendency of the suit, the parties come together again, and again separate, an action by the wife for the allowance is bad without proof of cause for the second separation. *Reed* vs. *Robinson*, S. C. 1864, 9 L. C. J. 103.

16. —— —— —— .—An alimentary allowance will not be granted to a wife during the pendency of an appeal from a judgment rejecting a petition for separation as to bed and board. *Villeneuve* vs. *Bédard*, Q. B. 1870, 2 R. L. 626.

16*a*. Minor.—A minor cannot compel his father to pay his board when he is earning enough himself to pay for it. *Veillette* vs. *Lebœuf*, C. C. 1874, 6 R. L. 25.

16*b*. Natural Child.—Art. 240 C. C.—*Held* (reversing the decision of the Superior Court, 6 L. N. 133), where a claim was made by a natural son aged 25, against the curator of his mother, an unmarried woman, and an interdict, for an alimentary allowance, and it appeared that the mother was possessed of means more than sufficient for her maintenance, that the son was entitled to a reasonable allowance, especially in view of the fact that such allowance might be paid without trenching on the principal of his mother's fortune, or interfering with the rights of the plaintiff's minor children. *Francis* vs. *Clement*, C. R. 1883, 6 L. N. 194.

16*c*. —— —— .—A natural child has no recourse against the relations of his mother or father for alimentary allowance, but he has a recourse against his father and mother, and his claim against them forms a debt of their succession which he can claim in preference to all heirs or legatees. *Miller* vs. *Lepitre*, C. R. 1889, M. L. R., 5 S. C. 346, 33 L. C. J. 280.

16*d*. —— —— .—The right of a natural child to recover aliment from his father belongs exclusively to the child, and cannot be exercised by the mother in her own name (1) *Mullin* vs. *Bogie*, C. R. 1893, 3 Que. 34.

16*e*. —— —— .—A natural child cannot sue his putative father without having him legally declared to be his father. (2) (*Ib.*)

16*f*. —— —— .—The defendant, father of an illegitimate child, had been condemned to pay an alimentary pension for the support of the child until it attained 14 years of age. At the age of 17, the child, a girl, being of weak intellect and unable to support herself, the mother sued as tutrix for an alimentary pension of ten dollars, to begin 5 months prior to the institution of the action. Judgment went for the plaintiff and in appeal the following reasons were urged: 1st, that the tutorship of the mother was not registered; 2nd, that appellant ought to be tutor, and was willing to take charge of the child and to place her in an asylum; and 3rd, that in any case he could only be condemned to pay aliment from the institution of the action—*Held*, dismissing the appeal on all these points. *Poissant* vs. *Barrette*, Q. B. 1879, 3 L. N. 12.

17. Person arrested on Capias.—Art. 790 C. P. C.—A defendant imprisoned under a *capias ad respondendum* has a right, if he be a pauper, to obtain an alimentary allowance from the plaintiff; or each plaintiff if there be more than one. *Killoran* vs. *Waters*, S. C. 1885, 11 Q. L. R. 18; *Warner* vs. *Tyson*, S. C. 1858, 2 L. C. J. 105.

(1) *Kingsborough* vs. *Pound*, 4 Q. L. R. 11; *Bilodeau* vs. *Tremblay*, 3 R. L. 445; *Patoine* vs. *Desmarais*, 1 L. C. L. J. 58 *Contra*, criticized.

(2) *Giroux* vs. *Hébert*, 5 R. L. 439, *Contra*, criticized.

18. —— —— —— .—And the same was held in the case of a person who has made an abandonment of his property to his creditors, although it is established that he had secreted from his creditors a sum exceeding fifty dollars. *Ogilvie* vs. *Furnan*, S. C. 1889, 17 R. L. 471.

19. —— —— ——.—Where the defendant was arrested under three different writs of capias, and made application for an alimentary allowance—*Held*, that the allowance referred to in C. S. L. C. cap. 87, sec. 6, will be divided, and the plaintiffs ordered to pay a share each, according to the number of suits pending under which the defendant is detained. *Moss* vs. *Wilson*, S. C. 1863, 14 L. C. R. 26.

20. Persons Committed for Contempt of Court.—Art. 790 C. P. C.—Have not right to alimentary allowance. *Vermette* vs. *Fontaine*, C. Ct. 1880, 6 Q. L. R. 159; *McCarthy* vs. *Jackson*, (1) C. C. 1886, 9 L. N. 298; *Leroux* vs. *Desaulniers*, S. C. 1881, 12 R. L. 298, 4 L. N. 256.

21. —— —— —— .—A judicial surety is not entitled to an alimentary allowance under Art. 790 of the Code of C. P. *Cramp* vs. *Cocquereau*, S. C. 1880, 25 L. C. J. 162, 3 L. N. 332; *Mathieu* vs. *Tremblay*, S. C. 1881, 4 L. N. 299.

22. —— —— —— .—But *Held*, in a lengthy judgment by Casault J. in the Superior Court at Quebec, that civil imprisonment is only a mode of executing judgments, and that a person against whom such imprisonment is declared until payment of the amount demanded has a right to an alimentary allowance. *Coté* vs. *Vermette*, S. C. 1883, 9 Q. L. R. 340.

ANIMALS.

I. Contagious Diseases Act.
II. Cruelty to—See Title "Cruelty to Animals."
III. Damages by—See Titles "Damages"—"Negligence."
IV. Ferocious Animals.
V. Prescription of Claim for Care of.
VI. Retention of, for Damages.
VII. Straying—(And see Title "Railroads.")
VIII. Wild—Property in.

(1) In this case a guardian.

I. CONTAGIOUS DISEASES ACT.

R. S. Can., ch. 69.

IV. FEROCIOUS ANIMALS.

See Art. from *Law Journal* in 13 L. N. 313.

V. PRESCRIPTION OF CLAIM FOR CARE OF.

The claim of a farmer for the care and food of animals left in his charge is prescribed in five years. *Lefebvre* vs. *Proulx*, C. R. 1880, 6 Q. L. R. 269.

VI. RETENTION OF, FOR DAMAGES.

The owner of a farm, who, under the authority of Art. 447 of the Municipal Code, has impounded animals found straying or trespassing on his premises, has no right to retain them for the payment of damages which he pretends to have been done by such animals on previous occasions. *Smith* vs. *Brownlee*, C. C. 1887, 10 L. N. 405.

VII. STRAYING.

When an animal straying has been put in the pound, the owner of the animal cannot claim it without first offering to pay the fine and damages incurred. And if he wishes to revendicate the animal, he must renew his offer and pay the money into court. *Brosseau* vs. *Brosseau*, S. C. 1885, M. L. R., 1 S. C. 307.

VIII. WILD—PROPERTY IN.

Any one hunting a wild animal is held to have the first claim to it, so long as the hunt continues, and any other person interfering with the pursuit and appropriating the animal is bound to pay the value of it to the party who commenced the hunt. *Charlebois* vs. *Raymond*, S. C. 1867, 12 L. C. J. 55.

APPEAL.

(*a*) *From Recorder's Court in Matters of Assessment.*
(*b*) *To Privy Council.*
(*c*) *To Queen's Bench.*
(*d*) *To Supreme Court.*
See also.—Arbitration.
" Elections.
" Criminal Law.
" Review.
" Municipal Corporation.

(*a*) APPEAL.

From Recorder's Court in Matters of Assessment.

Act. 57 Vic. (Que.), ch. 49, provides for appeals to the Court of Review in such matters. "In all cases or proceedings, when the amount in dispute relates to one or more municipal or school taxes, or assessments, exceeding in all the sum of $500, there shall be an appeal from the final decision of an, Recorder or Recorder's Court to the Superior Court sitting in review."

(*b*) APPEAL TO PRIVY COUNCIL.

I. Delay to Appeal. 1-5.—(See also *infra*, No. XI. 24.)
II. Grounds of—Change of.
III. Irregular Appeal.
IV. Notes of Judges.
V. Objections raised in Appeal for first Time.
VI. Printing Record for P.C.
VII. Provisional Execution of Judgment for Aliment.
VIII. Proceedings before Q. B. after Appeal taken. 1-3.
IX. Questions of Fact. 1-3.
X. Questions of Form and Practice.
XI. Security.
Disavowal by one of several Parties to suit. 1.
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Where Leave has already been granted to Appeal to Supreme Ct. 45.
Writ of Error. 46.

I. DELAY TO APPEAL.

(Art. 1181 C. C. P.).

1. The rule limiting the period of appeal to the Privy Council, though usually adhered to, is not imperative.

The party complaining of delay should not himself lie by and be guilty of delay; if he does so, he has no claim to be heard. The appeal may be allowed to proceed on sufficient cause shown. *St. Louis* vs. *St. Louis*, P. C. 1836, 1 Moore 143.

2. Where leave had been granted to appeal to the Privy Council, and a copy of the record had been transmitted by post within the delay required, but the certificate required by C. S. L. C. cap. 77, sec. 53, that appeal had been lodged and proceeding had thereon before the Privy Council had not been filed within that delay—*Held*, that the Court of Queen's Bench would not order the provisional execution of its judgment. *Jones* vs. *Guyon dit Lemoine*, Q. B. 1867, 17 L. C. R. 377, 2 L. C. L. J. 161.

3. Where a record has been remitted by the clerk to the Court below, in consequence of the proper certificate not being lodged within six months after the granting of an appeal to Her Majesty in Her Privy Council, and the appeal has been lodged in the Privy Council, the Court cannot order the Prothonotary of the Court below to return the record. *Brewster* vs. *Chapman*, Q. B. 1876, 20 L. C. J. 295; *Burton* vs. *Young*, Q. B. 1871, 1 R. C. 248.

4. The only penalty which the failure to proceed on an appeal to Her Majesty in Her Privy Council for more than six months after security has been given can entail, is the execution of the judgment appealed from. *Mer-*

chants Bank of Canada vs. *Whitfield*, Q. B. 1883, 27 L. C. J. 183.

5. Where permission to bring an appeal to the Privy Council is granted, the appellant must proceed with his appeal within six months, otherwise execution may issue. But the Court refused to declare the appellant deprived of his right to proceed with the appeal to the Privy Council, in view of the circumstances of this case. *Allan* vs. *Pratt*, Q. B. 1887, 32 L. C. J. 57, M. L. R., 3 Q. B. 322.

II. GROUNDS OF—CHANGE OF.

When a party obtains leave to appeal on a certain important question of law, he will not be permitted, at the hearing on the merits of the appeal, to argue that the appeal turns on a question of fact. *Corporation of St. John* vs. *Central Vermont*, P. C. 1889, 14 App. Cas. 590.

III. IRREGULAR APPEAL.

Where an appeal to the Privy Council has been irregularly allowed by the Queen's Bench, but both sides have appeared and pleaded their case, the Privy Council may grant leave to suspend the case in order to allow the appellant time to present a special application for leave to appeal. *Sauvageau* vs. *Gauthier*, P. C. 1874, 5 R. L. 602.

IV. NOTES OF JUDGES IN.

The Lords of the Privy Council will refuse to take cognizance of the notes of a judge of the Court of Appeal, where they have been furnished to a party after judgment without having been transmitted to the registrar, conformably to the rule of 1845. *Richer* vs. *Voyer*, P. C. 1874, 5 R. L. 591.

V. OBJECTIONS RAISED IN APPEAL AND NOT ARGUED IN COURT OF ORIGINAL JURISDICTION.

In an insurance case carried from the Court of Appeal to the Privy Council, it was decided that objections might be raised in appeal which had not been raised in the court of original jurisdiction. *Scott* vs. *The Phœnix Assurance Co.*, P. C. 1828, Stuart's Rep. 354, 1 R. J. R. Q. 188.

VI. PRINTING RECORD FOR THE P. C.

The Court cannot interfere with the printing of the record for the Privy Council, and cannot therefore order that only certain portions of the record be printed. *Lemoine* vs. *Lionais*, Q. B. 1871, 16 L. C. J. 99.

VII. PROVISIONAL EXECUTION OF JUDGMENT FOR ALIMENT.

Where a judgment of the Court of Queen's Bench in appeal has been rendered, declaring that certain rents, which had been attached, were really "aliments," and "unseizable," the party in whose favor such judgment has been rendered cannot obtain an order to execute the judgment provisionally, if permission to appeal to the Privy Council has been granted *Molson* vs. *Carter*, Q. B. 1883, 7 L. N. 292.

VIII. PROCEEDINGS BEFORE COURT OF QUEEN'S BENCH AFTER APPEAL

1. No proceeding can be had before the Court of Queen's Bench, after the certificate of the Privy Council has been lodged with the clerk of the Court that the appeal to the Privy Council stands referred to the Judicial Committee. *Brown* vs. *The Mayor, etc., of Montreal*, Q. B. 1875, 19 L. C. J. 140.

2. When a case is before the Privy Council the Court of Queen's Bench will not interfere, and so a motion to have a bail bond set aside for irregularity will be dismissed. *Muir* vs. *Muir*, Q. B. 1871, 16 L. C. J. 112.

3. The Court of Appeal has no authority to declare an appeal to the Privy Council deserted, even although the record has not been transmitted, if a certificate be filed that the petition of appeal to Her Majesty in Her Privy Council has been lodged in the Privy Council office, and that the appeal stands referred to the Judicial Committee. *Whyte* vs. *Home Ins. Co.*, Q. B. 1875, 19 L. C. J. 196.

IX. QUESTIONS OF FACT.

1. The Privy Council will reverse a judgment on questions of fact, only when there are very strong reasons which establish clearly that the Court below was wrong. *Gravel* vs. *Martin*, P. C., May 5, 1876. Beauchamp's P. C. p. 108.

2. An appeal from the Supreme Court of Canada will not be allowed where the only issue raised is one of fact. *Canada Central Ry. Co.* vs. *Murray*, P. C. 1883, 27 L. C. J. 163, 8 App. Cas. 575.

3. Where there have been concurrent findings of fact by the judges below, the question in appeal is not what conclusions their Lordships would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the

judges below were clearly wrong. *Allen* vs. *Quebec Warehouse Co.*, P. C. 1886, 12 App. Cas. 101.

X. QUESTIONS OF FORM AND PRACTICE.

"Their Lordships would hesitate very much to interfere with the unanimous judgment of the Court below upon a matter of this kind, which is to be regarded as a matter of procedure only, unless they were clearly satisfied that the Court had made a great mistake in the construction put upon their statutes." *Boston* vs. *Lelièvre*, P. C. 1870, 2 Moore N. S. 427.

XI. SECURITY FOR.

1. Disavowal by one of several Parties to suit.—Where several parties acting jointly as executors have been allowed to appeal to Her Majesty in Her Privy Council, and one of them disavows the act of the attorneys of record, applying to put in security for them jointly, and refuses to participate in the proceedings in appeal, the application so to put in security will be rejected. *Muir* vs. *Muir*, Q. P. 1870, 15 L. C. J. 79.

2. Delay for giving.—A judge of the Court of Queen's Bench has power in Chambers to extend the delay for giving security on an appeal to Privy Council beyond the delay ordered by the Court, as that within which security must be given, whenever he is seized of the matter prior to the expiration of such delay; and, on security being put in within such extended delay, the respondents are estopped from executing the judgment appealed from. *Mayor, &c., of Montreal* vs. *Hubert*, Q. B. 1877, 21 L. C. J. 85.

3. —— Application on behalf of appellant for leave to appeal to the Privy Council. The judgment was for $2,985.83, and with interest and costs of suit in the courts below was susceptible of appeal to the Privy Council; but in consequence of the accidental detention of the counsel specially charged with the case, he was not present at the rendering of the judgment, and no motion for leave to appeal to the Privy Council was presented before the court adjourned. Indeed, by error, his partner filed a motion for distraction of costs. The petitioner offered forthwith to enter security for an appeal to Her Majesty in Privy Council, and concluded as follows: "Wherefore your petitioner prays that Your Honor will permit him to enter his security in appeal to Her Majesty in Privy Council, and further order that this petition do stand as a rule for the first day of the next term of said Court of Queen's Bench, and that all further proceedings in this cause be stayed until after the hearing and determination of the rule." Ordered that the petition be allowed as to the offer of security, remainder rejected, with reserve of all rights to respondent. *Brewster* vs. *Lamb*, Q. B. 1880, 3 L. N. 75.

4. —— Where appellant neglected to apply for leave to appeal to the Privy Council during the same term, his lawyer being absent when judgment was rendered, but was allowed to put in security for such appeal during the fifteen days after judgment—*Held*, dismissing a motion to that effect, that the record would not be remitted to the court below for execution. *Brewster* vs. *Lamb*, Q. B. 1880, 25 L. C. J. 210, 3 L. N. 109.

5. Security for Costs only—Execution for Condemnation Money.—Where a party appealing to the Privy Council has given security for costs only, and has filed a declaration that he has no objection to execution issuing for the condemnation money, the Court will not allow the record to be remitted to the Court below, in order to enforce such execution. *Painchaud* vs. *Hudon*, Q. B. 1870, 15 L. C. J. 112.

6. Increase of.—Upon petition of the respondent, the sum ordered to be deposited for respondent's costs was increased, on account of the length of the transcript of the proceedings in the court below. *Boswell* vs. *Kilborn*, P. C. 1860, 15 Moore 476, 7 L. C. J. 150.

7. Irregularity in Appeal Bond.—The respondents served a notice upon the appellants, that they would put in security for appeal to the Privy Council on the 18th of August in the judges' chambers in the court house. Security was not put in on that day, but notice was given later on the Saturday that security would be entered in chambers on Monday. Security was put in that day, not in chambers, but at the judge's house, one of the sureties signing the bond in the forenoon and the other in the afternoon—*Held*, on motion to set aside the bond for irregularity and want of sufficient notice, that the bond must remain, but allowing the parties moving to make such objection to the sufficiency of the security as they might legally have made when such security was put in. *Gibb* vs. *The Beacon Fire & Life Assurance Co.*, Q. B. 1860, 10 L. C. R. 402.

8. Irregularities of Bail Bond.—After an appeal has been allowed to Her Majesty, in Her Privy Council, this Court cannot set aside the bail bond for alleged irregularities, and dismiss the appeal. *Muir* vs. *Muir*, Q. B. 1871, 16 L. C. J. 112.

9. Liability of Deposit for Costs in Court below.—Where a deposit of £500 has been made as security under Art. 1179 C. C. P. on an appeal to the Privy Council, and the judgment appealed from is confirmed in the Privy Council, but without costs in the Privy Council, the deposit will nevertheless avail to liquidate the costs in the court below, and cannot, therefore, be withdrawn by the appellant. *Lemoine* vs. *Lionais*, Q. B. 1877, 22 L. C. J. 23.

10. New Security.—After the allowance of an appeal to Her Majesty in Her Privy Council, an order to put in new security (one of sureties being insolvent and the other having left the province) will be granted by the Court, but the Court cannot dismiss the appeal, in case such new security be not duly put in. *Johnson* vs. *Connolly*, Q. B. 1871, 16 L. C. J. 100.

11. Seizure of.—Where leave was granted to appeal to the Privy Council, and the appellant filed a consent that the judgment should be executed, and at the same time a City of Montreal debenture was deposited with the Clerk of the Court as security for the costs of the appeal, the seizure of such bond in execution of the judgment will not prevent the Court from accepting it as security. *Jetté* vs. *McNaughton*, Q. L. 1876, 21 L. C. J. 192.

XII. WHEN IT LIES.

1. Appealable Value—Interest on Judgment.—In an action for non-performance of contract, where the verdict given was for a sum less that £500 sterling, the Court of Appeal refused leave to appeal to England, on the ground that the sum was under the appealable value.

Upon special petition to Her Majesty in Council, leave to appeal was granted, because interest ran with the judgment, and that fact, by the law of Canada, would bring the subject matter within the appealable value; and also because important questions of mercantile law were raised, and an action of a similar nature was still pending, the transaction being a continuing contract. *Boswell* vs. *Kilborn*, P. C. 1859, 12 Moore P. C. 467.

2. —— —— An order granting an appeal will be allowed on an *ex parte* application founded upon an allegation that the interest on the judgment rendered in the Court below and the costs, at the time of the rendering of the judgment in the Provincial Court of Appeals, added to the capital claimed, exceeded £500 stg; and that, on a deposit of £200 stg., for costs. *Quebec Fire Assr. Co.* vs. *Anderson*, P. C. 1861, 7 L. C. J. 150, 13 Moore 477.

3. —— —— In a case such as the foregoing, however, where the interest runs merely from the date of judgment, and no future rights are specially involved in the decision, the order granting the appeal will be discharged, on application to that effect by the opposite party. (Do.)

4. —— Interest added to Amount demanded.—In *Voyer* vs. *Richer*, after the Canadian Court of Queen's Bench (2 R. L. 244) had refused leave to appeal, on the ground that the amount demanded did not exceed £500 sterling, the Privy Council granted leave to appeal, and made up the £500 by adding interest and costs to the principal amount demanded by the action. See remarks of Dorion J. in *Stanton* vs. *Home Insurance Co.*, Q. B. 1879, 2 L. N. 314.

5. —— —— In this case, however (*Stanton* vs. *Ins. Co.*, 2 L. N. 314), the Court followed *Voyer* vs. *Richer* as decided by the Q. B. in 2 R. L. 244.

6. —— When determined by Amount of Judgment appealed from.—In determining the question of the value of the matter in dispute, upon which the right of appeal depends, the correct course is to look at the judgment as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by an appeal. *MacFarlane* vs. *Leclair*, P. C. 1862, 6 L. C. J. 170, 15 Moore P. C. 181.

7. —— —— In determining whether an appeal lies to Her Majesty in Her Privy Council from a judgment of the Court of Queen's Bench, the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal; and so, where the appeal was by the defendants from a judgment condemning them to pay $1,100 damages, it was *Held* that the appeal was incompetent, though the amount demanded by the action exceeded £500 sterling. (1) *Allan* vs. *Pratt*, P. C. 1888, 15 Q. L. R. 18, 32 L. C. J. 278, 13 App. Cas. 780, 11 L. N. 273.

(1) See Appeal to Supreme Ct. and to Queen's Bench.

8. —— —— There may be cases in which the importance of the general question of law involved may induce their Lordships to give leave to appeal, though the value of the matter in dispute is not sufficient, and they will be governed in the exercise of that discretion by a consideration of all the circumstances of each particular case. (*Ib*).

9. —— —— *Held*,—the Court of Review has no jurisdiction to grant leave to appeal from a judgment of that Court to the Queen in Her Privy Council, unless the interest of the party prejudiced by it, and who seeks to relieve himself from the judgment by appeal, exceeds £500 sterling. (*Allan* vs. *Pratt*, *supra* No. 7, followed;) *Marchand* vs. *Molleur*, C. R. 1893, 4 Que. 200.

10. —— —— An appeal may be had to the Privy Council when the amount involved in the controversy exceeds £500 sterling, though the amount actually demanded in the declaration be less than £500. *Bunting* vs. *Hibbard*, Q. B. 1865, 1 L. C. L. J. 60.

11. Capias.—A judgment of the Court of Queen's Bench confirming a judgment of the Superior Court, which rejected a petition to quash a writ of *capias ad respondendum*, is not a final judgment within Art. 1178 C. C. P. *Goldring* vs. *Banque d'Hochelaga*, P. C. 1880, L. R., 5 App. Cas. 371. (Reversing Q. B., 2 L. N. 232.) *Molson* vs. *Carter*, P. C. 1880, Novb. 27. Beauchamp's P. C. p. 105.

12. Coercive Imprisonment. Art. 1178 C. C. P.—There is no appeal to the Privy Council from a judgment for a sum of $40, although in default of payment of such judgment the respondent was subjected to coercive imprisonment until such time as such judgment would be satisfied. *Pacaud* vs. *Roy*, Q. B. 1866, 16 L. C. R. 398.

13. —— Under Art. 1178 C. C. P., no appeal lies *as of right* from a judgment of the Court of Queen's Bench for Lower Canada in the matter of a penalty of imprisonment.

But special leave was in this case granted on the ground of the importance of the question at issue. *Carter* vs. *Molson*, P. C. 1883, 27 L. C. J. 157, 8 App. Cas. 530.

14. From Supreme Court.—There is no appeal *de plano* from the Supreme Court to the Privy Council.

And in the present case involving the payment of taxes by a religious institution, special leave to appeal was not allowed. *City of Montreal* vs. *Seminary of St. Sulpice*, P. C. 1889, 12 L. N. 281, 33 L. C. J. 213.

15. —— Appeal from Supreme Court will not be allowed on questions of fact. *Canada Central Ry. Co.* vs. *Murray*, P. C. 1883, 8 App. Cas. 575, 27 L. C. J. 163.

16. Future Rights.—An annual rent of $11.28 was sold for $456, payable in ten equal yearly instalments, and the land was hypothecated to secure payment of the amount. *Held* not to be "titles to lands or tenements, annual rents, or other matters in which the rights in future of parties may be affected." *Sauvageau* vs. *Gauthier*, P. C. 1874, 5 R. L. 602, L. R., 5 P. C. 494.

17. —— An appeal will not be granted to the Privy Council from a judgment of the Queen's Bench, maintaining an action to recover an amount of assessments illegally exacted, where the matter in dispute does not exceed £500 stg., and the fact that the roll under which the assessments were collected might exist for three years does not bring the case under Art. 1178 C. C. P., especially where the total amount for the three years would be under £500 stg. *Lussier* vs. *Corporation of Hochelaga*, Q. B. 1880, 3 L. N. 309.

18. —— Where the action involved the point as to whether a railway company is obliged under 14 and 15 Vic., c. 51, to construct crossings for each subdivision of a farm—*Held*, that although the amount of the action was for $110, future rights were involved, and appeal to Privy Council allowed. *Cie. du Grand Tronc* vs. *Huard*, Q. B. 1892, 1 Que. 501.

19. In Election Cases.—The appellant asked leave to appeal from a judgment of the Superior Court, which declared his election as member of Parliament of the Province of Quebec null and void, and their Lordships, for the reasons mentioned in the case, refused the application. *Thébergе* vs. *Landry*, P. C. 1876, 2 App. Cas. 102.

20. —— In a contested election case the constitutionality of the Dominion Contested Elections Act, 1874, was called in question. The courts of the Province of Quebec, as also the Supreme Court of Canada, after able and exhaustive arguments, decided in favor of the constitutionality, and there being nothing to show that the judges of the Dominion would refuse to act in accordance with the judgments of the courts, leave to appeal to the Privy Council was refused. *Valin* vs. *Langlois*, P. C. 1879, 3 L. N. 38.

21. —— The Judicial Committee will not grant leave to appeal, as an act of grace, on special application, in the matter of contested elections. The Canadian statute having appointed for those contestations a special tribunal with a special procedure, and declared that the judgment of the Supreme Court of Canada shall be final, it is clearly the intention of the Parliament to confine the decisions locally within the Colony itself. *Kennedy* vs. *Purcell*, P. C. 1888, 32 L. C. J. 250, 59 Law Times (N. S.) 279.

22. In Insolvency Matters.—No appeal lies to the Privy Council, from a final judgment of the Court of Queen's Bench in a proceeding under the Insolvent Act of 1875, since the passing of the Dominion Statute 40 Vic., ch. 41. *Renny* vs. *Moat*, Q. B., 23 L. C. J. 262.

23. —— The Judicial Committee held that the Dominion Government had power to take away the right of appeal *de plano* to the Privy Council in matters of Insolvency. *Cushing* vs. *Dupuy*, P. C. 1880, 24 L. C. J. 151, 5 App. Cas. 409.

24. Injunction.—On an injunction to restrain the Government of Quebec from interfering with respondent in his possession of a railroad—*Held*, that appeal would lie from the Queen's Bench to the Privy Council. *Joly* vs. *Macdonald*, Q. B. 1879, 2 L. N. 104.

25. —— An appeal lies to the Privy Council from a judgment of the Queen's Bench dissolving an injunction where the matter in dispute exceeds £500 stg. *Dobie* vs. *Board of Temporalities, etc*, Q. B. 1880, 3 L. N. 308.

26. Interlocutory Judgment.—There is no appeal to the Privy Council from an interlocutory judgment which has gone through appeal. *Lacroix* vs. *Moreau*, Q. B. 1865, 15 L. C. R. 485, and 16 L. C. R. 180.

27. Interlocutory Judgment dismissing Demurrer.—Appeal held not to lie. *Simard* vs. *Townsend*, Q. B. 1856, 6 L. C. R. 147, 5 R. J. R. Q. 48.

28. Improbation.—An appeal to Her Majesty in Her Privy Council will not be allowed from a judgment of the Court of Q. B. confirming that rendered by the Court below, which dismissed a proceeding by way of improbation, such judgment not being a final one. *Darling* vs. *Templeton*, Q. B. 1875, 19 L. C. J. 105.

29. —— But on motion and by consent of both parties, a document against which such proceedings by way of improbation are directed may be ordered to be sent to the P. C. *Panet* vs. *Hamel*, Q. B., 3rd June, 1875.

30. Judgment setting aside Verdict of Special Jury.—An appeal to the Privy Council will be allowed by Her Majesty, in the case of a judgment of the Court of Queen's Bench setting aside the verdict of a special jury, and ordering a new trial, even when such appeal has been refused by the Court of Queen's Bench, on the ground that an appeal to the Privy Council does not lie in such cases. *Lambkin* vs. *South Eastern R. W. Co.*, P. C. 1877, 21 L. C. J. 325, 5 App. Cas. 352.

31. Judgment of Q. B. rejecting Appeal to Q. B.—And the Court of Queen's Bench will refuse leave to appeal to the Privy Council from a judgment of the Queen's Bench rejecting an appeal to that Court for want of jurisdiction. *Angers, Attorney General* vs. *Murray*, Q. B. 1880, 3 L. N. 308.

32. Leave to Appeal Rescinded.—Where leave had been granted by the Court of Queen's Bench to appeal to the Privy Council —*Held*, by the latter, that this did not preclude the Privy Council from entertaining a petition to rescind the leave to appeal. *Macfarlane et al.* vs. *Leclaire et al.*, P. C. 1862, 6 L. C. J. 170 and 12 L. C. R. 154.

33. Mandamus.—Where the Court of Appeal rendered judgment confirming a judgment of the Superior Court, which quashed a writ of mandamus addressed to a commissioner appointed to inquire into the conduct of a certain justice of the peace, requiring him to do things which he was not legally bound to do in the course of such inquiry—*Held*, that from such judgment there was no appeal to the Privy Council. *Belleville* vs. *Doucet*, Q. B. 1875, 1 Q. L. R. 250.

34. Opposition.—The right of appeal to Her Majesty in her Privy Council, upon the opposition made by a defendant to the execution of a judgment, is settled by the nature and quality of the demand, and not by the matters set forth in the opposition. *Guy* vs. *Guy*, Q. B. 1851, 1 L. C. R. 273, 3 R. J. R. Q. 9.

35. Prohibition.—A motion was made on the part of the respondent to be allowed to appeal to the Privy Council, on the ground that the judgment bound the future rights of the bar—*Held*, that the Court had no power to grant leave to appeal beyond the cases mentioned in Art. 1178 C. C. P. This case was not within any of them. It bound no future rights of respondent, and the bar was not a party. The only remedy was for respondent to apply

to the Privy Council for special leave to appeal. *O'Farrell* vs. *Brassard*, Q. B. 1878, 1 L. N. 115. The report of this case in 4 Q. L. R. 214 is not correct, see remarks of Dorion J. in *Dobie* vs. *Board of Temporalities*, 3 L. N. 308.

36. Quo Warranto.—Dorion J. in Dobie *vs.* Board of Temporalities (3 L. N. 308) pointed out that in the present case the Court only decided that the case did not fall within any of the dispositions regulating appeals to Her Majesty, and not that appeal to Her Majesty will not lie in matters of *Quo warranto*. *Pacaud* vs. *Gagné*, Q. B. 1867, 17 L. C. R. 357.

37. Special Leave.—An Act having been passed by the Colonial Legislature of Lower Canada, limiting the right of appeal to causes where the sum in dispute was not less than £500 sterling, a petition for leave to appeal, in a cause where the sum was of less amount, could not be received by the King in Council, although there was a special clause in the Colonial Act saving the rights and prerogatives of the Crown. (1) *Cuvillier* vs. *Aylwin*, Privy Council 1832, Stuart's Rep. p. 527, 2 Knapp 72.

38. —— An appeal to Her Majesty in Her Privy Council will be allowed by Her Majesty in Her discretion, on petition to that effect, in cases where the Colonial Court of Appeals could not in ordinary course allow such appeal. *Marois* vs. *Allaire*, P. C. 1862, 6 L. C. J. 85, 15 Moore 189.

39. —— On application to the Privy Council for special leave to appeal from a judgment in Canada from which an appeal does not lie as of right, it will not be granted, in the absence of some miscarriage in point of law, or gross miscarriage in the Courts below on the matters of fact, and that in the present instance no such miscarriage was apparent. *Molson* vs. *Carter*, P. C. 1880, 3 L. N. 407, 25 L. C. J. 99.

40. —— Notwithstanding that the right to appeal to the Privy Council is taken away by the Dominion Statute, the Queen, as an act of grace, can nevertheless allow such an appeal. *Dupuy* vs. *Cushing*, P. C. 1880, 24 L. C. J. 151, 5 App. Cas. 409.

41. —— The amount at issue was under the appealable value, the object of the appeal was the construction and effect of a private contract for the occupation of a pew in church. Leave to appeal refused. *Johnston* vs. *Minister and Trustees of St. Andrew's Church*, P. C. 1877, 3 App. Cas. 159.

(1) Criticized in *Marois* vs. *Allaire*, P. C. 1862 (*supra* No. 38) their Lordships declaring that it did not receive that full and deliberate consideration which its great importance demanded.

42. —— Special leave to appeal will not be granted on the ground that the questions raised are of great importance to the parties, or have attracted public attention, when there is no general principle of law involved, and especially when the appellant has appealed to the Supreme Ct. of Canada. *Dumoulin* vs. *Langtry*, P. C. 1887, 57 L. T. (N. S.) 317.

43. —— Leave to appeal refused, the poverty of the respondent being taken into consideration. *Allan* vs. *Pratt*, P. C. 1888. 13 App. Cas. 782.

44. Sum payable to Her Majesty.—Motion for leave to appeal to Privy Council, on the ground that there was a part of the sum payable to Her Majesty. Motion rejected, on the ground that there was no issue as to the exigibility of the auctioneer's tax. *McLeod* vs. *Masham*, Q. B. 1881, 4 L. N. 99.

45. Where Leave has already been granted to Appeal to Supreme Ct.—Leave to appeal to the Privy Council from a judgment of the Court of Queen's Bench will be granted, although the opposite party has already obtained leave to appeal to the Supreme Court of Canada. *City of Montreal* vs. *Devlin*, Q. B. 1878, 1 L. N. 151, 22 L. C. J. 136.

46. Writ of Error.—There is no appeal *de plano* from a judgment of the Court of Queen's Bench, in appeal, in Lower Canada, quashing a writ of error, on the ground that there was no appeal from the judgment of the Court of first instance condemning a practising attorney to pay a fine for contempt of Court.

Where a fine is imposed, the remedy is to petition the Crown for a reference to the Judicial Committee, under the Statute 3rd and 4th Will. IV, c. 41, s. 4. *In re* Ramsay, P. C. 1870, 7 Moore N. S. 263.

(*c*) APPEAL TO QUEEN'S BENCH.*

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* Arts. 1114—1141 C. C. P. Appeal to Q. B. from Superior Court abrogated and replaced by 51 Vic., ch. 48, sec. 2. Of these articles No. 1119 was again amended by 56 Vic., ch. 42, and No. 1132 by 58 Vic., ch. 47.

Arts. 1143 to 1153 were abrogated by 54 Vic., ch. 48, sec. 4, said section declaring that procedure on appeals from Circuit Court should be the same as from Superior Court.

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XXXII. Who May Appeal.

I. ACQUIESCENCE IN JUDGMENT.

(See Title—"Acquiescence.")

A voluntary payment of a portion of the judgment appealed from constitutes acquiescence, and the fact may be established by affidavit. *Charbonneau* vs. *Davis*, Q. B. 1875, 20 L. C. J. 167; See no IV. 3 *infra*.

II. AUTHORIZATION.

1. Married Woman.—A married woman who appeals must be authorized, and an appeal brought without authorization will be rejected. *St. Jean* vs. *Metropolitan Bank*, Q. B., Sept, 1874.

2. —— Art. 14 C. C. P. But *Held* not necessary where appellant is a foreigner, and such authorization is not necessary in her own country. *Stevens* vs. *Fisk*, Supreme Ct., 12 Jan., 1885, 8 L. N. 42; and 53; Cassel's Digest, 2nd edit, pp. 235-237.

3. Curator.—The curator to a person interdicted cannot appeal from a judgment, until he is authorized by a judge, or the prothonotary, on the advice of a family council; but he will be given a delay to procure the authorization,—the authorization of a tutor stands on a different footing to that of the wife. *Clement* vs. *Frances*, Q. B. 1883, 6 L. N. 325.

III. CONSENT OF PARTIES TO REVERSAL OF JUDGMENT.

Where the parties, after appeal had been taken, consented that the judgment should be reversed—*Held*, that notwithstanding such consent, the Court was bound to confirm the judgment if the record showed that the judgment in question was well founded, and it was actually confirmed. *McAndrews* vs. *Rowan*, Q. B. 1871, 3 R. L. 439.

IV. DEATH OF PARTY.

1. An appeal instituted in the name of a party who has died while the case was *en délibéré* in the Court below is null and void. *Kerby* vs. *Ross*, Q. B. 1874, 18 L. C. J. 148.

2. A petition by the alleged legal representative of such deceased party, to take up the proceedings, cannot be allowed. (*Ib.*)

3. But if the respondent has acquiesced by joining in the proceedings, allowing the assumption of the same by the representatives of the deceased, the motion to reject the appeal will be refused, as coming too late. *Hagarty* vs. *Morris*, Q. B. 1874, 19 L. C. J. 103.

4. On a motion to dismiss, on the ground that the reasons of appeal had not been filed in time—*Held*, the death of a party who has not appeared in appeal does not interrupt the proceedings in appeal. *Hus* vs. *Millet*, Q. B. 1879, 2 L. N. 229.

V. DELAYS IN.

1. Appellants took out a writ of appeal immediately after the judgment, and before the delay for inscribing in Review had expired. Respondent inscribed in Review within the delays, and moved to dismiss the appeal, on the ground that it had been taken within the delay for inscribing in Review—*Held*, that the appeal was rightly taken, and the respondent could only demand that proceedings be sus-

pended until the proceedings in Review were disposed of. *Cassils* vs. *Fair*, Q. B. 1882, 2 Dorion's Q. B. R. 382. (1)

2. Premature.—An appeal made within eight days from the rendering of a judgment, which is subject to revision, is premature. *Beaulieu* vs. *Charlton*, Q. B. 1867, 11 L. C. J. 297.

VI. EFFECT OF.—ON PROPERTY IN DISPUTE.

1. A sum of money was attached in the hands of the garnishee by the plaintiff after judgment. The defendant pleaded that the judgment had been appealed from, and the appeal was still pending. The plaintiff answered that the appeal was not allowed for want of security, and the plea was dismissed. *Perrault* vs. *Bogia*, K. B. 1816, 3 Rev. de Lég. 306.

2. An execution cannot be issued on a judgment rendered against four defendants if one of them has instituted an appeal, and such appeal is still pending. *Brush* vs. *Wilson*, S. C. 1856, 6 L. C. R. 39.

3. The Court of Appeal has no jurisdiction to grant an application for delivery of the property seized, on security being given. *Kelly* vs. *Hamilton*, Q. B. 1871, 16 L. C. J. 140.

4. Whilst a record is in appeal, an application to a judge in the Court below to obtain possession of property seized under the writ of attachment in revendication issued in the cause cannot be entertained. *Hamilton* vs. *Kelly*, S. C. 1871, 15 L. C. J. 168.

5. The plaintiff having obtained judgment on the 30th April issued an attachment in the hands of the garnishee, returnable on the 30th May. On the 20th May the defendant took an appeal from the judgment, and on the 23rd security was given. Under these circumstances, defendant claimed that he was entitled to a discharge from the seizure—*Held*, that the appeal had the effect of fixing all the proceedings in the position they then were, and that consequently a discharge could not be granted. *Desjardins* vs. *Ouimet & Perrault*, S. C. 1879, 2 L. N. 194.

6. Plaintiff obtained an order of a judge, putting him in possession of certain goods which had been attached by revendication. An intervenant appealed from this order. Meanwhile, a petition of plaintiff to have the provisional order enforced was granted. *Whitehead* vs. *Kieffer*, S. C. 1884, M. L. R., 1 S. C. 287.

7. Where the final judgment granting the prayer of an intervention has been appealed from, the Court has no further jurisdiction to grant possession of the goods to the intervening party. (*Ib.*, p. 288.)

(1) The principle set forth by this judgment is of value under the present method of procedure, although the writ of appeal has been abolished.

VII. ENQUÊTE IN.

Proof will be allowed in order to take evidence to prove acquiescence in the judgment of the Court below. *Jordan* vs. *Jetté*, Q. B., Sept., 1875; *Hotte* vs. *Champagne*, Q. B. 1880, 25 L. C. J. 227, 2 Dorion Rep. 127.

The Court of Appeal may order the adduction of evidence and revise a ruling of the judge of the lower Court presiding over the same on a petition for the purpose of taking up the proceedings instituted by another party disqualified for incapacity or otherwise. *McKillid* vs. *Kountz*, Q. B. 1845, 1 Rev. de Lég. 152.

VIII. ERROR IN JUDGMENT OF COURT BELOW.

1. A clerical error in the judgment of the Superior Court, by which the defendant was condemned to pay £54 4s. in lieu of £50 4s., will be corrected by the Court of Queen's Bench; and the judgment will be affirmed, with costs against the appellant, if, on the other grounds of appeal, the Court is against his pretensions. *Levy* vs. *Sponza*, Q. B. 1858, 6 L. C. J. 183.

2. Where a manifest error exists in the judgment of the Court below, and the party who might claim the benefit of such error desists therefrom, by a discontinuance filed in the prothonotary's office and notification thereof served on the opposite party before service of writ of appeal, such error will be held to be effectually cured, and an appeal, instituted for the mere purpose of curing such error, will be dismissed with costs. *Brown* vs. *Wood*, Q. B. 1863, 8 L. C. J. 53.

3. The Court of Appeal has no power to order a record to be remitted to the Court below, for the purpose of correcting an error in the copy of judgment, or to order the Court below to rectify such error. *Sunberg* vs. *Wilder*, Q. B. 1884, 28 L. C. J. 126, 7 L. N. 168.

IX. EXHIBITS IN.

A party cannot file in appeal a document which was not filed in the Court below. *Dorion* vs. *Champagne*, Q. B. 1881, 2 Dorion's Q. B. R. 196.

X. FACTUM IN.

1. A factum may be filed after the prescribed delay, when tendered at the time the opposite party moves to dismiss. *Dawson* vs. *Belle*, Q. B. 1859, 3 L. C. J. 256.

2. A factum is not required in appeals from the Circuit Court, unless it be specially ordered, and the Court will not make such order without some cause shown, and particularly on the part of defendant, the effect of such order being to create a delay. Parties can always make a factum if they desire it. *Beaudet* vs. *Mahoney*, Q. B. 1878, 1 L. N. 579.

3. Upon an appeal from an interlocutory judgment, any party may produce and file a factum, and if successful, the cost of the same will be taxed and allowed. But no delay can be granted for the filing of such factum. *Thornton* vs. *Trudel*, Q. B. 1885, 11 Q. L. R. 216.

XI. IN FORMA PAUPERIS.

1. Appeals cannot be brought *in forma pauperis* to the Court of Queen's Bench. *Legault* vs. *Legault*, Q. B. 1866, 2 L. C. L. J. 10.

2. Motion for leave to appeal *in forma pauperis* from an interlocutory judgment maintaining a demurrer. Leave to appeal was granted, but no permission to proceed *in forma pauperis*. *Derome* vs. *Robitaille*, Q. B. 1881, 4 L. N. 99.

3. The defendant in a *capias* case cannot obtain permission to appeal *in forma pauperis*. But the Court would not say that there was no case in which a party might not so proceed. *Canadian Bank of Commerce* vs. *Brown*, Q. B. 1874, 19 L. C. J. 110.

4. *Contra.*—*Loyseau* vs. *Charbonneau*, Q. B. 1880, 3 L. N. 308; *Trust* vs. *Quintal*, Q. B. 1880, 3 L. N. 397; *Prevost* vs. *Rogers*, Q. B., June, 1878.

XII. INTERVENTION IN.

1. The Court will, in its discretion, order a third party, having an apparent interest in the Appeal, to be made a party to the case, and will remit the record to the Court below for that purpose. *Joubert* vs. *Rascony*, Q. B. 1866, 12 L. C. J. 228.

2. Where parties show sufficient legal interest in the subject matter of the appeal, they will be allowed to intervene and obtain an order of suspension of the case in appeal until judgment be rendered on proceedings instituted in the Court below by the petitioners, provided due diligence be used in the prosecution of such proceedings. *Riddell* vs. *Evans*, Q. B. 1883, 27 L. C. J. 184.

XIII. JUDGE IN APPEAL.

An appeal of which two judges *ad hoc* (under Arts. 1161 and 1162 of the Code of C. P.) have "taken judicial cognizance," by having heard the case and ordered a rehearing, must be re-argued before such two judges as part of the Court, notwithstanding that one of the judges of the Court, who was replaced by one of such judges *ad hoc*, has ceased to be a judge of the Court, and has been replaced by another permanent judge, and notwithstanding that the other judge, originally replaced by a judge *ad hoc*, has been replaced by an assistant judge. *Mayor, etc., of Montreal* vs. *Drummond*, Q. B. 1873, 18 L. C. J. 76.

XIV. JUDICIAL OATH.

The Court of Queen's Bench (Appeal Side) has the same right to submit the judicial oath to one of the parties in the cause as a Court of original jurisdiction. *Ferrier* vs. *Dillon*, Q. B. 1868, 12 L. C. J. 202.

XV. MOTION FOR LEAVE TO APPEAL.

1. Service of a motion for leave to appeal is not sufficient if made on attorneys of the other party, after the record has been sent back to the Superior Court. *Asselin* vs. *de Gaspé*, Q. B. 1874, Ram. Dig. 48.

2. Motion for leave to appeal being served on respondent, he filed a renunciation to the judgment in his favor and offered to pay costs, but did not tender it on appellant's motion. The motion was rejected on respondent paying costs. *Bellay* vs. *Guay*, Q. B., 1 December, 1874, 4 Q. L. R. 91.

XVI. MOTION TO REJECT APPEAL.

An appeal may be rejected on motion, on the ground that no appeal lies, notwithstanding that the record is incomplete, provided it appear that the papers wanting to complete the record cannot affect the question of the right to appeal. *Dubuc* vs. *Champagne*, Q. B. 1874, 18 L. C. J. 224.

XVII. PARTIES TO.

1. The parties interested in the contestation are alone to be made parties to the appeal. *DeWitt* vs. *Burroughs*, Q. B. 1853, 5 L. C. R. 70, 4 R. J. R. Q. 289.

2. On an appeal all of the appellant's "opposite party" in the Court below must be made respondents. *Brewster* vs. *Starnes*, Q. B. 1874, 18 L. C. J. 195.

XVIII. PLEADING—WAIVER—RECORD.

Held—that, in appeal, a party cannot invoke a waiver by another party in the case, unless such waiver has been properly pleaded. *Allen* vs. *Merchants' Marine Ins. Co.*, Supreme Ct. 1888, 33 L. C. J. 314.

XIX. POSTPONEMENT OF HEARING.

Application to have case postponed on account of the absence of one of the attorneys granted on the understanding that it was not to be considered as establishing a precedent. *Citizens Insurance Co.* vs. *Grand Trunk Railway Co.*, Q. B. 1880, 3 L. N. 199.

XX. PRIVILEGED CASES IN.

The appellants applied to have their case heard by privilege, on the ground that the action had been dismissed on a special pleading in the lower Court reserving plaintiff's recourse, and that unless the appeal was decided during that term the appellants' recourse by another action would be prescribed. Application refused. *Merchants Bank* vs. *Whitfield*, Q. B. 1880, 3 L. N. 198.

XXI. PROCEDURE.

Motion to remit papers to Court below pending appeal in order to proceed with principal demand, copies to be substituted in appeal. Motion rejected. *Mills* vs. *Weare*, Q. B. 1879, 2 L. N. 202.

XXII. QUESTIONS OF COSTS.

1. Where the Court of Review has merely reformed a judgment of the Superior Court by disallowing the condemnation for costs, the Court of Queen's Bench will not interfere with the discretion as to costs thus exercised by the Court of Review. *Bayard* vs. *Martin*, Q. B. 1878, 23 L. C. J. 211.

2. Where an appeal involves merely a question of costs, the judgment will not, as a general rule, be disturbed. *Montrait* vs. *Williams*, Q. B. 1879, 24 L. C. J. 144; And see *Rohland* vs. *Ferguson*, Q. B. 1876, 8 R. L. 119, as to damages.

3. Especially where it is only a question of repartition. *Nadeau* vs. *St. Jacques*, Q. B. 1887, 15 R. L. 232.

4. An appeal will not be entertained on a question of costs, when the decision involves no question of principle, but depends on the mere exercise of the discretion of the Court in the matter of costs. *Burroughs* vs. *Wells*, 1887, M. L. R., 3 Q. B. 492.

5. An appeal will be entertained on a question of costs where the Court below, in adjudicating on the costs, proceeded upon a wrong principle. *McCartney* vs. *Linsley*, 1886, M. L. R., 5 Q. B. 455.

6. Where the Court below enunciates an erroneous principle in the adjudication of costs, the Court of Appeal will reverse the decision, although the appeal involves costs only. *Prowse* vs. *Nicholson*, 1887, M. L. R., 5 Q. B. 151.

7. An appellant, who by cross appeal in another case might have had the same point decided, will not be allowed the costs of a separate appeal to the Privy Council. *Gugy* vs. *Brown*, P. C. 1867, 17 L. C. R. 33.

8. Proceedings on a second appeal will be suspended till the costs of a previous appeal be paid; and if such costs be not paid on a day certain, the second appeal will be dismissed with costs. *Bouvier* vs. *Reeves*, Q. B. 1863, 12 L. C. J. 291, 15 L. C. R. 465.

9. The Court of Queen's Bench sitting in appeal will not, as a general rule, interfere with the award of costs in the inferior Court; and where a judgment is confirmed as to the grounds or reasons of judgment, the appellant may be condemned to pay costs on the appeal, though the judgment appealed from was based on erroneous grounds. *McClanaghan* vs. *The St. Ann's Mutual Building Society*, Q. B. 1880, 21 L. C. J. 162.

XXIII. QUESTIONS OF EVIDENCE.

1. Where it is not a matter of contract, and no question of law or principle is involved, and the case resolves itself into a mere question of appreciation of evidence, *e. g.*, as to the value of services, the Court of Appeal will not disturb the judgment of the Court below, unless a serious injustice has been done to the appellant. *St. Lawrence Steam Nav. Co.* vs. *Lemay*, 1885, M. L. R., 3 Q. B. 214.

2. Where evidence is conflicting and evenly balanced (as in this case as to the existence of the disease at the time of the sale), the Court of Appeal will not disturb the decision of the Court below. *Montreal Street Ry. Co.* vs. *Lindsay*, 1890, M. L. R., 6 Q. B. 125.

3. Where the case turned entirely upon the evidence, the Court made the following remarks as to the functions of the Queen's Bench in appeal in such cases: *Per Curiam.* It is with great regret that we reverse a judgment on a matter of evidence. Usually we do not do so, when either view of the evidence may in our opinion be fairly maintained, even although we might incline to a view different from that taken. I desire particularly not to be misunderstood in saying this, for I am perfectly aware that the rule we follow has been subjected to some misconception in different quarters. We do not say that we look upon the decision of the Court below as we should on the finding of a verdict by a jury, for that would be a manifest error as to our law. On the contrary, we are obliged to examine and appreciate the proof. But we do not readily reverse on mere appreciation of the evidence. It appears to me that however difficult it may be to express this rule, its application offers no practical difficulty. In this case, however, we have not to consider this rule. We have only to decide between two judgments, and we think that the judgment in the first instance was correct and should not have been touched. *Nicholson* vs. *Metras*, Q. B. 1881, 4 L. N. 281.

XXIV. QUESTIONS OF PRACTICE.

1. In questions purely of practice, the Court of Appeal will not, as a general rule, disturb the judgment of the Court below. *Perry* vs. *DeBeaujeu*, Q. B. 1869, 14 L. C. J. 334; *Phillips* vs. *Choquette*, Q. B., March, 1874; *Doyle* vs. *Desjardins*, No. 95 Q. B. 9 Dec., 1869.

2. The Court of Appeal ought not to interfere with rulings on points of practice in the Court below. *Lepine* vs. *Cusson*, Q. B. 1872, 16 L. C. J. 296.

XXV. QUESTION OF DAMAGES.

The Court of Appeal will not reverse a judgment, because in a demand for damages the Court below has recorded a few dollars too much. *Mondou* vs. *Quintal*, Q. B. 1882, 2 Dorion's Q. B. R. 175; *Rohland* vs. *Ferguson*, Q. B. 1876, 8 R. L. 19.

XXVI. RETROACTIVE EFFECT OF STATUTES.

1. The right of appeal is governed by the law in force at the time proceedings were commenced, and not by the law in force at the date of judgment. *Atlantic & Northwest Ry.* vs. *Pominville*, C. R. 1890, 34 L. C. J. 241.

2. Contra. *Cie. du Ch. de Fer de l'Atlantique au Nord Ouest* vs. *Descaries*, S. C. 1891, 21 R. L. 194; *Cie. du Ch. de Fer de l'Atlantique au Nord Ouest* vs. *Judah*, Q. B. 1891, 20 R. L. 527; *Cie. du Ch. de Fer de l'Atlantique au Nord Ouest* vs. *Prud'hon*, S. C. 1889, 18 R. L. 143.

(See APPEAL—TO SUPREME COURT—RETROACTIVE EFFECT OF APPEAL STATUTES).

XXVII. RIGHTS OF PARTY AS TO LEGISLATION SUBSEQUENT TO APPEAL.

Although an act of the legislature passed after judgment rendered in a Court of original jurisdiction may affect the rights of a party as they existed at the institution of a suit, this circumstance cannot be taken advantage of in an appeal from the judgment. *Donegani* vs. *Donegani*, P. C. 1835, Stuart's Rep., p. 605.

XXVIII. SERVICE OF APPEAL.

(See MOTION FOR LEAVE TO APPEAL—SERVICE OF).

Motion to reject appeal, the service being irregular. The service was made on Maloin & Maloin, attorneys of respondent in the Court below, by serving a copy personally on Philippe Maloin. The attorney in the Court below was Jacques Maloin, and a different person from Philippe Maloin, and not merely a misnomer. The time for appeal had elapsed. Appeal rejected. *Gauvin* vs. *Rochette*, Q. B. 1882, 5 L. N. 142; following *Dupuis* vs. *Dupuis* 6 L. C. R. 429.

XXIX. SECURITY IN.—(ART. 1124 C. C. P. abrogated, see new ART. 1122.)

1. Absence of Opposite Party.—Security in appeal cannot be legally given, in the absence of the opposite party, on a day different to that stated in the notice. *Charbonneau* vs. *Davis*, Q. B. 1875, 20 L. C. J. 167.

2. ——Where the bond is completed, without justification, and in the absence of the opposite party, who was present, however, when the securities presented themselves (contending that they ought to justify for a considerable amount to cover the possible balance of account), the Court will not set aside the security bond as irregular or illegal, but will reserve to the appellant his right to attack the solvency of the surety. *Brooke* vs. *Dallimore*, Q. B. 1875, 20 L. C. J. 176.

3. Before Date stated in Notice.—An appeal will not be dismissed merely because the security was put in one day sooner than that stated in the notice served on the respondent, if no objection be made to the sureties themselves. *Canada Investment & Agency Co.* vs. *Hudon*, Q. B. 1880, 25 L. C. J. 227.

5. Bond executed by Error and Surprise —After the prothonotary has received the acknowledgment of securities to a bond, and signed and stamped the same, it is not competent for the prothonotary to refuse to send up the record, on the ground that the bond was executed by error and surprise. *Mallette* vs. *Lenoir*, Q. B. 1876, 20 L. C. J. 293.

6. ——A security bond, duly signed by the prothonotary, and stamped, cannot be set aside by the Court of Queen's Bench on the ground that the security was executed by error and surprise. *Mallette* vs. *Lenoir*, Q. B. 1876, 21 L. C. J. 84.

7. By Indian.—A bond in appeal executed by Indians is valid, where it is established by affidavit that they are in possession as proprietors, according to the Indian customary law, of certain real estate situated and lying within the tract of land appropriated to the uses of the tribe to which they belong. *Nianentsiasa* vs. *Akwirente*, Q. B. 1859, 3 L. C. J. 316.

8. By Opposant.—On appeal from a judgment dismissing an opposition, where security was given only for costs—*Held*, to be insufficient. *Lampson* vs. *Wurtele*, K. B. 1847, 3 Rev. de Lég. 107.

9. —— An opposant, appealing from a judgment dismissing his opposition, must give security to answer the condemnation of the principal judgment in the case. *Contlée* vs. *Rose*, Q. B. 1862, 6 L. C. J. 186.

11. ——An opposant, who is *not* also defendant, appealing from a judgment dismissing his opposition, is bound to give security for costs only. *Ferrier* vs. *Dillon*, S. C. 1866, 10 L. C. J. 226; *Lionais* vs. *Molson's Bank*, Q. B 1880, 25 L. C. J. 226, 2 Dorion's Rep. 194.

12. Delay to put in.—*Held*, that the Court would, on cause shown, prolong the delay for giving security on an appeal from the Circuit Court. *Berrian* vs. *McCorkill*, Q. B. 1863, 13 L. C. R. 480.

13. Where the security on an appeal from Circuit Court has not been put in within the delay required by Art. 1143 of the Code of Civil Procedure the appeal must be dismissed. (1) *Carter* vs. *Lalanne*, Q. B. 1879, 24 L. C. J. 160.

14 —— Respondent moved to have it declared that appellant had lost his right of appeal, security not having been given within the time specified by the order. The Court granted the motion, as there was a question of costs on the application for leave to appeal. *McCaffrey* vs. *Bruneau*, Q. B. 1880, 3 L. N. 298.

16. —— A party obtaining leave to appeal from an interlocutory judgment forfeits such right if the security by law required be not given within the delay fixed by the Court. *Bruneau* vs. *McCaffrey*, Q. B. 1881, 7 Q. L. R. 364.

17. Execution of Judgment during Delay to Appeal.—Consent of Attorney.—Where the security is for costs only, the consent of the party's attorney that judgment shall be executed is sufficient. *Viola* vs. *Hamel*, 4 Q. L. R. 52.

18. —— Where the creditor executes his judgment within the delay allowed by law to appeal, he does so at his risk and peril, and cannot, therefore, exact greater security from the debtor appellant than that provided by Art. 1124 of the Code of Civil Procedure. *Compagnie du Chemin de Fer de Montréal, Ottawa & Occidental* vs. *Bourgoin*, Q. B., 1878, 23 L. C. J. 96.

20. In Action to set aside Deed of Donation.— Action for the purpose of

(1) Procedure in appeal from Circuit Court is now the same as from Superior Court.

having a deed of donation declared null. In July, 1880, the plaintiff made a donation to his brother, the defendant, of his undivided share in the father's estate, about one-third of which consisted of an emphyteutic lease which was to expire in eight years. The remainder of the estate consisted of immoveable property in the city of Montreal. In 1881, the donor brought an action alleging fraud on the part of the donee, and by his conclusions he prayed that the deed might be set aside, and declared null and void, and that the defendant be condemned to cancel the registration of the deed of donation within a certain delay, and that in default of his so doing, the judgment of the Court should effect the discharge of the registration. The Court of Review, reversing the judgment of the Superior Court, maintained the action, and granted the plaintiff all the conclusions of his action. The defendant appealed from that judgment, and contended that he was bound to give security for costs only, on the principle that there was no other condemnation in the judgment than to have the registration cancelled, and that the judgment itself would have this effect if nothing was done by the defendant towards that end—*Held*, that he must give security not only for costs, but that he will prosecute the appeal, and satisfy the condemnation in case the judgment was confirmed. *McCord* vs. *McCord*, S. C. 1882, 5 L. N. 246.

21. In Action to Account.—In the case of an appeal from a judgment ordering the appellant to render an account, security for costs alone is sufficient. *Brooke* vs. *Dallimore*, Q. B. 1875, 20 L. C. J. 176.

22. In Action to Condemn Corporation under ART 1025 C. C. P.—On an appeal by the defendant from a judgment ordering a railway company to call the annual meeting within one month, or to pay a fine of $2,000, security for costs only is insufficient; the security must be to satisfy the condemnation. *Mont., Portland & Boston Ry. Co.* vs. *Hatton*, 1884, M. L. R., 1 Q. B. 72.

23. In Contestation of Report of Distribution.—In the case of an appeal from a judgment dismissing the contestation of a judgment of distribution, and maintaining the collocation, the appellant is only bound to give security for costs. *Penyman* vs. *Buchanan*, Q. B. 1882, 27 L. C. J. 311, 6 L. N. 3-8.

24. In Hypothecary Action.—Security in appeal given merely for costs and damages, in a hypothecary action, is insufficient, and will be rejected. *Métrissé* vs. *Brault*, Q. B. 1858, 2 L. C. J. 303.

25. —— But *Held* otherwise under the Code of Procedure, Art. 1124. *Rochette* vs. *Ouellet*, Q. B. 1883, 9 Q. L. R. 361, 6 L. N. 412.

25*a*. —— *Held*, that the Court could dismiss the appeal when the security had not been put in in the delay ordered. *Morin* vs. *Hovier*, Q. B. 1880, 3 L. N. 392.

26. New Security.—An appellant will not be ordered to give new security, because one of the sureties admits and declares that he was really insolvent at the time he signed the bond, although he then declared he was solvent. *Riddell* vs. *McArthur*, Q. B. 1877, 22 L. C. J. 78.

27. —— Where the insolvency of a surety in appeal was alleged, and a new one demanded, the surety was ordered to be called in to be examined, and, on his failing to appear, a new one was ordered. *Wright* vs. *Foster*, Q. B. 1879, 2 L. N. 394.

28. Where a motion was made to dismiss an appeal on the ground of insufficient security, the appellant was allowed fifteen days in which to increase the security. *Lacy* vs. *Drapeau*, Q. B. 1880, 3 L. N. 194.

29. —— But where an appellant, from the Circuit Court, applied to be allowed to give security after the expiry of the fifteen days—*Held*, that in such case the party must show not only that the failure to give security was due to no fault attributable to himself, but that he persisted in his intention to appeal at the earliest opportunity. *Duquette* vs. *Brochu*, Q. B. 1880, 3 L. N. 195.

30. —— Petition by respondent to have the security rejected, and new security ordered within a specified delay. Appellant not being able to find proper security for her appeal made over a certain property, which was mortgaged to the respondent for $10,000, and which was the very property in dispute, by a deed in which it was stipulated that they would neither sell nor mortgage the property, and that they would return it to her if she paid the judgment. One of the sureties swore that the properties were worth from $15,000 to $17,000. They pretended to buy them from appellant for $12,000. In the corporation books they were valued at $12,600. Neither the purchaser nor the vendor had the full title to them. New security ordered. *Robert* vs. *The Trust & Loan Co.*, Q. B. 1880, 3 L. N. 378.

31. Notice.—Notice was given on the 15th, that security in appeal would be given on the

17th. Another notice was given that the same security would be put in on the 18th, but security was eventually given according to the first notice. The notice first given and the security put in were found irregular and insufficient, the first notice having been rendered of no effect by means of the second—*Held*, that no action would lie against the sureties on the bond thus set aside. *Smith* vs. *Egan*, Q. B. 1860, 10 L. C. R. 238.

32. —— One day's additional notice for each five miles of distance is not necessary in the case of a security in appeal. *Fiola* vs. *Hamel*, Q. B. 1877; *Gagnon* vs. *Hamel*, Q. B. 1877, 4 Q. L. R. 52.

33. —— It is necessary to give notice to the opposite party before putting in security for an appeal to the Queen's Bench from a judgment of the Superior Court. *Dorion* vs. *Dorion*, Q. B. 1882, 6 L. N. 325.

34. Sufficiency of—Affidavit.—An appeal bond is insufficient if the surety has not sworn that the immoveables which he has mortgaged belong to him. *Stuart* vs. *Scott*, S. C. 1850, 1 L. C. R. 218, 2 R. J. R. Q. 467.

35. —— Amendment of Bond. — A security bond in appeal from the Circuit Court may be amended by supplying the description of the real estate on which the security justified, and which had been omitted in the bond. *Montreal Cotton Co.* vs. *Town of Salaberry of Valleyfield*, Q. B. 1879, 24 L. C. J. 159, 2 L. N. 338, 9 R. L. 551; *Marshall* vs. *McCaffrey*, Q. B. 1876, 7 R. L. 575.

36. —— at the time Bond was given.—The Court of Queen's Bench can not entertain a petition to have the security declared insufficient, on the ground that the respondent has discovered since the completion of the bond that the securities were really insufficient at the time the bond was signed. *Lapointe* vs. *Faulkner*, Q. B. 1877, 22 L. C. J. 53.

37 —— Deposit.—Where the defendant makes a deposit instead of giving security which the prothonotary has declared shall be for the payment of costs only, a motion to set aside the deposit as insufficient will be rejected, if it appears to the Court that the deposit is sufficient to cover any condemnation in money, whether for costs or otherwise, to which the defendant is liable to be condemned, and the prothonotary's order will be amended accordingly. *Rochette* vs. *Ouellette*, Q. B. 1883, 6 L. N. 412

38. —— Exception to.—The sufficiency of the security offered in appeal cannot be questioned by preliminary exception, and such an exception will be dismissed by motion. *Knowlton* vs. *Clarke*, Q. B. 1863, 13 L. C. R. 500.

39. —— Hypothec on Real Estate received conditionally.—Action against the appellant accompanied by capias. In the Court below appellant had given security on the capias by transferring to the plaintiff unpaid vendor's claims to the amount of $4,344. The amount sued for was $1,450. The defendant, now appealing, prayed *acte* of the declaration that he had previously given security to an amount three times the amount sued for, and he renewed the offer of this security to avail as security for judgment and costs on the appeal. Security accepted on condition of proving the value of the hypothecs, and that it was sufficient for the purpose. *O'Brien* vs. *McLynn*, S. C. 1880, 3 L. N. 143.

40. —— Motion to Dismiss.—A motion to dismiss for want of sufficient security is not too late, although a term has intervened since the appearance for the respondent, especially when the return of the clerk of the Circuit Court is irregular. *Beaudet* vs. *Proctor*, Q. B. 1863, 13 L. C. R. 450.

41. —— —— Affidavits setting forth that the property described in the appeal bond is not of the value of £50, will be received in support of a motion to dismiss the appeal for want of sufficient security, and the appeal will be dismissed on such motion, unless the appellant deposit the sum of £50 together with the sum of five dollars to cover the costs of the motion. *Bedard* vs. *The Corporation of the Parish of St. Charles Borromée*, Q. B. 1860, 10 L. C. R. 429.

42. —— New Sureties.—When a surety in appeal was proved to be insolvent, he was ordered to be replaced by another. *Ouimet* vs. *Desjardins*, Q. B. 1880, 3 L. N. 108.

43. —— —— A new surety may be substituted for one whose real estate is proved to be of a value less than the amount of the bond. *Morin* vs. *Homier*, Q. B. 1880, 3 L. N. 309.

44. —— One Surety—Real Estate.—Where there is only one surety, such surety must justify on real estate. *Marshall* vs. *Coffing*, Q. B. 1876, 7 R. L. 575; *Dawson* vs. *Defosses*, Q. B. 1875, 1 Q. L. R. 121; *Fiola* vs. *Hamel*, Q. B. 1877, 4 Q. L. R. 52.

45. —— —— On appeal from Superior Court to Q. B. one surety is sufficient. *Fiola* vs. *Hamel*, Q. B. 1877, 4 Q. L. R. 52.

48. —— Real Estate—Registration.—Security in appeal on real estate, the title deed to which is not registered, is insufficient. *Prince* vs. *Morin*, Q. B. 1874, 18 L. C. J. 208.

47. —— Supreme Court.—On an appeal to the Supreme Court of Canada, personal security is sufficient. *Wheeler* vs. *Black*, 1886, M. L. R., 2 Q. B. 159.

48. —— What Amount sufficient—Motion to reject.—A security bond for $500, when the judgment appealed from exceeds $600, in capital, interest and costs, is insufficient, and will be rejected on motion, even after the production of the factums. *McGreery* vs. *Doucet*, Q. B. 1879, 10 R. L. 535.

49. Where to be Filed. (Art. 1125 C. C. P.) The security in appeal should be filed in the office of the prothonotary of the Superior Court, where the judgment appealed from was rendered, and not at the place where the Court sits. *McGreery* vs. *Doucet*, Q. B. 1879, 10 R. L. 535.

XXX. SURETIES IN.

1. Insolvency of Surety—Novation of Suretyship.—*Held*, where one of the sureties on an appeal bond became insolvent, and respondent's attorneys accepted $200 "pour "valoir comme cautionnement en appel, et en "tenir lieu à raison de l'insolvabilité d'une des "cautions," that this did not operate a novation of the suretyship, but the same remained binding and effective. *Truteau* vs. *Fahey*, S. C. 1892, 2 Que. 449.

2. —— Action on Bond.—Action on surety bond in appeal. Plea by one of the sureties that he was insolvent, and the plaintiff ought to have had another named in his stead, and also that the appellant was insolvent, and the assignee to his estate ought to have been called in—*Held*, dismissing both pleas. *Fuller* vs. *Farquhar*, S. C. 1879, 2 L. N. 142.

3. Liability of—Proof of Execution of Bond.—In an action against the sureties in a case in appeal, the appeal having been dismissed—*Held*, that the filing of a copy certified by the prothonotary of a bond given before a judge before the allowance of a writ of appeal is sufficient proof of the execution of the bond and of the liability incurred by the sureties without further evidence. *Gosselin* vs. *Chapman*, S. C. 1856, 6 L. C. R. 35, 4 R. J. R. Q. 481.

4. —— Hypothecary Action—Abandonment.—In an action against the defendants as sureties in appeal—*Held*, that they were liable for the costs of appeal where the judgment of the Court below, rendered in a hypothecary action, was affirmed, although an abandonment was made by the defendants before signification of the judgment rendered in the Court below, and although no absolute judgment was given in the Court below for costs, but only a judgment condemning the defendant to pay the debt and costs, unless they preferred to abandon the property. *Fisher* vs. *Provencher*, C. Ct. 1863, 13 L. C. R. 160.

5. —— Other Cases.—Where a judgment orders the issue of a writ of incarceration against a defendant, and his imprisonment until he shall have paid the debt, interest, costs, and subsequent costs in the cause, by virtue of a previous judgment, and on an appeal from the judgment ordering the imprisonment the sureties obligate themselves that W. B. (the defendant) shall effectually prosecute the appeal of the said judgment, and pay such condemnation money, costs and damage as shall be adjudged in case the said judgment or sentence of the Superior Court be affirmed, the sureties, in the event of the confirmation of the judgment, are not immediately liable to the plaintiff for more than the cost of the appeal, and are not liable for the balance of the condemnation money against the defendant, until the plaintiff has first enforced the order for imprisonment against the defendant. *Whitney* vs. *Brooks*, S. C. 1860, 5 L. C. J. 161.

6. —— The securities on an appeal bond cannot be sued for the condemnation money when the appellant files a declaration to the effect that the judgment appealed from may be executed, although the appeal bond has been given in the usual way. *Chaurette* vs. *Rapin*, S. C. 1859, 4 L. C. J. 293.

7. —— Sureties for costs may be sued by the party succeeding, although distraction of costs may have been awarded to his attorneys, when the suit is instituted by the same attorneys. *Larose* vs. *Wilson*, Q. B. 1872, 16 L. C. J. 29.

8. —— The sureties in such case are not entitled to a delay of fifteen days from the day of judgment. (*Ib.*)

9. —— Sureties in appeal, when the judgment has been confirmed, and the Court has not granted leave to appeal to the Privy Council, are liable for the costs absolutely, and they have no right to annex a condition to a tender of such costs, that the money shall be returned in the event of the Privy Council

granting a special application to appeal, and the judgment being reversed on such appeal. *Carter* vs. *Ford*, S. C. 1880, 3 L. N. 412.

10. —— Appeal discontinued.—Where leave to appeal to the Supreme Court from a judgment of the Court of Review was allowed, and surety bonds were entered into, but the appeal was dropped—*Held*, that the sureties were not liable. *Canadian Meat & Produce Co.* vs. *Wiseman*, S. C. 1880, 3 L. N. 85.

11. —— "In case the Judgment be confirmed".—*Held* (reversing the decision of Jetté, J., M. L. R., 2 S. C. 58), that a bond given as security for debt, interest and costs, on appeal by a defendant from the Superior Court to the Court of Queen's Bench, to the effect that the bondsmen will pay the condemnation money in case the judgment be confirmed, is binding, though the judgment of the Queen's Bench reversed the judgment of the Court below, if the original judgment of the Superior Court has been restored by the Judicial Committee of the Privy Council, and the effect is the same as if the Superior Court had been affirmed by the Court of Queen's Bench. *Lowrey* vs. *Routh*, 1887, M. L. R., 3 Q. B. 364, 33 L. C. J. 26.

12. Nature of Suretyship.—Sureties in appeal are judicial sureties, and are not entitled to demand the discussion of the principal debtor. *Riendeau* vs. *Campbell*, C. R. 1893, 3 Que. 393; *Larose* vs. *Wilson*, Q. B. 1871, 16 L. C. J. 29.

13. —— Sureties in appeal are judicial sureties and subject to coercive imprisonment. *Winning* vs. *Leblanc*, S. C. 1870, 14 L. C. J. 298.

14. Who can become Sureties.—A practising attorney cannot become bail or surety in appeal. *Lamelin* vs. *Larue*, Q. B. 1860, 10 L. C. R. 190.

15. —— But *Held*, that a bond in appeal by an attorney-at-law is valid, notwithstanding the 6th Rule of Practice, and assuming that Rule to be applicable to such a bond. *Fournier* vs. *Cannon*, Q. B. 1861, 6 Q. L. R. 228.

XXXI. WHEN IT LIES.

1. From Circuit Court.—Consolidation of Non-Appealable with Appealable.—Where several non-appealable actions in the Circuit Court are consolidated with one that is appealable, as involving the same question, the whole will be adjudicated on an appeal in the principal case. *Cie. du Ch. de Fer Montreal & Sorel* vs. *Vincent*, Q. B. 1884, M. L. R., 4 Q. B. 404.

2 —— Fee of Office.—In an action by a parish beadle for three quarts of wheat or three quarters of a dollar, which he had been accustomed to receive from such parish as his emoluments of office—*Held*, that such action was appealable *ex natura rei*. *Martin* vs. *Brunelle*, Q. B. 1869, 1 R. L. 616.

3. —— Hypothecary Action. — An hypothecary action for an amount less than $100, accompanied by conclusions, to the effect that defendant be condemned to pay the debt unless he prefers to abandon the property, is appealable. *Rodier* vs. *Hébert*, C. R. 1871, 16 L. C. J. 41. Reversing S. C. 15 L. C. J. 269.

4 —— Irregularity in Proceedings in Court below.—The parties plaintiff and defendant having proceeded in the Circuit Court in an appealable case as if the case were non-appealable, and judgment having been rendered in favor of the plaintiff—*Held*, upon an appeal instituted by the defendant, on the ground that the proceedings were irregular, the evidence not being in writing and no articulation of facts or inscription for enquête or for hearing on the merits having been made, that the Court would not disturb the judgment of the Court below. *Osgood* vs. *Cullen*, Q. B. 1860, 11 L. C. R. 282. (1)

5. —— In matters of Lessor and Lessee—Appeal lies to Q. B. from a case in the C. C. under £25, wherein the defendant in his plea set up a title to the property, and such appeal also lies from a judgment rendered in vacation under the Lessor & Lessee's Act of 1855. *Gould* vs. *Sweet*, Q. B. 1859, 1 L. C. J. 18.

6. —— —— An action to annul a lease, where the annual rent is $100, is appealable from the Circuit Court, although the amount claimed is only $41.68, and the evidence had not been taken in writing. *Matthews* vs. *Martin*, C. R. 1869, 13 R. L. 517.

7. —— Under Agricultural Act.—(24 Vic., ch. 30.) There is no appeal from a judgment of the Circuit Court on an appeal from a judgment of a justice of the peace homologating a report of experts as to a water course. *Bruneau* vs. *Prévost*, Q. B. 1863, 13 L. C. R. 498.

(1) Note Art 1142 C. C. P., § 1, has been amended by 54-4 Vict. 1890, by striking out the first paragraph beginning with the word "when the sum" and ending by the words "on points of law.

8. —— Where Evidence not in Writing.—An appeal lies to the Court of Q. B. *on points of law*, from a judgment of C. C., when the sum or value of the thing demanded amounts to or exceeds $100, although the evidence has not been taken down in writing. *Adam* vs. *Flanders*, Q. B. 1878, 25 L. C. J. 30. (1)

9. —— —— Appeal may be had from every appealable judgment, even when no written *enquête* has been made, but on questions of law only, and such an appeal will not be dismissed on account of a merely clerical error, where no injury is done to the parties. *McKenzie* vs. *Turgeon*, Q. B. 1882, 2 Dorion's Q. B. R. 243.

10. From Court of Review — Interpretation of 54 Vic., ch. 48, sec. 2.—This section applies to judgments of the Court of Review under Art. 1115 C. C. P., and not to Superior Court judgments. Thus Art. 1115 will apply to a case adjudged in Review after the 1st Sept., although the judgment of the Superior Court was before that date. *Cardin* vs. *Lussier*, Q. B. 1893, 3 Que. 388.

11. —— No appeal lies from a judgment confirmed in part, in review, where the party complains only of that part which was confirmed. *Beauchène* vs. *La Haie*, Q. B. 1876, 10 R. L. 115.

12. —— A judgment confirmed in Review is not susceptible of appeal, the provisions of Q., 37 Vic. cap. 6, amending 36 Vic., cap. 12, applying to judgments rendered under Art. 823 of the Code of Procedure, as well as to other judgments rendered in review. *Metaconnet National Bank* vs. *Paine*, Q. B. 1879, 5 Q. L. R. 372.

13. —— When a substantial change has been made in the judgment of first instance by the judgment of the Court of Review, an appeal lies from the latter judgment. *Fraser* vs. *Brunette*, Q. B. 1887, M. L. R., 3 Q. B. 310.

14. —— 54 Vic. (Q.), ch. 48, sec. 2.—*Held*,—that an appeal does not lie to the Court of Queen's Bench sitting in appeal in a case in which the sum claimed is under $200, and in which judgment has been rendered by the Superior Court sitting in review. *Boicin* vs. *Demers*, Q. B. 1892, 1 Que. 384.

15. Final Judgment.—A judgment of the Superior Court, refusing to grant a writ of mandamus upon a petition complaining that the Bishop of Quebec had refused to read the final service over the dead body of an individual, is a final judgment, and may be appealed from. *Wurtele* vs. *The Bishop of Quebec*, Q. B. 1852, 2 L. C. R. 65, 3 R. J. R. Q. 93.

16. —— Respondents and one M. having been appointed commissioners in expropriation under 27-28 Vic., cap. 60, made their valuation of certain land which had been expropriated. On petitions to the Superior Court, by certain contributories and the Corporation, appellants, the respondents were removed from office, on the ground that they had in their valuation adopted a principle, which was so palpably erroneous that its adoption amounted to a want of diligence, which justified the court in ordering their removal. This decision was reversed by the Queen's Bench in appeal—*Held*, in Privy Council, that an appeal lay from the Superior Court to the Court of Queen's Bench from the above order of removal, which, having been made after proceedings usual in an ordinary suit, was to all intents and purposes a final judgment of the Superior Court within the meaning of the 1115th Art. of the Code of Procedure. *Mayor, &c., of Montreal* vs. *Brown*, P. C. 1876, L. R. 2 App. Cas. 168.

17. —— A judgment ordering a person to do a specific act, as the delivering of certain promissory notes within a certain delay, or to pay a fixed amount, is a final judgment from which an appeal lies *de plano* and without leave of the Court. *Cassils* vs. *Fair*, Q. B. 1882, 2 Dorion's Q. B. R. 382.

18. From two or three Judgments by one Writ.—In an appeal by one writ from three different judgments rendered in the Superior Court,—*Held*, both on motion and on the hearing of the case, that one appeal could be instituted from one principal judgment, and from the judgments upon oppositions in the same cause. *Waggoner* vs. *Ricker*, Q. B. 1862, 13 L. C. R. 102. (2)

19. —— The appellant filed two oppositions, by one of which she claimed a share of the property seized by one title, by the other opposition she claimed the remainder of the property by another title. The two cases were conducted separately, and two judgments intervened rejecting the appellant's oppositions. The appellant took out one writ of appeal from both judgments. The respondent moved to reject the appeal. Motion dismissed but without costs. *Dionne* vs. *Ross*, Q. B. 1880, 3 L. N. 299.

(1) Note Art. 1112 C. C. P., § 1, has been amended by 53-4 Vict. 1890, by striking out the first paragraph beginning with the word "when the sum" and ending by the words "on points of law."

(2) This judgment would probably hold under the present method of procedure.

20. From Judge in Chambers.—An appeal lies to the Court of Queen's Bench, from a judgment in chambers, refusing a writ of prohibition. *Exp. O'Farrell*, Q. B., 6th March, 1875.

21. —— There is no appeal to the Court of Queen's Bench from an order given by a judge in chambers as a general rule, except in cases where the law, by a special disposition, assimilates the judge in chambers to the Superior Court, as in the case of prohibition. *Beliveau* vs. *Cherrefils*, Q. B. 1876, 1 Q. L. R. 209, 9 R. L. 661.

22. —— The Court of Queen's Bench sitting in appeal will grant leave to appeal from an order of a judge in chambers, where the judge is given the jurisdiction of the Court. (1) *McCraken* vs. *Logue*, Q. B. 1883, 6 L. N. 326.

23. —— An appeal from the decision of a judge in Chambers to the Court of Queen's Bench does not lie unless such decision has first been revised by the Court below. *Ross* vs. *Ross*, Q. B. 1886, M. L. R., 2 Q. B. 1, 15 R. L. 286; *Robillard* vs. *Dufaux*, Q. B. 1887, 16 R. L. 235, 31 L. C. J. 231.

24. From Justice of the Peace.—The Civil Code of Procedure has not taken away the right of appeal from judgments rendered by justices of the peace in agricultural matters. *Bradford* vs. *Wilton*, C. C. 1871, 5 R. L. 249; *Peloquin* vs. *Lamothe*, C. Ct. 1871, 3 R. L. 58.

24*a*. —— *Contra*, *Duppel* vs. *Rochon*, C. Ct. 1870, 2 R. L. 572.

25. From Judge in Vacation appointing a Sequestrator.—An appeal does not lie from a judgment or order of a judge given in vacation appointing a sequestrator. *Blanchard* vs. *Miller*, Q. B. 1871, 16 L. C. J. 80.

25*a*. —— But *Held* contra by Court of Review. *Heritable Securities Mortgage Association* vs. *Racine*, 1879, 2 L. N. 325.

25*b*. —— And Court of Queen's Bench (Dorion C. J. dissenting). *McCracken* vs. *Logue*, Q. B. 1883, 6 L. N. 32", 3 Dorion's Rep. 268, confirming S. C., 6 L. N. 90.

26. From Interlocutory Judgment—Aliment to Wife pending Suit.—Leave to appeal will not be granted from an interlocutory judgment allowing a wife aliments during the pendency of a suit with her husband, unless it is evident that injustice has been done. *Blacklock* vs. *Crosby*, Q. B., March, 1875.

(1) See appeal—from judge in vacation appointing a sequestrator.

27. —— **Altering Defendant's Pleas.**—Where defendant's pleas are, by an interlocutory judgment, altered, but not so as to prevent him proving his whole defence, leave to appeal from such interlocutory judgment will not be granted. *Leblanc* vs. *Pellerin*, Q. B., March, 1875.

28. —— **Decision at Enquete.**—An appeal will not be allowed from a judgment dismissing a motion to revise a ruling at *enquête*, the parties in such case proceeding at their own risk; and if one of them be aggrieved, the case may come up in appeal at a later stage of the proceedings. *Hudon* vs. *Painchaud*, Q. B. 1865, 15 L. C. R. 437.

29. —— —— There is no appeal from an interlocutory order at *enquête* maintaining the objection of the plaintiff's to hearing the husband of the defendant as a witness. *Ontario Bank* vs. *Duchesnay*, Q. B. 1865, 16 L. C. R. 194.

30. —— —— An application for an appeal from a ruling at *enquête*, which is manifestly wrong, will be rejected, when the granting of the appeal will have the effect of retarding the case. *Curé, etc., de Beauharnois* vs. *Robillard*, Q. B. 1876, 20 L. C. J. 294.

31. —— **Decision of Arbitrators.**—There is an appeal to the Court of Queen's Bench from decisions of the Superior Court, upon review of orders of the provincial arbitrators. *Attorney General* vs. *Ellice*, Q. B. 1865, 16 L. C. R. 64.

32. —— **Delay to Appeal.**—Application for appeal from an interlocutory judgment must be made in the term next after the judgment to be appealed from. *Séminaire de Québec* vs. *Vinet*, Q. B. 1861, 6 L. C. J. 138.

33. —— —— An application to be permitted to appeal from an interlocutory judgment, which is not made during the term immediately subsequent to the rendering of the judgment, is not too late when the applicant had previously sued out a writ of appeal *de plano*, which was set aside as having issued irregularly. *Wardle* vs. *Bethune*, Q. B. 1862 6 L. C. J. 221.

34. —— —— Where an appellant obtains the leave of the Court to be allowed to appeal from an interlocutory judgment, and since the allowance of the appeal has not further moved in the cause, and has failed and neglected to sue out a writ of appeal as he was bound to do in due course, the Court of Appeals will, at its next term, rescind and annul its order

allowing the appeal. *Hoffmann* vs. *Porter*, Q. B. 1863, 7 L. C. J. 301.

35. — Demurrer.—An appeal will not be allowed from an interlocutory judgment of the Superior Court, dismissing a demurrer to a declaration. *Benning* vs. *Grange*, Q. B. 1868, 13 L. C. J. 153.

36. —— —— An appeal may be allowed in the discretion of the Court where pleas are dismissed on demurrer. *Hall* vs. *Atkinson*, Q. B., 4th March, 1875; *Harrison* vs. *Dames du Sacré Cœur*, Q. B., Sept., 1875; *Pacaud* vs. *Nadeau*, Q. B., 7th Dec., 1875.

37. —— —— Leave to appeal will be refused from judgment dismissing a demurrer. *Daigneault* vs. *Perreault*, Q. B., 1st March, 1875.

38. —— —— Leave to appeal will generally be refused from an interlocutory judgment dismissing a demurrer. *McGreevy* vs. *Normand*, Q. B., 4th Dec., 1875.

39. —— —— Action was brought against the president and directors of the Levis & Kennebec R. R. for damages for illegal issue of debentures. Beaudette, one of the defendants, sued Reid, the London financial agent of the road, for having issued certain of these debentures in violation of the company's charter. R. pleaded to the action in warranty among other things, that the directors authorized the issue, and that Beaudette as one of a firm actually accepted a portion of the debentures as collateral security. The plaintiff in warranty demurred to the last part of the plea, and the demurrer was maintained. On motion, leave was granted to defendant in warranty to appeal. *Sargeant* vs. *Blanchet et al.*, and *Beaudette* vs. *Reid*, Q. B. 1878, 1 L. N. 111.

40. —— —— Motion for leave to appeal from a judgment dismissing a plea on demurrer. The action was for damages for libel against the proprietor of the *Canadien*. The plea rejected set forth that appellant had not written the article, but that it was written by another on whom plaintiff had since avenged himself. Appeal refused, on the ground that the judgment could be corrected on the merits if it appeared later that defendant had been deprived of a valid defence. *Desjardins* vs. *Hamilton*, Q. B. 1878, 1 L. N. 590.

41. —— —— An appeal will lie from a judgment on a demurrer rejecting part of defendant's plea. (1) *Huntingdon* vs. *White*, Q. B. 1879, 2 L. N. 399.

(1) See Article in *Legal News*, Vol. 3, page 191.

42. —— —— In an action of damages for a specific slander, where the Court below overruled a demurrer to a plea which set up the truth of the slander, and charged similar acts against the plaintiff on other occasions—*Held*, that leave to appeal from such judgment would be refused. *Rouleau* vs. *Lortie*, Q. B. 1880, 6 Q. L. R. 156.

43. —— —— Leave to appeal will be granted from an interlocutory judgment, on a motion dismissing a demurrer, and special plea filed by defendant. *Low* vs. *The Montreal Telegraph Co.*, Q. B. 1881, 4 L. N. 381.

44. —— —— **Discharging Delibéré until Party ascertained to be Insolvent.**—Motion for leave to appeal from an interlocutory judgment, discharging the *délibéré* until it be decided whether an insolvent who has obtained a settlement with his creditors be discharged. The appellant sued the respondent for *bornage*. When the case was ready for hearing, the respondent became insolvent, and proceedings were suspended. Subsequently the respondent obtained his discharge from his creditors, which was not confirmed by the Court. The appellant then continued his proceedings *en bornage*, and obtained judgment with costs. He tried to recover his costs, but was met with the objection that the respondent was not responsible for this debt, having been insolvent and discharged. Leave to appeal refused. *McCammon* vs. *McKinnon*, Q. B., 5 L. N. 112.

45. —— —— **Discharging Délibéré until husband called in.**—Action was taken to set aside a donation by a father to his daughter, and her future husband by marriage contract, as being in fraud of creditors. The husband, K, was sued to authorize his wife, and not in his own name. He appeared and pleaded with his wife. The case being inscribed on the merits, the judge discharged the *délibéré* in order that the husband should be called in personally, as he had an individual interest, and that time should be given to sell the real estate of the donor, then under seizure—*Held*, that the order to call in K was proper, but that the order to discuss the donor before giving judgment, or to refuse to give judgment until something was done which was not within the control of either of the parties, was irregular. Leave to appeal granted. *Tracey* vs. *Liggett*, Q. B. 1882, 5 L. N. 135.

46. — Exception to the Form.—A party is not entitled to an appeal from an

interlocutory judgment, rejecting an exception to the form upon the grounds of its having been filed too late, if the grounds of such exception to the form might have been made the grounds of a demurrer filed in the same cause, and if a copy of the demurrer be not produced, and that because the Court of Appeals cannot say if the grievance complained of may be irremediable or not, the demurrer not being before the court. *Moreau* vs. *Motz*, Q. B. 1853, 3 L. C. R. 53, 3 R. J. R. Q. 344.

47. —— —— Appeal may be granted from an interlocutory judgment dismissing an exception to the form. *Board of Temporalities* vs. *Minister, etc., of St. Andrew's Church*, Q. B. 1880, 3 L. N. 379; *Nadeau* vs. *Baby*, Q. B., 5th Dec., 1874.

48. —— —— Action for penalty under sec. 149 of the Insolvent Act of 1869 by the assignee. The action alleged that appellant took a promise of payment from one L., an insolvent, whose assignee respondent was, as a consideration or inducement to consent to the discharge of such insolvent. Defendant pleaded to the form, setting up that the assignee could not now bring such action. The exception to the form was rejected by the Court below. The defendant therefore asked leave to appeal. Court refused leave to appeal, as the point could be better decided on the merits. *Joseph* vs. *Murphy*, Q. B. 1881, 4 L. N. 101.

49. —— —— Motion for leave to appeal from interlocutory judgments on two motions. The first motion was by plaintiff to correct a clerical error, by effacing the words *de Circuit*, and replacing them by the word *Supérieure*. The other motion also by plaintiff was to allow plaintiff to serve defendant with a duly certified copy of the writ, the copy served not being certified. Both these motions were accorded on payment of the costs incurred on the exception to the form previously filed by the defendant. The Court rejected the motion for leave to appeal with costs. *Therien* vs. *Wadleigh*, Q. B. 1881, 4 L. N. 100, 1 Dorion's Rep. 300.

50. —— —— Where the right of action is not denied by the defendant, but he complains of the vagueness and insufficiency of the allegations of the declaration, it is matter for an exception to the form, and not for a demurrer, or for a motion for particulars.

An interlocutory judgment rejecting an exception to the form in such case is susceptible of appeal, being a matter which cannot be remedied by the final judgment. *McGreevy* vs. *Beaucage*, 1891, M. L. R., 7 Q. B. 82.

51. —— **Expertise.**—Leave to appeal from a judgment ordering an investigation by experts may be refused in the discretion of the Court, although it decides part of the issues. *Been* vs. *Valin*, Q. B., 3rd June, 1875.

52. —— **Final and Interlocutory Judgment.**—Where a party appealing from a final judgment is desirous of appealing at the same time from interlocutory judgments rendered in the cause, mention thereof must be made in the writ and reasons of appeal, unless the question decided by the interlocutory judgment be also involved in the final judgment. *Stefani* vs. *Monbleau*, Q. B. 1889, M. L. R., 5 Q. B. 23. (1)

53. —— **Foreclosure for Non-Appearance.**—Leave to appeal may be granted from an interlocutory judgment foreclosing a party at *enquête* for non-appearance. *Dontaey* vs. *Richard*, Q. B., June, 1875; *Hall* vs. *King*, Q. B., 1 March, 1875.

54. —— **Grounds of.**—An appeal ought to be allowed from an interlocutory judgment which cannot be remedied by the final judgment, unless the Court is clearly of opinion that the judgment complained of must be confirmed. *Cheney* vs. *Frigon*, Q. B. 1870, 15 L. C. J. 57.

55. —— —— The Court will reject a motion for a rule to obtain a writ of appeal from an interlocutory judgment, if the Court be against the moving party on the merits of his application. *Mann* vs. *Lambe*, Q. B. 1862, 6 L. C. J. 75.

56. —— **Inscription in Improbation.**—An appeal from a judgment dismissing an inscription in improbation on a demurrer cannot be sued out *de plano*, but must be moved for as in the case of an interlocutory judgment. *Beaudry* vs. *Mayor, etc., of Montreal*, Q. B. 1866, 11 L. C. J. 28, 2 L. C. L. J. 231.

57. —— **Judgment referring Case to Roman Catholic Bishop.**—Application for leave to appeal from an interlocutory judgment referring the case and the parties to the Roman Catholic Bishop of Montreal, in order that he might decide whether the marriage tie between appellant and her husband should be broken, and also from a previous judgment of 31st March, 1880, dismissing her demurrer, and that part of the conclusions which prayed

(1) These decisions are probably applicable under the present method of procedure by inscription.

that the present cause should be so sent to the bishop for adjudication. Leave to appeal was granted. *Evans* vs. *Laramée*, Q. B. 1882, 5 L. N. 134.

58. —— Jury Trial.—Motion for leave to appeal from an interlocutory judgment of the Superior Court, settling the facts for a jury trial. Both parties were dissatisfied with the judgment, and the plaintiff declared in writing his willingness to desist from it—*Held*, granting the motion as to costs only, and sending the parties back to the Superior Court to have the facts settled. *Citizens Insurance Co.* vs. *Lajoie*, Q. B. 1880, 3 L. N. 108.

59. —— —— A judgment of the Superior Court determining and defining the facts to be inquired into by the jury is a judgment from which an appeal will lie to the Court of Queen's Bench. *Arthur* vs. *Montreal Assurance Co.*, Q. B. 1856, 6 L. C. R. 99, 5 R. J. R. Q. 30; *Dominion Type Founding Co.* vs. *Can. Guarantee Co.*, C. R. 1880, 3 L. N. 77.

60. —— —— And a judgment refusing a trial by jury is susceptible of the same appeal. *Lovell* vs. *Campbell*, S. C. 1861, 12 L. C. R. 97, 6 L. C. J. 116.

61. —— Motion to Reject Account.—The plaintiff having moved in the Court below for delay to contest an account filed by defendant or to have it rejected, obtained delay to contest it on the merits. They then moved to reject the account. The motion was rejected, and on motion for leave to appeal from the last judgment,—*Held* that the leave to appeal could not be granted, as plaintiff should have appealed from the judgment granting delay to contest the account as well as from the judgment rejecting their last motion. *Henderson* vs. *Henderson*, Q. B. 1881, 1 Dorion's Q. B. R. 304.

61*a*. —— Order naming Commissioners in Expropriation.—The judgment or order of the Superior Court naming commissioners in a matter of expropriation is only an interlocutory order, and cannot be appealed from *de plano*. *Canadian Rubber Co.* vs. *City of Montreal*, Q. B. 1880, 25 L. C. J. 231.

62. —— Preuve avant Faire Droit.—The plaintiff moved for leave to appeal from an interlocutory judgment which ordered the adduction of evidence before adjudicating as to the merits of a demurrer. The Court rejected the motion, but said that it would not lay down the rule that an appeal would under no circumstances be granted from such judgment. *Hochelaga Bank* vs. *Lavender*, Q. B. 1882, 5 L. N. 378.

63. —— —— Appeal refused in such case in *Jobin* vs. *Barbeau*, Q. B., 5th Sept. 1875.

64. —— —— Leave to appeal will not be granted from an interlocutory judgment ordering evidence before adjudicating as to the merits of a demurrer, where to an action (which is to be tried by a jury) demurrer has been filed to part of the declaration, alleging facts generally necessary to the demand, though the development of these facts on certain points may be useless. *Rasconi Woollen & Cotton Manufacturing Co.* vs. *Lancashire Ins. Co.*, Q. B. 1887, M. L. R., 3 Q. B. 317.

65. —— Procedure.—The reasons of appeal should state that the interlocutory judgment appealed from is erroneous.(1) *Dunning* vs. *Girouard*, Q. B. 1877, 9 R. L. 177.

66. —— rejecting Motion to unite Causes.—A writ of appeal will not be allowed from an interlocutory judgment of the Superior Court, rejecting a motion by a defendant to unite four separate actions, on promissory notes, between the same parties, in which the pleas are precisely similar, where the application is resisted by the plaintiffs. *Foley* vs. *Turratt*, Q. B. 1865, 9 L. C. J. 108.

67. —— Suspension of Proceedings to obtain Leave to Appeal from.—*Held*, by judge sitting *in banco*, revising the rulings of the judge at *enquête*, that proceedings would not be suspended in order to enable one of the parties, who wished to appeal from an interlocutory judgment, to apply to the Court of Appeals for the allowance of an appeal of which he has given notice to the other side. *Scott* vs. *Scott*, S. C. 1859, 3 L. C. J. 134, 3 L. C. J. 132.

68. —— What is an Interlocutory Judgment.—A judgment which determines all the matters in litigation between the parties, with the exception of the amount claimed under a plea of compensation, and orders, before determining as to the validity of such plea, that the amount of compensation be settled by *experts*, and reserves the question of costs, is not a definitive judgment entitling the party aggrieved to sue out a writ of appeal *de plano*, and a writ so sued out will be set aside on motion. *Wardle* vs. *Bethune*, Q. B. 1862, 6 L. C. J. 220.

69. Grounds of.—A conservatory attachment being attacked by exception to the form, the latter was dismissed. Motion for leave to appeal was refused, because a more expeditious

(1) Reasons of Appeal have been dispensed with by 53-54 Vict., 1890.

mode of meeting the seizure existed, and nothing but delay would result. *Lebel* vs. *Pacaud*, Q. B. 1879, 2 L. N. 202.

70. —— Appeal will not lie on the ground of irregularities in the Court of first instance which have not been mentioned in Review when the case was before that Court. *Scroggy* vs. *Gordon*, Q. B. 1879, 2 L. N. 350.

71. —— A dilatory exception was filed, asking for security for costs. Security was given by the plaintiff, but no judgment was rendered on the exception.—*Held*, that this omission not causing any injustice to the plaintiff, who did not complain in due time, was not ground for an appeal. *Bowen* vs. *Gordon*, Q. B. 1882, 5 L. N. 300.

72. In Matters of Habeas Corpus.—The Court of Queen's Bench has no jurisdiction on an application for *habeas corpus* to correct an error in a warrant of commitment by the Superior Court. *Pollock Exp.*, Q. B. 1881, 5 L. N. 293, 2 Dorion's Q. B. R. 60.

73. In Election Cases. (1) (See also "ELECTIONS.")—No appeal lies to the Court of Queen's Bench from a judgment of the Superior Court on an election petition under the Dominion Controverted Elections Act. *Bruneau* vs. *Massue*, Q. B. 1878, 23 L. C. J. 60.

74. —— The only appeal contemplated by the Act 52 Vic., c. 10, is an appeal by a party convicted of corrupt practices at an election; no cross appeal is allowable under the Act, and therefore the only charges upon which the Court of Appeal is called upon to adjudicate are those upon which the appellant has been convicted by the Court below. *Whyte* vs. *Johnson*, Q. B. 1890, 34 L. C. J. 145.

75. In Matters of Insolvency.—No appeal lies from a judgment rendered in a case under the Insolvent Act of 1875 after the expiration of eight days from the rendering of the judgment complained of. *Johnston* vs. *Leaf*, Q. B. 1879, 23 L. C. J. 262. (2)

76. —— (38 Vic., c. 16, s. 128.) The term of eight days, within which, under sec. 128 of the Insolvent Act, 1875, proceedings in appeal or revision must be prosecuted, applies to judgments in Review as well as to those of the court of first instance. *Graftis* vs. *Sleeper*, Q. B. 1877, 1 L. N. 31, and 22 L. C. J. 76. (2)

77. —— A rule to show cause why a writ of appeal should issue will be rejected where the only cause for the rule was the mere fact that the delay for appealing under the Insolvent Act had expired. *Cotton* vs. *The Ontario Bank*, Q. B. 1877, 22 L. C. J. 77.

78. —— When one of the parties makes an assignment under the Insolvent Act, the other party may obtain (on motion) a suspension of all proceedings until the assignee takes up the *instance*. *Burland* vs. *Larocque*, Q. B., 1867, 12 L. C. J. 292. (2)

79. —— Where a bank is insolvent, or it is sought to put it into insolvency, an appeal lies from every order or judgment of the Court or a judge; but where such order or judgment is an interlocutory one, leave must first be obtained in the usual manner. *Mechanics Bank* vs. *St. Jean & Wylie*, Q. B. 1879, 2 L. N. 315, 9 R. L. 659. See article 2 L. N. at p. 321.

80. —— No appeal lies from interlocutory judgments rendered under the Insolvent Act 1875. *St. Lawrence Salmon Fishing Co.* vs. *Mackay*, Q. B. 1876, 7 R. L. 572, 21 L. C. J. 76. (2)

81. In Matters of Imprisonment.—An appeal may be instituted from a judgment dismissing a petition for release under a *capias*, and from various other interlocutory orders or judgments in connection with such *capias*, rendered partly by the Court below, and partly by a judge thereof in chambers, by one and the same writ, and without obtaining the previous permission of the Court of Queen's Bench to appeal from such interlocutory judgments or orders. *Phillips* vs. *Sutherland*, Q. B. 1874, 19 L. C. J. 134.

82. —— On a motion for leave to appeal—*Held*, that an appeal would lie from a judgment of the Superior Court rendered in vacation ordering the discharge under the provisions of 12 Vic., cap. 42, of a defendant arrested under *capias*. *Gugy* vs. *Ferguson*, Q. B. 1862, 12 L. C. R. 254. *Blackensee* vs. *Sharpley*, Q. B. 1859, 3 L. C. J. 292.

83. —— A defendant, whose petition to be released from custody under a writ of capias has been rejected, has a right to appeal *de plano* from the judgment rejecting such petition, and, therefore, an application by him for permission to appeal will be rejected on that ground. *Canadian Bank of Commerce* vs. *Brown*, Q. B. 1874, 19 L. C. J. 110.

(1) Sec. 549 R. S. Q.—An appeal lies to Court of Q. B. from judgment convicting of corrupt practices under Quebec Controverted Election Act, as amended 52 Vic., ch. 10, sec. 1.
Under Federal Act, appeal lies to Supreme Ct., 1 R. S. C., sec. 50.

(2) Insolvency matters are now regulated by the provisions of the Code of Civil Procedure. Arts. 763 and following.

84. In Summary Matters.—There is no appeal from judgments rendered either in chambers or *in banco* when they concern matters of summary jurisdiction which are not contested. *Andrews* vs. *Davies*, Q. B. 1856, 1 R. L. 210.

85. In Quasi Municipal Matters.—Appeal from judgment of the Superior Court refusing a writ of prohibition to prevent the respondent Aubé, a Justice of the Peace, who had condemned the appellant to pay the penalty provided by Art. 793 Municipal Code, from executing the judgment. The respondents moved to reject the appeal, on the ground that it was a municipal matter, and came within 1033 C. C. P.—*Held*, this was not a matter relating to municipal corporations and offices, within the meaning of Art. 1033 C. C. P. *Corp. of St. Lazare* vs. *Aubé*, Q. B., 4th March, 1876.

86. Report of Distribution.—Appeal lies to the Court of Queen's Bench from a judgment homologating a report of distribution not contested. *Shortis* vs. *Normand*, Q. B. 1877, 3 Q. L. R. 382; *Eastern Townships Bank* vs. *Pacaud*, Q. B. 1866, 17 L. C. R. 126.

87. —— And the recourse by opposition accorded to the creditor by Art. 761 C. C. P. does not take away the right of appeal. *Shortis* vs. *Normand*, Q. B. 1877, 3 Q. L. R. 382.

88. What Amount determines Right to Appeal.—Cases holding it is the amount demanded, and not the amount of the judgment appealed from that determines the right of appeal. *Grand Trunk Ry.* vs. *Godbout*, (1) Q. B. 1877, 3 Q. L. R. 316; *Boudreau* vs. *Sutte*, Q. B. 1877, 3 Q. L. R. 336; *Richer* vs. *Voyer*, Q. B. 1870, 2 R. L. 211; *Stanton* vs. *Home Ins. Co.*, Q. B. 1879, 2 L. N. 314.

90. —— The plaintiff obtained judgment in the court below for a sum exceeding £15, upon which a writ of attachment issued and a judgment rendered upon the attachment for a sum exceeding £15. The appellants intervened in the cause, claiming £4 13s. 6d. of the money attached, and being dissatisfied with the judgment appealed—*Held*, that in such case, the demand of the appellants not exceeding £15, they had no right to appeal. *Russel* vs. *Graveley*, Q. B. 1852, 2 L. C. R. 494, 3 R. J. R. Q. 334.

91. Future Rights.—An appeal lies to the Q. B. from Circuit Court in an action to recover municipal taxes, although the amount claimed is under $100, if the *right* to impose the tax is put in issue. *Corp. de Chambly* vs. *Lamoureux*, Q. B. 1890, 19 R. L. 312.

(1) See note to this case in Ramsay's Digest at p. 52.

The Jurisprudence of the Privy Council is in a contrary sense. See Appeal to P. C.—When it lies—Appealable Value, Nos. 6-10. And the Supreme Court finally adopted the reasoning of the P. C. overruling *Joyce* vs. *Hart*. See article on these cases 2 L. N. 313. See Appeal to Supreme Court—When it lies—What amount determines. But this point is now settled as regards appeals to the Supreme Ct. by 54-55 Vic., ch. 25, sec. 3(4), which enacts that the amount demanded shall determine the right to appeal.

XXXII. WHO MAY APPEAL.

Generally those who have an interest may appeal; even those not parties to the suit may intervene to prosecute the appeal, and so a notary whose minute is attacked by way of improbation and who has been examined as a witness on the inscription in improbation and declared he had no interest in the suit, will be allowed to intervene in order to appeal from the judgment declaring his deed to be defective. *Defoy* vs. *Forté*, Q. B., 20th December, 1879, Ram. Dig. 33.

(*d*) APPEAL TO SUPREME COURT.

I. Delay to Appeal. 1-2.
II. Grounds of.
III. Power of Superior Court to Interfere with Case in Appeal.
IV. Questions of Costs. (See also *Infra* VIII.-32.)
V. Questions of Amount of Damage.
VI. Security for Costs.
VII. Security Bond.
VIII. When it lies.
Action in Disavowal. 1.
Action to Vacate Sheriff's Sale of Immoveable. 2.
Annual Rents. 3.
From Q. B., where action originated in Circuit Court. 4.
From Queen's Bench and Court of Review—Retroactive effect of Statute. 5-11.
From Order of Judge of Q. B. in Chambers refusing Appeal. 13.
From Judgment on Intervention. 14.
Fees of Office—Future Rights. 15-16.
Final Judgment. 17-23.
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Hypothecary Action. 31*a*-31*b*.
In Action to quash By-Law. 32.
In Action to set aside By-Law. 33-34.

In Matters of Assessments. 34*a*.
" " *New Trial.* 35-36.
" " *Mandamus.* 37 38.
" " *Certiorari and Prohibition.* 39.
" " *Procedure.* 40.
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In Expropriation of land under Railway Act. 44*a*.
Judgment Rendered before Supreme Court Act came into force. 45-46*a*.
Petition of Right Act P. Q. 46*b*.
Servitudes. 47-48.
Title to Land. 49-51.
What interest Determines. 52-56.
Which Amount Determines. 57-59.

I. DELAY TO APPEAL.

1. The Court of Queen's Bench has discretionary power to allow an appeal to the Supreme Court, after the delay mentioned in the statute has expired. *Caverhill* vs. *Robillard*, Q. B. 1876, 21 L. C. J. 74, 7 R. L. 575.

2. But will refuse leave to appeal in such cases unless it is shown that special circumstances have retarded the appeal. *Massue* vs. *Corporation de St. Aimé*, Q. B. 1887, M. L. R., 3 Q. B. 319.

II. GROUNDS OF.

Questions not in the pleadings or record in the Court below cannot form ground of or be used as an argument in appeal. *L'Union St. Joseph* vs. *Lapierre*, Supreme Ct. 1879, 4 Can. S. C. R. 164.

III. POWER OF SUPERIOR COURT TO INTERFERE WITH CASE BEFORE SUPREME COURT.

When an appeal to the Supreme Court of Canada, from a judgment of the Court of Queen's Bench sitting in appeal, has been regularly allowed, and the case is before the Supreme Court, the Superior Court has no power by injunction to suspend or interfere with the proceedings before the Supreme Court; the remedy being by application to the Supreme Court. *McManamy* vs. *Corporation of City of Sherbrooke*, S. C. 1890, 13 L. N. 290.

IV. QUESTIONS OF COSTS.

The judges of the Supreme Court being equally divided and the decision of the Court below affirmed, the successful party was refused the costs of appeal. *Liverpool & London & Globe Insurance Co.* vs. *Wyld et al.*, Supreme Court 1877, 1 Can. S. C. R. 605.

V. QUESTION OF AMOUNT OF DAMAGES.

Where, in an action of damages, a judge tries the case without a jury, and is not shewn to have acted upon a wrong principle in assessing the quantum of damages, this Court, as an appellate court, will not interfere with the discretion such judge has exercised in determining the amount to be awarded. *Gingras* vs. *Désilets*, Supreme Ct., 11th Feb., 1881, Cassel's Dig. 2nd Edit. 213; *Leet* vs. *Reed*, Supreme Ct., 6 Can. S. C. R. 482.

VI. SECURITY FOR COSTS.

The following certificate was filed with the printed case as complying with the Supreme Court rule: "We, the undersigned Joint Prothonotary for the Superior Court of Lower Canada, now the Province of Quebec, do hereby certify that the said defendant has deposited in our office, on the twentieth day of November last, the sum of five hundred dollars, as security in appeal in this case before the Supreme Court, according to sec. 31 of the Supreme Court Act, passed in the 38th year of Her Majesty, chapter second, Montreal, 17th January, 1878, Sgd.—*Held*, on motion to quash appeal, that the deposit of the sum of five hundred dollars in the hands of the Prothonotary of the Court below, made by appellant without a certificate that it was made to the satisfaction of the Court appealed from or any of its judges, was nugatory and ineffectual as security for the costs of appeal. *Macdonald* vs. *Abbott*, Supreme Ct. 1879, 3 Can. S. C. R. 278.

VII. SECURITY BOND.

The penalty in a security bond, on appeal to the Supreme Court, which stipulates that the penalty shall become due and payable in case the appellant fails to prosecute his appeal, and the judgment appealed from be affirmed, cannot be recovered, when the appellant, after giving security, discontinues his appeal. *South Eastern R. W. Co.* vs. *Lambkin*, S. C. 1877, 22 L. C. J. 224.

VIII. WHEN IT LIES.

1. Action in Disavowal.—*Held*, that as the judgment obtained against the appellant on the appearance filed by respondent exceeded the amount of $2,000, the judgment on the petition for disavowal was appealable.—*Held*, also, that where a petition in disavowal has been served on all parties to the suit, and is only contested by the attorney, whose authority to act is denied, the latter cannot on an appeal complain that all parties interested in the result are not parties to the appeal. *Dawson* vs. *Dumont*, Supreme Ct., 20 Can. C. S. R. 709.

2. Action to Vacate Sheriff's Sale of an Immoveable.—*Held*, appealable under R. S. C., c. 135, s. 29 (*b*). *Lefeuntun* vs. *Verronneau*, Supreme Ct. 1893, 22 S. C. R. 203. (*Dufresne* vs. *Dixon*, 16 Can. S. C. R. 596 followed.)

3. Annual Rents.—B. R. claimed under the will of the Hon. C. S. Rodier and an Act of the Legislature of the P. Q., 54 Vic., c. 96, from A. L., testamentary executrix of the Estate, the sum of $200, being for an instalment of the monthly allowance which A. L. was authorized to pay to each of the testator's daughters out of the revenues of his estate. The action was dismissed by the Court of Queen's Bench for Lower Canada; and on appeal to the Supreme Court it was—*Held*, that the amount in controversy being only $200, and there being no "future rights" of B. R. which might be bound within the meaning of those words in s. 29 (*b*) of the Supreme and Exchequer Court Acts, the case was not appealable. (1)

Annual rents in s.s. (*b*) of sec. 29 R. S. C., ch. 135, mean "ground rents" (*rentes foncières*), and not an annuity or any other like charges or obligations. *Rodier* vs. *Lapierre*, Supreme Ct., 1892, 21 Can. S. C. R. 69.

4. From Q. B where Action originated in Circuit Court.—An appeal will not lie to the Supreme Court of Canada from a final judgment of the Court of Queen's Bench, Appeal side, in cases in which the Court of original jurisdiction is the Circuit Court for the Province of Quebec. *Magor* vs. *Corporation of City of Three Rivers*, Supreme Ct. 1882, 17th Nov., Cassel's Dig., 2nd Edit., 422; *Le Maire et Conseillers de Terrebonne* vs. *Les Sœurs de la Providence*, Supreme Ct., 18th May, 1886, Cassel's Dig., 2nd Edit., 434.

(1) But see now 56 Vic., ch. 29, amending sub sec. (*b*) of sec. 29, R. S. C., ch. 135; and see *infra* "Future Rights."

5. From Queen's Bench and Court of Review.—By 54-55 Vic. (1891 D.), ch. 25, sec. 3, amending R. S. C., sec. 29, sub-sec. 2, it is provided that:—

"2. Where the matter in controversy involves any such question, or relates to any such fee of office, duty, rent, revenue or sum of money payable to Her Majesty, or to any such title to lands or tenements, annual rents or such like matters or things where rights in the future might be bound, or amounts to or exceeds the sum or value of two thousand dollars, there shall be an appeal from judgments rendered in the said Province (Quebec), although such action, suit, cause, matter or judicial proceeding may not have been originally instituted in the Superior Court.

"3. Provided that such appeals shall lie only from the Court of Queen's Bench, or from the Superior Court in Review in cases where, and so long as, no appeal lies from the judgment of that Court, when it confirms the judgment rendered in the Court appealed from, which by the law of the Province of Quebec are appealable to the Judicial Committee of the Privy Council."

6. —— Retroactive Effect of such Amendment.—A judgment was delivered by the Superior Court in Review in favor of D., the respondent, on the same day on which the Amending Act came into force.

Held, that the appellants, not having shown that the judgment was delivered subsequent to the passing of the amending Act, the Court had no jurisdiction.

Quære, whether an appeal will lie from a judgment pronounced after the passing of the Amending Act in an action pending before the change of the law. *Hurtubise* vs. *Desmarteau*, Supreme Ct. 1891, 19 Can. S. C. R. 562.

7. ——Where a case was argued and taken *en délibéré* in the Court of Review, on the same day in which the above Act was sanctioned, and the judgment was rendered a month later in favor of the respondents—*Held*, that the respondent's rights could not be prejudiced by the delay of the Court in rendering judgment, which should be treated as having been given on the day when the case was taken *en délibéré*, and therefore (following *Hurtubise* vs. *Desmarteau*, *supra*) the case was not appealable. *Couture* vs. *Bouchard*, Supreme Court 1892, 21 Can. S. C. R. 281.

8. ——From the above holding, Gwynne J. and Patterson J. dissented, and these two judges further *Held*, that the judgment being

for less than £500 sterling, it was not a judgment from which the appellant had a right to appeal to the Privy Council. Taschereau J. expressed no opinion on this point, and Fournier J. seemed to concur. Strong J. concurred in judgment of Taschereau J. (*Ib.*)

9. ——*Held* (Taschereau and Gwynne dissenting), that the above Act does not extend to cases standing for judgment in the Superior Court prior to the passing of said Act. (*Couture* vs. *Bouchard*, *supra*, followed.) *Williams* vs. *Irvine*, Supreme Court 1893, 22 Can. S. C. R. 108.

10. ——Per Fournier J. That the Statute is not applicable to cases already instituted or pending before the Courts, no special words to that effect being used. (*Ib.*)

11. ——So held by the Court (Gwynne J. diss.) in *Mitchell* vs. *Trenholme*, Supreme Court 1893, 22 Can. S. C. R. 331; *Evans* vs. *Cowan*, Supreme Court 1893, 22 Can. S. C. R. 331.

13. From Order of Judge of Q. B in Chambers refusing Appeal, or to Compel such Judge of Court to receive Security refused.—*Held*, that the Supreme Court had no jurisdiction to grant the conclusions of the motion, even if the appellant had a right to appeal in such case. *Bourget* vs. *Blanchard*, Supreme Court, 29th Nov., 1882 Cassel's Dig., 2nd Edit., 423.

14. From Judgment on Intervention.—In an appeal to the Supreme Court on the principal action, defendant cannot have the judgment on the intervention in the Superior Court which was abandoned in the Queen's Bench, reviewed. *Hall* vs. *McCaffrey*, Supreme Court, 20 Can. S. C. R. 319.

15. Fees of Office—Future Rights.—To give the Supreme Court jurisdiction to hear an appeal in a case from the Province of Quebec by virtue of sec. 29 (*b*), R. S. C., ch. 135, the matter relating to fee of office, where the rights in future might be bound, must be the matter really in controversy in the suit in which the appeal is sought, and not something merely collateral thereto. This clause will not give jurisdiction in a case in which the action was brought to recover penalties for bribery under the Quebec Election Act R. S. Q., Art. 429, and where the effect of the judgment may be to disqualify the appellant from holding office under the Crown for seven years. *Chagnon* vs. *Normand*, Supreme Court, 16 Can. S. C. R. 661.

16. ——The plaintiff, a school mistress, by her action claimed $1,243 as fees due to her in virtue of s. 68 C. S. L. C., c. 15, now s. 2073 R. S. Q., which were collected by the school commissioners of the city of Three Rivers, while she was employed by them. At the time of the action the plaintiff had ceased to be in their employ. The Court of Queen's Bench affirming the judgment of the Superior Court dismissed the action. On a motion to the Supreme Court of Canada to allow the bond in appeal, the same having been refused by a judge of the Court below, the Registrar of the Supreme Court, and a judge in Chambers, on the ground that the case was not appealable—*Held*, that the matter in dispute did not relate to any office or fees of office within the meaning of s. 29 (*b*), R. S. C. c. 135. (2) Even assuming it did, that there being no future right involved, and the amount in dispute being less than $2,000, the case was not appealable. (3) The words "where the rights in future might be bound" in s. s. (*b*) of sec. 29 governed all the preceding words "any fee of office," etc. (*Chagnon* vs. *Normand*, 16 Can. S. C. R. 661; *Gilbert* vs. *Gilman*, *ib.* 189 referred to.) *Larivière* vs. *School Commissioners of the City of Three Rivers*, Supreme Court 1891, 5th November.

17. Final Judgment.—In an action instituted in the Superior Court (P. Q.) by the appellant against M. A. C. and nine other defendants, the respondents, three of the defendants, severally demurred to the appellant's action, except as regards two lots of land, in which they acknowledged the appellant had an undivided share. The Superior Court sustained the demurrer, and on appeal the Court of Queen's Bench affirmed the judgment. The appellant thereupon appealed to the Supreme Court, and the respondents moved to quash the appeal, on the ground that the Supreme Court had no jurisdiction—*Held*, that as the judgment of the Court of Queen's Bench (the highest court of last resort having jurisdiction in the Province) finally determined and put an end to the appeal, which was a judicial proceeding within the meaning of sec. 9 of the Supreme Court Amendment Act of 1879, such judgment was one from which an appeal would lie to the Supreme Court of Canada; and though an appeal cannot be taken from a court of first instance directly to the Supreme Court until there is a final judgment, yet whenever a Provincial Court of Appeal has jurisdiction, the Supreme Court can entertain an appeal from its judgment, finally disposing of the appeal, the case being in other respects a proper subject of appeal. *Chevallier* vs.

Cuvillier, 1879, Supreme Court, 4 Can. S. C. R. 695.

18.—The Court of Queen's Bench, or a judge thereof, has a right to grant or refuse leave to appeal to the Supreme Court from a judgment of the Queen's Bench, and the decision of the one or the other is final. *Bourget* vs. *Blanchard*, Q. B., 1883, 6 L. N. 51.

19. —— St. L. claimed of S. $2,125, balance due on a building contract. S. denied the claim, and by incidental demand claimed $6,368 for damages resulting from defective work. The Superior Court, on 27th March, 1877, gave judgment in favor of St. L. for the whole amount of his claim, and dismissed S.'s incidental demand. This judgment was reversed by the Court of Review, on the 29th Dec., 1877. St. L. appealed to the Court of Queen's Bench, and on the 24th November, 1880, that Court held that St. L. was entitled to the balance claimed by him, from which should be deducted the cost of rebuilding the defectively constructed work; and in order to ascertain such cost, the case was remitted to the Superior Court, by whom experts were appointed to ascertain the damage, and, on their report, the Superior Court, on the 18th June, 1881, held it was bound by the judgment of the Court Queen's of Bench, and deducting the amount awarded by the experts from the balance claimed by St. L. gave judgment for the difference. This judgment was affirmed by the Court of Queen's Bench on the 19th Jan., 1882.

Held—on appeal, that the judgment of the Court of Queen's Bench of the 24th Nov., 1880, was a final judgment on the merits, and that the Superior Court, when the case was remitted to it, rightly held that it was bound by that judgment, and that St. L. was entitled to the balance thereby found due to him.

Per Fournier J.: (1) That the judgment of the 24th Nov., 1880, though interlocutory in that part of it which directed the reference to experts, was final on the other points in litigation, and could therefore have been properly appealed from as a final judgment. (2) That although on appeal from a final judgment an appellant may have the right to impugn an interlocutory judgment rendered in the cause; yet he loses the right if he voluntarily and without reserve acts upon such interlocutory judgment. *Shaw* vs. *St. Louis*, Supreme Ct., 1883, 8 Can. S. C. R. 385.

20. —— No appeal lies to the Supreme Court from a judgment in appeal confirming a judgment of the Superior Court granting an injunction, but reserving to adjudicate as to amount of damages until after an account has been rendered. *Whitehead* vs. *White*, 1885, M. L. R., 1 Q. B. 482.

21. —— A judgment of the Court of Queen's Bench quashing a writ of appeal, on the ground that the writ of appeal had been issued contrary to the provisions of Art. 1116 C. C. P., is not a final judgment within the meaning of section 28 of the Supreme and Exchequer Court Acts. *Ontario & Quebec Ry. Co.* vs. *Marcheterre*, (1) Supreme Court, 1889, 17 Can. S. C. R. 141.

22. —— A judgment of Court Queen's Bench reversing a judgment of the Superior Court, which quashed, on petition, a seizure before judgment, and ordering that the hearing of the petition contesting the seizure should be proceeded with in the Superior Court at the same time as the hearing of the main action, is not a final judgment appealable to the Supreme Court. (R. S. C., ch. 135, ss. 24 and 28.) *Molson* vs. *Barnard*, Supreme Ct., 1890, 18 Can. S. C. R. 622.

23. —— The plaintiff in an action brought to set aside a deed of assignment died before the case was ready for judgment, and the respondent, having petitioned to be allowed to continue the suit as legatee of the plaintiff under a will dated 17th Nov., 1869, the appellant contested the continuance, on the ground that this will had been revoked by a later will dated 17th Jan., 1885. The respondent replied that this last will was null and void, and upon that issue the Court of Queen's Bench reversing the judgment of the Superior Court declared null and void the will of 17th Jan., 1885, and maintained the continuance of the original suit by respondent. On appeal to the Supreme Court, the respondent moved to quash the appeal, on the ground that the judgment appealed from was an interlocutory judgment, and it was *Held*, that the judgment was *res judicata* between the parties and final on the petition for continuance of the suit, and therefore appealable to this court. (*Shaw* vs. *St. Louis*, *supra* followed.) *Baptist* vs. *Baptist*, Supreme Ct., 1892, 21 Can. S. C. R. 425.

24. Future Rights.—Section 29 (*b*) of the Supreme and Exchequer Courts Act, R. S. C., ch. 135, has been very materially altered by 56 Vic., ch. 29. The words "or such like matters" now reading "and other

(1) Shaw v. St. Louis, 8 Can. S.C.R. 385 distinguished.

matters." Thus negativing most of the jurisprudence on this point. (1)

25. —— The words "where the rights in future might be bound" in s. s. (*b*) of sec. 29 govern all the preceding words "any fee of office," etc., etc. *Larivière* vs. *School Commissioners of the City of Three Rivers*, Supreme Ct. 1894, 5th November.

26. —— By a *procès-verbal* made by the Municipal Council of Ste-Anne du Bout de l'Ile, a portion of the road fronting the land of one R. was ordered to be improved by raising and widening it. Upon R.'s refusal to do the work, the Council had it performed, paid $200 for it, and subsequently sued R. for the said $200. The Court of Queen's Bench affirmed a judgment in favor of the Municipal Council for that amount. On appeal to the Supreme Court *Held*, that although the matter in controversy did not amount to $2,000, yet as it related to a charge on the defendant's land whereby his rights in future might be bound, the case was appealable. *Reburn* vs. *The Corporation of Ste-Anne du Bout de l'Ile*, Supreme Court 1887, 15 Can. S. C. R. 92.

27. —— A question of servitude is a question involving future rights within the meaning of sec. 8 of the Supreme Court Amendment Act of 1879. *Wheeler* vs. *Black*, 1886, M. L. R., 2 Q. B. 159.

28. —— *Held*, referring to *Les Sœurs de l'Asile de la Providence de Montréal* vs. *Le Maire et les Conseillers de la Ville de Terrebonne* in which leave to appeal was granted by Mr. Justice Monk, that the case was one which was comprehended under the term "Future Rights;" that it was dangerous to refuse to allow leave to appeal, and that where there was any difficulty leave would be given, as the respondent would always have his recourse before the Supreme Court to have the appeal rejected summarily. *Wylie* vs. *City of Montreal*, Q. B. 1885, 8 L. N. 155.

30. —— Action to recover $361.90, amount of special assessment for drain—*Held*, that the case came within the words "such like matters or things when the rights in future might be bound," and was therefore appealable. *Ecclésiastiques de St. Sulpice* vs. *City of Montreal*, Supreme Ct., 16 Can. S. C. R. 399.

31. —— In an action brought by the plaintiffs, claiming $1,000 damages, and praying that the defendant be condemned to demolish the temporary bridge interfering with plaintiff's franchise—*Held*, that as rights in future might be bound, the case was appealable. *Galarneau* vs. *Guilbeault*, Supreme Ct. 1889, 16 Can. S. C. R. 579.

31*a*. Hypothecary Action.—In an hypothecary action for $165.82, or the abandonment of the immoveable, appeal will not lie to the Supreme Court. *Bank of Toronto* vs. *Curé et Marguilliers, etc*, Supreme Ct. 1886, 12 Can. S. C. R. 25.

31*b*. —— Where the question decided by the Queen's Bench was as to the priority of a hypothecary debt of $500, no appeal lies to the Supreme Court.(2) *Martin* vs. *Mills*, Q. B., 12 Q. L. R. 98.

32. In Action to quash By-Law—By-Law repealed - Costs.—If in an action brought against a municipal corporation, for the purpose of quashing a by-law of such corporation, judgment be rendered in favor of the defendant, by the Court of Queen's Bench (Appeal side), and since the rendering of such judgment, and while the plaintiff is still within the delays to appeal to the Supreme Court, the by-law is repealed, the right of appeal is taken away by the repeal of the by-law, only a question of costs remaining, appeals as to which the Court will not entertain. *Weir* vs. *Corp. de Huntingdon*, Supreme Ct. of Can., 1891, 21 R. L. 272; *Moir* vs. *Corporation of Village of Huntingdon*, Supreme Ct. 1891, 19 Can. S. C. R. 363.

33 In Action to set aside By-Law or Procès Verbal.—Judgment setting aside by-law or *procès verbal*, defining who were to be liable for the rebuilding and maintenance of a certain bridge—*Held*, that the case

(1) A judgment of the Court of Queen's Bench for Lower Canada (Appeal side) in an action for $1,333.36, being for the balance of one of the money payments which the defendant was to pay to the plaintiff every year so long as certain security given by the plaintiff for the defendant remained in the hands of the government, is not appealable. The words "where the rights in future might be bound" in sub-section (*b*) of section 29 of the Supreme and Exchequer Courts Act, relate only to "such like matters" as are previously mentioned in said sub-section. *Gilbert* vs. *Gibson*, S. C. 1888, 12 L. N. 76, and 16 Can. S. C. R. 189; *Dominion Salvage & Wrecking Co.* vs. *Brown*, 20 Can. S. C. R. 263.

One D., being desirous of establishing a cheese factory in the town of Montmagny, an agreement was entered into between himself and the defendant and certain others, whereby the latter were to furnish for twenty years all the milk of their cows to the said Duhaime, to be manufactured into cheese, Duhaime to receive a percentage for manufacturing.

Held—by Gwynne J. in chambers, that he considered the case similar to one of a contract for payment of a sum by certain instalments to an amount of $170.20 in all, and, apart from the amount sought to be recovered, not coming within the words "rights in future" as used in sec. 8 of the Supreme Court Amendment Act of 1879, so as to give an appeal to the Supreme Court of Canada. *Boudreau* vs. *Brunetteau*, Supreme Ct. 1886, 13th March, Cassel's Dig. 2nd Edit., 431.

(2) Basing his decision upon the principle of *Bourget* vs. *Blanchard*, 9 Q. L. R. 262.

was not appealable, and did not come within sec. 29 or sec. 24 (*g*) R. S. C., ch. 135, no future rights within meaning of the former section being in question. (1) and the appeal not being from a rule or order of a court quashing or refusing a by-law of a municipal corporation. *County of Verchères* vs. *Village of Varennes*, Supreme Ct. 1891, 19 Can. S. C. R. 365; *Bell Telephone Co.* vs. *City of Quebec*, Supreme Ct., 20 Can. S. C. R. 230.

34. —— Action for $262.14 for macadamizing and keeping road in repair under municipal by-law, nullity of which pleaded—*Held*, that the obligation to keep the road in repair under the by-law not being "future rights" within the meaning of sec. 29 (*b*) R. S. C., ch. 135, (1) and the appeal not being from a rule or order quashing or refusing to quash a by-law of a municipal corporation, the case was not appealable. *Dubois* vs. *Corporation Village of Ste. Rose*, Supreme Ct. 1893, 21 Can. S. C. R. 65.

34*a*. In Matters of Assessments.—By 52 Vic. (D.), ch. 37, sec 2, amending sec. 24 of the Supreme & Exchequer Court Acts, an appeal lies to the Supreme Court. "From the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such Court is or are appointed by provincial or municipal authority, and the judgment appealed from involves the assessment of property at a value of not less that $10,000." And by 57 Vic. (1894), ch. 49, (P. Q.) providing for appeals from the Recorder's Court in matters of assessments, it is provided that sections 4 and 5 shall apply to the appeals provided for in the Federal Act, 52 Vic., ch. 37.

35. In Matters of New Trial.—R. S. C., ch. 135, sec. 24 (*d*), as amended by 54-55 Vic. (D.), ch. 25, sec. 2, provides that appeal to the Supreme Court lies "from the judgment upon any motion for a new trial."

36. —— New trial ordered by Court of Queen's Bench *suo motu* is not a final judgment, and does not come within the exceptions allowing an appeal in cases of new trial. *Accident Ins. Co. of N. A.* vs. *McLachlan*, Supreme Ct., 18 Can. S. C. R. 627.

37. In Matters of Mandamus.—Appeal to Supreme Court in matters of *mandamus* allowed by R. S. C., ch. 135, sec. 24 (*g*), applies only to decisions of the "highest Court of final resort" in the Province, and an appeal will not lie from any court in the Province of Quebec but the Court of Queen's Bench. Query: can the Dominion Parliament give an appeal in a case in which the Legislature of a Province has expressly denied it? *Danjou* vs. *Marquis*, Supreme Ct. 1879, 3 Can. S.C. R. 251.

38. —— Interlocutory judgments upon proceedings for and upon a writ of mandamus are not appealable to the Supreme Court under sec. 24 (*g*), R. S. C., ch. 135. The word "judgment" in that s. s. means the final judgment in the case. *Langevin* vs. *Commissaires d'Ecole*, Supreme Ct. 1890, 18 Can. S. C. R. 599.

39. In matters of Certiorari and Prohibition.—Appeal now lies to the Supreme Court from the judgment in any case or proceeding for or upon a writ of *certiorari* or prohibition not arising out of a criminal charge. R. S. C., ch. 135, sec. 24 (*g*), as amended by 54-55 Vic. (D.), ch. 25, sec. 2.

40. —— **of Procedure.**—The Supreme Court will not interfere. *Dawson* vs. *Union Bank*, Supreme Court, 17th Feb., 1885, Cassel's Dig., 2nd Ed., 429; *McDonald* vs. *Ferdais*, Supreme Ct. 1893, 22 Can. S. C. R. 260.

41. —— **of Injunction.**—Judgment of the Queen's Bench quashing interim injunction not appealable to Supreme Court as it is not a final judgment. *Stanton* vs. *Canada Atlantic*, Supreme Ct., 18th March, 1885, Cassel's Dig., 2nd Edit., 130.

42. —— **of Capias.**—A writ of capias having been issued against McK. under the provisions of Art. 798 C. C. P., he petitioned to be discharged under Art. 819 C. C. P., and issue having been joined on the pleadings under Art. 820 C. C. P., the petition was dismissed by the Superior Court. From that judgment McK. appealed to the Court of Queen's Bench, and that Court maintained the judgment of the Superior Court. Thereupon McK. appealed to the Supreme Court. On motion to quash for want of jurisdiction—*Held*, that the judgment was a final judgment in a judicial proceeding within the meaning of R. S. C., ch. 135, sec. 28, and therefore appealable. (*Stanton* vs. *Canada Atlantic Ry. Co.*, *supra*. Reviewed.) *McKinnon* vs. *Keroack*, Supreme Ct. 1887, 15 Can. S. C. R. 111.

43. —— **of Quo Warranto.**—Application was made to appeal to Supreme Court, but

(1) But see now 56 Vic., ch. 29, amending R. S. C., ch. 135, sec. 29 (*b*).

refused, on the ground that appeal did not lie to that Court in matters of *quo warranto*. *Heffernan* vs *Walsh*, Supreme Ct. 1887, 14 Can. S. C. R. 738.

44. —— of Insolvency.—No appeal lies to the Supreme Court, from a final judgment of the Court of Queen's Bench, in a proceeding under The Insolvent Act of 1875, since the passing of the Dominion Statute 40 Vic., ch. 41. *Borroweman* vs. *Angus*, Q. B. 1879, 23 L. C. J. 59; *Scath* vs. *Hagar*, Supreme Ct. 1891, 18 Can. S. C. R. 715.

44*a*. In Expropriation of Land under Ry. Act.—The College of Ste. Thérèse having petitioned for an order for payment to them of a sum of $4,000 deposited by the appellants as security for land taken for railway purposes, a judge of the Superior Court in Chambers, after formal answer and hearing of the parties, granted the order under 42 Vict., ch. 9, sec. 9, sub-sec. 31. The railway company appealed against this order to the Court of Queen's Bench for Lower Canada (Appeal side), and that Court affirmed the decision of the Judge of the Superior Court. On appeal to the Supreme Court of Canada, it was—*Held*, that as the proceedings had not originated in the Superior Court of the Province of Quebec, the case was not appealable. R. S. C., ch. 135, sec. 28. *Canadian Pacific R. R. Co.* vs. *The College of Ste. Therese*, 12 L. N. 338, Supreme Ct. 1889, 16 Can. S. C. R. 606.

44*b*. The Judge of the Superior Court, when he made the order in question, acted as *persona designata*. (*Ib.*)

45. Judgment rendered before Supreme Court Act came into Force.—The right to appeal to the Supreme Court does not exist, in respect of any judgment rendered prior to the coming into force of the Act creating the Court. *Brewster* vs. *Chapman*, Q. B. 1876, 20 L. C. J. 295.

46. —— The judicial functions of the Supreme Court of Canada took effect and came into operation under C., 38 Vic., cap. 11, sec. 80, and by proclamation issued thereunder by order of the Governor in Council on the eleventh day of January, 1876, and the said Court has no jurisdiction when the judgment appealed from was signed or entered or pronounced previous to that date. *Taylor* vs. *Regina*, Supreme Ct. 1876, 1 Can. S. C. R. 65.

46*a*. Nor can the Court appealed from or any judge thereof allow an appeal in such case under sec. 26 of the Supreme and Exchequer Courts Act. (*Ib.*)

46*b*. Petition of Right Act (P.Q.)—The provisions of the Supreme and Exchequer Courts Act, relating to appeals from the Province of Quebec, apply to cases arising under the Petition of Right Act of the Province of Quebec, 46 Vic., ch. 27. *McGreevy* vs. *Regina*, Supreme Ct. 1886, 9 L. N. 387, 14 Can. S. C. R. 735.

47. —— Servitude.—By a judgment of the Court of Queen's Bench, the defendants in the action were condemned to build and complete certain works and drains within a certain delay, in a lane separating the defendant's and plaintiff's properties on the west side of Peel street, Montreal, to prevent water from entering plaintiff's house which was on the slope below. The question of damages was reserved. On appeal to Supreme Court—*Held*, that the case was not appealable, there being no controversy as to $2000 or over, and no title to lands or future rights in question within the meaning of s. 29, ss. (*b*) of the Supreme Court Act. The words "title to lands" in this sub-section are only applicable to a case where a title to the property or a right to the title may be in question. The fact that a question of the right of servitude arises would not give jurisdiction. (1) *Winebery* vs. *Hampson*, Supreme Ct. 1891, 19 Can. S. C. R. 369.

48. But in an *action negatoire* the plaintiff sought to have a servitude claimed by the defendant declared non-existent, and claimed $30 damages—*Held*, that under 56 Vic., ch. 29, sec. 1, amending R. S. C., ch. 135, sec. 29 (*b*), the case was appealable, the question in controversy relating to matters where the rights in future might be bound. (*Winebery* vs. *Hampson*, distinguished.) *Chamberland* vs. *Fortier*, Supreme Ct. 1891, 23 Can. S. C. R. 371.

49. Title to Land, etc.—No appeal lies to the Supreme Court on an action under 32 Vic., ch. 11, sec. 6, and 39 Vic., ch. 10, sec. 1, giving settlers a right of action against parties cutting their wood, for the value thereof, and damages, where the amount of damages claimed is less than $2,000. *King* vs. *Kerr*, Q. B. 1886, 12 Q. L. R. 83.

50. —— In an action brought before the Superior Court with seizure in recaption under Arts. 857 and 887 C. C. P., and Art. 1624 C. C., the defendant pleaded that he had held the property (valued at over $2,000) since the expiration of his lease under some verbal agree-

(1) But see now 56 Vic., ch. 29, amending R. S. C., ch. 135, sec. 29 (*b*).

ment of sale. The Court of Queen's Bench for Lower Canada, reversing the judgment of the Court of Review—*Held*, that the action ought to have been instituted in the Circuit Court. On appeal to the Supreme Court—*Held*, that as the case was originally instituted in the Superior Court, and upon the face of the proceedings the right to the possession and property of an immoveable property was involved, an appeal would lie. *Blatchford* vs. *McBain*, Supreme Ct. 1890, 19 Can. S. C. R. 42.

51. —— In a case of a dispute between adjoining proprietors of mining lands, where an encroachment was complained of, and it appeared that the limits of the respective properties had not been legally determined by a *bornage*, the Court of Queen's Bench *Held*, that an injunction would not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage*—*Held*, that as the matter in controversy did not put in issue any title to land, where the rights in future might be bound, the case was not appealable. *Emerald Phosphate Co.* vs. *Anglo-Continental Guano Works*, Supreme Ct. 1892, 21 Can. S. C. R. 422.

52. —— **What Interest Determines.**—In appeals from judgments on opposition, the principle followed is that laid down by the Privy Council in Macfarlane *vs.* Leclaire (see *supra* p. 103), viz., the right of appeal in such cases is determined by the pecuniary interest of the party appellant. *Champoux* vs. *Lapierre*, Supreme Ct., 19 June, 1883, Cassel's Dig., 2nd Edit., p. 126; *Gendron* vs. *McDougall*, Supreme Ct., 4th March, 1885, Cassel's Dig., 2nd Edit., p. 430; *Bourget* vs. *Blanchard*, Q. B. 1882, 9 Q. L. R. 262; *Kinghorn* vs. *Larue*, Supreme Ct., 23rd October, 1893, 22 Can. S. C. R. 347.

53. —— Thus where the plaintiff contested an opposition *à fin de conserver* for $24,000, filed by the defendant on the proceeds of a sale of property upon the execution by the plaintiff of a judgment obtained by him against H. & Co., for $1,129, the Superior Court dismissed the defendant's opposition. On appeal the Court of Queen's Bench maintained the opposition, and ordered that the defendant should be collocated rateably with the other creditors on the sum of $930, being the amount of the proceeds of the sale—*Held*, that the pecuniary interest of the plaintiff appealing from the judgment of the Court of Queen's Bench being under $2,000, the case was not appealable. *Kinghorn* vs. *Larue*, Supreme Ct. 1893, 22 Can. S. C. R. 347.

53*a*. In such a case, sec. 3 of 54 and 55 Vict., ch. 25, does not apply. (*Ib.*)

54. —— The plaintiff, who had acted as agent for the late J. B. S., brought an action for $1,470 for a balance of account due him as such agent. The defendants, in addition to a general denial, pleaded compensation for $3,416 and interest. The plaintiff replied that this sum was paid by the transfer by him of certain immoveables in payment. The defendants answered that the transaction was not a giving in payment, but a giving of security. The Queen's Bench *Held* that the defendants had been paid by the transfer of the immoveables, and that the defendants owed a balance of $1,154 to the plaintiff. On application being made to the Registrar of the Supreme Court in Chambers, the security for appeal to the Supreme Court was allowed. On a motion to quash the appeal by the plaintiff for want of jurisdiction, on the ground that the amount in controversy was under $2,000,—*Held*, that the pecuniary interest of the defendants affected by judgment appealed from was more than $2,000 over and above the plaintiff's claim, and therefore the case was appealable under R. S. C. ch. 135, sec. 29. (*MacFarlane* vs. *Leclaire*, 15 Moore 181, followed.) *Hunt* vs. *Taplin*, Supreme Ct. 1894, 24 Can. S. C. R. 36.

55. —— The Ætna Insurance Company deposited with the Prothonotary of the Superior Court, under the Judicial Deposit Act of Quebec, the sum of $3,000, being the amount of a life policy issued by the Company to one E. L., which by its terms had become payable to those entitled to the same, but to one half of which sum rival claims were put in. The appellants, as collateral heirs of the deceased, by a petition claimed the whole of the $3,000, and the respondent (*mise-en cause*, petitioner), the widow of the deceased, by a counter-petition, claimed as being in community of property with her late husband one-half, and in answer to the appellant's petition prayed that in so far as it claimed any greater sum than one-half, it should be dismissed. After issue joined, the Superior Court awarded one half to the appellants and the other half to the respondent. From this judgment the appellants appealed to the Court of Queen's Bench (Appeal side), and that Court confirmed the judgment of the Superior Court. The case upon the appellants appealed to the Supreme Court of Canada, and it was—*Held*, that as the sum or value of the matter in controversy between the parties in this case was the sum

of $1,500, and fell short of the appealable amount, the case was not appealable. R. S. C. ch. 135, sec. 29. (Fournier, J., *dubitante.*) *Lavelle* vs. *Barbeau*, Supreme Ct. 1889, 12 L. N. 131, and 16 Can. S. C. R. 390.

53. —— F. a trader sold to G., one of the respondents, real estate in Montreal which was mortgaged for $7000 with a right of redemption for one year. F. made an assignment, and Flatt *et al's*, creditors of F., in the sum of $1,800 brought an action against G. to have the deed of sale of the property which was valued at over $11,000 set aside as made in fraud of his creditors. G. pleaded that he was willing to return the property upon payment of the sum of $1,000 which he had advanced to F., and the Courts below dismissed Flatt *et al's* action—*Held*, on appeal to Supreme Court of Canada, that as the appellants' claim was under $2,000, and they did not represent F.'s creditors, the amount in controversy was insufficient to make the case appealable. *Flatt* vs. *Ferland*, Supreme Ct. 1892, 21 Can. S. C. R. 32.

57. —— **Which Amount Determines.** —By 54 55 Vic. (1891), ch. 25, sec. 3, amending R. S. C. ch. 135, sec. 29, sub-sec. 2, it is now provided that whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different. (1)

1. Jurisprudence before 1891.

1. The statute 38 Vic., cap. 11, sec. 17, enacts that no appeal shall be allowed from any judgment in the Province of Quebec in any case wherein the sum or value in dispute does not amount to two thousand dollars. H. brought an action against J., praying that J. be ordered to pull down the wall and remove all new works complained of, etc., in the wall of H.'s house, and pay $500 damages with interest and costs. H. obtained judgment for $100 damages against J., who was also condemned to remove the works complained of or pay the value of the *mitoyenneté*—*Held*, that in determining the sum or value in dispute in case of appeal by a defendant, the proper course was to look at the amount for which the declaration concludes, and not at the amount of the judgment. *Jones* vs. *Hart*, Supreme Ct. 1877, 1 Can. S. C. Rep. 32.

2. The right of appeal to the Supreme Court is governed by the amount sued for, not by the amount of the judgment. *Sheridan* vs. *The Ottawa Agricultural Insurance Co.*, S. C. 1879, 2 L. N. 266.

3. Appellant sued respondent before the Superior Court at Arthabaska in an action of $10,000 damages for verbal slander. The judgment of the Superior Court awarded to appellants $1,000 for special and vindictive damages. Respondent appealed to the Queen's Bench, and the amount of damages was reduced to $500, and costs of appeal against appellant, who thereupon appealed to the Supreme Court—*Held*, that he was entitled to his appeal, as in determining the amount of the matter in controversy between the parties, the proper course was to look at the amount for which the declaration concludes, and not the amount of the judgment. *Levi* vs. *Reid*, Supreme Ct. Inst. 6 Can. S. C. R. 482.

4. In this case the appeal arose out of an opposition filed by the appellant to the seizure of thirty-three shares of Molsons bank stock, part of a larger number seized under a writ of execution to levy $31,125 and interest pursuant to a judgment obtained in a suit of *Carter* vs. *Molson*. The *par value* of the stock was $50 per share, equal to $1,650, but it was shown by affidavit to the satisfaction of the learned Chief Justice of the Court of Queen's Bench of the Province of Quebec, that at the time the opposition was filed and the appeal brought, the shares were worth $2,500. The Chief Justice therefore allowed the appeal. On a motion to quash for want of jurisdiction, on the ground that the value of the matter in controversy did not amount to $2,000—*Held*, that under section 29 of the Supreme and Exchequer Courts Act the sum or value of the matter in controversy determined the right to appeal, and such value was the actual value of the shares, which was properly established by an affidavit to be over $2,000. *Muir* vs. *Carter*, Supreme Ct. 1888, 12 L. N. 75, and 16 Can. S. C. R. 473.

5. In an action of damages for slander contained in certain resolutions adopted by defendants (respondents) as School Commissioners of the Parish of St. Constant, the plaintiff (appellant) claimed by his declaration $5,000 damages, and prayed that the defendants be ordered to enter in the Minute Book of the School Commissioners the judgment in the cause, and that the same be read at the church doors of St. Philippe two consecutive Sundays. The case was tried before a judge without a jury, and the plaintiff was awarded $200 damages. The defendants thereupon appealed to the Court of Queen's Bench (Appeal side), and the plaintiff did not file any cross appeal, but contended that the judgment for two hundred dollars should be affirmed. The Court of Queen's Bench, setting aside the judgment of the Superior Court—*Held*, that a retraction made by the defendants and a tender of $10 for damages and the costs for an action of $10 were sufficient, and dismissed the plaintiff's action for the surplus. The plaintiff thereupon appealed to the Supreme Court of Canada, and it was—*Held*, that the case was not appealable, as the matter in controversy did not amount to the sum or value of $2,000. Where the plaintiff has acquiesced in the judgment of the Court of first instance by not appealing from the same, the measure of value for determining his right of appeal, under section 29 of the Supreme and Exchequer Courts Act, is the amount awarded by the said judgment of the Court of first instance, and not the amount claimed by his declaration. (*Allan* vs. *Pratt*, 11 Leg. News 273, 13 App. Cas. 780, followed; *Joyce* vs. *Hurl*, 1 Can. Supreme Ct. R. 321; and *Levi* vs. *Reed*, 6 Can. Supreme Ct. R. 482, overruled.) *Monette* vs. *Lefebvre*, Supreme Ct. 1889, 12 L. N. 131, and 16 Can. Supreme Ct. Rep. 387; (*Monette* vs. *Lefebvre*, followed in *Evans* vs. *Cowan*, Supreme Ct. 1893, 22 Can. S. C. R. 331; *Mills* vs. *Limoges*, 1893, 22 S. C. R. 331.)

58. —— In the interpretation of the above statute the proper course is to look at the amount demanded by the statement of claim (in this case, $10,000), even though the actual amount in controversy in the Court appealed from, was for less than $2,000. Thus where the plaintiff obtained a judgment in the Court of original jurisdiction for less than $2,000, and did not take a cross appeal upon the defendant's appealing to the intermediate Court of Appeal, where such judgment was reversed, he was held entitled to appeal to this Court. It was the intention of Parliament to confer, by way of exception, upon this Court jurisdiction in cases wherein the matter in controversy on the appeal is less than $2,000, whether the appeal is by plaintiff or defendant. (*Levi* vs. *Reid* see note *supra* No. 3, approved and followed because restored by statute of 1891.) *Laberge* vs. *Equitable Life Assurance Co.*, Supreme Ct. 1894, 24 Can. S. C. R. 59.

59. —— Although the amount claimed by the declaration is made to exceed $2,000 by

including interest which has been barred by prescription, the appeal will lie. *Ayotte* vs. *Boucher*, Supreme Ct. 1883, 9 Can. S. C. R. 460.

APPRENTICE.

Liability of Father for Misrepresentations.—Father of apprentice, misrepresenting his age, is liable in damages to the party to whom he binds him, if any be incurred, by reason of such apprentice quitting his engagement when of age. *Rice* vs. *Coo*, S. C. 1856, 1 L. C. J. 10.

See Master and Servant.
See Minor.

ARBITRATION.*

IN GENERAL.

(See also In Railway Cases.)

I. Agreement to Arbitrate—whether it excludes Right of Action, etc. 1-7. (See also *infra*, No. XIV.)
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See also,—Expertise.
" Expropriation.
" Advocate and Attorney—Fees — Right to — Arbitration under Railway Act.

* The law of Arbitration in regard to expropriation proceedings is now governed by the addition of section 8 to the Revised Statutes of the Province of Quebec, ch. 2, Art. 5754, enacted by 54 Vic., ch. 38 1890).

Chapter 8, sec. 5, R. S. Q. (articles 1786-1810), provides for arbitration in relation to certain disputes with the Department of Public Works of the Province.

IN GENERAL.

I. AGREEMENT TO ARBITRATE.

(See ALSO No. XIV. *infra*).

1. Whether it excludes Right of Action.—Under the clause or condition in policies of insurance, that in case of dispute between the parties it should be referred to arbitration, the courts are not ousted of their jurisdiction, nor can they compel the parties to submit to a reference during the progress of the suit. *Scott* vs. *The Phœnix Assurance Co.*, K.B. 1823, Stuart's Reports 152, 1 R. J. R. Q. 184.

2. Under the common law of this country, no one can stipulate that he will not have recourse to the ordinary Courts for the decision of his rights. No statute has relaxed the law upon this point. This applies to an agreement to arbitrate in a Marine Insurance policy. Such agreement does not exclude the ordinary action before the common law Courts. *Anchor Marine Insurance Co.* vs. *Allen*, Q. B. 1886, 13 Q. L. R. 4, 16 R. L. 180 (referring to *Merchant's Marine Ins. Co.* vs. *Ross*, Q. B. 1884, 10 Q. L. R. 237 239).

3. The Court has not jurisdiction to appoint an arbitrator to act on behalf of a party refusing to appoint such arbitrator, where the parties have covenanted that the matter in dispute should be determined by arbitration. *Quebec Street Ry. Co.* vs. *Corp. of Quebec*, Supreme Ct. 1887, per Strong & Henry J. J., 15 Can. S. C. R. 164, reversing 13 Q. L. R. 205.

4. *Quære*: whether a right of action exists where a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration? (*Quebec Street Ry. Co.* vs. *Corp. of Quebec*, *supra* in the Queen's Bench referred to.) *Royal Electric Light Co.* vs. *City of Three Rivers*, Supreme Ct. 1891, 23 Can. S. C. R. 289. (But see *supra* No. 3.)

5. Distinction.—The following distinction was laid down by the House of Lords in Scott *vs.* Avery (5 H. L. Cas. 811), which was followed in Caledonian Ins. Co. *vs.* Gilmour, decided by the House of Lords 1891 (1 R. 110): "It is a principle of law, that parties cannot by contract oust the Courts of their jurisdiction; but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant."

6. In a Quebec case decided by the Supreme Court according to the above principles, the contract contained the ordinary powers given in such contracts to the engineers to determine all points in dispute by their final certificate—*Held*, that the certificate of the engineers was binding on the parties, and could not be set aside as regards any matter coming within the jurisdiction of the engineers.(1) confirming in this respect the decision of the Queen's Bench (16 Q. L. R. 129), but reversing the Superior Court (15 Q. L. R. 277). *Peters* vs. *Quebec Harbour Commissioners*, Supreme Ct. 1891, 19 Can. S. C. R. 685.

7. —— —— The plaintiffs by their declaration sought an account from the defendant of the value of two vessels which had been built by them, and concerning which a number of written agreements had passed between the parties, in one of which a reference to arbitration was stipulated in event of dispute—*Held*, confirming the judgment of the Court of Appeal, that such clause was not to be construed so as to admit of a reference to arbitration for the purpose of defeating the appellant's construction of the deed, and the object of the parties thereto. *Shaw* vs. *Jeffrey*, P. C. 1860, 10 L. C. R. 340.

II. AMIABLES COMPOSITEURS.
ART. 1346 C. C. P.

(See ALSO INFRA No. IV. 15-16.)

1. *Held* (reversing the judgment of Tait J., 5 Que. [S. C.] 10), although arbitrators who are appointed to act as mediators (*amiables com-*

(1) By the law of Scotland, a general agreement to refer future differences, if any, and when they arise, to arbiters who are not named, is not binding on either of the contracting parties, and does not oust the jurisdiction of the Courts. But the jurisdiction is ousted where (though the arbiters are not named) the agreement makes the award a condition precedent to a right of action. (Caledonian Ins. Co. *vs.* Gilmour, House of Lords (Scotch) 1893, 1 R. 110.) In this case Lord Watson said: "In my opinion, the distinction between those contracts of submission to arbiters unnamed, which have been held to be invalid, and those which the law sustains, is to be found in the fact that the one class does, whilst the other does not, oust the jurisdiction of the ordinary Courts of the country." The reason assigned for the decision in Buchanan *vs.* Muirhead (Mor. Dict., 14, 593) was that "supporting such clauses would create a new Court;" and in all the cases which have followed on the same point that has been accepted by the Bench as the real ground of their judgment, although some judges have doubted whether it was satisfactory. On the other hand, where the object of the reference is to ascertain some fact or term which is made essential to the constitution of contract rights or liabilities, it does not raise a proper *lis*. As Lord Deas said in Cochrane *vs.* Guthrie (21 Sess. Cas. 2nd Series 376): — "It has long been settled that such a stipulation is effectual. It is not a submission of disputes and differences. It is an agreement that the occurrence of a certain contingency shall be ascertained in a certain way, and in that way only." In the later case of Howden *vs.* Dobie (3 Sess. Cas., 4th Series 761), Lord President Inglis observed: "A reference to fix a price, or the conditions of a lease, or any dispute arising as to the execution of a contract, as in Merry Cunninghame's Case (21 Sess. Cas., 2nd Series, 1887) are matters which cannot be settled by a Court of law without assistance."

positeurs) are not obliged under Art. 1346 C. C. P. to hear the parties and their proofs, and decide according to the rules of law, nevertheless, while acting as such mediators, they are bound to observe the essential forms of arbitration pertaining to justice, and they will not be permitted to act in an arbitrary manner towards the parties. And where it appears to the Court that one of the parties to the arbitration was taken by surprise, and had no opportunity of supporting his pretensions, more especially in a case where the arbitrators were not in a position to arrive at a correct estimate of the amount which should be awarded without hearing the parties and their proofs, the award will be annulled. (1) *Richelieu & Ontario Nav. Co.* vs. *Commercial Union Assr. Co.*, Q. B. 1894, 3 Que. 410.

2. The quality of *amiable compositeur* does not permit the referees to enlarge the scope of the matters submitted to them. *Daigle* vs. *Sévigny*, Q. B., 4 June, 1875, Ram. Dig., p. 32.

3. (Per Fournier, J.) Mediators are not subject to the provision of Art. 1346 C. P. C., and their award can only be set aside by reason of fraud or collusion if given on the matters referred to them. *McGreevy* vs. *The Queen*, Supreme Ct. 1890, 19 Can. S. C. R. 180.

III. ARBITRATOR.

1. Appointment.—Where the parties have each chosen an arbitrator to determine the value of a building to be sold, and have arranged for the appointment of a third arbitrator in case of disagreement, such third arbitrator cannot be chosen by the Court. *MacPherson* vs. *Drumm*, S. C. 1881, 17 R. L. 672.

2. As Representative of Party nominating him.—A person named by a party as his arbitrator does not represent him in the sense that the presence of the arbitrator, and his taking part in the proceedings and deliberations, will justify a statement by the arbitrators in their award that the party was heard. *Richelieu & Ontario Nav. Co.* vs. *Commercial Union Assr. Co.*, Q. B. 1894, 3 Que. 410.

3. —— An arbitrator is the agent of both the parties having recourse to arbitration, and not only of the party appointing him. *Malo* vs. *The Land & Loan Co.*, S. C. 1894, 5 Que. 483.

4. Disqualification — Accepting Refreshments—Damages. ART. 126 C. P. C. —This was an action by an arbitrator against one of the parties to the submission, for damages for a libellous publication by the party in an action to have the award set aside. The defendant alleged that the arbitrators had accepted refreshments and drinks from the party expropriated, and were thereby on several occasions rendered unfit for their duties. The evidence showed that the arbitrators had accepted such refreshments and drinks from the proprietors—*Held*, reversing judgment of Court below, that the appellant had a right to make the above-mentioned allegations, they being true, without incurring any liability therefor. It would seem that the position of arbitrators in such matter can be assimilated to that of jurymen, and that the law applicable to the latter under Art. 426 C. C. P. is applicable to the former. *Atlantic & Northwest Ry. Co.* vs. *Bronsdon*, Q. B. 1893, 2 Que. 470.

5. Duties of.—When arbitrators appointed to value a property proceed upon an erroneous basis in law, and refuse to admit the best evidence of value, an interested party may obtain a writ of *mandamus* against the arbitrators to compel them to admit such evidence. *Re Expropriation of St. John's Bridge. Jones* vs. *Laurent*, S. C. 1885, M. L. R., 1 S. C. 438.

6. Fees.—An arbitrator cannot recover his fees, when he has failed to make his award, and signify the same within the delay specified in the submission. *Maynard* vs. *Marin*, C. C. 1873, 17 L. C. J. 140.

7. —— An arbitrator is the agent of both parties to the arbitration, and not only of the party appointing him, and, therefore, he has a joint and several recourse for his fees against all the parties to the arbitration. *Malo* vs. *Land & Loan Co.*, S. C. 1894, 5 Que. 483.

8. Powers.—Arbitrators, even when vested with powers of *amiables compositeurs*, cannot adjudicate on the question of costs, unless the same is specially referred to them, and so much of their award as adjudicates with respect to the costs will be set aside. *McKenna* vs. *Tabb*, C. C. 1858, 2 L. C. J. 190.

IV. AWARD.

1. Acquiescence — Conditional. — A party to an arbitration who accepts condition-

(1) Per Earl of Selborne in Roland *vs.* Cassidy (P. C. 1888, 14 L. N. 242): "Their Lordships would, no doubt, hesitate much before they held that to entitle arbitrators named as *amiables compositeurs* to disregard all law and to be arbitrary in their dealings with the parties."

any the amount awarded, thereby acquiesces in the award, and is bound by it so long as the condition under which he accepted it is not realized. *McDonald* vs. *The Queen*, S. C. 1890, 16 Q. L. R. 221.

2 —— A condition—" that if from any cause the Government should conclude to re-consider or re-open to any contractor.... the matters in dispute, or any award or claims made by them.... the same privilege will be extended to you "—is not realized by the fact that one of the other contractors had obtained from the Lieutenant-Governor an order that justice be done on a petition of right presented by him for the prosecution of his claim. (*Ib.*)

3 **By one Arbitrator**.—The Corporation, appellant, had granted to the Company, respondent, the privilege of building and operating a horse railway in the city, for 10 years, retaining the right of assuming the ownership after 20 years, upon a notice of 6 months and payment of the value to be determined by arbitration. The notice was duly given and an arbitrator appointed by appellants, but respondents neglected and refused to appoint their arbitrator—*Held*, that such neglect and refusal did not justify the appellants in proceeding to an *ex parte* valuation of the property, and the award of their arbitrator was not, under the circumstances, binding on respondents. (1) *Corp. of Quebec* vs. *Quebec Street Ry. Co.*, Q. B. 1886, 12 Q. L. R. 317, 14 R. L. 112.

4. —— And in such a case of refusal to appoint an arbitrator, the Court cannot appoint one (*Ib.*) per Strong & Henry, J.J. in Supreme Ct. 1887, 15 Can. S. C. R. 161, reversing 13 Q. L. R. 205.

5. —— **Complaint of Irregularities after Award.**—An order for execution was asked from the Court upon an award made under the Corn Exchange Act. Under that Act the Corn Exchange has power to appoint arbitrators to settle disputes between its members. Certain formalities are prescribed, and amongst others that the arbitrators must be sworn, and that there must be a submission in writing at the commencement of the proceedings. Within five days after the decision rendered, the award itself and all questions connected with it may be reviewed. The award if confirmed is then a final one, and execution may issue upon it. The arbitrators on the 28th of June made an award against the defendant, which was confirmed by the Board of Review. The plaintiff now moved for an *exequatur* and the defendant answered, alleging irregularities, among others, that the arbitrators had not been sworn. Defendant, however, had objected to nothing until after the award—*Held*, that as the formalities had not been complied with, the plaintiff could not succeed, and the motion would be rejected, but without costs, as defendant had not objected until after he saw what the award was. *Mitchell* vs. *Butters*, S.C. 1872, 2 R. C. 180.

6. —— But in a case where similar irregularities existed, the appellant took advantage of the award, in so far as to take possession of some of the goods, and turned them to his own account, protesting at the same time against the irregularities of the arbitrators—*Held*, that he had acquiesced in the award, knowing the objection to it, and that he was bound to abide by it. *Lepine* vs. *Fiset*, Q. B. 1879, 8th Sept., Ram. Dig., p. 60. 10 R. L. 153.

7. —— Where the parties agreed to submit their differences to arbitrators and mediators, and notwithstanding serious irregularities on the part of the mediators, proceeded with the arbitration, it was too late to complain of the irregularities after the award was rendered. (2) *Rolland* vs. *Cassidy*, 1886, M. L. R., 2 Q. B. 238.

8. —— And so *Held* in *Reg.* vs. *McGreevy*, Q. B. 1885, 15 R. L. 595, confirmed in Supreme Ct. on the ground that the award was valid. 19 Can. S. C. R. 180.

9. **Deposit of.**—The deposit of an award cannot be made by one who has ceased to be an arbitrator. *Seriguy* vs. *Provencher*, C. R. 1875, 1 Q. L. R. 122.

10. **Form of.**—That an award in the following form, " and a further and additional " sum of $3,500 to be paid to the said J. H. " Molson, for loss of river frontage if the said " J. H. R. Molson is entitled to a river front- " age," is hypothetical and void. *Starnes* vs. *Molson*, Q. B. 1885, 29 L. C. J. 278.

11. —— The award of an arbitrator and *amiable compositeur*, which does not state that he heard the parties, is illegal, and will be rejected on motion. *Farmer* vs. *O'Neill*, S. C. 1878, 1 L. N. 220, 22 L. C. J. 76.

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(1) As to the question of sufficiency of notice in this case, see under title "Contract."

(2) But in the Privy Council, their Lordships did not think it necessary to go into this question, and until they had heard the other side would rather assume that there was not waiver and acquiescence in this case. 32 L. C. J. at pp. 174-175. (See *infra* No. 15.)

12. Interest on.—Under the law of the Province of Quebec, where interest has been allowed on an award by the official arbitrators, a claim for loss of profit or rent cannot be entertained by the Court on appeal, as such interest must be regarded as representing the profits. *Paradis* vs. *The Queen*, Exchequer Ct. 1887, 1 Can. Ex. 191.

13. Interference with in Appeal. Art. 1351 C. C. P.—Award of arbitrators which does not embrace all the material points submitted, or which discloses excess of authority, will be set aside. *Tate* vs. *Jones*, S. C. 1857, 1 L. C. J. 151.

14. —— Under this article of the Code of Procedure the Court cannot revise the amount awarded, even if it were excessive and based upon an erroneous appreciation. *Cie. du Ch. de Fer Ont. & Québec* vs. *Curé et Marguilliers*, Q. B. 1891, 21 R. L. 180.

15. Interference with, in Appeal.—Amiables Compositeurs. Art. 1316 C. C. P.—*Held* (affirming the judgment of the Court of Queen's Bench, Montreal, M. L. R., 2 Q. B. 238), that an award will not be set aside, because a mere error of judgment, in a matter not affecting the law or the justice of the case, has been committed by the arbitrators, more especially where they are acting under a deed of submission by which they are expressly appointed *amiables compositeurs*. And so, where arbitrators were appointed to settle partnership accounts, and a legal opinion, correct in itself, as to the mode of dealing with the accounts, obtained by one of the parties, was communicated to the arbitrators, it was *Held*, that the award was not vitiated by such a proceeding. *Rolland* vs. *Cassidy*, P. C. 1888, 11 L. N. 241, 32 L. C. J. 169.

16. —— —— Art. 1316 C. C. P. (Per Fournier J. in Supreme Court.) Mediators (*amiables compositeurs*) are not subject to the provisions of Art. 1346 C. P. C., and their award can only be set aside by reason of fraud or collusion, if given on the matters referred to them. *McGreevy* vs. *The Queen*, Supreme Ct. 1890, 19 Can. S. C. R. 181.

17. Irregularities in Proceedings.—When several matters are in dispute and are referred to arbitrators, they must decide upon the whole of them, and must hear the parties on all of them, and for want of these steps the Court will set aside an award in such case. *Fairfield* vs. *Butchard*, K. B. 1821, 3 Rev. de Lég. 357.

18. Premature.—Where reference to arbitrators allowed the parties two days to produce papers, etc., and the award was made by the arbitrators on the day following the reference, without their having had any communication with the defendants, such award will be held premature and null. *Chapman* vs. *The Lancashire Insurance Company*, S. C. 1868, 13 L. C. J. 36.

19. Rendered outside Place agreed upon.—An award will not be annulled because it was rendered in a different place from that agreed upon, if it has been served upon the parties at the place agreed upon by them. *Reg.* vs. *McGreevy*, Q. B. 1885, 15 R. L. 595, confirmed in Supreme Court on other grounds, 19 Can. S. C. R. 181.

20. Service of—Delay.—An award of arbitrators and mediators not signified to the parties interested, until after the delay fixed by the deed of submission for the rendering of award, is null and void; notwithstanding such award may have been rendered within the prescribed time. *Chapman* vs. *Hodgson*, C. C. 1864, 9 L. C. J. 112.

21. —— Art. 1352.—An award not pronounced to the parties or served upon them is null. *Blanchet* vs. *Charron*, Q. B. 1842, 4 L. C. J. 8.

22. —— It is upon the party who demands the execution of the award to prove that it has been pronounced or served upon the defendant, and an award that has not been so pronounced or served is null, even where the arbitrators are *amiables compositeurs*. *Hébert* vs. *Wright*, Q. B. 1892, 1 Que. 391, confirming S. C. 1889, 18 R. L. 538.

23. Whether objectionable Part severable from the Rest.—(Sir James Colville): "The point was never taken in the Canadian Courts, no offer of waiver was made there, and it may be questionable whether that point can now, for the first time, be raised here. Assuming, however, that it is open to the appellants, their Lordships are of the opinion that the award is not severable in the manner suggested, the compensation improperly awarded being combined as it is with that which was properly awarded, and both declared to be "le montant de la compensation à être payé pour le dit morceau de terre, et pour tous les dommages résultant de la possession d'icelui." And if they were severed, a question might arise, as Mr. Benjamin has argued, whether the award would not be defective in that it failed to deal fully with one of the questions submitted to the arbitrators, viz., the amount of compensation due to the appellants under

the fourth head of their claim." *Bourgoin* vs. *La Cie du Ch. de Fer de Montréal, Ontario et Occidental*, P. C. 1881, 5 App. Cas. 381, 24 L. C. J. 193, 3 L. N. 178.

24. —— An award of arbitrators may be good in part and bad in part, but only in cases where the subject appears clearly capable of being separated, where for instance the arbitrator exceeds his authority on one subject or proceeds to another as to which he has no power to make an award. *Guay* vs. *Fradet*, S. C. 1879, 5 Q. L. R. 226; *Freeman* vs. *Corporation of Quebec*, Feb., 1854, by Ch. J. Bowen and judges Meredith and Morin.

V. COSTS IN.

(See also No. III. 8.)

Where the rule appointing arbitrators authorizes them to settle the question of costs, the Court will not disturb their award as to costs. *McGibbon* vs. *Dalton*, S. C. 1865, 1 L. C. L. J. 93.

VI. EFFECT OF.

When an insurance company—governed by a statute which declares that arbitration by it shall not constitute a renunciation on the part of the company to its right to invoke any cause of forfeiture discovered only since the nomination of the arbitrators—agrees to an arbitration to determine the loss suffered by the insured, it thereby renounces its right to invoke any cause of forfeiture known to it before the nomination of the arbitrators. *Cie d'Assurance Mutuelle contre le Feu* vs. *Villeneuve*, Q. B. 1886, M. L. R., 2 Q. B. 89.

VII. IN DISPUTES BETWEEN RELATIONS.

ART. 341 C. C. P.

The courts have a right to refer to arbitration disputes between relations, where the facts are difficult of appreciation, without its being necessary that the contestation should be the result of relationship. *Robert* vs. *Robert*, Q. B. 1876, 21 L. C. J. 18.

VIII. NOTICE IN.

1. Upon its being established by an affidavit of the plaintiff that an award purporting to be made after notice to the parties was in fact made without such notice, the award will be set aside. *McCulloch* vs. *McNevin*, C. C. 1862, 6 L. C. J. 257.

2. When two of the arbitrators change the place of meeting or deliberation, notice of such change should be given to the third. *O'Connell* vs. *Frigon*, S. C. 1865, 9 L. C. J. 173, 1 L. C. L. J. 65.

IX. PENALTY—PLEADING.

1. ARTS. 1316, 1354 C. C. P.—A party who has submitted a matter to arbitrators cannot, after the arbitrators have made their award, call for the decision of the respective tribunals without previously paying the penalty stipulated in the arbitration bond, unless the award be absolutely null. *Tremblay* vs. *Tremblay*, S. C. 1853, 3 L. C. R. 482, 4 R. J. R. Q. 38; *Reg.* vs. *McGreevy*, 15 R. L. at p. 597, Note 1.

2. Where a party, dissatisfied with an award under a bond of reference to arbitration, containing a covenant that the party refusing to abide by the award shall pay a penalty of $100, sues to recover an amount involved in the reference, the defendant can legally oppose the non-payment of the penalty by way of temporary exception *en droit*. *Allard* vs. *Benoit*, S. C. 1870, 16 L. C. J. 79, and see Report of *Tremblay* vs. *Tremblay* (*supra*).

3. A stipulation in a bond of arbitration to pay a penalty is commiratory. *Bouthillier* vs. *Turcot*, S. C. 1858, 3 L. C. J. 50.

X. POWER TO REFER TO.

The agent of the contractors of a railroad having referred to arbitrators the valuation of a piece of land required for the construction of a road, the question submitted was whether, under the circumstances, the contractors had received from the company the necessary power to refer the matter to arbitrators, and whether that power, if they had it, had been transferred to their agent. The Court below held the award good, and the judgment was confirmed in appeal, the judges being equally divided. *Quebec & Richmond Ry. Co.* vs. *Quinn*, Q. B. 1856, 6 L. C. R. 129 and 350; affirmed by Privy Council 1858, 12 Moore P. C. 232.

XI. REPORT.

1. Completion of—Formalities.—The Court may, on motion, order arbitrators and *amiables compositeurs* to complete their report, by adding a statement of the formalities observed, and an explanation of parts of the report, and also by annexing a certificate that they were sworn, etc. *Dubé* vs. *Coristine*, 1889, M. L. R., 5 S. C. 132.

2. Delay to render. Art. 337 C. C. P.—Arbitrators must not only hear the parties, but must decide the matter in dispute before the expiration of the rule of reference, their proceedings are otherwise void. *Gilley* vs. *Miller*, K. B. 1811, 1 Rev. de Lég. 510.

3. Evidence in Action on.—In an action brought upon a report of arbitrators, the defendant may contest the validity of the report, where it does not set forth that the witnesses have been heard, by alleging that the arbitrators refused to hear his witnesses, and the defendant will be allowed to prove such refusal. *Ostell* vs. *Joseph*, Q. B. 1857, 9 L. C. R. 440, 6 R. J. R. Q. 58, reversing Superior Court, 1 L. C. J. 265.

4. Irregularities. Art. 330 C. C. P.—The declaration of arbitrators in their report, that they had been sworn, will not suffice, and in the absence of authentic evidence of their having been duly sworn, their report will be set aside on motion to that end. *Joseph* vs. *Ostell*, S. C. 1861, 6 L. C. J. 10, 11 L. C. R. 499.

5. —— Art. 334 C. C. P.—A report of arbitrators will not be set aside on motion (supported by an affidavit to that effect by the defendant), on the ground that it is not accompanied by satisfactory evidence that the parties or their witnesses were legally sworn, it appearing that the oath was administered to the parties and their witnesses by one of the arbitrators. *Daly* vs. *Cunningham*, S. C. 1862, 6 L. C. J. 242.

6. —— Arts. 331, 342 C. C. P.—A report of arbitrators and *amiables compositeurs* will be set aside and annulled, on motion, when it appears that a material witness gave evidence before the arbitrators, without having been previously sworn; and such evidence afterwards reduced to writing, and signed, and sworn to by the witness, is irregular and cannot be filed of record or used, even where two or three arbitrators consent to such a course. *O'Connell* vs. *Frigon*, C. C. 1865, 9 L. C. J. 173; 1 L. C. L. J. 65.

7. —— Art. 334 C. C. P.—The declaration of arbitrators in their report, that they had examined the proceedings of record in the cause, examined the witnesses of the parties under oath, and deliberated, will not suffice; but such report should allege due notice to the parties, or that they were present and were heard; and a report thus defective will be set aside on motion. *Brown* vs. *Smith*, S. C. 1856, 6 L. C. J. 126.

XII. RESPECTING DEBTS OF THE PROVINCES.

Under Section 142 B. N. A. Act.*

The Superior Court of Canada has jurisdiction to enquire whether a arbitrator, appointed by the Government of the Dominion of Canada, under sec. 142 of the B. N. A. Act 1867, is in the legal exercise of his office. *Quimet, Attorney General*, vs. *Gray*, S. C. 1871, 15 L. C. J. 306.

XIII. SUBMISSION.

1. —— Where a reference to arbitrators requires that they shall "finally adjust, settle and determine the precise state of account" between the parties, and "the precise amount which either of the said parties should pay to the other," and the arbitrators, by their award, merely determine in a general way how the matters in dispute shall be adjusted, without determining any precise figure of it debtedness by the one party to the other, no action will lie on such award. *Colson* vs. *Ash*, S. C. 1874, 18 L. C. J. 281.

2. —— Art. 1346 C. C. P.—Art. 1346 of the Code of Procedure does not prohibit parties from stipulating in a submission that the mediators shall hear the parties and their witnesses, or declare them to be in default. *Breakey* vs. *Carter*, S. C. 1878, 1 Q. L. R. 332.

3. Such conditions of the submission bind the mediators on pain of nullity of the award. (*Ib.*)

4. —— **Stipulation for Benefit of a Third Person.** Art. 1029 C. C.—By an arbitration bond, A. agreed to pay the sub-contractor of P., who was the sub-contractor of A., for the construction of the Pontiac Pacific Junction Railway. R., one of P.'s sub-contractors, brought action against P. and A., claiming the benefit of the stipulation made in and by the bond. A. pleaded *inter alia*, that the arbitration was not carried out, no award made, and that the submission had become inoperative. (Art. 1318 C. C. P.)—*Held*, that the arbitration having fallen through, the submission became inoperative, and the stipulation in favor of R., the third party, was revoked. *Reed* vs. *Perrault*, C. R. 1887, M. L. R., 3 S. C. 99.

5. *Held*, affirming judgment of the Court of Queen's Bench (15 R. L. 595) that the ob-

* See article on this subject in Revue Critique, Vol. I, pp. 68-83, by Desiré Girouard, Q.C.

ject of the submission was to ascertain what amount the contractor T. McG. was to receive from the government, and the specification of the several matters referred to in the submission was merely to secure that in determining the amount the mediators should fully consider all these matters, and that all matters having been so considered the award was valid. *McGreevy* vs. *The Queen*, Supreme Ct. 1890, 19 Can. S. C. R. 181.

6. Revocation. ART. 1317 C. C. P.—Parties resolved to refer a matter to *amiables compositeurs*, who were to make a report as soon as possible. After the arbitrators had taken up the matter the defendants' arbitrator refused to go on, and made default to appear. The other two, after notification to him, went on without him and made a report, although the defendants previously notified them that they revoked the submission. Plaintiff then sued for the amount of the award. Defendants' plea was that the award was *ultra vires*, null and void—*Held*, that the award was a nullity, and the action must be dismissed, as the defendants had revoked the submission before the report was made, which they had a right to do. *Méthivier* vs. *Communauté de Sœurs Ste. Croix*, S. C. 1875, 7 R. L. 388.

7. —— Where the submission stated that the delay for making the award was to be five weeks from date 24th June, but that the arbitrators could prolong the time at their discretion if need should arise, and the proceedings were adjourned by simple consent of parties to the 12th October, and the appellant then revoked the power—*Held*, that he had a legal right to do so, and that no action of damages would lie. *Foisy* vs. *Dery*, Q. B., Quebec, 7th Sept., 1874.

8. —— *Semble* that the power given to arbitrators to prolong the delay indefinitely is similar in effect to fixing no period within which the award shall be rendered. (*Ib.*)

XIV. STATUTES PROVIDING FOR.

(See also No. I *supra*).

1. When they Oust the Jurisdiction of the Courts.—In an action of damages against the City of Montreal for closing up a street in 1866—*Held*, in the Privy Council, that whatever may be the right of the proprietors to damages, they cannot demand them by action at common law, but the damages must be determined by the Commissioners in expropriation under 27 and 28 Vic., ch. 60. *Mayor of Montreal* vs. *Drummond*, P. C. 1876, 1 App. Ca. 384, 22 L. C. J. 1 (Reversing Q. B., 18 L. C. J. 225).

2. —— But *Held, contra*, by the Queen's Bench (Appeal side), commenting on the above decision, that the Statute 27 and 28 Vic., ch. 60, s. 18, does not exclude an action in indemnity, but merely provides a mode of procedure; and if the corporation desires to have the compensation estimated by commissioners, it must move the Court to appoint them. If it fails to do so, it acquiesces in the ordinary procedure, and is forecloseed from raising the objection afterwards. *Morrison* vs. *The Mayor, &c., of Montreal*, Q. B. 1880, 4 L. N. 25, 1 Dorion's Q. B. Rep. 107.

3. —— To the same effect Ramsay J. in *Grenier* vs. *City of Montreal*, Q. B. 1880, 25 L. C. J. at page 144.

4. —— The mode of proceeding given by c. 51 of the C. S. L. C. (which provides for the appointment of experts to determine the damage from overflow done by mill dams, etc.) did not exclude the right to proceed by ordinary action. (1) *Breakey* vs. *Carter*, Supreme Ct. 1885, Cassel's Dig., 2nd Edit., p. 461, S. C. 1881, 7 Q. L. R. 286, per Justice Casault at pp. 288-289; *Emond* vs. *Gauthier*, S. C. 1877, 3 Q. L. R. 360; and see *Atl. & N. W. Ry. Co.* vs. *Leeming*, Q. B. 1891, 3 Que. at p. 169.

5. —— But *Held, contra*, in a prior case under the same statute. *Blais* vs. *Lacocheth*, *Blais* vs. *Blais*, S. C. 1869, 13 L. C. J. 277.

6. —— A direct action can be taken by an insured against a mutual fire insurance company for the amount of insurance in case of fire, without having recourse to arbitration as indicated by 45 V. (Que.), ch. 51, secs. 51-57. *Cie. d'Assurance Mutuelle et de Montmagny* vs. *Carbonneau*, Q. B. 1888, 16 R. L. 275, 17 Q. L. R. 86.

IN RAILWAY CASES.

APPEAL FROM AWARD. (2)

1. 51 Vic. (D.), ch. 29, sec. 161.—The remedy by appeal to the Superior Court of irregularities in the proceedings of the arbitrators, exists under sec. 161 of the Railway Act. It is only when a valid award exists that the Court can be called upon to increase or diminish the amount of the award. *Cie. du Chemin de Fer*

(1) Decided in same sense in *Nesbitt* vs. *Bolduc*, 9th March, 1869. Duval C. J., and Caron, Badgley, Drummond, JJ. See also Loranger, Commentaire du Code Civil, Vol. 1, p. 140, No. 25.

(2) Under 51 Vic., ch. 29, sec. 161, appeal lies from award for sums over $400 to Superior Court on questions of fact and of law.

de M. & O. vs. St. Denis, Q. B. 1893, 2 Que. 532, affirming S. C., M. L. R., 6 S. C. 484.

2. Where a party for certain consideration agrees to submit to the terms of an award, he cannot appeal therefrom by virtue of a statute passed subsequent to the agreement and allowing appeals from awards. *Atlantic & N. W. Ry. Co. vs. Treyholme*, S. C. 1890, 19 R. L. 659, 18 R. L. 527.

3. Retroactive Effect of Appeal Statutes. 51 Vic., ch. 29, sec. 161.—The right of appeal is governed by the law in force at the time the award is rendered. *Cie. du Ch. de Fer de l'Atlantique du Nord-Ouest vs. Judah*, Q. B. 1891, 20 R. L. 527; *Same vs. Prudhomme*, S. C. 1889, 18 R. L. 143; *Same vs. Descaries*, S. C. 1891, 21 R. L. 194.

4. Sect. 161 of 51 Vic. (C.), ch. 29, provides: "Whenever the award exceeds $400, any party to the arbitration may, within one month after receiving a written notice from any one of the arbitrators, or the sole arbitrator, as the case may be, of the making of the award, appeal therefrom upon any question of law or fact to a Superior Court of the province in which such lands are situate: and upon the hearing of the appeal the Court shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators, as in a case of original jurisdiction." This Act was assented to on the 22nd May, 1888. The award in question was rendered 18th May, 1888, and served on the appellants 26th June, 1888—*Held*, that an award has the force of *chose jugee* between the parties only from the date of service thereof, and that the award in question having been served upon the appellants after the enactment of 51 Vict., ch. 29, they were entitled to the benefit of the appeal provided by that Act. *Mills vs. Atlantic & N. W. Ry. Co.*, 1888, M. L. R., 4 S. C. 302.

5. The arbitrators having proceeded under the Act then in force, which did not require that the evidence should be taken in writing, and there being no evidence of record, the Court was not in a position to revise the valuation made by the arbitrators.

6. **Contra.**—The right of appeal is governed by the law in force when proceedings commenced, and not when judgment rendered *Cie. du Ch. de Fer de l'Alt. au Nord-Ouest vs. Pominville*, C. R. 1890, 34 L. C. J. 241.

II. ARBITRATORS.

1. Appointment of.—Under the Railway Act, a judge of the Superior Court has no power to appoint an arbitrator for either of the parties, or to replace an arbitrator who has resigned. *Ont. & Que. Ry. Co. vs. Latour*, S. C. 1886, M. L. R., 4 S. C. 84.

2. —— R. S. Q. 5164.—The respondent in naming his arbitrator declared that he only appointed him to watch over the arbitrator of the company; but the company recognized him officially, and subsequently an award of $1,974.25 damages and cost for land expropriated was made under R. S. Q. 5164—*Held*, that the appointment of respondent's arbitrator was valid under the Statute, and bound both parties, and that in awarding damages for three feet of land injuriously affected on both sides of the track, the arbitrators had not exceeded their jurisdiction. *Que., Montmorency & Charlevoix Ry. Co. vs. Mathieu*, Supreme Ct. 1891, 19 Can. S. C. R. 426, confirming Q. B., 15 Q. L. R. 300.

3. —— **Objection to.** Que., 43-44 Vic., cit. 43, secs. 9, 25, 26, 27.—The evidence showing that the arbitrator objected to was not in the continuous employ of the respondents, but acted for them from time to time only, in his professional capacity as a notary public, and not in any other capacity, he was not disqualified from acting as arbitrator. *North Shore Ry. Co. vs. The Rev. Ursuline Ladies of Quebec*, Supreme Ct., 5th March, 1885, Cassel's Dig., 2nd edit., p. 37, confirming Q. B. 1884, 19 R. L. 614.

4. —— R. S. C., ch. 109.—The party expropriated cannot object to the arbitrator named by the company on the ground of his relationship to the surveyor whose certificate accompanies the offer made by the company, nor on the ground of alleged inexperience, especially when these facts were known to the proprietors before the appointment of the third arbitrator. The fact that the third arbitrator in the expropriation proceedings has since the award represented the company in other similar proceedings forms no legal ground of objection to such third arbitrator. *Benning vs. Atlantic & N. W. Ry. Co.*, Q. B. 1890, 34 L. C. J. 391, M. L. R., 6 Q. B. 385, M. L. R., 5 S. C. 136, affirmed in Supreme Ct., 20 Can. S. C. R. 177.

5. —— R. S. Q. 5164. §§ 25, 26, 27.—Where the arbitrator appointed by a proprietor stated to the proprietor prior to his appointment that he believed the company's offer was insufficient, this would not void the award. *Cie. de Ch. de Fer de Jonction de Beauharnois vs. Leduc*, Q. B. 1890, 19 R. L. 75.

6. Powers of. Railway Act (D.) 1868.—The indemnity or compensation awarded by the arbitrators can only consist of a capital sum of money and not of monthly payments in money. *Bourgonin* vs. *Compagnie du Chemin de Fer de Montréal, Ottawa et Occidental*, P. C. 1880, 24 L. C. J. 193, 3 L. N. 178; Q. B. 1880, 2 L. N. 131, 23 L. C. J. 96.

6*a*. The arbitrators have no right to order the making of certain works, or to condemn the expropriating party to perform such works. (*Ib.*)

7. —— The demand for expropriation as formulated in the company's notice to arbitrate was for the width of their track; but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award—*Held*, affirming the judgments of the Courts below (Q. B. 1888, 15 Q. L. R. 300), that the arbitrators had not exceeded their jurisdiction. *Que., Montmorency & Charlevoix Ry. Co.* vs. *Mathieu*, Supreme Ct. 1891, 19 Can. S. C. R. 426.

8. —— Where a riparian proprietor on a navigable river has had his right of passage obstructed by a railway company, the arbitrators can condemn the railway to give such proprietor a passage, or in the alternative to pay stated damages. (*Pion* vs. *North Shore Ry. Co.*, 14 App. Cas. 612 followed.) *Bigaouette* vs. *North Shore Ry. Co.*, Supreme Ct. 1888, 17 Can. S. C. R. 363, reversing Q. B. and S. C., 19 R. L. 488.

9. —— **Contra.**—The functions of valuators appointed under the Quebec Railway Act, to value property on the bank of a river for the purposes of expropriation, does not extend to awarding compensation for the deprivation of any easement or servitude upon the public wharves or banks of the river, even supposing any such right to exist. *Starnes* vs. *Molson*, Q. B. 1885, 29 L. C. J. 278; M. L. R., 1 Q. B. 427; (see remarks on this case in *North Shore Ry.* vs. *Pion*, 14 App. Cas. at p. 623).

10. Remuneration of—Arbitrator rendering additional Services to Party. R. S. C., Ch. 109, Sec. 8, Sub-Sec. 22.—The fact that a person who has acted as arbitrator on behalf of the landowner, in an expropriation by a railway company, has been paid by the company the amount taxed for his services as arbitrator, does not preclude him from recovering from the party appointing him the value of additional services rendered to such party in connection with the same arbitration, but outside of the ordinary duties of an arbitrator, such as interviews, consultations, etc. *Evans* vs. *Darling*, 1889, M. L. R., 6 Q. B. 73, 18 R. L. 572.

11. Recourse for Fees.—*Held*, where an award has been rendered against one of the parties to an arbitration under the Railway Act, which would have the effect of making him liable by law for the costs of the arbitration, and the award has been confirmed by the Superior Court, but he has appealed from such judgment, the arbitrator appointed by the other party has no action against the appellant for his taxed fees, at all events until the appeal has been determined. (1) *Brodie* vs. *M. & O. Ry. Co.*, S. C. 1893, 3 Que. 466.

12. Resignation—Effect of.—Following Art. 1348 C. C. P., a submission to arbitration becomes inoperative upon the resignation of one of the arbitrators named by either of the parties, if no provision is made in the submission for the replacement of such arbitrator.

13. Swearing of.—R. S. C., Ch. 109, Sec. 8, Sub-Sec. 20.—**Recusation.**—The fact that the arbitrators and the witnesses were sworn may be established by the declaration in the award itself, setting forth that they were sworn,—more particularly where no objection was made at the time by the arbitrator who represented the party objecting to the validity of the award. *Mills* vs. *Atlantic & N. W. Ry. Co.*, 1888, M. L. R., 4 S. C. 302.

14. —— —— *Held*, that where arbitrators, appointed for the purpose of fixing the indemnity to be paid by a railway company, for land expropriated by such company for the purposes of its railway, proceed to fix such indemnity, and render their award as such arbitrators, without having been previously sworn, the Court will annul and set aside such award of said arbitrators. That where in such case one of the parties institutes proceedings for the recusation of any of such arbitrators, notice of such proceeding in recusation must be given to the arbitrator against whom they are directed. *Whitfield* vs. *Atlantic & Northwest Ry. Co.*, S. C. 1888, 33 L. C. J. 24.

III. AWARD.

1. Absence of Dissentient Arbitrator. 51 Vic. (D.), Ch. 29, Sec. 161.—The

(1) Counsel—Remuneration of.—See under title "Advocates and Attorney—Fees of."

majority of the arbitrators having the right to make an award, the absence of the dissentient arbitrator at the time the award was signed before notary is not a ground of nullity. *Mills* vs. *Atlantic & N. W. Ry. Co.*, S. C. 1888, M. L. R., 4 S. C. 302.

2. Adjournment *sine die*.—An adjournment to enable one of the arbitrators to visit the property, without any date being fixed for next meeting, did not terminate the arbitration; and that an award made on a subsequent day, the three arbitrators being present, was a valid award. *Ont. & Que. Ry. Co.* vs. *le Curé, etc., de Ste. Anne du Bout de l'Isle*, 1891, 21 R. L. 180, M. L. R., 7 Q. B. 110.

3. —— Form of.—In an award for land expropriated for railway purposes, where there is an adequate and sufficient description, with convenient certainty of the land intended to be valued and of the land actually valued, such award cannot afterwards be set aside, on the ground that there is a variation between the description of the land in the notice of expropriation and in the award. *Bigaouette* vs. *North Shore Ry. Co.*, Supreme Ct. 1888, 17 Can. S. C. R. 363, reversing Q. B., 19 R. L. 488.

4. —— E. B. et al., joint owners of land situate in the city of Quebec, were awarded $11,900 under 43 and 44 Vic., ch. 43, sec. 9, for a portion of said land expropriated for the use of the North Shore Railway Company. On the 12th March, 1885, E. B. *et al.* instituted an action against the N. S. Railway Company, based on the award. The company not having pleaded, foreclosure was granted, and on 21st April, process for interrogatories upon *faits et articles* was issued, and returned on the 26th April. The company made default. On 18th June, the *faits et articles* were declared taken *pro confessis*. On 16th May, E. B. *et al.* consented that the defendants be allowed to plead, but it was only on the 7th July that a plea was filed, alleging that the arbitration had been irregular and was against the weight of evidence. On 2nd September, E. B. et al. inscribed the case for hearing on the merits, on which day the railway company moved for permission to answer the *faits et articles*, and the motion was refused. The notice of expropriation and the award both described the land expropriated as No 1, on the plan of the railway company deposited according to law, but in another part of the notice it described it as forming part of a cadastral lot 2345, and in the award as forming part of lots 2344, 2345. On the 5th December, judgment was rendered in favor of E. B. *et al.* for the amount of the award. From this judgment the railway company appealed to the Court of Queen's Bench (11 Q. L. R. 239), and that Court reversed the judgment of the Superior Court, holding *inter alia* the award bad for uncertainty, and that the case should also be sent back to the Superior Court, to allow the defendants to answer the *faits et articles*. On appeal to the Supreme Court of Canada, it was—*Held*, 1. That there was no uncertainty in the award, as the words of the award and notice were sufficient of themselves to describe the property intended to be expropriated and which was valued by the arbitrators. 2. That the motion for leave to answer *faits et articles* was properly refused. *Beaudet* vs. *North Shore R. R.*, Supreme Court, 1888, 11 L. N. 35, and 15 Can. S. C. R. 14.

5. —— It is not necessary that the award should contain the reasons of the arbitrators for arriving at their conclusions; nor that they should specify therein the damages for which an indemnity has been granted. *Co. de Chemin de Fer de Jonction de Beauharnois* vs. *Leduc*, Q. B. 1890, 19 R. L. 75.

6. —— *Held*, affirming the judgment of Wurtele, J., M. L. R., 5 S. C. 136. 1. The Railway Act (cap. 109, R. S. C.) only requires that the award in arbitration proceedings should state clearly the sum awarded and the property for which such sum is to be the compensation. It does not require that the award should mention the person to whom the award is to be paid, nor what amount is to be paid for land, and what amount for buildings to be taken, nor what amount has been deducted for increased value to be given to the remnant of the property. *Benning* vs. *Atlantic & N. W. R. Co.*, Q. B. 1890, M. L. R., 6 Q. B. 385, 31 L. C. J. 301, confirmed in Supreme Ct., 20 Can. S. C. R. 177.

6a. The Act in question does not require that the award should show on its face that a day had been fixed on or before which the award had to be made, or that it was made within the time so fixed; it is sufficient that it should be proved that as a matter of fact such time was fixed and that the award was made within the delay. (*Ib.*)

7. Interest on.—*Held*, affirming the judgment of Tait, J. (M. L. R., 5 S. C. 211), that where a railway company obtains possession of land on making a deposit, and the arbitrators subsequently make an award of a sum

money for the value of the land, and " in full " payment and satisfaction of all damages " resulting from the taking and using of the " said piece of land for the purposes of said " railway," the company is liable for interest on the amount of the award only from the date thereof, and not from the date when the company obtained possession of the land. It will be presumed that the arbitrators included in their award compensation for the company occupation of the land prior to the date of the award. *Reburn* vs. *Ont. & Que. Ry. Co.*, 1890, M. L. R., 6 Q. B. 381, 34 L. C. J. 299.

7*a*. —— But *Held*, where the railway company takes possession of the land required by it, after the institution of arbitration proceedings, but prior to the date of the award by the arbitrators, the latter are competent witnesses to prove that the matter of interest between the date of possession and the date of the award was not taken into consideration by them, and in that case the party expropriated is entitled to such interest in addition to the amount of the award, and it can be recovered by direct action. *Atlantic & North West Ry. Co.* vs. *Leeming*, Q. B. 1894, 3 Que. 165.

8. —— **Additional.** 51 Vic., Ch. 29, Secs. 170, 172.—To a petition to the Superior Court, praying that a railway company be ordered to pay into the hands of the prothonotary of the Superior Court a sum equivalent to six per cent. on the amount of an award previously deposited in Court under s. 170 of the Railway Act of Canada, and praying further that the company should be enjoined and ordered to proceed to confirmation of title with a view to the distribution of the money, the company pleaded that the Court had no power to grant such an order, and that the delays in proceeding to confirmation of title had been caused by the petitioner, who had unsuccessfully appealed to the higher Courts for an increased amount—*Held*, reversing the judgment of the Courts below, that by the terms of s. 172 of the Railway Act, it is only by the judgment of confirmation that the question of additional interest can be adjudicated upon. *Held*, further, (Fournier J., dissenting) that, assuming the Court had jurisdiction, until a final determination of the controversy as to the amount to be distributed, the railway company could not be said to be guilty of negligence in not obtaining a judgment in confirmation of title. *Atlantic & North West Ry. Co.* vs. *Judah*, Supreme Ct. 1894, 23 Can. S. C. R. 231.

9. **Interference with Appeal.** Que., 43-44 Vic., Ch. 43, Secs. 8, 9.—Where the terms of the award are obscure the Court can look to the arbitrators for an explanation thereof, but cannot modify or change the conclusions of the arbitrators. (1) *Cie. du Chemin de Fer du Nord* vs. *L'Hôpital du Sacré-Cœur*, Q. B. 1885, 15 R. L. 599.

10. Can., R. S. C., Ch. 109.—Inadequacy in the sum awarded may be such as in itself to constitute proof of fraud on the part of the arbitrators, and in such a case the Court may annul and set aside such award by reason of such fraud; but to justify such action by the Court, the sum awarded must be so grossly and scandalously inadequate as to shock one's sense of justice—which was not the case in this instance, the arbitrators having acted in good faith and with proper discrimination. (1) *Benning* vs. *Atlantic & North West Ry. Co.*, 20 Can. S. C. R. 177, confirming Q. B. 1889, M. L. R., 6 Q. B. 385, 34 L. C. J. 301, S. C., M. L. R., 5 S. C. 136.

11. —— When all the requirements of the law have been observed, the award made by the arbitrators, or any two of them, is final and conclusive; and the compensation awarded is entirely within the discretion of the arbitrators in the absence of fraud on their part, and is not in such case subject to review by the courts. (*Ib.*)

12. —— In a matter of expropriation of land for the Intercolonial Railway, the award of the arbitrators was increased by the Judge of the Exchequer Court from $4,155 to $10,824.25, after additional witnesses had been examined by the Judge. On an appeal to the Supreme Court it was—*Held*, affirming the judgment of the Exchequer Court, that as the judgment appealed from was supported by evidence, and there was no matter of principle on which such judgment was fairly open to blame, nor any oversight of material consideration, the judgment should be affirmed. Gwynne, J., dissenting. *Regina* vs. *Chartland*, Supreme Ct. 1889, 12 L. N. 221; 16 Can. S. C. R. 721.

13. —— Can. 1888, Ch. 29, Sec. 161 — In appeal from an award of arbitrators under this Statute, the Court should not as a means of arriving at valuation of the property, etc., strike an average from the conflicting estimates of the parties and their witnesses. The evidence of such witnesses should simply be appreciated in assisting the Court to determine

(1) These Acts granted no appeal from awards. But under "The Railway Act," Canada, 51 Vic., ch. 29 sec. 161, an appeal lies to Superior Ct. from sums over $400 upon questions of law and of fact.

the justness of the award, which should only be set aside in the case of palpable error. *Cie. du Chemin de Fer de l'Atlantique au Nord-Ouest* vs. *Judah*, Q. B. 1891, 20 R. L. 527.

14. —— Can. 1888, Ch. 29, Sec. 161.—While the Court has the right, under the Dominion Railway Act, to reconsider the evidence of value, and to vary the decision of the arbitrators or a majority of them, this power was intended only as a check upon possible fraud, accidental error, or gross incompetence, and should never be exercised unless in correction of an award which carries upon its face unmistakable evidence of serious injustice. *Canada Atlantic Ry. Co.* vs. *Morris*, Q. B. 1892, 2 Que. 222; and see *Paradis* vs. *The Queen*, 1 Can. Exch. at p. 229, judgment of Supreme Ct.

15. —— Can. 1888, Ch. 29, Sec. 161.—*Held*, in the matter of a railway expropriation, an award of arbitrators who have had the advantage of viewing and examining the property taken, and also the property affected by the construction of the railway, should only be altered by the Court when it is shown that the arbitrators were influenced by improper motives, or when the evidence clearly and conclusively establishes that they erred in fixing an amount undoubtedly too high or undoubtedly too low. *Cie. du Chemin de Fer Montréal & Ottawa* vs. *Bertrand*, Q. B. 1893, 2 Que. 203.

16. —— Can. 1888, Ch. 29, Sec. 161.—*Held*, in cases of expropriation, where the arbitrators or commissioners are experienced in the valuation of real estate, and where, in addition to hearing the opinion of the expert witnesses produced, they have had the advantage of examining the property to be taken, the Court, before making an increase or reduction of the award, will require either proof of improper motives on their part, or evidence showing conclusively that an error has been committed in fixing the amount of the compensation. *Cie. du Chemin de Fer Montréal & Ottawa* vs. *Castonguay*, Q. B. 1893, 2 Que. 207.

17. —— 51 Vic., Ch. 29, Sec. 161, Sub-Sec. 2.—The principle upon which a Superior Court ought to review the award of arbitrators in an appeal under sub-section 2 of section 161 of the Canadian Railway Act 1888, is not that the Court should entirely supersede the arbitrators, and themselves make the award, but that they should examine into the award on its merits, on the facts as well as the law, reviewing the judgment of the arbitrators as they would that of a subordinate Court, in a case of original jurisdiction where review is provided for. *Atlantic & North West Ry. Co.* vs. *Wood*, P. C. [1895] App. Cas. 257.

18. Homologation of.—An award of arbitrators cannot be homologated by a judge of the Superior Court, and is informal on its face, when it is not stated in what manner the third arbitrator has been appointed. *Atlantic & North West R.R. Co.* vs. *Johnson*, S. C. 1887, 10 L. N. 228.

19. —— Notice of a petition demanding the homologation of an award under Quebec Railway Act 1880, ch. 43, sec. 9, is duly served on the attorney of the opposite party at the prothonotary's office, when such attorney has not made election of domicile elsewhere. *Cie. du Chemin du Fer Sud-Est* vs. *Guevremont*, Q. B. 1887, 15 R. L. 258.

20. Notarial.—When the arbitrators in the record of their proceedings make a minute of the sum to be awarded as compensation, and agree that the award shall be in notarial form, and such award is afterwards drawn by a notary and signed by all three arbitrators, and duly served on the parties, such notarial award is the true award, and is valid. *Benning* vs. *Atlantic & North West Ry. Co.*, M. L. R., 6 Q. B. 385, confirmed in Supreme Ct. 1891, 20 Can. S. C. R. 177.

21. —— A notarial award is not necessary in the case of an arbitration under the Railway Act of 1879; the entering of the amount awarded in the minutes constitutes the actual award; and the fact that on a subsequent day the award was made out in notarial form and signed by two of the arbitrators, the other arbitrator not being present, does not invalidate the award as previously made and entered in the minutes. *Ontario & Quebec Ry. Co.* vs. *Les Curé, etc., de Ste. Anne du Bout de l'Isle*, M. L. R., 7 Q. B. 110.

22. Notice of Meetings. 1880 (Que.). Sec. 9, Ch. 43.—The award of arbitrators under this Act will not be void because the arbitrators did not give notice to the parties of the hour, the day, and the place of their meetings, nor because they did not hear the parties or their witnesses. *Cie. du Chemin de Fer Sud-Est* vs. *Guerremont*, Q. B. 1887, 15 R. L. 258.

23. Notice to absent Arbitrators. 51 Vic., Ch. 29, Sec. 152 (D.)—*Held*, affirming

the judgment of Wurtele J., M. L. R., 6 S. C. 481, an award of arbitrators under the Railway Act is irregular and void when the amount of the award was determined upon by two of the arbitrators at a meeting of which the third and absent arbitrator had not received due notice, nor been present at the adjournment stipulated as essential by section 152 of the Railway Act, 51 Vic., ch. 29. *Cie du Chemin de Fer Montréal & Ottawa* vs. *St. Denis*, Q. B. 1893, 2 Que. 532.

24. Payment of —— Deposit.—A proprietor expropriated is entitled to obtain the amount of the award out of the deposit made by the company, although an action may have been brought to set aside the award. *Cie. du Ch. de Fer de Q. & O.* vs. *Curé, etc., de Ste Anne de Bellevue*, M. L. R., 3 S. C. 154.

25. Principles for determining Valuation (See under title—"Expropriation.")—The principle to be followed by arbitrators in making such an award is that the proprietor shall be left in the same position, financially, as he was before his property was expropriated, without allowing any sentimental value, and therefore, when, as in this case, the evidence of the proprietors' witnesses proves that the value of the remnant of the property added to the sum awarded as compensation is greater than the price for which the proprietors were willing to sell the whole property before the expropriation, the award must be held to be reasonable and adequate. *Benning* vs. *Atlantic & N. W. Ry. Co*, Supreme Ct. 1891, 20 Can. S. C. R. 177, M. L. R., 6 Q. B. 385, 34 L. C. J. 301, M. L. R., 5 S. C. 136.

26. —— An award is not void because the arbitrators allowed for future damages which the property might suffer by reason of the construction of the railway. *Cie. du Ch. de Fer de Jonction de Beauharnois* vs. *Ledue*, Q. B. 1890, 19 R. L. 75.

27. Prolongation of Delay for making. 42 Vic., Ch. 9.—Where the delay for rendering the award has been prolonged with the consent of the arbitrators and the parties, neither of the parties can complain that the award was given after the delay originally fixed. *Cie. du Ch. de Fer Q. & O.* vs. *Curé, etc., de Ste. Anne de Bellevue*, S. C. 1887, M. L. R., 3 S. C. 154.

28. —— 42 Vic., Ch. 9 (D.)—Under the Railway Act of 1879, 42 Vic., ch. 9, where the arbitrators appointed to fix the compensation for a property adjourned to a day subsequent to that originally fixed for making the award, without stating in their minutes that such adjournment was for the purpose of making an award, and at their subsequent meeting the three arbitrators and counsel for the parties were present, and no objection was made to the regularity of the meeting, such absence of objection constituted a tacit ratification of the proceedings up to that time. *Ontario & Que. Ry. Co.* vs. *Le Curé, etc., de Ste. Anne du Bout de l'Isle*, M. L. R., 7 Q. B. 110, 21 R. L. 180, M. L. R., 5 S. C. 51.

ARCHITECT.

I. Property in Plans.
II. Liability of. 1-2. (See also under titles—"Builders"—"Contractors.")
III. Remuneration of.
Evidence—Quantum Meruit. 1.
Refusal to Show Plans. 2.
Who Liable for. 3-5.
IV. Submission of Plans. 1-2.

I. PROPERTY IN PLANS.

Plans, identified by parties to a contract to build a church and by the notaries, although not annexed to the contract nor specially stated to form part of it, form, nevertheless, an essential part of such contract, and, in the absence of proof that they are the property of the architect, will be deemed to be the property of the church, and cannot be revendicated by the architect in the hands of the notary having the legal custody of the contract and being also the depositary of the plans. *Moffatt* vs. *Scott*, Q. B. 1863, 8, L. C. J. 310.

II. LIABILITY OF.—(See also under title—"Builders"—"Contractors.")

1. Art. 1688.—Where the floor of a building had sunk, in consequence of the insufficiency of the timber used to support the joists—*Held*, that the *architects*, as well as the carpenters and joiners employed in the erection of the building, were jointly and severally liable for the damages incurred. *David* vs. *McDonald*, *McDonald* vs. *David*, and *Hopkins* vs. *David*, Q. B. 1863, 8 L. C. J. 44 and 14 L. C. R. 31.

2. Art. 1689 C. C.—In action by an architect for his commission—*Held*, that architects are responsible for defects in buildings erected

by them, though the plans were made by another architect before he assumed charge. *Scott* vs. *The Incumbent & Church Wardens of Christ Church Cathedral*, S. C. 1865, 1 L. C. L. J. 63.

III. REMUNERATION OF.

1. Evidence—Quantum Meruit.—In an action by an architect for the value of his services rendered in connection with the construction of a block of buildings, the value being estimated at a certain percentage on the cost of the buildings—*Held*, that although the architect had no right, in the absence of an express agreement, to recover a commission on the property *eo nomine*, yet the value of his services could be established by evidence; that the allowance of a commission was usual, and was a fair and reasonable mode of remuneration, in which case he would recover as for a *quantum meruit*. *Footner* v. *Joseph*, Q. B. 1860, 5 L. C. J. 225, 11 L. C. R. 94, 7 R. J. R. Q. 478; reversing S. C., 3 L. C. J. 233, 7 R. J. R. Q. 477; *Roy* vs. *Hunt*, S. C. 1879, 2 L. N. 347, and see remarks, 2 L. N. 345.

2. Refusal to show Plans.—The appellants in this case having refused to show the plans prepared by them as architects, for the respondents, or to place them at their disposal, could not recover the price thereof. *Resther* vs. *Frères des Ecoles Chrétiennes*, Q. B. 1890, 34 L. C. J. 89.

3. Who liable for.—In an action by an architect to recover the amount agreed upon for the superintendence of a house in course of construction—*Held*, confirming judgment of Court below, that an architect cannot at the same time be employed by the proprietor and the builder and receive pay from both, and the fact that the architect has covenanted with the builder to receive pay from him was sufficient to discharge the proprietor. *Tahrland* v. *Rodier*, Q. B. 1866, 16 L. C. R. 473.

4. —— An architect who has made plans, and superintended their carrying out at the request of the proprietor, has no claim for commission against the builder or contractor of such work. *Poitras* vs. *Deslauriers*, S. C. 1872, 4 R. L. 375.

5. —— The fact that the builder went to the architect to see the plans, and even to borrow them, is not in itself a presumption that the architect was employed by him. (*Ib.*)

IV. SUBMISSION OF PLANS.

1. Action was brought by the plaintiff, an architect, to recover the value of his services in the preparation of plans for a church. Letters were addressed on behalf of the congregation to the plaintiff and three other architects, inviting them to submit plans. The cost of the edifice was not to exceed $32,000. If the plans were rejected, the competitor was to receive only $50. All the plans were rejected except those of Mr. Thomas, and it appeared that his plan was not in accordance with the conditions. The others being also dissatisfied, the plaintiff brought action on a *quantum meruit*, and it was *Held*, that he was entitled to his *quantum meruit*, and judgment for an amount equal to one per cent. or $320 was granted him. *Hopkins* vs. *Thompson*, S. C. 1867, 3 L. C. L. J. 36.

2. The plaintiff, an architect, in response to a public advertisement, offered plans in competition for a building about to be erected by the defendant, on being assured by the president of defendant's board that all the plans sent in would be submitted to disinterested experts before a choice was made. The plans were not submitted to experts, and those finally adopted were submitted by an architect who was not a competitor within the terms of the public advertisement—*Held*, that the plaintiff was not entitled to damages, it being evident that the defendant was not bound to adopt the plans which might be recommended by the experts, and no partiality or bad faith in the selection being proved. *Walbank* vs. *Protestant Hospital for the Insane*, 1891, M. L. R., 7 Q. B. 166.

ARREST.

1. Privilege of Members of Parliament.—*Held*, that privilege from arrest under writ of capias did not attach to members of the Canadian Legislature in virtue of any law or usage, or by reason of any analogy between it and the Parliament of Great Britain, but that it attached solely on the ground of necessity, within which the case of the prisoner did not fall, the assembly having been prorogued some time previously, and the petitioner not then being engaged in any Parliamentary duty or service. *Cavillier* vs. *Munro*, Q. B. 1848, 4 L. C. R. 146.

2. Rights of Prisoner illegally Arrested.—On an application for bail, the applicant having shot the officer who was

making his arrest under a demand in extradition, but without any warrant—*Held*, that where the prescribed forms were not complied with, the police had no power to arrest, and the prisoner was quite justified in shooting as he had done. *Garner Exp.*, Q. B. 1868, 4 L. C. L. J. 59.

ARTICULATION OF FACTS.

I. Delay to File Answers. 1-3.
II. Form of. 1-6.
III. Failure to Produce. 1-3.
IV. When Allowable. 1-6.

I. DELAY TO FILE ANSWERS.

1. A party will be allowed to produce and file answers to articulations of facts, even after the final hearing of the case, upon payment of costs, the motion for leave being founded on an affidavit to the effect that such answers have not been produced through oversight or inadvertence. *Boswell* vs. *Lloyd*, S. C. 1862, 13 L. C. R. 121.

2. A party will not be allowed to file answers to articulations of facts after the case has been inscribed for review by the opposite party. *Nicotte* vs. *Reeves*, C. R. 1865, 1 L. C. L. J. 107.

3. Where a party has been permitted to file answers to articulations of facts after the delay allowed by law, and after inscription for hearing on the merits, such party will only be condemned to such costs as are caused by his failure to produce the answers within the proper delays; and the adverse party cannot put aside the proof already made by him and recommence his *enquête*, but can add to his proof if he has other witnesses to examine. *Lambert* vs. *Duclos*, S. C. 1886, 13 Q. L. R. 299.

II. FORM OF.

1. An articulation of facts which contains matters not to be found in the pleadings, or matters admitted by such pleadings, is nevertheless good. *Rouleau* vs. *Bacquet*, S. C. 1858, 8 L. C. R. 154, 6 R. J. R. Q. 182.

2. Art. 208 C. C. P.—A general articulation of facts will be rejected from the record as contrary to the law which requires such articulation to be clear and distinct. *Molsons Bank* vs. *Falkner*, 3. C. 1862, 6 L. C. J. 120.

3. Art. 208 C. C. P.—An articulation of facts in the words: "Is it not true that the "allegations, matters and things set forth in "the plaintiff's declaration in this cause filed "are true and well founded in fact," will be rejected with costs, as being no articulation of facts under the statute, and as being insufficient and irregular. *Day* vs. *Hart*, S. C. 1866, 16 L. C. R. 397.

4. No costs for articulation of facts, or for answers thereto, will be allowed, when the articulation is merely general. *Guérin* vs. *Mathe*, C. R. 1871, 15 L. C. J. 253; *Désautels* et vir vs. *Ethier*, C. R., 15 L. C. J. 301.

5. Art. 208 C. C. P.—Articulations in the following terms:—"*N'est-il pas vrai que* "*toutes les allégations de la déclaration du* "*demandeur sont vraies? N'est-il pas vrai* "*que toutes les allégations du plaidoyer des* "*défendeurs sont fausses?*" are illegal, and can be rejected on motion. *Leygat* vs. *Larose*, 1887, M. L. R., 3 S. C. 47.

6. Art. 208 C. C. P.—An articulation of facts which does not set up specific facts in the interrogatories does not comply with the requirements of Art. 208 C. C. P., and will be rejected from the record. *Williams* vs. *Labine*, S. C. 1891, M. L. R, 7 S. C. 237.

III. FAILURE TO PRODUCE.

1. Costs.—A party failing to produce articulations of facts must bear the expenses of his enquête. *Atkinson* vs. *Noad*, S. C. 1863, 14 L. C. R. 159.

2. —— A party failing to produce articulations of facts must bear the expenses of his enquête if the other party demands it. *Kimball* vs. *City of Montreal*, S. C. 1887, M. L. R, 3 S. C. 131.

3. Effect of.—The non-production of articulation of facts by one or other of the parties will not prevent the cause from being heard and adjudged. *Bélanger* vs. *Moyé*, Q. B. 1861, 6 L. C. J. 61.

IV. WHEN ALLOWABLE.

1. In an action, instituted under the Lessor and Lessees Act (embodied in the Code of C. P.), articulations of facts cannot be filed, and will be rejected (if filed) on motion to that end. *Mitchell* vs. *Gaucher*, S. C. 1872, 17 L. C. J. 66.

2. On applications for writs of injunction, articulations of facts are not called for, and, if filed, will be rejected. *Angus* vs. *The Montreal, Portland & Boston Railway Company*, S. C. 1879, 23 L. C. J. 161, 9 R. L. 646.

3. The defendant pleading the general issue will be allowed the taxation of witnesses produced by him to refute the evidence of plaintiff, without being required to file an articulation of facts to be proved by such witnesses. *Mathewson* vs. *O'Reilly*, S. C. 1879, 23 L. C. J. 313.

4. Articulation of facts cannot be produced on an exception to the form. *Lachambre* vs. *Normandin*, 1884, M. L. R., 1 S. C. 241; *Rees* vs. *Morgan*, S. C. 1878, 4 Q. L. R. 184.

5. Contra.—*George* vs. *La Cie. du Chemin de Fer du Pacifique Canadien* (Mathieu J.), S. C. 1884, 12 R. L. 632.

6. Articulation of facts should be produced on an exception to the form where the facts alleged in the plea are not admitted by the other party. *Russell* vs. *Asselin* (Mathieu, J.), S. C. 1892, 1 Que. 86.

ASSAULT.

1. Civil Remedy not affected by Criminal. By Art. 534 of the Criminal Code it is now enacted that—"after the commencement of this Act no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence." (1)

2. What constitutes.—Carrying away the windows of a dwelling house and leaving the occupants exposed to the weather is an assault. *Dubuc* vs. *City of Montreal*, S. C. 1879, 2 L. N. 334.

See CRIMINAL LAW.
" DAMAGES.

ASSESSMENTS.

See MUNICIPAL CORPORATION—TAXATION.
" SALE OF IMMOVEABLES.
" SCHOOLS.

ASSIGNMENT.

See INSOLVENCY.

ASSUMPSIT.

I. EVIDENCE IN ACTION OF.
II. WHEN IT LIES. 1-10.

See also " ACCOUNT, ACCOUNTING."

(1) For former jurisprudence, see *Dageneau* vs. *Hunter*, 1 R. de L. 346; *Lamothe* vs. *Chevalier*, 4 L. C. R. 160, 4 R. J. R. Q. 127; *Pingault* vs. *Symmes*, 7 L. N. 3; *Bouton* vs. *Lallemand*, 12 L. N. 260; *Marchessault* vs. *Gregoire*, C. R. 1873, 4 R. L. 541.

I. EVIDENCE IN ACTION OF.

In an action on *assumpsit* in which the bill of particulars filed was "to amount of account rendered $120," to which the general issue has been pleaded, it is competent to the plaintiff to prove that the account was really for the price of sale of a horse. *Cox* vs. *Patton*, Q. B. 1872, 17 L. C. J. 68.

II. WHEN IT LIES.

1. If there be a special agreement, an action *indebitatus assumpsit* will not lie. *Hitchcock* vs. *Grant*, K. B. 1817, 2 Rev. de Lég. 80; and *Fieblers* vs. *Blackstone*, *Ib.* 1818.

2. In an action of *assumpsit* for work and labor done, if it be pleaded and proved that the work was performed under a written agreement, the plaintiff cannot recover. *McGinnis* vs. *McCloskey*, S. C. 1857, 1 L. C. J. 193.

3. Money paid to a contractor in advance on account of the consideration of a contract for building cannot be recovered back by ordinary action of *assumpsit*. *Ingham* vs. *Kirkpatrick* S. C. 1856, 3 L. C. J. 282.

4. An action of *assumpsit* or debt will lie for a liquidated or acknowledged balance of account settled between co-partners, but until their account is settled the action must be founded on the partnership agreement and be in the form of an action to account. *De Lagrave* vs. *Hanna*, Q. B. 1818, 1 R. de L. 353.

5. When between co-partners a balance has been struck, an action of assumpsit or debt will lie for the amount; but if no balance has been so struck, the action must be for an accounting. *Robinson* vs. *Riffenstein*, Q. B. 1821, 1 R. de L. 352.

6. A party has no right of action in *assumpsit* against his former partner for debts alleged to be due, or money taken out of the partnership funds, where the partnership has been dissolved, the proper remedy being by an action *pro socio*. *Thurbur* vs. *Pilon*, S. C. 1859, 4 L. C. J. 37.

7. And in a later case in which the parties having been formerly in partnership made a statement of their partnership account, by which the defendant acknowledged himself to be indebted to the plaintiff in the sum of $232, and the plaintiff brought action in *assumpsit* for the amount.—*Held*, per J.J. Mondelet and Berthelot, Dis.—Mackay J., that the proper remedy was by action *pro socio* and not by assumpsit, which does not exist in our law

and cannot be tolerated. *Marcoux* vs. *Morris*, C. R. 1871, 3 R. L. 441.

8. Where defendant refused to take delivery of goods purchased by him, on the ground that the goods were inferior to sample, and plaintiff brought action for goods sold and delivered—*Held*, that the proper remedy was to have tendered the goods and then sued for breach of the contract, and as the goods were proved to be inferior to what they were represented to be, the action was dismissed. *Moore* vs. *Butters*, Q. B. 1868, 30 L. C. J. 32.

9. Appellant sold lumber to one P, who used it in building two houses on the property of respondent. Respondent paid appellant for the lumber used in the construction of one of the houses, but refused to pay for that used in the construction of the other, on the ground that he had never authorized P to purchase lumber for the second house—P having built it for his own benefit. Appellant brought action in *assumpsit* for the full amount of the lumber used by P—*Held*, that the action in assumpsit in such case was wrongly brought, and judgment dismissing confirmed. *Ryder* vs. *Vaughan*, 3 L. N. 391, and 1 Dorion's Q. B. R. 79, Q. B. 1880.

10. An action simply for work and labor will not lie in favor of a person who has worked for a company, against the person who ostensibly acted for the company in employing the plaintiff, although the company had no legal existence, if it appear that plaintiff knew how matters stood. *Guimond* vs. *Grondin*, Q. B. Que. 1881, Ram. Dig. p. 64.

ASSURANCE.

See INSURANCE.

ATTACHMENT.

(*a*) BEFORE JUDGMENT.
(*b*) BY GARNISHMENT.
(*c*) CONSERVATORY.
(*d*) FOR RENT.
(*e*) IN REVENDICATION.

(*a*) ATTACHMENT BEFORE JUDGMENT.

I. AFFIDAVIT.
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X. SALE OF PERISHABLE GOODS.
XI. WRIT OF.

I. AFFIDAVIT.

1. Amendment of.—The sworn affidavit for attachment before judgment cannot be amended. *Blais* vs. *Brunet*, S. C. 1889, 20 R. L. 144.

2. Jurat (See also under titles "AFFIDAVIT," "CAPIAS."—The court will not quash a writ of attachment because the jurat of the affidavit upon which it issues is certified by the prothonotary of the court, the office being held by two persons, the oath stating it to have been taken "before me," nor will the affidavit be held bad by reason of erasures not mentioned in the jurat of immaterial word or words without which the affidavit is otherwise complete. *City Bank* vs. *Hunter & Maitland*, Q. B 1847, 2 Rev. de Lég. 171.

3. —— An affidavit for a writ of attachment before judgment sworn before a commissioner of the Superior Court is irregular. *Fleming* vs. *Fleming*, S. C. 1854, 6 L. C. R. 473, 5 R. J. R. Q. 142.

4. —— Where a writ of attachment before judgment was issued upon an affidavit sworn before the deputy prothonotary, but which purported to be sworn before a commissioner of the Superior Court—*Held*, to be null, and that the deputy prothonotary would not be permitted to correct the error, inasmuch as such act having a retroactive effect might prejudice the interests of the defendant. *Gagnon* vs. *Rousseau*, S. C. 1855, 6 L. C. R. 461, 5 R. J. R. Q. 137.

5. —— The omission of the words "before us" in the jurat of an affidavit for attachment sworn to before the prothonotary of the Superior Court is a fatal irregularity, and a writ issued on such an affidavit will be quashed on motion. *Hough* vs. *Ross*, Q. B. 1864, 8 L. C. J. 96; confirming S. C., 13 L. C. R. 32.

6. —— An affidavit which was stated to be sworn to on the 29th Dec., 1883, before Her Britannic Majesty's Consul-General at New York, is sufficient. *Ryle* vs. *Corricean Silk Co.*, S. C. 1884.

7. Sufficiency of. ART. 834 C. C. P.—An affidavit for an attachment before judgment must state the fact, "that the defendant is about to secrete his effects" absolutely, or "that the plaintiff is informed and hath good reason to believe that the plaintiff is about to secrete his effects." *Lamoureux* vs. *Kimmery*, K. B. 1819, 3 Rev. de Lég. 307.

8. —— If in the affidavit the deponent swears, "that he is credibly informed and "verily in his conscience believes that the "defendant is immediately about to secrete "his estate, and that without the benefit of a "writ of attachment he may lose his debt or "sustain damage," it is sufficient. *Shaw* vs. *McConnell*, S. C. 1854, 4 L. C. R. 19, 4 R. J. R. Q. 62.

9. —— An affidavit for attachment before judgment, in which it is said "that the depo- "nent is credibly informed, hath every reason "to believe and doth verily in his conscience "believe, that the defendant is immediately "about to secrete his estate, debts and effects "with intent to defraud," is sufficient. *Wurtele* vs. *Price*, S. C., 5 L. C. R. 214; *Hayes* vs. *Kelly*, S. C., 5 L. C. R. 336, 4 R. J. R. Q. 366; and *Fitzback* vs. *Chalifoux*, S. C. 1855, 5 L. C. R. 385, 4 R. J. R. Q. 385.

10. —— In another case where the words "is credibly informed" and "in his conscience" were omitted—*Held*, to be insufficient. *Baile* vs. *Nelson*, S. C. 1855, 5 L. C. R. 216, 4 R. J. R. Q. 348.

11. —— In another case where the words "hath every reason" and "in his conscience" were omitted, the affidavit was held to be insufficient. *Maguire* vs. *Harvey*, S. C. 1855, 5 L. C. R. 251, 4 R. J. R. Q. 349.

12. —— An affidavit for a writ of attachment before judgment, in which it is alleged "that the deponent is credibly informed, has "every reason to believe, and doth verily in "his conscience believe, that the defendant "has secreted and is about to secrete his es- "tate, debts and effects with intent, etc.," is sufficient. *Laing* vs. *Bresler*, S. C. 1855, 5 L. C. R. 195, 4 R. J. R. Q. 335.

13. —— An affidavit for attachment before judgment, in which the word "*celer*" instead of the word "*receler*" was used, and the latter word was erased in the body of the affidavit and put in the margin without reference thereto in the jurat, was held to be good. *Bourassa* vs. *Hawe*, S. C. 1858, 8 L. C. R. 135, 6 R. J. R. Q. 170.

14. —— Affidavit for attachment before judgment, concluding with the averment, that without the benefit of the writ the plaintiff will lose his debt *or* sustain damage, is not bad for uncertainty, and although such affidavit contains special reasons in conformity to the 48th Section of the 22 Vic., ch. 5, insufficient in themselves to sustain the attachment, the affidavit will be sufficient if it contains the general averments sanctioned by the 10th Section of the 25th Geo. 3, ch. 2. *Milne* vs. *Ross*, S. C. 1859, 4 L. C. J. 3.

15. —— An affidavit for attachment before judgment, stating the indebtedness of the defendant to be "for goods, wares and merchandizes, by the said plaintiff's then and there and before that time sold and delivered, as will appear by the account thereof to be filed in this cause," is insufficient, inasmuch as it does not state that the sale and delivery was *to the defendant*; and the omission is not cured by the declaration in the affidavit that it is the defendant who is indebted. *Beaufield* vs. *Wheeler*, S. C. 1860, 5 L. C. J. 44.

16. —— An affidavit for attachment before judgment not alleging that the work was done "at the request of the defendant," but alleging an acknowledgment of the debt by promissory note, is sufficient. *Macnamara* vs. *Meagher*, S. C. 1860, 5 L. C. J. 49.

17. —— Affidavit for attachment before judgment in which deponent says that without the benefit of a writ he *may* lose his debt or sustain damage, is insufficient, and the omission in the *jurat* of the words "sworn before me (or us, as the case may be)" is also fatal. *Robertson* vs. *Atwell*, C. C. 1862, 7 L. C. J. 18.

18. —— In the case of an attachment before judgment, the words "*may* be deprived of his remedy and *may* lose *his debt and sustain damage*," in the affidavit, are not sufficient to justify the issuing of the writ. *Ferres* vs. *Rutherford*, S. C. 1864, 9 L. C. J. 102.

19. —— **Contra.**—On a motion to quash a writ of attachment, on the ground that the allegation in the affidavit was "that without the benefit of such a writ the plaintiffs *may* lose their said debt"—*Held*, that the use of the imperative was unnecessary, and that the affidavit as it stood was sufficient. *Sharples* vs. *Ross*, S. C. 1867, 17 L. C. R. 39.

20. —— In an affidavit for attachment before judgment, the words "may lose his debt or sustain damage" held sufficient. *Andersen* vs. *Beaugard*, C. C. 1877, 3 Q. L. R. 287.

21. —— The omission of the words "will lose his debt" does not vitiate the affidavit or entitle the defendant to have the writ quashed. *Giolia* vs. *McConnell*, C. C. 1863, 13 L. C. R. 465.

22. —— An affidavit in an action for money laid out and expended, and lent and advanced by the plaintiff to the defendant, and at his request, is bad for not distinctly stating that the money "paid, laid out and expended" was so paid, etc., to the use of defendant and at his request. *Maguire* vs. *Link*, S. C. 1865, 16 L. C. R. 372.

23. And where such affidavit embraces several causes of action, and one of them is defectively stated, it vitiates the whole affidavit. (*Ib.*)

24. —— In the case of an attachment before judgment, *en main tierce*, the omission to state in the affidavit, that the defendant was "personally" indebted to the plaintiff, and to state also the cause of debt, and that the defendant hath or had an intent to defraud his creditors and the plaintiff in particular, is fatal, and the attachment in such case will be quashed on motion. *Lynch* vs. *Ellice*, S. C. 1868, 12 L. C. J. 209.

25. —— On a motion by the defendant to quash a writ of attachment before judgment —*Held*, that the article of the Code of Procedure, which provides for the issuing of writs of attachment before judgment, *has not in any way altered, with respect to the affidavit required for such writs, the law as previously in force*, and that in such affidavit it is sufficient to state that the defendant is about to leave Lower Canada, or that he is about to leave the Province with intent to defraud his creditors, without stating that he is about to leave the heretofore Province of Lower Canada with such intent. *Beaulieu* vs. *Linklater*, C. C. 1867, 17 L. C. R. 406.

26. —— In an affidavit for attachment, the assertion "that the deponent is credibly informed and hath every reason to believe, and doth verily and in his conscience believe that defendant is secreting, etc.," with the grounds of belief, is sufficient, and the omission of the word "verily" in the conclusion of the affidavit is not fatal. *Clement* vs. *Moore*, S. C. 1869, 13 L. C. J. 163.

27. —— An affidavit for attachment before judgment, made before the passing of the Quebec Act 35 Vic., ch. 6, s. 18, to the effect merely that the defendant is *immediately about to secrete* his property, is sufficient. *Griffith* vs. *McGovern*, Q. B.; reversing C. R. 1872, 16 L. C. J. 336. The judgment in the Queen's Bench is not reported. See remarks of Ramsay J. in *Blake* vs. *Wadleigh*, 6 L. N. at p. 1.

28. —— In the case of a seizure before judgment, the absence of a specific allegation in the affidavit that the defendant "is secreting or is about to secrete his estate, debts and effects" is fatal. *McNeren* vs. *McAndrew*, S. C. 1873, 18 L. C. J. 70.

29. —— The affidavit when founded on a note not yet due must allege, besides the ordinary allegation, the insolvency of the debtor. *Trempe* vs. *Vidal*, C. C. 1874, 5 R. L. 539.

30. —— The omission to allege in an affidavit for attachment before judgment, that the defendant "is secreting" his property, or (in the case of a trader alleged to be insolvent) "that he still carries on his business," is fatal. *Osborn* vs. *Nitsch*, S. C. 1877, 21 L. C. J. 252.

31. —— Conformably to the judgment of the Court of Appeals, in *Hurtubise* vs. *Bourret*, 23 L. C. J., p. 130, in an affidavit for an attachment, it is not necessary to state the date of the debt, nor the place at which it was contracted. *L'Heureux* vs. *Martineau*, C. S.

1880, 6 Q. L. R. 275 ; *Lanktree* vs. *Grey*, C. R. 1891, M. L. R., 7 S. C. 453 ; *Ryle* vs. *Corriveau Silk Mills*, S. C. 1884.

32. —— Conformably to the judgment of the same court in *Dallimore* vs. *Brooke* (9 Rev. Leg., p. 657), the allegations in an affidavit for an attachment under 834 C. P., as to the grounds of the plaintiff's belief that the defendant is immediately about to secrete his property, etc., etc., may be stated according to form 45 of the C. P., although that form is given in connection with another article, namely, Art. 842. *L'Heureux* vs. *Martineau*, S. C. 1880, 6 Q. L. R. 275.

33. —— An affidavit in which the plaintiff swears that the defendant is secreting or is about to secrete his estate, debts and effects, with intent to defraud his creditors, or the plaintiff in particular, is insufficient. *Plante* vs. *Carrier*, S. C. 1879, 5 Q. L. R. 350.

34. —— Since the Act 35 Vic., ch. 6, sec. 18, amending Art. 834 C. C. P., it is sufficient to allege that the defendant has alienated his property with the intention of defrauding his creditors in general or the plaintiff in particular. *Arcand* vs. *Flanagan*, C. Ct. 1880, 7 Q. L. R. 256 ; *McGowan* vs. *Guay*, S. C. 1890, M. L. R., 6 S. C. 93.

35. —— **Contra.**—But held *contra* by Mathieu, J., that the above amendment allows the plaintiff the alternative of alleging either one or the other of the above intentions. He cannot allege both. *Vineberg* vs. *Harrowitch*, S. C. 1884, 12 R. L. 648. *Plante* vs. *Carrier*, supra No. 33.

36. —— The affidavit set out in this case contained all the essential allegations and is valid. *Gagnon* vs. *Hall*, C. Ct. 1884, 8 L. N. 71.

37. —— Where the affidavit for an attachment before judgment is made by one of the plaintiffs, it is not necessary to state that the deponent is authorized. *Dougall* vs. *Brun*, S. C. 1884, 12 R. L. 614.

38. —— And the fact that the affidavit alleges in the singular that the plaintiff will lose his debt, etc., when there are several plaintiffs, is not an irregularity sufficient to annul the seizure. (*Ib.*)

39. —— Nor is the deponent bound to give his reasons for the statement that the defendant is notoriously insolvent. (*Ib.*)

40. —— An affidavit which alleges that the defendant has secreted or is about to secrete a part of his goods and effects is sufficient, and it is not necessary to allege that he is about to secrete his goods and effects generally. *Schwob* vs. *Bertrand de St. Aignan*, S. C. 1887, 15 R. L. 328.

41. —— It is not necessary that the affidavit should be given by the plaintiff himself; it may be given by his bookkeeper. *Valin* vs. *O'Brien*, S. C. 1889, 18 R. L. 568, 33 L. C. J. 291.

42. —— The allegation that the defendant is about to leave the Province of Quebec with the intent to defraud his creditors is sufficient. (*Ib.*)

43. —— It is not sufficient to allege that the defendant is a contractor, and has ceased his payments; in such case the word "trader" must be used. (*Ib.*)

44. —— The allegations in an affidavit for attachment before judgment that the defendant is a trader is notoriously insolvent, and has refused to abandon his property for the benefit of his creditors, is sufficient. *McCall* vs. *Simmons*, S. C. 1890, 20 R. L. 343.

45. —— The allegations, in an affidavit for simple attachment, of an intent on the part of the defendant "to defraud his creditors *or* the plaintiff in particular," and that the plaintiff will "sustain damage or lose his debt," are not uncertain or incompatible. *McGowan* vs. *Guay*, 1890, M. L. R., 6 S. C. 93.

46. —— The allegation that the defendant "is secreting or is about to secrete his property," is uncertain and incompatible, and therefore insufficient to justify the issue of a writ of simple attachment. (*Ib.*)

47. —— The allegation "that the defendant absconds" is sufficient to justify the issue of a writ of attachment. (*Ib.*)

48. When necessary.—No attachment for debt can be obtained before judgment without an affidavit, except in cases of seizure for rent and the case of the *dernier équipeur*. *Tiffany* vs. *Derling*, K. B. 1810, 3 Rev. de Lég. 304 ; *Dubeault* vs. *Robertson*, C. Ct. 1864, 8 L. C. J. 334.

49. —— But *Held*, in an action for work and labor done as a rigger and *dernier équipeur* on board the "Miranda," while the defendant was master thereof in the harbor of Quebec, that whether the person doing the last repairs to a ship be the *dernier équipeur* or not, he cannot obtain process of attachment before judgment without affidavit. *Plante* vs. *Clarke*, C. C. 1866, 17 L. C. R. 75.

II. AGAINST FOREIGN CORPORATION.

1. Appellants, being indebted to respondent for money expended upon certain dumping cars held by him under lease from them, made an assignment in insolvency, under the laws of Ontario, and their assignee sold the cars to one Beemer, whereupon respondent seized them by a conservatory attachment alleging his debt, fraud and secretion on the part of appellants, and that said cars were the only property they possessed in the province of Quebec. Appellants petitioned to quash—*Held*, that the facts disclosed did not constitute a fraudulent secretion, and were not sufficient to justify the attachment, and that respondent, by his proceedings, having acknowledged the legal existence of appellants, they had sufficient interest to contest the attachment. *Ontario Car Co.* vs. *Hogan*, Q. B. 1887, 13 Q. L. R. 332, 19 R. L. 416.

2. Respondent having answered the petition to quash by a general denial only, would thereafter be restricted to the precise matter set up in his *affidavit*, and could not avail himself of other proof in the record which might show him to be entitled to the remedy sought to be enforced. (*Ib.*)

III. BY WIFE.

ART. 204 C. C.—A writ of attachment before judgment in an action for separation from bed and board issued on the petition of the plaintiff, which alleged that she was credibly informed and verily believed that the defendant to frustrate her action and her rights intended to dispose of and make away with his property and effects, the said writ being so issued by order of a judge in chambers to seize and attach all the property and effects of the defendant wherever the same may be found within the district —*Held*, to be good and valid. *Idler* vs. *Clarke*, S. C. 1860, 11 L. C. R. 490.

IV. CONTESTATION. (See also under title "CAPIAS.")

1. Burden of Proof. — An attachment issued for recovery of a debt not due, but which became due during pendency of suit, is properly declared good and valid by the final judgment in the case; and the truth of the contents of the affidavit, in virtue of which the writ issued, cannot in any way be attacked in such suit. *Préfontaine* vs. *Prévost*, (1) Q. B. 1857, 1 L. C. J. 104, 5 R. J. R. Q. 454.

(1) In a note at termination of case of *Leslie* vs. *Molson's Bank*, 8 L. C. J., at p. 7, it is remarked that, "at the argument it was stated by one of the judges that the report of the case of *Prefontaine* vs. *Prevost*, 1 L. C. J. 104, does not correctly convey the views of the judges in respect of the point under discussion."

2. Delay.—In the contestation by petition of an attachment before judgment the usual delays of procedure are applicable, and such procedure is not summary except in the cases of Arts. 820 and 823 C. C. P. *Greece* vs. *Higgins*, S. C. 1890, 20 R. L. 264.

3. Evidence.—Costs.—In contestation of an attachment before judgment, when the contestant in his answers to articulations of facts has, to avoid costs, admitted that he owes the plaintiff more than $5, the plaintiff may nevertheless make proof of his claim. *Mallette* vs. *Ethier*, S. C. 1888, M. L. R., 6 S. C. 383, 20 R. L. 262.

4. Exception to the Form. (2) ARTS. 819 *et seq.* AND 854 C. P. C.—An irregularity in an affidavit to attach property cannot be taken advantage of by an exception to the form. (2) *Barney* vs. *Harris*, K. B. 1811; Stuart's Rep. 52.

5. —— Where affidavit for an attachment before judgment was attacked by exception to the form, on the ground that the allegations of the affidavit were false, and asking that the attachment be quashed, and the plaintiffs demurred on the ground that the allegations of the affidavit could not be put in issue by an exception to the form, the exception was maintained and the demurrer dismissed. *Leslie* vs. *The Molsons Bank*, Q. B. 1861, (2) 8 L. C. J. 1, and 12 L. C. R. 265.

6. —— And again where the affidavit set up that "the defendant was concealing his property with intent to defraud his creditors, etc.," and the defendant contested the truth of the affidavit by exception to the form—*Held*, that the exception was properly brought, and being proved was maintained with costs. *Biroleau* vs. *Lebel*, (2) C. C. 1862, 6 L. C. J. 168; and *Chapman* vs. *Nimmo*, S. C. 1863, 8 L. C. J. 42, and 14 L. C. R. 103.

7. —— *Held*, notwithstanding above decisions, that the facts set forth in the affidavit and sworn to there could not be traversed by exception to the form. *Asselin* vs. *Kemp*, (2) C. C. 1864, 15 L. C. R. 191.

8. —— But *Held*, in Superior Court, the same year, that the affidavit for a writ of attachment before judgment and the writ itself may be attacked by exception to the form.

(2) The universal practice now is to contest the validity of the attachment before judgment by petition. See *infra* "Contestation of,—Petition."

Giroux vs. *Garcau*, (1) S. C. 1864, 14 L. C. R. 447, and 8 L. C. J. 164.

9. —— The truth of the allegations of the affidavit for attachment before judgment as well as the informalities thereof can be attacked by exception to the form. (1) *Bouchard* vs. *Morrison*, C. Ct. 1882, 10 L. N. 239.

10. Petition. Arts. 819 and 854 C. C. P.—No reasons for quashing a writ of attachment before judgment other than those set forth in the motion (or petition.—Ed.) can be taken into consideration by the court. *Godin* vs. *McConnell*, C. C. 1863, 13 L. C. R. 465.

11. —— An attachment before judgment may be attacked out of term by petition. *Maillou* vs. *Somerville*, C. C. 1864, 9 L. C. J. 80.

12. —— The petition in virtue of Art. 819 C. C. P. is an independent procedure, and the petitioner can invoke thereby the same defences as those raised by him in his exception to the form. *Morgan* vs. *LeBouthillier*, S. C. 1879, 5 Q. L. R. 212.

13. —— In the case of an attachment before judgment, where an exception to the form had been filed against the attachment, and subsequent to the filing of the exception a petition had been produced contesting the validity of the seizure, in the manner provided for the contestation of writs of *capias*, the proof of the petitioner on the petition may be proceeded with independent of the contestation on the exception to the form. *Quebec Bank* vs. *Steers*, S. C. 1868, 12 L. C. J. 227.

14. —— An attachment before judgment can only be contested by petition. *Quintal* vs. *Mounier*, S. C. 1880, 11 R. L. 554.

15. —— Art. 821 C. P. C.—Where a petition to quash a writ of attachment before judgment has been, after its presentment, continued to another day, it is not necessary that there should be an inscription for proof and hearing on the petition; but on the day fixed, the petitioner should be present with his witnesses, and upon default on his part to proceed with the petition, the court can, upon inscription by the plaintiff, render judgment upon the merits of the action, without regard to the defendant's petition. *McHugh* vs. *Walker*, C. R. 1892, 2 Que. 158.

16. Grounds of must be definite and clear.—An affidavit for an attachment before judgment cannot be attacked by vague and general reasons. *Hotte* vs. *Currie*, S. C. 1877, 22 L. C. J. 34.

17. When Debt not due. Arts. 821, 854 C. C. P.—The contestation of a writ of attachment before judgment must be made with the contestation to the merits, and not by petition, when the debt is not due. *Métrisse* vs. *Brière*, S. C. 1871, 15 L. C. J. 259.

(1) The universal practice now is to contest the validity of the attachment before judgment by petition. See *infra* "Contestation of.—Petition."

V. DAMAGES FOR ILLEGAL ATTACHMENT—(See Damages).

VI. GROUNDS OF.

1. General Principles.—Plaintiff, being about to give up bar keeping, and remove to another house, advertised his goods for sale by public auction, being at the time indebted in $104 to defendant, as assignee of an insolvent estate. Defendant had made frequent applications for payment, and plaintiff had constantly promised to pay, but had failed to do so. Defendant, seeing the plaintiff's advertisement caused an attachment to issue, which was contested by plaintiff. It was shown that there was no intention to secrete on the part of the defendant and as a consequence the Court held that the process of attachment before judgment could not be made use of as a means of compelling dilatory debtors to pay doubtful debts, that process being allowed by law only against debtors guilty of fraud; that the plaintiff had disproved the charge of fraudulent secreting, and had a right of action; but as the defendant had acted as a public officer, and without any feeling of malice towards the plaintiff, and as the latter had not suffered any real damages, and, moreover, had not acted as he ought to have done towards his creditors, damages were allowed to the plaintiff to the extent of $20, with costs as in an action for $60. *Powell* vs. *Paterson*, S. C. 1878, 4 Q. L. R. 192; *Perry* vs. *Peel*, S. C. 1879, 2 L. N. 404.

2. —— The issue of a writ of attachment before judgment cannot be justified by facts subsequent to the seizure. *DeMaisonneuve* vs. *Larue*, S. C. 1885, M. L. R., 1 S. C. 124.

3. Departure.—Where a debtor about to leave the province advised his creditor of the fact, and the latter made no objection thereto, he will not be considered as acting fraudulently so as to subject him to an attachment before judgment. *Riopel* vs. *Arpin*, C. Ct. 1872, 4 R. L. 270.

4. Departure after making Assignment—Insolvent Trader.—The fact that an insolvent trader has made a voluntary assignment of his estate does not justify his departure from the country without the consent of his creditors. It is his duty to be present, in order to give such information as may be required for the realization of his assets, and his departure without explanation is ground for the issue of an attachment before judgment. *Heyneman* vs. *Harris*, Q. B. 1886, M. L. R., 2 Q. B. 466.

5. **Departure.**—Departure from the province, unaccompanied by any circumstance to indicate fraud, does not give rise to the right of attachment before judgment. *Lanktree* vs. *Grey*, C. R., 1891, M. L. R., 7 S. C. 453; *Lagacé* vs. *Ayotte*, Q. B. 1880, 6 Q. L. R. 88. Confirming C. R., 1880, 5 Q. L. R., 240.

6. **Indebtedness.**—Where the affidavit for an attachment before judgment stated that the sum of money due was for the price of the immoveable property which the plaintiff promised to sell and the defendant promised to purchase:—*Held*, to be sufficient. *Shaw* vs. *McConnell*, S. C. 1854, 4 L. C. R. 49, 4 R. J. R. Q. 62.

7. **In Hands of Judicial Guardian.**—The seizure of the goods of a defendant by process of attachment before judgment in the hands of the judicial guardian in whose custody they are is valid. *Merchants Bank* vs. *Montreal, Portland & Boston Railway*, C. R. 1883, 6 L. N. 229.

8. **Secretion.**—The plaintiff filed a petition for attachment under the provisions of 12 Vic., cap. 42, sec. 8, alleging that the defendant had, after the institution of the action and before the making of the statement filed by defendant, as well as within thirty days next preceding the institution of the action, secreted a large portion of his property exceeding in value £2,000, with intent to defraud their creditors—*Held*, on demurrer, that the petition was sufficient and would not be dismissed. *Foster* vs. *Dorion*, S. C. 1858, 8 L. C. R. 152.

9. —— Where a trading partnership obtained advances from a bank, under an agreement that the proceeds of sale of hemlock bark extract manufactured by the partnership should be paid into the bank in re-payment of the advances, and the partnership, while in a state of insolvency and largely indebted to the bank, contrary to the agreement, applied the proceeds of 174 barrels of bark extract to the general purposes of the business, without the knowledge or consent of the bank; such act (even in connection with evidence that the acts of partnership as regarded the bank were from first to last akin to fraud) did not amount to secretion with an intent to defraud, sufficient to sustain an attachment before judgment. *Quebec Bank* vs. *Steers*, Q. B. 1870, 13 L. C. J. 155, confirming C. R., 13 L. C. J. 75.

10. —— The head of the firm defendants, a foreigner residing at Bremen, in Germany, had for some time been insolvent, and, in consequence, the defendants B. M. & P., at Quebec, were in liquidation, and had, from time to time, made remittances from the funds of the firm so in liquidation to B. in Germany. Whilst the business of the firm was so being wound up, the defendants, and specially B., refused to pay or to make any offer towards the payment of the plaintiffs' debt, and at the same time were causing the assets of the firm to be placed beyond the reach of the plaintiff's and their other creditors, and beyond the jurisdiction of the Court—*Held*, that such proceedings on the part of the defendants were, in law and in effect, a fraudulent secreting of their property, sufficient to warrant the issue of a writ of attachment before judgment. *Mills* vs. *Meier*, Q. B. 1879, 5 Q. L. R. 274, affirming S. C., 5 Q. L. R. 153.

11. —— The refusal to pay, accompanied by such a disposal of the property or part of the property of the debtor as shall place it out of the reach of the creditor, and out of the jurisdiction of the Court of the place where the debt was contracted and where the business of the debtor was carried on, is to all intents and purposes a secreting within the meaning of the law, and implies an intent to commit a fraud. *(Ib.)*

12. —— In attachment before judgment the secretion mentioned in Art. 831 C. C. P. means that the defendant is secreting at the time of making the affidavit, or that he is about to secrete. *Dorion* vs. *Dorion*, 1887, M. L. R., 3 Q. B. 155.

13. —— The fact that a debtor wastes money in dissipation does not establish acts of secretion to warrant the issue of an attachment before judgment. *Mallette* vs. *Elvé*, C. R. 1889, M. L. R., 7 S. C. 151.

14. **Selling Property and leaving Country.**—In an attachment before judgment, the only proof that defendant was making away with his estate was that he had advertised his moveable property for sale, but no notice or advertisement was made at Longue

Pointe where the plaintiff lived—*Held*, insufficient, as there was no proof of fraud, and attachment dismissed. *Quinn* vs. *Edson*, S. C. 1865, 1 L. C. L. J. 29.

15. —— A defendant who keeps an hotel, but who is about to give up that occupation and announces the sale of his moveables, and who sells them with the knowledge of the plaintiff, is not liable on that account to attachment of his property before judgment. *Primeau* vs. *Trudeau*, Q. B. 1878, 8 R. L. 566.

16. —— The defendant, in 1875, gave the plaintiff an obligation for $100, with interest at 8 per cent., upon which he gave her a first mortgage duly registered upon a farm, which he had purchased at sheriff's sale for $1,320. The evidence showed that the farm so purchased had somewhat decreased in value, but even the plaintiff's witnesses acknowledged that it was worth more than five times the amount of the plaintiff's claim. The defendant owed another sum of $375, for which he sold his farm with right of redemption, which had expired by lapse of time, and he further owed a couple of small debts amounting together to $41. The defendant having a large family, it was decided that the father and four daughters should go to the States and try to earn money to pay off the incumbrances on his farm, and that the sons should remain to work upon a lot of land belonging to one of them in the township of Bulstrode. With a view to their leaving, in order to pay travelling expenses, defendant advertised his moveable property, of the value of about $200, for sale by auction, and thereupon the plaintiff sued out a writ of attachment before judgment, making the usual affidavit for that purpose. The defendant proved that he had always borne a good character, was much more than solvent, had always met his engagements, and that the action in question was the first that had ever been instituted against him—*Held*, that there was no evidence of fraudulent intent on the part of the defendant, that the plaintiff's claim was perfectly secured, and that her attachment was entirely unfounded. *Lagacé* vs. *Ayotte*, C. R., 5 Q. L. R. 240, and Q. B. 1880, 6 Q. L. R. 88.

17. —— Attachment before judgment, on the ground that the defendant intended to remove to the United States, and was secreting her effects. No proof of the first ground, and under the second it was proved that she had sold all her effects, moveables, etc., some time before the attachment, for the sum of $2,000, which had been handed over to privileged creditors. The sale was a public one. Attachment quashed. *Latour* vs. *Brunelle*, S. C. 1881, 4 L. N. 141.

18. Where Debt not Due. ART. 1092 C. C.—In an attachment before judgment for notes not yet due, where the deponent swears that the defendant is secreting his goods, is selling them and getting rid of them with the intention of defrauding the plaintiff, his creditor, and it is his belief that, without the benefit of an attachment before judgment, he will suffer damage and lose his debt; he is not bound to add that the defendant is insolvent, the insolvency being sufficiently indicated in the fraud and concealment alleged. *Blais* vs. *Brunet*, S. C. 1889, 20 R. L. 144.

VII. GUARDIAN UNDER.

In a case of attachment before judgment—*Held*, that the appointment of the plaintiff as guardian of the effects seized would not vitiate the seizure. *Boudrot* vs. *Locke*, (1) C. C. 1863, 13 L. C. R. 469.

VIII. POWER TO ISSUE.

A justice of the peace has no authority to issue a writ of attachment before judgment. *Corporation of the Parish of St. Philippe Exp.*, S. C. 1856, 6 L. C. R. 484, 5 R. J. R. Q. 150.

IX. RIGHT OF.

1. Action to Account.—An attachment before judgment cannot properly issue where the plaintiff's action is for an accounting. *Dorion* vs. *Dorion*, Q. B. 1887, M. L. R., 3 Q. B. 155.

2. Bank Shares.—Bank shares cannot be seized by a writ of attachment before judgment. *Hudon* vs. *Painchaud*, Q. B., Montreal, June, 1875.

3. In Hands of Creditor.—A creditor may attach in his own hands, before judgment, money and effects of his debtor. *Dorion* vs. *Dorion*, Q. B. 1887, M. L. R., 3 Q. B. 155.

4. Immoveables. ART. 834 C. C. P.—The immoveables of the debtor cannot be legally seized under a writ of attachment before judgment. *Corbeil* vs. *Charbonneau*, C. R. 1881, 4 L. N. 277, 12 R. L. 316, reversing S. C. 1880, 3 L. N. 381; 1881, 1 L. N. 60.

(1) See *Patville* vs. *Guilmette*, 1 R. L. 51.

5. **Insurance Money in Hands of Tenant.**—A landlord cannot attach, by a writ of seizure before judgment, the money payable under a fire insurance policy to his tenant, on the simple pretension that the tenant is worthless and that the moveables insured and destroyed by the fire were hypothecated or affected for the landlord's claim. *Bélanger* vs. *McCarthy*, S. C. 1874, 18 L.C. J. 138.

6. **Timber upon which Advances have been made.** Arts. 1472, 1493 and 1970 C. C.—The respondent, plaintiff in the court below, attached a quantity of timber got out by the defendant, but upon which advances in goods and merchandise had been made by the respondent under a written agreement between him and the defendant, by which the timber as soon as dressed should be considered to belong to the appellant, but conveyed to market at the risk and expense of the defendant, and also that the plaintiff should have the sale of the timber, and account to the defendant for any balance remaining after deduction of disbursements and advances, including ten per cent. upon the latter with a commission of two and a half per cent. upon the sale—*Held*, that after delivery to appellant before it reached market, without fraud or collusion with defendant, the timber could not be attached by defendant's creditors, but the balance, if any, after a sale by the plaintiff could be attached in his hands. *Vankoughnet* vs. *Maitland*, K. B. 1829, Stuart's Rep. 357, 1 R. J. R. Q. 301.

7. **Vessels.**—Art. 834 C. C. P. *Held*, that a vessel laden and ready for sea could be attached for a civil debt unconnected with the ship. *Parant* vs. *Grenier*, K. B. 1831, Stuart's Rep. 453, 1 R. J. R. Q. 352.

X. SALE OF PERISHABLE GOODS.

Perishable goods seized under attachment before judgment cannot be ordered by the Court to be sold, while awaiting a final decision of the case. *Lavochelle* vs. *Piché*, S. C. 1857, 1 L. C. J. 158.

XI. WRIT OF.—Art. 837 C. C. P.

It is not necessary to endorse on the writ the name of the person who made the affidavit. *Blais* vs. *Brunet*, S. C. 1869, 20 R. L. 144.

(*b*) ATTACHMENT BY GARNISHMENT.

I. Appeal, Effect of.

II. Appearance of Garnishee.

III. Contestation of Garnishee's Declaration.

Allegations of Contestant. 1-2.
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Costs. 4.
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IV. Declaration of Garnishee.

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Amount for which Debtor is collocated. 1.
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XV. Service. 1-2.

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" Gaming Contract.

I. APPEAL—EFFECT OF.

An attachment by garnishment is not dissolved by an appeal from the judgment under which the attachment is made. *Desjardins* vs. *Ouimet*, S. C. 1879, 2 L. N. 194.

II. APPEARANCE OF GARNISHEE.

A garnishee has no right to appear by attorney, in answer to the writ served on him, and an appearance fyled under such circumstances will be rejected on motion. *Forbes* vs. *Lewis*, S. C. 1871, 18 L. C. J. 74.

III. CONTESTATION OF GARNISHEE'S DECLARATION.

1. Allegations of Contestant.—A plaintiff in his contestation of the declaration of a garnishee cannot allege himself to be the proprietor of certain effects in the possession of the garnishee, and ask that the same be sold to satisfy the amount of a judgment against the defendant. *Nordheimer* vs. *Roy*, C. C. 1866, 16 L. C. R. 298.

2. —— Where a contestation of a garnishee's declaration merely alleges that the garnishee is indebted to the defendant, without indicating the reasons of the indebtedness, it will be dismissed on demurrer. *Stanley* vs. *Webster*, S. C. 1890, 20 R. L. 129.

3. Contestation by one Act of three Declarations of Joint Debtors — On the hearing of contestation of the declaration of the garnishee in an attachment in garnishment against three garnishees—*Held*, that as the garnishee must be considered a party in the cause and not a witness, that the nature of the debt due by several garnishees must determine the nature and form of the contestation of their respective declarations, and that a contestation by one act of three separate but similar declarations of garnishees who are joint debtors of the defendant is good and valid. *Macfarlane* vs. *Whiteford*, Q. B. 1857, 1 L. C. J. 49, and 7 L. C. R. 318, 5 R. J. R. Q. 262.

4. Costs.—Where the declaration of a garnishee does not fully disclose the facts of the case, the garnishee must pay the costs of contestation. *McFarlane* vs. *Delisle*, 1859, 3 L. C. J. 163.

5. By Defendant.—The declaration of a garnishee cannot be contested by a defendant on the ground that the goods of the garnishee are under seizure for the amount admitted by him in his declaration to be due to the defendant, the defendant having no interest in raising such a contestation; and such a contestation will be dismissed on demurrer filed by the garnishee himself. *Constable* vs. *Gilbert*, S. C. 1859, 4 L. C. J. 299.

6. —— A defendant foreclosed from pleading to a writ of attachment after judgment will, on special motion, be allowed to answer the plaintiff's contestation of a garnishee's declaration made in obedience to such writ, if he has an interest in the matters raised by the contestation. *Kingston* vs. *Torrance*, S. C. 1864, 9 L. C. J. 20.

7 Defenses of Garnishee.—A garnishee whose declaration is contested cannot attack the validity of the judgment or the regularity of service of the writ of attachment, such objections being personal to the defendant, and moreover waived by the garnishee, by the fact of his declaring. *Tousignant* vs. *Tousignant*, S. C. 1885, 11 Q. L. R. 269.

8. —— His declaring will be construed as a waiver of such objections, even when he alleges that he made his declaration in another district, and that the proceedings in the case did not come to his knowledge until long after he had made it. The facility afforded him by law of making his declaration in his own district, and having it transmitted, does not prevent his being a party to the suit in the district where the judgment was obtained, and he is bound to take cognizance of the proceedings there. (*Ib.*)

9. **Delay to Contest.**—Art. 626 C. P. C. To be admitted to contest declaration of a garnishee after the expiration of eight days from the filing thereof, it is necessary to shew sufficient cause why the contestation was not filed within the prescribed delay. *Lynch* vs. *McLennan*, 3 L. C. J. 114.

10. —— Declaration of garnishee cannot be contested after the expiration of eight days from the filing thereof, unless by express permission of the court. *Bruneau* vs. *Charlebois*, Q. B., 1857, 3 L. C. J. 56.

11. —— Motion by the plaintiff to be allowed to contest the declaration of the garnishee made in December, 1877, and on the part of the garnishee that he be discharged. Similar motions were made in the February previous. The petition of the bank failed because it showed no reason why it should be allowed to contest, and was unsupported by affidavit. The demand for peremption failed because the petition of the bank served a few days before was held to be an interruption of the peremption. The present application of the bank gave no reasons why it should so late in the day be allowed to contest. Besides, the bank had lodged another attachment in the hands of the garnishee. Both motions rejected. *Banque Ville-Marie* vs. *Société de Construction du Canada*, S. C. 1881, 4 L. N. 86.

12. —— The declaration of a garnishee cannot be contested without leave of the Court, but such leave may be granted even after the delays have expired, on payment of costs. *Neveu* vs. *Rabeau*, S. C. 1881, 4 L. N. 44.

13. —— In attachment by garnishment before judgment, the plaintiff forfeits his right to contest the garnishee's declaration if he omits to do so before the principal judgment, or before the expiration of the eight days following, unless such delay has been extended by the Court. *Richard* vs. *Michaud*, C. R. 1882, 8 Q. L. R. 244.

14. —— When the seizing creditor, in a seizure by garnishment, has allowed the eight days to elapse without contesting, he cannot afterwards contest the declaration of the garnishee without leave from the Court. *Astle* vs. *Andrews*, S. C. 1883, 9 Q. L. R. 144.

15. —— A contestation filed after the eight days, and without leave of the court, will be rejected. Although the seizing party cannot forfeit his right to contest without an order of the court to that effect, this only means that he can always ask for leave so long as he has not been foreclosed by the Court. *Tousignant* vs. *Tousignant*, S. C. 1885, 11 Q. L. R. 269.

16. —— When a delay is granted by the Court, the contestation must be, not only *served*, but *filed*, within such delay. (*Ib.*)

17. **Discontinuance of Contestation —Costs.**—Where a plaintiff had been led to contest a garnishee's declaration owing to its vagueness—*Held*, that he might discontinue the contestation without being subjected to costs. *Bonnell* vs. *Miller*, S. C. 1866, 1 L. C. L. J. 122.

18. **Failure of a Garnishee to answer Contestation.**—Where a garnishee, whose declaration is contested, fails to answer the contestation, the allegations of such contestation are not held to be admitted, but proof must be adduced in support of such contestation. *Mattinson* vs. *Cadieux*, Q. B. 1880, 25 L. C. J. 255.

19. **Jurisdiction of Circuit Court.**—The contestation of a garnishee's declaration forms a separate and distinct issue from that of the original action, and if the amount involved in such contestation by the addition of interest and costs to the original amount sued for, exceeds the jurisdiction of the Circuit Court, it will be sent to the Superior Court. *Wright* vs. *Corp. of Stoneham*, S. C. 1881, 7 Q. L. R. 133.

20. —— The defendant, a merchant, residing at Ste. Geneviève de Batiscan, became financially embarrassed; on the 23rd September, 1882, at Montreal, he made a voluntary notarial assignment of all his estate to the two garnishees. The garnishees entered into possession of his assets, and realized, from the sale of such assets, $2,200.71. The defendant's pretensions are that they sacrificed his assets; he claims that they sold to one Alphonse Turcotte, for $1,690, his stock in trade, which was worth $2,825.42; and that, to the same person, they sold for $500, a building lot with a dwelling and a store upon it; a hypothecary debt for $182; promissory notes,

to the amount of $718.20. The plaintiff in this case, a creditor of the defendant for $185, became dissatisfied with the trustees' management of the defendant's estate, sued the defendant, in the Circuit Court at Three Rivers, for that sum, and, on the defendant's confession, obtained judgment. The plaintiff then lodged a writ of seizure by garnishment in the hands of the trustees. The garnishees separately, on oath, made declarations, identical in their terms; the plaintiff in this case contested the declaration of each of the garnishees. Issue having been joined on the contestations, the parties proceeded to proof and hearing; and, upon the 8th February, 1883, the Circuit Court dismissed the present plaintiff's contestations of those declarations, and adjudged that the trustees, as garnishees, had rendered a satisfactory judicial account of their management of the defendant's estate. In the Court of Review, it was—*Held*, that the Circuit Court had no jurisdiction in the subject matter of the litigation, since it involved an amount exceeding $200; and that, on that ground, the judgment should be reversed. *Guillet* vs. *L'Heureux*, C. R. 1883, 9 L. N. 371.

21. —— The plaintiff, having selected a tribunal without jurisdiction to try such contestations of the garnishees' declarations, involving an amount exceeding $200, should be condemned to pay the costs of such contestations. (*Ib.*)

22. —— Since the garnishees had not invoked, either in the Circuit Court or in Review, the question of jurisdiction, each party should be condemned to pay his own costs in review. (*Ib.*)

23. —— The Circuit Court has no jurisdiction to pronounce on the merits of a contestation of a garnishee's declaration, concerning the revocation of the transfer of a debt of $1,150 on account of fraud. *Lapointe* vs. *Bélanger*, C. R. 1881, 7 Q. L. R. 316.

24. —— The Circuit Court cannot decide upon the contestation of a garnishee's declaration, demanding that a sale by defendant to the garnishee for a price exceeding $200 should be declared null; and if the Circuit Court should decide such contestation a writ of prohibition would lie, ordering the Court to suspend all proceedings thereon. *Doherty* vs. *La Cour de Circuit de St. Francis*, C. C. 1888, 16 R. L. 144.

25. —— In a contestation of a garnishee's declaration in a Circuit Court action, wherein matters are to be decided which are beyond the jurisdiction of that Court, such case will be evoked to the Superior Court. *Chandonnet* vs. *Chandonnet*, C. R. 1894, 6 Que. 289. (Following *Wright* vs. *Corporation of Stoneham*, *supra* No. 19.)

26. —— **Contra.**—But *Held*—on the contestation of a declaration of a garnishee in the Circuit Court, that said Court has jurisdiction to pronounce upon the validity of a deed invoked by the garnishee to prove title to goods in his hands, though the price or consideration mentioned in the deed exceed $200. *Adams* vs. *Boucher*, C. R. 1892, 2 Que. 182; *Leduc* vs. *Tourigny*, Q. B. 1883, 17 Q. L. R. 385.

27. Pleading—Sale in Fraud of Creditors.—A sale and transfer in fraud of creditors may be attacked by a creditor on the contestation of the transferee's declaration. *Kane* vs. *Racine*, Q. B. 1880, 3 L. N. 66 and 24 L. C. J. 216; and see *Wilson* vs. *Mahon*, C. R. 1893, 3 Que. 267.

28. When Necessary. ART. 619 C. C. P. —Although, from the general tenor of the declaration of a garnishee it may be reasonably inferred that, at the time of the service upon him of the writ of garnishment, he was indebted to the defendant, yet, if the garnishee shall have expressly declared that he was not so indebted, the garnishee cannot be condemned on a motion for judgment against him; the plaintiff must adopt the proceeding of a contestation of the garnishee's declaration. *Lagacé* vs. *Grenier*, C. C. 1886, 9 L. N. 412.

29. —— Where the garnishee has declared that he owes the defendant nothing, but in answer to questions put by the judgment creditor, under C. C. P. 619, has made admissions which apparently show that he has a sum in his hands belonging to the defendant, the proper course is to contest the declaration, and not to inscribe for judgment *ex parte* on such statements. *Grant* vs. *Federal Bank of Can.*, 1885, M. L. R., 2 Q. B. 4, 29 L. C. J. 332.

30. —— The answers of a garnishee to questions which may be put to him by the plaintiff seizing do not form part of his declaration, and a judgment cannot be rendered on such answers *de plano;* the seizing creditor must contest the declaration. *Laframboise* vs. *Rolland*, C. R. 1885, M. L. R., 2 S. C. 75, reversing S. C., M. L. R., 1 S. C. 367.

31. —— A garnishee who declares he is not indebted to the defendant, but who does

not declare that at the time he was served with the writ he was not indebted to him, but adds that since the service he has paid the defendant a certain sum, can be condemned to pay such sum to the plaintiff, without the latter's contestation of the declaration. *Robert* vs. *Laporte*, S. C. 1890, 18 R. L. 612.

IV. DECLARATION OF GARNISHEE.

1. Cannot be Divided.—The plaintiff was a judgment creditor of defendant in his quality of curator to the vacant succession of the late A. D., and lodged an attachment by garnishment in the hands of the Guarantee Co. The Company declared that they had in their hands a sum of $570.24 belonging to the succession, but that they held it as a special security to secure them against any claims which might be brought against them under certain bonds given by them to the Queen, whereby they guaranteed the good conduct of the said A. D. On a contestation, the declaration was maintained. *McNichols* vs. *Badeau*, S. C. 1880, 3 L. N. 134.

2. Concerning Wages.—The garnishee was condemned as the personal debtor of the defendant. The plaintiff took an attachment against him in the hands of his employer. J. G. S. appeared, but declined to answer questions touching the terms of R.'s engagement, claiming that wages not due could not be seized. Upon motion of plaintiff to make the garnishee answer—*Held*, that he was bound to answer under Art. 619 C. C. P. *Shaw* vs. *Bateman*, C. C. 1884, 7 L. N. 368.

3. Delay to Transmit. Arts. 617-624 C. C. P.—Where a garnishee made his declaration in the district where he resided, which was not the district where the writ issued, and the prothonotary having neglected to forward it in time, the garnishee was condemned to pay the debt personally, unless he made a new declaration, and paid all the costs of the garnishment; on motion, leave to appeal was granted. *Gleason* vs. *Vancourtland*, Q. B. 1878, 1 L. N. 115.

4. Documentary Evidence.—A garnishee, referring in his declaration to certain documentary evidence, will be held to produce the same at his own cost, on motion by plaintiff to that effect. *Forsyth* vs. *Canada Baptist Missionary Society*, S. C. 1852, 2 L. C. J. 167, 6 R. J. R. Q. 460.

5. New Declaration. Art 624 C. C. P.—A garnishee who has been condemned on a false declaration, made by him in error, may be relieved from the effect of the judgment, and allowed to make a new declaration, on payment of costs. *Atkinson* vs. *Walker*, S. C. 1869, 14 L. C. J. 60.

6. —— Contradictory Statement.—A garnishee who declares on oath that he has nothing in his possession belonging to the defendant, and afterwards, when examined as a witness, admits having a number of articles of value, but refuses to give any precise or detailed statement thereof, will be condemned as the personal debtor of the plaintiff for the value of such articles. *Grant* vs. *Teusel*, S. C. 1872, 17 L. C. J. 163.

7. —— Costs.—The garnishee may at any time amend his declaration by making a new one, on payment of costs; such new declaration being subject to contestation in the same way as the original one would be. *Richard* vs. *Piché*, S. C. 1876, 20 L. C. J. 290.

8. —— The garnishee can make his declaration at any time, even after judgment, on paying such costs as his default to answer within the delay specified in the writ may have occasioned. *Beaudoin* vs. *Ducharme*, C. C., (1) 20 L. C. J. 223, 8 R. L. 663.

9. —— The costs to be paid by a garnishee to be relieved from a judgment against him by default are those attributable to his default and no more. (1) *Coveney* vs. *Mullins*, C. Ct. 1880, 6 Q. L. R. 173.

10. —— Where the contestation by intervenants of a garnishee's declaration has been dismissed, and the judgment dismissing it has been appealed from, the Court of Appeal will not entertain an application by the garnishee to be permitted to set aside the former declaration and make a new one. *Fairbanks* vs. *O'Halloran* 1888, M. L. R., 4 Q. B. 163, 32 L. C. J. 42.

11. Notice of Declaration.—Motion by defendants to reject the inscription for judgment on the declaration of the garnishee, on the ground that they were not notified of the time when he would make his supplementary declaration, and that in consequence they were prevented from cross-examining him, which they had a right to do. *Per curiam.* Under Art. 619 of the Code of Civil Procedure, the plaintiff has a right to be present when a garnishee makes his declaration, and to question him; but there is no law which obliges a garnishee to notify the defendant of the time when he will make his declaration. Besides,

(1) But see now Art. 624 as amended by 53 Vic., ch. 59, sec. 2.

the defendants' attorney received a short notice of the time of making the declaration. The motion is dismissed with costs. *Vaillancourt* vs. *Payton*, S. C. 1884.

12. —— A garnishee summoned to declare what he owes to a laborer is not bound to give notice of his declaration each month under Art. 628 C. C. P. *Lortie* vs. *Boileau*, C. C. 1889, 19 R. L. 612.

13. Monthly Declaration.—But the declaration must in all cases be made under pain of payment of the debt by the garnishee. *Poiterin* vs. *Ledoux*, C. Ct. 1890, 13 L. N. 114.

14. Notes not yet Due. Art. 619 C. C. P.—*Held*, that no judgment can be awarded against a garnishee upon a declaration to the effect that he had given to the defendant three negotiable promissory notes, which are not yet due, but the interest upon which has been demanded from him by a third party, and that the defendant has an interest in contesting the garnishment. *Banque du Peuple* vs. *Donegani*, S. C. 1851, 1 L. C. R. 107, 2 R. J. R. Q. 419.

15. Of Company.—In the case of a seizure by garnishment in the hands of an incorporated company, the declaration must be made either by an attorney specially authorized, or by an officer or employee of the company who holds a general authorization for that purpose. *O'Connor* vs. *Murtagh*, C. C. 1887, 10 L. N. 218.

16. Partnership Interest.—A commercial firm summoned to answer as garnishees may be compelled to state what was the capital of their firm in which the defendant is one of the partners, at the time the attachment was served. *Laframboise* vs. *Rolland*, S. C. 1885, M. L. R., 1 S. C. 366.

17. —— In the case of a seizure by garnishment in the hands of persons associated in partnership, but not incorporated as a joint-stock company, the firm cannot be represented by an attorney, but one of the partners must appear and make the declaration under oath. *Ferguson* vs. *Kirk*, S. C. 1887, 10 L. N. 219.

18. Refusal to Declare Certain Things.—In the case of a seizure by garnishment of monies due to a defendant, sued as a universal usufructuary legatee, but condemned as such personally to pay the plaintiff's debt, the garnishee cannot refuse to declare what he owes the defendant personally as well as in her quality of usufructuary legatee. *Hudon* vs. *Rivard*, Q. B. 1879, 24 L. C. J. 268, 3 L. N. 114.

19. —— A judge is bound to revise at the final hearing a decision maintaining an objection made by a garnishee to answer a question submitted to him. (*Ib.*)

20. Tax. Art. 620 C. C. P.—**Main levée.**—A garnishee, when verbally informed by the plaintiff that he will not be required to make a declaration, and who afterwards does so, cannot claim his tax, formal *main levée* not being required. *Lambert* vs. *Cartier*, S. C. 1886, 31 L. C. J. 150

21. Other Cases.—The declaration of a garnishee is conclusive until contested and disproved. *Smith* vs. *Bourne*, K. B. 1809, 3 Rev. de Lég. 304.

22. —— 627 C. C. P.—An answer of the garnishee which would be no answer to a demand by his creditors is no answer to the attaching creditor. *Brehaut* vs. *Longpré et al*, K. B. 1812, 3 Rev. de Lég. 305.

V. EFFECT OF.

1. Defendant Condemned as Garnishee in Another Case. Art. 625 C. C. P.—In an action for work and labor done and materials furnished, where the defendant pleaded payment, and also that he had been condemned as garnishee in an action against the plaintiff for a larger sum than that claimed by the plaintiff—*Held*, that a creditor cannot recover against his debtor if the latter have been condemned as garnishee in another case in which the creditor is defendant, and that more especially when he has commenced to satisfy the judgment rendered against him as such garnishee. *Parent* vs. *Talbot*, C. C. 1863, 14 L. C. R. 127.

2. Dilatory Exception. Art. 120 C. C. P.—Action for $25,000, Plea, by dilatory exception, that an attachment had been lodged in the hands of defendant for the same sum, to which attachment plaintiff was a party, and defendant prayed that all proceedings be stayed until a decision was obtained on the merits of the attachment—*Held*, maintaining the exception. *O'Halloran* vs. *Barlow*, S. C. 1880, 3 L. N. 171.

3. Insolvency of Defendant. Arts. 602-625 C. C. P.—Attachment after judgment, when declared valid, and the garnishee ordered to pay the plaintiff, operates as a legal transfer, and vests the debt due by the garnishee in the plaintiff, to the exclusion of the creditors of the defendant, even although he be insolvent. *Chapman* vs. *Clark*, S. C. 1859, 3 L. C. J. 159; *Choall* vs. *The Merchants Assurance Co.* S. C. 1856, 6 L. C. R. 169.

4. —— Art. 602 C. C. P.—The service of the writ of attachment on the defendant and the garnishee does not operate a transfer of the debt due by the latter to the former, and, consequently, a writ of attachment under the Insolvent Act of 1875, sued out and returned prior to the rendering of any judgment on the attachment, has the effect of vesting said debt absolutely in the assignee to whom said writ is addressed. *Marsan dit Lapierre* vs. *Tessier*, S. C. 1879, 23 L. C. J. 214.

5. —— Arts. 602-625 C. C. P.—Judgment on the declaration of a garnishee operates a judicial assignment to the plaintiffs, and an opposition subsequently filed by another creditor, alleging insolvency of the defendant (as of date of opposition), and asking that the money be paid into Court, is insufficient, and will be rejected on motion. *Taylor* vs. *Brown*, S. C. 1881, 7 L. N. 62.

6. —— Where a writ of attachment is lodged in the hands of a garnishee seizing in his hands moneys paid to him by the defendant while insolvent to the former's knowledge, and which had been paid to him by fraudulent preference over the insolvent's other creditors; the judgment upon the contestation of the garnishee's declaration condemning him to pay over the amount will not transfer the debt to the plaintiff so attaching and contesting, but should order the sum to be paid into Court to be distributed among the defendant's creditors. *Lacoursière* vs. *Lefebvre*, C. R. 1890, 16 Q. L. R. 215.

7. **Right of Action.** Art. 625 C. C. P. —An outside creditor has no right of action on a claim transferred by a garnishee order of a court. *Théberge* vs. *Fournier*, Q. B. 1876, 8 R. L. 390.

8. **Rights of Creditor of Garnishee.**—A creditor whose claim has been attached in garnishment by one to whom he owes money may, notwithstanding, sue and obtain judgment against his debtor, but in such case the Court will order that the judgment be served upon the plaintiff and on the garnishee fifteen days before its execution. *Crébassa* vs. *Cie. du Chc. de Fer de Sud-Est*, C. Ct. 1878, 8 R. L. 722.

9. **Rule Nisi—Vend. Exponas.** Arts. 616-621 C. P. C.—The garnishee who has goods of the defendant in his hands is rendered guardian thereof by service upon him of the writ of attachment after judgment attaching such goods. Where the garnishee fails to declare what goods he has in his hands, the plaintiff can obtain a rule *nisi* in order to prove that the garnishee is in possession of goods belonging to the defendant, and have him condemned to deliver such goods to the bailiff, bearer of a writ of *renditioni exponas*. *Bertrand* vs. *Menier*, C. Ct. 1888, 16 R. L. 266.

10. **Sale of Immoveable, Rent of which is Attached.** Art. 625 C. C. P.—By virtue of Art. 625 C. C. P., the sale to a third party of an immoveable, the rents of which have been attached, and which attachment has subsequent to the sale been declared valid, has no effect on the garnishment even in regard to rent not yet due, where there is no allegation of fraud or insolvency. But as to rent becoming due after the service of the writ of attachment, the attachment can only be declared *tenable*. *Dépatie* vs. *Barré*, Q. B. 1891, 1 Que. 202, reversing S. C. 1891, 5 Que. 151.

VI. EFFECT OF JUDGMENT QUASHING ATTACHMENT.

1. That a judgment quashing an attachment before judgment in the hands of third parties at once releases the property seized, and the garnishee must hand it over to the owner without any delay when required so to do. *Pleau* vs. *City & District Savings Bank*, C. R. 1886, 30 L. C. J. 167.

2. A garnishee who refuses to deliver up articles seized in his possession is guilty of contempt. *Ferguson* vs. *Millar*, K. B. 1813, 3 Rev. de Lég. 305.

VII. IN HANDS OF WIFE.

1. A creditor, who has obtained judgment against the husband, cannot have the wife who was garnished condemned upon her default to make a declaration. He must prove the existence of the wife's indebtedness to her husband. *Breckon* vs. *Kane*, S. C. 1892, 1 Que. 254.

2. Where a wife has been garnished for what she may owe to her husband, she can be questioned on her declaration, notwithstanding Art. 1231 C. C., which declares that a husband and wife cannot give testimony for or against each other. *Demers* vs. *Brunet*, S. C. 1891, 5 Que. 377.

VIII. INSOLVENCY OF DEFENDANT—Art. 622 C. C. P. (See Also "Effect of," No. V — 3, 4, 5, 6.)

1. When the defendant's insolvency is established by the evidence, the Court will order the garnishee to deposit the money in his hands in Court, to be distributed among

the creditors. *Quesnel* vs. *Barcelle*, C. R. 1885, M. L. R., 2 S. C. 13.

2. Where a garnishee declares to owe, and it is shown that the defendant is insolvent, it is the duty of the Court, under Art. 622 C. C. P., to order the garnishee to pay into Court the amount acknowledged by him to be due defendant, in order that it may be distributed according to law. *Fairbanks* vs. *O'Halloran*, Q. B. 1888, 32 L. C. J. 42.

IX. MAIN-LEVEE PENDING REVIEW—DEPOSIT.

Shortly after service of seizure in hands of garnishee the defendant inscribed in Review from a judgment dismissing his petition in revocation of the judgment against him, and petitioned that he might be permitted to deposit in Court the amount of the original judgment in principal, interest and costs, together with a further sum for costs of seizure, the whole to abide the decision in Review; and that upon doing so *main-levée* of said seizure be granted him. Petition granted. *Lebourreau* vs. *Beard*, S. C. 1882, 5 L. N. 335.

X. OF SALARY.

A deed by which an employee transfers in advance to trustees of his choice several months' salary, without the consent of his creditors, will be null and void as against any creditor complaining of it. *Kenwood* vs. *Robbin*, C. C. 1886, 15 R. L. 710.

XI. OF EFFECTS SEIZED CORPOREALLY.

1. Where the plaintiff caused a quantity of timber to be attached in the hands of a third party who was not responsible for the debt, but as a means of securing him (the plaintiff) —*Held*, in appeal, that such an attachment, whereby any other person than the defendant was divested of the possession of property, would not lie. *Wood* vs. *Gates*, K. B. 1833, Stuart's Rep. 536, 1 R. J. R. Q. 397.

2. Although a seizure corporeally effected of property in the hands of a garnishee be null, an intervening party cannot, by motion made immediately after he is allowed to intervene, and before any issue is joined on the intervention, ask for the quashing of the seizure. *Fleck* vs. *Brown*, Q. B. 1865, 9 L. C. J. 216 and 15 L. C. R. 416, and 1 L. C. L. J. 32.

XII. POWERS OF COURT IN—(See "Right of—Tutors to Minors," No. XIII — II.)

1 On the contestation of a garnishee's declaration—*Held*, that the court could not look into accounts between the garnishee and a party not in the record in order to determine what may be due by the garnishee to the defendant. *Ireland* vs. *Gregory*, S. C. 1866, 2 L. C. L. J. 132.

2. The Court will not, under ordinary circumstances, order a garnishee to deposit in court the amount which he has declared that he owes. *Naud* vs. *Lavoie*, S. C. 1888, M. L. R., 4 S. C. 423.

XIII. RIGHT OF.

1. Amount for which Debtor is Collocated.—A creditor may attach by garnishment a sum of money for which his debtor is collocated, though such sum may have been illegally transferred to the debtor. *Sentenal* vs. *Exchange Bank of Canada*, S. C. 1886, M. L. R., 2 S. C. 108.

2. Concurrent Garnishments.—Where a defendant came in and contested a writ of attachment by garnishment, issued by plaintiff, on the ground that writs of attachment had been served on him by creditors of the plaintiff—*Held*, that this was no reason why plaintiff should not issue his writ, and the contestation was dismissed. *Cadieux* vs. *Canadian Mutual Fire Insurance Co.*, S. C. 1878, 1 L. N. 340; *Mackay* vs. *Routh & Bank of Montreal*, S. C. 1878, 1 L. N. 161, 22 L. C. J. 22, confirmed in Review 1 L. N. 266; and see *Duvernay* vs. *Dessaulles*, 4 L. C. R. 142.

3. Curator to Interdicted Person.—An attachment by garnishment will lie against a curator to an interdicted person under a judgment rendered against the interdicted person and the curator in his quality as curator. *Crebassa* vs. *Fourquin*, C. C. 1869, 3 R. L. 57.

4. Debt not yet Due.—An attachment in hands of a third party attaches a debt which did not exist at the service of the writ, but which became one before the declaration of the garnishee was made. *Molson's Bank* vs. *Lionais*, Q. B. 1881, 5 L. N. 252, 27 L. C. J. 40, 2 Dorion's Rep. 176, reversing C. R., 24 L. C. J. 176, 3 L. N. 116.

5. Delay to Garnishee to Pay Debt.—On attachment by garnishment of monies of the defendant in the hands of the garnishees, judgment of the Court below reversed. The

Court were of opinion that the delay stipulated in favor of the garnishees, that they should not be held to pay what they owed to the respondent until after six months' notice had been given to them, could not affect the rights of the respondent's creditors, who were entitled, under their judgment, to attach all the debts and property of their debtor, however held, or in whatever manner due. That here the money in the hands of the garnishees was a debt they owed to the respondent, the nature of which could not be varied by the delay allowed for the payment of it; and as all that the garnishees could demand was a six months' notice before they were bound to pay, the appellants here were entitled to obtain the money on giving that notice. In this there could be no injustice—a contrary principle might lead to it. *Frost* vs. *Cameron*, Q. B. 1830, 3 R. L. 457.

6. **Goods of Debtor's Debtor in Hands of Third Party.**—A creditor cannot seize by attachment before judgment the goods of his debtor's debtor which are in the hands of a third party. *Starr* vs. *Phillips*, C. R. 1892, 1 Que. 315.

7. **Note in Hands of Drawer.** Arts. 565 and 612 C. C. P.—The amount of a note payable to order cannot be attached in the hands of the drawer as garnishee. *Thore* vs. *Hoyt*, K. B. 1813, 3 Rev. de Lég. 305.

8. **Partnership Assets.**—The creditor of a person forming part of a partnership has the right to seize by garnishment the assets of the partnership, according to the share of the debtor in the thing seized. *Eastern Townships Bank* vs. *Porter*, Court of Review 1882, 11 R. L. 587.

9. —— The share or interest of a partner in a commercial firm may be attached by garnishment, and the partners will be personally liable for any sums paid to their co-partner, defendant, after service of the writ upon them. *Laframboise* vs. *Rolland*, S. C. 1885, M. L. R., 1 S. C. 367, 13 R. L. 461, 29 L. C. J. 184, reversed in Review, M. L. R., 2 S. C. 75, but on other grounds.

10. **Premium Note.**—The amount of a note due to a Mutual Insurance Company for the premium on a policy may be the subject of an attachment by garnishment on the part of one of the creditors of the Company. *Dickson* vs. *Beaver Mutual Insurance Company*, S. C. 1881, 12 R. L. 27.

11. **Tutor to Minors.** That a writ of attachment by garnishment cannot be legally placed in the hands of an individual acting also as a tutor to minors in order to obtain her declaration as to sums of money due by her to the tutorship, inasmuch as such declaration cannot legally be contested under the attachment but only by a direct contestation with the parties interested. *Dorion* vs. *Dumont*, Q. B. 1870, 3 R. L. 60.

12. **Wages.** Art. 558 C. C. P. As amended by R. S. Q., Art. 5918. (See under title, "Execution, Exemption From.")—Wages or salary not yet due or gained only on the day of service of attachment are not seizable. (1) *Sternberg* vs. *Dresser*, S. C., 1859, 4 L. C. J. 126.

13. —— Art. 5931 R. S. Q., 558 C. C. P.—When an employer has contracted with his workman to pay him his wages in advance, a seizure made at two p.m. on the day on which the wages are payable under the agreement is inoperative. *Geddes* vs. *Doudiet*, S. C. 1882, 5 L. N. 153.

14. —— But *Held*, that under Statute 1888 (Q.), workmen and day-laborers cannot be paid in advance in order to protect their wages from seizure. *Poitevin* vs. *Ledoux*, C. Ct. 1890, 13 L. N. 114; *Kenwood* vs. *Rodden*, C. Ct. 1886, 9 L. N. 222.

15. —— Art. 5931 R. S. Q.—A garnishee is only bound to declare the wages he owes at the moment of service, and not what he owes at the time of making the declaration; for salaries are not seizable in advance. *Leprohon* vs. *St. Germain*, Mag. Ct. 1890, 13 L. N. 340.

16. —— Art. 558, § 5, C. C. P., exempting from seizure "wages and salaries not yet due," refers to salary not earned at the time of seizure, and does not exempt such portion of the month's or week's salary as has been actually earned at the time the attachment is served, though not exigible by the defendant from the garnishee until the end of the month or week. *Kenwood* vs. *Rodden*, C. Ct. 1886, 9 L. N. 222.

17. **War Department.**—Moneys payable on account of a pending contract with the War Department for the erection of fortifications in this Province are not liable to attachment. *Fitts* vs. *Pilon*, S. C. 1869, 13 L. C. J. 165.

18. **Who are Third Parties within Meaning of 612 C. C. P.**—A clerk or employee is not a "third party" within the meaning of Art. 612 C. C. P. His possession of his employer's moneys is not distinct from

(1) But note *Molson's Bank* vs. *Lionais*, *supra* No. 4, "Debt not due."

that of his master, and such moneys cannot be seized in the hands of the clerk by garnishment. The fact that the clerk may have deposited such moneys in a bank in his own name "in trust" does not affect the case. *Ontario Car Co.* vs. *Que. Central Ry. Co.*, C. R. 1886, M. L. R., 2 S. C. 287, confirming S. C. 1886, 9 L. N. 3.

19. —— The respondents, judgment creditors of defendant (one C.), took a seizure by garnishment in the hands of appellant, a public notary, who declared that he owed defendant nothing. On contestation of such declaration it appeared that appellant was bearer, as agent or attorney of the heirs D, of certain debentures, payable to bearer, on which arrears of interest were due; that a dividend on account of such arrears had been declared and was payable at the time of garnishee's declaration, and was actually thereafter paid by him; that defendant was owner, to appellant's knowledge, of one-half such arrears by transfer from certain of the heirs. It further appeared that defendant was indebted to the heirs D. in a larger sum of money, which appellant set up in compensation against any sum he might, as their agent, have received for defendant—*Held*, that the attachment so made of defendant's monies in the hands of appellant was good and valid, appellant occupying, *quoad* defendant, the position of a third party, within the meaning of Art. 612 C. C. P., in whose hands an attachment could legally be effected. And that the compensation set up by appellant was a right which could be urged only by the heirs themselves, and not by their agent or attorney. *Marcoux* vs. *Merchants' Bank*, Q. B. 1890, 16 Q. L. R. 200.

XIV. RIGHTS OF DEFENDANT UNDER.

When a plaintiff who has obtained judgment against a garnishee neglects or refuses to enforce payment from the garnishee, the defendant will be empowered to cause the issue of a writ of execution for the levy of the amount due by the garnishee, which amount will be held by the sheriff subject to the order of the plaintiff. *Quebec Bank* vs. *Stuart*, S. C. 1863, 14 L. C. R. 101.

XV. SERVICE.

1. The want of service of the writ of attachment upon the defendant may be covered by his appearance by attorney *ad litem* upon the plaintiff's contestation of the declaration of the garnishee. *Tousignant* vs. *Tousignant*, S. C. 1885, 11 Q. L. R. 269.

2. In every case of seizure by garnishment the defendant must be summoned to appear. If this service is not made, no condemnation can be had against the garnishee even on his default to declare. *Prior* vs. *Delamarth & Heath*, K. B. 1816, 3 Rev. de Lég. 306.

XVI. WHEN VOID.

On appeal from a judgment on a writ of attachment—*Held*, that an attachment under the Ordonnance of 1787 could be set aside, if it be not, in the language of the law, against the estate, debts and effects of the defendant to be attached in the hands of some person in particular, and does not contain a summons to him as well as to the defendant to appear; and if it be not accompanied by an injunction from the judge to the sheriff to retain the effects seized to abide the judgment of the court; and if it appear in the declaration that the debt sworn to has been cancelled. *Richardson* vs. *Molson*, K. B. 1829, Stuart's Rep. 376, 1 R. J. R. Q. 307.

XVII. WRIT OF.— Arts. 555-614 C. C. P.

1. *Held* that the writ of attachment by garnishment constitutes a new proceeding, and ought to be definite and complete in itself when issued. *Vézina* vs. *Tousignant*, C. R. 1893, 3 Que. 17.

2. Art. 614 C. C. P., which provides that the writ must mention the amount of the judgment for the satisfaction of which it issues, is to be construed as meaning the amount remaining unsatisfied on such judgment. (*Ib.*)

3. Art. 555 applies to the writ of *fieri facias* and not to that of seizure by garnishment, between which two writs there is an essential difference. (*Ib.*)

(c) ATTACHMENT CONSERVATORY.

I. Affidavit.
II. Contestation of. 1-4.
III. Delay in acting upon.
IV. Execution.
V. Insolvency of Defendant—Proof of.
VI. Possession of Goods seized.
VII. Right to.
Generally. 1-6.
Bank Shares. 7.
Contract to Raft Timber—Lien. 8-9.
Costs. 10.
Donation. 11.
Holder of Railway Bonds. 12.

Identity and Entirety of Goods seized. 13 14.
Mortgagee of Immoveables—Seizure in Hands of Purchaser in Good Faith. 15.
Partners. 16.
Privilege on Moveables. 17.
Sale with a term. 18.
Unpaid Vendor. Arts. 1474 C. C. and 866 C. C. P. 19.
Where Goods partly disposed of. 20.
Wood supplied for building Vessel. 21.

I. AFFIDAVIT.

Conservatory attachment by the vendor of goods may validly issue, without the affidavit required for the issue of the regular writ of seizure before judgment. *Leduc* vs. *Tourigny*, S. C. 1861, 5 L. C. J. 123, 6 L. C. J. 24; *Sinclair* vs. *Ferguson*, S. C. 1858, 2 L. C. J. 101; *Burnett* vs. *Pomeroy*, S. C. 1884, 7 L. N. 110; *Blumenthal* vs. *Forcimer*, S. C. 1885, 3 Step. Dig. 73; *Fraser* vs. *McTavish*, S. C. 1887, 15 R. L. 200. (1)

II. CONTESTATION OF.

1. Attachment, under 17th Article of the *Coutume de Paris*, cannot be tried by motion. *Torrance* vs. *Thomas*, S. C. 1857, 2 L. C. J. 98.

2. —— But see *Wyatt* vs. *Séncéal*, S. C. 1878, 1 L. N. 98, 1 Q. L. R. 76.

3. Motion for leave to appeal. Action commenced by a conservatory attachment. Defendant met the affidavit by an exception to the form which was dismissed as not being the mode indicated by the Code for attacking the affidavit. Motion for leave to appeal refused, on the ground that the party moving had a more expeditious mode of proceeding than by exception to the form, and that therefore nothing but delay would result from granting the appeal. *Lebel* vs. *Pacaud*, Q. B. 1879, 2 L. N. 202.

4. A conservatory attachment may be contested by petition in the same manner as an attachment before judgment. (1) *Prince* vs. *Jones*, Q. B. 1886, 31 L. C. J. 168; *Richardson* vs. *Brand*, S. C. 1893, 4 Que. 111; *Mullin* vs. *Kehoe*, C. Ct. 1885, 9 L. N. 37.

(1) All the authorities are collected in foot note to this case.

(2) Overruling *Farrell* vs. *Ebbitt*, S. C. 1891, 21 R. L. 443; *Burnett* vs *Pomeroy*, S. C. 1884, 7 L. N. 110.

III. DELAY IN ACTING UPON.

A seizure, suffered to remain unacted on for more than two months, ceases to exist. *Scholefield* vs. *Rodden*, S. C. 1861, 5 L. C. J. 332. See Art. 172 Custom of Paris.

IV. EXECUTION.

In the case of a conservatory attachment under Art. 176 of The Custom of Paris, of a quantity of wheat on board a vessel in the Port of Montreal, the Court can authorize the removal by the sheriff of flour stowed above the wheat, to such an extent as to admit of the proper seizure of the wheat. *Duchesnay* vs. *Watt*, S. C. 1864, 8 L. C. J. 169.

V. INSOLVENCY OF DEFENDANT—PROOF OF.

In an attachment under the 177th Art. of the Custom of Paris when the insolvency of the defendant is alleged, the affidavit of the plaintiff is sufficient proof of such insolvency, unless it is denied by the defendant in a special plea. *Jackson* vs. *Paige*, S. C. 1862, 6 L. C. J. 105.

VI. POSSESSION OF GOODS SEIZED.

The plaintiff has a right to obtain delivery of flour seized by him as vendor under a writ of conservatory attachment on giving security that the flour will be forthcoming, to abide the future order of the Court, or the value thereof duly accounted for by plaintiff. *Baldwin* vs. *Binmore*, S. C. 1861, 6 L. C. J. 299.

VII. RIGHT TO.

1. Generally.—The vendor has a privilege on goods sold on credit and delivered by him to a purchaser, having the same still in his possession, but who has subsequently become insolvent, and such goods may be attached by a conservatory process to prevent their disappearing. *Torrance* vs. *Thomas*, S. C. 1858, 2 L. C. J. 99; *Sinclair* vs. *Ferguson*, S. C. 1858, (1) 2 L. C. J. 101; *Leduc* vs. *Tourigay*, S. C. 1862, 6 L. C. J. 324.

2. —— The right of conservatory attachment in virtue of the 177th Art. of the Custom of Paris was not abolished by the Statute regulating the issue of attachments before judgment. *Leduc* vs. *Tourigny*, S. C. 1861, 5 L. C. J. 123.

3. —— In an action by the vendor of goods sold and delivered, for the recovery of the price of sale, accompanied by a conservatory attachment of such goods, the plaintiff has a

(1) See note to this case 2 L. C. J. at p. 306.

right to demand, by the conclusions of his declaration, that the defendants be condemned to pay the price of sale, that the goods seized be declared subject and liable to a privilege in favor of the plaintiff, as the vendor thereof, for such price of sale, and that the goods be sold in due course of law, and the proceeds of sale paid to plaintiff, in satisfaction (either in whole or in part, as the case might be) of his claim as vendor. *Baldwin* vs. *Binmore*, S. C. 1861, 6 L. C. J. 297.

4. —— Where goods seized have been delivered up, on security given as above stated to account for their value, such value shall be held to be the value of the goods at the time of their delivery to the plaintiff, from which date the plaintiff shall be accountable therefor, with interest. (*Ib.*)

5. —— Art. 1513 C. C.—In an action by the unpaid vendor claiming the resolution of a sale of moveables, the plaintiff has a right to attach the property by a process of conservatory attachment even after the expiration of the eight days allowed for revendication by Art. 1999 C. C., and although the attachment may be of the nature of an attachment in revendication, it will nevertheless avail him as a conservatory attachment. *Henderson* vs. *Tremblay*, Q. B. 1876, 21 L. C. J. 24.

6. —— A conservatory attachment will not lie, except where a lien or right in the property in question is established by the seizing party. *Prince* vs. *Jones*, Q. B. 1886, 31 L. C. J. 168.

7. **Bank Shares.**—A person laying claim to bank shares, and who has reason to fear that they may disappear, can accompany his demand with seizure by way of conservatory attachment. *Fraser* vs. *McTavish*, S. C. 1887, 15 R. L. 200.

8. **Contract to Raft Timber—Lien.**—A person who conveys timber down a river according to agreement has a right to a conservatory attachment on said timber, until his charges for said conveyance are paid. *Trudel* vs. *Trahan*, S. C. 1871, 7 R. L. 177.

9. —— But a mere raftsman is not a *dernier équipeur*, and has no lien on the raft, and therefore has no right to a conservatory attachment thereon, although *semble* per Drummond, J., that if the raft had completed its journey the raftsman would have a right to a conservatory attachment against parties seeking to dispossess him of the raft by force. *Graham* vs. *Coté*, C. R. 1872, 4 R. L. 3, reversing C. R., 3 R. L. 571.

10. **Costs.**—Counsel fees and disbursements incurred in saving for the *grevé* a sum of money belonging to a substitution may constitute a privileged claim upon such money under Art. 2009 C. C., and a conservatory attachment may be made of such money. *Barnard* vs. *Molson*, Q. B. 1890, M. L. R., 6 Q. B. 202, reversing C. R., M. L. R., 5 S. C. 374.

11. **Donation.**—A donor demanding the revocation of a donation for cause of ingratitude may cause the issue of a conservatory attachment pending the action, to attach in the hands of the donee the effects donated, and also any moveables replacing those donated. *Cryan* vs. *Cryan*, S. C. 1887, 13 Q. L. R. 271.

12. **Holder of Railway Bonds.**—The holder of railway bonds, constituting a privileged claim on the moveable property of the Company, may, for the protection of his rights, proceed against such property by an attachment in revendication of the nature of a conservatory attachment. *Wyatt* vs. *Senécal*, S. C. 1878, 1 L. N. 98, and 4 Q. L. R. 76.

13. **Identity and Entirety of Goods Seized.** -Conservatory attachment by unpaid vendor, of goods sold on credit, to secure payment by privilege from proceeds of sale, the purchaser having become insolvent within 15 days of delivery. The goods, 7,000 cigars in boxes, had been packed and shipped in one large wooden case, which had been opened by purchaser and the boxes exposed for sale. Some of the latter were broken, but 6,675 of the cigars remained in their respective boxes, with factory mark, number and revenue stamp intact, and these only were seized—*Held*, that the goods, to the extent seized, were entire and in the same condition as when sold, notwithstanding the opening of the outer bale or case, and the seizure thereof declared good and valid. *Goulet* vs. *Green*, Q. B. 1887, 13 Q. L. R. 103.

14. —— To support a conservatory attachment the unpaid vendor must establish the clear and certain identity of the object seized with the object sold, this being the test sanctioned by the jurisprudence of our Courts, and the true one to be applied as well under the articles of the *Coutume de Paris* as of our Civil Code. (*Ib.*)

15. **Mortgagee of Immoveables—Seizure, in Hands of Purchaser in Good Faith.**—A mortgagee of an immoveable on which was placed certain machinery which had become immoveable by destination cannot

attach such machinery by an attachment in revendication of the nature of a conservatory attachment, in the hands of the defendant who has purchased the same in good faith. *Flannigan vs. Fee*, S. C. 1889, 13 L. N. 98.

16. **Partners.**—Where a partnership consisting of two persons was dissolved under an agreement, by which one of them purchased the stock and trade of the partnership for a certain sum of money, for which he gave his promissory note, and agreed for the security of said notes to transfer to the other a certain part of the machinery and effects belonging to the business, and also that he would not be considered proprietor of the stock till the notes were paid, and afterwards refused to carry out part of the agreement which referred to the transfer of the machinery as security, but, on the contrary, commenced to sell out part of the assets—*Held*, that the other had a right to a conservatory attachment, notwithstanding that the notes were not due. *White vs. Murphy*, S. C. 1882, 12 R. L. 77.

17. **Privilege on Moveables.**—A creditor who has a privilege upon moveables can secure it by a conservatory attachment. *Wiser vs. Murphy*, S. C. 1883, 9 Q. L. R. 327; *Groulx vs. Wilson*, C. R. 1892, 1 Que. 546.

18. **Sale on credit.**—An unpaid vendor, even under a credit sale, has a right to protect his privilege by a conservatory attachment of the thing sold. *Maguire vs. Baile*, C. R. 1893, 3 Que. 76; *Goulet vs. Green*, Q. B., 13 Q. L. R. 103.

19. **Unpaid Vendor.**—Art. 1474 C. C. and 866 C. C. P.—The plaintiff brought an action in revendication of a quantity of hops purchased by him and which the seller refused to deliver—*Held*, that he had a right to a conservatory attachment, but not to an attachment in revendication, as the sale had never been perfected. *Kelly vs. Merrills*, C. R. 1869, 1 R. L. 194.

20. **Where Goods partly disposed of.**—The disposal by the purchaser of a portion of a number of articles sold and delivered does not cause the loss of the vendor's privilege on those articles which remain undisposed of; and a conservatory attachment will lie to preserve those goods (1) *Goulet vs. Green*, Q. B., 13 Q. L. R. 103; *Wiser vs. Murphy*, S. C. 1883, 9 Q. L. R. 327; and see *Torrance vs. Thomas*, S. C. 1858, 2 L. C. J. 99; *Sinclair vs. Ferguson*, S. C. 1858, 2 L. C. J. 101, etc.

21. **Wood Supplied for Building Vessel.**—The unpaid vendor of wood used in the construction of a vessel has, by virtue of the last paragraph of Art. 2383 C. C., a privilege on the vessel, and to an action to recover the price of the wood he can join a conservatory attachment. *Provost vs. Brulé*, C. R. 1888, 16 R. L. 219.

(1) See opinion of Badgley, J., W. H. Kerr, Q.C., Hon. A. Lacoste, Q.C., Mr. Robertson, Batonnier of the Montreal Bar, and Mr. Geoffrion, *in re* The Estate A. C. J. Hope & Co., Insolvents, 6 L. N. 21.

(d) ATTACHMENT FOR RENT.

I. Damages for Illegal Seizure.
II. Damages for Malicious Seizure.
III. Delay to Attach in Recaption. 1-6.
IV. Effect of taking Collateral Security.
V. Procedure. 1-4.
Service. 5-10.
Description of Place where Property removed to. 11.
Description of Property Leased. 12.
Description of Goods Seized. 13.
Declaration. 14.
VI. Right to. 1-2.
See "Lessor and Lessee."

I. DAMAGES FOR ILLEGAL SEIZURE.

Defendant was condemned to pay $160 damages for improvidently issuing a writ of attachment against a tenant who did not owe him any money. The complaint was that on the 10th June, 1877, the defendant *es qualité* as assignee to the estate of one Phelan caused a writ of attachment to issue unlawfully and with malice, causing the plaintiff damages to the amount of $2,000. The defendant pleaded: 1st. That the seizure was made without his knowledge or authorization, and by error, owing to the fault and bad faith of plaintiff. 2nd. That the action should have been directed against the defendant personally, and not against him in his quality of assignee. 3rd. That there was no malice, and therefore no action. 4th. That there being no malice, there was no ground for exemplary damages. It appeared from the evidence that there was an unsettled account in January, 1877, between the insolvent and the plaintiff, who was his tenant and sub-tenant of L., the proprietor. The last was claiming payment of rent from the assignee, and was allowed by the latter to address himself to the plaintiff for payment. The plaintiff was unable to settle with the landlord or his lawyers, and settled with the assignee. Meanwhile the landlord, losing

patience, sued out a writ of attachment against the plaintiff, who then owed nothing—*Held*, that as there was an understanding between the assignee and the landlord, that the latter should collect in the name of the assignee from the plaintiff, the seizure was an illegality, and judgment condemning to pay $100 for his error and the seizure made in his name and by his sufferance was confirmed, but without costs, in review, as the damages were rather excessive. *Trempe* vs. *Perkins*, C. R. 1877.

II. DAMAGES FOR MALICIOUS SEIZURE.

Damages cannot be recovered for suing out maliciously, and with marked rigor, where the rent was really due. *David* vs. *Thomas*, Q. B. 1857, 1 L. C. J. 69.

III. DELAY TO ATTACH IN RECAPTION.—Art. 873 C. C. P.

1. The right of attachment in recaption may be exercised after the eight days, as between the landlord and tenant, during the existence of the lease. *Mondelet* vs. *Power*, Q. B. 1845, 1 L. C. J. 276.

2. The right of attachment in recaption may be exercised (as between landlord and tenant) after the expiration of eight days from the date of the removal of goods from the premises leased. *Serravia* vs. *Lapierre*, C. C. 1869, 13 L. C. J. 252.

3. The right of attachment in recaption may be exercised (so far as the lessor is concerned) after the expiration of the eight days succeeding the removal of his effects. *Beaudry* vs. *Rodier*, C. C. 1856, 10 L. C. J. 202.

4. The lessor cannot, by an agreement with a third person, extend his privilege on the effects in the possession of the lessee to more than eight days from the time of leaving the leased premises, even where such effects are the property of the third person, his privilege being absolutely extinct after the expiration of eight days. *Hearn* vs. *Vézina*, C. Ct. 1880, 6 Q. L. R. 93.

5. Attachment in recaption must be exercised within the eight days following the removal of the goods. If exercised after that date the *defendant* can demand its nullity. *Léveillé* vs. *Couillard*, C. Ct. 1886, 14 R. L. 653.

6. Where the eighth day expires on a Sunday the lessor must exercise his right before that day; an attachment in recaption taken on the ninth day (Monday) will be dismissed as taken too late. *Strachan* vs. *Depatie*, S. C. 1893, 3 Que. 401.

IV. EFFECT OF TAKING COLLATERAL SECURITY.

The right of attachment for rent cannot be affected by the mere taking of collateral security. *Terreau* vs. *Garcau*, C. C. 1866, 10 L. C. J. 203.

V. PROCEDURE.

1. *Held*, where the plaintiff has combined with a *saisie-gagerie simple* and *saisie-gagerie par droit de suite* a *saisie-arrêt en mains tierces*, without producing an affidavit to justify the *saisie-arrêt*, the absence of the affidavit merely entails the nullity of the seizure as respects effects not *gagés* for the rent, but does not affect the validity of the *saisie-gagerie*. *Beaulieu* vs. *Phillips*, S. C. 1882, 2 Que. 537, confirmed in Review, 31 Oct., 1892.

2. The fact that a copy of the declaration was deposited for the defendant at the prothonotary's office *before* the service of the writ of attachment is immaterial, so long as the copy was in the office before the expiry of three days following the service of the writ. (*Ibid.*)

3. So long as the seizure of effects which have been removed from the premises is made within eight days after the date of their removal, it is not essential that the writ be served upon the defendant within eight days. (*Ibid.*)

4. Art. 875 C. C. P.—In an action for rent *Held*, that the *procès verbal* of seizure could be left at the domicile of the defendant although he be absent, and that such domestic could be legally constituted the guardian of the effects seized, and be compelled by coercive imprisonment to produce the same, unless he can establish that when the seizure first became known to him the effects were no longer in his possession. *Mann* vs. *Hatfield*, S. C. 1859, 1 L. C. R. 170, 2 R. J. R. Q. 119.

5. Service.—Where an attachment of goods by process of recaption is in the hands of a person claiming to have purchased them, and not in the hands of a new lessor, service on the *mis en cause* is unnecessary. *Wilson* vs. *Rutter*, Q. B. 1879, 2 L. N. 211.

6. —— Art. 874 C. C. P.—On proceedings of attachment for rent the declaration must be served on the defendant. The service, by leaving a copy at the prothonotary's office for the defendant is irregular. (1) The fact of the

(1) But by Art. 874 C. C. P. as amended by R. S. Q. Art. 5954, such service is now permitted.

defendant taking and accepting the copy left for him, at the office of the prothonotary, is a waiver of the right to invoke the irregularity of the service. *Learmonth* vs. *Boisseau*, S. C. 1886, 12 Q. L. R. 279.

7. —— Art. 874 C. C. P.—In an action under Arts. 887, 888 C. C. P. for rescission of a lease or for ejectment, to which the plaintiff joins as an accessory a demand for balance of rent and an attachment for rent, the service must be made in the usual manner by serving a copy of the declaration with the writ. Arts. 804 and 874 C. C. P. not being applicable to such cases. *Maguire* vs. *Watkins*, S. C. 1890, M. L. R., 6 S. C. 135.

8. —— In all cases of attachment for rent, whether or not the demand for rent accompany a demand for the rescission of the lease or for ejectment, and whether the action be instituted under the articles of the Code of Civil Procedure relating to summary matters or otherwise, the plaintiff, by virtue of Art. 874 C. C. P., as amended by 5974 R. S. Q., may cause the copy of the declaration to be served upon the defendant, or deposited in the prothonotary's office, within the three days which follow the service of the writ, and is not obliged to serve the declaration at the same time as the writ. If the service be made on the return day, or after the return, the defendant is entitled to ask for delay to plead, but cannot ask for the dismissal of the action. *David* vs. *Bonner*, S. C. 1892, 6 Que. 243.

9. —— In the case of an attachment for rent the copy of the declaration may be simply deposited (not served by a bailiff) in the office of the Prothonotary or Clerk, and it is *not* necessary that the delay between such deposit and the return day of the writ should be the same as between the day of service and the return day of an ordinary writ of summons. *Brohodi* vs. *Bergeron* Q. B. 1865, 10 L. C. J. 117.

10. —— **Return — Delay.**—Where service of the declaration is made by leaving a copy thereof for the defendant at the prothonotary's office, the service of the action is not complete until such service of the copy has been made. Hence, in actions between lessor and lessee, if service be made at the prothonotary's office, the delay of one clear day between service and return to which the defendant is entitled is computed from such service of the declaration. *Hall* vs. *Pinsonnault*, S. C. 1893, 3 Que. 543.

11. **Description of Place where Goods removed to.**—The want of designation in the writ of the place where the goods have been removed to cannot be taken advantage of at the hearing on the merits. *Rodier* vs. *Joly*, S. C. 1859, 4 L. C. J. 15.

12. **Description of Property leased.**—The writ of attachment for rent should contain a description of the property leased, and a general reference in the writ to the property mentioned in a deed annexed is not sufficient. *Robitaille* vs. *Mallette*, Q. B. Que., 4 Sept., 1875.

13. **Description of Goods seized.**—But the plaintiff is not bound to specify in the writ or declaration of attachment, the effects he seeks to have seized in recaption. *Beaulieu* vs. *Phillips*, S. C. 1892, 2 Que. 537; confirmed in Review, 31 Oct., 1892.

14. **Declaration.**—The lessor, in using the right of attachment in recaption, is bound to declare and prove that the lessee has not left sufficient furniture to secure the rent. *Zeigler* vs. *MacMahon*, Q. B. 1845, 1 Rev. de Lég. 95.

VI. RIGHT TO.

1. An attachment for rent may be had on the lease of a farm. *Hamilton* vs. *Constantineau*, K. B. 1812, 3 R. de L. 305.

2. An attachment for rent cannot be had of logs for rent of boom space. *Tourville* vs. *Ritchie*, Q. B. 1889, 34 L. C. J. 243.

(*c*) ATTACHMENT IN REVENDICATION.

I. Affidavit in. 1-3. (See also "Attachment, Conservatory—Affidavit.")
" as Proof in the Case. 1-5.
II. Amendment.
III. Contempt of Court in.
IV. Defendant's Option. 1-3.
V. Effect of Appeal.
VI. Execution in.
VII. Form of. 1-2.
VIII. Liability of Defendant.
IX. Nature of.
X. Possession of Goods to Intervenant.
XI. Privilege of Defendant. 1-2.
XII. Procedure in.
XIII. Right to.
Affreightment. 1-2.
Animals seized for trespassing. 3.

Bailiff. 4.
By Person charged with Felony. 5.
Carriage—Possession. 6.
Condition precedent in Contract of Sale. 7.
Entirety of Goods. 8.
Goods in Customs. 9-11.
Grain—Mixed with other Grain—Identity. 12.
Grounds of. 13-14
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Horse—Possession 18.
Indeterminate Object 19.
Insolvency of Lessee of L[illegible]
Landlord's Privilege. 21-22
Legatee. 23.
Lease of Movables 24.
Mortgage of Barge. 25.
Owner of undivided Share of Real Estate. 26.
Partnership Property. 27.
Property attached. 28.
Property illegally detained. 29.
Repairs to Cars. 30.
Sale by Foreign Company. 31.
Stolen Horse. 32.
Title Deeds. 33.

XIV. Service in.

XV. Title to Goods Seized.

See also Sale.

I. AFFIDAVIT IN. (See "Attachment, Conservatory—Affidavit.")

1. Arts. 866 and 834 C. C. P.—In a case of attachment in revendication by a vendor under his privilege—*Held*, that an affidavit was not necessary to obtain a writ in such case. *Robertson et al.* vs. *Ferguson*, S. C. 1858, 8 L. C. R. 239, 6 R. J. R. Q. 227.

2. In another similar case—*Held*, that the affidavit was not absolutely necessary. *Sinclair et al.* vs. *Ferguson*, S. C. 1858, 2 L. C. J. 101.

3. In an attachment in revendication—*Held*, that such attachment could not issue before judgment without affidavit. *Poston* vs. *Thompson*, C. C. 1862, 12 L. C. R. 252.

4. As Proof.—In an action in revendication where there is default, the affidavit on which the writ issued, makes proof against the defendant, and the Court may condemn the defendant without other proof, although the action be based on a special agreement which gives to him the thing revendicated. *Bergevin* vs. *Vermillon*, C. R. 1876, 3 Q. L. R. 134.

5. Contra.—But *Held* in another case, pointing out that the above holding did not represent the opinion of the judges in that case, that the affidavits to procure revendication, saisie or attachment are completely exhausted by the issue of the writ, and are of no value as proof in the case. *Crehan* vs. *Hagerty*, C. C. 1877, 3 Q. L. R. 322.

II. AMENDMENT.

The plaintiff in an action of revendication may, on leave granted by the Court, amend the description of the goods seized, even before the return day, on giving notice to the other parties. *Legge* vs. *Dufresne*, S. C. 1885, M. L. R., 1 S. C. 315.

III. CONTEMPT OF COURT IN.

Where in an attachment in revendication, the Court has granted the plaintiff possession of the effects seized, the forcible removal of these effects by another party in the case is a contempt of Court. *Whitehead* vs. *Kieffer*, S. C. 1885, M. L. R., 1 S. C. 288.

IV. DEFENDANT'S OPTION.

1. It is not obligatory in the case of an attachment in revendication, to give the defendant the alternative to restore the property seized or pay its value. *Watzo* vs. *Labelle*, C. C. 1881, 26 L. C. J. 120.

2. The object of attachment in revendication is to get possession of the goods seized and not their price or value. (*Ib.*)

3. A defendant who has been condemned upon an attachment in revendication to remit certain moveables within fifteen days of service of judgment, or in default to pay the value thereof, cannot after the expiration of the fifteen days offer to remit the goods, his obligation being then transformed into an obligation to pay the value of the goods in question. *Stevens* vs. *Levinson*, S. C. 1893.

V. EFFECT OF APPEAL.

While the record is in appeal, an application to obtain possession of the property seized under an attachment in revendication cannot be entertained. *Hamilton* vs. *Kelly*, S. C. 1871, 15 L. C. J. 168, 3 R. L. 128.

VI. EXECUTION IN.

Where a defendant in a case of attachment in revendication refuses to open his doors, the judge may, upon a return of the seizing bailiff to that effect, on the petition of the plaintiff, order

the opening to be effected by all necessary means, in the presence of two witnesses, and with such force as may be required. *Moreau vs. Matthewson*, C. C. 1868, 12 L. C. J. 285.

VII. FORM OF.

1. The forms in attachment in revendication are to be rigorously observed under pain of nullity. *Brassard vs. Turgeon*, S. C. 1873, 5 R. L. 123.

2. *Semble*, per Mackay J., that an attachment in revendication which sets up no value is null for want of jurisdiction. *Prime vs. Perkins*, C. R. 1879, 2 L. N. 256, 23 L. C. J. 250.

VIII. LIABILITY OF DEFENDANT.

Held, reversing judgment of Court below, that defendant in an attachment in revendication, even though the proprietor, is answerable if the property be seized upon his land, and he fail to inform the plaintiff in the cause who the real possessor is. *Eanis vs. Grand Trunk Ry. Co.*, Q. B. 1866, 2 L. C. L. J. 113.

IX. NATURE OF.

An attachment in revendication is a real action, whether of moveables or immoveables, and should be brought in the place where the property seized is situated. *Ethier vs. Dandurand*, S. C. 1879, 2 L. N. 158.

X. POSSESSION OF GOODS TO INTERVENANT.

The Court cannot give possession of the goods seized to an intervenant in an attachment in revendication, when the final judgment maintaining the intervention has been appealed from. *Whitehead vs. Kieffer*, S. C. 1885, M. L. R., 1 S. C. 288.

XI. PRIVILEGE OF DEFENDANT.

1. Where in an attachment in revendication it was proved that the defendant had a lien on the things seized—*Held*, that he could not be compelled to deliver them until the amount of his lien was deposited in Court. *Bell vs. Wilson*, S. C. 1855, 5 L. C. R. 491, 4 R. J. R. Q. 470.

2. In the case of attachment in revendication of a wagon, by an assignee under the Insolvent Act of 1869, wherein defendant pleaded a right of retention for repairs, the plaintiff cannot claim possession of the wagon, without prepayment of or security for such repairs. *Stewart vs. Ledoux*, S. C. 1872, 17 L. C. J. 167.

XII. PROCEDURE IN.

In an attachment in revendication—*Held*, that the omission to leave with the defendant a copy of the *procès-verbal* of seizure is not fatal, inasmuch as the Ordonnance of 1667 only requires that formality in cases of seizure in execution. *Moisan vs. Jorgensen*, S. C. 1863, 13 L. C. R. 399.

XIII. RIGHT TO.

1. **Affreightment.**—Art. 2421 C. C.—An affreighter cannot proceed by way of revendication, as in the case of an unlawful detainer, against the master of a ship, when such affreighter and master cannot agree as to the quantity of the goods shipped, and as to the bill of lading to be signed. *Gordon vs. Pollock*, Q. B. 1849, 1 L. C. R. 313, 3 R. J. R. Q. 17.

2. Art. 866 C. C. P.—A merchant shipped a quantity of barrels of flour on a vessel of which defendant was master, and defendant refused to deliver bills of lading therefor, according to the custom of trade—*Held*, that plaintiffs were entitled to an attachment in revendication to recover the goods. *McCulloch vs. Hatfield*, Q. B. 1862, 7 L. C. J. 229, and 13 L. C. R. 321.

3. **Animals.**—In an action in revendication of an ox, it is no justification to say that he was seized while trespassing on the defendant's soil and no more. *Reilly vs. Chandler*, K. B. 1817, 1 Rev. de Lég. 507.

4. **Bailiff.**—Revendication will lie against a bailiff who under an authority of a justice of the peace holds in his hands goods of the plaintiff, if the cause of the detention be a matter over which the justice has no jurisdiction. *Pacaud vs. Bégin*, K. B. 1820, 1 Rev. de Lég. 507.

5. **By Person charged with Felony.**—A person charged with felony cannot maintain an action in revendication of bank stock supposed to be stolen or taken from him when he was arrested, until the charge preferred against him has been disposed of. *Carlisle vs. Sutherland*, K. B. 1821, 1 Rev. de Lég. 507.

6. **Carriage — Possession.**—Action to revendicate a carriage. Defendant denied that she ever had possession, and said that her husband deceased had bought or leased the carriage from plaintiff, who had taken out a revendication against him and had obtained judgment; that the carriage was portion of his succession and in the legal possession of his heirs—*Held*, that as defendant had the

physical possession of the carriage that that was sufficient. *Normandeau* vs. *Bougie*, S. C. 1880, 3 L. N. 133.

7. Condition Precedent in Contract of Sale.—*Held*, that the condition precedent on which a sale was made not having been complied with, the vendor has a right to take an attachment in revendication to recover back the moveable sold. *Goldie* vs. *Rasconi*, S.C. 1888, 32 L. C. J. 308; M. L. R., 4 S. C. 313.

8. Entirety of Goods Sold (see also "ATTACHMENT CONSERVATORY—RIGHT TO"—No. 20).—A cask of gin which has been tapped is not within the provisions of C. C. 1599, par. 2. *Thompson* vs. *Dion*, S. C. 1885, 11 Q. L. R. 273.

9. Goods in Customs.—Where goods were retained by the collector of customs as forfeited under the Customs Act, 1883, and the importer seized them in the collector's hands by process of revendication—*Held*, that the plaintiff was entitled to an order for the delivery thereof, only on making deposit with the collector of a sum of money at least equal to the full value of the goods. *Ryan* vs. *Sanche*, Q. B. 1887, M. L. R., 4 Q. B. 312.

10. —— *Quære*, whether, pending a controversy between the importer and the Customs Department, an action of revendication will lie to revendicate goods retained by the collector as forfeited. (*Ib.*)

11. —— *Semble* (per Church, J.), that it is not competent for an importer to adopt this proceeding under the circumstances. (*Ib.*)

12. Grain.—The vendor, without day or term, can revendicate the goods sold by him, even in the hands of a third party, purchaser; and where the goods consist of grain, the fact of the grain being mixed with other grain of the same kind is no bar to the revendication. *Sauvéal* vs. *Mills*, S. C. 1860, 4 L. C. J. 307.

13. Grounds of.—Where the defendant to an attachment of things in revendication pleaded that he had no interest in the articles in question, and had never claimed them or refused to deliver them to the plaintiff, the premises in which they were having been formerly occupied by the plaintiff and defendant as copartners, and no proof was made of a demand and refusal to deliver, and the things were delivered to plaintiff by an interlocutory order of the Court—*Held*, confirming the judgment of the Court below, that the action would be dismissed with costs. *Hearle* vs. *Pate*, Q. B. 1861, 11 L. C. R. 290.

14. —— The appellants in the month of July borrowed from the firm of B., M. & Co. 25,000 bushels of corn, which was awarded to them at the rate of 70 cents per bushel, amounting to $17,560,88, which was paid to them. It seemed that such loans are common with grain dealers, and if the corn is returned within a reasonable time the money is paid back, not always at once, but generally within three days, as witnesses say. On the 21st of July, 1874, appellants returned the corn to B., M. & Co., by giving them orders for it, then on the way to Montreal in the "Wando" and "Milwaukee" barges, into which the corn had been transhipped at Kingston. To fill contract made some days before, by B., M. & Co., to deliver to D. B. & Co. 25,000 bushels of corn, B., M. & Co., on the 21st and 22nd of July, 1874, delivered to them, as part of this quantity, out of the "Milwaukee" and "Wando" 12,648 53-56 bushels of corn, and these orders were transferred to J. M. B., and by him put into "The Aphrodite," of which the respondent was the captain, to be taken to Europe. This was mixed with a larger quantity of corn in the vessel, and was undistinguishable from the rest. Action in revendication of 12,648 53-56 bushels of corn. Respondent, master of the ship "Aphrodite," pleaded that the corn did not belong to appellants, but to J. M. B., from whom he had received it, and to whom, or to whose order, he was bound to deliver it. Besides this, he also pleaded the general issue. The first plea was demurred to, as an exception not personal to the defendant. The demurrer was dismissed and parties went to proof, and finally the action was dismissed —*Held*, that to entitle the seller to revendicate, three things must exist: 1. The sale must not have been made on credit. 2. The thing must be entire and in the same condition. 3. The thing must not have passed into the hands of a third party who has paid for it. None of these conditions existed here. It was said that the respondent had no interest to urge the rights of third parties. He might have called in B., or B. might have intervened. Respondent, however, had a right to vindicate his lawful possession, and the appellants to maintain their action should have shown their title, and it should appear that respondent's right of possession was not sustained. The facts showed that he held the corn for B., who had legally purchased it and paid for it, from B. & Co., who had acquired it of B., M. & Co., who were in a position to

sell it. Action had on this ground. The judgment was also based upon want of identification. It was necessary to decide whether this was necessary in the case of an article like corn, when the quantity existed with the larger quantity. Judgment confirmed, because appellants had no right of action under the circumstances. *Borrowman* vs. *Bass*, Q. B., 18th Dec., 1876.

15. **Guardian.**—Revendication will lie by a judicial guardian to recover possession of property placed in his charge. *Moisan* vs. *Roche*, Q. B. 1877, 4 Q. L. R. 47, 1 L. N. 33; *Gilbert* vs. *Coindet*, Q. B. 1877, 4 Q. L. R. 50, 1 L. N. 42

16. —— But not if the guardian had allowed a person acting in good faith to purchase the goods of defendant without notifying him that they were under seizure. *Duperré* vs. *Dumas*, C. C. 1882, 8 Q. L. R. 333.

17. —— A voluntary guardian who has left the defendant in possession of the things seized may seize them by an attachment in revendication, and it is not necessary to allege reason to fear that they are in danger of disappearing, and the defendant refuses to give them up. *Wheeler* vs. *Duputil*, Q. B. 1887, 15 R. L. 564, confirmed C. R. 1884, M. L. R., 1 S. C. 147

18. **Horse—Possession.**—Seizure and revendication of a horse, wagon and harness in the possession of the defendants against the will of the plaintiffs, the proprietors. The defendants denied that they had possession of these things; said that plaintiff had sold them their business in December, 1881, and placed the articles claimed in the possession of one M. to be sold by him: and meanwhile the defendants were to have the use of them by paying for the keep of the horse: that the horse always remained in possession of said M. up to about the time of the seizure, when M. sold the horse to the person actually in possession when the seizure was made—*Held*, on proof maintaining the seizure. *Oshawa Cabinet Co.* vs. *Shaw*, S. C. 1883, 6 L. N. 213.

19. **Indeterminate Object.**—Where the object is indeterminate the plaintiff has no right to a revendication. S. C. 1882, 11 R. L. 479.

20. **Insolvency of Lessee of Vessel.**—An affidavit to the effect that the lessee of a vessel to run between Montreal and Upper Canada has incurred liabilities on the vessel at a United States port, that he has become insolvent, and that should he run the boat to Upper Canada, she would in due course call at such port in the United States and be in all probability seized there for the payment of such liabilities, is sufficient to sustain an attachment in revendication of the vessel by the lessor. *Routh* vs. *Macpherson*, S. C. 1859, 4 L. C. J. 45.

21. **Landlord's Privilege—Rights of Third Parties.**—The plaintiff issued a writ of attachment in revendication to recover certain goods and chattels on the premises and in the possession of the defendant. The defendant pleaded that he had a privilege upon the articles for the rent of a third party to whom the premises were let—*Held*, that although a landlord has a privilege upon the goods of third parties found on the premises let, yet he must exercise his right by course of law, and as in this case the landlord had not done so, judgment must go for the plaintiff. *Jackson* vs. *Cuthbert*, C. C. 1885, 8 L. N. 68.

22. —— And where a landlord took an attachment in revendication against a piano belonging to a third person after it had been removed from the house of his tenant, but neglected to join his tenant or debtor in the action—*Held*, that the action must be dismissed. *Auld* vs. *Laurent*, S. C. 1863, 7 L. C. J. 49.

23. **Legatee.**—A legatee can maintain an action in revendication of his legacy from a third holder before he has become actually vested with the property in the legacy as owner. (1) *Morin* vs. *Dubuc*, K. B. 1 20, 1 Rev. de Lég. 503.

24. **Lease of Moveables.**—An act by private writing, purporting to be a lease of moveables with promise of conditional sale for a nominal price, after certain instalments shall have been made, followed by delivery, constitutes a conditional sale, and in such a case revendication will not lie, although the deed contained a clause providing therefor. *Papin* vs. *Laverdière*, C. Ct. 1886, 12 L. N. 2.

25. **Mortgagee of Barge.**—A registered mortgagee of a barge, who is also holder of the certificate of ownership, can revendicate the barge in the hands of a purchaser thereof by judicial sale, under a judgment against the mortgagors, even when such mortgagors have at all times prior to delivery to the purchaser been in the actual possession

(1) *Délivrance de Legs* abolished by Art. 891 C. Code.

of the barge. *Kelly* vs. *Hamilton*, Q. B. 1872, 16 L. C. J. 320.

26. Owner of Undivided Share of Real Estate.—A proprietor of an undivided share of real estate may, if his right be denied by his co-proprietors, bring an action in revendication to establish his right by a judgment, and secure payment of his share of the revenue; but a judgment cannot be rendered in such case so as to cause the defendant to be dispossessed of any part of the common property. *Armitage* vs. *Evans*, C. R. 1878, 4 Q. L. R. 300.

27. Partnership.—Where after the dissolution of a partnership one of the partners has partnership property in his possession which he is about to convert to his own use, the other partner cannot claim his undivided share of such property by attachment in revendication. *Maguire* vs. *Bradley*, Q. B. 1845, 1 R. de L. 367.

28. Property Attached.—Revendication for property attached and tortiously abstracted can be maintained. *Merkley* vs. *Carillier*, K. B. 1812, 1 Rev. de Lég. 506.

29. Property Illegally Detained.—In an action in revendication of certain moveables alleged to have been illegally detained by the defendant *Held*, that an action in revendication would lie to recover possession of moveables illegally seized. *Langlois* vs. *Corporation of the Parish of St. Roch South*, C. C. 1863, 13 L. C. R. 317.

30. Repairs to Cars.—A person who repairs cars, and transforms platform cars into passenger cars, cannot be considered the owner of them, and cannot exercise an attachment in revendication in regard to them; and when such attachment concludes that the plaintiff be put in possession of the cars, or that the defendant be condemned to pay their value, plaintiff cannot obtain judgment thereon for the value of the work done on said cars, the attachment being illegal. *Séneal* vs. *Peters*, Q. B. 1874, 7 R. L. 308.

31. Sale by Foreign Company.—The appellants, plaintiffs in the Court below, sold to the South Eastern Railway Company two locomotives, and the purchaser not having paid the prices, the Rhode Island Locomotive Works took out a seizure in revendication, asking that the sale be set aside, and that the locomotives be sent to them. The declaration alleged that the sale and delivery of the locomotives took place at Providence, Rhode Island, and it was proved that under the law of that State there was no such remedy as that of attachment in revendication, or the privilege of annulling the sale if the price were not paid. The Court below, upon that as well as other grounds, dismissed the action. The court here was of opinion to confirm the judgment, on the ground that the law of Rhode Island does not give any such right. *Rhode Island Locomotive Works* vs. *South Eastern Ry. Co.*, Q. B. 1886, 31 L. C. J. 86.

32. Stolen Horse.—A right of revendication exists in favor of the owner of a stolen horse, even when the purchaser bought it at public auction and in good faith. *Langevin* vs. *McMillan*, S. C. 1865, 9 L. C. J. 105.

33. Title Deeds.—An action in revendication can be maintained for the recovery of title deeds. *Perrault* vs. *Hausserman*, K. B. 1817, 1 Rev. de Lég. 506.

XIV. SERVICE IN.—Arts. 809 and 868 C. C. P.

A writ of attachment in revendication addressed to "one of the bailiffs of our Superior Court in the district of, etc.," must be executed by one of such bailiffs, but the writ may be served by a bailiff and the declaration by a sheriff. *Brossard* vs. *Turgeon*, S. C. 1873, 5 R. L. 123.

XV. TITLE TO GOODS SEIZED.

When a person is forcibly deprived of his possession of moveables in an action of revendication, he will not be held to establish his title as against the trespasser. It will be for defendant to justify his act. *Spoliatus ante omnia restituendus. Lavoie* vs. *St. Laurent*, Q. B. 1886, 9 L. N. 66.

ATTORNEY.—See Advocates and Attorneys.

ATTORNEY GENERAL.—(See also "Crown"—"Lieut. Governor")

1. Delegation of Authority.—Under 32 and 33 Vict., c. 29, the attorney general could not delegate to the judgment and discretion of another the power which the legislature had authorized him personally to exercise. *Abrahams* vs. *The Queen*, Supreme Ct. 1881, 6 Can. S. C. R. 10; *Regina* vs. *Granger*, Q. B. 1881, 7 L. N. 247.

2. Art. 704 R. S. Q. provides that "the Lieutenant-Governor in Council appoints by commission an officer called the Assistant Attorney-General." This article has been amended by 56 Vic. (Q.), ch. 14, adding the following paragraph: "The Assistant Attorney General has *ex officio* power to represent the attorney general before all Courts of Justice in this Province."

3. Office of, filled by Member of the Bar.—Office of assistant attorney general not to cause advocate filling it to lose his quality of member of the Bar. 57 Vic., ch. 34.

4. Fiat. 997 C. C. P.—It is within the discretion of the attorney general of Canada to grant or withhold his *fiat* for a *scire facias*. *Sauzim* vs. *Bank of St. Hyacinthe*, Dept. of Justice 1881, 28 L. C. J. 270, 20 R. L. 580; *Gilmour* vs. *Van Horne*, Dept. of Justice 1889, 20 R. L. 590.

5. Desistment.—The attorney-general of the Province of Quebec is the sole *dominus* of a suit instituted by him in his official capacity, whether there be a relator or not. Accordingly, a *mandamus* will not lie at the instance of a relator to compel him to continue proceedings under Art. 997 C. C. P., nor need he obtain the leave of the Court before discontinuing such proceedings. A succeeding attorney-general cannot retract a discontinuance by his predecessor. *Casgrain* vs. *Atlantic & North West Ry.*, 1895, App. Cas. 282, confirming Q. B., 23 Dec., 1893 (reversing S. C., 21 R. L. 71.

6. Public Roads.—A person can proceed in the name of the attorney general to compel a railroad company to reopen a road closed by it, without establishing that he had received damages therefrom particular and distinct from that suffered by the public in general. *Turcotte* vs. *Cie. du Ch. de Fer l'Alt. du Nord*, S. C. 1891, 21 R. L. 71.

7. Precedence for Hearing of his Case.—The attorney general for the Province of Quebec claimed precedence for the hearing of his cases as a privilege. The Court without adjudicating on the right allowed the special case to take precedence, as it was a matter of general public interest. *Attorney General* vs. *The Queen's Insurance Co.*, Q. B., 11 June, 1877.

8. Right to Appear for Crown.—The right of the attorney general for the Province of Quebec to appear for the Crown cannot be questioned by a private person. *Monk* vs. *Ouimet*, Q. B. 1874, 19 L. C. J. 71.

AUCTION—See Sale.

AUCTIONEER (1)—See Agency.

1. Action was brought against an auctioneer to recover the value of a horse, which the plaintiff placed at £15 sterling, and the auctioneer, contrary to instructions, had sold at £15 currency, and the defendant pleaded that the limitation placed upon the auctioneer was illegal—*Held*, that under the circumstances the limitation was perfectly legal, and that the auctioneer was liable for the full value of the horse. *Lawlor* vs. *Fages*, C. C. [illegible] 15 L. C. R. 25.

2. Question as to the right of auctioneer over property entrusted to them for sale. The decision turned on evidence solely, it being *Held*, confirming the judgment of the Superior Court, that the auctioneer had not proved that the property entrusted to him for sale; and that he had never sold the property for sale without instructions of any kind. *Booker* vs. *Cuthp*, Q. B. 1875, Rev. Dig. 66.

3. An auctioneer is not liable personally on a sale made by him for a disclosed principal. *Lacoe* vs. *Fraser*, S. C. 1877, 21 L. C. J. 309.

4. Expulsion of Person Attending Auction.—A person attending an auction cannot be expelled without proper motives, and it is on the auctioneer to prove such motives. *Martineau* vs. *Marleau*, S. C. 1879, 9 R. L. 530.

"AUTHORIZATION TO PAY"—See Statute.

AVOCAT—See Advocate and Attorney.

AVOWAL—See Admissions.

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(1) For obligations imposed by Statute upon auctioneers and penalties for contraventions, see Arts. 945-953 R. S. Q. As to auctioneers' licenses see Art. 866 R. S. Q.

B.

BAIL BOND—See Capias—Crim. Law.

BAIL—See Lease.

BAILIFFS. (1)

I. Action for Goods sold.
II. As Witnesses. 1-2.
III. Contempt of Court. 1-4.
IV. Duties of.
Operation of Bailiffs—Regulations. 1.
Execution—Assaulting Bailiff. 2-3.
Execution—Coercive Imprisonment. 4-5.
Return. 6-7.
V. Favoring Relatives and Others. 1-3.
VI. Fees.
Action in Forma Pauperis. 1.
Failure to Execute. 2.
Invoices. 3.
Liability of Client for. 4-5.
Liability of Attorney for. 6-7.
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VII. Jurisdiction.
VIII. Liability of.
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Irregularities in Return. 5.
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Retaining Money received. 7.
Seizure in Hands of Third Party objecting. 8.
Subrogation (See No. 2 *supra*).
IX. Litigious Rights. 1-2.
X. As Sureties.
XI. Powers of. 1-2.
XII. Residence of. (See also "Jurisdiction," No. VII *supra*).
XIII. Service—Relations. 1-3.
XIV. Status of. 1-3.
XV. Suspension of.
Offences committed in Private capacity. 1.
Remedy of Petitioner. 2.
Review. 3.
XVI. Security of (2). See under title "Suretyship."

(1) Act concerning their admission, security, duties, removal, penalties, 2 R. S. Q. Art. 5744.

(2) See Act, 53 Vic. (Que.), ch. 48, amending the security to be given by the bailiffs of Montreal.

I. ACTION BY, FOR GOODS SOLD.—Art. 593 C. C. P.

Where a bailiff, having sold certain goods in process of execution, delivered them before having been paid, and afterwards brought action for the price—*Held*, that no such action would lie. *Pelletier* vs. *Lajoie*, C. C., 1855, 5 L. C. R. 394, 4 R. J. R. Q. 388.

II. AS WITNESS.—Art. 262 C. C. P.

1. A bailiff who has acted in a case may be examined as a witness, provided that it is not to prove conversations had or admissions made at the time of service. *Garneau* vs. *Courchêne*, C. Ct. 1879, 6 Q. L. R. 34.

2. In an action to recover a penalty for the sale of intoxicating liquors, the bailiff who served upon the defendant's attorney the inscription of the case can be examined as a witness regarding the sale of intoxicating liquors by the defendant. *Rivard* vs. *Courtemanche*, C. Ct. 1881, 11 R. L. 163.

III. CONTEMPT OF COURT.

1. A bailiff, in default for not making a return to a writ of execution, is not liable to imprisonment for contempt of Court without being put in default by rule of Court to make his return. *Rolland* vs. *Ranger*, C. C. 1862, 7 L. C. J. 48.

2. Where order for coercive imprisonment against a bailiff for not making his return ordered the sheriff "d'appréhender au corps le dit huissier en cause, et de l'incarcérer dans la prison commune du district de Montréal, et qu'il y soit détenu jusqu'à ce qu'il ait rapporté, devant cette Cour, le dit bref d'exécution, avec ses procédés sur icelui, ou payer au dit demandeur le montant de la dette intérêt et frais en cette cause," it is not sufficiently executed where the sheriff only received from the bailiff a return of the proceedings written on the writ of execution, showing that the said bailiff had received from the defendants the amount stated in the writ of execution; the sheriff should also have demanded the remittance of the amount so received. *Dufresne* vs. *Coderre*, C. Ct. 1870, 3 R. L. 428.

3. Where a bailiff, resident in another district, and charged with the execution there of a writ of execution issued out of the District of Montreal, fails to comply with the exigencies of the writ, he is liable to imprisonment

in the District of Montreal. *Gauvlinger* vs. *Decoutin*, S. C. 1877, 21 L. C. J. 220.

4. A bailiff who proceeds with a sale, notwithstanding an opposition and order to suspend served upon him, is liable to imprisonment for contempt of court. *Leroux* vs. *Desjardiers*, S. C. 1881, 4 L. N. 173, 12 R. L. 298.

IV. DUTIES OF.

1. **Corporation of Bailiffs.**—A bailiff is bound to comply with the regulations of the Corporation of Bailiffs, and to keep a register of the sales made by him. *Corp. des Huissiers* vs. *Bourassa*, S. C. 1889, M. L. R., 5 S. C. 409.

2. **Execution.**—Where a writ of execution has been issued apparently regular in every respect and addressed to a certain bailiff, it is his duty to proceed under it, notwithstanding that it may really contain causes of nullity. *Regina* vs. *Morrison & Paguelo*, Q. B. 1872, 3 R. L. 525.

3. —— **Assaulting Bailiff.**—And if the party executed against assaults the bailiff in the execution of such a writ, he is guilty of assault. (*Ib.*)

4. —— A bailiff, even belonging to another district, is obliged to immediately execute a writ of execution sent to him; and his refusal to so execute such writ will entail order for coercive imprisonment against him. *Hamel* vs. *Webb*, C. C. 1886, 10 L. N. 36.

5. —— It is no answer for such bailiff to plead, to the order for coercive imprisonment, that his disbursements had not been forwarded to him, unless he shows that he had, before such refusal, made a demand for such disbursements. (*Ib.*)

6. **Return.**—A bailiff being charged with a writ of garnishment before judgment issued at the instance of the plaintiff himself, without the ministry of an attorney, and having served such writ failed to return it either into court or to the plaintiff, by reason of which the plaintiff lost his recourse against the moneys in the hands of the garnishee, on action being brought against the bailiff—*Held*, that it was his duty to deliver the writ on or before the return day, either to the attorney or the party from whom he received it, or to file it in the office of the clerk of the court in which it was returnable, although he was not especially requested to do so, and that, having executed such writ, he would not be permitted to urge want of proof of his being a bailiff in answer to such action. *Lampson* vs. *Barrett*, C. Ct. 1851, 2 L. C. R. 77, 3 R. J. R. Q. 101.

7. —— It is not part of the official duty of a bailiff employed by a sheriff to return to the court his doings under a warrant from the sheriff, and such return if made to the court, will be regarded as an unofficial act, and therefore not authentic. *Dinning* vs. *Oliver*, Q. B. 1862, 14 L. C. R. 296.

V. FAVORING RELATIVES AND OTHERS.

1. The sale of an article by a bailiff to his *recors* at an undervaluation, and in the absence of bidders, will be considered a sale to the bailiff himself, and in such case the bailiff may be condemned to return the article to the person in whose possession it was when sold. *Corp. des Huissiers* vs. *Bourassa*, S. C. 1889, M. L. R., 5 S. C. 409.

2. A bailiff will be considered as favoring his relatives or employees in the adjudication of goods sold by him, if he is in the habit of adjudging things to them at his sales. (*Ib.*)

3. The frequent adjudication of goods to his relatives or employé by a bailiff, will be considered as constituting favoritism. (*Ib.*)

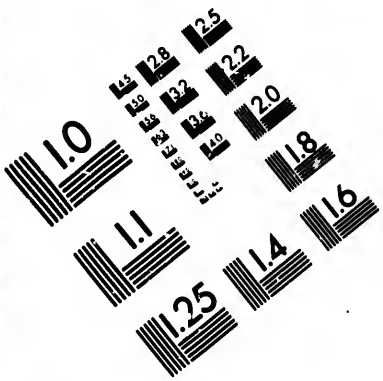
VI. FEES.

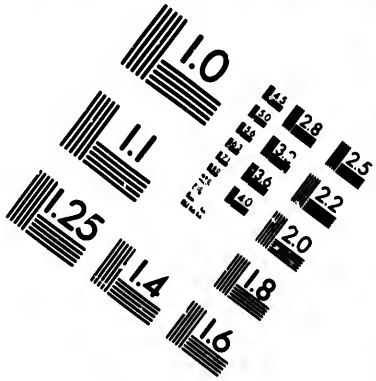
1. **Action in Forma Pauperis.**—In an action *in forma pauperis* a bailiff cannot recover for his services, but he can recover for his disbursements, and as such for the amount allowed by the tariff for mileage. *Dion* vs. *Toussaint*, C. Ct. 1880, 7 Q. L. R. 54.

2. **Failure to Execute.**—A bailiff charged with a writ of execution who, for insufficient reasons, fails to act upon it is not entitled to his fees. *Croteau* vs. *Gingras*, C. C. 1864, 15 L. C. R. 204.

3. **Invoices.**—Where a bailiff sells goods in considerable quantity, he is bound to furnish the purchasers with invoices, for which he can charge at the rate of 5 cents for each 100 words as allowed him by the tariff for all documents which he is obliged to prepare. *Whitehead* vs. *Dubeau*, S. C. 1884, 10 Q. L. R. 162.

4. **Liability of Client for.**—The fees of a bailiff in a suit, except where they are taxed against the adverse party and distraction given to the attorney, belong to the bailiff himself, and if the client pays them to his attorney, he will be liable to pay them again to the bailiff. *Théroux* vs. *Green*, C. C. 1883, 7 L. N. 7.





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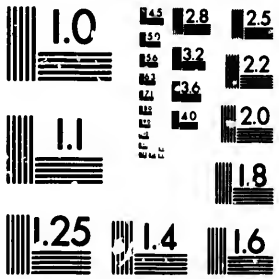

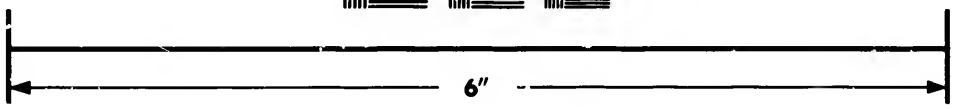

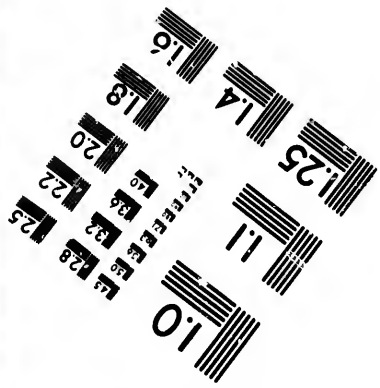

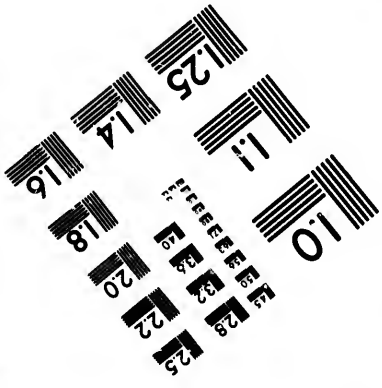

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5. —— An attorney and client are jointly and severally liable for bailiffs' fees. *Devlin* vs. *Bibeau*, Q. B. 1864, 30 L. C. J. 101.

6. Liability of Attorney for.—Proof that the plaintiff performed services as a bailiff in certain cases, and that the defendant acted as attorney for the parties for whom such services were rendered—*Held*, not of itself sufficient to give the bailiff a right of action against the attorney for the value of such services. *Théroux* vs. *Pacaud*, C. of R. 1879, 6 Q. L. R. 14; *Gelinas* vs. *Dumont*, C. Ct. 1880, 10 R. L. 229.

7. —— An attorney *ad litem* employing a bailiff to execute a writ and making a special agreement with him as to his charges, without stipulating that he is not contracting for himself, becomes personally liable towards the bailiff. *Panneton* vs. *Guillet*, C. Ct. 1880, 7 Q. L. R. 250.

8. Mileage.—A bailiff cannot charge mileage from his place of residence to the place where a writ served by him is returnable, nor can he charge mileage in the same manner for remitting money levied under execution, his duty being in the first place to transmit his return by mail, and in the second to transmit the money by post office order. *Boswell* vs. *Belfian*, C. C. 1864, 15 L. C. R. 22.

9. —— Art. 78 C. C. P., § 4.—On a motion to revise a taxed bill of costs—*Held*, that the bailiff in reckoning the distance travelled in the service of a subpœna cannot count from the Court House but from his domicile, and that even when he has to go to or return from the Court House to get or return the subpœna served. *Lozeau* vs. *Coté*, S. C. 1868, 1 R. L. 49.

10. —— And *Held*, also, that although plaintiff resided in a different part of the district from that in which the Court House was situated, the subpœna or service should have been returned by mail, and, if the bailiff chooses to travel the distance himself, he can only be paid by the party employing him. (*Ib.*)

11. —— And *Held*, also, that in a general way this applies only to the service of subpœnas, and to such services as require the presence of the bailiff to receive instructions. (*Ib.*)

12. —— A bailiff is entitled to charge a double fee when he is obliged to return a second time and effect a service, in consequence of the absence of the defendant from his domicile, provided he waits a reasonable time for his return. *Brunelle* vs. *Chagnon*, C. Ct. 1870, 2 R. L. 129.

13. ——A bailiff cannot charge mileage from the Court House when his own place of residence is close to the place of service. *Liste Electorale de Berthier* vs. *Corp. de Berthier*, S. C. 1878, 8 R. L. 748; *Lozeau* vs. *Coté*, 1 R. L. 49 (*supra*).

14. —— On motion to revise the taxation of a bailiff's costs—*Held*, that in an action issuing from the Superior Court of the chef-lieu of the district, the bailiff charged with the execution of a writ of *Fi Fa de bonis* can only have his mileage taxed for the same distance as if the writ had been executed by a bailiff dwelling nearest to the defendant's domicile, the balance to be paid by the party employing him. *Sawyer* vs. *Bohan*, S. C. 1888, 12 L. N. 1.

15. Prescription.—Art. 2267 C. C. P.—Bailiffs' fees are *absolutely* prescribed by lapse of 3 years, under the 12th Vic., ch. 44. *Le Pailleur* vs. *Scott*, S. C. 1856, 1 L. C. J. 275.

VII. JURISDICTION.

Art. 78 C. C. P.—A bailiff of the S. C. appointed for the district in which he resides does not lose his quality as bailiff in such district by removing his residence into another district and being appointed as a bailiff for that district also. *Compagnie du Chemin de Fer des Laurentides* vs. *Gauthier*, C. C. 1880, 24 L. C. J. 174, 3 L. N. 243.

VIII. LIABILITY OF.

1. Delay in Execution.—A bailiff who, through negligence and ignorance, made a seizure in an attachment for rent several days after the service of the writ on the lessee, was held responsible for the loss thereby occasioned to the plaintiff. *Michon* vs. *Venne*, C. R. 1886, M. L. R., 2 S. C. 367.

2. —— **Subrogation.**—The judgment in such case condemning the bailiff to damages will subrogate him to that extent in the rights of the plaintiff against the lessee. (*Ib.*)

3. His Guardian's Costs.—A bailiff charged with the execution of a writ is personally liable for the remuneration of the guardian appointed by him. *Courchêne* vs. *Généreux*, C. Ct. 1865, 1 R. L. 433.

4. —— But *Held*, in a later case, that neither the advocate nor the bailiff is responsible to the guardian whom he has appointed, and who has voluntarily accepted the charge,

for the costs of his guardianship. *Plante* vs. *Cazeau*, S. C. 1875 (Dorion, J.), 1 Q. L. R. 203.

5. **Irregularities in Return.**—When a bailiff, by irregularities in his return, gives rise to an exception to the form, he is liable for the loss occasioned thereby. *Major* vs. *Chartrand*, C. Ct. 1877, 21 L. C. J. 303.

6. **Overcharge.**—A bailiff for overcharge is subject to suspension, fine and imprisonment. *Degure* vs. *Despins*, S. C. 1871, 6 R. L. 736.

7. **Retaining Money Received.**—A bailiff who retains money which he has levied is liable to an attachment. *Rex* vs. *Ready*, K. B. 1813, 2 Rev. de Lég. 471.

8. **Seizure in Hands of Third Party Objecting.** Art. 553 C. P. C.—Where a bailiff seized goods supposed to belong to defendant in the hands of a third party without his consent, he will be liable towards such third party for their value. *Flagg* vs. *Vaughan*, Q. B. 1864, 12 R. L. 161.

IX. LITIGIOUS RIGHTS.—Art. 1485 C. C.

1. Where the plaintiff, a bailiff of the Court, purchased a claim of $200, of which there was evidence that at the time of the purchase $100 had been paid on it at least, and there was some doubt about the balance—*Held*, to be a litigious claim within the meaning of Art. 1485 C. C. and action dismissed. *Coté* vs. *Haughey*, C. R. 1881, 7 Q. L. R. 142.

2. Arts. 1485-1583 C. C.—An agreement whereby the defendant undertook to pay the sum of $500 if a picture attributed to Correggio, and in which he had a third interest, should prove to be authentic, creates a litigious debt which cannot be acquired by plaintiff, a Superior Court bailiff. *Reid* vs. *Helbronner*, S. C. 1892, 3 Que. 363.

X. AS SURETIES.—Arts. 828 C. C. P., 1938 C. C.

Bailiffs who have become sureties in violation of the 6th Rule of Practice cannot plead that rule in defence of an action against them on the bond. *Dupras* vs. *Sauvé*, S. C. 1881, 4 L. N. 164.

XI. POWERS OF.

1. A bailiff has no authority to insert in a *procès-verbal* of seizure an obligation on the part of the guardian to the effects seized, that in default of producing the goods seized he will pay the plaintiff his debt, interest and costs. *Dupuis* vs. *Bell*, S. C. 1865, 15 L. C. R. 435.

2. Bailiffs are only officers of the Superior Court for judicial matters, and outside of that their certificate of return proves nothing. *DeBellefeuille* vs. *Piché*, S. C. 1879, 23 L. C. J. 314.

XII. RESIDENCE OF (See Jurisdiction of).

A writ of summons addressed to any of the bailiffs *residing* in a district will be good if served by a bailiff duly appointed for such district. *Têtu* vs. *Martin*, S. C. 1853, 3 L. C. R. 194, 4 R. J. R. Q. 2.

XIII. SERVICE.

1. **Relatives.**—A bailiff can execute a writ of *fieri facias de bonis* against his brother-in-law, or other relative, notwithstanding the provisions of the 12 Vic., cap. 38. *Lemieux* vs. *Coté*, C. Ct. 1859, 10 L. C. R. 124.

2. —— Art. 74 C. C. P.—The prohibition contained in Art. 74 C. C. P. does not apply to cases in which bailiffs make service *against* their relations. *Bazin* vs. *Lacouture*, S. C. 1883, 7 L. N. 68.

3. —— Art. 74 C. C. P.—But *contra*. The words "which concern" in Art. 74 C. C. P. extend the prohibition to service *against* as well as *for* relations, Art. 74 differing in that respect from Art. 66 of the French Code of Procedure, which only prohibits bailiffs from serving for relations. Therefore service by a bailiff of his uncle is null. *Cliche* vs. *Poulin*, S. C. 1890, 16 Q. L. R. 233.

XIV. STATUS OF.

1. In an action by a bailiff for fees, where the defendant pleaded prescription of three years under C. S. L. C. cap. 82, sec. 34, ss. 3—*Held*, that bailiffs are officers of justice, and the plea must therefore be maintained. *Hébert* vs. *Peutland*, C. C. 1863, 14 L. C. R. 155.

2. A bailiff is not a public officer in the sense of Art. 22 C. C. P. so as to entitle him to a month's notice of action. *Major* vs. *Chartrand*, C. Ct. 1877, 21 L. C. J. 303; *Major* vs. *Boucher*, C. Ct. 1877, 21 L. C. J. 304; *Michon* vs. *Venne*, C. R. 1886, M. L. R., 2 S. C. 367.

3. Bailiffs are only officers of the Superior Court for judicial matters. *DeBellefeuille* vs. *Piché*, S. C. 1879, 23 L. C. J. 314.

XV. SUSPENSION AND REMOVAL OF. (1)

1. Offences Committed in Private Capacity.—The removal of a bailiff can be demanded for fraudulent acts committed by him in his private capacity. *Desmarteau* vs. *Reed*, S. C. 1893, 3 Que. 42.

2. Remedy of Petitioner.—Petition was filed, asking that a bailiff be deprived of his office on the ground of having made false returns, and having accepted, as guardian to the effects of petitioner which he had seized, a person whom he did not know, and who was an undischarged insolvent. Petition dismissed, but without costs, petitioner having other recourse. *Nield Exp.* vs. *Laporte*, S. C. 1872, 3 R. C. 75.

3. Review.—Where it appeared to the judge that a bailiff who had been examined as a witness in the cause had been tampered with, and had sworn falsely, and by the judgment in the case it was ordered that he be suspended from his functions as such bailiff—*Held*, that he was not a party to the cause so as to inscribe in Review from such order, and the Court of Review could not consider whether his suspension had been legally ordered or not. *Hurtubise* vs. *Riendeau*, C. R. 1881, 4 L. N. 354.

BANKS AND BANKING. (2)

I. Accounts. 1-2.

II. Advances. (See also *infra* No. VI.)

Draft. 1.
Husband and Wife. 2.
On Real Estate. 3.
Miscellaneous. 4.

III. Banks are Public Corporations.

IV. Cheques. (See also under title "Bills and Notes.")

Acceptance at Future Date. 1.
Bank Acting as Agent of Another Bank. 2-5.
Endorsement. 6.

V. Clearing House.

VI. Collateral Security. (See also No. XXV. *infra.*)

Insolvency — Fraudulent Preference. 1.
Overdue Debt. 2.
Property in Goods pledged. 3.
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Shares of Trading Company. 5-9.
Securities which Pledgor had no Right to pledge—Liability of Bank. 10.
Warehouse Receipts. 11.
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VII. Constitutional Law. (See No. VI. 12.)

VIII. Compensation. 1-2.

IX. Deposits. (See also No. XIII.)

As Security for Government Contract—Failure of Bank. 1.
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Rights of Creditors of Depositor. 6.

X. Directors—Liability of. 1-3.

XI. Discounts.

Claim against Maker of Note. 1.
Security by Third Party. 2.

XII. False Returns. 1-6.

XIII. Insolvent Bank.

Calls—Double Liability. 1-4.
Cheques Paid after Suspension—Recourse of Liquidators. 5.
Compensation. 6-8.
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Restitution of Money received at Time of Suspension. 16-17.
Rights of Creditors. 18.
Savings Banks—Holding Shares as Collateral Security — Double Liability. 19-20.
Suspension of Payment—90 Days how Calculated—Creditors—Order of Judge. 21-23.

XIV. Interest. 1-2.

XV. Letters of Credit. 1-2.

XVI. Liability. (See also No. VI *supra.*)

Forgery. 1-2.
For Acts of Officers. 3-6.
For Error in Money paid out. 7.
Holding Shares as Collateral Security—Calls. 8-10.

XVII. Lien.

Limitation of Time for holding Goods pledged 1-2.
Logs. 3.
Stock. 4-5.

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(1) "Bailiffs are removable by the Superior Court or by any judge thereof, or by the Circuit Court," Art. 5751 R. S. Q.

(2) 63 Vic. (D.), ch. 31. The Bank Act.

XVIII. Powers.
Contract of Guarantee — Ultra-Vires. 1-2.
Guaranteeing Purchase of Goods. 3.
XIX. Powers of Officers of Bank. 1-4.
XX. Questions of Evidence. 1-2.
XXI. Service of Summons.
XXII. Shares.
Attachment. 1.
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XXIII. Stock—Nature of.
XXIV. Trusts. 1-5.
XXV. Ultra Vires Acts—Effect of. 1-3. (See also No. XVIII. 1-2.)
XXVI. Unlawfully engaged in Banking.

See also Company and Corporation Law.
" Bills and Notes.
" Agency.

I. ACCOUNTS.

1. Action on a deposit account kept by the plaintiff in the defendant's bank for the sum of $1,732.18, which had been charged against the plaintiff in his pass-book and in the bank ledger, but which he declared he had never withdrawn. The plaintiff, before bringing his action, had called on the plaintiffs to produce the cheque, but this they had failed to do, although by their plea they alleged that all the plaintiff's cheques had been returned to them. Defendants, in fact, admitted that the cheque had been mislaid, but sought to prove by evidence that the cheque was drawn by the plaintiff and paid by themselves. It was certain that it had been paid, and the evidence as to the mode of paying it was as follows, viz.:—"The clerk to whom the disputed cheque was "presented, and by whom it was accepted, "says: A few days before the 16th of January "a low sized man, whom I did not know, pre-"sented the cheque. I ascertained that there "were no funds to pay it. I submitted it to "Mr. H, and he told me to tell the man to "present it again, as he presumed it would "then be all right. I told this to the man. "He replied that it was strange, as the plaintiff "had written to him or told him that there "were sufficient funds. A day or two after-"wards, a deposit was made to the credit of "the plaintiff, and two days after the same "person returned with the cheque, and said, "'I suppose it is all right.' I said, 'Yes.'" The witness also said he knew the plaintiff's signature, and was positive that it was his writing at the foot of the cheque, and being now examined for the defendants, said he was not sure if he had ever before seen the person who presented the cheque, but thought he was familiar with him. The clerk who paid the cheque saw nothing to distinguish the signature from the ordinary signature of the plaintiff, and besides, while in his examination for the plaintiff he said that he did not know the person who presented the cheque, in his second he said he was not sure, but thought the person familiar to him. The court would have deemed that evidence sufficient to establish the genuineness of the cheque, if it remained, as now, uncontradicted, and if the cheque made part of the record. But the defendants, by their negligence in losing the cheque, had made it impossible to contradict their evidence, and it was, therefore, incumbent on them to make it morally certain that even if the cheque were in the record their evidence could not be contradicted. This they had failed to do, though there were circumstances which confirmed the parole evidence. Thus the pass book was sent to plaintiff on the 27th July, 1871, and showed a balance of only $1.44, whereas, according to his pretension, the balance should have been $1,736.62; and on the 3rd August, 1871, the defendants wrote to him that his account was overdrawn, and if there were any error he should let them know, when, according to his pretension, there should have been a balance of $1,719.62 in his favor. They also again drew attention to the state of his account on the 30th August, and it was strange that plaintiff did not answer these letters, nor complain for several months afterwards, though the disputed cheque was dated 16th January, 1871. But when he saw the pass book, and that it had not been balanced for seventeen months, during which time plaintiff had made deposits to the amount of $12,637, this oversight did not appear so unaccountable as at first. His conduct was, at all events, most careless; but the defendants were chargeable with grave carelessness, and he did not think the plaintiff ought to be made answerable for the cheque they had mislaid. He did not pronounce that the cheque was forged, but that he could not on the evidence declare it genuine, and therefore must give judgment for plaintiff, saving their recourse to defendants if they should find the cheque. *Fournier* vs. *Union Bank*, S. C. 1873, 2 Step. Dig. 99.

2. Where an account has been kept in the name of M. C., as the agent expressly of C. S., and that account has been closed, and a new account opened in the name simply of "M. C., agent," and it is proved that M. C. was in reality (although unknown to the bank) the agent not only of C. S. but of various other parties, all of whose funds were indiscriminately deposited and withdrawn in the name of "M. C., agent," C. S. cannot be held for an overdrawn balance due by "M. C., agent," in the absence of any special evidence to establish indebtedness to the Bank by C. S. personally. *Metropolitan Bank* vs. *Symes*, C. S. 1876, 21 L. C. J. 201.

II. ADVANCES.

1. Draft.—Where a bank is induced to advance a sum of money to B, on the undertaking implied in a telegram from A to B, and exhibited to the bank, that A will repay the advance by accepting a draft for the amount thereof, and the advance is used to retire another draft for which A is liable, A is liable to the bank for the advance, though he subsequently refuses to accept the draft. *Dunspaugh* vs. *Molsons Bank*, Q. B. 1878, 23 L. C. J. 57.

2. Husband and Wife.—Where a husband, dealing under power of attorney with his wife's money, obtained advances from a bank on the security of promissory notes endorsed by him in his own name, and then in the name of the wife as her attorney, such advances being used to carry on a business which was subsequently transferred to their son, the wife is liable for the amount of such advances. *Banque d'Hochelaya* vs. *Jodoin*, P. C. 1895, 18 L. N. 244, reversing Q. R., 3 Q. B. 36.

3. On Real Estate.—B transferred to the Bank of Toronto (appellants) by notarial deed a hypothec on certain real estate in Montreal, made by one C to him, as collateral security for a note which was discounted by the appellants, and the proceeds placed at B's credit on the same day on which the transfer was made. The action was brought by the appellants against the insolvent estate of C, to set aside a prior hypothec given by C and to establish their priority—*Held*, affirming the judgment of the Court of Queen's Bench (1 Dorion 357), that the transfer of B to the Bank of Toronto was not given to secure a past debt, but to cover a contemporaneous loan, and was, therefore, null and void, as being a contravention of the Banking Act 34 Vic. c. 5, sec. 40. (1) *Bank of Toronto* vs. *Perkins*, Supreme Ct. 1882, 8 Can. S. C. R. 603.

4. —— Security taken in the name of a third person. Right of bank to lien on shares. Claim in insolvency. Liability for maladministration. Interest. Commencement of proof in writing. See case of *Lamoureux* vs. *Molleur*, Supreme Ct., 8th March, 1886. Reported at length, Cassel's Dig., 2nd Edit, pp. 71-75.

III. ARE PUBLIC CORPORATIONS.

Henry vs. *Simard*, S. C. 1866, 16 L. C. R. 273.

IV. CHEQUES.

1. Acceptance by Cashier and President at a Future Date.—Liability of Bank.—In 1881, G., having business transactions with the Exchange Bank, agreed with C., president and manager of the bank, that in lieu of further advances the bank would accept his cheque, but made payable at a future date. On the 19th October, 1881, G. drew a cheque on the Exchange Bank, and after having it accepted as follows: "Good on February 19th, 1882, T. Craig, Pres.," got the cheque discounted by the People's Bank, and deposited the proceeds to his credit in the Exchange Bank. This cheque was renewed on the 23rd May, and it was presented at the Exchange Bank, and paid. Thereupon another cheque for the same amount was accepted in the same way and discounted by the People's Bank on the 7th September, 1883. At the time of the suspension of payment by the Exchange Bank, the People's Bank had in its possession four cheques signed by G., and accepted by T. Craig, president of the Exchange Bank, which were subsequently presented for payment on the dates when they were payable, and duly protested, and also after the three days of grace. The total amount of these cheques was $66,020.64, and one of them, viz., the one dated 7th September, 1883, for $31,000, was a renewal of the cheque the proceeds of which had been paid to the credit of G. in the Exchange Bank. C. was manager as well as president of the Exchange Bank. On an action brought by the People's Bank against the Exchange Bank, for the recovery of the sum of $66,020.74, based on the four cheques in question, the Exchange Bank pleaded *inter alia* that C. had not acted within

(1) Bk. Act 1890, sec. 64; but see sections 68, 70.

the scope of his duties and within the limits of his powers, and that the bank had never authorized or ratified his acceptance of G.'s cheques—*Held*, affirming the judgment of the Court of Queen's Bench (3 M. L. R. 232, S. C., 1 M. L. R. 271) (Strong, Taschereau and Gwynne, JJ., dissenting), that under the circumstances the Exchange Bank was liable for the acceptance by their president and manager of G.'s cheques discounted by the People's Bank in good faith and in due course of business. *Exchange Bank of Canada* vs. *The People's Bank*, Supreme Ct., 22d June, 1887, 10 L. N. 362.

2. Acceptance of Cheque—Powers of Bank acting as Agent for other Bank—Compensation.—A bank acting as agent for another bank is not authorized, in the absence of express agreement, to cash a cheque drawn upon the principal bank, but unaccepted by it. *Maritime Bank* vs. *Union Bank of Canada*, S. C. 1888, M. L. R., 4 S. C. 244.

3 —— A telegram from the president of the principal bank to a depositor therein, stating that certain funds are at his credit, is not an acceptance of a cheque drawn by the depositor upon the receipt of such telegram for the amount of the funds, such telegram adding nothing to the legal obligation of the principal bank towards the depositor to pay the cheque when duly presented for payment, if there were then funds at his credit to meet it, and no legal hindrance to its payment existed. (*Ib.*)

4. —— No compensation arises between the principal bank and its agent, entitling the latter to set off monies paid under an unaccepted cheque upon the principal bank against monies held by the agent and due to the principal bank. (*Ib.*)

5. —— A custom of bankers cannot be put in evidence unless it has been specially pleaded. (*Ib.*)

6. Endorsement—Liability of Bank.—Where a cheque was payable to the order of "W. A.", the bank on which it was drawn was not justified in paying the amount on the endorsement "W. A." per "A. B. A.," unless A. B. A.'s authority to endorse for W. A. was proved. *Almour* vs. *La Banque Jacques Cartier*, C. R. 1884, M. L. R., 1 S. C. 142.

V. CLEARING HOUSE.

Rules—Return of Unaccepted Cheque—Usage.—A custom of trade or banking in derogation of the common law must be strictly proved. And where a bank sought to excuse itself from taking back an unaccepted cheque on another bank, which had been sent in to the clearing house in the morning, on the ground that by a rule of the association a cheque for which there were no funds should be returned to the presenting bank before noon of the day of presentation, whereas the cheque in question was not offered back until 3.30 p.m., and it appeared that the rule in question was of a temporary character only, and was not usually followed by the banks which belonged to the clearing house association, it was held that such rule could not derogate from the ordinary rule of law as to the return of cheques for which there are no funds. *Banque Nationale* vs. *Merchants' Bank*, 1891, M. L. R., 7 S. C. 336.

VI. COLLATERAL SECURITY.

1. Insolvency—Knowledge of, by Creditor — Fraudulent Preference — Pledge — Warehouse Receipt — Novation. ARTS. 1035, 1036, 1169 C. C.—W. E. E. connected with two business firms in Montreal, viz., the firm of W. E. Elliott & Co., oil merchants, of which he was the sole member, and Elliott, Finlayson & Co., wine merchants, made a judicial abandonment on the 18th August, 1889, of his oil business. Both firms had kept their accounts with the Bank of Commerce. The bank discounted for W. E. Elliott & Co., before his departure for England, on the 30th June, a note of $5,087.50, due 1st October, signed by John Elliott & Co. and endorsed by W. E. Elliott & Co. and Elliott, Finlayson & Co., and on the 5th July took, as collateral security from Finlayson, who was also W. E. Elliott's agent during his absence, a warehouse receipt for 292 barrels of oil, and the discount was credited to Elliott, Finlayson & Co. On and about the 9th July, 146 barrels were sold, and the proceeds, viz., $3,528.30, were subsequently, on the 9th August, credited to the note of $5,087.50. On the 13th July, McDougall, Logie & Co. failed, and W. E. E. was involved in the failure to the extent of $17,000, of which amount the bank held $7,559.30, and on the 16th July Finlayson, as agent for W. E. E., left with the bank as collateral security against W. E. E.'s indebtedness of $7,559.30 on the paper of McDougall, Logie & Co., customers' notes to the amount of $2,768.28, upon which the bank collected $1,603.43, and still kept a note of J. P. & Co. unpaid of $1,165.32. On the return of W. E. E. another note of John Elliott &

Co. for $1,101.33, previously discounted by W. E. E., became due at the bank, thus leaving a total debit of the Elliott firms on their joint paper of $2,660.53. The old note of $5,087.50 due 1st October, and the one of $1,101 33 were signed by John Elliott & Co., and on the 10th August were replaced by two notes signed by Elliott, Finlayson & Co., and secured by 200 barrels of oil, 146 barrels remaining from the original number pledged, and an additional warehouse receipt of 54 barrels of oil, endorsed over by W. E. E. to Finlayson, Elliott & Co., and by them to the bank.

The respondent, as curator for the estate of W. E. Elliott & Co., claimed that the pledge of the 200 barrels of oil on the 10th August, and the giving of the notes on the 16th July to the bank, were fraudulent preferences.

The Superior Court held that the bank had knowledge of W. E. E.'s insolvent condition on or about the 13th July, and declared that they had received fraudulent preferences by receiving W. E. E.'s customers' notes and the 200 barrels of oil; but the Court of Appeal, reversing in part the judgment of the Superior Court, held that the pledging of the 200 barrels of oil by Elliott, Finlayson & Co. on the 10th August was not a fraudulent preference.

On an appeal and cross-appeal to the Supreme Court:

Held, 1st. That the finding of the Courts below of the fact of the bank's knowledge of W. E. Elliott's insolvency, dated from the 13th July, was sustained by evidence in the case, and there had therefore been a fraudulent preference given to the bank by the insolvent in transferring over to it all his customers' paper not yet due. Art. 1036 C. C. Gwynne, J., dissenting.

2nd. That the additional security given to the bank on the 10th August, of 54 barrels of oil for the substituted notes of Elliott, Finlayson & Co., was also a fraudulent preference. Art. 1035 C. C., Gwynne, J., dissenting.

3rd. Reversing the judgment of the Court of Queen's Bench and restoring the judgment of the Superior Court, that the legal effect of the transaction of the 10th August was to release the pledged 146 barrels of oil, and that they became immediately the property of the insolvent's creditors, and that they could not be held by the bank as collateral security for Elliott, Finlayson & Co.'s substituted notes. Arts. 1169 and 1035 C. C. Gwynne and Patterson, JJ., dissenting. *Stevenson* vs. *Canadian Bank of Commerce*, Supreme Ct. 1892, 23 Can. S. C. R. 539 (reversing in part Q. B., 1 Que. 371).

2. Overdue Debt.—The customer of a bank bought a quantity of wheat for cash, and obtained delivery promising immediate payment. Being remonstrated with by one of the officers of the bank for having overdrawn his account, and being pressed for immediate settlement, he drew a bill on England, and attached to it the bill of lading for the unpaid wheat. The bank discounted the bill, and placed it to the customer's credit, where it extinguished his indebtedness, he never having had control or possession of the proceeds. The bill was not paid in England, and the wheat was sold for the profit of the bank. Appellant sued the bank for the proceeds of the sale on the ground that the bill transaction was fraudulent, and was only a covert mode of avoiding the terms of the Banking Act, and obtaining the payment of an overdue debt—*Held*, confirming the judgment of the Superior Court, that the transaction was legitimate. *Denholm* vs. *The Merchants' Bank*, Q. B., 22 June, 1877, Ram. Dig., p. 68.

3. Property in Goods pledged—Revendication — Bailee Receipt. — Goods vested in a bank for advances on a draft, under sections 46, 47 and 49 of the Banking Act of 1871, and entrusted by the bank to the acceptor of the draft, for sale on account of the bank (the bank taking a bailee receipt from the acceptor), do not cease to be the property of the bank, and may be revendicated by the bank in case of insolvency of the acceptor. *Merchants Bank of Canada* vs. *McGrail*, C. R. 1878, 22 L. C. J. 148, 1 L. N. 231.

4. Sale of—Accounting.—Where a bank advances money on the security of a bill of lading under Stat. Can. 34 Vic., ch. 5, sec. 46, and does not obtain possession of the animals covered by the bill of lading, which animals are sent to Europe by the bank's debtor and were there sold by the bank's agent, the bank is not bound to render to the debtor an account of the sale of the animals when suing him for the debt; but need only account for the *amount* received by them from the person making the sale. (1) *Banque des Marchands* vs. *McShane*, C. R. 1885, 16 R. L. 682.

5. Shares of Trading Companies —(See also *infra* "LIABILITY OF").—A bank may lawfully make advances under the Banking Act, 34 Vic., ch. 5, on the security of shares in an incorporated trading company, and sell

(1) See secs. 73, 78, Bk. Act 1890.

such shares (in default of re-payment of the advances), on giving 30 days' notice to that effect. (1) *Geddes* vs. *Banque Jacques Cartier*, S. C. 1878, 24 L. C. J. 135; *Bank of Montreal* vs. *Geddes*, S. C. 1879, 2 L. N. 356.

6. —— *Contra Bank of Montreal* vs. *Geddes*, S. C. 1880, 3 L. N. 146. (2) (See note 3 L. N. 146.)

7. —— A bank having made advances on the security of the shares of an incorporated company is not bound to sell the shares previous to bringing an action for damages against the directors of the company for having made false reports and fictitious dividends whereby the said shares were given an undue value which induced the bank to purchase them. *Banque d'Epargne de Montréal* vs. *Geddes*, S. C. 1890, 19 R. L. 684.

8. —— The directors of the company were not held liable to the bank for damages said to have been suffered by them by reason of the false reports and fictitious dividends made by the directors, the bank having, through its officers, attended the meetings of the company and acquiesced in the reports and statements made by the directors. Were it not for his acquiescence the directors would be liable (3) (*Ib.*)

9. —— Such action is subject to the prescription of thirty years. (*Ib.*)

10. Securities which Pledgor had no Right to pledge—Liability of Bank—Broker. (4)

11. Warehouse Receipts—Banking Act. R. S. C., Ch. 120, Sec. 53, et seq.—The Molsons Bank took from one H. several warehouse receipts as collateral security for commercial paper discounted in the ordinary course of business, and having a surplus from the sale of the goods represented by the receipts after paying the debts for which they were immediately pledged, claimed under a parol agreement to hold that surplus in payment of other debts due by H. H. having become insolvent, T. (appellant) under Art. 1031 C. C. brought an action against the bank, claiming that the surplus must be distributed ratably among the creditors generally. H. was a member of the firm of H. & H., and they were not parties to the suit—*Held*, affirming the judgment of the courts below, that the parol agreement was not contrary to the provisions of the Banking A . . 120, secs. 52 *et seq.* That after the goods were lawfully sold, the money that remained after applying the proceeds of each sale to its proper note was simply money held to the use of H., subject to the terms of the parol agreement. (Ritchie, C. J., *dubitante*, and Fournier, J., dissenting.) *Per* Taschereau, J., that H. & H. ought to have been made parties to the suit. *Thompson* vs. *Molsons Bank*, Supreme Ct. 1883, 12 L. N. 339, 16 Can. S. C. R. 664.

12. —— Constitutional Law. B. N. A. Act., Sec. 91 (15).—The words "Banking, Incorporation of Banks and the Issue of Paper Money," in section 91 (15) B. N. A. Act, cover the case of warehouse receipts taken as security by a bank in the course of the business of banking. Notwithstanding section 92 of the same Act, the Dominion Parliament has power to legislate with respect to such securities, though with the effect of modifying the law of the Province in relation thereto. *Tennant* vs. *Union Bank*, P. C. 1893, [1894] App. Cas. 31. (Appeal from Ontario.)

VII. CONSTITUTIONAL LAW—(See *supra* "Collateral Securities," No. 12).

VIII. COMPENSATION.

1. The plaintiff had a note for $600 discounted by the defendants, and the latter retained out of the proceeds of the note the amount of another note overdue by the plaintiff to the bank, and which was duly protested —*Held* reversing judgment of court below, that the bank had a right to retain the amount of the note so held by them, and the action in so far was dismissed with costs. *Banque Nationale* vs. *Guay*, Q. B. 1865, 15 L. C. R. 496.

2. No compensation arises between the principal bank and its agent, entitling the latter to set off monies paid under an unaccepted cheque upon the principal bank against monies

(1) See secs. 65, 66, Bk. Act 1890.

(2) See now Bk. Act 1890, sec. 66.

(3) *Contra Bank of Montreal* vs. *Geddes*, S. C. 1880, 3 L. N. 146. But this case was decided under the Banking Act, 34 Vic., ch. 5, whereas the above case (*City & District Savings Bank* vs. *Geddes*) would appear to come under the Savings Bank Act passed in the same year (ch. 7), which permitted loans on security of *stock* of incorporated companies. (See also remarks of Johnston, J., 3 L. N. at p. 150.)

(4) A broker in fraud of the owner pledged negotiable instruments together with other instruments belonging to other persons with a bank as security *en bloc* for an advance. The bank did not know whether the instruments belonged to the broker or other persons, or whether the broker had any authority to deal with them, and made no inquiries. The broker having absconded, the bank realized the securities—*Held* (reversing Ct. of Appeal 1891, 1 Ch. 270) that there being as a matter of fact no circumstances to create suspicion, the bank was entitled to retain and realize the securities, having taken negotiable instruments for value in good faith. *London Joint Stock Bank* vs. *Simmons*, House of Lords 1892, App. Cas. 201.

held by the agent and due to the principal bank. *Maritime Bank* vs. *Union Bank of Canada*, S. C. 1888, M. L. R., 4 S. C. 244.

IX. DEPOSIT.

1. As Security for Government Contract.—Where a contractor deposits money in a bank in the name of the Government, or the money is deposited in his behalf by another party, as security for the execution of a Government contract, such deposit is at the risk of the Government, which is not freed from liability by delivering to the depositor the deposit receipt after the bank has become insolvent; it must return the amount deposited. *Gilman vs. Gilbert*, Q. B. 1889, 17 R. L. 132; *ib.* p. 124, 32 L. C. J. 138. (Appeal to Supreme Ct. quashed for want of jurisdiction, 16 S. C. R. 189.)

2. Imputation of Payments.—Where a bank took a note endorsed by a customer as security for past advances amounting to about $10,000, and after the maturity of this note, deposits amounting to more than $100,000 were passed to his credit in the books of the bank—*Held*, that in the absence of any special imputation of payments or reserve as to the application of the subsequent deposits, these deposits were to be imputed in payment of the oldest debt, and the customer's liability at the maturity of the collateral security being more than paid by the subsequent deposits, the collateral was discharged, and the bank's action against the maker and first endorser of said note would be dismissed. *Exchange Bank* vs. *Nowell*, 1887, M. L. R., 3 S. C. 129; *Cleveland* vs. *Exchange Bank*, Q. B. 1887, 31 L. C. J. 126.

3. Interest on.—A bank is not liable to pay interest on money for which it has accepted and certified cheques. *Wilson* vs. *La Banque Ville Marie*, S. C. 1880, 3 L. N. 71.

4. Negotiability.—A special deposit receipt granted by a bank is negotiable, and can, therefore, be transferred by a simple endorsement. *Richer* vs. *Voyer*, P. C. 1874, L. R., 5 P. C. 461, 5 R. L. 591. This holding is obiter. See L. R., 5 P. C., at p. 477.

5. Right to as Security for Note of Depositor (See also "COMPENSATION," *supra* No. VIII)—Action for $700, amount of a cheque presented by plaintiff, and which the bank refused to pay, alleging no funds. It appeared there were funds sufficient nominally to the credit of the drawer, but the bank held the drawer's note for a still larger amount payable on demand, and, the drawer's credit not being very good, thought it prudent to hold on to the deposit—*Held*, that a plea of want of privity of contract would not hold, but as a matter of fact the drawer under the circumstances had no funds in the bank, and the bank was perfectly justified in refusing payment of the cheque. (1) *Marler* vs. *Molson's Bank*, S. C. 1879, 23 L. C. J. 293, 2 L. N. 166.

6. Rights of Creditors of Depositor.—Where monies have been deposited from time to time in a bank to the credit of A., of whom the bank was creditor to an amount far exceeding the balance of such deposits, and on the understanding that such deposits were to enure to the benefit of the creditors of A generally, B and others cannot legally sue the bank to recover a proportion of such deposits, on the ground that a portion of said monies really belonged to B and others, in the absence of any notice to, or knowledge by, the bank of the existence of any such right on the part of B and others, whilst such deposits were being made. *Girabli* vs. *Banque Jacques Cartier*, Q. B. 1882, 26 L. C. J. 110. This opinion was sustained in the Supreme Court by Strong, Taschereau and Gwynne JJ. (Ritchie, C.J., and Fournier and Henry, JJ., *contra*), 9 Can. S. C. R. 597.

X. DIRECTORS.

1. Liability of — Unincorporated Bank.—A charitable institution formed for the relief of the poor appointed delegates to establish a savings bank. These delegates elected a president and directors who adopted certain regulations, and among others one prohibiting any profit to the officers of the institution. Deposits were received to be repaid with interest, and promissory notes were discounted upon the credit of individuals. Upon these discounts a percentage was taken by the directors, and a portion of the funds was appropriated to their own use for their services. The bank so established was ultimately closed as being insolvent, and a portion of the debts due as special deposits was bought

(1) In the case of *National Mahaiwe Bank vs. Peck*, which was decided by the Supreme Court of Massachusetts (1879) 127 Mass. 298) and which involved a point similar to that above, Chief Justice Gray said: "Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien only; but it becomes the absolute property of the bank, and the bank is merely a debtor to the depositor in an equal amount." Citing *Foley v. Hill*, 1 Phillips 399; 2 H. L. Cas. 28. Since the Bills of Exch. Act, 1890, a bill does not operate as an assignment of funds in the hands of the drawee (sec. 53), and see Girouard on Bills and Notes relative to the case of *Marler v. Molson*, at p. 165.

up by the directors at a composition in the pound. In an action on assumpsit by one of the depositors against the president and several of the directors for the full amount of his deposits—*Held*, that without reference to the question of fraud, the president and directors had become traders by mixing themselves up with a commercial banking business, and were jointly and severally liable to such depositor, and the fact that the plaintiff approved of the proceedings of the directors submitted annually at meetings of the depositors, where such approval was obtained by means of false statements, could not operate to his prejudice in this regard. *Prevost* vs. *Allaire*, Q. B. 1861, 11 L. C. R. 293.

2. And *Held*, also, that the president and directors being a co-partnership or unincorporated company, the action was properly brought against any one or more of them under the provisions of 12 Vic., cap. 45. (*Ib.*)

3. And *Held*, also, that the charitable institution had no interest in the matter, and consequently that no action to account *pro socio* for or against it would lie.

XI. DISCOUNTS.

1. **Claim against Maker of Note.**—A bank which discounts a note in favor of the endorser has no claim against the maker, where it is proved that the maker has paid the amount to the endorser, and that the note was charged to the account of the endorser who had an account at the bank. *Cleveland* vs. *Banque d'Echange du Canada*, Q. B. 1887, 15 R. L. 51, 31 L. C. J. 126.

2. **Security by Third Party—Pledge—Condition.**—Where a bank discounts a note and takes as security a cheque of a third party having funds in the bank, given on condition that the bank use due diligence in collecting the amount of the note when overdue from the maker and endorsers before cashing the cheque, the bank violates this condition by accepting a renewal of the note and in treating with one of the endorsers with a view to releasing him in consideration of a partial payment, thus losing their recourse against him. The third party has thereupon an action against the bank for the amount of his pledge. *Banque du Peuple* vs. *Pacaud*, Q. B. 1893, 2 Que. 424, Superior Ct. 1893, 3 Que. 8.

XII. FALSE RETURNS.

1. An indictment under sec. 62 of the Banking Act of 1871 for having unlawfully and wilfully made a wilfully false and deceptive statement in a return respecting the affairs of the bank, need not allege that the return referred to was one required by law to be made by the accused, or that any use was made by him of such return, or specify in what particulars the return was false. (1) *Regina* vs. *Cottè*, Q. B. 1877, 22 L. C. J. 141.

2. The enumeration in the indictment of several false statements constitutes but one count, and a general verdict is sufficient, if the statement be shown to be false in any one of the particulars alleged. (*Ib.*)

3. It is not necessary to allege in the indictment that the false statement was made with intent to deceive or mislead. (*Ib.*)

4. In a prosecution under the Banking Act of 1871 for making a wilfully false and deceptive return, the question as to whether certain items in the return had been improperly classified was not one of law but of fact, and the failure, therefore, to leave it to the jury makes it the duty of the Court of Q. B., on a reserved case, to quash the verdict. (1) *Regina* vs. *Hincks*, Q. B. 1879, 24 L. C. J. 116.

5. The information in a case of making a false return under the Banking Act, 34 Vic., cap. 5, s. 62, may be sworn to by a non-shareholder, and even by a citizen who is a debtor of the Bank. (1) *Molleur* vs. *Loupret*, S. C. 1885, 8 L. N. 305.

6. The affidavit should be written in the language spoken by the informant, or in one which he understands perfectly. (*Ib.*)

XIII. INSOLVENT BANK. (2)

1. **Calls—Double Liability.**—Action by the liquidator of the Mechanics Bank, insolvent, to recover from defendant the sum of $7,500, being the balance due on his subscription of 50 preferential shares including the double liability. Plea that by 39 Vic., cap. 42, sec. 2, a by-law had to be passed authorizing the issue of the preferential stock, and that no such by-law was passed, and that the Act could only have effect on acceptance by shareholders by resolution passed at a special general meeting of shareholders called for the purpose, and concurred in by at least two-thirds of the holders of paid up stock present, and no such meeting was called or held; that no by-law by a qualified board of directors was ever passed authorizing the issue of the said stock; and that, moreover, defendant was not

(1) Now sec. 99 Bkg. Act. 1890.
(2) 45 Vic. (D.), ch. 23, 2 R. S. C., ch. 129.

jiable for the additional calls pretended to be due under the double liability clauses of the banking Act—*Held*, that as defendant himself had been a director and had himself authorized the issue of the shares, and had taken fifty of them and had received dividends on them, that the plea did not come with a good grace from him, and must be overruled. Judgment for amount claimed. *Court* vs. *Waddell*, S. C. 1881, 4 L. N. 78.

2. —— Under C. 31 Vic., cap. 5, sec. 34 (Banking Act of 1871), there must be an interval of 40 days between the making of calls on the shareholders, as well as an interval of 30 days between the dates fixed for payments. *Hochelaga Bank* vs. *Robertson*, Q. B. 1883, 6 L. N. 307.

3. —— There must be an interval of thirty clear days between calls under sec. 58 Bk. Act, 1871. *Banque d'Echange* vs. *Campbell*, S. C. 1885, 15 R. L. 373; *Cloges* vs. *Darling*, S. C. 1884, 16 R. L. 649; *Gilman* vs. *Court*, Q. B. 1882, 13 R. L. 619.

4. —— Several calls of 20 per cent. each cannot be made by one resolution or order under sec. 58, Bk. Act, 1871. *Gilman* vs. *Court*, Q. B. 1882, 13 R. L. 619.

5. Cheques paid after Suspension—Recourse of Liquidators.—The respondent, having funds to his credit in a bank which had suspended payment, drew cheques on the bank for various sums. These cheques were accepted by the bank on the same day, and the respondent then, for valuable consideration, disposed of them to various parties who were paid the respective amounts by the bank, by credits or otherwise—*Held*, that the bank had no action against the respondent to recover the amount of the cheques so paid, their recourse if any, being against the parties to whom they had paid the money. *Exchange Bank of Can.* vs. *Hall*, 1886, M. L. R., 2 Q. B. 409.

6. Compensation or Set-off.—Where a shareholder of a bank buys debts of the bank after it has suspended, he cannot oppose these debts in compensation of calls on his double liability made by the liquidator under sec. 58 Bk. Act 1871. *Gilman* vs. *Court*, Q. B. 1882, 13 R. L. 619.

7. —— Where a bank deposited certain negotiable instruments with another bank as security for a sale of bonds made to it, and the purchasing bank became insolvent after paying the value of the bonds for which the security was given, the creditor bank could not upon demand of the liquidators for the possession of the above security oppose in compensation thereto a former debt of the insolvent bank for which the security was not given. *Banque d'Echange du Canada* vs. *Banque d'Epargne de la Cité, etc.*, S. C. 1885, 14 R. L. 8.

8. —— **Notes received for Collection.** —*Held* (reversing M. L. R., 1 S. C. 225), where drafts and notes are placed with a bank by a debtor of the bank, not as collateral security, but for collection, that compensation does not take place until the bank has received the amounts collected by them on such notes; and in the present case, the debtor having become insolvent before any amounts were received on such notes, compensation did not take place between the amount collected by the bank and the debt due to it. *Exchange Bank of Canada* vs. *Canadian Bank of Commerce*, Q. B. 1886, M. L. R., 2 Q. B. 476.

9. Contributories.—In two cases the respondent, plaintiff in the Court below, sued the petitioner, defendant in the Court below, who was alleged to be debtor of the bank. The declaration alleged the insolvency of the Exchange Bank and its liquidation under the Statute of Canada, 45 Vic., cap. 23, the indebtedness of the petitioners, with conclusions accordingly. The petitioners pleaded dilatory exceptions on the ground that, if true as alleged in declaration, they were "contributories," they were so under the Statute, and before any suit could be taken against them they must be settled on the list of contributories to the bank as provided in the Act. Admissions were filed that the petitioners were not settled on any list of contributories—*Held*, not necessary, and exceptions dismissed. *Acer* vs. *Exchange Bank*, Q. B. 1884, 7 L. N. 346.

10. Depositors.—A deposit of money made with a bank on the day and at the very hour when it suspended payment may lawfully be returned to the depositor. *Exchange Bank* vs. *Montreal Coffee House Association*, C. R. 1886, M. L. R., 2 S. C. 141.

11. —— A person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit. *Ontario Bank* vs. *Chaplin*, 1889, Superior Ct., 15 R. L. 435, M. L. R., 5 Q. B. 407, 17 R. L. 246, affirmed by Supreme Ct. 1890, 20 Can. S. C. R. 152.

12. Liquidators — Dismissal. — The Court has the power to dismiss the liquidators of an insolvent bank upon demand of the

parties interested, but before doing so will order a general meeting of the shareholders and creditors of the bank to get their advice as to the grounds of dismissal. *Cloyes* vs. *Darling*, S. C. 1884, 16 R. L. 649.

13. —— The Court can dismiss a liquidator upon demand of the creditors if it is shown that the liquidators do not agree, and work harmoniously among themselves as to the liquidation of the bank's affairs. *Ib.* and *Banque d'Echange* vs. *Campbell*, S. C. 1885, 15 R. L. 373.

14. —— If at such meeting of creditors a majority of all the creditors is not present, the absentees will be held to have acquiesced in the opinion of the majority of those present. *Banque d'Echange* vs. *Campbell*, S. C. 1885, 15 R. L. 373.

15. —— **Salary.**—Before determining the salary or remuneration of the liquidator, they will be ordered to appear before the Court to give evidence as to the value of their services. (*Ib.*)

16. Restitution of Money received at Time of Suspension.—The provisions of 45 Vic. (D.), ch. 23, override any rule as to insolvency contained in the Civil Code; and therefore only payments made by an insolvent corporation within thirty days before the commencement of the winding up order (s. 75), *i. e.*, the date of the order made by the Court for the winding up (s. 13) can be recovered by the liquidators. *Exchange Bank of Can.* vs. *Montreal Coffee House Association*, C. R. 1886, M. L. R., 2 S. C. 141.

17. —— In any case the deposit of money made with a bank, on the day and at the very hour when it suspended payments, may be lawfully returned to the depositor. (*Ib.*)

18. Rights of Creditors.—A creditor of an incorporated bank which has suspended payments has a right to sue for the amount of his claim, even before the expiration of 90 days from the suspension. *Senécal* vs. *Banque d'Echange*, S. C. 1884, M. L. R., 2 S. C. 107.

19. Savings Bank—Holding Shares as Collateral Security—Double Liability.—A savings bank holding bank shares as pledgee, and appearing as owner on the books of the bank, is not the owner of such shares within the meaning of section 58 of the Banking Act 34 Vic., ch. 5, and therefore not subject to the double liability. *Exchange Bank of Canada* vs. *Montreal City & District Savings Bank*, S. C. 1885, M. L. R., 2 S. C. 51, confirmed in Q. B. 1887, M. L. R., 6 Q. B. 196.

20. —— A bank, shares of which are transferred to a savings bank, is presumed to know that the shares are held by the latter as collateral security, inasmuch as under section 18 of 34 Vic. (D.), ch. 7, a savings bank cannot acquire bank shares or hold them except as pledges. (*Ib.*)

21. Suspension of Payment—90 Days how Calculated—Creditors—Order of Judge.—On the 26th of August a demand for a writ of attachment, under the Insolvent Act 1875, against the Mechanics Bank, was presented to a judge in Chambers. The bank asked for a provisional order giving them notice of the demand. This order was given the same day, notifying the bank of the hearing on the merits of a demand for a writ of attachment for the 29th August. The notice was served the 26th, and the 29th the parties appeared, when the bank opposed the demand for a writ of attachment for the following reasons: Because the demand for a writ could not be made before the 27th August, seeing that the bank had suspended payment the 28th May, and the 90 days granted to the bank under the provisions of the Act only expired the 26th August; because the order of the judge which was written on the demand had been given without the notice required by law; because the affidavit of the intervenants was dated the 26th before the expiration of the 90 days—*Held*, that the bank having suspended payment on the 28th May, as admitted in the preliminary answer of the bank, the 28th must count as the first of the 90 days during which the bank could remain in suspension according to the terms of 39 Vic., cap. 31, sec. 2, and therefore the 25th August was the 90th day, and the demand was rightly made on the 26th. *Mechanics Bank* vs. *St. Jean et al.*, S. C. 1879, 9 R. L. 555.

22. —— And there was no notice of the order of the judge necessary. (*Ib.*)

23. —— And that the creditors of the bank, being in a better position than the judge to decide what should be done, the court before deciding as to the issue of a writ appointed an assignee with instructions to call a meeting of the creditors of the bank, in order that they might adopt such resolutions as they deemed best and submit them to the judge according to the terms of sub-sec. 5 of sec. 147 of the Insolvent Act 1875. (*Ib.*)

XIV. INTEREST. (See also *Supra* "DEPOSIT.")

1. Banks cannot charge more than 7 per cent. interest upon notes discounted by them. *Banque de St. Hyacinthe* vs. *Sarra*: S. C. 1892, 2 Que. 96.

2. The prohibition in this respect is a matter of public order, and any person who pays to the bank interest in excess of that rate can recover back the excess. (1) (*Ib.*)

XV. LETTERS OF CREDIT.

1. Banks cannot revoke letters of credit at pleasure, but after notice of revocation has been given to the holder he is not bound to present for acceptance in order to recover from the bank. *Bank of Toronto* vs. *Ansell*, S. C. 1873, 7 R. L. 408.

2. The verdict of the jury was maintained in Review, but in appeal the Court of Queen's Bench set aside the verdict ($6,500), and ordered a new trial. 7 R. L. 262.

XVI. LIABILITY OF. (See also *Supra* "ACCOUNTS."—"COLLATERAL SECURITY.")

1. **Forgery.**—In an action to recover from the bank the sum of $1,500 drawn by plaintiff on his account with the bank, which the latter refused to pay, alleging that the plaintiff had no funds in the bank, the fact being that all the money belonging to plaintiff had been drawn out by means of forged cheques by some person or persons unknown, and the signatures to which were so perfect that the court could scarcely discover any difference between it and the genuine one, the bank was condemned to pay. *Wenham* vs. *La Banque du Peuple*, S. C. 1865, 1 L. C. L. J. 30.

2. —— A bank is bound to know the amount of its own drafts, and consequently if one of the branches pays a draft drawn by another, the body of which has been altered, it is bound by such payment, and cannot recover back the amount from an innocent third party who has parted with the money. *Union Bank of Lower Canada* vs. *Ontario Bank*, S. C. 1879, 23 L. C. J. 66, 9 R. L. 631.

3. **For Acts of Officers.** (See also under title "AGENCY.")—A cashier or other officer of the bank, receiving money, as the attorney of another party, acts individually, and the bank is in no way affected by the transaction. *Lynch* vs. *McLennan*, S. C. 1858, 3 L. C. J. 84, 9 L. C. R. 257.

(1) Sec. 89 Bk. Act, 1890, reproducing sec. 61, R. S. C., ch. 120, and 34 Vic., ch. 5, sec. 52. *Contra Quinlan* vs. *Gordon*, 20 Grant's Chy., p. 1; *Hutton* vs. *Federal Bank*, 9 Ont. Pr. Rep. 568.

4. —— To an action on a cheque the defendant pleaded *inter alia* that the cheque was given as a compromise of a criminal prosecution brought against defendant and six other directors of the consolidated bank for making false and fraudulent returns; that the bank paid the money to one M. and his solicitor who were bringing the prosecution, and that this took place with the full knowledge of the bank of all the facts, and that therefore the cheque was illegal and they could not recover on it. The court found that the money was paid under the circumstances above stated, but that the bank had no knowledge of the alleged compromise as the personal knowledge of the president could not be opposed to the bank, and the bank was not bound by the acts of the president in his individual capacity, and therefore had no cognizance of the pretended compromise at the time the money was paid. *Bank of Montreal* vs. *Rankin*, S. C. 1881, 4 L. N. 302.

5. —— **Ratification.** Acquiescence and ratification must be founded on a full knowledge of the facts, and, further, it must be in relation to a transaction to which effect may be given thereby. *Banque Jacques Cartier* vs. *Banque d'Epargne de Montréal*, P. C. 1887, 13 App. Cas. 111, 11 L. N. 66.

6. ——Where the accounts of a bank in liquidation had been changed so as to represent the bank as a debtor in respect of a sum which had been borrowed by its manager for his own purposes—*Held*, overruling the Court below (Q. B. 1886, 30 L. C. J. 106, M. L. R., 2 Q. B. 64), that the doctrine of acquiescence and ratification by the liquidating authorities would not avail to render the bank liable to pay a debt which it never owed. (*Ib.*)

7. **For Error in Money paid out.**—In an action to recover $20 which the bank had paid short on a cheque—*Held*, that banking institutions are not liable for any deficit in packages of silver paid out by them, unless the silver be counted and the deficit made known before the packages are taken from the bank. *Brown* vs. *The Quebec Bank*, C. C. 1866, 2 L. C. L. J. 253.

8. **Holding Shares as Collateral Security—Calls.**—A bank taking a transfer of shares as collateral security is not liable as a stock holder for calls on such shares. *Railway & Newspaper Advertising* vs. *Molsons Bank*, Q. B. 1879, 2 L. N. 207.

9. —— **Insolvent Bank.**—*Held* (affirming the judgment of Johnson, J., M. L. R., 2

S. C. 51, 30 L. C. J. 85), that a savings bank, holding bank shares as pledgee, and appearing as owner on the books of the bank, is not the owner of such shares within the meaning of sec. 58 of the Banking Act, 34 Vict. (D.), ch. 5, and therefore is not subject to the double liability. *Exchange Bank of Can.* vs. *City & District Savings Bank*, 1887, M. L. R., 6 Q. B. 196.

10. —— —— A bank, shares of which are transferred to a savings bank, is presumed to know that the shares are held by the latter as collateral security, inasmuch as under sec. 18 of 34 Vic. (D.), ch. 7, a savings bank cannot acquire bank shares or hold them except as pledgee. (*Ib.*)

XVII. LIEN.

1. Limitation of Time for holding Goods pledged under.—34 Vic., cn. 5, SEC. 50. (1) Sec 50 of the 34 Vic., cap. 5, which reads as follows: "No cereal grains or goods, wares or merchandise shall be held in pledge by the bank for a period exceeding six months (except by the consent of the person pledging the same), etc.," does not imply that a bank should forfeit its right of pledge by allowing the six months to elapse without selling the goods. *Molsons Bank* vs. *Lanaud*, Q. B. 1881, 2 Dorion's Rep. 182.

2. —— In the present case there was a repledging or consent given by the owner of the goods sufficient to secure a continuation of the pledge beyond the first six months. (*Ib.*)

3. Logs. ARTS. 1745, 1966.—Banks cannot acquire a lien on logs under 34 Vic., ch. 5, ss. 46 and 47, if the pledge of the logs was made for a previous indebtedness, or if they were not held by virtue of a transfer of a receipt by a cove keeper, or by the keeper of any wharf, yard, harbor or any other place in Canada within the meaning of said Act. (2) *Ross* vs. *Molsons Bank*, Q. B. 1881, 2 Dorion's Rep. 82.

4. Stock.—Under R. S. C., ch. 120, sec. 59, a bank has a lien on the stock held in it by a member of a firm for a debt due to it by such firm. (3) *In re* Chinic, S. C. 1888, 14 Q. L. R. 289.

5. —— When a debt is due a bank, and the debtor acquires stock in the same, such stock is at once affected by the lien of the bank, and monies realized by the bank out of such stock may be applied by it to the payment of said debt, in preference to another debt contracted subsequently by the same debtor. (*Ib.*)

(1) Sec. 66 Banking Act, 1890.
(2) Sec. 73 Banking Act, 1890.
(3) Sec. 65 Banking Act, 1890.

XVIII. POWERS OF. (See also *Supra* "COLLATERAL SECURITY.")

1. Contract of Guarantee—Ultra Vires.—A bank is not authorized to enter into a contract of suretyship guaranteeing the payment by a customer of the hire of a steamship under a charter party. *Johansen* vs. *Chaplin*, 1889, M. L. R., 6 Q. B. 111.

2. —— A bank cannot validly enter into a contract of suretyship, guaranteeing the payment by a customer of the hire of a steamship under a charter party; and where the bank has derived no benefit from such contract, a claim made thereon against the bank in liquidation will be dismissed. *Watts* vs. *Wells*, 1890, M. L. R., 7 Q. B. 387.

3. Guaranteeing Purchase of Goods.—Where a bank, wishing to guarantee a purchase of goods, telegraphs to the sellers in these terms: "If you send to the Molson's Bank, Montreal, goods to the amount of £1,000 purchased by K. & Co., about the first of July, sending us the bill of lading and documents in time, we will guarantee the collection," sending their address to the same, it does not violate the provisions of the Banking Act, 34 Vic., ch. 5, sec. 40. (1) *Banque Molson* vs. *Kennedy*, S. C. 1879, 10 R. L. 110.

XIX. POWERS OF OFFICERS OF BANKS.

1. Cashier, Action by. ART. 19 C. C. P.—Where the cashier of a bank brought action in his own name for a sum due the bank, and the defendant demurred, the demurrer was dismissed, and this judgment was confirmed in appeal. *Ferrie* vs. *Thompson*, K. B. 1838, 2 Rev. de Lég. 303; *Armour* vs. *Main*, K. B., 20 July, 1821.

2. Cashier— Note — Endorsement — Hypothec.—The cashier of a bank, who has endorsed notes for a customer of the bank, may, if in good faith, take a hypothec on the debtor's property to protect himself on the endorsements. *Thibeaudeau* vs. *Beaudoin*, Q. B., 22 June, 1885. (See as to this point *Lamoureux* vs. *Molleur*, Supreme Ct., 1886, Cassel's Digest, 2nd Edit., pp. 71-75.)

3. Manager — Discounts — Favoring Certain Parties.—The appellants were su-

(1) Banking Act, 1890, sec. 64.

ing their late manager to recover money lost on bills of exchange and promissory notes which were discounted by him, while managing the bank in favoring certain companies and firms in which he was interested. The evidence established that such transactions were all in the ordinary course of the business of the bank; that he had not exceeded the power and authority with which he was entrusted; and that he had not acted in bad faith in any case brought up in the trial.

The Judicial Committee, affirming the judgments of both Courts below, held, under the circumstances, that no such action could be sustained, and that the bank should bear the losses. Appeal dismissed with costs. *Bank of Upper Canada* vs. *Bradshaw*, P. C. 1867, 4 Moore N. S. 406, 17 L. C. R. 273, Q. B. 1865, 16 L. C. R. 1.

4. Manager and President.—The manager and president of a bank cannot, as such, give as security for the debt of a bank incurred before the giving of such security, a considerable amount of discount notes ($260,000). To do so requires the special authorization of the directors. *Banque d'Echange* vs. *Banque d'Epargne de la Cité et du District*, S. C. 1885, 14 R. L. 8.

XX. QUESTIONS OF EVIDENCE.

1. Statement of Bank. ART. 1228 C.C.—Action was brought by a bank on an obligation for £1,200. The defendant pleaded payment, relying on a statement by the bank in which certain credits were given them—*Held*, on objection, that the statement would be taken as evidence against the bank where there was no evidence to show error. *Morris* vs. *Unwin*, S. C. 1851, 4 L. C. R. 235, 4 R. J. R. Q. 173.

2. Burden of Proof concerning forged Documents.—Where a bank supports an answer of "no funds" with a cheque, by which it claims that the amount claimed was withdrawn, the onus is on it to prove the cheque genuine. *Clark* vs. *Exchange Bank*, Q. B. 1880, 3 L. N. 45.

XXI. SERVICE OF SUMMONS.

Service of summons on a bank or other joint stock company must be made at its chief place of business. *Baxter* vs. *Union Bank of Lower Canada*, S. C. 1884, 7 L. N. 61; *Parker* vs. *Banque d'Ontario*, S. C. 1889, 18 R. L. 523; *Loignon* vs. *Banque Nationale*, S. C. 1892, 2 Que. 310.

XXII. SHARES.

1. Attachment.—Bank shares cannot be seized under *saisie-arrêt*. *Hudon* vs. *Painchaud*, Q. B., June, 1875.

2. Sale by Bank to satisfy Debt to Bank—Irregularity.—Where a bank, without authority of justice, sells shares subscribed by a husband, but subsequently transferred by him to his wife, as having been paid for with her money, the wife or her heirs cannot complain of the informality of the sale, where it is apparent that under no circumstances could such shares have brought sufficient to discharge her obligations to the bank. *Banque d'Hochelaga* vs. *Jodoin*, P. C. 1895, 18 L. N. 244, reversing Q. R., 3 Q. B. 36.

3. Title to.—In order to act under 24 Vic., cap. 91, sec. 4, which allows the directors of the Bank of Montreal, in case they entertain reasonable doubt as to the legality of any claim to any share, dividend or deposit of or in the said bank, when the legal right of possession of such share, dividend or deposit shall change by any lawful means other than transfer, to present a declaration and petition to the Superior Court, setting forth the facts, and praying that an order or judgment adjudicating and awarding the said shares, dividends or deposits to the parties legally entitled to the same, it is not sufficient or within the meaning of the statute merely to allege that the petitioners entertain "reasonable doubts," and unless the grounds of such reasonable doubts be fully declared in the declaration and petition, the court can have no jurisdiction, and such petition will be rejected with costs. (1) *Bank of Montreal* vs. *Glen*, S. C. 1862, 6 L. C. J. 248, 12 L. C. R. 348.

4. —— When a title to bank shares is claimed by a plaintiff in an action against the bank, to obtain *un titre recognitif*, and the bank pleads that the shares in question had previously been transmitted to other parties who claimed transmission, it is the duty of the Court to order such other parties to be called into the cause. *Woolrich* vs. *Bank of Montreal*, Q. B. 1869, 16 L. C. J. 329.

(See also under title "ATTACHMENT—CONSERVATORY.")

5. Transfer.—The transfer of shares of a bank, made in fraud of the bank, may be set aside although the transfer has been accepted by the bank, provided such shares are held by gratuitous title by the nominal transferee.

(1) Omitted in present Act. See Act of 1871, 34 Vic., ch. 5, sec. 25.

Walsh vs. *Union Bank of Lower Canada*, Q. B. 1880, 4 June.

c —— **Bank of Montreal.**—A party acquiring shares of stock in the Bank of Montreal, by will or by notarial transfer or other legal means, may claim to have his name recorded as a stockholder, although no transfer be made to him in the books of the bank, in accordance with sections 16 and 17 of the Act 19th Vic., ch. 76. *Bank of Montreal* vs. *Henderson*, Q. B. 1870, 14 L. C. J. 169.

7. —— See Statute of Que. 55-56 Vic., ch. 17, which provides that all transfers of property, shares, etc., belonging to the succession are null and void, and pass no title until the tax has been paid. (Repealed 60 Vict., ch. 12.)

8. Usufructuary.—The usufructuary of shares of stock in the Bank of Montreal is entitled to the share or proportion of profits applicable to such shares, realized by the bank on the sale of all such shares of the increased capital stock as were unsubscribed for by those entitled to do so. *Ross* vs. *Esdaile*, S. C. 1873, 17 L. C. J. 301.

c. —— The usufructuary of shares of stock in the Bank of Montreal is entitled to the dividends and profits on all new shares of stock subscribed for, under the privilege granted by the bank to the holder of the original shares to so subscribe. *Hargrave* vs. *Clouston*, S. C. 1871, 18 L. C. J. 290.

XXIII. STOCK.

Nature of.—Where action was brought to set aside a sale of bank stock belonging to the plaintiff, made by her tutor during her minority, on the ground that the tutor had exceeded his powers in selling it—*Held*, confirming the judgment of the courts below, that bank stock must be considered at common law to be what is termed in the French law *un immeuble fictif*. *Bank of Montreal* vs. *Simpson*, Q. B., 5 L. C. J. 169, 10 L. C. R. 225, and 6 L. C. J. 1, 11 L. C. R. 377, 14 Moore 417, P. C. 1861.

XXIV. TRUSTS. (1)

1. Where a statute incorporating a bank provides that "the bank shall not be bound to see to the execution of any trust, whether express, implied or constructive, to which any of the shares of the bank may be subject," such provision must relate to, and free the bank from, liability for trusts of which the bank had notice or knowledge, as the bank could not, apart from the statute, incur liability by not seeing to the execution of a trust of which they had no knowledge. *Simpson* vs. *Molsons Bank*, P. C. 1895, 11 R. 427; [1895] App. Cas. 270 confirming Q. B., but upon another point, see *Stewart* vs. *Molsons Bank*, Q. B. 1894, 4 Que. 11.

2. But assuming that the bank would be liable if it were shown that they were possessed of actual notice of the trust, the facts: 1st, that a copy of the testator's will was in the possession of the bank; 2nd, that in the case of three of the testator's children, notice of the substitution of grandchildren was contained in the transfer registered by the executors in the bank's books on a previous occasion; 3rd, that one of the executors was president of the bank, and that the law agent of the executors was also law agent of the bank, are not sufficient to prove that the bank have received notice of the trust. (*Ib.*)

3. Where the transferor of shares has no authority to transfer, and the want of authority is apparent; for instance, where shares in a bank stood in the name of a tutor to a minor, and the bank allowed the transfer to be made by the tutor, without the authorization of the Court, upon the advice of a family council, it was—*Held*, that the bank was liable for the value of the shares (which had been dissipated and lost), on the ground that the tutor had no power to sell. *Bank of Montreal* vs. *Simpson*, P. C. 1861, 14 Moore P. C. 417, 6 L. C. J. 1, 11 L. C. R. 377, Q. B., 5 L. C. J. 169, 10 L. C. R. 225.

4. Where a bank for its own benefit deals with stock held in trust or subject to a trust of which it had notice, it would be obliged to account to the true owner for the shares, should it appear that the person from whom it got the shares had not authority to deal with them. *Bank of Montreal* vs. *Sweeney*, P. C. 1887, 12 App. Cas. 617, affirming Supreme Ct., 12 Can. S. C. R. 661.

5. And in such case where the shares are held by a person "in trust," these words import an interest in some other person, though not in any specified person, and clearly show an infirmity or insufficiency in the holder's title, and are enough to put the company upon their guard. (*Ib.*)

XXV. ULTRA VIRES ACTS.

1. Loan—Bank Shares. 34 Vic., cu. 5, sec. 40.—The Exchange Bank in advancing money to F. on the security of Merchants' Bank shares caused the shares to be assigned

(1) Sec. 43 Banking Act, 1890.

to their managing director, and an entry to be made in their books that the managing director held the shares in question on behalf of the bank as security for the loan. The bank subsequently credited F. with the dividends accruing thereon. Later on the managing director pledged these shares to another bank for his own personal debt, and absconded—*Held*, affirming the judgment of the Court of Queen's Bench (19 R. L. 377, 34 L. C. J. 130, M. L. R., 7 Q. B. 11), that upon repayment by F. of the loan made to him, the Exchange Bank was bound to return the shares or pay their value. The prohibition to advance upon security of shares of another bank contained in the amendment to the general Banking Act applies to the bank and not to the borrower.

Per PATTERSON, J.—Assuming that the subsequent amendment of the general Banking Act forbade the taking of such security by any bank, the amendment did not alter the charter of the Exchange Bank, 35 Vic., ch. 51 (D), under which the Exchange Bank had power to take the shares in question in its corporate name as collateral security. To take such security may become an offence against the banking law, punishable from the beginning as a misdemeanor, and subject to a pecuniary penalty, but it was not *ultra vires*. Art. 14 C. C., which declares that prohibitive laws import nullity, has no application to such case. (1) *Exchange Bank* vs. *Fletcher*, Supreme Ct. 1890, 19 Can. S. C. R. 278.

2. —— An alleged infringement of the Banking Act (*e. g.*, taking security for future advances) though a matter affecting public policy, will not support a contestation of the bank's claim unless pleaded and legally proved. *In re McCaffrey*, Ct. of Rev. 1894, 5 Que. 135.

3. Loan by Savings Bank.—L. borrowed a sum of money from La Caisse d'Economie, a savings bank in Quebec, giving as collateral security letters of credit on the Government of Quebec. L. having become insolvent, the bank filed a claim with the curator of his estate for the amount so loaned, with interest, which claim the curator contested, on the ground that the bank was not authorized to lend money on the security of letters credit which were not securities of the kind mentioned in sec. 20 of the Savings Bank Act, R. S. C., c. 122, and the loan was therefore null; and that it was a radical nullity, being contrary to public order, and the repayment could not be enforced (Arts. 989, 990 C. C.). The Superior Court dismissed the contestation, and its judgment was varied by the Court of Queen's Bench, which held that the bank could not recover interest on the loan—*Held*, affirming the decision of the Court of Queen's Bench (Q. R., 3 Q. B. 315), and of the Superior Court (4 Que. 65), that assuming the loan to have been *ultra vires*, the borrower could not avail himself of its invalidity to repudiate his obligation to pay his debt, nor could his creditors; that a contract of loan and one of pledge are so far independent that the one may stand and the other fall; and that the contestation was rightly dismissed—*Held*, also on cross-appeal, reversing the judgment of the Court of Queen's Bench, that the bank was entitled to interest on its claim as well as to the principal money. *Rolland* vs. *La Caisse d'Economie de Notre Dame de Québec*, Supreme Ct., 6 May, 1895, 24 Can. S. C. R. 405.

(1) See Sec. 64, Banking Act, 1890.

XXVI. UNLAWFULLY ENGAGING IN BANKING.

A loan by a Building Society on the security of a promissory note (the transaction being in effect an ordinary discount) is not illegal. *Société Permanente de Construction d'Iberville* vs. *Rossiter*, C. R. 1881, 4 L. N. 269; but see the Ontario case, *Walmsley* vs. *Real Guarantee Co.*, 29 Grant's Chy. 484, and see 5 Connecticut 560, 574, 578.

BAR. (1)

Jurisdiction.—The council of the Bar, acting and taking cognizance of complaints against members of the profession under the 72nd chapter of the Cons. Stat. of L. C., have no jurisdiction to try a complaint made against a member for an act done as a mere agent. *Ex parte Devlin*, S. C. 1862, 7 L. C. J. 29.

Offences Derogatory to. (2) — The appellant, an attorney and advocate, practising in the district of Quebec, was proceeded against before the council of the section

(1) Bar Act (2 R. S. Q. 3514) amended 52 Vic., ch. 37, and 58 Vic., ch. 36.

In regard to the latter Act, Art. 3524 R. S. Q. is amended by adding the following: "The syndic is specially charged with the supervision of the discipline of the Bar. He is bound immediately to denounce to the council of the section any infringement of the by-laws, all conduct of any member derogatory to the honor of the Bar, and to submit to it any accusation for similar acts which is handed to him by any person, saving the right of the council to receive the same directly, or to take the initiative in the exercise of its disciplinary powers."

(2) In regard to discipline of the Bar, see By-Laws of the Bar 1881, 4 L. N. 377.

of the Bar for said district on the following accusations: 1. "*D'avoir, le dit "John O'Farrell, le ou vers le 26me jour de "mai dernier, été nommé et assermenté comme "constable à St. Etienne de la Malbaie, la- "quelle charge il accepta volontairement dans "une poursuite où lui, le dit John O'Farrell, "agissait pour le plaignant, en sa qualité "d'avocat et de procureur, cumulant ainsi "dans la même poursuite les fonctions d'avo- "cat et de constable, et d'avoir dans la nuit "du vingt-six ou vingt-sept mai aussi dernier "accompagné d'une douzaine d'hommes arrêté "comme constable susdit en la paroisse de "Ste. Agnes un nommé Joseph Guay, culti- "vateur du dit lieu. 2. D'avoir, le dit John "O'Farrell, dans la nuit du vingt-deux ou "vingt-trois juin dernier, accompagné l'huis- "sier chargé d'arrêter un nommé Alexander "Murray dit Brunoche, cultivateur de Ste. "Agnes, et d'avoir assisté et aidé à faire la "dite arrestation.*" The council of the Bar found these charges proved, and that they were infractions of discipline, and derogatory to the honor of the Bar; but *Held*,—reversing this decision and the decision of the Superior Court in Review, that the charges in the absence of any by-law did not disclose any offence. *O'Farrell* vs. *Brossard*, 1 L. N. 32, Q. B. 1877, reversing Ct. of Rev., 3 Q. L. R. 33.

BEACH. (1)

The owner of the land facing the beach cannot contest the validity of letters patent of the Government of Quebec conveying right over the beach of which he is not in possession. *Motz* vs. *Carrier*, Q. B., Sept. 7th, 1878, Ram. Dig. 72.

BENEFIT SOCIETIES (2) (3)

I. By-Laws—See also No. VI. *infra.*

II. Constitutional Law — Insolvency Matters.

III. Dissension—Forming New Branch—Accounting.

IV. Election of Officers—See under title "Company and Corporation Law."

V. Expulsion of Members. 1-4.

VI. Powers of—By-Law—Ultra Vires. 1-5.

VII. Rules of. 1-2.

(1) Art. 400 C. C.
(2) R. S. Q., Vol. 2, Art. 3006 et seq.
(3) See Act to declare that the benefits conferred upon their members by incorporated benevolent societies are exempt from seizure. 52 Vic. (Que.), ch. 33.

I. BY-LAWS.

Penalties for Infraction.—Where an article of the by-laws of a benefit society imposes a general penalty for all infractions of the by-laws, and in another subsequent article a special penalty is imposed for a special infraction, the only penalty that can be applied in the case of the special infraction is the special penalty. *Desmarais* vs. *Société de Secours, etc., de Joliette*, S. C. 1882, 12 R. L. 198.

II. CONSTITUTIONAL LAW.

Insolvency Matters.—The Legislature of Quebec has power to pass an Act, authorizing a benefit society to compel a widow of a deceased member to receive $200 once for all, instead of a life rent of 7s 6d weekly, on the ground that the society was insolvent. *Belisle* vs. *L'Union St. Jacques*, P. C. 1874, Beauchamp's Privy Council 482, reversing C. Ct. 1871, 15 L. C. J. 212.

III. DISSENSION—FORMING NEW BRANCH—ACCOUNTING.

A majority of the members of a corporate body were expelled from the meeting rooms of the society. They retired and met in another place, and organized themselves for objects similar to those of the association, taking a new name. The trustees were among the number. On an action by the old association calling on the trustees to account, it was held by the Court of Appeal confirming the judgment of the Court of Review, that the members who had taken a new name represented the old association, and that having accounted to that association they were discharged. *Court Mount Royal No. 5694* vs. *Boulton*, 22 Nov., 1881, Ramsay J., dissenting.

IV. ELECTION OF OFFICERS. (See under title—"Company and Corporation Law.")

V. EXPULSION OF MEMBERS.

1. On a petition for a writ of mandamus, the petitioner asked to be replaced on the list of members of a benefit society from which he had been expelled, and the defendants pleaded that the petitioner had obtained admission by representing that he was in good health when in fact he was suffering from consumption. And that subsequently he had refused on several occasions to submit to medical

examination—*Held*, that the admisson to membership was null, and the expulsion was justified by the facts. *Durantaye* vs. *The Société St. Ignace de Montréal*, S. C. 1869, 13 L. C. J. 1.

2. Respondent was expelled from membership in the society appellant for being in default to pay six months contributions. Art. 20 of the Society's by-laws provided that "when a "member shall have neglected during six "months to pay his contributions or the entire "amount of his entrance fee, the society may "erase his name from the list of members, and "he shall then no longer form part of the "society: for that purpose at every general "and regular meeting it is the duty of the collector-treasurers to make known the names "of those who are indebted in six months "contributions or in a balance of their entrance "fee, and then any one may move that such "members be struck off from the list of members of the society." Respondent thereupon brought suit in the shape of a petition, praying that a writ of mandamus should issue enjoining the company to re-instate him in his rights and privileges as a member of the society, on the ground that he had not been put *en demeure* in any way, and that no statement or notice had been given him of the amount of his indebtedness; on the ground that many other members of the society were in arrears for similar periods, and that it was not competent for the society to make any distinction among those in arrears; on the ground that no motion to that end was made at any regular meeting. In Queen's Bench in appeal it was *Held*, that respondent should have had "prior notice" of the proceedings to be taken with a view to his expulsion. But in Supreme Court—*Held*, reversing the judgment in appeal, and maintaining the pretensions of the society, that as respondent did not raise by his pleadings the want of "prior notice," or make it a part of his case in the court below, that he could not do so in appeal. *Union St. Joseph de Montréal* vs. *Lapierre*, Supreme Ct. 1879, 4 Can. S. C. R. 164, reversing Q. B. 21 L. C. J. 332, 1 L. N. 40.

3. A benefit society can expel one of its members where, by his scandalous conduct, he has insulted or compromised the honor of the society; such power is common to all corporations, although not specially conferred by their Acts of incorporation. *Monette* vs. *Société St. Jean Baptiste*, Q. B. 1886, 30 L. C. J. 150, confirming Ct. of Rev. 1885, 13 R. L. 451.

4. Such member cannot ask to be reinstated because his expulsion had not been carried out with the proper formalities, provided the omissions were not important, and that he had the opportunity of defending himself before the society. (*Ib.*)

VI. POWERS OF.

1. Benefit societies organized under ch. 71 C. S. C. must restrain their operations to those provided in by the Statute (1) *La Métropolitaine Société Mutuelle de Bienfaisance* vs. *Dugre*, C. Ct. 1882, 11 R. L. 341.

2. By-Law—Illegal Assessment—Ultra Vires.—*Held*, the power to levy an assessment upon the members of a corporation must be deduced from the act of incorporation. So, where the objects of the corporation are declared by the charter to be "to form a benefit society.....and by means of the revenue derived from the property of the society, and of the monthly contribu ions, to form a fund for providing aid and assistance to its members in case of accident or illness, and in the event of death to their widows and children or fathers and mothers," a by-law providing that, on the decease of the wife of any member, 10 cents should be levied on each member, to be paid to the widower, is *ultra vires*, null and void. *Harvard* vs. *L'Union St. Joseph*, C. Ct. 1893, 4 Que. 352.

3. By-Laws Ultra Vires.—The Act. 25 Vic. (Que.), ch. 98, incorporating the Quebec Ship Laborers, renders such society a purely benevolent one; it cannot therefore pass by-laws having the effect of interfering with the demand and price of labor. Such by-laws will be null, and the society will be civilly responsible for the illegal acts of its members performed under such by-laws. *Paradis* vs. *La Société des Ouvriers de Bord*, C. Ct. 1887, 13 Q. L. R. 101.

VII. RULES OF.

1. By a by law of a benefit society it was provided "that no member, who shall not have been a member of this corporation for twelve months, shall have any right to claim assistance, and by another article it was declared that the widow or widowed mother of a deceased member shall have no claim on this society unless her husband or son, as the case may be, shall have been an active member dur-

(1) Two similar decisions were rendered at Three Rivers, 10 Nov., 1880, in *Martel* vs. *Dontigny, Panneton* vs. *Mathieu* reported in the "Journal des Trois Rivières," 2 Jan., 1882.

ing twelve months from the date of his admission card." G., at the time of his death, had been a member of the society for a period of less than twelve months. *Held*, that under the above provisions the children of G. were not excluded from claiming benefits from the society. *Irish Catholic Benefit Society* vs. *Gooley*, Q. B. 1886, 31 L. C. J. 56.

2. By the constitution and by-laws of the French Canadian Artisans Society of Montreal (Que., 40 Vic., ch. 63), the sum payable on the decease of a member should be paid to his heirs and not to his widow. *Plante* vs. *Société des Artisans C. F. de Montréal*, S. C. 1889, 20 R. L. 320.

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(1) Bills of Exchange Act, 1890, whereby Arts. 2279 to 2351 C. Civil, are repealed (see Schedule No. 2). Except in so far as such articles (or any of them) relate to evidence in regard to bills of exchange, cheques and promissory notes.

(2) Sect. 14 (2) of the Bills of Exchange Act, 1890, is amended by adding to the days to be observed in the several provinces as legal holidays or non-juridical days, the first Monday in September, to be designated "Labour Day." 57-58 Vict. ch. 55 (D).

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I. ACCOMMODATION NOTE.

1. A holder of an accommodation promissory note even with knowledge of the fact may recover thereon from the maker, and may rank on the estate of and discharge the endorser, without losing his recourse against the maker, and the imputation made by the holder of payments made by the endorser, and not declared to be incorrect upon an account furnished, will operate as a valid imputation even against the accommodation maker. *Lyman* vs. *Dyon,* S. C. 1868, 13 L. C. J. 160.

2. Action on a note made by defendant to the order of another, and endorsed by that other to plaintiff. Plea, that defendant had received no consideration, but had given the note for the accommodation of the endorsee who was interested with plaintiff in certain real estate transactions, and that plaintiff knew that the note was an accommodation note—*Held,* that the fact that the plaintiff knew that this was an accommodation note could not affect his right to collect the amount from the

maker, he having given value for it. *Beique* vs. *Bury*, S. C. 1880, 3 L. N. 160; Bills of Exch. Act. 1890, sec. 28 (2).

3. Action by respondent against the maker of a promissory note for $650 at four months, payable to the order of J. S., and endorsed by S. to the bank. Plea that this note was made by him for the accommodation of S., that he never had any value for it; that S. promised him, the defendant, that he would pay it, and that he, defendant, would not be troubled about it. *Held*, that the contract expressed on the face of a negotiable instrument cannot be varied without an express agreement. Knowledge that the parties to a note occupy between themselves a relation different from that expressed on the note is not sufficient to alter their relations to a third party having such knowledge. *Scott* vs. *Quebec Bank*, Q. B. 1884, 7 L. N. 343.

II. ACTION ON. (1) (See also under title—"ACTION—CAUSE OF.")

1. Affidavit. (See also "SIGNATURE.") — Where on the face of the notarial certificate it is utterly null, the party pleading the want thereof *must* file the affidavit required by the 87th Section of the Judicature Act of 1857. *Chamberlin* vs. *Ball*, Q. B. 1860, 5 L. C. J. 88, 11 L. C. R. 50, overruling *Hobbs* vs. *Hart*, C. Ct. 1860, 5 L. C. J. 52.

2. —— A plea of no value, and that note was obtained by surprise, need not be accompanied by the affidavit required by the 86th Section of Chapter 83 of the Consolidated Statutes of L. C. *McCarthy* vs. *Barthe*, S. C. 1862, 6 L. C. J. 130.

3. —— In an action on a promissory note dated at Montreal, in which the defendant pleads that the note was really made at Sorel, such plea need not be sustained by an affidavit such as required by Art. 145 of the Code of Civil Procedure. *Hudon* vs. *Champagne*, S. C. 1872, 17 L. C. J. 45, *contra Beauchemin* vs. *Brodeur*, Sorel, 10 Jan., 1872, Ramsay J.

4. **Allegations of Declaration.**—In action on a promissory note against endorser, an erroneous allegation in the declaration as to date of note and its maturity and protest will not be covered by a subsequent allegation of the promise of the endorser after protest to pay the amount of the note to the plaintiff, and a demurrer to such a declaration is well founded. *Hellwell* vs. *Mullin*, S. C. 1861, 5 L. C. J. 76.

5. —— In an action on a promissory note, the plaintiff (not the payee) sufficiently set out the contract by alleging that the note was made, without alleging that it was signed and that it was endorsed and delivered by the payee to the plaintiff, and without alleging delivery by the maker to the payee. *Bullitt* vs. *Shaw*, S. C. 1863, 7 L. C. J. 47.

6. Before Maturity—Maturity during Pendency of Action.—The maturity of a note during the pendency of an action prematurely brought upon it is no answer to the exception of the defendant that such note was not payable at the moment of the institution of the action. *Work* vs. *Perron*, C. R. 1892, 2 Que. 56.

7. By Firm. 89 C. C. P.—Where judgment had been rendered *ex parte* in an action on a promissory note, and the case was taken to appeal, on the ground that proof should have been made by plaintiffs of the partnership alleged to exist between them, and also of the partnership alleged to exist between the defendants, the appeal was unanimously dismissed. *Foley* vs. *Forrester*, Q. B. 1866, 2 L. C. L. J. 16, 16 L. C. R. 411.

8. By whom it may be taken. (See also "RIGHTS OF HOLDER—TRANSFER WITHOUT INDORSEMENT.")—The indorsee and holder of a promissory note, for the purpose of collection, may recover against the maker and endorser. *Mills* vs. *Philbin*, Q. B. 1848, 3 R. de L. 255; *Fulton* vs. *Lafleur*, S. C. 1894, 5 Que. 431.

9. —— Action was to recover $225, amount of a promissory note made by defendant in favor of plaintiff. The defendant pleaded: 1st, That the plaintiff was not holder for value, but is a *prête-nom* of the Ætna Insurance Company; 2nd, that the consideration of the note was the first annual premium on a life policy for $5,000, and that the annual premiums were not to exceed that amount; that the policy offered was at an annual premium of $315—*Held*, that the burden of proof was upon the defendant that there was want of consideration. There was no difficulty in plaintiff suing in his own name, though trustee for another. (*Mills* vs. *Philbin*, 3 Rev. de Lég. 255.) There were two witnesses in the case, one who proved for plaintiff that the policy offered and refused by defendant was in the usual terms of the

(1) See Art. 49 C. C. P. as to description of defendant.
See Art. 89 C. C. P. as to judgment by default.
See Art. 145 C. C. P. as to denial of signature.
As to cause of action, Art. 85 of the Civil Code as amended reads as follows:—"The indication of a place of payment in any note or writing, wherever it is dated, is equivalent to such election of domicile at the place so indicated."

office of plaintiff. The other witness was the plaintiff examined for defendant. He certainly does not make out the case of the defendant. The undertaking of plaintiff was to furnish the policy, and he did so. The Court could not adopt the proposition of defendant that plaintiff should have produced the written application, signed by defendant, for the policy. It was for defendant to produce it or prove it in the usual way. Probably the production of the application would not have helped defendant, and he therefore abstained from asking for it. Judgment confirmed. *Alexander* vs. *Taylor*, C. R. 1880.

10. —— The holder of a note, even if he be but a *prête-nom*, can maintain an action on the note if there is no fraud and the debtor suffers no prejudice thereby. *Biron* vs. *Brossard*, 1880, M. L. R., 2 S. C. 105; *Lee* vs. *Ingram*, C. R. (Montreal), 30 Jan., 1886.

11. —— Art. 99 C. C. P.—Where plaintiff who sues on a promissory note files the original thereof, the defendant cannot contest the former's right to its payment, even where he proves that plaintiff was not the owner of the note at the time of taking the action, and where he only filed the note after the action had been returned. *MacKinnon* vs. *Keronack*, Q. B. 1887, 15 R. L. 31.

12. Description of Parties.—The holder of a promissory note who sues an indorser thereof need only state the names of the maker and indorsers prior to himself, such as they appear on the note. *Arpin* vs. *Carreau*, S. C. 1884, 13 R. L. 270.

13. —— In an action against the endorser of a note alleged in the declaration to have been made by one E. B. Perry, although really signed by J. B. Perry, the plaintiff will recover without amending his declaration, and on the production of a protest and notice of protest of a note purporting to have been made by E. B. Perry. *Scullion* vs. *Perry*, C. C. 1865, 9 L. C. J. 174.

13*a*. Foreign Note.—Action for the recovery of the amount of a promissory note for goods sold and delivered to the defendant in the United States. *Per curiam.*—The defendant demurs to the action, on the ground that it is not alleged that the note was duly stamped; that a demand of payment was made, and other reasons. It is alleged that the note was made and delivered conformably to the laws of the place were it was made, and this is sufficient. It is also alleged in the declaration that by the law of the State of Massachusetts, it is not necessary to present a promissory note for payment, and that the maker may be sued without presentment, and the court holds that the allegations of the declaration are sufficient, and dismisses the demurrer with costs. *Beebe* vs. *Mahon*, S. C. 1884.

14. Note not Filed.—Action will be dismissed. *Hudon* vs. *Girouard*, Q. B. 1875, 21 L. C. J. 15.

15. Notice of Protest, etc.—In an action by the endorsee of a promissory note against the endorser, protest, demand, refusal by the drawer and notice to the defendant must be proved, or that he is not entitled to notice. *Sutherland* vs. *Oliver*, K. B. 1821, 2 Rev. de Lég. 31.

16. Parties to—Dilatory Exception—Action in Warranty. Art. 1953 C. C. (See "Indorsers—Right of—Action in Warranty.")—*Held*, the maker of a promissory note cannot by dilatory exception stay the suit of the holder in order to call in the endorser in warranty. (1) *Molson's Bank* vs. *Charlebois*, S. C. 1892, 2 Que. 286; *Black* vs. *Lawrence*, 1886, M. L. R., 2 S. C. 279; *Durocher* vs. *Lapalme*, 1885, M. L. R., 1 S. C. 491.

17. *Contra*, *Beaulieu* vs. *Demers*, C. Ct. 1874, 5 R. L. 214; *Demers* vs. *Harvey*, S. C. 1893, 5 Que. 1; and *see Banque Nationale* vs. *Ross*, C. R. 1885, 11 Q. L. R. at p. 113. (2)

18. Pleading Prescription. 2260 C. C., Sec. 4. (See under title "Prescription.")—The defendant pleaded that he had not within a period of five years promised and undertaken in manner and form as alleged in the plaintiff's declaration—*Held*, a good plea, and action dismissed. *Giard* vs. *Giard*, S. C. & C. R. 1865, 15 L. C. R. 494.

19. Striking out subsequent Indorsements.—In an action on a promissory note the Court may, on motion of the plaintiff, authorize the striking out of all endorsements subsequent to those recited in the declaration. *Fisher* vs. *McKnight*, S. C. 1878, 22 L. C. J. 146.

20. Two Notes against one Maker.—The holder of two notes by the same maker can sue separately on them by two actions. *Laliberté* vs. *Chenard*, S. C. 1879, 6 Q. L. R. 12.

21. When Lost.—Where the note was payable by instalments, the first of which it was alleged in the declaration was payable in September, whereas by the evidence it was

(1) See Girouard on Bills and Notes at p. 123.

(2) See Remarks on this case by Routhier J., S. C. 1893, 5 Que. at pp. 2-3.

proved to be payable in December—*Held*, that the variance was not material. *Corden* vs. *Ruiter*, Q. B. 1864, 9 L. C. J. 217, and 15 L. C. R. 237.

22. —— And *Held*, also, that in any case such variance was covered by the maker's acknowledgment of the note subsequent to his knowledge of the loss. (*Ib.*)

23. —— And the evidence of the payee himself after making affidavit of the loss of the note was legal.

24. —— An action on a note mislaid, payable to order, and endorsed, and not proved to have been either lost or destroyed, cannot be maintained. (1) *Wante* vs. *Robinson*, K. B. 1816, 2 Rev. de Lég. 29.

25. —— And such action cannot be maintained under any circumstances without indemnity to the drawer. (1) *Beaupré* vs. *Burn*, K. B. 1821, 2 Rev. de Lég. 31.

26. —— Art. 2316 C. C.—Where a bill of exchange is lost after being filed in Court, plaintiff to proceed as if lost before. (1) *Lewis* vs. *Walters*, Q. B. 1888, 16 R. L. 640, M. L. R., 4 Q. B. 257.

27. —— No indemnity is due if the note be not negotiable. *Cooley* vs. *Dom. Bldg. Soc.*, Q. B. 1878, 24 L. C. J. 111.

28. —— Where a party sues on a note alleged to be in his possession, he cannot recover judgment thereon, even if he prove that the note once existed, but without proving whether plaintiff ever had possession of it. *Raymond* vs. *LaRocque*, Q. B. 1875, 20 L. C. J. 175.

29. Where Maker Absconds.—Before a note of hand payable with a term becomes due, action may be maintained for the amount against the drawer if he abscond. *Shepherd* vs. *Henrickson*, K. B. 1819, 2 Rev. de Lég. 31.

30. Where Maker Insolvent. 1092 C. C. —Promissory note with a term allowed for payment is immediately exigible where maker is insolvent. *Lovell* vs. *Meikle*, S. C. 1853, 2 L. C. J. 69, and *see Wark* vs. *Perron*, Ct. of Rev. 1893, 3 Que. 56.

III. ALTERING.

1. Bank Draft.—Where a bank draws a draft for $25 on one of its branches, and fails to advise such branch of the fact, and the draft is afterwards raised to one for $5,000, and so skillfully as to deceive the branch office, which pays the amount of the draft as raised to another bank, holding the draft in good faith, and, in consequence of such payment, the latter bank pays $3,500 on account thereof to the person from whom the bank received it, the former bank cannot recover from the latter bank the amount so paid by it. *Union Bank of L. C.* vs. *Ontario Bank*, Q. B. 1880, 24 L. C. J. 309, confirming S. C., 23 L. C. J. 66.

2. Date—Indorser—Discharge.—In an action on a note against an accommodation endorser, exhibiting on its face a manifest alteration of date, and the endorser pleaded such alteration, the holder was bound to show that the alteration was made before the endorsement, or that it was made with the endorser's consent. *Banque Ville Marie* vs. *Primeau*, Q. B. 1880, 26 L. C. J. 20, 4 L. N. 19, 1 Dorion's Rep. 24.

3. —— Action for the recovery back of a sum of money paid to the bank by the plaintiffs, drawers of a bill dated Montreal, upon one B. in Ontario, which bill the bank discounted for the plaintiffs in March, 1877.—*Held*, that when a bill has been accepted and delivered to the holder, the date of acceptance cannot be altered without the consent of all the parties to the bills. *Ogilvie* vs. *Quebec Bank*, S. C. 1882, 5 L. N. 183, Q. B. 1883, 3 Dorion's Rep. 200.

4. —— The alteration of a promissory note by changing the date from the 8th to the 28th is not a sufficient alteration to release the maker, such alteration being in his favor by extending the delay for payment, and it was not proved that the alteration was made by the plaintiff who was holder in due course. *Canada Investment & Agency Co.* vs. *Brown*, C. R. 1890, 19 R. L. 364.

5. Inserting Word.—Where the holder of a promissory note inserted the word "months" which had been omitted in the note after the word "three," without the knowledge of the endorser, such addition did not constitute a forgery, and the endorser was therefore not released. *Laine* vs. *Clarke*, S. C. 1871, 3 R. L. 450.

IV. ATTACHMENT OF.

The amount of a note payable to order cannot be attached in the hands of the drawer as *tiers saisie*. *Thorl* vs. *Hoyt*, K. B. 1813, 3 Rev. de Lég. 305, 2 R. J. R. Q. 296.

(1) See Secs. 68-69 Bills of Exchange Act, 1890.

V. BILLS OF EXCHANGE. (See also under title—"BANKS AND BANKING.")

1. Consideration.—A draft made by B., P. & B., through their agent D., and given to a bank in payment of another draft drawn by W. on S. & M. in favor of D. (subsequently dishonored by S. & M.) discounted by the bank to pay a promissory note due by reason of a transaction by which B., P. & B. never profited, and of which they were ignorant, is without consideration, and no action lies on it against B., P. & B. *Union Bank of Canada* vs. *Bryant, Davis & Bryant*, S. C. 1891, 17 Q. L. R. 93.

2. Funds in Hands of Drawee.—When a bank discounts for A. a draft by him on B., and accepts a check for the proceeds, and delivers it to A., for transmission to B., to enable B. therewith to retire a draft for a similar amount drawn by A., and accepted by B. for A.'s accommodation, and about to fall due at the branch of the bank where B. resides, on the faith of A.'s representation, assurance and undertaking (without authority, however, from B.) that B. will accept the new draft, and B. receives the check, and before using it has knowledge of the transaction as between A. and the bank, B. cannot legally use the check to retire his acceptance on the old draft, without accepting the new one. *Torrance* vs. *Bank of B. N. America*, P. C. 1873, 17 L. C. J. 185, 5 P. C. App. 246, confirming Q. B., 15 L. C. J. 169, S. C., 12 L. C. J. 325.

3. —— *Held*, following Bank of B. N. A. vs. Torrance (*supra*), where a bank discounts the unaccepted draft of A. on B., for the purpose of retiring B.'s acceptance on a former draft, on the faith of a telegram from B. to A. to draw on B. for the purpose aforesaid, the bank may recover the amount of such draft on B., although he subsequently refuse to accept the same. *Molsons Bank* vs. *Seymour*, S. C. 1877, 21 L. C. J. 82, confirming in appeal Q. B. 1878, 23 L. C. J. 57; *Dunspaugh* vs. *Molsons Bank* (*Ib.*).

4. Liability of Acceptor—Imputation of Payments. (See "PAYMENT OF.")—J., a customer of the Exchange Bank, respondent, discounted with that bank appellant's acceptance. When it fell due appellant failed to pay it, and the bank charged it to J.'s account, who at the time owed the bank a small balance, which balance was augmented by subsequent transactions, wherein nevertheless if the credits were imputed to the earliest indebtedness, the balance due when the acceptance matured would be more than covered. The bank retained possession of the acceptance, and brought this suit against appellant, the acceptor, to recover its amount. Appellant pleaded payment and compensation. *Held*, that the bank was entitled to recover from appellant the amount of his acceptance, and that appellant was not discharged by the credits in the bank's account with J. *Goodall* vs. *Exchange Bank of Can.*, Q. B. 1887, M. L. R., 3 Q. B. 430.

5. Liability of Drawer.—The drawer of a bill of exchange who transfers it after maturity is jointly and severally liable with the acceptor, and can be sued with him. *Horcy* vs. *Nolin*, C. R. 1889, 18 R. L. 439.

6. Surety—Renewal.—A creditor bank holder of a bill of exchange which is in the hands of its agent in another country cannot recover from the surety for its debtor (who had bound himself to pay the amount of the bill and all renewals thereof) the amount of a bill discounted by it to renew the former, but the product of which was remitted by it to the principal debtor, and used by him for other purposes than the renewal of the former bill. *Banque Union du Canada* vs. *Banque de Québec*, Q. B. 1887, 16 R. L. 126.

7. What are. (SEE PROMISSORY NOTES—WHAT ARE.)—Where an officer of the Government gave to the plaintiff an open letter, desiring the commissary general to pay him a certain sum of money due by the department to plaintiff, and the letter being presented, payment was refused, upon which it was regularly protested, and action brought against the writer of the letter—*Held*, that it could not be considered a bill of exchange, as there was no exchange of money for money or value received, and that no action would lie thereon. *McLean* vs. *Ross*, K. B. 1816, 3 Rev. de Lég. 434.

VI. BY AGENTS. (See also under title "AGENCY.")

1. Liability of. (1) —A note promising to pay A., or his order, £20 on account of B., enables the endorser of A. to recover the amount. *Newton* vs. *Allen*, K. B., 2 Rev. de Lég 29; and *Moir* vs. *Allen*, *Ib.* 1817.

2. —— And on such a note, payment must be made to A., or A.'s order, and not to B. *Clarke* vs. *Esson*, K. B. 1820, 2 Rev. de Lég. 30.

3. —— L. R. & Co., a Montreal firm, acting as agents of a London Phosphate Company, drew upon the Company, in London, two bills

of exchange payable to the order of B., to whom they were indebted, and following their signature were the letters "Mg. Agents." The bills were accepted, and B. endorsed them for value to plaintiff. They were not paid at maturity.

In an action by plaintiff upon them, against L., a member of the firm, which had since been dissolved, L. pleaded that the bills were drawn by the firm in their capacity of *managing agents*, the letters "Mg. Agents" signifying *managing agents*, and not *mining agents*—*Held*, (1) that under sec. 26 of the Bills of Exchange Act 1890, the firm, in order to escape personal liability as drawers, were bound to sign for and in the name of principals disclosed in the instrument, and the mere addition to their signature of words or letters describing them as agents did not exempt them from personal liability. *Bank of Ottawa* vs. *Lomer*, S. C. Montreal, May 10, 1893, reversed in Review, 31 Jan., 1894, but judgment of Superior Court restored in Appeal, 26 Dec., 1894.

4. Powers of.—Extent.—Where an agent accepts or endorses *per pro.* the taker of a bill or note so endorsed is bound to enquire as to the extent of the agent's authority; where an agent has such authority, his abuse does not affect a *bonâ fide* holder for value. *Bryant, Powis & Bryant* vs. *Quebec Bank*, P. C. (1893), App. Cas. 170.

5. Proof of Signature.—Where an indorsement on a promissory note is made by an agent, his agency must be established, as such case does not come within the provisions of the 20th Vic., ch. 44, sec. 87. (1) *Joseph* vs. *Hatton*, C. Ct. 1859, 9 L. C. R. 299; *Ethier* vs. *Thomas*, Q. B. 1873, 15 L. C. J. 225.

VII. BY CORPORATION. (2)

1. Authority of Officers of Corporation.—Bill of exchange accepted by an officer of a society, without due authority, cannot bind the society. *Browning* vs. *British American Friendly Society*, S. C. 1859, 3 L. C. J. 306.

2. —— Unless ratified by it. *Banque Jacques Cartier* vs. *Les Religieuses, etc.*, Q. B. 1892, 1 Que. 215, reversing C. R. 1891, 17 Q. L. R. 8.

(1) See Sec. 26, Bills of Exchange Act, 1890.

(2) See, 22 Bills of Exchange Act, 1890. As to the power of Quebec Joint Stock Companies to issue notes, see 54 Vic. (Que.), ch. 35. "The company may, by a simple resolution, issue notes payable to order or to bearer, for the settlements of accounts or other current matters."

3. —— The secretary and accountant of the Montreal & Champlain R. R. Co. have no power to accept drafts on behalf of the Company, and consequently the moneys covered by such drafts may be legally attached by process of attachment, notwithstanding such acceptance by such unauthorized officers. *Ryan* vs. *Montreal & Champlain R. R. Co.*, Q. B. 1859, 4 L. C. J. 38, reversing S. C., 2 L. C. J. 203.

4. —— The endorsement of a premium note by the secretary of the Company, in that capacity, is sufficient to pass the title to the note when an implied authority in him to do so has been shown by proof of the ordinary course of business of the Company, that the directors had effected the arrangements with the holders of which the transfer of the note formed part, and that the Company had received the consideration of such transfer. *Wood* vs. *Shaw*, S. C. 1858, 3 L. C. J. 169.

5. —— Action on two promissory notes made by one of the defendants in favor of the other, a company, and by it endorsed by its president. The company pleaded that it was a corporation, etc., and could only bind itself in that manner by the signatures of the president, vice-president and treasurer. The other defendant summoned the company in warranty as having signed for their accommodation simply. Action dismissed as to both, and demand in warranty maintained. *Mechanics Bank* vs. *Bramley*, Q. B. 1879, 2 L. N. 389.

6. —— A note, payable to the order of a corporation, cannot be endorsed to a third party by its vice-president, unless the by-laws expressly allow of such endorsement. *Mechanics Bank* vs. *Bramley et al.*, Q. B. 1879, 25 L. C. J. 256.

7. Building Society—Powers.—A negotiable promissory note made by a building society, or other corporate body, not specially authorized by its charter to make promissory notes, is a promise held out to the public that it will pay the amount to the order of the person named therein, and will be held good as an acknowledgment of indebtedness; and the indorsee of such a note may recover the amount thereof from the corporation, promissor, on the mere production of the note, in the absence of a plea specially denying the existence of the debt, or that valid consideration was received by the corporation. *Société de Construction du Canada* vs *Banque Nationale*, Q. B. 1880, 24 L. C. J. 226. See also *Corporation of Granby* vs. *Couture*, 21 L. C. J. 105.

8. Company's Act 1868.—Companies incorporated under 31 Vic., ch. 25, cannot issue promissory notes unless this power is formally given by the by-laws of the company. (1) *Coates* vs. *Glen Brick Co.*, S. C. 1870, 2 R. L. 625.

9. —— Where the by-laws provide that "the directors shall have the management of the affairs of the Company," and "the president and secretary shall have power to draw cheques, to sign deeds, stock certificates, all contracts authorized by the board of directors, and all matters and documents of special import," and where it was not proved that the notes in question were authorized in such a manner as to bring them within the category of "contracts authorized by the board of directors,"—they were not binding on the Company. (*Ib.*)

10. Company's Act 1877—Burden of Proof.—Under sec. 66 of this Act the burden of proof is upon the defendant to disprove the authority of the president. *Brice* vs. *Morton Dairy Company*, C. R. 1883, 6 L. N. 171.

11. By Corporation (2) — Non-Commercial Corporation — Ratification.—The making of a promissory note, or the indorsing of one where liability is incurred, is not an act of mere administration, and such act on the part of the corporation must be authorized either by the by-laws or by a special resolution of the board or council; but as the making or indorsing of a promissory note, where this has been done without proper authority on the part of those who have purported to act for the corporation, are not in themselves illegal and prohibited on pain of nullity, the engagement may be ratified by the corporation, and such ratification will render the corporation liable. *Banque Jacques Cartier* vs. *Les Religieuses Sœurs Hospitalières de St. Joseph, etc.*, Q. B. 1892, 1 Que. 215, reversing C. R. 1892, 17 Q. L. R. 8.

12. By-Laws—Rights of Third Parties—Mutual Insurance Co.—The by-laws of a mutual insurance company gave the president the management of its concerns and funds, with power to act in his own discretion and judgment in the absence of specific directions from the Directors; and it was also his duty to sign all notes authorized by the board or by virtue of the by-laws. The president was both president and treasurer, and was also acting as secretary —*Held*, that the plaintiff, who was the transferee for value given before maturity, of a note signed in behalf of the company by the president as president and treasurer, and given to the payee in settlement of a valid claim against the company, was entitled to recover the amount of said note from the company. *Jones* vs. *East. Townships Mutual Fire Insurance Co.*, C. R. 1887, M. L. R., 3 S. C. 413, 15 R. L. 500.

(1) See now 54 V. (Que.), ch. 35.

(2) See, 22 Bills of Exchange Act, 1890.

VIII. BY INSOLVENT.

Claim on a note made by the insolvent in favor of her brother seven days before she was put into insolvency. The claimant proved consideration given for the note, namely, goods sold—*Held*, that as the note was given under suspicious circumstances the contestation would be dismissed but without costs. *Garon* vs. *Globensky*, S. C. 1880, 3 L. N. 162.

IX. BY MARRIED WOMAN.

1. For Debt of Husband—Absolute Nullity—Bank discounting Note in Good Faith. ART. 1301 C. C.—A promissory note made by a married woman, separated as to property, in favor of a creditor of her husband, in payment of a debt of her husband, is absolutely null; and no action can be maintained thereon by a bank which has discounted the same in good faith before maturity, in ignorance of the cause of nullity. *Banque Nationale* vs. *Guy*, S. C. 1891, M. L. R., 7 S. C. 144.

2. —— *Held* (reversing the judgment of Loranger, J., Q. R. 2 S. C. 152), that a note to order, signed by a married woman without consideration, and for the benefit of her husband, who received the product of the discount of said note for his own use, is absolutely null and void as being against public order, even in the hands of a third holder for value. *Ricard* vs. *Banque Nationale*, Q. B. 1893, 3 Que. 161.

3. —— A promissory note made by a married woman, separated as to property, in favor of a creditor of her husband, is null as being in violation of Article 1301 C. C. *Thibaudeau* vs. *Burke*, S. C. 1890, 20 R. L. 85.

4. —— A married woman, separate as to property, cannot bind herself for the debt of, or as surety for, her husband. *Scantlin* vs. *St. Pierre*, S. C. 1879, 10 R. L. 52; *Jodoin* vs. *Dufresne*, Q. B. 1853, 3 L. C. R. 189; *Shearer* vs. *Compain*, S. C. 1860, 5 L. C. J. 47; *Klock* vs. *Chamberlain*, Supreme Ct.

1887, 15 Can. S. C. R. 325; *Chapdelain* vs. *Vallée*, C. R. 1886, 16 R. L. 51.

5. —— So *Held*, even where the wife represented that the money was for herself. *Rheaume* vs. *Caille*, S. C. 1878, 1 L. N. 340.

6. —— And in such cases as above the wife can recover back what she has paid on behalf of her husband. *Buckley* vs. *Brunelle*, Q. B. 1873, 21 L. C. J. 133.

7. —— By the effect of a judgment of separation as to property duly executed, the wife is exempted from any liability by her previously incurred as surety for her husband. *Plessis* vs. *Dubé*, S. C. 1865, 9 L. C. J. 76.

8. Common as to Property. Arts. 177 & 986 C. C.—Promissory notes signed by a married woman without the authority of her husband are null. *Danziger* vs. *Ritchie*, Q. B. 1864, 8 L. C. J. 103 and 14 L. C. R. 425.

9. —— Promissory note signed by a woman separated as to property without proof of an authorization by the husband, is null, notwithstanding it be given for purchases made by herself. *Badeau* vs. *Brault*, S. C. 1857, 1 L. C. J. 171.

10. —— But a married woman common as to property acting as the agent of her husband may sign alone as such attorney. *Norris* vs. *Condon*, C. R. 1888, 14 Q. L. R. 184.

11. For Loan—Wife separate as to Property—Burden of Proof.—A wife separate as to property can bind herself jointly and severally with her husband if she profited by the transaction. To escape her liability the wife must prove that the creditor knew at the time of contracting she was doing so as security for her husband. *Malhiot* vs. *Brunelle*, Q. B. 1870, 15 L. C. J. 197.

12. —— But in a later case, *semble*, that it is incumbent on the party claiming to enforce the contract of a married woman in such case, to show that it inured to her separate advantage. *Artisans' Permanent Building Society* vs. *Lemieux*, S. C. 1888, 15 Q. L. R. 35.

13. —— And so *Held* in *Banque Union* vs. *Gagnon*, Q. B. 1888, 15 Q. L. R. 31.

14. For Necessaries—Wife separate as to Property.—Promissory note made by a wife, separated as to property from her husband, in favor of her husband, and indorsed by him for groceries and other necessaries of family use purchased by her, is valid. (1)

(1) Contra *Rousson* vs. *Gauvin*, C. Ct. 1863, 13 L. C. J. 82.

Cholet vs. *Duplessis*, S. C. 1862, 6 L. C. J. 81, 12 L. C. R. 303; *Rivet* vs. *Léonard*, S. C. 1848, 1 L. C. J. 172; *St Amand* vs. *Bourret*, C. Ct. 1863, 13 L. C. R. 238; *Roberts* vs. *Rombert dit Martin*, C. R. 1870, 2 R. L. 188; *Elliott* vs. *Grenier*, S. C. 1865, 1 L. C. L. J. 91.

15. —— But *Held*,—the indorsement *pour aval* of a wife separated as to property from her husband, on a promissory note signed by the husband, for goods sold and delivered to him and charged to him alone in the vendor's books, and given in renewal of a note of the husband not bearing her indorsement, is null and void, notwithstanding that the goods so sold and delivered may have contributed to the support of the wife. *Bruneau* vs. *Barnes*, Q. B. 1880, 25 L. C. J. 245.

16. Indorsers for—Pleading Nullity.—The incapacity of a married woman cannot be pleaded by her endorser or warrantor *d'aval*. *Morris* vs. *Conden*, C. R. 1888, 14 Q. L. R. 184.

17. Marchande Publique.—Both the husband and wife are jointly and severally liable for a joint note made in the course of a business in which they were both jointly interested. *Girouard* vs. *Lachapelle*, C. Ct. 1863, 7 L. C. J. 289, and see *Shearer* vs. *Compain*, S. C. 1860, 5 L. C. J. 47.

18. —— A promissory note signed by a married woman separate as to property, without the authority of her husband, is good, the woman having, at the period of the making of the note in question, assumed the quality of a *marchande publique*. *Beaubien* vs. *Hudon*, Q. B. 1862, 12 L. C. R. 47.

19. —— A wife separate as to property who is a *marchande publique* cannot indorse a note, received by her in the course of her business, to one of her husband's creditors. Such creditor would thereby have no recourse against her. *Martin* vs. *Guyot*, S. C. 1885, M. L. R., 1 S. C. 181.

X. BY MUNICIPAL CORPORATIONS.

1. Municipal corporations cannot sign a promissory note unless expressly authorized by statute. *Pacaud* vs. *Corporation of Halifax South*, Ct. of Rev. 1866, 17 L. C. R. 56; *Martin* vs. *Cité de Hull*, S. C. 1878, 10 R. L. 232.

2. Contra. But a note signed by the mayor and secretary-treasurer of a municipal corporation, in the name of the corporation, is binding on the corporation, when it is neither

alleged nor proved that the note was given without lawful consideration. *Corporation of the Township of Grantham* vs. *Couture*, Q. B. 1879, 24 L. C. J. 105, 10 R. L. 186, and see *Ville d'Iberville* vs. *Banque du Peuple*, Q. B. 1895, 4 Que. 268.

3. Where a contestation arose on the declaration of a *tiers-saisi* as to the validity of a promissory note which the *tiers-saisi*, a municipal corporation, urged that it had given in settlement—*Held*, that as the note was not given to raise money but to pay a debt, and as it had passed into the hands of a third party, and plaintiff was not in a position to offer it back, that the claim of defendant was discharged and plaintiff could not recover. *Ledoux* vs. *Picotte & Municipality of Mile End*, S. C. 1878, 2 L. N. 37.

XI. BY PERSON TO WHOM JUDICIAL ADVISER HAS BEEN APPOINTED.

A note signed by a person carrying on business as a grocer, to whom a judicial adviser has been appointed, without the assistance of such adviser, for goods sold and delivered to him as such grocer, is valid. *Delisle* vs. *Valade*, S. C. 1877, 21 L. C. J. 250.

XII. BY PARTNER.

1. A note made fraudulently by a partner in the partnership's name binds the partners in the hands of a *bonâ fide* holder for value, *Walter* vs. *Molson's Bank*, Q. B. Montreal, 18 Sept., 1877.

2. Where a partner gives an accommodation note in the firm name to a friend, without authority to do so—*Held*, that a holder for value without knowledge of its defective character, can recover thereon. *Union Bank of Canada* vs. *Bulmer*, Supreme Ct., 22nd June, 1887.

XIII. BY TRUSTEES OF INSOLVENT ESTATE.

A note signed by several persons, trustees of an insolvent estate under a deed of composition which gave them no power to draw or accept bills, as "trustees to Estate C. D. Edwards," can be recovered from such persons personally and jointly and severally. *Archibald* vs. *Brown*, Q. B. 1879, 24 L. C. J. 85, 3 L. N. 43, confirming S. C., 22 L. C. J. 126, 1 L. N. 327.

XIV. BY SCHOOL COMMISSIONERS.

The president and secretary of school commissioners cannot sign a promissory note for a debt due by the commissioners, without a special authorization to that effect. *Letellier* vs. *Commissaires d'Ecole de Ouatchouan*, Q. B. 1888, 16 R. L. 449.

XV. CHEQUES. (See also under title "Banks and Banking".)

1. Accepted conditionally.—Where a cheque on the defendants, a building society, was given to the plaintiff for the payment of certain doors and windows, and the plaintiff, before accepting the cheque in payment, had gone to the defendants' office and been told that there was money still due to the maker of the cheque, and would be paid if the house, for the construction of which the maker of the cheque had the contract, were built, and defendants afterwards paid to the maker of the cheque all that was due him and refused to pay the plaintiff, and plaintiff brought action; the action was dismissed on demurrer on the ground that the obligation to pay the cheque was conditional, and the fulfilment of the condition had not been alleged. *Dufresne* vs. *The Jacques Cartier Building Society*, S. C. 1873, 5 R. L. 235.

2. Consideration—Burden of Proof.—A cheque which does not show consideration on its face is not conclusive evidence of a debt due from the drawer to the payee, but the plaintiff must make proof of the consideration for which it was given. In the present case, such proof was found in the allegations of the plea, and the promises of defendant to pay. *Dufresne* vs. *St. Louis*, 1888, M. L. R., 4 S. C. 310.

3. Fraudulently initialed.—A cheque fraudulently initialed as accepted by the manager of a bank, and for which the drawer has given in exchange to the manager certain securities which the bank retains, cannot be repudiated by the bank, when the check is held by a *bonâ fide* holder for value. *Banque Nationale* vs. *City Bank*, C. R. 1873, 17 L. C. J. 197.

4. Indorsement.—An indorsement of a cheque, payable to bearer, is an *aval*, and no protest is necessary to make the indorser liable; nor is any special diligence required from the holder of the check in the presentment of the check, if no special damages accrue in consequence, such as the failure of the Bank on which the check is drawn. (1) *Pratt* vs. *MacDougall*, S. C. 1868, 12 L. C. J. 243.

5. Nature of.—"A cheque is a bill of

(1) But see sec. 56 Bills of Exchange Act, 1890, and Girouard, Bills and Notes, p. 187.

exchange drawn on a bank, payable on demand, and except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque." Sec. 72 Bills of Exchange Act, 1890.

6. —— Under our law a cheque is a commercial paper, especially if signed by a trader, and payment thereof can be proved by parole evidence, although the amount exceed $50. *Baril* vs. *Tétreault*, S. C. 1885, 29 L. C. J. 208.

7. —— A cheque resembles an inland bill of exchange, and it is not payment until cashed. *Ladouceur* vs. *Morasse*, Q. B. Montreal, 20 Sept., 1876.

8. Presentment — Indorser — Discharge.—Defendant H. gave to the other defendant C. a cheque for $75 on the Union Bank of Lower Canada. C. endorsed it over to plaintiff, who did not present it until some twelve days after its date, when it was refused for want of funds. Some days afterwards it was presented again with the same result and protested for non-payment. H. then had left the country. On action against C.—*Held*, that defendant was liberated by want of diligence in presenting the cheque and also by want of notice of the protest. *Lord* vs. *Hunter*, C. C. 1883, 6 L. N. 310.

9. —— **for Payment—Cheques**—In an action on a cheque said to have been given as collateral for a note, the defendants said that the cheque was not presented and protested with diligence for non-payment, and recourse on it was lost. It was dated the 30th May, 1877, and not presented till the 6th June. When the cheque was given it was stipulated that it was not to be presented immediately, but only on the following day, and it was not proved that there were any funds in the bank to meet the cheque on any of the days in question. It was admitted that the cheque was not good on the day of its date, and—*Held*, not unreasonable to require of the payee in the present case to show that the cheque would have been good at a subsequent date before protest. *Marler* vs. *Stewart*, C. R. 1878.

10. —— **Reasonable time after issue—Usage of Trade—Bills of Exchange Act, 1890,** SECTIONS 72, 73, 45.—The appellant gave one D. his cheque on a bank at Lachute, to take up a note which had matured. The cheque was payable to D., or bearer. D., without retiring the note, got the cheque cashed by respondent at Montreal three days after its issue, and the respondent deposited the same in a bank at Montreal. The appellant, having discovered that he had been deceived by D., stopped payment of the cheque, and the bank at Lachute having refused payment, it was subsequently protested and returned to respondent. The presentment of the cheque at Lachute was made on the eighth day after its issue. In an action for the amount of the cheque, brought by respondent against the appellant:—*Held*, the cheque under the circumstances was presented within a reasonable time after its issue, in accordance with the usage of trade and of banks, within the meaning of section 45, sub-section 2*b*, and section 73*b* of the Bills of Exchange Act, 1890, and respondent, being the "holder in due course" (section 29), was entitled to recover the amount from the appellant, the drawer. *Campbell* vs. *Riendeau*, 2 Que. 604, (Q. B.) 1892.

11. Payable to Bearer—Indorsement "for deposit" — Negotiability—Payment by one Bank of Cheque drawn on another Bank—Good Faith.—The liquidators of the Exchange Bank handed to V., their accountant and confidential clerk, a cheque drawn by one of their debtors on The People's Bank, payable to "Archibald Campbell, Frederick B. Matthews and Isaac H. Stearns, liquidators, or bearer," and endorsed by the three liquidators "For deposit to credit of the liquidators Exchange Bank of Canada." The Quebec Bank at that time received deposits from the liquidators in a regular deposit account, and also assisted them in the redemption of the circulation of the insolvent bank by purchasing the bills of the latter, which were afterwards redeemed by the liquidators. V., instead of making the deposit as instructed, presented the cheque to the paying teller of the Quebec Bank, who had shortly before requested V. to redeem some of their circulation, and received the amount in Exchange Bank bills, which he appropriated to his own use. The teller of the Quebec Bank did not notice the restrictive endorsement and paid the cheque in good faith to V.—*Held*, that a cheque payable to a certain person or bearer is equivalent to a cheque payable simply to bearer. That the negotiability of such a cheque cannot be restricted by endorsement, and the bearer thereof has a sufficient title to demand and receive payment thereof. That even if the payment by one bank of a cheque drawn on another

bank may at first sight seem irregular, still, under the circumstances of this case, as the cheque had been paid in good faith, in ignorance of the indorsement, to the trusted employee of the liquidators of the plaintiff bank, and for the purpose of redeeming its circulation, the payment made to V. discharged the defendant bank. *Exchange Bank of Can.* vs. *Quebec Bank*, 1890, M. L. R., 6 S. C. 10.

12. Rights of Transferee after Maturity—Illegal Consideration.—A third party coming into possession of a cheque long after its issue can have no greater rights therein than his transferor; he has no recourse, therefore, against the maker where it is established that the cheque was given in consideration of contributions to an election fund. *Dion* vs. *Boulanger*, S. C. 1893, 4 Que. 358. Confirmed in Review, 31 Oct., 1893.

13. —— Holder in good Faith—Accommodation.—Where a person for accommodation lends his cheque to another person who owes him an amount in excess of the cheque, he cannot refuse to pay the same to a third party who in good faith accepts the cheque in payment of goods sold and delivered. *Kenny* vs. *Price*, S. C. 1890, 20 R. L. 1.

14. —— As regards Bank.—A cheque on a bank operates as an assignment of the funds drawn on, and presentation of such cheque is equivalent to signification. (1) *Marler* vs. *Molsons Bank*, S. C. 1879, 23 L. C. J. 293.

15. —— The holder of an unaccepted cheque on a bank has only the same rights against the bank as the drawer would have, and therefore where, at the time of presentation of the cheque, the drawer was really indebted to the bank, though he apparently had funds on deposit, the holder could not recover. (*Ib.*)

16. What are Cheques.—Where to an action on a cheque the defendant pleaded *inter alia* that the order in question was not really a cheque, not being against money on deposit, but an overdraft or advance made by the bank:—*Held*, that it was nevertheless a cheque. *Bank of Montreal* vs. *Rankin*, S. C. 1881, 4 L. N. 302.

17. —— Where an order contained the following: "Gentlemen, please pay to bearer M — $850 in cash, and I will see you later," there is a presumption of law that the money was borrowed by the drawer, and not that he was drawing on funds deposited with his bankers. And upon his failure to prove the contrary he will be condemned to pay the amount. *Nichols* vs. *Ryan*, C. R. 1868, 2 R. L. 111.

(1) But otherwise now under sec. 53 Bills of Exch. Act, 1890. See Girouard on Bills and Notes at p. 165.

XVI. COLLATERAL SECURITY.

1. Rights of Holder.—Where the appellant gave his promissory note to respondent as collateral security for a hypothecary debt due by his (appellant's) father, and on the same piece of paper wrote a letter stating that the note was so given as collateral, upon condition that respondent should delay proceedings on the mortgage until the note was due, —that the respondent was entitled to sue the appellant on the note when due, without putting the principal debtor *en demeure*, and the appellant, not having demanded that the principal debtor be discussed, or proved that the mortgage was paid, was rightly held liable for the amount of such note. *Palliser* vs. *Lindsay*, Q. B. 1890, 6 M. L. R. 311.

2. —— The severance of the note from the letter written above it, was not mutilation that could affect the validity of the instrument. (*Ib.*)

3. —— But held, that a note given by a building society as collateral security for the repayment of a deposit made with it is not a negotiable instrument. *Cooley* vs. *Dominion Building Society*, Q. B. 1878, 24 L. C. J. 111; 1 L. N. 495.

4. —— But since the Bills of Exchange Act, 1890—*Held*, that where a note is received as collateral security from a holder in due course, before maturity, and without notice of any defect in the title of the person who negotiated it, the creditor has all the rights of such holder as regards all parties prior to him, and he can recover the amount of the note from such prior parties. When the sum secured is less than the amount of the note, the pledgee, as regards the surplus, sues as trustee for the pledgor, and can recover if the latter could do so. *Ward* vs. *Quebec Bank*, Q. B. 1894, 3 Que. 122.

XVII. CONSIDERATION.

1. Holders for Value.—The transferee of a promissory note who receives it as collateral security, is a holder for value. (1) *Banque d'Echange* vs. *Normand*, S. C. 1884, 13 R. L. 59.

(1) See sec. 27 (3) and 82 Bills of Exch. Act, 1890.

2. —— The indorsee and holder of a note for the purpose of collection is a holder in due course. *Mills* vs. *Philbin*, Q. B. 1848, 3 R. de L. 255.

3. —— An exchange of negotiable paper is sufficient to constitute each party to such exchange a holder for value of the paper he receives. *Wood* vs. *Shaw*, S. C. 1858, 3 L. C. J. 169.

4. —— A holder of negotiable paper as collateral security, before it became due, is not affected by any equities between the original parties. (*Ib.*)

5. —— Appellant, assignee to the insolvent estate of one B., sold the stock in trade to his own father, who paid part cash and gave a note of the insolvent for the balance. *Held*, that the stock in trade was good consideration for the note, and in any case the respondent, who represented her deceased husband, the insolvent, could not refuse to pay the note without returning the goods. *Lemieux* vs. *Bourassa*, Q. B. 1881, 1 Dorion's Q. B. R. 305.

6. **Transaction.**—C. having purchased Y.'s interest in certain lands which were in the City of Montreal, and upon which there was a mortgage of $80,000, gave his promissory notes to Y. for the balance of the purchase price. Subsequently C. failed and Y. being liable for the mortgage, C. agreed to take the necessary steps to obtain Y.'s discharge from the mortgagees on a payment of one thousand dollars, and Y. signed a document *sous seing privé*, dated 18th February, 1879, agreeing that all parties should be in the same position as if the deed of sale had never been passed. The mortgagees subsequently gave a discharge to Y. in conformity with the above agreement. In an action taken by Y. against C. on his promissory notes.—*Held*, affirming the judgments of the Superior Court for Lower Canada and the Court of Queen's Bench (33 L. C. J. 106), that there was no consideration given for the notes, and that C. was discharged from all liability under the document of the 18th Feb., 1879. *Yon* vs. *Cassidy*, Supreme Ct. 1890, 18 Can. S. C. R. 713.

7. **Validity—Composition with Creditors.**—The consideration is illegal as being against public policy, when given to induce a creditor to sign a deed of discharge, or a deed of composition and discharge, in favor of an insolvent, in fraud of the other creditors. *Blackwood* vs. *Chinic*, K. B. 1809, 2 R. de L. 27; *Sinclair* vs. *Henderson*, Q. B. 1865, 9 L. C. J. 306; *Prevost* vs. *Pickle*, 14 L. C. J. 220; *Doyle* vs. *Prevost*, Q. B. 1872, 17 L. C. J. 307; *McDonald* vs. *Senez*, S. C. 1877, 21 L. C. J. 290; *Decelles* vs. *Bertrand*, C. R. 1877, 21 L. C. J. 291; *Wilkes* vs. *Skinner*, Q. B. Montreal, 6 March, 1882.

8. —— —— That a note given by an insolvent, *or by a third person*, to induce the payee to consent to the insolvent's discharge, or to sign a deed of composition, is null and void; and where money is paid for the same purpose, it may be recovered from the creditor receiving it. The fact that the maker of the note is the insolvent's father does not constitute a valid consideration for such a note; for a benefit to another is a good consideration only where the benefit can be had lawfully. *Leclaire* vs. *Casgrain*, S. C. 1887, 3 M. L. R. 355; and see *Prevost* vs. *Pickle*, 14 L. C. J. 220, *supra*; *Decelles* vs. *Bertrand*, 21 L. C. J. 291, *supra*.

9. —— —— And no action can be maintained on such notes by a person to whom the note is transferred after maturity. *Gervais* vs. *Dubé*, S. C. 1890, 6 M. L. R. 91, 20 R. L. 211.

10. —— —— **Contra**, where it is transferred before maturity to holder in good faith. *Gironard* vs. *Guindon*, S. C. 1879, 2 L. N. 270, 9 R. L. 539.

11. —— —— And such notes are void at common law. *Lefebvre* vs. *Berthianme*, C. Ct. 1889, 18 R. L. 325; *Leclaire* vs. *Casgrain*, M. L. R. 3, S. C. 355; *Gervais* vs. *Dubé*, M. L. R. 6, S. C. 91; *Greene, Sons & Co.* vs. *Tobin*, S. C. 1892, 1 Que. 377; *Martin* vs. *Poulin*, Q. B. 1880, 1 Dorion's Q. B. R. 75; *Arpin* vs. *Poulin*, Q. B. 1878, 22 L. C. J. 331.

12. —— —— A promissory note, given by an insolvent debtor to one of his creditors, in excess of the composition payable under an agreement of composition, to induce the creditor to sign such agreement, is absolutely null, and no action upon such note can be maintained by the creditor against the debtor. *Greene & Sons Co.* vs. *Tobin*, S. C. 1892, 1 Que. 377.

13. —— —— **Contra decisions.**—*Held*, in appeal, that the note taken under the agreement mentioned was valid and binding on the defendant, the note not being prejudicial to the other creditors, nor complained of by them, and the defendant having frequently acknowledged to owe and promised to pay the same. *Greenshield* vs. *Plamondon*, Q. B. 1860, 10 L. C. R. 251, 8 L. C. J. 192. Reversing S. C. 3 L. C. J. 240.

14. —— —— And held in another case that as the note was signed after the composition was agreed to by the other creditors, it was not given in fraud of their rights and was consequently good. (*Greenshields* vs. *Plamondon, supra,* followed.) *Perrault* vs. *Laurin,* C. Ct. 1863, 14 L. C. R. 85, 8 L. C. J. 195.

15. —— —— Note given in excess of composition. Plea that note was given before the composition notes and was post-dated by plaintiff; and that if it were paid, the plaintiff would receive more than the other creditors—*Held,* no answer to action. (1) *Martin* vs. *Macfarlane,* Q. B. 1865, 1 L. C. L. J. 55.

16. —— —— And *Held* in a later case that if a note is given by an insolvent to a creditor in excess of his proportion of the debt, and that the circumstances do not disclose fraud, concealment or collusion, or any attempt whatever by plaintiff to obtain a preference over other creditors, such note will be held valid. *Bank of Montreal* vs. *Audette,* S. C. 1878, 4 Q. L. R. 254.

17. —— —— There is no principle of common law, statutory provision or rule of public policy sanctioned by jurisprudence, requiring that all creditors being parties to a deed of composition should, irrespective of the existence of good or bad faith, detriment, or injustice or inducement, or otherwise, be in perfectly the same position, to the extent of invalidating security given to one or more creditors, because others had not received it (*Ib.*)

18. —— —— In the absence of legislative enactments prohibiting the same, and in default of an Insolvent Act whereby the majority of the creditors would bind the remainder to the conditions of a composition and discharge, nothing invalidates, as between the debtor and his creditor, an agreement by which the debtor undertakes to pay such creditor more than the amount of said composition and discharge, and a promissory note given to cover such excess is valid. *Racine* vs. *Champoux,* S. C. 1890, 6 M. L. R. 478; *Letang* vs. *Champoux,* S. C. 7th Nov., 1890, No. 2589, Montreal.

19. —— —— Where a debtor is relieved from paying part of his debt, by an agreement of composition signed by his creditors, the natural obligation subsisting as to the part remitted may form a valid consideration for a new obligation, and an action may be brought on a promissory note so made by the debtor. *Lockerby* vs. *O'Hara,* S. C. 1890, 7 M. L. R. 35; *Lamalice* vs. *Ethier,* S. C. 31st May, 1890, Montreal.

20. —— —— In an action on a promissory note by the payee against the maker, the latter pleaded that he owed the plaintiff $180 on a note, but that while this note was at the bank he, defendant, made a composition with his creditors, including the plaintiff, for 15 cents on the dollar, and got a full discharge; that a few days afterwards the plaintiff asked him to renew the note for his accommodation, which he did, without receiving any consideration, the renewal note being that now sued upon. It was proved that the composition between plaintiff and defendant was simulated, the plaintiff never having discharged defendant, and having received the note sued upon as a renewal of the original obligation. *Held,* (Johnson, C.J., *diss.*), even admitting that the composition was simulated, the defendant was liable for the amount of the note, he having received consideration for the original note, now represented by the note sued upon, and having specially agreed that he should not be discharged from the debt. *Collins* vs. *Baril,* C. R. 1893, 4 Que. 192.

21. —— —— Action on a note. The defendant pleaded illegal consideration and violation of the clauses of the Insolvent Act; that the note had been given to the plaintiff at the request of the brother of the plaintiff, who was an insolvent, and who sought in this way to give his brother, the plaintiff, a preference over his other creditors. The amount of the note was a debt due by defendant to the insolvent and transferred to the plaintiff. *Held,* that the judgment which overruled the plea should be confirmed. There was no proper evidence of the assignment under the Insolvent Act in order to bring the case within the operation of the Insolvent Act. The vague testimony of two witnesses would not do. The assignment should be proved by documentary evidence. Apart from this, the objection did not come from a creditor, and this was a fatal objection to the pretension of the defendant. He was condemned to pay a debt which he admitted he owed to the insolvent over what he agreed to pay to the plaintiff. If there was anything wrong in this, those interested should complain, namely, the creditors. *Reynolds* vs. *Kyte,* C. R. 1877.

22. —— —— Where an insolvent debtor, in order to induce one of his creditors to sign

(1) Duval, C. J., said there was an important omission to allege fraudulent intent. On this principle they held judgment of Superior Court correct.

a deed of composition, gives the latter a promissory note on more favorable terms than the rest of his creditors, he cannot, in an action on the note, take advantage of his own fraud in pleading the nullity of the note for illegal consideration. *Chapleau* vs. *Lemay*, C. Ct. 1886, 14 R. L. 198; *Smith* vs. *Blumenthal*, C. Ct. 1888, 13 L. N. 396.

23. —— Gambling Debt.—Given for a bet or wager, respecting the result of an election, is illegal, null and void, at least as regards the payee. *Dufresne* vs. *Guévremont*, C. C. 1859, 5 L. C. J. 278.

24. —— —— On the 15th October, 1874, the appellant and one S. made a bet as to certain words alleged to have been used by S., and to secure the payment of the bet they each deposited a cheque in the hands of one L. The latter having decided that S. had won the bet, handed him the cheque, and transferred it to the respondents, who are brokers at Sorel. They presented it at the Merchants' Bank, and, payment being refused, instituted the present action against appellant, the drawer of the cheque, and S., who had endorsed it. The appellant pleaded the illegality of the consideration and his right to oppose this illegality, seeing that the respondents had received the cheque long after its date. The bet was proved to have been the consideration of the cheque. The question was reduced to this—did respondent receive the cheque in good faith? It was put into the hands of an arbiter, and given to S., as the winner of the bet, and by him transferred to respondent, a broker. This was not an unusual circumstance, as S. was accustomed to take notes there. The main issue raised in the case was that S. was not entitled to this cheque, because the bet was not properly decided in his favor. The next point was that respondent was a mere *prête nom* for S. The only evidence from which that could be inferred was the evidence of respondent himself, and he denied all knowledge that the cheque was given for a bet. An overdue cheque was not necessarily presumed to be received in bad faith, Articles 2350 and 2352 C. C. Upon the whole—*Held*, that the plaintiffs were entitled to recover on the cheque, and consequently there was no error in the judgment. *Ladouceur* vs. *Morasse*, Q. B. 1876.

25. —— Third Parties — Gambling Debts—(See under title "GAMBLING TRANSACTIONS)"—A note given for a gambling debt is null and void, even in the hands of a third party holding it in good faith, before maturity. *Biroleau* vs. *Derouin*, C. C. 7 L. C. J. 128. Contra *Ladouceur* vs. *Morasse*, Q. B. 1876, 2 Step. Dig. p. 182. *Supra* No. 24.

26. —— Third Parties.—The holder of a promissory note in good faith which has been transferred to him before maturity for value received may recover the amount, even where the note has been given for an immoral consideration. *Dorais* vs. *Chalifoux*, C. C. 1875, 6 R. L. 325.

27. Subscribing to Election Funds. ART. 425 R. S. Q.—A note given as subscription to an election fund is void. *St. Louis* vs. *Sénécal*, Q. B. 1889, 18 R. L. 160, 33 L. C. J. 325; M. L. R., 5 Q. B. 332. Affirmed in Supreme Ct., 1890, *sub nom. Dansereau* vs. *St. Louis*, 18 Can. S. C. R. 587.

29. —— —— Third party acquiring cheque long after issue cannot recover thereon when the consideration is for advances to election fund. *Dion* vs. *Boulanger*, S. C. 1893, 1 Que. 358. Confirmed in Review, 31 Oct. 1893.

30. Valuable Consideration—Becoming Security for Third Party.—A note given as an indemnity for becoming security for a third party, at the request of the maker, is valid, and may be sued on, so soon as the holder is troubled, and before paying the debt for which he became security. *Perry* vs. *Milne*, S. C. 1861, 5 L. C. J. 121.

31. Value Received.—Sect. 3 (*b*) Bills of Exchange Act.—The want of the words "for value received" does not prevent a plaintiff from recovering on a note if it be in evidence that value was given therefor. *Duchesnay* vs. *Evarts*, 2 Rev. de Lég. 31, K. B. 1821.

32. —— Under certain circumstances a plaintiff suing on a note may be compelled to prove what value he gave therefor, notwithstanding such note may contain the words "value received." *Converse* vs. *Brown*, S. C. 1865, 10 L. C. J. 196; *Whitney* vs. *Burke*, S. C., 4 L. C. J. 308.

33. —— For instance, if fraud be alleged and proved by the defendant. *Walters* vs. *Mahan*, C. R. 1883, 6 L. N. 316. *Baxter* vs. *Bilodeau*, S. C. 1883, 9 Q. L. R. 268. See *infra* No. 41.

34. —— Presumption as to.—Where a promissory note is given for value on the face of it, the defendant must prove that it was not given for value. And it will not be a presumption that it was not given for value that the parties had another note transaction for election purposes, which is not shown to be

connected with the note sued upon. *McGreevy* vs. *Senecal*, Montreal, 30 June, 1886.

35. Want of—Affidavit by Defendant. —(See also "CONSIDERATION—VALUE RECEIVED." See also "OBTAINED BY FRAUD") —*Held*:—In an action on promissory notes which state upon their face that they were given for value, the presumption that value was so given is in no way affected or destroyed by defendant's affidavit, filed with his plea, denying that he ever received any consideration. Such an affidavit is wholly irrelevant and useless, and will be rejected on motion. *Sanford Mfg. Co.* vs. *McLaren*, 4 Que. 467.

36. —— —— The defendant pleaded want of consideration—*Held*, that he was bound to produce with such plea an affidavit under C. S. L. C. cap. 83, sec. 86. *Kelly et al.* vs. *O'Connell*, S. C. 1866, 16 L. C. R. 140.

37. —— Error of Law.—A promissory note given without value and for a consideration erroneously believed to be good in law is not valid. *Riel* vs. *McEwen*, Q. B., Montreal, 29th September, 1881.

38. —— Evidence of.—Action was to recover the sum of $366.78, amount of a bon. The defendant pleaded want of consideration, and that the bon was given by him on the fraudulent representations of the plaintiff, and as a mere form. The note was given in acknowledgment of a purchase of goods made by defendant from plaintiff, who was selling the insolvent stock of one R., an insolvent. The defendant contended that he was to be paid a sum of $500, which he had advanced R.; that it was to be returned to him out of the proceeds of the sale by plaintiff. It was admitted, however, that plaintiff was to be paid along with his associate D. in preference to the defendant. By the Court: It may be that the defendant is entitled to an amount from the plaintiff, but on the issues I cannot hold that the note is without consideration by the defendant. Judgment will go against him. *Bell* vs. *Prévost*, S. C. 1879.

39. —— —— *Bon* vs. *Cassidy*, Q. B. 1889, 33 L. C. J. 106. Confirmed in Supreme Ct., 18 Can. S. C. R. 713. (See No. XVII. 6 *supra*.)

40. —— Discharge of Hypothec.—In an action on a promissory note given by the defendant on consideration of the promise of the plaintiff to discharge a mortgage, which he claimed, as attorney of the representative of his father, to have on the property of defendant, and defendant proved that the title from which the plaintiff's father derived the hypothec was null and void, and in fact the plaintiff never offered nor had the power to discharge any such hypothec, or indeed possessed any such hypothec—*Held*, that there was no consideration, and the plaintiff could not recover. *Phillips* vs. *Sanborn*, Q. B. 1862, 6 L. C. J. 252 & 12 L. C. R. 408.

41. —— Burden of Proof.—The burden of proving want of consideration for a promissory note is on the maker. *Downie* vs. *Francis*, C. R. 1885, 30 L. C. J. 22, and see *Coté* vs. *Bergeron*, C. Ct. 1893, 3 Que. 476. *McGreevy* vs. *Senécal*, Montreal, 30th June, 1886. See *supra* Nos. 31, 32, 33.

42. —— Logs revendicated. — The plaintiff sold and delivered a quantity of pine logs to the defendant, which were paid for partly in cash, and for the balance the defendant gave the promissory note sought to be recovered on, which stated, however, that the value received was contigent on no claim being made to the logs. The logs were afterwards revendicated by the British American Land Co., as having been cut upon their land, to whom the defendant gave his note for stumpage for a larger sum than that for which the note was given to plaintiffs. On an action by the plaintiffs—*Held*, confirming judgment of court below, that a plea of no consideration and compensation formed a good defence, although the note so given to the company had not been paid, nor the plaintiffs notified of its being given, nor called in as warrantors in the action in revendication, which had been dismissed for want of form a year after the seizure. *Gamsby* vs. *Chapman*, Q. B. 1862, 13 L. C. R. 239.

43. —— Patent Right.—When a promissory note is given for a patent right for a new and useful invention, and the patent is not for a new and useful invention, the vendor of the alleged patent cannot recover. (1) *Almour* vs. *Cable*, Montreal, 27th March, 1886.

44. —— Stock that was never purchased.—Where a *bon*, made to represent the value of a share in a business, purchased by the plaintiff, was endorsed and transferred to the plaintiff by the vendor, that the plaintiff could not sue the vendor on the *bon* while at the same time he retained the share acquired by him in the business, which was represented

(1) By the Bills of Exchange Act, 1890, sec. 30 (4), a note given in consideration of purchase money of *patent* rights must be marked across the face "given for patent right," otherwise it will be void, except in the hands of a holder in due course without notice of such consideration. (See also 24 Can. S. C. R. 278.)

by the *bon. Crediford* vs. *Bulmer*, 1886, M. L. R., 4 Q. B. 293.

45. —— —— The defendant had placed his name on a note which had been sent him along with others for the purchase of stock, etc., and it passed through several hands without consideration being given for it, and the last one sued the defendant as indorser *par aval—Held*, that the action must be dismissed for want of consideration in the *auteur* of the holder and the receipt for it by the holder subject to all objections. *Perry* vs. *Rodden*, S. C. 1873, 5 R. L. 477.

46. —— Threats of Prosecution.—A note for $400 given under threats of criminal prosecution for theft is null and void for want of consideration and as being given in compromise of a felony. *Macfarlane* vs. *Dewey*, Q. B. 1870, 2 R. L. 622.

XVIII. DATE OF.

Where a bill or an acceptance, or any indorsement on a bill, is dated, the date shall, unless the contrary is proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be. Sec. 13 Bills of Exchange Act, 1890, and *Hutchins* vs. *Cohen*, S. C. 1869, 14 L. C. J. 85.

XIX. DAYS OF GRACE.

The maker may be sued on the afternoon of the last day of grace. (1) *Ontario Bank* vs. *Foster*, S. C. 1883, 6 L. N. 398. Contra *Demers* vs. *Rousseau*, C. Ct. 1892, 1 Que. 440.

XX. DESCRIPTION OF.

In a case of capias, *Held*, that it was unnecessary, in describing a promissory note as the cause of debt, to state where the same was made. *Berry* vs. *May*, S. C. 1859, 13 L. C. R. 1.

XXI. EVIDENCE. (See also "SIGNATURE." "INDORSERS.")

1. Commercial Matter.—Where a note to order is signed by two persons, one of whom is a trader, parol evidence is admissible to prove that such note had been replaced by another of the same amount which was paid at maturity. *Hamilton* vs. *Perry*, C. R. 1894, 5 Que. 76. Reversing S. C. 1893, 3 Que. 66.

2. Burden of Proof— Exchange of Notes.—Where a defendant pleads that promissory notes were given in exchange for the one sued upon, the burden of proof is on defendant; he may, however, prove by parol the consideration of the note, and that it formed part of other transactions. *Temple* vs. *Jones*, Q. B., Montreal, 20 Jan., 1883.

3. Of Consideration—C. C. 989, C. C. P. 145.—The burden of proving want of consideration for a promissory note is upon the maker even where he has given the proper affidavit under Art. 145 C. C. P. *Côté* vs. *Bergeron*, C. Ct. 1893, 3 Que. 476; *Downie* vs. *Francis*, C. R. 1885, 30 L. C. J. 22. See "Consideration," 31 to 33.

4. Of making and Loss of Note.—The making and loss of a note may be established by parol evidence, and the variance between the declaration (stating maturity of note to be in September), and the proof (establishing it to be in November) is immaterial, when the evidence establishes acknowledgment of the note by the maker, subsequent to his knowledge of its loss. *Carden* and *Ruiter*, Q. B. 1864, 9 L. C. J. 217.

5. Of Indorsers.—The evidence of an indorser of a note is admissible to prove that the signature of another indorser of the same note is genuine. *McLeod & Eastern Townships Bank*, Q. B. 1879, 2 L. N. 239.

6. Of Indorsement (See also Indorsers—Evidence).—*Held*, that parol evidence to the effect that a note was indorsed only for form and without recourse against the indorser is inadmissible. *Decelle* vs. *Samoiselle*, C. R. 1888, 32 L. C. J. 236.

7. —— and Relationship of Parties.—But *Held*—1. In a suit founded on promissory notes or bills of exchange, in the investigation of facts, recourse must be had to the laws of England in force on the 30th May, 1849. C.C. 2341 (1). 2. According to the laws of England parol evidence is admissible to establish the real relationship of the parties to a bill of exchange or promissory note, and the circumstances under which it was endorsed. *Northfield* vs. *Lawrence*, S. C. 1891, M. L. R., 7 S. C. 148; 21 R. L. 359. Confirmed in Review, 15 L. N. 324.

(1) It has been very recently decided in England in the Court of App. that "although the holder of a bill of exchange may present the bill for payment at any reasonable hour on the day it becomes payable, that is ordinarily on the third day of grace, and if it is not then paid may at once give notice of dishonour to the parties liable upon it; yet even after dishonour he is not entitled (at least where the acceptance is general) to commence an action upon the bill before the expiration of the last day of grace." *Kennedy* vs. *Thomas*, Q. B. App. 1894, vol. 9, The Reports 564.

(1) See Bills of Exchange Act, Schedule 2.

8. Of Payment.—May be proved by parol testimony. *Carten* vs. *Finley*, Q. B. 1860, 8 L. C. J. 139.

XXII. FORGED.

Whenever a name is inserted in a bill as that of payee by way of pretence merely, without any intention that payment shall be made in conformity therewith, the payee is a "fictitious" person within the meaning of the Bills of Exchange Act, 1882 s. 7, subs. 3 (Imperial). [Sec. 7 (3) Canadian Act 1890.]

The respondent's clerk, by forging letters of advice and preparing and filling in forged drafts, in which he inserted the name of a foreign correspondent as being that of the drawer and the names of a foreign firm who were existing persons and actual correspondents of the respondent as payees, procured his employer's acceptance of these forged instruments and obtained payment of them across the counter from the appellant bank. The clerk appropriated the monies to his own use.

Held—That the loss incurred on the forged bills must fall upon the respondents. *Bank of England* vs. *Vagliano*, House of Lords, [1891] App. Cas. 107.

XXIII. INDORSER.

1. Discharge.—Absence of Protest.—The drawer and indorsers of a bill or draft on their debtor are absolutely discharged if the draft, after being accepted, is not protested for non-payment on the day it becomes due, and notice be not given within three days after protest; and that the insolvency of the drawee, when the protest should have been made, is no excuse for want of protest and notice. *Quebec Bank* vs. *Ogilvy*, Q. B. 1883, 3 Dorion's Rep. 200.

2. —— —— Where it was shown by the evidence that the indorsers of a promissory note became warrantors of the maker, before the "Bills of Exchange Act, 1890," absence of protest did not relieve them from liability. *Contu* vs. *Rafferty*, S. C. 1891, M. L. R., 7 S. C. 146.

3. —— —— *Held*—An accommodation indorser of a promissory note is entitled to notice of protest for non-payment, and is discharged by the absence of it. *Merchants Bank of Canada* vs. *Cunningham*, Q. B. 1892, 1 Que. 33.

4. —— Demand Note — Reasonable Time—By the Bills of Exchange Act, 1890, sec. 45, subs. 2 (*b*), a demand bill must be presented within a reasonable time after its indorsement in order to render the indorser liable. (1)

5. —— Fraud—Action to have defendant held personally liable on a promissory note, and to have the words "without recourse" struck from his endorsement. Declaration that defendant requested plaintiff to lend him $86, promising to give him the note of another with his own endorsement for $100 for the accommodation. That plaintiff consented and drew a note which he gave to defendant to procure the necessary signature, which he did, and brought it back to plaintiff, and, while the money was being counted, defendant took the note, ostensibly to endorse it, but handed it back without endorsement. Plaintiff without looking at it put it away. That plaintiff in discovering the fraud sent for defendant, who came and endorsed it, but wrote over his signature the words "without recourse against me." Evidence of the maker that when defendant asked him to sign he promised to take it up himself. Judgment for plaintiff. *Gauthier* vs. *Picard*, S. C. 1879, 2 L. N. 163.

6. —— Giving Time. Sec. 61 Bills of Exch. Act.—In an action by an indorser, who has paid his indorsee, against the maker of a note, it is not a good defence to allege that the indorsee, whilst holder of the note, granted delay to the maker by taking his note and renewing it from time to time; nor can such indorser be compelled, under the circumstances, to return or account for such renewal notes, or any of them. (2) *Massue* vs. *Crebassa*, S. C. 1863, 7 L. C. J. 211.

7. —— —— Mere delay in recovering on a note does not discharge the indorser, who as surety can at any time force the maker to pay. *Meikle* vs. *Dorion*, C. R. 1892, 1 Que. 72; *Guy* vs. *Paré*, C. R. 1892, 1 Que. 443.

8. —— Waiver of Protest—Where the indorser of a note was released from liability by the fact that the note was not protested, but afterwards went to the lawyer of the holder and promised to pay it, and again subsequently sent a letter to the same effect, which was destroyed—*Held*, on action brought, that his

(1) Thus negativing *Dandurand* vs. *Roulier*, Ct. Rev. 1889, 33 L. C. J. 167; *Merchants Bank* vs. *Whitfield*, 2 Dorion's Rep. 157.

(2) This decision, although overruled by several decisions prior to the Bills of Exchange Act, 1890, has been revived by sec. 61 of that Act (see Girouard, p. 214, No. 14), the Act requiring that the renunciation must be in writing or the bill must be delivered up to the acceptor. The decisions modified by the effect of the Act are *St. Aubin* vs. *Fortin*, 3 R. de L. 293; *Desrosiers* vs. *Guerin*, 21 L. C. J. 96; *Banque Ville Marie* vs. *Mallette*, 33 L. C. J. 8; *Carslake* vs. *Wyatt*, Stephen's Dig. vol. 2, p. 112, No. 64; *Pelletier* vs. *Brosseau*, S. C. 1890, 3 M. L. R. 331.

promise to the lawyer was as binding as if made to the holder, and, moreover, could be proved by parol evidence. *Johnson* vs. *Geoffrion*, C. C. 1863, 7 L. C. J. 125 and 13 L. C. R. 161.

1. Liability of — Accommodation — Evidence of Guarantee.—The defendant indorser, being sued on a promissory note, pleaded that he had indorsed for credit, and that the plaintiff (a subsequent indorser) had guaranteed the prior indorsers that he would see the note paid.—*Held*, not proved, it appearing, among other things, that the defendant had by a letter to plaintiff personally guaranteed due payment of the note in question. *Willett* vs. *Court*, Q. B. 1883, 6 L. N. 204.

2. —— Accommodation Indorser.—Where a person has placed his name on the back of a note below the indorsement of the payee, the fact that he did so solely for the accommodation of the maker and to give him credit with the party discounting, without having received any consideration, and without ever having been the holder of the note, is not sufficient to destroy the presumption arising from the position of the names on the back of the note, and to make him liable as warrantor. *Merchants Bank of Canada* vs. *Cunningham*, Q. B. 1892, 1 Que. 33; *Bourgouin* vs. *Bower*, S. C. 1884, 13 R. L. 62.

3. —— Composition Notes—The indorsers of composition notes for an insolvent remain liable thereon though the discharge of the insolvent may have been annulled by the court, and though the insolvent may have given other notes by way of preference to some of his creditors. *Marchand* vs. *Wilkes*, Q. B. 1880, 3 L. N. 318.

4. —— Evidence.—In an action by the bearer, who was also the maker, against an indorser, the latter pleaded that he indorsed the note simply as an accommodation, and on the understanding that the plaintiff should place his name above his (the defendant's) as second indorser. On appeal from a judgment against the defendant—*Held*, reversing the judgment of the court below, that the order of signature by indorsement of a note was a mere presumption of the undertaking of the indorser's with respect to one another, and that this presumption could be destroyed by proof of a contrary understanding, and that, accordingly in the case submitted, the indorsation made by one of the indorsers, with the express condition that such indorsement would be preceded by the indorsement of a third party, who was made acquainted by the bearer of the note with the conditions of the indorsement, could not give to such third party right of action against the indorser,—the bearer of the note being considered in such case the agent of the indorser. *Day* vs. *Sculthorpe*, Q. B. 1861, 11 L. C. R. 269.

5. —— —— Although it is the rule that the responsibility of indorsers of a negotiable instrument is according to the order of their indorsement, this rule is not invariable, and it may be shown by ordinary proof that the indorsements occurred in such order by mistake, or that there was an understanding between the indorsers that their liability would not follow the order of indorsement. *Léveillé* vs. *Daigle*, Q. B. 1880, 2 Dorion's Q. B. R. 129; *Scott* vs. *Turnbull*, S. C. 1883, 6 L. N. 397; *Laurent* vs. *Mercier*, Q. B. 1884, 26 Feb., Ram. Dig. 584; *Deschamps* vs. *Léger*, S. C. 1886, M. L. R., 3 S. C. 1; *Willett* vs. *Court*, Q. B. 1883, 6 L. N. 204.

6. —— Costs—The maker of a promissory note is not liable for the costs of an action on such note against the indorser. *McDonald* vs. *Seymour*, S. C. 1855, 6 L. C. R. 102, 5 R. J. R. Q. 31.

7. —— —— The indorser sued together with the drawer, but who has pleaded separately, though by the same attorney, is not responsible for the costs, *faux frais*, of the drawer, unless these *faux frais* are denounced to the indorser. *Boucher* vs. *Latour*, Q. B. 1862, 6 L. C. J. 269.

8. —— —— Where the holder of a note promises to accept from the indorsers a composition on the note if not paid when due, he must present the note for payment when due and protest if not paid, and the indorsers must pay the cost of such protest; but such cost must not comprise the notice of protest to the *aval* and to the *holder* because they are unnecessary. *Banque Union* vs. *Gibault*, C. R. 1886, 12 Q. L. R. 145.

9. —— —— An offer made at Three Rivers to pay a composition on such note on the day it became due, when the note was payable at Montreal, was not sufficient to save the indorsers the costs of protest. (*Ib.*)

10. —— Privity of Contract. — Composition note.—Action on four notes against the sureties of an insolvent firm which had entered into a composition of thirty-five cents in the dollar. The composition was carried out by the notes indorsed by the defendants being delivered to the assignee for the benefit

of the parties concerned, but the bank not having filed a claim in time, their claim was included in the notes given for the claim of the indorser, who was also insolvent. They now sought to get the benefit of the indorsement *pro tanto* on the notes of the indorser. The defendants pleaded that there was no privity of contract beween them and plaintiff, and that their indorsement was only in favor of the indorser who had no claim—*Held*, that the Bank was entitled to recover. *Bank of Montreal* vs. *McLachlan*, S. C. 1880, 3 L. N. 231. Confirmed in Appeal March 22, 1882.

11. —— Misleading holder.—L., the indorser of a note of M.'s, due the 11th Feb., gave to the bearer of the note the following memorandum: "my note due the 10th inst., 10 days after date." The note to which he referred came due the 11th. There was no other note. It was only protested on the 24th Feb. *Held*, by the Circuit Court at St. Hyacinthe, and confirmed in Review, that the indorser was liable. *Burnett* vs. *Monaghan*, C. R. 1871, 3 R. L. 448.

12. —— Not affected by Holder taking new Note as Security.—The holder of a promissory note to order under protest, who has received an account from the maker and another note as security for the first, does not lose his recourse against the indorsers of the first note who have given their assent to the transaction, notwithstanding the insolvency of the maker of the first note. *Woodbury* vs. *Garth*, Q. B. 1858, 9 L. C. R. 438, 5 R. J. R. Q. 421.

13. —— Overdue Note. In an action on two promissory notes—*Held*, that a person receiving by indorsement a bill of exchange after it was due, held it, under 2287 C. C., subject to the objections to which it was liable in the hands of the indorser. (1) *Amazon Insurance Co.* vs. *Quebec & Gulf Ports Steamship Co.*, S. C. 1876, 2 Q. L. R. 310.

13a. —— —— And, *Held* also, that this article differs from the law of England, which makes the indorser liable to the equities attaching to the note itself, that is, to the equities arising out of the transaction in the course of which the note was made, but not to those arising out of a collateral matter. (2) (*Ib.*)

14. —— —— Where there are two or more Indorsers.—Under the circumstances of this case, the plaintiff, though last indorser, could not recover from defendant, a prior indorser, more than one half the amount of the promissory note sued upon, inasmuch as they were both accommodation indorsers, and so joint sureties, for the maker of the note. *Vallé* vs. *Talbot*, C. R. 1892, 1 Que. 223.

15. —— —— So where several persons mutually agree to give their indorsements on a bill or note as co-sureties for the holder, who wishes to discount, they are entitled and liable to equal contribution *inter se*, irrespective of the order of their indorsements. *Macdonald* vs. *Whitfield*, 6 L. N. 278, 27 L. C. J. 165, 8 App. Cas. 733, P. C. 1883.

16. —— —— The defendant indorser cannot have proceedings suspended until the plaintiff shall furnish him with a complete description of the maker and prior endorsers in order that he may call them in warranty. It is the defendant's duty to get such information. *Arpin* vs. *Carreau*, S. C. 1884, 13 R. L. 270.

17. —— —— Wrongful Possession—Second Indorser.—The second indorser of a bill of exchange who guarantees the indorsement of a prior indorser, is not liable to the drawer where the bill came legitimately into possession of the first indorser by mistake of the drawer's agent. *American Express Co.* vs. *Harwood*, C. Ct. 1887, 15 R. L. 556.

18. Rights of—Action in Warranty. ART. 1953 C. CODE.—An indorser of a note who is sued for its payment may bring action as surety against the maker in order to secure himself, though the note be not in his possession. *Desbarats* vs. *Hamilton*, S. C. 1879, 2 L. N. 279; *Mathieu* vs. *Mousseau*, C. Ct. 1874, 5 R. L. 260. And see *Macdonald* vs. *Whitfield*, P. C. 8 App. Cas. 733, 6 L. N. 278, 27 L. C. J. 165.

19. —— —— Also, an indorser of a note discounted by a bank has the right under Art. 1953 C. C. to avail himself of the remedy provided by Art. 793 C. C. P. if the maker fraudulently disposes of his property. *MacKinnon* vs. *Kerouack*, Supreme Ct. 1887, 15 Can. S. C. R. 111. (The Court were equally divided.) Confirming Q. B. 1887, 15 R. L. 34.

20. —— —— But *Held*, the indorser of a note payable to order, who has not paid it himself, and is not otherwise the holder thereof, cannot sue the maker to compel him to pay the note, in consequence of its being due and protested. *Maynard* vs. *Renaud*, Q. B. 1865, 12 L. C. J. 293.

(1) See sec. 36 Bills of Exchange Act, 1890, subsection 2. Sec. 2287 C. C. repealed. See 2nd Schedule to Act, 1890.

(2) This latter holding is the sense of the English, Ontario and French decisions. See Girouard, p. 118, No. 8.

21. —— —— But the exercise of this right of action in warranty must cause no delay to the holder in his own recourse. *Durocher* vs. *Lapalme*, S. C. 1885, M. L. R., 1 S. C. 494; *Block* vs. *Lawrence*, S. C. 1886, M. L. R., 2 S. C. 279; *Molson's Bank* vs. *Charlebois*, S. C. 1892, 2 Que. 286.

22. —— —— **Contra.**—*Beaulieu* vs. *Demers*, C. Ct. 1874, 5 R. L. 244. *Demers* vs. *Harvey*, S. C. 1893, 5 Que. 1 (see remarks of Routhier J. at pp. 2 and 3), and see *Banque Nationale* vs. *Ross*, 11 Q. L. R. at p. 113.

23. —— **Compensation.**—1188 C. C.—In an action against an indorser—*Held*, that the defendant had a right to set up in compensation against the holder all sums of money, which the holder had been paid by, or in which he had become indebted to the maker since the protest of the note, and that the salary of a bank officer paid by quarterly instalments ought in this way to be set up against the bank by an accommodation indorser. *Quebec Bank* vs. *Molson*, S. C. 1851, 1 L. C. R. 116, 2 R. J. R. Q. 426. And see *Hays* vs. *David*, Q. B. 1852, 3 L. C. R. 112.

24. —— **Obligation with a Term.**—The indorsers do not lose the benefit of the term because the maker of the note has become insolvent. *Guibault* vs. *Migué*, C. C. 1891, 20 R. L. 597.

25. —— **Subrogation.** Arts. 2314, 1156, C. C.—The indorser of a promissory note tendering the amount to the payee does not require and cannot demand any special subrogation besides the surrender of the note, and therefore the indorser cannot throw upon the payee refusing tender of the amount the liability for the maker's insolvency unless he has renewed the tender by legal action. *Bore* vs. *Macdonald*, Q. B. 1865, 1 L. C. L. J. 55, 16 L. C. R. 191.

25a.—— The accommodation indorser who pays a promissory note is subrogated by law in all the rights of the creditor, including any hypothec which the latter may have taken as collateral security. *Re McCaffrey*, C. R. 1894, 5 Que. 135.

XXIV. INDORSEMENT. (See "Signature." "Indorser.")

26. By Error.—In an action against the endorser of a promissory note—*Held*, that a party who indorses a note is liable although he intended to do so at the time as the attorney of another, the error not being pleaded, and that in the present case the sole proof of the indorsement being the defendant's answers, the plaintiff was entitled to have them divided so that the part in which he sought to explain the character in which he signed or indorsed such note might be rejected as not having been pleaded. *Seymour* vs. *Wright*, S. C. 1852, 3 L. C. R. 454, 4 R. J. R. Q. 31.

27. Forged.—In an action on a promissory note—*Held*, confirming court below, that the holder whose title thereto was derived from an indorsement which proved to be a forgery, although he be acting in entire good faith, could not recover the amount of the note from any of the previous indorsers. *Larue* vs. *Beauturel*, Q. B. 1866, 2 L. C. L. J. 112.

28. In Blank—Liability of Maker.—In order to vitiate the payment by the maker of a promissory note indorsed in blank, bad faith must be shown, as the maker is only bound to assure himself of the genuineness of the signature, and is not bound to make any inquiry. *Ferrie* vs. *The Wardens of the House of Industry*, Q. B. 1845, 1 Rev. de Lég. 27.

29. Of less than whole Amount of Note.—Where action in assumpsit was brought by the indorsees of a note against the indorser for a sum less than that made payable by the note, the action was dismissed. (1) *McLeod* vs. *Meek*, K. B. 1831, Stuart's Reports 456, 1 R. J. R. Q. 353.

30. Pour aval.—A note payable to the order of the plaintiffs was indorsed first by L. L. & P. G. L., and underneath these names by the plaintiffs—*Held*, confirming court below, that L. L. & P. G. L. indorsed as *avals* and security for the maker. (2) *Latour* vs. *Gauthier*, Q. B. 1866, 2 L. C. L. J. 109.

31. —— The plaintiff sued the defendant on a note which he had obtained to be drawn by another in favor of the plaintiff or bearer, which he, the defendant, had indorsed in blank—*Held*, to be an indorsement *pour aval*, and that the defendant, the indorser *pour aval*, could not plead want of notice of protest, or raise any other defence than might have been raised by the maker. (2) *Merritt* vs. *Lynch*, S. C. 1859, 3 L. C. J. 276 and 9 L. C. R. 353.

32. —— And where the trial was had before a special jury—*Held*, on argument, that the question whether such an indorsement was an indorsement *pour aval* or not, was a question for the jury to decide. (*Ib.*)

(1) See sec. 32 (*b*) Bills of Exchange Act, 1890.

(2) See sec. 56 Bills of Exchange Act, 1890, and remarks of Mr. Girouard thereon, p. 189. By sec. 56 the warrantor is probably an indorser.

33. —— The liability of an *aval* to a promissory note, while co extensive with that of the maker, is unaffected by any purely personal grounds which the latter might urge, e. g., such a personal ground as the want of authorization of the husband in the married woman who is maker of the note. *Norris* vs. *Condon*, S. C. 1888, 14 Q. L. R. 184.

34. —— Under the law, as it existed prior to the Bills of Exchange Act, 1890, the indorser *pour aval* of a promissory note was not discharged for want of notice of protest, and that Act has not modified the old law as regards notes made before the passing of the Act. *Fyfe* vs. *Boyce*, S. C. 1891, 21 R. L. 4. Confirmed in Review, 15 L. N. 327.

XXV. INTEREST ON.

1. Interest on promissory note runs from date of service of suit only, unless proof is made that payment of the amount of such note was regularly demanded previous to such action. (1) *Clervoux* vs. *Pigeon*, S. C. 1888, 32 L. C. J. 236.

2. A promise to pay on demand £200 with interest is a promise to pay interest from the date of the note. *Baxter* vs. *Robinson*, K. B. 1816, 2 Rev. de Lég. 439.

3. But when the note was drawn, "Twelve months after date, I promise to pay £200 with six months interest"—*Held*, that no more than six months interest before service of process could be allowed, but the plaintiff was entitled to interest from service of process. *Heariside* vs. *Munn*, K. B. 1817, 2 Rev. de Lég. 439, K. B., and 3 Rev. de Lég. 390.

XXVI. INSOLVENCY OF MAKER.

Promissory note, having two years to run, will become exigible in case of insolvency. *Lovell* vs. *Meikle*, S. C. 1853, 2 L. C. J. 69.

XXVII. JOINT AND SEVERAL LIABILITY.

1. Note of three persons promising jointly and severally to pay is equal to solidarity, and the holder of the note may sue any one or two of them as well as all the parties to the note. *McNider* vs. *Whitney*, K. B. 1817, 2 Rev. de Lég. 29.

2. Two farmers who signed a promissory note were held to be not jointly and severally liable. Joint and several liability only exists where the makers of the note are traders. *Malhiot* vs. *Tessier*, S. C. 1870, 2 R. L. 625.

3. Contra. *Perrault* vs. *Bergevin*, C. Ct. 1886, 14 R. L. 604.

XXVIII. LAW APPLICABLE TO (1) (AND SEE EVIDENCE).

1. The drawer of a bill of exchange is liable to the damages provided by the laws of the country in which it is made and no other. *Astor* vs. *Benn*, K. B. 1812, 2 Rev. de Lég. 27.

2. The rules of evidence laid down in ch. 9, tit. 3, Book 3, C. Code, do not apply to actions on bills and notes, which must be governed by Arts. 2341 and 2342 C. Code. *Straus* vs. *Gilbert*, C. Ct. 1889, 15 Q. L. R. 59.

3. Art. 2340 C. C.—*Held*, in a case not affected by 54-55 Vict. (Can.), ch. 17, s. 8, that Art. 2340 C. C., which provides that "in "all matters relating to bills of exchange not "provided for in this Code, recourse must be "had to the laws of England in force on the "30th May, 1849," applies only to the form, negotiability and proof of the instrument, and not to matters of civil obligation resulting from the substance of the contract created thereby,—in regard to which recourse must be had to the provisions applicable thereto to be found in other parts of the Civil Code. *Guy* vs. *Paré*, C. R. 1892, 1 Que. 443. And see *Northfield* vs. *Lawrence*, S. C. 1891, 21 R. L. 359.

XXIX. LIABILITY ON IN A PARTICULAR CASE.

1. Action on promissory note. Plea that plaintiff and defendant, together with others, were associated for the purpose of making a tender to Government for the lease of a railway, and that a deposit of $1,000 was required to be made with their tender, and they were to contribute $200 apiece, but that defendant not having the ready money gave the note now sued on to plaintiff to represent his share. That they all agreed among themselves that any of them might retire from the scheme before the acceptance of their tender. That the tender was not accepted, and the whole of the money was returned by the Government. That defendant retired from the scheme before the matter was decided.—*Held*, that he

(1) "Interest (runs) thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case." Sec. 57 (2) Bills of Exchange Act, 1890.

(1) See Bills of Exchange Act, 1890, Schedule 2.

was nevertheless liable. *Falardeau* vs. *Smith*, S. C. 1874, 2 L. N. 162.

XXX. MADE ON SUNDAY.

1. A promissory note or agreement in writing, dated on Sunday, in payment of a horse purchased on the same day, is null and void, under 45th Geo. III., cap 10, and 18 Vic. cap. 117. (1) *Coté* vs. *Lemieux*, S. C. 1859, 9 L. C. R. 221.

2. A promissory note made payable to order and dated on Sunday is valid. (2) *Kearney* vs. *Kinch*, C. Ct. 1863, 7 L. C. J. 31.

XXXI. OBTAINED BY FRAUD, ERROR, OR DECEIT.

1. Rights of Holder in due Course. (2)—Only a holder in due course can recover on a note obtained by fraud.

But if, in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him. *Belanger* vs. *Baxter*, Q. B. 1883, 6 L. N. 413, 12 R. L. 532. Sec. 30 (2) Bills of Exchange Act, 1890. *Dumas vs. Baxter*, Q. B. 1885, 14 R. L. 496; *Walters* vs. *Mahan*, C. R. 1883, 6 L. N. 316; *Withall* vs. *Ruston*, S. C. 1857, 7 L. C. R. 399, 5 R. J. R. Q. 327; *Robinson* vs. *Calcott*, Q. B. 16 Sept., 1875, 2 Themis 331; *Morin* vs. *Grenier*, Montreal, 15 Sept., 1877; *McDonnell* vs. *Mahan*, S. C., 29 L. C. J. 76; *Baxter* vs. *Bruneau*, S. C. 1884, 17 R. L. 359; *Exchange Bank* vs. *Carle*, Q. B. 1887, M. L. R., 3 Q. B. 61, 31 L. C. J. 90, 15 R. L. 250, confirming C. R., 13 R. L. 284; *Banque Jacques Cartier* vs. *Gagnon*, C. R. 1894, 6 Que. 88.

2. Unless and until he proves that subsequent to the alleged fraud, etc., value has in good faith been given for the bill by some other holder in due course. Sec. 30 (2) Bills of Exchange Act, 1890.

3. The fact that the fraud by which notes are obtained is a matter of public notoriety forms a strong presumption that the holder has not obtained them in due course. *Exchange Bank* vs. *Carle*, Q. B. 1887, M. L. R., 3 Q. B. 61.

4. There is a class of cases which hold that even a holder in due course cannot recover on a note obtained by fraud; for instance, where a person is induced by fraud to sign a bill or note, under the belief that he is signing a wholly different instrument. (1) *Banque Jacques Cartier* vs *Lescard*, Q. B. 1886, 13 Q. L. R. 39, 15 R. L. 14; *L'Abbé* vs. *Normandin*, C. Ct. 1888, 32 L. C. J. 163; *Ford* vs. *Auger*, S. C. 1874, 18 L. C. J. 296; *Waters* vs. *St. Onge*, S. C. Montreal, 31 March, 1881.

5. —— But it has now been held by the Court of Appeal, reversing the judgment of the Superior Court (M. L. R., 6 S. C. 217), that a party who, before maturity, has become the holder of a promissory note, in good faith and without notice of any objection, for valuable consideration, is entitled to recover the amount thereof from the person whose signature appears on the note as maker, even where it is proved that the signature was obtained by artifice and fraud, and without any consideration being received by the promissor. *Banque Jacques Cartier* vs. *Leblanc*, Q. B. 1892, 1 Que. 128, and see *Bank of Nova Scotia* vs. *Lepage*, M. L. R., 6 S. C. 321.

6. —— Where a person loans the sum of $50, and causes the borrower to sign a note for $58, who does so without reading it, the lender must reimburse the difference to the borrower who paid the note to a holder in good faith. The lender could not claim the $8 as interest on the loan, as such interest must be specially stipulated for. *Lemire* vs. *Gélinas*, C. Ct. 1879, 10 R. L. 20.

XXXII. PAYMENT. (See PROTEST.)

1. Compensation.—In an action on a note, T., one of the indorsers, pleaded payment. It appeared that he had furnished the plaintiff with groceries, the accounts for which were stated in the passbook to have been settled, but it did not appear that any money passed. The plaintiff having given unsatisfactory replies when examined—*Held*, the price of the goods must be deducted from the note. *Angers* vs. *Ermatinger et al.*, Q. B. 1866, 2 L. C. L. J. 158.

2. Currency.—A draft drawn in New York on a party in Montreal, and accepted and payable there, is payable in Canadian funds, even as between the drawer and acceptor, and

(1) Sec. 13 (2) Bills of Exchange Act, 1890, provides that a bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

As to Coté vs. Lemieux, see remarks of M. Girouard at pp. 29-30, who thinks it is still good law.

(2) As to who is a holder in due course, see secs. 29 and 30 Bills of Exchange Act, 1890.

(1) But it is to be noted that secs. 29 and 30 of the Act make no distinction between fraud in the making and fraud in the signing of a note.

even when it is proved that the consideration of the draft was the value of goods sold and delivered in New York at prices payable in United States currency. *Copcutt* vs. *McMaster*, C. C. 1863, 7 L. C. J. 340.

3. —— The maker of a *bon* made in the United States payable on demand, if sued in Canada, will be condemned to pay the full amount of the *bon* in Canadian currency. *Daly* vs. *Graham*, C. C. 1864, 8 L. C. J. 340, 15 L. C. R. 137; *Chapman* vs. *McFee*, C. R. 1869, 1 R. L. 192.

4. —— A note made and dated at Malone, N.Y., between American citizens, but payable to bearer, and held by a Canadian, must be paid in Canadian currency if sued here. *McCoy* vs. *Dineen*, C. C. 1864, 8 L. C. J. 339.

5. **Delay to present.**—A bill made on the 27th August, indorsed by the payee on the 29th, presented by the holder on the 1st September and protested on the 8th of that month—*Held*, not a reasonable time. *Harriss* vs. *Schwob*, Q. B. 1871, 3 R. L. 453.

6. **Demand of.**—Partial payment is a waiver of all objections as to a want of demand. (1) *Rice* vs. *Bowker*, S. C. 1853, 3 L. C. R. 305, 4 R. J. R. Q. 23.

7. —— The demand of payment of a promissory note must be accompanied by a tender of that promissory note to the debtor, and such demand of payment cannot be made publicly at the church door immediately after Divine service, either on a Sunday or a feast of obligation. (1) *De la Chevrotière* vs. *Guilmet*, C. C. 1886, 9 L. N. 412.

8. —— Demand of payment must be accompanied by an exhibition of the note. *Cousineau* vs. *Lecours*, S. C. 1888, 4 M. L. R. 249.

9. **Costs of Action.**—A note was made payable at plaintiff's house, but subsequently plaintiff gave the note to his attorney, and it was not in his hands to return it to defendant, who, on suit without any demand, paid the money into court with his plea—*Held*, not liable for the costs of the action. *Lessard* vs. *Genest*, Q. B., Que. 8 Oct., 1883.

10. **Instalment Note.**—An action lies on a note payable by instalments as soon as the first day of payment is passed, but it lies only for the amount of the first instalment, each of them being considered as a separate debt. *Clearihue* vs. *Morris*, K. B. 1820, 2 Rev. de Lég. 30.

11. **Presentment for.** (See also Protest).—In action on a promissory note payable on demand by a Lower Canada debtor to a foreign creditor, a previous demand need not be proved, and the amount thereof will be covered with costs, notwithstanding a tender of such amount with plea. *Shuter* vs. *Paxton*, C. C. 1866, 5 L. C. J. 55.

12. —— On an appeal from a judgment condemning the defendants jointly and severally to pay the amount of the promissory note sued upon—*Held*, reversing the judgment of the court below, that a promise to pay at a specified place is not a promise to pay generally, and there is no liability on the part of the maker of a promissory note payable at a specified place unless proof be made of a presentment and of demand of payment at such specified place, and of neglect or refusal there to pay the amount of such note. (1) *O'Brien* vs. *Stevenson*, Q. B. 1865, 15 L. C. R. 265.

13. —— The defendant pleaded that no proper presentation for payment had been made—*Held*, that presentation at the closed doors of the bank after its usual office hours is not such a presentation for payment as is necessary for protest. *Watters* vs. *Reiffenstein*, C. C. 1866, 16 L. C. R. 297.

14. —— **Costs.**—In an action against the maker of a note payable on demand, and generally, want of presentment is not a ground of demurrer. But if the defendant tender the debt and interest before plea filed, and bring the money into Court, the plaintiff will be condemned to pay costs. *Archer* vs. *Lortie*, C. R. 1877, 3 Q. L. R. 159.

15. —— —— A note payable generally should be presented for payment at the maker's domicile before action thereon, otherwise the plaintiff will not get his costs if the defendant tenders the debt in court. *Mignault* vs. *Lajoie*, C. Ct. 1877, 9 R. L. 382.

16. —— Where plea of payment is specified—*Held*, non-presentation not a ground for demurrer unless pleaded and proved that there was provision at the place named to meet the note when it became due, and that it would have been paid if presented. (2) *Crépeau* vs. *Moore*, C. R. 1882, 8 Q. L. R. 197.

17. **Proof of.**—In an action brought for the purpose of establishing the payment of a promissory note between parties not traders—*Held*, reversing judgment of court below, that the question was one which must be gov-

(1) See secs. 52 and 86 Bills of Exchange Act, 1890.

(1) But see secs. 52 and 86 Bills of Exch. Act, 1890.
(2) But see sec. 52 (2) Bills of Exch. Act, 1890.

erned by the laws of England, and may be made by parol evidence. *Carden* vs. *Finlay*, Q. B. 1860, 8 L. C. J. 139 and 10 L. C. R. 255.

18. Time, how reckoned. — Where a note is made payable at "fifteen days after sight," the delay commences to run only from date of presentment of the note. *Cousineau* vs. *Lecours*, S. C. 1888, 4 M. L. R. 249.

19. To Indorser.—To an action on his promissory note the maker pleaded that he had sent the money to the indorser when it was made payable, before maturity; that he had made other notes to the order of the same person and sent the money in that way, and they were always retired; that when the present note fell due there was money enough at the indorser's credit in the plaintiff's hands to pay it, and it was actually paid, though not withdrawn. The indorser subsequently assigned. *Held*, that there was nothing proved in the way of payment to the bank and the payment to the indorser was no answer. *Banque du Peuple* vs. *Vian*, S. C. 1880, 4 L. N. 133.

20. —— A bank having discounted a note for the indorser charges the same to the latter's account. The maker pays the note to indorser after maturity. *Held*, a valid payment, and that the bank had no recourse against the maker. *Cleveland* vs. *Exchange Bank*, Q. B. 1887, 15 R. L. 51, 31 L. C. J. 126.

XXXIII. PROMISSORY NOTES—WHAT ARE.

1. Acknowledgment of Indebtedness. --A private writing containing an acknowledgment of indebtedness in these words :—"I, the "undersigned, by these presents, acknowledge "to well and legally owe to Edouard Camp- "bell Wurtele, merchant, of the parish of St. "David, hereto present and accepting creditor, "the sum of $81.60 currency for value re- "ceived on account of notes consented to "before this day, and pledge myself to pay to "the said creditor or order, within one year "from this date, with interest at seven per "cent. from date until complete payment, the "said interest payable semi-annually. River "David, 13th February, 1863," and duly signed—*Held*, to be a promissory note and to be subject to the prescription of five years even although the word "obligation" be written on the back of such paper writing. *Wurtele* vs. *Girouard*, C. R. 1873, 6 R. L. 737 and 18 L. C. J. 154.

2. —— A writing merely certifying that a person is indebted to another in a certain sum of money is not a negotiable promissory note. *Dasylva* vs. *Dufour*, C. Ct. 1866, 16 L. C. R. 294.

3. Agreement.—Action was brought, as on a promissory note, on an agreement in the following terms:—"Nous promettons solidai- "rement et conjointement de payer à Amable "Coté la somme de vingt-cinq louis courant, "pour une jument qu'il m'a vendue et livrée, "que nous promettons de payer à lui ou à son "ordre, payable comme suit, savoir, en quatre "ans en donnant six louis cinq chelins chaque "année au premier septembre de chaque "année, et de plus nous promettons de faire "obligation jeudi prochain, et à défaut de ce "faire la dette sera échue."—*Held*, not to be a promissory note but an agreement, and to be sued on as such. *Coté* vs. *Lemieux*, S. C. 1862, 9 L. C. R. 221.

4. —— For Space on Cattle Boat.—The following writing is a note:—"This is to certify that I, Nathan Kennedy, cattle exporter, hereby agree and bind myself to pay to J. McShane, jun., or order, the sum of two thousand dollars, for all the space from date to close of navigation that he has on Beaver line steamers, Allan line and other line steamers; the sum of one thousand dollars I now pay in cash, and the sum of one thousand dollars, I bind and pledge myself to pay to J. McShane, jun., or order, on or about the 25th Nov., 1883. It is understood that this amount of two thousand is paid for premium over and above the rate of freight to be paid for said steamers to agents or ship owners." *Kennedy* vs. *Exchange Bank of Canada*, Q. B. 1886, 30 L. C. J. 266.

5. Bank Deposit Certificate.—A certificate of deposit given by a bank and payable to order 15 days after notice, with interest in the event of the deposit lasting three months, is a promissory note. *Richer* vs. *Voyer*, P. C. 1874, 5 R. L. 591.

6. Cash or Goods.—A promise in writing to pay on a day certain £250 to A B or order, with an engagement to pay in cash or goods, if the holder should choose to demand the latter, is a promissory note, for this engagement is no more than a power given to the holder to convert a promissory note into an order for merchandise if he see fit to do so. *McDonell* vs. *Holyate*, K. B. 1818, 2 Rev. de Lég. 29.

7. Certificate of Government Officer. —A certificate of an officer of the Government, certifying a balance due to another and directing a third officer to pay the amount, is

not a Bill of Exchange. *McLean* vs. *Ross*, K. B. 1819, 2 Rev. de Lég. 30.

8. **Conditional.**—An action upon a note for £20 given to a seaman for wages "for the run," payable on the arrival of the ship in England, cannot be maintained if it appear that the ship was lost on its voyage home. *Wood* vs. *Higginbotham*, K. B. 1813, 2 Rev. de Lég. 28.

9. —— A note payable "five days after sailing of vessel" is not a negotiable promissory note. *Duchaine* vs. *Maguire*, C. Ct. 1882, 8 Q. L. R. 295; *Dooley* vs. *Ryarson*, C. Ct. 1876, 1 Q. L. R. 219.

10. **Given as Collateral Security by Building Society.**—A note given by a building society as collateral security for an advance to the society is not an ordinary negotiable note, and if lost the holder is not compelled to give security before he can exact repayment of the advance. *Cooley* vs. *The Dominion Building Society*, Q. B. 1878, 1 L. N. 495, 24 L. C. J. 111.

11. **I. O. U.—or Bon.**—An acknowledgement in the following letters and words, "I. O. U. twenty-five pounds," is a negotiable promissory note. (1) *Beaudry* vs. *Laflamme*, S. C. 1862, 6 L. C. J. 307.

12. —— No set form of words is requisite to constitute a promissory note, and an instrument called a writing obligatory or a *bon* payable to order for value received may be considered as a note in writing within the intent of the Provincial Statute 34 Geo. III., cap. 2, though it do not follow the very words of that Act, and though it be merely described and designated in the plaintiff's declaration as a writing obligatory or *bon*. (1) *Hall* vs. *Bradbury*, Q. B. 1845, 1 Rev. de Lég. 180.

13. **Municipal Debentures.**—Debentures issued under the authority of ch. 25 of the Consolidated Statutes of Lower Canada are negotiable securities, and pass from hand to hand by mere delivery, and the holder may declare upon them as upon promissory notes, under the Municipal Code. (2) *Eastern Townships Bank* vs. *Corporation of Compton*, S. C. 1871, 7 R. L. 446.

14. **Notarial Deed.**—A note signed before a notary in the notarial form, although made payable to order, is not a promissory note under the Statute. (1) *Gravelle* vs. *Beaudoin*, C. Ct. 1863, 7 L. C. J. 289; *Lacoste* vs. *Chauvin*, C. Ct. 1863, 7 L. C. J. 339; *Seguin* vs. *Bergevin*, Q. B. 1865, 15 L. C. R. 438; *Pigeon* vs. *Dagenais*, Q. B. 1872, 17 L. C. J. 21.

15. —— **Contra.**—A promissory note signed before notaries in the notarial form, payable to a party or his order, is negotiable by indorsement in the ordinary way. (1) *Morin* vs. *Legault*, C. Ct. 1859, 3 L. C. J. 55. *Crevier* vs. *Sauriole*, C. Ct. 1862, 6 L. C. J. 257. *Marc Auréle* vs. *Durocher*, C. R. 1873, 5 R. L. 165.

16. —— But *Held*—That a note *en brevet* payable to A B, or order, cannot be indorsed in blank. (1)

Semble: That it may be by indorsement in full. *Brunet* vs. *Lalonde*, C. Ct. 1866, 16 L. C. R. 347.

17. **Note to order of Maker—Not indorsed.**—In an action prior to the Bills of Exchange Act—*Held*, that a note whereby the maker promises to pay a certain sum of money to his own order, and not indorsed by him, is not a promissory note within the meaning of Arts. 2344, 2345 C. Code, and therefore the indorser thereon cannot be held liable as such or as warrantors *pour aval* for the payment of the note. *Trenholme* vs. *Coutu*, Q. B. 1893, 2 Que. 387. Reversing S. C., M. L. R., 7 S. C. 146.

18. **Part Cash, part Goods.**—A paper writing, undertaking to pay A B, or bearer, a certain sum of money, one half in cash and the other half in grain, is not a promissory note, and therefore not negotiable. *Gillin* vs. *Cutler*, C. R. 1857, 1 L. C. J. 277.

19. **Premium Note.**—A promissory note payable to the order of a Mutual Insurance Company, and given in payment of premium of insurance, is negotiable. *Wood* vs. *Shaw*, S. C. 1858, 3 L. C. J. 169.

20. —— A memorandum at the foot of such a note indicating its consideration does not limit its negotiability. (*Ib.*)

21. **Receipt for Loan.**—A letter acknowledging the receipt of a sum of money as a loan, and promising to repay it on demand, with interest, is not a promissory note, within the meaning of the Statute 12th Victoria, ch. 22, sec. 31. *Whishaw* vs. *Gilmour*, S. C. 1862, 6 L. C. J. 319; 13 L. C. R. 94.

22. —— The following receipt: "Received

(1) See secs. 3 and 82 Bills of Exchange Act, 1890. Note should contain words of promise to pay. See Girouard on Bills and Notes, p. 13.

(2) See sections 4628-4631 of R. S. Q., "Debentures Registration Act."

(1 See Girouard, Bills and Notes, p. 65.

from Mrs. Rachel Ascher loan of eight hundred dollars, to be returned when required," is not a note. (1) *DeSola* vs. *Ascher*, Q. B. 1889, 17 R. L. 315.

XXXIV. PROTEST.

1. By Notary Holder of Note.—A notary who is indorser o a promissory note cannot as notary protest such note, even where, being bearer of the note, he erased his name and transferred the note to a *prête-nom*, under whose name the protest was made; such a protest is null and void and discharges the indorsers. *Pelletier* vs. *Brosseau*, 1890, M. L. R., 6 S. C. 331.

2. Notice of—Address.—A notice of protest of a note addressed to a lady as "Sir," instead of "Madam," is sufficient, if duly served upon her. (2) *Mitchell* vs. *Browne*, S. C. 1865, 15 L. C. R. 425, 9 L. C. J. 168.

3. —— —— But in an earlier case, where the notice was similarly addressed, it was held to be insufficient, another party having received the notice. (3) *Seymour* vs. *Wright*, S. C. 1852, 3 L. C. R. 454.

4. —— —— *Held*, that the fact of an indorser having been appointed to a temporary office in a place where he went alone, leaving his family for some time afterward in the domicile occupied by him at the time of his appointment, did not effect a change of domicile, and notice of protest left at such domicile was good, and sufficient to render him liable for the payment of the note. *Ryan* vs. *Malo*, Q. B. 1861, 12 L. C. R. 8.

5. —— **Conflict of Laws.**—To an action on a promissory note the endorser pleaded that he owed nothing to plaintiff, and that he was not bound in law or in fact to pay the sum claimed; that plaintiff (a third holder) was the *prête-nom* of the payee, etc., and at the hearing urged that no protest and notice had been made and given as required. The fact was that the note though made in Montreal was payable in New York, and the last day of grace falling on Sunday, it had been protested on the Saturday previous, according to the custom of that State. *Held*, that everything concerning the payment of the note and the mode of securing must be made according to the law of the country where note is payable, and therefore the protest and notice were sufficient. *Bank of America* vs. *Copland*, S. C. 1881, 4 L. N. 154.

6. —— **Description of Maker.**— The maker of a note was described in the protest and also in the writ and declaration as E. B. P. instead of Joseph B. P.—*Held*, that a plea by the indorser to the effect that he never indorsed the note described by plaintiff, and that a protest of E. B. P.'s note was not a legal protest of J. B. P.'s note, was bad, and would be dismissed because he did not put in the affidavit required by the Statute. *Scullion* vs. *Perry et al.*, S. C. 1865, 9 L. C. J. 174, 1 L. C. L. J. 64.

7. —— —— **of Note.**—In an action against indorser of a note payable to the order of the maker, and indorsed by him to such indorser, the following notice of dishonour addressed to maker and indorser conjointly is sufficient in the absence of any proof by the defendant of the existence of another note, "Your promissory note for £30 cy., dated at Montreal the 2nd September, 1856, payable three months after date to you or order, and indorsed by you, was this day, at the request of Messrs. Handyside, Sinclair & Company, of this city, merchants, duly protested for non-payment." *Handyside* vs. *Courtney*, S. C. 1857, 1 L. C. J. 250.

8. —— **Bill of Exchange.**—The indorser of a bill of exchange is in all cases entitled to notice whether the drawer have or have no effects in his hands, and on this ground the court non-suited the plaintiff and refused his motion for a new trial. *Griffin* vs. *Phillips*, K. B. 1821, 2 Rev. de Lég. 30.

9. —— Notice of protest is not sufficiently given to an indorser, when such notice is sent to an erroneous address of such indorser, given by the maker at the time he got the note discounted. *Merchants Bank of Canada* vs. *Cunningham*, Q. B. 1892, 1 Que. 33.

10. —— **Verbal.**—By sec. 49 (*c*) Bills of Exchange Act, 1890, notice of dishonour may be given in writing or by personal communication. But in the province of Quebec it must be given by a notary.

11. —— **Waiver.**—A promise to pay a protested bill of exchange, of which no notice of protest has been given, if made with a knowledge of that fact, is a waiver of want of notice. *Ross* vs. *Wilson*, K. B. 1812, 2 Rev. de Lég. 28; *Johnson* vs. *Geoffrion*, C. Ct. 1863, 7 L. C. J. 125, 13 L. C. R. 161; *City Bank* vs. *Hunter & Maitland*, Q. B. 1847, 2 R. de L. 171.

(1) See remarks of Mr. Girouard on these last two cases at p. 14.
(2) See sec. 49 E and G, Bills of Exchange Act, 1890.
(3) See Girouard, p. 153. And *Contra* Cowan vs. Turgeon, Q. B. 1832, 1 Rev. de Lég. 230.

12. —— —— The husband being universal legatee of his wife, indorsed for her a promissory note—*Held*, that he was bound to pay the amount of the note, notwithstanding there was no protest, it being sufficiently established that he had consented in the name of his wife to waive protest, in order to avoid costs, and that in fact the wife was only a *prête-nom* to cover the trading of the husband. *Berian* vs. *McCorkill*, Q. B. 1864, 14 L. C. R. 400.

13. Proof of. (1)—In an action against the indorser of a promissory note—*Held*, the duplicate notice of protest must be produced and filed, and that the certificate of the notary that he had served due notice upon the indorser was insufficient. *Seed* vs. *Courtenay*, S. C. 1853, 3 L. C. R. 303, 4 R. J. R. Q. 21.

14. Regularity of—Non-Exhibition of the Note.—*Held*, that the non-exhibition of the note to the maker at the time of protest, the maker being notoriously insolvent, will not invalidate the protest, and notice of protest to the indorsers will hold them liable, notwithstanding such non-exhibition. (2) *Venner* vs. *Futroye*, S. C. 1863, 13 L. C. R. 307.

15. —— **Mention of Time of Protest.**—In an action against the maker and indorser—*Held*, that the omission to state in a notarial protest that it was made in the forenoon of the day of protest was fatal, and the indorser was discharged. *Joseph* vs. *Delisle et al.*, S. C. 1851, 1 L. C. R. 244, 3 R. J. R. Q. 3.

XXXV. RENEWAL. (See also under title "NOVATION." See "INDORSERS, LIABILITY OF.")

1. Agreement.—In an action on a note where defendant pleads that he had sent in a renewal to plaintiffs and that they never returned it, and plaintiffs reply that they had refused to accept the note as a renewal, defendant will be held to have been bound, on such refusal, to call and take away the note he had so sent in renewal; and that the mere fact of plaintiffs' not returning it will not be construed into an agreement to renew. *Lyman* vs. *Chamard*, S. C. 1857, 1 L. C. J. 285.

2. Effect of.—The acceptance of a note in renewal of one previously made is not a novation, unless there be an express intention to effect such novation. *Noad* vs. *Bouchara*, S. C. 1860, 10 L. C. R. 476; *Brown* vs. *Mailloux*, S. C. 1859, 9 L. C. R. 252.

(1) See sec. 93 (5) Bills of Exchange Act, 1890.
(2) But see sec. 45 Bills of Exchange Act, 1890.

3. —— This intention is presumed from the surrender of the original note. *Brewster* vs. *Chapman*, Q. B. 1875, 19 L. C. J. 301.

XXXVI. RIGHTS OF HOLDERS. (See also "OBTAINED BY FRAUD," also "CONSIDERATION.")

1. Accommodation Note.—An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not. *Béique* vs. *Bury*, S. C. 1880, 3 L. N. 160. Bills of Exchange Act, 1890, sec. 28 (2).

2. —— **Partners—Renewal.**—In an action on a promissory note, the defence was that the note of which it was a renewal was given for the accommodation of the payee by the defendant's partner, who had no authority to make it, and that the plaintiffs, when they took the renewal, knew its defective character—*Held*, that as it did not appear that such knowledge attached when the original note came into plaintiffs' possession, they were entitled to recover. *Union Bank of Lower Canada* vs. *Bulmer*, Supreme Ct., 22 June, 1887, 10 L. N. 361.

3. Collateral Security—Insolvency of Payee.—G., who was not a party to the note in question, got it into his possession before maturity as collateral security. The payee subsquently became insolvent, and G., before maturity of the note, obtained from the assignee a transfer of all the insolvent's assets—*Held*, that G. might sue the maker on the instrument though not indorsed, and, where there is conflict of evidence on the question whether a security has or has not been satisfied by payment, the possession of the uncancelled security by the claimant ought to turn the scale in his favor. *Guerin* vs. *Orr*, C. R. 1882, 5 L. N. 379.

4. Holder in due Course.—The indorsee and holder of a promissory note for collection may recover thereon against the maker and indorser. *Mills* vs. *Philbin*, Q. B. 1848, 3 Rev. de Lég. 255.

5. Insolvency of Maker.—A promissory note not yet due, indorsed by a party who has since become bankrupt, does not entitle the holder to be paid concurrently with the other creditors of the bankrupt, the term for payment not having expired. *Mailloux* vs. *Audet*, C. C. 1864, 14 L. C. R. 207.

6. Note to be delivered in Performance of Condition.—The holder of a promissory note for value can recover on the note against the indorser, although the agent

to whom he transmitted the note delivered it against his instructions, without the accomplishment of a condition which the indorser had stipulated with the drawer, but to which the plaintiff was not privy. *Sylvain* vs. *Flanagan*, Q. B. Que., 8 March, 1875.

6a. Ownership.—The stamp of a bank on a promissory note is not an infallible indication of the legal holder and owner. *Barthe* vs. *Armstrong*, C. C. 1869, 5 R. L. 213.

6b. The holder and owner of a promissory note may cancel any of the indorsations, and reserve his recourse only against the maker, and may bring his action as if he received it from the payee or any subsequent indorser whose name is not cancelled. (*Ib.*)

7. Transferred without Indorsement.—The holder of a promissory note, made to the order of a third party but not indorsed by the latter, has not a legal possession sufficient to allow him to recover from the maker, but the court will allow the plaintiff to have the party to whose order the note was made payable made a party to the suit in order to determine whether the holder is the real owner of the note. *Vandal* vs. *Douville*, S. C. 1890, 20 R. L. 305.

8. —— A note not exceeding $50 in amount and payable to order, may be legally transferred without indorsement. (1) *Dupuis* vs. *Marsan*, C. C. 1872, 17 L. C. J. 42.

9. —— The plaintiff was the transferee of two notes, accepted by his employer in part settlement of a note of £250, given by defendant in consideration of 1,000 shares of the capital stock of a slate company. The plaintiff's declaration alleged that the notes were delivered to him for value received, and that he was the sole, true and lawful bearer and proprietor of the said notes, but there was no allegation of any indorsement to the plaintiff by the payee, whose name appeared on the notes as having been erased—*Held*, that the plaintiff had not proved the title under which he held the notes, and the allegation that they were delivered to him by the payee was not sufficient to constitute him the creditor, the notes not being payable to bearer and no indorsement from the payee to the plaintiff being alleged. *Hempsted* vs. *Drummond*, Q. B. 1859, 10 L. C. R. 27.

10. Want of Consideration—Transferee after Maturity.—The transferee after maturity of a promissory note given without consideration can recover thereon if he received it from a holder who received it in apparent good faith and before maturity. *Pichette* vs. *Lajoie*, S. C. 1887, 10 L. N. 266.

11. Warranty.—Where the transferee of a promissory note takes proceedings in warranty against his transferrer on the plea of one of the indorsers that he is discharged, he is entitled to ask that the price paid by him be returned to him, and what has been paid him by the other indorser cannot be deducted; but, in his turn, he must offer to put the transferrer in the position in which he was before the transfer. *Lamarche* vs. *Banque Ville-Marie*, C. R. 1884, M. L. R., 1 S. C. 203.

12. When note non-negotiable.—The defendant, the first indorser of an unnegotiable promissory note, was sued by the holder, the third indorser, and the action dismissed with costs, whereupon action was brought by his immediate indorsee, the second indorser, to which he pleaded *chose jugée*, the present plaintiff being a *prête-nom* for the former plaintiff—*Held*, that the indorser of an unnegotiable bill or note could sue his immediate *auteur*, and the fact that the plaintiff had filed the note in support of his action was proof that he was the proprietor and holder for all the purposes of such action, and that, the parties being different, the former action could not be considered *chose jugée*. *Jones* vs. *Whitty*, S. C. 1859, 9 L. C. R. 191.

XXXVII. SIGNATURE. (See AGENTS.)

1. Altered Note—Liability of Indorser.—If an indorser sign his name on the back of a note having spaces to the left of the amount sufficient to permit of alteration by the maker, and deliver the note in that condition to the maker, and the maker afterwards increase the amount of the note, by filling in the blank spaces with an additional word and figure, and pass the note in its altered state to a *bonâ fide* holder for value, and if the said note so altered appear, on the face thereof, to be genuine, the indorser is liable to pay the full amount of the note as altered to such *bonâ fide* holder for value. *Darwin* vs. *Thomson*, Q. B. 1869, 13 L. C. J. 262.

2. Aval.—A signature subscribed to a negotiable note, by a person other than the maker of the note, is equivalent to an *aval*. (1) *Narbonne* vs. *Tétreau*, C. C. 1863, 9 L. C. J. 80.

(1) See sec. 31 (3) Bills of Exchange Act, 1890.

(1) See sec. 56 Bills of Exchange Act, 1890, and remarks of M. Girouard thereon relative to *aval*, at p. 189.

3. **By Agents.** (See AGENTS.)—When a promissory note is signed by procuration, proof of the due execution of such procuration must be made to entitle the plaintiff to recover judgment in an *exparte* suit on the note. *Ethier* vs. *Thomas*, Q. B. 1873, 15 L. C. J. 225.

4. —— And that even where the defendant is in default to appear. *Ib.*, Q. B., 17 L. C. J. 79.

5. **By Mark—Sufficiency.**—A promissory note to order cannot be transferred by an indorsement made by the mark of the indorser, although so made in presence of two witnesses. *Lagueux* vs. *Casault*, K. B. 1813, 2 Rev. de Lég. 28, 2 R. J. R. Q. 136.

6. —— A note of hand executed by the maker's mark, if indorsed, gives no action to the indorsee against the maker, but the indorser is answerable for money had and received. *Jones* vs. *Hart*, K. B. 1819, 2 Rev. de Lég. 29, 58, 2 R. J. R. Q. 137 and 149.

7. —— The indorsement by mark in presence of the two witnesses of a promissory note gives a right of action to the holder against the maker and indorser. *Noad* vs. *Chateauvert*, Q. B. 1846, 1 Rev. de Lég. 229, 2 R. J. R. Q. 19.

8. —— Where the defendant had signed a note *pour aval* by making her mark of a cross in the presence of witnesses—*Held*, reversing the judgment of the court below, that the signature was good, where the subject matter of the contract was of a commercial nature. *Patterson* vs. *Pain*, S. C. 1851, 1 L. C. R. 219, 2 R. J. R. Q. 467.

9. —— An action lies against the indorser of a note payable to order and indorsed with his cross. *Thurber* vs. *Desève*, C. Ct. 1854, Robertson's Dig. 43, Montreal Condensed Reports 125.

10. —— Maker's signature by cross good, maker, indorser and trader being described as traders. *Anderson* vs. *Park*, S. C. 1855, 6 L. C. R. 479.

11. —— A promissory note signed by a cross in presence of a witness is good and valid. *Collins* vs. *Bradshaw*, C. C. 1860, 10 L. C. R. 366; *Dionne* vs. *Talbot*, 1872, not reported.

12. —— A note made with mark in presence of witness may be proved by one witness. *Blackburn* vs. *Decelles*, S. C. 1871, 15 L. C. J. 260.

13. —— Defendant was sued on a note signed with a cross, and pleaded, denying the signature, and plaintiff failed to prove the signing—*Held*, that the action must be dismissed. *Coupal* vs. *Coupal*, C. R. 1873, 5 R. L. 465.

14. —— A receipt signed by cross, before two witnesses, one of whom, in turn, signed by cross, is valid. *Latulippe* vs. *Bernard*, Q. B. 1880, 1 Dorion's Rep. 69. (1)

15. —— A note signed with a cross does not make proof of itself, and proof must be made of the signature in order to obtain judgment thereon. *Fiset* vs. *Pilon*, C. C. 1886, 9 L. N. 380.

16. —— A promissory note signed with a cross is not a private writing, which makes proof between the parties without evidence of its execution. *Banque Nationale* vs. *Charette*, S. C. 1887, 10 L. N. 85, and see *Ouimet* vs. *Migneron*, S. C. 1890, 20 R. L. 357.

17. —— Promissory notes signed by a cross are, in matters of proof, subject to the same rules as where the maker signs his own name. *Straus* vs. *Gilbert*, C. Ct. 1889, 15 Q. L. R. 59.

18. —— **Amendment—Pleading.**—To an action on a note signed with a cross the defendant first pleaded forgery but was afterwards allowed to amend this and plead that he had made the mark under the impression that he was signing a receipt for a like amount. On proof of amended plea action dismissed. *Benoit* vs. *Brais*, Q. B. 1883, 6 L. N. 342.

19. —— A receipt signed by cross, in the presence of a single witness, is valid, but is not a private writing which makes proof between the parties without evidence of its execution, and only constitutes a commencement of proof in writing. (2) *Trudeau* vs. *Vincent*, S. C. 1892, 1 Que. 231.

20. **In Blank.**—Where a person gives to another a promissory note signed in blank, with the intention that the latter shall fill it in for a certain sum, he is liable to a third party for the full amount which appears on the face of the note, even where it is beyond the amount agreed upon. *Bank of Nova Scotia* vs. *Lepage*, 1889, M. L. R., 6 S. C. 321.

21. —— A note signed in blank may be legally filled up by the holder thereof in any way he pleases. *Gnaedinger* vs. *Bertrand*, S. C. 1879, 24 L. C. J. 8.

22. **Proof of.**—If a defendant by exception admits his signature to a note of hand,

(1) In the report it is said that Ramsay, J., differed, but it was not on the case as reported. The dissent went only so far as this that there must be a cross made by the party, otherwise there was nothing done. (See Rain. Dig., p. 274.)

(2) Preceding authorities collected in this case.

and plead a term for payment, it is not necessary for the plaintiff to prove the signature, even though the exception be dismissed and there is a plea of general denial to the action. *Vallières* vs. *Roy*, 2 Rev. de Lég. 335, K. B. 1820.

23. —— *Held*, that the genuineness of the signature to or indorsement of a note ceases to be presumed the moment the defendant denies it in his plea supported by affidavit, and the plaintiff must make proof of the same, and that in the present case the plaintiffs were guilty of neglect in accepting the note without sufficient caution. *Dorwin* vs. *Thompson*, S. C. 1867, 3 L. C. L. J. 130.

24. —— An acceptance on sight of a bill of exchange admits the signature of the drawer. *McKenzie* vs. *Fraser*, 2 Rev. de Lég. 30, K. B. 1825.

25. —— Motion by defendant to be allowed to file pleas to an action on a note after foreclosure. One was founded on an affidavit charging that the signature to a note was not the signature of defendant—*Held*, that the allegation of forgery was not made in the terms required by the Code, and therefore the application could not be granted. *Milloy* vs. *Farmer*, C. R. 1879, 2 L. N. 182.

26. —— The signature to a promissory note is presumed genuine till denied by affidavit under Art. 145 C. C. P. *Straas* vs. *Gilbert*, C. Ct. 1889, 15 Q. L. R. 59; *Dorwin* vs. *Thompson*, S. C. 1867, 3 L. C. L. J. 130.

27. —— Where the signature to a note after being denied under oath by the pretended maker, is not sufficiently proved, the action on the note must be dismissed. *Quære* as to appreciation of evidence in the absence of plea alleging fraud. *Boulanger* vs. *Walters*, Q. B. 1886, 12 Q. L. R. 219, 14 R. L. 354.

28. —— Where the signature to a bill or note is denied, experts may be appointed on motion of one of the parties, and their report when homologated is conclusive. *Lord* vs. *Laurin et al.*, C. C. 1865, 9 L. C. J. 171 and 15 L. C. R. 452.

29. —— In an action by the indorsees of a promissory note against alleged makers, in which the defendants by their plea denied their signature—*Held*, confirming courts below, on evidence that one of the firm by whom the note purported to be signed had thrice admitted that the signature was that of their firm, and had been written by himself, that as there was no clear and legal proof of want of genuineness in the signature, the admission could not be set aside on mere presumption arising from knowledge of the maker's handwriting, and also that another promissory note signed by the firm could not be used for the purpose of creating a standard of comparison of handwriting, such signature not having been itself established to be genuine. *Reid* vs. *Warner*, Q. B. 1867, 17 L. C. R. 485.

30. —— The signature to a promissory note, which is denied, cannot be proved solely by comparison of the disputed signature with other signatures which are proved or admitted to be genuine. *Paige* vs. *Ponton*, Q. B. 1877, 26 L. C. J. 155.

31. *Quære* as to the effect of illegal evidence taken without objection. (*Ib.*)

32. —— The burden is upon the plaintiff of proving the genuineness of the signature of the note on which he sues where the defendant denies under oath that he signed it. *Banque d'Exchange du Canada* vs. *Pichette*, C. R. 1884, 13 R. L. 66.

Sec. 30 (2) Bills of Exchange Act, 1890.

XXXVIII. STAMPS.

The following are names of cases relating to stamping of promissory notes, now abolished.

Procedure.—*Doyle* vs. *Clement*, S. C., 10 L. C. J. 332; *Shefler* vs. *Fauteux*, S. C. 1873, 5 R. L. 351, 18 L. C. J. 216.

Insufficient Stamps. — *Stevenson* vs. *Kimpton*, 12 L. C. J. 291; *Dixon* vs. *Normandeau*, 6 L. N. 136; *Filion* vs. *Roy*, 6 L. N. 175; *Cimon* vs. *Thompson*, 3 L. N. 194; *Lamarche* vs. *Banque Ville Marie*, M. L. R. 1 S. C. 203.

Omission to Stamp.—*Christin* vs. *Archambault*, C. R., 30 L. C. J. 237; *Gilman* vs. *Exchange Bank*, 31 L. C. J. 320; *Aurele* vs. *Durocher*, 18 L. C. J. 197; *Richard* vs. *Boisvert*, 3 R. L. 7; *Sheffer* vs. *Fauteux*, 18 L. C. J. 216; *Hudon* vs. *Girouard*, 21 L. C. J. 15.

Affixing Double Stamps.—*Exchange Bank* vs. *Gilman*, 34 L. C. J. 120; *Denoncourt* vs. *Trahan*, 5 R. L. 687; *Quebec Bank* vs. *Sewell*, 17 L. C. R. 1; *Société de Construction* vs. *Banque Nationale*, 24 L. C. J. 226; *Baxter* vs. *Hallé*, 9 Q. L. R. 174; *Lepage* vs. *Brassard*, 6 Q. L. R. 194; *Falardeau* vs. *Smith*, 2 L. N. 162.

Cancellation. — *Delbar* vs. *Landa*, 22 L. C. J. 46; *Fausse* vs. *Brien*, 3 L. N. 213.

XXXIX. TO ABSENTEE.

A note to one who is absent and who (as it happens) is dead, is not void, and his executors may maintain action upon it. *Grant* vs. *Wilson*, K. B. 1814, 2 Rev. de Lég. 29.

XL. TRANSFER OF. (See RIGHTS OF THIRD HOLDERS.)

1. Action on by Transferrer.—E. & M. having been in co-partnership in the firm of Wm. M. & Co., and E. having subsequently entered into partnership with other parties under the firm name of "J. E. & Co.," by an agreement passed in July, 1855, M. agreed with J. E. & Co. to assume all the liabilities of Wm. M. & Co., to pay the sum due E. & Co., in four instalments, and to give security on condition that he should be allowed to cut timber on certain timber limits of E. & Co. He subsequently cut timber without giving security, and the timber was transferred to the firm of Symes & Co., which had made advances to him. M. paid E. & Co. the first instalment of the above-mentioned debt by his notes, one for £1,500, which E. & Co. paid away to a third party, and one for £800, which E. & Co. placed to the credit of M. & Co., E. & Co. having by an attachment before judgment seized the timber cut as in the possession of M., and having sued for the whole debt—*Held*, that E. & Co. having paid away the note for £1,500 to a third party could not sue for the debt for which it was given without producing the note, and also that E. & Co., having carried the note for £800 to the credit of Wm. M. & Co., could not withdraw it from that account without the consent of M. *Gibson* vs. *Moffatt & Young*, Q. B. 1866, 2 L. C. L. J. 60.

2. —— And *Held*, also, that the plaintiffs not having alleged the insolvency of M. in their declaration could not base their right to sue for the whole of the debt on such insolvency, and the allegation of his insolvency in their special answer could not avail to supply the deficiency in their declaration. *Ib.*

3. —— Neither could the right to sue for the whole of the debt be based on the alleged fraud of the defendant in transferring the timber to S. & Co., unless such fraud were alleged in the declaration, the allegation of fraud in the affidavit alone being insufficient. (*Ib.*)

4. After Maturity.—A note of hand was transferred after the time appointed for payment, and there was fraud proved in the transaction—*Held*, that on slight grounds the law would presume that the indorsee had knowledge of the fraud if it appear that he omitted to satisfy himself as to the validity of the note. *Hunt* vs. *Lee*, K. B. 1813, 2 Rev. Lég. 28.

5. —— The defendant made his promissory note in favor of another. The note was not paid or protested at maturity, but some time afterwards the payee indorsed it over to plaintiff in part payment of things purchased from him. In an action on the note, want of protest was raised by the defendant—*Held*, that the note might be transferred after maturity, but the maker could raise all the questions which might have arisen in the meantime between himself and the payee. *Duguay* vs. *Sénécal*, Ct. of Rev. 1865, 1 L. C. L. J. 26.

6. Insolvency of Maker.—Defendant was sued on a promissory note and pleaded that the note had been made by him in favour of a commercial firm since insolvent, that it had passed into the hands of the assignees of said firm, that it did not appear that the insolvent had ever legally recovered possession of it, and that the plaintiff had no interest, but was merely *prête-nom* for the creditors to whom it belonged. *Held*, that the defendant could not plead the rights of the creditors, but was bound to pay the amount of the note to the holder. *Lemay* vs. *Boissinot*, S. C. 1883, 10 Q. L. R. 90.

7. Negotiability.—Since the coming into force of the Bills of Exchange Act, 1890, a bill or note, which is made payable to a particular person, is negotiable unless it contains words prohibiting transfer or indicating an intention that it should not be transferable. *Ward* vs. *Quebec Bank*, Q. B. 1894, 3 Que. 122.

8. Non-Negotiable Note.—Art. 1570-1571 C. C.—Signification.—A non-negotiable note indorsed by payee in full, and transferred to a third party, may be collected by the latter in his own name from the maker, if signification of the transfer is duly made upon him. And such signification of transfer need not be in authentic form, but may be under private signature. *McCorkill* vs. *Barrabé*, C. R. 1885, M. L. R., 1 S. C. 319.

9. —— Indorsement in Blank.—A promissory note not made to payee *or order* cannot be transferred by indorsement in blank, and the holder of such note cannot recover on it from the maker. *Banque du Peuple* vs. *Ethier*, C. Ct. 1868, 20 R. L. 520. And see *Vandal* vs. *Douville*, S. C. 1890, 20 R. L. 305. *supra*.

10. Note for the Payment of Money under Art. 1573 C. C. and Art. 1574— A promissory note, given in payment of the price of an immoveable, and secured by hypothec on such immoveable, may be transferred without signification (C. C. 1573), and such transfer will include the hypothec as an accessory of the debt (C. C. 1574). *Quebec Bank* vs. *Bergeron*, Q. B. 1885, 11 Q. L. R. 368, 14 R. L. 170.

10a. —— The transferee of such note, after fruitless discussion of the maker and indorsers, may take an hypothecary action against the holder of the immovable property. (*Ib.*)

11. —— A *bon* to bearer for a sum of money payable when the signer shall have collected two notes put into his hands, can be transferred by delivery alone. *Lamoureux* vs. *Roy*, C. R. 1889, 18 R. L. 680.

12. Notarial Note—Indorsement in Blank.—In an action to recover $60.00, amount of a note or obligation passed before notaries—*Held*, that it could not be transferred by indorsement in blank though it might be by an indorsement in full. *Brunet* vs. *Lalonde*, C. C. 1866, 16 L. C. R. 347.

13. Of Note which is invalid. Art. 1573 C. Code.—Although a note may be invalid as depending on a condition, yet it can be transferred by indorsement if made to order or by delivery if made to bearer. But in such case the holder will have none of the privileges specially conferred by law on holders of valid promissory notes. *Duchaim* vs. *Maguire*, C. Ct. 1882, 8 Q. L. R. 295.

14. Property in.—The property in a promissory note to bearer or indorsed in blank can only be transferred by delivery to the transferee, and the plaintiff, never having had either actual or implied delivery of the note on which he seeks to recover, cannot be regarded as the owner and cannot recover thereon. *Compagnie de Moulins à Papier* vs. *Parkin*, C. R. 1893, 4 Que. 365.

15. Without Indorsement—Warrantor.—The holder of a promissory note payable to order has an action against the person who transferred the note to him, and who accidentally omitted to endorse it, to compel him to do so; but in a suit on a note by the holder against the maker, transferrer, legal proof of the transfer is sufficient, and a judgment ordering the transferrer to indorse the note would be superfluous. *Coutu* vs. *Rafferty*, 1891, M. L. R., 7 S. C. 146.

16. —— **Warranty—Laches.**—Where a note of a third party is transferred for valuable security, being given in payment of goods purchased, and the note is not indorsed by the transferrer, a warranty is implied that the maker is not insolvent to the knowledge of the transferrer. *Lewis* vs. *Jeffrey*, 1875, M. L. R., 7 Q. B. 141.

17. —— If it be proved that the maker of the note was insolvent to the knowledge of the transferrer, the party who received it is entitled to offer it back and claim the amount from the transferrer without asking for the rescission of the contract *in toto*. (*Ib.*)

18. —— Art. 1530 C. C. does not apply to such a case, and there being no time fixed by law for offering back such note, it is in the discretion of the Court to determine whether there was *laches*, and whether the transferrer was prejudiced by the delay. (*Ib.*)

BILLS OF LADING. (1)

See Affreightment.

BIRTH.

See Evidence.

A person has a right to bring an action to establish the date of his birth, although his *status* as the lawful issue of certain parents be admitted. *Lane* vs. *Campbell*, Q. B. 1863, 8 L. C. J. 68.

BOARD OF HEALTH. (2)

1. Local Board—Appointment—Conflict of Powers—Quo Warranto.—Where in default of action by the city council, the Lieutenant Governor in council appointed a local board of health for the city of Quebec, the city council could not legally thereafter appoint another local board of health for the said city. *Rinfret* vs. *Pope*, Q. B. 1886, 12 Q. L. R. 303, 14 R. L. 605.

A member of the board so afterwards appointed by the city council may be ousted on *quo warranto*, and such proceeding may be taken upon the complaint of any burgess or inhabitant of the said city, and not necessarily by the Attorney-General. But, *Held*, that in the present case, the appellant, in accepting such charge as a gratuitous one and having acted in good faith, and having done nothing preju-

(1) See an Act relating to Bills of Lading, 1889 (D.), ch. 30.

(2) R. S. Q. Art. 3054, Provincial Board of Health Amended, 54 Vic., ch. 27, 57 Vic., ch. 31; R. S. Q. Art. 3069, Central Board of Health; R. S. Q. Art. 3073, Local Boards of Health.

dicial to the interests of the respondent or of the public, the judgment of the Court below, condemning him to a fine of $100, should be reversed. *Rintret* vs. *Pope*, Q. B. 1886, 12 Q. L. R. 103, 14 R. L. 605.

2. **Powers of Provinces relating to Public Health.**—All matters concerning public health, with the exception of quarantine stations and marine hospitals, are within the exclusive control of Provincial and not Dominion legislation. *Ib.* and *Municipality of Mile End* vs. *City of Montreal*, S. C. 1885, 8 L. N. 337, confirmed in Review, M. L. R., 2 S. C. 218.

3. **Liability of City of Montreal.**—An action will not lie against the City of Montreal for acts done by the central and local boards of health established under the authority of the provincial legislature. *Municipality of St. Louis et Mile End* vs. *City of Montreal*, C. R. 1885, M. L. R., 2 S. C. 218.

BOARDING HOUSE. (1)

See also Hotel-Keepers.

1. The lessor of a furnished room, with common use of the kitchen stove, has a *lien* or right of retention on the baggage and furniture of the lessee for the price of the rent. *Picard* vs. *Gingue*, Mag. Ct. 1889, 12 L. N. 148; *Fleury* vs. *St. Hilaire*, C. Ct. 1888, 11 L. N. 171; *Boyer* vs. *Ross*, 14 May, 1886. Confirmed in Review. And, *held* thus, when the lodger cooks her meals in her room. *Lalonde* vs. *McGloin*, C. Ct. 1880, 3 L. N. 94.

2. A boarding-house keeper can, after three months, sell his boarder's effects for board owing by the latter, and such right exists independently of all other legal recourse. *Moore* vs. *Wallace*, C. Ct. 1890, 13 L. N. 314.

3. The keeper of a boarding-house has a *lien* for the amount due for board on a piano brought into the house by a lodger as part of his effects, and used by him during a residence there of four years in the exercise of his calling as a teacher of music, and this *lien* may be enforced even after removal of the piano, as against the owner and lessor thereof, of whose ownership the keeper of the boarding-house had not received any notice. *Foisy* vs. *Calvin*, S. C. 1894, 5 Que. 333.

BOARD OF REVISORS.

See Municipal Corporations—Elections.

(1) 1816a C. Code, 39 Viet. (Que.), ch. 23.

BOARD OF TRADE. (1)

Although the Quebec Board of Trade cannot legally fix the tariff of charges for placing timber in booms at Quebec, such tariff will, nevertheless, be presumed legitimate and reasonable. *Stevenson* vs. *Burstall*, Q. B. 1877, 8 R. L. 190.

BONDS.

See also Appeal—Security in.
" Capias.
" Criminal Law.
" Coupons.
" Suretyship.

Stolen Railroad Bonds—Where held to be Negotiable Instruments and Good in Hands of "bona fide" Holder for Value—English Case. *Venables* vs. *Baring Bros. & Co.*, Chy. Div. 1892. Reported 15 L. N. 231.

Bond to keep the Peace—Subsequent Conviction of Person under Bond—Action against Bondsmen—Defence.—*Held*, the fact that a person under bond to keep the peace has been convicted subsequently of attempt to commit an assault, does not debar the bondsmen from pleading and proving, in an action against them on the bond, that the acts of the person so convicted did not amount to a breach of the bond. The conviction, while proof of the fact that the person was found guilty, is not *chose jugée* as to the bondsmen, who were not parties to the cause. *Casgrain* vs. *Leblanc*, S. C. 1893, 4 Que. 350.

Action on—Affidavit. (2)—In action on a bond where it is signed by an attorney, and the authority of such attorney is impugned by the plea, such plea must be accompanied by affidavit, under the requirements of the 87th section of the Judicature Act of 1857. *Attorney General* vs. *McPherson*, C. C. 1858, 2 L. C. J. 121, 6 R. J. R. Q. 413.

Contra — *Attorney General* vs. *McPherson*, C. Ct. 1858, 2 L. C. J. 182; 6 R. J. R. Q. 414.

Conflict of Laws.—Bond in favor of a foreign Insurance Company, if signed in this province, is to be interpreted according to the law of this province. *Vennor* vs. *The Life Association of Scotland*, Q. B. 1886, 30 L. C. J. 303.

(1) See an Act authorizing the Montreal Board of Trade to hold immoveable property and to issue debentures, and confirming a deed hypothecating their property. 55-56 Vic. (Que.), Ch. 83.
See also Act respecting the incorporation of Boards of Trade, ch. 130 R. S. C., amended 58-59 Vic. (D.), ch. 17.

(2) See Arts. 145 C.P.C. and 1223 C. Code.

Foreign.—A bond given for salvage in an Admiralty court in Nova Scotia can be recovered in Canada. *Moore* vs. *Mure*, K. B. 1818, 2 Rev. de Lég. 207 and 1 Rev. de Lég. 353.

Detention of—Condemnation in event of failure to deliver.—Upon the facts of the case, the Court was of opinion (confirming the judgment of the Court below) that the deefndant (appellant) was bound to return certain railway bonds which had been placed in his hands by the plaintiff's assignor. —*Held*, reforming the judgment of the Court below (6 L. N. 220), that the condemnation against the defendant, in default of returning the bonds, should be to pay the actual value thereof as established in evidence and not the par or nominal value. *Senécal* vs. *Hatton*, 1884, M. L. R., 1 Q. B. 112, affirmed by the Privy Council, 10 L. N. 50.

BOOMAGE.

1. Estopped by Conduct. — F. McC. brought an action against G. B. for $4,464, as due him for charges which he was authorized to collect under 36 Vic., ch. 81 (Que.), for the use by G. B. of certain booms in the Nicolet River during the years 1887 and 1888. G. B. pleaded that under certain contracts entered into between F. McC. and G. B. and his *auteurs*, and the interpretation put upon them by F. McC., the repairs to the booms were to be and were, in fact, made by him, and that in consideration thereof he was to be allowed to pass his logs free; and also pleaded compensation of a sum of $9,620 for use by F. McC. of other booms, and repairs made by G. B. on F. McC.'s booms, and which by law he was bound to make.

Held,—reversing the judgment of the Court below, that there was evidence that F. McC. had led G. B. to believe that under the contracts he was to have the use of the booms free in consideration for the repairs made by him to piers, etc., and that F. McC. was estopped by conduct from claiming the dues he might otherwise have been authorized to collect.

Held, further, that even if F. McC.'s right of action was authorized by the Statute, the amount claimed was fully compensated for by the amount expended in repairs for him by B. (1) *Ball* vs. *McCaffrey*, Supreme Ct. 18: 20 Can. S. C. R. 319. Reversing Q. B. and Superior Ct. 34 L. C. J. 91 (S. C.), and see *O'Shaughnessey* vs. *Ball*, Supreme Ct. 1892, 21 Can. S. C. R. 415, where the facts were substantially the same.

2. Constitutional Law.—The Statute 36 Vic., ch. 81 (1), is not *ultra vires* of the provincial legislature. *McCaffrey* vs. *Ball*, S. C. 1891, 35 L. C. J. 38.

3. But while a provincial legislature can incorporate boom companies, it cannot give them the power to obstruct a tidal, navigable river. *Queddy River Boom Driving Co.* vs. *Davidson*, Supreme Ct. 1883, 10 Can. S. C. R. 222 (Case from New Brunswick).

4. Rights of Parties.—Where the proprietor of a boom for the purpose of his own business extends it across a navigable river in the face of a previous protest from the owner of logs up the river that he would require a clear passage in the spring to let his logs down, with the result that the delay of the logs in the boom caused to plaintiff a large loss, the defendant will be liable for such loss, but will be allowed to compensate against it any benefit which plaintiff may have received by the booming of his logs (in this case the concentration of plaintiff's logs in a pocket which facilitated their construction into a raft). *Tourville* vs. *Ritchie*, Q. B. 1889, 34 L. C. J. 243 and 312.

(1) See Queddy River Driving Boom Co. vs. Davidson, 10 Can. S. C. R. 222.

BORNAGE.

See Boundaries.

BOUNDARIES.

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I. ACTION TO DETERMINE BOUNDARIES. (See also Boundary—when necessary.)

1. **Compromise.**—If after the institution of an action to establish a boundary, the parties arrive at a compromise and agree to an amicable determination of the boundary, no further proceedings can be made in the case. *McFaul* vs. *McFaul*, S. C. 1864, 12 R. L. 597.

2. **Compulsion.**—The defendant in an action to establish a boundary cannot be condemned to compel his neighbor to enter into such proceedings with him, and conclusions to that effect will be held bad on demurrer. *Fradet* vs. *Labrecque*, S. C. 1858, 8 L. C. R. 218, 6 R. J. R. Q. 214. (See Art. 504 C. Code.)

3. **Misdescription.**—Where in an action in boundary it is alleged that the defendant is a neighbour on a certain side, the action will be maintained although it is proved that the neighbour adjoins another side of plaintiff's land. *Buffard* vs. *Nadeau*, Q. B. 1876, 8 R. L. 321.

4. **Notice of Motion to homologate Report of Surveyor.**—In an action in boundary if the defendant has appeared, he is entitled to notice of motion to have the expert's report homologated, as well as of the motion to homologate the *procès-verbal* of the surveyor who made the boundary. *Blackburn* vs. *Blackburn*, Q. B. 1885, 19 R. L. 481, 11 Q. L. R. 305.

5. **Production of Titles.** Art. 945 C. C. P.—The person bringing an action in boundary must allege and produce his titles, as the fixing of bounds is ordered in conformity with the rights and titles of the parties. *Dufaux* vs. *Lamontagne*, S. C. 1893, 4 Que. 126.

6. **Right to.** Art. 504.—An action in boundary cannot be maintained if the lands of the plaintiff and defendant are separated by a highway. *Blanchet* vs. *Jobin* and *Thériault* vs. *Leclerc*, K. B. 1817, 1 Rev. de Lég. 354.

7. —— A *mitoyen* wall erected by agreement by two proprietors of "djoining lots of land is a bar to an action in boundary instituted by either of them. *Fortier* vs. *Rhinhart*, K. B. 1817, 1 Rev. de Lég. 354.

8. —— Art. 504 C. C.—If the declaration shows that the estates of the plaintiff and defendant are non-contiguous, the action must be dismissed. *Thériault* vs. *Leclerc*, K. B. 1817, 1 R. de L. 354.

9. —— In order to bring and maintain an action in boundary, it is necessary to be in possession under claim of ownership, or at least of civil possession of the body of the property for which a boundary is sought. *Lovell* vs. *McAndrew*, S. C. 1887, 11 L. N. 362; *Mann* vs. *Hogan*, Q. B. 1881, 8 Q. L. R. 1.

10. **Witness.**—Where the case has been referred to a surveyor-expert before trial with power to the surveyor to hear witnesses, the parties to the suit will not be allowed without the Court's permission to hear witnesses in Court on the same matters which have already been heard by the surveyor-expert. *Plante* vs. *Legendre*, S. C. 1880, 6 Q. L. R. 201.

II. BOUNDARIES.

1. **Agreement as to.**—A memorandum in the following terms will not be considered as a deed of exchange or as affecting the original title of the property: "Whereas, it is difficult building a division line fence between Riley Wyman and Charles G. Libby, both of Barnston, in the County of Stanstead, in the Province of Canada, Farmers: we, the undersigned, Riley Wyman & Charles G. Libby, have agreed that the line between them on Lot No. 2 in the 3rd Range of Barnston aforesaid shall commence on the west side of the river, at the

Discourse by R. A. Ramsay Q. C. Treaties affecting the boundaries and fisheries of Canada, 8 L. N. at pp. 84 and 91.

division line between Hugh Odbert and the said Charles G. Libby, about 12½ rods from the river at low water mark, running a little east of north-east to a poplar tree on the brink of the river, thirteen rods, thence across the river to the east side, thence down the river far enough from the river to build a fence to be safe, to a small spruce tree, spotted, and with a pile of stones, thence northwest 15 rods to a spotted birch, thence about north-west 13 rods to a spruce tree on the bank of the upper end of the mill-pond, thence on said bank to the north end of the said lot, the said line to be established as a division line of said lot between the parties. That, therefore, either party is entitled to demand the establishment of a boundary, and in case of its being refused by the other party the costs of the suit, if successful, will be borne by the party refusing to bound. *Libby* vs. *Wyman*, Montreal, Q. B., March, 1875.

2. Blazed Trees.—A line indicated by blazed trees will not be a sufficient reason for laying down the boundary line between the parties otherwise than in accordance with the title deeds of the parties. *Grenier* vs. *Giroux*, Que., Q. B., 6 Sept., 1877.

3. Crown Lands. R. S. Q. 4153, 4154, 4155.—Where there is a dispute as to the boundary line between two lots granted by patents from the Crown, and it has been found impossible to identify the original line, but two certain points have been recorded in the Crown Lands Department, the proper course is to run a straight line between the two certain points. *Bell's Asbestos Co.* vs. *The Johnson Co.*, Supreme Ct. 1894, 23 Can. S. C. R. 225.

4. Ditches.—*Semble:* That the owners of contiguous lands can accept a boundary ditch as a legal boundary. *Nadeau* vs. *Cheval dit St. Jacques*, S. C. 1884, 13 R. L. 321.

5. Evidence of Acceptance.—The acceptance of division line between two properties cannot be proved by parol testimony. *Nadeau* vs. *St. Jacques*, S. C. 1884, 13 R. L. 321.

6. —— Unless there is a commencement of proof in writing. *Davelny* vs. *Vigneau*, Q. B. 1890, 16 Q. L. R. 261.

6a. Estoppel.—Option of locating Boundary.—Lease of Mining Rights.—Where the parties from whom the appellants derived their title had purchased certain mining lots described in the deed by superficies and by metes and bounds "with power to change the direction of the lines and boundaries according to the course of the quartz veins, but without extending the superficies."—*Held*, that if appellant's *auteurs* exercised their power to change the course of said lines and boundaries, and drew up a plan and placed boundaries, in consequence the surveyor-experts appointed by the Court to define such lots must follow the lines so laid down. *McArthur* vs. *Brown*, Q. B. 1887, 13 Q. L. R. 168. Affirmed by S. Ct. 1888, 17 S. C. R. 61.

7. Fences.—In an action in boundary, where it was proved that no trace of a previous establishment of bounds remained, the land being only divided by a fence—*Held*, that the action was properly brought. *Lanouette* vs. *Jackson*, Q. B. 1857, 7 L. C. R. 362, 5 R. J. R. Q. 300.

7a. The C. S. L. C., cap. 26, sec. 32, art. 8, with respect to boundaries between neighbours in country places and the rights and obligations of such, is still in force. *Malboin* vs. *Pelland*, C. Ct. 1874, 5 R. L. 279.

7b. Notwithstanding section 53 of the Act incorporating the town of Iberville (22 Vic., c. 64), the inspector is not a judge as to the bounds between the road and the adjoining proprietors. There must be a formal *bornage*. *Ex parte Lanier*, 6 R. L. 350.

7c. Where part of a property is sold under condition that the purchaser shall maintain the line fence between the property sold and the neighbouring property, the maintenance of which was formerly wholly at the charge of the vendor, does not entitle the owner of the neighbouring property, whose position is not changed, to call upon the vendor to maintain one half of the remainder of the fence dividing their properties. *Handfield* vs. *Bienvenu*. S. C. 1889, 17 R. L. 560.

7d. A road not fenced at either side and closed at each end by gates, is not a public road, and the proprietor of the land through which this road passes can oblige the adjoining proprietor to construct his share of the fencing along this strip of land. *Neil* vs. *Noonan*, Q. B. 1888, 19 R. L. 334.

8. How determined—Deed—Interpretation of. ART. 1501 C. C.—A piece of land containing about 140 or 150 acres was sold in two lots, the eastern portion being described in the deed as containing 90 acres more or less, and the western portion about 59 acres, but the descriptions in the deed did not agree as to the way the line of boundary was to run. An action in boundary was brought, and a

survey was made giving 61 acres to the owner of the latter portion and 82 to the former. The report of the survey was homologated thereupon by the Superior Court, and on appeal to the Queen's Bench the judgment of the Superior Court was confirmed, but both judgments were reversed on appeal to Privy Council, it being held that the Canadian Courts were wrong in their construction of the deeds and evidence as to the boundaries, the rule being that in a deed conveying land where the description of the land intended to be conveyed is so ambiguously expressed that it is very doubtful what were intended to be the boundaries of the land, and the language of the description admits equally of two different constructions, the one making the quantity conveyed agree with the quantity mentioned on the deed, and the other making the quantity altogether different, the former construction must prevail. *Herrick* vs. *Sirby*, P. C. 1867, 17 L. C. R. 146, 4 Moore P. C. (N. S.) 349, 11 L. C. J. 129.

9. —— —— And *Held*, also, that the case differed from a conveyance of a certain ascertained piece of land correctly described by its boundaries on all sides, with a statement that it contained so many acres or thereabouts, when, if the quantity was incorrectly stated, it did not affect the transaction. (*Ib.*)

10. —— —— In an action in boundary between two neighboring proprietors, if one of the parties has more land than his deed calls for and the other less, it will be taken as a proof of the necessity of a change of boundary, and in order to establish this the judge may and should refer to the official plans and books of reference; but where one party has his proper quantity of land according to his deed and the other has not, he cannot object to the boundary line between them unless he brings the proprietor on the other side into the cause as an interested party. *Boulet* vs. *Bourdoin*, S. C. 1882, 12 R. L. 121.

11. —— —— R. sold to I., the respondent, in 1857, lot 104 of the 8th concession of the parish of Ste. Brigitte, district of Iberville, as "containing 3 arpents of frontage, by 30 arpents in depth, more or less, bounded in front by the 7th concession, in rear by the lands of the 9th concession, on one side by the land of W. McG., and on the other side by M. D." McG., the appellant's author, bought from S., in 1854, five lots, numbered 99, 100, 101, 102, 103, in the same concession. In 1877, after 20 years of peaceful possession by defendant, he brought a petitory action, and later, an action in boundary, claiming the respondent's lot, alleging it was his own lot (103). The Superior Court of Iberville held that the lot possessed by L. was 103. The Court of Appeal reversed the judgment, holding that L. was in possession of 104, and even if lot possessed by him was wrongly described as lot 104, it was the lot intended to be sold, and sold by the deed of 18th March, 1857, under an accurate description by metes and bounds, and that L. acquired the same in good faith under a translatory title, and had before the commencement of the action an effective possession thereof during ten years. The judgment of the Court of Appeal was confirmed by the Privy Council —*Held*, that the lot conveyed to the respondent was specifically described, not with reference to numbers, but with reference to the actual state and position of the surrounding lots. *Dunn* vs. *Lareau*, P. C. 1888, 32 L. C. J. 227.

12. —— —— The respondent's possession, which was in perfect good faith, must be ascribed to his title, and the lapse of ten years had perfected his right in competition with the appellant (2251 C. C.). (*Ib.*)

12*a*. —— —— Where establishment of boundaries shows an excess of land over and above the quantities allotted to the parties according to their titles, the party who is in legal possession of the surplus should be confirmed in his possession thereof according to the maxim *in pari causâ melior est causa possidentis*. *Marcoux* vs. *Bélanger*, S. C. 1884, 5 Que. 538.

13. —— —— Where an estate is described in a deed as having an approximate extent, but as being contained within precise and clearly defined limits, the extent of the estate must be determined according to such limits. *Tétrault* vs. *Paquette*, S. C. 1891, 21 R. L. 62.

14. —— —— In the absence of title derived from the common proprietor of the now separated lands, the boundary will be ascertained from the possession of the parties, and it is for the party who claims a boundary other than that indicated by the possession, to establish his right by sufficient titles. (*Ib.*)

15. —— Fences and Ditches.—An action in boundary, where the plaintiff's title showed a deficiency in superficies and the defendant's title showed a uniform width throughout the whole depth of his property, and where line fences and ditches were proved to have existed, to a certain extent, between the two properties,—the division line should

be run in the direction of the said fences and ditches, but so as in any case to give the defendant his full breadth and depth, according to his title. *Lambert* vs. *Bertraud*, S. C. 1858, 3 L. C. J. 115.

16. —— **Posts.**—On the contestation of an opposition of the appellant, as representing the estate McTavish, and the respondent, as representing the corporation of Portuguese Jews of Montreal, from whom the land had been purchased some time previously to be used as a cemetery—*Held*, confirming the judgment of the court below, that, as there were no fences, the posts were still available as landmarks, and the fact of the fences having disappear ' gave the appellant no title to the property. *Taylor* vs. *Buchanan*, Q. B. 1865, 1 L. C. L. J. 58.

17. —— —— The placing by a surveyor of two landmarks with *procès verbal*, on a line to indicate its direction, indicates permanently the boundary line dividing the properties, and this not only for the part where the landmarks are placed, but for the whole extent of the contiguous properties, and, unless a contrary possession is proved, the possession of the land from landmark to landmark implies the possession of the whole length of the lot, and this possession will serve as a basis for prescription. *Cormier* vs. *Leblanc*, Q. B. 1888, 14 Q. L. R. 247, 16 R. L. 288.

18. —— **Prescription.**—In an action in boundary the defendant may claim and prove title by prescription and possession apart from that conferred by his title, but he cannot claim as against his title deed. *Thériault* vs. *Leclerc*, K. B. 1820, 1 Rev. de Lég. 354.

19. —— —— Evidence of an existing boundary, without further testimony, affords no proof of title of any description. *Thibault* vs. *Rancourt*, K. B. 1820, 1 Rev. de Lég. 354.

20. —— —— Boundaries will be established according to the existing fences where they have existed for a period sufficient to acquire by prescription the land on which they are constructed. *Ricard* vs. *Fabrique de Ste. Jeanne de Chantel*, Q. B. 1868, 1 R. L. 713.

21. —— —— By law, a peaceable possession, as proprietor, for thirty years, prevails over the limits indicated by title, or by measurement, and also over posts or boundary marks between lots and other tracts of land, and confers ownership of the land so possessed upon the possessor. *Cosgrove* vs. *Maguru*, Q. B. 1868, 10 L. N. 162.

22. —— —— In an action to establish a boundary, the existence of a fence between the two properties for upwards of 30 years before action brought, entitles the defendant to claim such fence as the legal boundary or division line between the properties. And although such fence be so constructed as to form an irregular encroachment on the plaintiff's land to the depth of about 7 feet by about 48 feet only in length along a portion of the line of division between the properties, and although the title deed of the defendant and the title deeds of *all* his predecessors show the line of division between the properties to be a *straight* line *throughout its entire length*, and are *silent* as to the *encroachment*, and, although defendant's possession only dates back a little over 4 years, he nevertheless can avail himself of the possession up to the fence, of all those from whom he derives title to the property described in the deeds. And verbal evidence, to the effect that the fence had been upwards of 30 years in the same line as it was at the time of the action, is sufficient, although it be proved that such fence was *entirely destroyed by fire, and remained so* destroyed *for upwards of a year*, and none of the witnesses testify to having seen a vestige of the old fence after the fire, or to having been present when the new fence was made. (1) *Eglaugh* vs. *The Society of the Montreal General Hospital*, Q. B. 1868, 12 L. C. J. 39, 4 L. C. L. J. 61.

23. —— —— In an action *en bornage*, where a division fence is proved to have existed for upwards of 30 years between the contiguous properties, and one of the parties has enjoyed his possession "franchement, publiquement et sans équitation" for that period, such party is entitled to demand that the boundary be drawn according to this line. (1) *Patenaude* vs. *Charron*, S. C. 1870, 17 L. C. J. 85, 2 R. L. 624.

24. —— —— **Contra.** (1) *Curé et Marguilliers de l'Ile Perrot* vs. *Picard*, S. C., 9 L. C. J. 99 (40 years); *Macfarlane* vs. *Thayer*, S. C. 1858, 2 L. C. J. 204 (10 years); *Devoyeau* vs. *Watson*, Q. B. 1857, 1 L. C. J. 137 (20 years).

25. —— **Surveyor's Line—Township Line.**—The plaintiff's title gave him a lot of land in the township of Upton and the defendant's title gave him one in the contiguous township of Grantham. Both titles were posterior to the verification of the township line by a government surveyor and to a statute confirming the line surveyed and

(1) See Art. 2242 C. C.

marked out by him, and in each title the rear boundary (where the lots adjoined) was stated to be the township line. *Held*, that in the absence of any right acquired by either of the parties by prescription beyond the township line, that line must be their boundary without regard to measurement given in the titles. *Duguay* vs. *Vincent*, Q. B. 1893, 2 Que. 407.

26. Injuring or removing Boundaries. CRIM. CODE, ART. 505.—"Every one is guilty of an indictable offence and liable to seven years' imprisonment, who *wilfully* pulls down, defaces, alters or removes any mound, land-mark, post or monument *lawfully* erected, planted or placed to mark or determine the boundaries of any province, county, city, town, township, parish or other municipal division."

27. —— ART. 506.—"Every one is guilty of an indictable offence and liable to five years' imprisonment, who *wilfully* defaces, alters or removes any mound, land-mark, post or monument *lawfully* placed by any land surveyor to mark any limit, boundary or angle of any concession, range, lot or parcel of land."

(2) "It is not an offence for any land surveyor in his operations to take up such posts or other boundary marks, when necessary, if he carefully replaces them, as they were before."

28. —— The misdemeanor mentioned in section 107 of Chap. 77 of C. S. C. can only be committed in relation to boundaries or landmarks which have been legally placed by a land surveyor with all the formalities required by said statute, to mark the limit or line between two adjoining lots of land. *Reg.* vs. *Austin*, Q. B. 1885, 11 Q. L. R. 76.

29. Landmarks. 45 VIC., CH. 16, SEC. 57.—The landmarks recognized by law as determining the boundaries between neighbouring properties must be of stone, and the law will recognize no others for landmarks in the country. *Nadeau* vs. *St. Jacques*, S. C. 1384, 13 R. L. 321.

30. New Boundary.—Where a property has already been bounded at the common expense and by consent of the parties who have signed the *procès-verbal*, one of them cannot demand a new bounding so long as the first has not been set aside for insufficiency. *Nadeau* vs. *St. Jacques*, C. R. 1884, M. L. R., 1 S. C. 302, 13 R. L. 322.

31. Powers of Court.—An interlocutory judgment is irregular where it orders the placing of bounds between the properties of the parties, where they have not been heard upon the report of the surveyor's preliminary operations, and where it does not indicate where the bounds should be placed. *Brown* vs. *Perkins*, Q. B. 1880, 6 Q. R. L. 143, 10 R. L. 428.

32. —— The proceedings of a surveyor in obedience to such a judgment cannot be rendered valid even by the subsequent homologation of the *procès-verbal* of survey. (*Ib.*)

33. —— The court cannot order the placing of bounds where the judgment does not designate the division line whereon the bounds are to be placed. *Loiselle* vs. *Paradis*, Q. B. 1881, 1 Dorion's Rep. 264; *Desroyeaux* vs. *Tarte*, Q. B. 1890, 19 R. L. 407.

34. —— In such case the Court in appeal will order a new survey and the production of extracts from the official plans and books of reference and other titles such as extracts from the books of the registration office concerning the lands in question whereon to base the new boundary, and this although there were two previous surveys. *Loiselle* vs. *Paradis*, Q. B. 1881, 1 Dorion's Rep. 264.

35. —— **To refer to Surveyor.** 942 C. C. P.—In an action in boundary where the court cannot correctly know the limits of the land of plaintiff and defendant, according to their titles and possession from the evidence of record, it may order a plan to be made by a surveyor, showing the pretensions of the parties. *Moineau* vs. *Corbeille*, S. C. 1870, 14 L. C. J. 236.

36. —— The appointment of a surveyor to visit the premises and indicate the line of separation between the parties, is a preliminary operation that must precede the placing of bounds. *Brown* vs. *Perkins*, Q. B. 1880, 6 Q. L. R. 143.

37. —— In an action in boundary the court ordered a surveyor to visit the place to establish whether, as pretended by defendant, a public highway intervened between his land and that of plaintiff, and if not, to make a report of the state of the premises to the court. Leave to appeal was applied for on the ground that the court had no right to refer the case to a surveyor, for that was to delegate its authority, and if the surveyor was to be considered an expert, three should have been named instead of one. Leave to appeal refused. *L'Ainé* vs. *Hamel*, Q. B. 1883, 6 L. N. 154.

38. —— **With regard to Boundaries of Property in another Province.**—In an action of damages for trespass and for cutting timber, etc., on the property of the

plaintiff, the question turned upon the boundary line, the property of the one being in Ontario and the other in Quebec. The court ordered an enquiry by experts to establish whether the timber alleged to have been cut was so cut on one side or other of the line—*Held*, reversing this judgment, that the court had no power to name experts for the purpose mentioned, the line to be established being in the province of Ontario. *Skead* vs. *McDonnell*, Q. B. 1872, 3 R. C. 42.

39. Tutor.—A tutor cannot consent to an amicable establishment of boundaries, and in an action in boundary against a tutor, the costs both of the action and the bounding will be divided evenly between the parties. *Parent* vs. *Parent*, Q. B. 1883, 21 R. L. 214.

40. Uncertain Bounds—Claim for Trees cut—Evidence.—Where persons are occupying lands which have never been marked off by a regular survey, and one of them, instead of bringing an action in boundary to settle the limits of his property, sues a neighbor for the value of trees alleged to have been cut by him upon plaintiff's land, it is incumbent on the plaintiff to make it clear by positive testimony that the trees were in fact cut upon his land; and if, upon the reports of surveyors, uncertainty exists as to the limits of the respective properties, the doubt must be interpreted against the plaintiff. In the present case, moreover, the weight of evidence was in favor of the defendant. *Milliken* vs. *Bourget*, Q. B. 1889, M. L. R., 5 Q. B. 300 and see *infra* No. VII.

III. COSTS OF ACTION.

1. In an action in boundary when defendant pleads that he has been always ready to bound, and prays *acte* of his willingness so to do, but also prays *that plaintiff's action may be dismissed with costs*, defendant must pay the costs of the suit, although the costs of the bounding are divided. *Dansereau* vs. *Privé*, S. C. 1857, 1 L. C. J. 283.

2. When defendant pleads his willingness to bound, and prays *acte* thereof, and the action has been brought without previous notification, the plaintiff will be condemned to pay the costs of his action. *Slack* vs. *Short*, Q. B. 1857, 2 L. C. J. 81. (Judges in appeal evenly divided in opinion.)

3. Where the defendant prays for the dismissal of the action on offering to re-establish the old boundaries, he will be condemned in costs. *Thibault* vs. *Larallée*, S. C. 1874, 6 R. L. 80.

4. In an action in boundary if the defendant deny the plaintiff's right of action, he must be condemned to pay costs. *Weymess* vs. *Cook*, Q. B. 1852, 2 L. C. R. 486, 3 R. J. R. Q. 329; *Grenier* vs. *Giroux*, Que., 8 Sept., 1877, Q. B.; *Bouffard* vs. *Nadeau*, Q. B. 1876, 8 R. L. 321; *Libby* vs. *Wyman*, Montreal, March, 1875, Q. B.

5. Where an action in boundary is brought without previous demand with a claim for damages joined thereto, of which no proof is made, the plaintiff will be condemned to pay the costs of the suit. *Rochon* vs. *Côté*, S. C. 1877, 21 L. C. J. 273.

6. Costs of action in boundary should be borne exclusively by the losing party, even where he did not refuse to establish bounds and did not plead to the action. Only the costs of the establishment of the boundaries and of the expert enquiry necessary to determine such boundaries can be equally divided between the parties. *Roy* vs. *Gagnon*, C. R. 1881, 7 Q. L. R. 207.

7. The costs of an uncontested action in boundary should be divided and not paid by the defendant. (1) *Loiselle* vs. *Paradis*, Q. B. 1881, 1 Dorion's Rep. 264.

8. Costs of an action in boundary should be borne exclusively by the party who refuses to consent to an amicable bounding, or who renders such settlement impossible by pretensions which the judgment rejects. *Bélanger* vs. *Giroux*, S. C. 1883, 9 Q. L. R. 249; *Burland* vs. *Macdonald*, Q. B., Sept., 1875, Ram. Dig. 176.

9. In an action in boundary with demand of damages, which were not granted, the costs of the action (which was partly *ex parte*) must be borne by the defendant when, upon a demand for an amicable bounding, he has unnecessarily delayed to do so. *Thornton* vs. *Trudel*, Q. B. 1886, 14 R. L. 286, 30 L. C. J. 202.

10. Where in an action in boundary it is proved that the parties could not agree as to the boundary between their properties, and that in the interests of both it was necessary that one of them should take an action in boundary, the costs of such action should be considered as made in the interest of both parties, and be equally divided between them.

(1) This is *obiter dictum* as to costs in Superior Court as judgment on them was reserved. See remarks of Casault, J., in *Bélanger* vs. *Giroux*, 9 Q. L. R. at p. 257.

Cormier vs. *Leblanc*, Q. B. 1888, 14 Q. R. L. 247, 16 R. L. 288.

11 And in such action when the defendant denies all the allegations of plaintiff's declaration, and the plaintiff denies all the allegations of defendant's pleas, and the court orders proceedings tending to the establishment of a boundary, each party must pay his own costs. *Patenaude* vs. *Charron*, S. C. 1870, 17 L. C. J. 85.

12. Where an action in boundary is brought on insufficient grounds, the plaintiff will be condemned to pay all the costs of the action, but the costs of the fixing of the boundary will be equally divided between the parties. (1) *Nadeau* vs. *Cheval dit St. Jacques*, C. R. 1884, 13 R. L. at pp. 329-332 and M. L. R., 1 S. C. 302; *Cosgrove* vs. *Maguru*, S. C. 1886, 10 L. N. 162.

(The latter case reformed in Review, each party being declared liable for the costs in Superior Court; defendant liable for costs in Review. See 16 R. L. at p. 291 note.)

13. Under Art. 501 C. C., not only the costs of settling boundaries should be common to the parties, but also the costs of the suit when it is not contested. Only in case of contestation are the costs of the suit in the discretion of the court. *Desroyaux* vs. *Tarte*, Q. B. 1890, M. L. R., 6 Q. B. 177, 19 R. L. 407.

14. Where the plaintiff in an action in boundary bases his action on exaggerated claims as to the extent of land, he must pay the costs of contestation if the defendant, whose pleas are maintained, declares his willingness to have a boundary fixed in accordance with the title deed of both parties, and asks the dismissal of the action as to the surplus. *Tétrault* vs. *Paquette dit Lavallée*, S. C. 1891, 21 R. L. 62.

IV. NATURE OF. (2)

A demand for a legal establishment of boundaries is the demand for an execution of the obligation resulting from the legal servitude of boundary, and does not give rise to an action in warranty. *Darelay* vs. *Vigneau*, Q. B. 1890, 16 Q. L. R. 261.

The establishment of boundaries is merely the delimitation of adjoining properties, and the apparent boundary between such properties where changed by a legal establishment of boundaries subsequent to the sale thereof, cannot give rise to an action of damages except where such boundary has been guaranteed as to its correctness, or where there has been a guarantee as to the contents of the immoveable sold. (*Ib.*)

(1) On appeal to the Q. B. on question of costs, the court while believing that the judgment of the Ct. of Rev. was erroneous in this respect, yet refused to allow the appeal, as such matters are discretionary with the judge below, 15 R. L. 232.

(2) See also 2 Themis, p. 108, *O'Hear* vs. *Lataille*, Loranger, J.

V. SURVEYOR'S DUTIES. (See also under title "EXPERTISE.")

1. In a *procès-verbal* of survey in a city, it is not necessary to mention the true magnetic course of the lines laid out by the surveyor, and the day, the hour and place where the instrument's deviation was last determined by him. *Evans* vs. *Lamb*, Q. B. 1889, 18 R. L. 319.

2. A surveyor in laying down the boundary line between properties in an action in boundary should proceed with the consent of the parties, and observe the formalities required by law, where the judgment omits to define where the boundary should be laid and where there has been no previous report determining where such boundary should be made. *Brown* vs. *Perkins*, Q. B. 1886, 10 R. L. 427.

3. A surveyor appointed by the court before the boundary line is settled is only an expert whose office it is to report on the locality and indicate where, in his opinion, the boundary line should be drawn, for the guidance of the court in settling the boundaries. *Desroyaux* vs. *Tarte*, Q. B. 1890, 6 M. L. R. 177.

4. A surveyor appointed by the Court to carry out the definite instructions contained in the judgment is not bound to be sworn anew, but may proceed under his oath of office. *Forest* vs. *Heathers*, S. C. 1881, 11 R. L. 7.

5. **Notice.**—Return of service of surveyor's notice to the parties, stating that the service was made between one and four o'clock of the afternoon, is sufficient, and sufficiently describes the hour of service *Forest* vs. *Heather*, 11 R. L. 7.

VI. SURVEYOR'S REPORTS.

1. **Formalities.**—It is not necessary that the surveyor should state in his report that the parties to the action have signed it, or have been requested to do so. *Bouffard* vs. *Nadeau*, Q. B. 1876, 8 R. L. 321.

2. —— The omission to affix to the report of a surveyor appointed to determine the boundary of adjoining estates the documents produced by the parties to an action in

partition, is not a cause of nullity, and the surveyor can be ordered to supply the omission, or the parties themselves can file the documents with the record. Such reports are not definitive, and either of the parties can continue the *enquête* thereafter. *Pacaud* vs. *Fabrique St. Eusèbe de Stanfold*, Q. B. 1887, 16 R. L. 104.

3. Homologation.—A motion demanding homologation of a surveyor's report in an action in boundary, as well as the motion demanding homologation of the *procès-verbal*, should be notified to the opposite party within the ordinary delay, even where the opposite party has not pleaded to the action. *Blackburn* vs. *Blackburn*, Q. B. 1888, 11 Q. L. R. 305.

4. Objection to the appointment of a surveyor is made too late when his report is being homologated. *Forest* vs. *Heathers*, S. C. 1881, 11 R. L. 7.

5. Where two Surveyors appointed.—Where, in an action in boundary, two surveyors are named experts to make a plan of the properties of the disputants and describe their respective claims, one of such surveyors can, in addition to his joint report made with the other surveyor, make a special report, and such special report will not be rejected as irregular, because it contains information necessary for the guidance of the court in determining the position of the division line between the properties. *Cormier* vs. *Leblanc*, Q. B. 1888, 14 Q. L. R. 247, 16 R. L. 288.

VII. WHEN NECESSARY TO DETERMINE.

1. Encroachment.—Held, that neighboring proprietors between whom no boundary has ever been fixed are not entitled the one to bring a petitory action against the other, under pretext that there has been encroachment, without first taking measures to establish the boundary between their respective properties. *Harbour Commissioners of Montreal* vs. *Hall*, S. C. 1861, 5 L. C. J. 155; *Robertson* vs. *Stuart*, 13 L. C. R. 462.

2. —— A petitory action will not lie for an alleged encroachment in the erection of a dwelling, shed and fence, on the line of division between the plaintiff's and defendant's lots, acquired by them from a common *auteur*, when such erection has been effected with the knowledge and consent of the party complaining, and specially so in the absence of any legal establishment of the boundaries of the respective properties. *Martin* vs. *Jones*, C. R. 1869, 15 L. C. J. 6.

3. —— Where A sells to B "half an acre" of a lot owned by him, without having the piece sold surveyed or divided off by proper metes and bounds, and B takes possession of more land than A considers him entitled to, A cannot sue B by a petitory action for the recovery of the alleged encroachment, but should have recourse to an action in boundary. *Graham* vs. *Kempley*, C. R. 1871, 16 L. C. J. 56, 3 R. L. 440.

4. —— An action for cutting wood on the limits of contiguous lands cannot be maintained if there has been no legal establishment of the boundaries of the properties. *Verroneau* vs. *Perry*, S. C. 1872, 28 L. C. J. 253; *Fournier* vs. *Lavoie*, C. R. 1871, 15 L. C. J. 270.

5. —— In an action for encroachment on a lot of land, by building beyond the line of division between it and the adjoining lot, where the encroachment is clearly proved, judgment may be rendered accordingly without the necessity of a legal establishment of boundaries. *Levesque* vs. *McCready*, Q. B. 1876, 21 L. C. J. 70.

6. —— A proprietor cannot bring a petitory action against his neighbor without putting him in default to contest his rights of ownership. And as it is a question of determining boundary lines, the action should have been in boundary. *Fraser* vs. *Gagnon*, Q. B. 1878, 4 Q. R. L. 381.

7. —— Where there is a dispute between the proprietors of neighboring lands as to their boundary which is not determined, their only recourse is by action in boundary, and a possessory action for encroachments will not lie. *Lacroix* vs. *Ross*, C. R. 1884, 11 Q. L. R. 78.

8. —— Where the plaintiff complains of an encroachment, and the defendant has been in possession of the land for more than a year and a day, the court can only determine whether there has been an encroachment by proceedings in boundary. *St. Stephen's Church* vs. *Evans*, 1891, M. L. R., 7 S. C. 255. In appeal 23rd Dec., 1892, judgment reduced by $45.

9. —— Where lands are contiguous, and no division line exists between them, the settlement of such line and fixing of bounds, either by agreement or under judgment in an action in boundary, is an essential preliminary to the bringing of a possessory action by one possessor against the other, for encroachment or trespass by cutting timber on the confines of both lands. *Béliveau* vs. *Church*, Q. B. 1893, 2 Que. 545.

BRIBERY. (1)

See CRIMINAL LAW.

BRIDGES. (2)

See TOLL BRIDGES.
" MUNICIPAL CORPORATIONS.

Destroying — CRIM. CODE, ART. 499 (A.C.)—The willful destruction of or damage to every bridge over which railways pass, or which spans a canal, with intent to render it dangerous or impassable, is punishable by imprisonment for life.

BROKERS.

See AGENCY.
" GAMBLING TRANSACTIONS.

BUILDERS.

I. ACCEPTANCE OF WORK.
II. EXTRA WORK. 1-3.
III. LIABILITY OF.
After Work accepted. 1.
Exemption from. 2.
Defective Wall. 3.
Frost.--Defective Wall. 4.
Foundations. 5-6.
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Independent Contractors. 8.
Repairs to old Houses. 9.
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IV. PRIVILEGE OF.
Conflict between Bailleur de Fonds and Builder. 1.
Nature of. 2.
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V. RIGHTS OF. 1-3.
See also ARCHITECT.
" CONTRACTORS.

I. ACCEPTANCE OF WORK.

Where a contractor has undertaken to complete a building during the summer, but is only ready to deliver it in the month of November, and the architect, owing to the advanced period of the season, declines to accept the work until the spring, the owner is entitled to retain a sum sufficient to guarantee him against loss, and if, in the spring, the work stands in need of repairs, the owner, after putting the contractor in default, may cause such repairs to be made, and deduct the cost from the sum so retained by him. *Boismenu* vs. *Fabrique de St. Cunégonde*, S. C. 1888, M. L. R., 4 S. C. 80.

II. EXTRA WORK—1690 C. C.

1. Where a proprietor, sued by a builder for the value of extra works beyond those mentioned in the contract and specifications, *voluntarily* admits on oath, when examined as a witness, certain items of such extra works for which no authority in writing had been granted by or with the sanction of the proprietor (as required by Art. 1690 of the Civil Code), the value of such items so admitted may be recovered in the suit. *Beckham* vs. *Farmer*, Q. B. 1878, 22 L. C. J. 261, 1 L. N. 116. Reversing S. C., 21 L. C. J. 164, 7 R. L. 623.

2. Sub-Contractor.—Article 1690 C. C., which requires an authorization in writing to establish a claim arising from any change in plan or increase in labor and materials, applies only between the proprietor and his architect or contractor, and not between a contractor and his sub-contractor. *Robert* vs. *Chartrand*, S. C. 1893, 3 Que. 339.

3. A contract for the construction of a building which stipulates that the work is to be done according to "plans and specifications and to such descriptions and details as may be submitted to the contractors by the architect in the course of the works" constitutes a contract at a fixed price and falls within Art. 1690 C. C. *Barsalou* vs. *Mainville*, S. C. 1893, 1 Que. 346.

III. BUILDER—LIABILITY OF. (See also under title "ARCHITECT.")

1. After Work accepted.—In an action by a contractor for money due under a contract—*Held*, on the plea of the defendant that the work had been badly done, and confirming the judgment of the court below, that, after the acceptance of the work, they could not complain of defects therein which did not result from defects of the ground, unless there be fraud or deception. *Morrison* vs. *Ducharme*, Q. B. 1865, 16 L. C. R. 65 and 1 L. C. L. J. 55.

2. Exemption from.—A contractor may by his contract stipulate that he shall not be liable for the plan of works he is to execute. *St. Patrick's Hall Association* vs. *Gilbert*, Q. B. 1878, 1 L. N. 116, 23 L. C. J. 1, 9 " L. 612.

3. Defective Wall.—Where a house was badly built so that one side of it had to be

(1) See an Act to prevent bribery and corruption in municipal and civic corporations, 58 Vic., cap. 42 (Que.).

(2) See an Act respecting the protection of colonization and other bridges, relating especially to the driving of timber down streams. Stat. Que. 1890, 53 Vic., ch. 37.

taken down and replaced—*Held*, that the contractor was liable. *Pepin* vs. *Martin*, S. C. 1873, 5 R. L. 183, 1688 C. C.

4. Frost-Wall.—Where a builder undertakes to build a wall in winter time, he is liable for damage done to the wall by frost which existed at the time of building, although before commencing the work he protested the proprietor that he would not be responsible for damages caused by frost. But such liability does not extend to another wall which the proprietor built upon the one which was damaged. *St. Louis* vs. *Shaw*, Q. B. 1882, 2 Dorion's Rep. 374, reforming judgment of Ct. of Rev., 1 L. N. 65. Confirmed in Supreme Ct. 1882, 8 Can. S. C. R. 385.

5. Foundations.—In an action by a builder to recover the sum of £389 1s. 6d., balance due on a contract for the erection of seven houses, etc., the defendant set up an amount due for damages by reason of the foundations of three of the houses having given way, so that the houses had to be taken down and rebuilt—*Held*, confirming the judgment of the court below, that the defendant was responsible for the defects of the ground, although he be bound by his contract to follow certain plans and specifications under the direction of an architect employed by the proprietor. *Brown* vs. *Laurie*, S. C. 1851, 1 L. C. R. 343; Q. B., 5 L. C. R. 65; 3 R. J. R. Q. 27 (S. C. and Q.B.).

6. —— A builder is responsible for the sinking of a building erected by him on foundations built by another, but assumed by him in his tender and contract without protest or objection, although such sinking be attributable to the insufficiency of the foundations and of the soil on which they are built, and is liable to make good at his own expense the damage thereby occasioned to his own work. *Wardle* vs. *Bethune*, P. C. 1872, 16 L. C. J. 85, confirming Q. B. 1868, 12 L. C. J. 321, 8 L. C. J. 289.

7. —— Burden of Proof—Independent Contractors.—Where a builder is under a contractual obligation to erect a brick wall on a substructure of stone built by another contractor, and he seeks to be relieved from his obligation on the ground that the stone foundation is defective and insufficient, the burden of proof is on him to establish the insufficiency of the foundation wall. *Evans* vs. *Cowan*, Q. B. 1893, 3 Que. 59, reversing S. C. 1891, 21 R. L. 285. Appeal to Supreme Court quashed for want of jurisdiction, 22 Can. S. C. R. 328.

8. —— Independent Contractors. — Where a contractor undertakes certain works for the proprietor of a building for a certain price, independently of the other contractors, and, not having the general direction of the works, he is not liable for the faults of the other contractors. *Cowen* vs. *Evans*, S. C. 1887, 16 R. L. 43.

9. Repairs to old Houses—Evidence.—*Held*, where a builder makes repairs to an old house, in order to hold him responsible under C. C. 1688, it must be shown that the deterioration or loss complained of arose from a defect in the repairs, or the omission of something which the repairer was bound to do. *Parent* vs. *Durocher*, 1887, M. L. R., 3 S. C. 352.

10. Roof Contractors.—In an action against the contractor of the St. Patrick's Hall and his surety, for damages occasioned by the falling of the roof of the hall, the plea was that the contractor was not a builder by profession, that the iron supplied by him was good, and that under the contract entered into he was bound to follow the instructions given him by the architect, and was not responsible for the design. In appeal the judgment maintaining the plea was confirmed. *St. Patrick's Hall Association* vs. *Gilbert*, Q. B. 1878, 1 L. N. 116, 9 R. L. 612, 23 L. C. J. 1, confirming S. C. 1872, 3 R. C. 82.

11. —— But *held*, a contractor who undertakes to put a new roof on a building is responsible for a defect in the timbers of the building on which the roof is placed, in the same manner as a builder for the unfavorable nature of the ground; and if an injury results to the roof, not from any defect in the materials used in its construction, but from the weakness of the timbers supporting it, he is liable for the loss. *Martel* vs. *Les Syndics de la Paroisse de St. George d'Henriville*, S. C. 1887, 11 L. N. 82.

12. —— Action for cost of a new roof which respondent had been obliged to put on his house by reason of defects in the original. Appellant admitted his liabilities for repairs, but not for a new roof—*Held*, liable. *Malo* vs. *Melançon*, Q. B. 1879, 3 L. N. 42.

13. Who are Builders. ART. 1696 C. C. —A builder cannot escape liability for defective execution of work by pleading that the work was performed under the orders and directions of the proprietor.

The words "who undertake work," which occur in Art. 1696 C. C., indicate that the liability as "builder" extends to the construction of such works as aqueducts. *Roberge* vs. *Talbot*, C. Ct. 1893, 4 Que. 451.

IV. PRIVILEGE. (1) Art. 2013 C. C.

1. Conflict between Bailleur de Fonds and Builder.—In case of Sheriff's sales, the valuation made by *experts* in terms of the registry ordinance will not prevail as against third parties, and consequently the unpaid vendor can claim an expert examination to establish the relative value of the land and buildings at the time of the sheriff's sale; and, in case the money left for distribution is not sufficient to pay both claims, the unpaid vendor has a preference on so much as represents the value of the land as determined by the *experts*. *Doutre* vs. *Green*, S. C. 1861, 5 L. C. J. 152.

2. Nature of.—A builder who has observed the formalities required by Art. 2013 C. C. has a privilege only upon the additional value given to the immoveable by the works performed by him; he has no privilege or hypothec upon the whole immoveable. (2) *Corporation du Séminaire de St. Hyacinthe d'Yamaska* vs. *La Banque de St. Hyacinthe*, Q. B. 1885, 29 L. C. J. 261.

3. Preservation of.—Privilege cannot be preserved otherwise than by strict compliance with the formalities of sections 31 and 32 of the 4th Vic., ch. 30. *Clapin* vs. *Nagle*, S. C. 1861, 6 L. C. J. 196.

4. —— An expertise made subsequent to the work is not that contemplated by the Article of the Civil Code (2013). And the privilege only dates from the registration (1) of the statement. *Robert* vs. *Rieutord*, Montreal, May 26, Q. B. 1883.

5. —— Experts.—It is not necessary for an expert appointed under Article 2013 C. C. to secure a builder's privilege on an immoveable to give notices of his proceedings to the proprietor's creditors, such proceedings not being regulated by Arts. 322 *et seq.* C. C. P. (1) *Dufresne* vs. *Préfontaine* and *Vallée* vs. *Préfontaine*, Supreme Ct. 1892, 21 Can. S. C. R. 607, confirming Q. B. 1892, 1 Que. 330.

6. —— There was evidence in this case to support the finding of fact of the courts below, that the second *procès-verbal* or official statement, required to be made by the expert under Art. 2013, had been made within six months of the completion of the builder's work. (*Ib.*)

7. —— It was sufficient for the expert to state in his second *procès-verbal* made within the six months that the works described had been executed, and that such work had given to the immoveable the additional value fixed by him. The words "executed in accordance with the rules of art" are not *strictissimi juris*. (*Ib.*)

8. —— If an expert includes in his valuation works for which the builder had by law no privilege, such error will not be a cause of nullity, but will only entitle the interested parties to ask for a reduction of the expert's valuation. (*Ib.*)

(1) See now Stat. Que. 59 Vic., ch. 42, amending 57 Vic., ch. 46, amending Arts. 2013 and 2103 C. Code, known as the "Auge Law."

(2) Otherwise under the above amendment to Art. 2013, which accords a privilege upon the whole immoveable for the additional value. Further amended by 59 Vic., ch. 42.

V. RIGHTS OF.

1. Where a builder had quarried some stone under a contract, which he afterwards refused to sign—*Held*, that he was nevertheless entitled to be paid the value of the work done. *McWilliams* vs. *Joseph*, S. C. 1865, 1 L. C. L. J. 92.

2. A stone building was to be erected in place of a wooden one, and the question arose, was the builder bound to account for the stone on the premises? The usage appeared to be that where the builder is not paid for taking down the old building, he has a right to the stone; but where he is paid he must account. In this case he was paid $35 for taking down the old building, therefore this item must be deducted. *Viau* vs. *Jubinville*, C. R. 1865, 1 L. C. L. J. 64.

3. A builder has no right to claim payment of Gothic work according to double measurement. *Ouimette* vs. *Gamache*, Q. B., 1865, 10 L. C. J. 132.

"OR OTHER BUILDING."

The words "or other building," in Art. 1408 R. S. Q., which provides for the issuing of a search-warrant in certain cases, include a schooner afloat. *Joanette* vs. *Governor, etc., Hudson's Bay*, Q. B. 1894, 3 Que. 211. Confirmed in Supreme Court, 23 Can. S. C. R. 415.

BUILDING SOCIETIES. (1)

I. By-Laws— Meetings — Election of Directors. 1-4.

II. Liquidation.

Action to annul Sale in Liquidation—Interest in. 1.

Assessment—Pleading want of Account. 2.

(1) Article thereon in 1 Themis, 97, by B. A. T. DeMontigny.

Discharge—Agreement — Borrowing Members. 3.
Effect of—Borrowing Members. 4.
Mandamus. 5.
Powers of Dominion Parliament with regard to. 6.
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III. Lotteries.

IV. Powers of.
To borrow Money. 1.
To discount Notes—Engaging in Banking. 2.
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V. Rights of.
Loans—Treatment of Hypothec. 1.
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VI. Rights of Members—Mandamus. 1-2.

VII. Rules—Irregularity. 1-2.

VIII. Shares.
Confiscation. 1-4.
Held by Minors—Confiscation. 5.
Transfer—Rights of Creditors—Insolvent—Pledge. 6.

IX. Shareholders.

X. Security for Appropriations.

See also Company and Corporation Law.

BY-LAWS—MEETINGS—ELECTION OF DIRECTORS. (1)

1. The right to summon a society organized under the 12 Vict., ch. 57, 14 and 15 Vict., ch. 23, and 18 Vic., ch. 116, is in the President or Secretary. (1) *Jodoin* vs. *Dubois*, S. C. 1859, 3 L. C. J. 325.

2. The requisition for meeting of building societies ought to be addressed to the president and directors, and ought also to indicate specially the object of the meeting. (1) (*Ib.*)

3. The 1st section of the 18 Vic., ch. 116, has not abrogated the dispositions contained in the 7th section of the 12th Vic., ch. 57. (*Ib.*)

4. The by-laws of a building society ought to be enregistered, as required by the 5th section of 12 Vic., ch. 57; the election of directors ought to be made singly and not collectively; and the president ought to preside at all meetings, and all by-laws ought to be passed and amended under his presidency. (*Ib.*)

(1) See "An Act to amend the law respecting Building Societies," 52 Vic. (Que.), ch. 45, amending Art. 5430 R.S.Q.

II. LIQUIDATION. (1)

1. Action to annul Sale in Liquidation—Interest in.—In an action to set aside a sale of the assets of a defunct building society, the plaintiff was shown only to own four shares which stood in the name of another who had purchased them after the society had gone into liquidation and after it was in fact wound up. *Held*, to have no interest to bring the action. *Bélanger* vs. *Gauthier*, S. C. 1882, 5 L. N. 171.

2. Assessment.—Pleading want of Account.—A member of a building society sued for the recovery of an assessment required to liquidate the affairs of the Society, cannot plead that no account has been rendered him and that he has not been offered any explanation why the liquidation is necessary. *Société de Construction Mutuel des Artisans* vs. *Lefebvre*, S. C. 1881, 12 R. L. 294.

3. Discharge.—Agreement.—Borrowing Members.—To facilitate the liquidation of a mutual building society, a resolution was passed at a meeting of the borrowing members to discharge those who in three months should pay eighty per cent. of their indebtedness, the surplus, after paying non-borrowing members in full, to be divided among the borrowing members. *Held*, that those non-borrowing members who did not discharge the society were not bound by this arrangement, and were entitled to claim the surplus to the exclusion of the borrowing members who had all discharged the Society. *Harvey* vs. *Shaughnessey*, S. C. 1882, 5 L. N. 429, Q. B. 1883, 6 L. N. 369.

4. Effect of—Borrowing Members.—The appellant's *auteur* in 1878 borrowed from a building society $3,500, at the same time subscribing to seventy shares of the capital stock of the said company at $50 per share = $3,500 as member of class "O. 2," formed in July, 1878, to expire in six years. On these shares he was to contribute 1 per cent. monthly, viz., $35.00. The loan was to be repaid at the time when the affairs of this class would be liquidated, and the members thereof would have the right to receive their shares, that is to say, when the accumulated profits joined to the capital paid on shares would form an amount equal to the nominal capital of said shares, the amount of the loan to be compensated by what is coming to the borrower on his shares. The appellant's *auteur* was further bound to pay, in addition to the monthly instalments on his shares, a

(1) Law as to powers of liquidators amended, see 52 Vic. (Que.), ch. 45, amending Art. 5459 R. S. Q.

monthly instalment of 1 per cent. on the capital borrowed by way of interest and bonus, both instalments amounting to $70.00 per month. He paid this monthly sum regularly until January, 1884, at which period the company was put into liquidation. In October, 1884, the liquidators of the company, with a view not to paying the creditors of the company but to meeting a deficit in class "O. 2," made a call of twenty-eight instalments. Action was brought against the appellant's *auteur* to recover these instalments, both on the loan and the shares, and for two instalments due between the months of January and October, 1884. *Held* (reversing the judgment of the Superior Court, Bossé and Blanchet J.J., dissentientibus). 1° That the building society after being put into liquidation could not claim instalments due thereafter, which were required not to satisfy the creditors of the company but to liquidate the affairs of the claims to which the appellant's *auteur* belonged. *Sauterre* vs. *Guertin*, Q. B. 1894, 3 Que. 344.

5. **Mandamus.**—In an action by way of mandamus demanding that the liquidators of a building society recognize the plaintiff as a member of the society, and pay him the same dividends as had been paid the other members, the conclusions should not be for a stated amount but should ask that plaintiff be paid such sums as he may be entitled to, without specifying the amounts thereof. *Stewart* vs. *Charbonneau*, Q. B. 1884, 13 R. L. 290.

6. **Powers of Dominion Parliament with regard to.**—On an injunction—*Held*, that an Act assuming to provide for the liquidation of building societies generally in the Province of Quebec is *ultra vires* of the Parliament of Canada, and, therefore, the Act of the Parliament of Canada, 12 Vic., cap. 48, is unconstitutional and void. *McClanaghan* vs. *St. Ann's Mutual Building Society*, Q. B. 1880, 24 L. C. J. 162, 3 L. N. 61.

7. **Resolution cancelling Vote to wind up.**—Where a building society has passed a resolution to wind up and liquidate the business of the society under R. S. Q. 5455, and liquidators have been appointed to carry out and give effect to the resolution, and the liquidators have prepared a dividend sheet accordingly, the contract binding the members of the society is by such entrance into liquidation dissolved and cannot be resuscitated without the unanimous consent of its former members, and a resolution passed by a majority vote at a subsequent meeting, resolving that the society continue its business, is null and of no effect. *Larivée* vs. *Société Canadienne Française de Construction*, 1890, M. L. R., 6 Q. B. 464, 19 R. L. 419.

III. LOTTERIES.

A building society distributed its lots of land by a lottery, which was a secondary or subordinate element in its constitution. *Held*, that it did not constitute a lottery prohibited by C. S. C., ch. 95, and it did not come under the operation of C. C. 1927. (1) *Société de Construction du Côteau St. Louis* vs. *Villeneuve*, C. Ct., 1877, 21 L. C. J. 309.

IV. POWERS OF.

1. To borrow Money. Cap. 69 C. S. L. C.—A building society has power under cap. 69 C. S. L. C. to borrow money when it is authorized so to do by its by-laws. *Société de Construction du Canada* vs. *Banque Ville Marie*, Q. B. 1880, 1 Dorion's Q. B. R. 73.

2. To discount Notes.—Engaging in Banking.—The plaintiff, a building society, had advanced money, and in renewal of a loan and security therefore had discounted the note on which it sued. The action was contested on the ground that the society had no power to discount notes. The plaintiff relied upon the Act of Quebec, 36 Vic., cap. 78, permitting the society to invest its surplus funds *inter alia* in loans to persons whether shareholders or not, and on any security, personal or real, which may be deemed sufficient by the directors of the society. *Held*, reversing the judgment of the Court below, that discounting notes was not engaging in banking, and was within the powers so conferred. *Société Permanente District d'Iberville* vs. *Rossiter*, C. R. 1881, 4 L. N. 269.

3. To hypothecate Real Estate as Security for Advances. C. S. L. C., Chap. 69. Art. 1971 C. C.—*Held*, That a contract by which a building society takes a transfer of real estate as security for advances made by it to the owner, and then leases the same property to the debtor, with a stipulation that, in default of compliance by the lessee with the conditions of the lease, the society may keep the property, is lawful; and where, in such case, the lease has been cancelled by the court, owing to the debtor's default to comply with the conditions, the society becomes absolute owner of the property, and may sell or dispose of it without being under any obligation to ac-

(1) See Art. 205 Criminal Code, 1892.

count for the proceeds. Section 12 of Ch. 69 C. S. L. C., which enables a society to sell property transferred to it as security, and repay itself its advances and hand over the balance to the owner, does not exclude the society's right to stipulate that in default of payment it may keep the property pledged. *Stewart* vs. *St. Ann's Building Society*, Q. B. 1892, 1 Que. 320.

4. To make Bills and Notes.—A building society not specially authorized by its charter to make a negotiable promissory note, may lawfully make such a note as an acknowledgment of indebtedness, and, in the absence of any plea specially denying such indebtedness, the society will be condemned to pay the note. *Société de Construction du Canada* vs. *La Banque Nationale*, Q. B. 1880, 24 L. C. J. 226.

5. To purchase Immoveables—Cap. 69 C.S.L.C.—Lease.—Action to set aside a deed of lease entered into between respondents and the *auteur* of the appellants. The respondents, a building society, purchased from the *auteur* of the appellants certain immoveable property situated in Montreal for $2,200, and the same day leased it for twelve years to the vendors for $4,356.80, payable in 154 payments. This lease being transferred to appellants they sought to have it set aside on the ground that the building society had no right to purchase the property, that the acquisition was *ultra vires*, that the payments to respondents were consequently illegal, and that the appellants cannot safely continue to make them. *Held*, that under the terms of C. S. L. C., cap. 69, sec. 10, that the purchase was quite within the powers of the society and judgment confirmed. *Larcau* vs. *La Société Permanente de Construction Jacques Cartier*, Q. B. 1881, 4 L. N. 363.

6. —— Dominion Incorporation.—A building society incorporated under the Dominion Statute, 37 Vic., which confers on such society power to buy, sell or hold real estate in the different Provinces of Canada, is nevertheless subject to the laws of the Province of Quebec as regards the holding of real estate in the Province of Quebec, and particularly to the provisions of Arts. 364, 365 and 366 C. C. In the present case the society plaintiff had no power to acquire, hold or sell real estate in the Province of Quebec. *Cooper* vs. *McIndoe*, Q. B. 1887, 32 L. C. J. 210, M. L. R., 7 Q. B. 481.

—— Chap. 69 C. S. L. C.—La Cie. de V., a building society incorporated under ch. 69 Con. Stat. L. C., by its by-laws on the 21st August declared that the principal object of the society was to purchase building lots, and to build on such lots cottages costing about $1,000 each for every one of its members. In order to attain its object, the company, through its directors, obeying the instructions of the shareholders, on the 7th October, 1874, purchased the particular lots described in the by-laws, and contracted for the building of twenty-four cottages at $1,250 each, the amount that each of the shareholders had agreed to pay. A year elapsed, during which the cottages were built and drawn by lot for distribution among the members. On the 11th October, 1875, the vendors of the lots and contractors for the building of the cottages borrowed money from the Dominion Building Society, and transferred to the same as collateral security the money due them by the appellants, in virtue of the deed of purchase and building contract. The appellant company accepted the transfer and paid some monies on account, and finally a deed of settlement was executed between the two companies, upon which was based the suit by H., the respondent, as assignee of the Dominion Mortgage Loan Company (which name was substituted for that of "The Dominion Building Society," by 40 Vic., ch. 80, D.), against the appellants. The question argued on the appeal was whether the purchase of the lots and contract for building entered into by the directors was *intra vires* of the appellant company. *Held*, it was. *Cie. de Villas du Cap Gibraltar* vs. *Hughes*, Supreme Ct. 1884, 11 Can. S. C. R. 537, confirming Q. B., 3 Dorion's Rep. 175.

V. RIGHTS OF.

1. Loans.—The defendant borrowed a sum of money from a building society and in the mortgage deed gave them power to sell, without any formality, the property in default of payment, which they did. The plaintiff was the purchaser. *Held*, that this did not authorize them to sell without the necessary formalities and ordinary prudence. *Gélinas* vs. *Marchand*, Q. B. 1883, 9 Q. L. R. 120.

2. —— Privilege.—The money advanced to the owner of a property by a building society becomes the money of the borrower, and the building society cannot therefore claim any privilege for improvements made with such money by the owner of the property, so as to defeat or retard the claim of the unpaid vendor for which claim the owner is personally responsible. *Grant* vs. *La Société Permanente de Construction*, Q. B., Montreal, Jan. 25, 1883.

VI. RIGHTS OF MEMBERS.

1. Mandamus.—A member of an incorporated building society is not entitled to demand an inspection of the minutes kept by the directors of the association, unless there be a parliamentary direction to that effect, or he show that he has an interest or is under the influence of lawful motive in demanding the inspection. *Langelier* vs. *Laroche*, S. C. 1877, 3 Q. L. R. 239.

2. The fact of taking a reasonable time (three days, e. g.) to consider and take advice before complying with the demand, is not a refusal sufficient to justify a resort to the remedy by mandamus. (*Ib.*)

VII. RULES OF.

1. Irregularity.—The plaintiff claimed under a rule of a building society, which had been changed and substituted prior to his becoming a member, but which it was shown was substituted by one adopted at a meeting irregularly called—*Held*, that as it was not shown that he was aware of the new rule at the time that he invested, he would not be bound by it. *Prévost* vs. *Société Canadienne Française de Construction de Montréal*, S. C. 1879, 2 L. N. 412.

2. —— The plaintiff claimed under a rule of a building society which had been changed, and substituted the right to retire and get back his money when he pleased. *Held*, following *Prévost* vs. *Société Canadienne Française de Montréal*, *supra* No. 1, that he was not bound by the change, but would have to pay what he owed in deduction. *Robillard* vs. *Société Canadienne Française de Construction*, S. C. 1879, 4 L. N. 133.

VIII. SHARES

1. Confiscation—How made. Cn. 69 C. S. L. C.—The entry of the word "forfeited" by the secretary of a building society, opposite the names of certain members in the books of the society, is not sufficient evidence that such members received due notice that their shares would be forfeited if their arrears were not paid.—more especially where the entry was made long after the date of such alleged notice. *Higgins* vs. *Power*, 1885, M. R. L., 1 S. C. 268.

2. —— Under C. S. L. C., ch. 69, s. 15, confiscation of shares for non-compliance with the rules of the building society must be declared. Such declaration may be made by resolution of the board of directors. (*Ib.*) *Stewart* vs. *Charbonneau*, Q. B. 1884, 13 R. L. 290.

3. —— Where such confiscation has not been declared previous to the liquidation of the society, the liquidators have no authority to pronounce the confiscation. (*Ib.*)

4. —— The forfeiture of shares under the by-laws of a building society is an act of administration within the powers of the board of directors, and need not be pronounced by the society itself. *Doran* vs. *McNally*, S. C. 1884, M. L. R., 1 S. C. 21.

5. Held by Minor—Confiscation.—A minor may hold shares in the stock of a building society incorporated under C. S. L. C., ch. 69, and such shares are subject to forfeiture in accordance with the by-laws of the society. *Doran* vs. *McNally*, S. C. 1884, M. L. R., 1 S. C. 21.

6. Transfer of—Rights of Creditors—Insolvent—Pledge.—A by-law of building society (appellants) required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. One P., a director, in contravention of the by-laws, induced the secretary to countersign a transfer of his shares to the Banque Ville Marie as collateral security for an amount he borrowed from the bank, and it was not till P.'s abandonment or assignment for the benefit of his creditors that the other directors knew of the transfer to the bank, although, at the time of his assignment, P. was indebted to the appellant society in a sum of $3,744, for which amount under the by-law his shares were charged as between P. and the society. The society immediately paid the bank the amount due by P., and took an assignment of the shares and of P.'s debt. The shares being worth more than the amount due to the bank, the curator to the insolvent estate of P. brought an action claiming the shares as forming part of the insolvent's estate, and with the action tendered the amount due by P. to the bank. The society claimed the shares were pledged to them for the whole amount of P.'s indebtedness to them under the by-laws. *Held*, reversing Q. B. (M. L. R., 7 Q. B. 417), and restoring the judgment of the Superior Court, that the shares in question must be held as having always been charged under the by-laws with the amount of P.'s indebtedness to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he made the abandonment of his property, viz., to get the shares upon payment of P.'s indebtedness to the society.

Société Canadienne Française de Construction vs. *Daveluy*, Supreme Ct. 1891, 20 Can. S. C. R. 449.

IX. SHAREHOLDERS, RIGHTS OF.

A shareholder in a building society who has approved of an arrangement with a creditor of the society, whereby the creditor is granted delay on condition that the society should not sell its real estate, waives thereby his right to bring the real estate of the society to sale in satisfaction of his claim as a shareholder. *Champoux* vs. *Lapierre*, Q. B. 1880, 3 L. N. 302.

X. SECURITY FOR APPROPRIATION.

The defendants, a building society, refused to pay over an appropriation which had been made in favor of plaintiff, and the condition of which as to security he claimed to have fulfilled. The society pleaded that the security was insufficient, inasmuch as the security offered was in a part of the city in which, as they alleged, they did not wish to extend their risks. The rules of the society provided in one place that the security must be to the satisfaction of the Board as well as of the valuator, and in another place that all property in Montreal was available as security, if sufficient. *Held*, that the society could not object to the security on the ground they urged, and that the plaintiff was entitled to his appropriation. *Canada Mutual Building Society of Montreal* vs. *O'Brien*, Q. B. 1880, 3 L. N. 58.

BUILDINGS, PUBLIC.

See 57 Vic. (Que.), ch. 29. (1)

§ 1. Interpretative and Declaratory Provisions.
§ 2. Application of the Law.
§ 3. Safety in Public Buildings.
§ 4. Duties of Proprietors of Public Buildings.
§ 5. Inspection of Public Buildings.
§ 6. Contraventions and Penalties.
§ 7. Jurisdiction of certain Courts and Procedure.
§ 8. Application of Fines.
§ 9. Regulations.

BUOYS.

See Harbour Commissioners.

(1) See also 57 Vic. (Que.), ch. 30. An Act respecting Industrial Establishments.

BURIAL. (1)

See Mandamus.
" Cemeteries.

Roman Catholic.— Mandamus.— The body of a Roman Catholic not actually excommunicated *nominatim*, nor adjudged or proved to be a "public sinner," according to the Quebec Ritual, cannot legally be refused sepulture in that part of the burial ground where Roman Catholics are usually buried with the rites of the Church, and in which the graves are consecrated. *Brown* vs. the *Curé*, &c., of Montreal, P. C. 1874, 20 L. C. J. 228, 6 R. L. 378, Beauchand, P. C. 191.

And *Held*, also, that the Fabrique were bound, on payment of the accustomed dues, to give to the remains of the deceased, burial in that part of the cemetery in which Roman Catholics are usually buried with the rites of the Church, and in which the graves are consecrated. (2) (*Ib.*)

Church of England.—On a mandamus to compel the rector of a parish to bury in the Mount Hermon Cemetery the body of the infant son of the petitioner, a member of the Church of England—*Held*, that where there was ground consecrated and set apart as a burial ground in a parish, a clergyman of the Church of England cannot be compelled to bury the dead in a place that has not been sanctioned or approved of as a burying ground by the authorities of that Church. *Wurtele exp.*, S. C. 1851, 1 L. C. R. 414, 3 R. J. R. Q. 66.

Certificate. (3)—A certificate of burial, which does not purport to be an extract from a register of burials kept by a minister or clergyman authorized by law to keep such register, does not make proof of its contents. *Ricker* vs. *Simon*, Q. B. 1877, 22 L. C. J. 270.

BY-LAWS.

See Building Society.
" Company and Corporation Law.
" Municipal Corporation.

The legality of a by-law is examinable on a motion to quash a conviction predicated thereon. And a by-law, imposing a penalty of £5 *and* imprisonment for 60 days, in default of payment, is in excess of an authority granted by Statute to impose by by-law a penalty not exceeding £5 *or* 60 days imprisonment, and is therefore illegal. *Exparte Rudolph*, S. C. 1856, 1 L. C. J. 17.

(1) R. S. Q., Arts 3458-3485, amended 52 Vic., cap. 36.
(2) See 39 Vic. (Que.), ch. 19.
(3) See also under title Absence VIII. 4.

C.

CAB TARIFF.

In the City of Montreal.—On a *certiorari* from a conviction by the Recorder—*Held*, that the tariff which regulates the hire of carriages in the City of Montreal applies also to engagements commenced within the city and terminated outside in another municipality. *Robert Exp.*, S. C. 1883, 6 L. N. 148.

CADASTRE.

An Act to amend the law respecting the subdivision of cadastral lots. 58 Vic., ch. 40 (Que.).

Cadastral plans for Railways Act, amending Art. 5668 R. S. Q., 57 Vic., ch. 42.

Erection of Parishes, with a view to facilitating the compilation of cadastral plans. R. S. Q., Art. 3383.

Preparation of cadastral plans. R. S. Q., Art. 5661.

Coming into force of cadastre. R. S. Q., Art. 5844.

C. S. L. C., ch. 41, sec. 18.—A cadastre duly deposited and closed, and as to which no appeal was taken before the Seigniorial Court of Revision, is final, and a defendant cannot ask its reformation upon the alleged ground that the commissioner was led into error owing to the non-production of deeds. *Ellice* vs. *Renaud*, S. C. 1869, 13 L. C. J. 164.

CAPIAS.

I. Absence of Defendant—How interpreted by the Court.

II. Affidavit.
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I. ABSENCE OF DEFENDANT.

How interpreted by the Court.—The pretensions of a defendant, who, after being arrested under a writ of *capias*, leaves the country and refuses to appear for examination, will not be favorably regarded by the court. *Molsons Bank* vs. *Campbell*, S. C. 1877, 21 L. C. J. 280.

II. AFFIDAVIT.

1. **By whom made**—ART. 798 C. C. P.—**Bookkeeper.**—An affidavit made by the bookkeeper of a branch of the Upper Canada bank was held to be sufficient. *Bank of Upper Canada* vs. *Allain*, S. C. 1855, 5 L. C. R. 318, 4 R. J. R. Q. 365.

2. —— **Legal Attorney.**—An attorney *ad litem*, even when he holds a power of attorney "to take all such steps by legal proceedings or otherwise as he might think necessary," is not authorized, under Art. 798 C. C. P., to make the affidavit for *capias*, the "legal attorney" referred to in the article being not the procurator *ad litem* but the procurator *ad hoc negotium*. *Boston Woven Hose Co.* vs. *Fenwick*, C. R. 1890, M. L. R., 6 S. C. 487.

3. —— **Must state capacity in which made.**—An affidavit for *capias* made by a person other than the plaintiff, which does not state whether the deponent is the plaintiff's bookkeeper, clerk or legal attorney, is insufficient. *Demers* vs. *Lamothe*, S. C. 1893, 4 Que. 100.

4. —— **President of Corporation.**—The President of an Incorporated Company is competent to make the affidavit for *capias*. *Moisie Iron Co.* vs. *Olsen*, Q. B. 1873, 18 L. C. J. 29.

5. **Description of Parties.**—In an affidavit for *capias* where the creditor's name was written "Justras" instead of "Joutras"—*Held*, to be good. *Joutras* vs. *Dunlop*, S. C. 1857, 7 L. C. R. 420, 5 R. J. R. Q. 330.

6. **Form of—Currency.**—On a motion to quash a writ of *capias*, on the ground that there was no sufficient statement of the debt, inasmuch as it was stated to be due in sterling money—*Held*, that the amount due may be legally so stated, as the value of the pound sterling was defined by the Canada Currency Act. *Bank of Montreal* vs. *Brown*, S. C. 1867, 17 L. C. R. 144.

7. **Jurat.**—On a motion to quash a *capias* on the ground that the affidavit did not show that it had been sworn to by the plaintiff, or by his bookkeeper, clerk or legal attorney, as required by 25 Geo. 3, cap. 2—*Held*, confirming the decision of the court below, that the rule obtained on such motion should be dismissed. *Coates* vs. *The Bank of Montreal*, Q. B. 1840, 2 Rev. de Lég. 328.

8. —— The affidavit for *capias* may be sworn before the Deputy Prothonotary. Q. B. 1873, 18 L. C. J. 29.

9. —— The defendant petitioned to quash the *capias*. One of the grounds was that the affidavit was sworn before a person whose right to receive it did not appear. It was signed simply "commissioner," without stating at length that he was a commissioner to receive affidavits for the court—*Held*, that this was not an adequate reason. The court knows its own officers, and the affidavit in question was sworn before one of them. *Joseph* vs. *Donovan*, S. C. 1877.

10. —— Where the prothonotary or his deputy, before whom an affidavit for *capias* or attachment before judgment is sworn, omits to sign the *jurat*, the court will not grant leave to affix the signature after the issue and service of the writ. *Dubois* vs. *Persillier*, S. C. 1890, M. L. R., 6 S. C. 269.

11. **Sufficiency of—Defective in Part.** ARTS. 798 and 799 C. C. P.—An affidavit to hold to bail though bad in part may be efficient for the remainder. *Patterson* vs. *Bowen*, K. B. 1809, 3 Rev. de Lég. 347.

12. —— 821 C. C. P.—An affidavit to hold to bail cannot be contradicted by counter affidavits. *Lawrence* vs. *Hinckley*, K. B. 1810, 3 Rev. de Lég. 318; *Hodgson* vs. *Oliva*, K. B. 1821, 3 R. de L. 349.

13.—— **Reason of Belief.**—If in an affidavit for *capias* the plaintiff swears he believes the defendant is about to leave the province from his own knowledge, he must state the cause of his belief, because that is the best criterion for the exercise of the judge's discretion. If he founds his belief on the information of others, he must swear "that he is credibly informed, and hath just reason to believe, and in his conscience doth verily and sincerely believe that the defendant is immediately about to leave the Province." *Chrétien* vs. *McLane*, K. B. 1811, 3 Rev. de Lég. 348.

14. —— **By Wife.**—An affidavit to hold to bail made by the plaintiff's wife is sufficient. (*Ib.*)

15. —— **Cause of Debt.**—An affidavit to hold to bail must be positive that the debt is due. The words "as appears by the plaintiff's

books," or "as the plaintiff believes," is not sufficient, and the defendant in such case will be discharged on filing a common appearance. *Hodgson* vs. *Oliva*, K. B. 1821, 3 Rev. de Lég. 349.

16. —— Personally indebted.—An affidavit to obtain a *capias*, which states that the defendant is indebted to the plaintiff in a certain sum for board and lodging during the space of six months, and for articles of clothing furnished him, is bad. *Cuthbert* vs. *Barrett*, S. C. 1850, 1 L. C. R. 212, 2 R. J. R. Q. 463.

17. —— Establishing fraudulent Departure.—The allegation in the affidavit, that the defendant himself stated that he was leaving for California, was held to be sufficient to justify the issuing of a writ of *capias*. *Benjamin* vs. *Wilson*, S. C. 1850, 1 L. C. R. 351, 3 R. J. R. Q. 34.

18. —— —— In an affidavit on the ground that the defendant is about to leave the Province, the omission of the words "with intent to defraud his creditors generally and the plaintiff in particular" is fatal. *Lamarche* vs. *Lebrocy*, S. C. 1851, 1 L. C. R. 215, 2 R. J. R. Q. 465.

19. —— Establishing Fraud.— *Held*, that the allegation that the defendant had taken away goods placed with the plaintiff as security for the payment of a note, that he had refused to deliver a horse, and that he was a stranger and had failed to keep appointments, and that he had withdrawn himself from his creditors, were not sufficient to justify a *capias*. *Leeming* vs. *Cochrane*, S. C. 1851, 1 L. C. R. 352, 3 R. J. R. Q. 35.

20. —— Name of Informant.—*Held*, that the allegation "that the plaintiff has been credibly informed that the defendant had secretly removed his goods in the night time, with intent to depart the province," is not sufficient to support a writ of capias, the name of the party from whom the information is obtained not being disclosed. *Cornell* vs. *Merrill*, S. C. 1851, 1 L. C. R. 357, 3 R. J. R. Q. 38. See *Milligan* vs. *Masson*, *infra* No. 57; *Cameron* vs. *Brega*, *infra* No. 52.

21. —— Damage to Goods.—An affidavit for capias is insufficient if being taken for damage suffered by goods on board ship, it does not state with certainty that the goods were so damaged while in the custody and safe-keeping of the defendant, and before delivery. *Gale* vs. *Brown*, S. C. 1852, 3 L. C. R. 148, 3 R. J. R. Q. 475.

22. —— Establishing fraudulent Departure.—An affidavit contains sufficient grounds for belief of the defendant's departure with fraudulent intent, if it be stated that the defendant refuses to pay the sum sworn to be due, that the vessel of which he is master is immediately about to sail for Europe, and that the defendant is to sail therein. *Lefebvre* vs. *Tullock*, S. C. 1854, 5 L. C. R. 42, 4 R. J. R. Q. 287. But see *Larocque* vs. *Clarke*, No. 24 *infra*.

23. —— —— *Held*, that in such affidavit it was necessary that the party making it should swear he was immediately about to leave the Province with intent to defraud the plaintiff in particular and his creditors in general. *Wilson* vs. *Ray*, S. C. 1854, 4 L. C. R. 159, 4 R. J. R. Q. 127.

24. —— —— In an affidavit for a *capias*, the allegation that the defendant, who resided at Rouses Point, in the United States, is upon the point of immediately leaving the Province to go to the United States, and giving the names of the plaintiff's informants, disclose no intention of fraud and is insufficient. *Larocque* vs. *Clarke*, S. C. 1854, Montreal Condensed Reports 83, 4 R. J. R. Q. 212, 4 L. C. R. 402. See also *Hurtubise* vs. *Bourret*, *infra* No. 83.

25. —— Establishing Fraud.—Where an affidavit stated that the deponent's grounds for believing that the defendant was about to leave the province with intent to defraud his creditors, were that the defendant's vessel was loaded and ready for sea, and that he, the defendant, intended sailing in her, and had told the deponent that he would not return to Canada—*Held*, to be sufficient. *Wilson* vs. *Reid*, S. C. 1854, 4 L. C. R. 157; *Berry* vs. *Dixon*, S. C. 1854, 4 L. C. R., 218, 4 R. J. R. Q. 126 and 166; and see *Hurtubise* vs. *Bourret*, *infra* No. 83.

26. —— Personally indebted.—Affidavit for *capias* must contain the allegation of *personal* indebtedness by defendant. *Alexander* vs. *McLachlan*, S. C. 1856, 1 L. C. J. 5. See *infra Sheridan* vs. *Hennessey* No. 78.

27. —— "May lose Recourse."—But it is not necessary that the deponent should swear that without the benefit of a writ of capias the plaintiff may be deprived of his remedy against the debtor. *Lelièvre* vs. *Donnelly*, S. C. 1856, 6 L. C. R. 247, 5 R. J. R. Q. 100. See *Piché* vs. *Bernier*, *infra* No. 101.

28. —— —— *Held*, that in such affidavit it is not necessary that it be sworn that the plaintiff, without the benefit of a writ of attach-

ment against the body of the defendant, may be deprived of his remedy. *Têtu* vs. *Pelletier*, S. C. 1856, 6 L. C. R. 32, 4 R. J. R. Q. 480.

29. —— **Personally indebted—"May lose Recourse."**—*Held*, that, where the affidavit shows a personal cause of action, the allegation that the defendant is personally indebted is not essentially necessary, and the allegation that the plaintiff may lose his said debt and sustain damage, is equivalent to the allegation that he may be deprived of his remedy. *Lampson* vs. *Smith*, S. C. 1857, 7 L. C. R. 425, 5 R. J. R. Q. 334. See *Piche* vs. *Bernier*, *infra* No. 101. See *Sheridan* vs. *Hennessey*, *infra* No. 78.

30. —— **Establishing fraudulent Departure.**—On a motion to quash a writ of capias on various grounds—*Held*, with regard to the departure of the defendant, that, where the deponent alleged as his ground of belief that the defendant was about to leave the province, that the defendant was a mariner, having no domicile in the province, and was about to sail with his ship, it was sufficient. *Hasse* vs. *Mulcahey*, S. C. 1856, 6 L. C. R. 15, 4 R. J. R. Q. 474.

31. —— **Demand for Payment.**—And it is not necessary to state in such affidavit that the defendant has been asked to pay the debt and refuses to do so. (*Ib.*)

32. —— **"May lose Recourse."**—And it is sufficient if the deponent swear that, without benefit of the writ of capias, the creditor will lose his debt or suffer damage, and the omission of the words "will lose his remedy" is not fatal. (*Ib.*)

33. —— **Cause of Debt.**—The allegation that the defendant is personally indebted to the plaintiff for work done by the plaintiff for the defendant, and for wages and salary earned by the plaintiff in the service of the defendant, is sufficient, although it is not stated that the work was done at the instance or request of the defendant. *Joutras* vs. *Dunlop*, S. C. 1857, 7 L. C. R. 420, 5 R. J. R. Q. 330. See also *Hurtubise* vs. *Bourret*, *infra* No. 83.

34. —— **Establishing fraudulent Departure.**—An affidavit in which it is stated that the reasons for believing that the defendant is about to leave the province with a fraudulent intent, are that the defendant is the master of a vessel which is loaded and ready for sea, with the defendant as master, and the defendant himself had stated that he was immediately about to sail to parts beyond the sea, is sufficient. *Quinn* vs. *Atcheson*, S. C. 1854, 4 L. C. R. 378, 4 R. J. R. Q. 203.

35. —— **Establishing fraudulent Intent.**—A *capias* cannot be quashed by motion on the ground that the reasons of belief in the affidavit do not specifically allege any fraudulent intent on the part of the defendant. *Henderson* vs. *Eunes*, S. C. 1858, 2 L. C. J. 186, 6 R. J. R. Q. 467.

36. —— —— ART. 799 C. C. P.—An affidavit to hold to bail which does not disclose any ground for the allegation that the defendant is a trader, and that he is notoriously insolvent, and has refused to compromise or arrange with his creditors, and does not allege that he has refused to make a *cession de biens* to them, is bad, even although it be alleged, as required, that he had secreted his estate, debts and effects with intent to defraud, and the capias issued in virtue of such affidavit will be quashed on motion. *Warren* vs. *Morgan*, Q. B. 1859, 9 L. C. R. 305. See *Cie. d'Imprimerie la Minerve* vs. *Barnett*, *infra* No. 100.

37. —— ART. 799 C. C. P.—And where the affidavit stated the cause of debt fully, the insolvency of the defendant, a trader, and that the deponent had been credibly informed that he was immediately about to secrete his estate, debts and effects with intent to defraud—*Held*, to be sufficient, and a motion to quash dismissed. *Macfarlane* vs. *Béliveau*, S. C. 1859, 9 L. C. R. 261.

38. —— **Description of Domicile.**—In an action commenced by *capias* where motion was made to quash the writ on the ground of irregularities in the affidavit—*Held*, that where the plaintiff was described as "of the city of Kingston, Canada West," it was a sufficient indication of his domicile. *Berry* vs. *May*, S. C. 1859, 13 L. C. R. 1.

39. —— **Establishing fraudulent Departure.**—An affidavit for *capias*, which alleges "that the defendant is about to leave the province and that the belief of the deponent that he is about to leave the province with intent to defraud, is founded, etc.," is insufficient, as the affidavit must specifically allege that the defendant is about to leave the province with intent to defraud. *L'Hoist* vs. *Butts*, S. C. 1860, 10 L. C. R. 204.

40. —— **"Or."**—An affidavit to hold to bail, which sets forth the essential obligations as required by the 12 Vic., cap. 42, in the disjunctive instead of in the conjunctive form is bad, and the *capias* must be quashed. *Talbot*

vs. *Donnelly*, S. C. 1860, 11 L. C. R. 5. See *Montgomery* vs. *Lyster*, *infra* No. 97.

41. —— ART. 799 C. C. P.—In an affidavit for a writ of *capias* against a trader it is necessary to allege the insolvency of the debtor, and that such debtor being insolvent refuses to make an assignment of his estate for the benefit of his creditors. *Hamel* vs. *Colé*, 1861, 11 L. C. R. 446.

42. —— An affidavit commencing "T. S., of the City of Montreal, bookkeeper of H. H., plaintiff, being duly sworn, doth depose and say"—was *held* to be sufficient without any statement in the body of the affidavit that he was such bookkeeper. *Hogan* vs. *Hoskins*, S. C. 1861, 12 L. C. R. 84.

43. —— **Deterioration of Property.**—An affidavit for *capias* in case of deterioration of property, under the provisions of chapter 47 of the Consolidated Statutes of L. C., need not contain the word "willfully," nor the allegation, that without the benefit of the writ the applicant will suffer damage; and on a contestation of the *capias*, the affidavit is *primâ facie* evidence of the allegations contained therein sufficient to oblige the party contesting to adduce evidence to the contrary. *Doutre* vs. *McGuinnis*, S. C. 1861, 5 L. C. J. 158.

44. —— **Where Debt contracted.**—*Capias* will be quashed on motion if the place where the debt was contracted be not mentioned in the affidavit. (1) *Brisson* vs. *McQueen*, S. C. 1862, 7 L. C. J. 70.

45. —— **Allegations of Indebtedness.**—An affidavit may contain several different averments of debt, inconsistent with one another, and is not void because one of them is insufficient. *Green* vs. *Hatfield*, S. C. 1862, 12 L. C. R. 115. See *Pike River Mills Co.* vs. *Priest*, *infra* No. 117.

46. —— **Cause of Debt—Where Debt contracted.**—*Held*, that the debt was sufficiently set forth in the affidavit by stating that the defendant was indebted to the plaintiff in the sum of £39, without stating the cause of debt or the place where it was contracted. *Debien* vs. *Marsan*, S. C. 1863, 14 L. C. R. 89. See also *Hurtubise* vs. *Bourret*, *infra* No. 83.

47. —— **Reasons of Belief.**—*Held*, also, that the grounds of the deponent's belief are sufficiently set forth by a statement to the effect that defendant stated to deponent, at a time and place mentioned, that he was about to go to California, one of the United States of America, to make money, and asked the deponent to procure him money for the voyage, and by afterwards making the same statements to persons named in the affidavit. (*Ib*)

48. —— **By several Plaintiffs.**—Action of *capias* was taken by several plaintiffs for debts due to each of them, and the affidavit was made by one of them, setting out that the defendant was indebted to him in a sum exceeding £10 currency, and action was brought for the whole amount due—*Held*, that the *capias* must be quashed, the deponent not appearing to act as the agent or legal attorney of the other legatees, his co-plaintiffs. *Bourassa* vs. *Brosseau*, S. C. 1863, 14 L. C. R. 23.

49. —— **Cause of Debt.**—The statement in an affidavit for *capias* that the defendant is truly and personally indebted to the plaintiff in the sum of £300, "for the balance of an account for various transactions which the said defendant had with the plaintiff in their business as wood merchants, which sum defendant hath acknowledged to owe the plaintiff," is a sufficient statement of the cause of debt to entitle the plaintiff to the writ. *Kenny* vs. Keown, S. C. 1864, 9 L. C. J. 104. See also *Hurtubise* vs. *Bourret*, *infra* No. 83.

50. —— **Order of Allegations.**—An affidavit for *capias* is sufficient if it contains all the allegations required by the Statute, although in a different order. *Gregory* vs. *Ireland*, Q. B. 1864, 9 L. C. J. 131.

51. —— **Cause of Debt.**—The cause of action is sufficiently set forth in an affidavit for *capias* where it alleges that the deponent was agent at Montreal of the plaintiffs, and that the defendant was justly, truly and personally indebted to the plaintiffs in a sum exceeding forty dollars, to wit, in the sum of $2,500, being as and for the price and value of a large quantity of glass sold by the deponent, as agent of the plaintiffs, to the defendant. *Gregory* vs. *Boston & Sandwich Glass Co.*, Q. B. 1864, 9 L. C. J. 134. See also *Hurtubise* vs. *Bourret*, *infra* No. 83.

52. —— **Names of Informants.**—In an affidavit for *capias* it is necessary to disclose the names of the persons from whom the information that defendant was immediately about to abscond, etc., was obtained. *Cameron* vs. *Bréga*, S. C. 1865, 10 L. C. J. 88. See *Milligan* vs. *Mason*, *infra* No. 57. See *Cornell* vs. *Merrill*, *supra* No. 20.

53. —— **Cause of Debt.**—The affidavit for *capias* must set forth the cause of action

(1) This holding is incorrect. See *Hurtubise* vs. *Bourret*, Q. B. 1879, at p. 139 of 23 L. C. J., per Monk, J.

and the nature of defendant's indebtedness. *Rolland* vs. *Guilbault*, S. C. 1868, 12 L. C. J. 276. See also *Hurtubise* vs. *Bourret*, *infra* No. 83.

54. —— **Establishing Secretion—"Moveable Property."**—In the case of a *capias* on the ground of fraudulent secretion it is not sufficient to swear that deponent "is credibly informed, hath every reason to believe, and doth verily and in his conscience believe," and the secretion must be affirmed of the property and effects generally of the debtor, and not merely of his "moveable property or effects." *Hurtubise* vs. *Leriche*, S. C. 1868, 13 L. C. J. 83. See also *Croteau* vs. *Demers*, *infra* No. 90.

55. —— **"May be deprived."**—An affidavit for *capias* grounded on the departure of the defendant, which does not allege that the departure of defendant *will* deprive plaintiff of his recourse, but is worded "whereby the plaintiff *may* be deprived of his remedy, etc.," is bad, and will be set aside. *Boyd* vs. *Freer*, S. C. 1871, 15 L. C. J. 109. See also *Stevenson* vs. *Robertson*, *infra* No. 67.

56. —— **Establishing Fraud.**—Where the plaintiff states in his affidavit for *capias* as reason for his belief that the defendant who is domiciled outside the province is about to leave the province with intention, etc., "that the defendant is about to sail on his vessel for Europe or other parts of the world," is insufficient, and *capias* quashed. *Paquet* vs. *McNab*, S. C. 1871, 3 R. L. 456, and see *Hurtubise* vs. *Bourret*, *infra* No. 83.

57. —— **Name of Informant.**—*Held*, that the mere fact of the name of the informant not being given will not invalidate the affidavit if it appear from other facts related in the affidavit that the defendant is immediately about to leave the limits of the old Province of Canada without any intention of returning. *Milligan* vs. *Mason*, C. R. 1872, 17 L. C. J. 159. See *Cameron* vs. *Brega*, *supra* No. 52.

58. —— **Establishing fraudulent Departure.**—That it is sufficient that deponent as one of his grounds swears directly that defendant is master of a ship, and that said ship is cleared at custom house, though without saying that this is done by defendant or that he is going with her, or naming the destination. (*Ib.*)

59. —— In the case above referred to the plaintiff was not limited to the remedy by revendication but was entitled to *capias*. (*Ib.*)

60. —— **"Province of Canada."**—That in an affidavit made since confederation, the allegation that defendant is about to leave the "Province of Canada" will be held to mean that part of the Dominion formerly called the Province of Canada. (*Ib.*) See *contra Lefebvre* vs. *DeLorimier*, *infra* No. 64.

61. —— **Establishing fraudulent Departure.**—It is not necessary that it should be positively sworn that at the time of the making of the affidavit the debtor is actually within the limits of the former Province of Canada. *Moisie Iron Co.* vs. *Olsen*, Q. B. 1873, 18 L. C. J. 29.

62. —— The affidavit for *capias* is not bad because it states that the debtor is about to leave the "Dominion of Canada," when it can be gathered from the other allegations of the affidavit that the departure is really from a point within the limits of the former Province of Canada. (*Ib.*)

63. —— **Reasons for Belief, etc.—Time.**—In an affidavit the deponent must state specially the reasons that lead him to believe that the debtor is making away with or secreting his goods with the intention of defrauding his creditors, without being obliged, however, to state who gave him the information or when he received it, provided that it appear by the terms of the affidavit and the circumstances therein related that the information was given to him at a time sufficiently recent to support an affidavit. *Bell* vs. *Vigneault*, S. C. 1874, 5 R. L. 697. But see *Drapeau* vs. *Pacaud*, *infra* No. 89. *Montgomery* vs. *Lyster*, *infra* No. 97. *Hotte* vs. *Currie*, *infra* No. 70.

64. —— **"Province of Canada."**—An affidavit for *capias* made since Confederation, alleging that the defendant is immediately about to leave the "Province of Canada," is bad, and a writ issued on such an affidavit will be quashed. *Lefebvre* vs. *Delorimier*, C. R. 1875, 19 L. C. J. 102. See *contra Milligan* vs. *Mason*, *supra* No. 57.

65. —— **"Or."**—An affidavit for *capias* alleging in the alternative that the defendant has secreted *or* made away with his property and effects is insufficient. *Ostell* vs. *Péloquin*, S. C. 1875, 20 L. C. J. 48. See *Gannon* vs. *Wright*, *infra* No. 94.

66. —— —— An affidavit for *capias* which deposes in the alternative, that "the defendant has secreted *or* made away with *or* is about immediately to secrete or make away with his property, etc.," is defective. *Mc-*

Master vs. *Robertson*, S. C. 1877, 21 L. C. J. 161. See *Gannon* vs. *Wright*, *infra* No. 94.

67. —— **"May deprive."**—An affidavit for *capias* is defective which deposes that the departure of the defendant "may" deprive the plaintiff of his recourse in place of using the words of the Code of C. P. "will deprive." *Stevenson* vs. *Robertson*, S. C. 1877, 21 L. C. J. 102. See also *Boyd* vs. *Freer*, *supra* No. 55.

68. —— **"May be deprived."**—An affidavit for *capias* is defective which used the words "may be deprived of his recourse" in place of the words "will be deprived," etc., and which omitted to depose as to the intent to defraud. *Ford* vs. *Léger*, S. C. 1877, 21 L. C. J. 191. See *Stevenson* vs. *Robertson*, *supra* No. 67.

69. —— **"About to secrete"—Reasons for Belief.**—The allegation in an affidavit for *capias* that deponent believes and is informed that the defendant is about to secrete "his moveable property and effects" is defective, and the affidavit is also bad on account of the failure to state therein the special grounds and reasons of such belief. *Ange* vs. *Magrauel*, C. R. 1876, 21 L. C. J. 216.

70. —— **Reasons for Belief—Secretion.**—The affidavit for *capias* need not specify the special reasons in support of the belief stated in the affidavit, nor the name of the informant, when the writ is issued on the charge of secreting property. *Hotte* vs. *Currie*, S. C. 1877, 22 L. C. J. 31. *Cassegrain* vs. *Patenaude*, S. C. 1871, 3 R. L. 416. See also *Montgomery* vs. *Lyster*, *infra* No. 97. See *Drapeau* vs. *Pacaud*, *infra* No. 89.

71. —— In the absence of the affidavit for *capias* the court cannot declare the writ void and valid. (*Ib.*)

72. —— **Time of Debt, etc.—Name of Informant.**—An affidavit for *capias ad respondendum*, alleging a debt to exist, need not state when the same was contracted, nor show that it was contracted within five years next preceding. *Maguire* vs. *Rockett*, S. C. 1877, 3 Q. L. R. 347. See *Hurtubise* vs. *Bourret*, *infra* No. 83.

73. —— Nor, that the sale and delivery were made to the defendant, when they are alleged to have been made "at his instance and request. (*Ib.*)

74. —— When the facts, upon which his *belief* is based, are sworn to directly, and not as hearsay, the deposant is not bound to disclose the name of any informant. (*Ib.*)

75. —— **Currency — Description of Defendant—Cause of Action**—In an affidavit for *capias* it is sufficient to state the amount in "dollars" without any qualification as to a particular currency. Where the initial only of defendant's Christian name is given, this is no ground of petition to quash. *Hall* vs. *Zernichon*, S. C. 1878, 4 Q. L. R. 268.

76. —— The cause of action was not sufficiently stated in the affidavit in this cause, which did not show a personal liability of the defendant, or the nature of that liability. (*Ib.*)

77. —— The form of affidavit given in the appendix (No. 42) to articles 812 and 813 of the Code of Civil Procedure is sufficient for the arrest of a debtor under Art. 788. *Rhodes* vs. *Robinson*, S. C. 1879, 23 L. C. J. 166, 2 L. N. 216.

78. —— **Personally indebted.**—The omission to state, in an affidavit for *capias*, that the defendant is *personally* indebted to the plaintiff is not fatal if the affidavit otherwise disclose a personal indebtedness. *Sheriden* vs. *Hennessey*, S. C. 1879, 23 L. C. J. 212. See *Lampson* vs. *Smith*, *supra* No. 29. *Alexander* vs. *McLachlan*, *supra* No. 26.

79. —— **Time and Place of Debt.**—In such affidavit it is not necessary to allege where or when the indebtedness was incurred. (*Ib.*) See also *Hurtubise* vs. *Bourret*, *infra* No. 83.

80. —— Alleged differences between the allegations of the affidavit and the declaration cannot be raised by the petition to quash. (*Ib.*)

81. —— **Establishing fraudulent Departure.**—The allegation in an affidavit for *capias*, that deponent hath been informed by a person designated, that the defendant "had come to Montreal to attend the meeting of the Graphic Company, and that the said defendant was about to go to New York," was insufficient in law to justify the belief that the defendant was about to leave Canada for the United States of America, with intent to defraud the plaintiff, his creditor. *Canada Paper Co.* vs. *Bannatyne*, S. C. 1879, 23 L. C. J. 261.

82. —— —— Where the defendant petitioned to be liberated on various grounds, one of which was that it was not alleged in the affidavit that defendant was *immediately* about to leave the province—*Held*, that the word *immediately* was indispensable. *Hawkes* vs. *Caffrey*, S. C. 1879, 2 L. N. 159.

83. —— **Time and Place of Debt.**—On a petition to quash a *capias* on the ground of the insufficiency of the affidavit—*Held*, that it was not necessary to state in such affidavit either the date when or the place where the debt for which the *capias* issues were contracted. *Hurtubise* vs. *Bourret*, Q. B. 1879, 2 L. N. 54, 23 L. C. J. 130. See *Maguire* vs. *Rockett*, *supra* No. 72. *Sheridan* vs. *Hennessey*, *supra* No. 78.

84. —— **Cause of Debt.**—*Held*, in accordance with the jurisprudence since the Code of Procedure, that the affidavit for *capias* must contain the causes of defendant's indebtedness. (*Ib.*) See also *Gregory* vs. *Boston & Sandwich Glass Co.*, *supra* No. 51. *Debien* vs. *Marsan*, *supra* No. 46. *Kenny* vs. *McKeown*, *supra* No. 49. *Joubras* vs. *Dunlop*, *supra* No. 33. *Rolland* vs. *Guilbault*, *supra* No. 53. *Hall* vs. *Zerniehon*, *supra* No. 75

85. —— **Establishing Fraud.** — And where the affidavit alleged merely that the defendant resided at New York and had no domicile in Canada; that he refused to pay the debt, although he had means to do so; that he counted on escaping payment by his absence, and by the fact that he had no property in this country that plaintiff could seize; that he was in Montreal on family affairs which would only detain him a few hours, and that he was about to leave immediately for New York, where he carried on business—*Held*, that this was not sufficient of itself to establish that it was with the intention of defrauding his creditors that he was on the point of leaving the country, and the *capias* must therefore be quashed. (*Ib.*) See also *Berry* vs. *Dixon*, *supra* No. 25. *Paquet* vs. *McNab*, *supra* No. 56. *Lavoeque* vs. *Clarke*, *supra* No. 21.

86. —— **Reasons for Belief.**—An affidavit for *capias* alleging that the deponent is informed that the defendant is secreting, or is about to secrete, his property, is insufficient, if he does not give his reasons for swearing so, or mention the names of the persons from whom he received the information, in order to place the defendant in a position to contradict them if he can do so. *Mullarky* vs. *Phaneuf*, S. C. 1879, 9 R. L. 529, and see *Bell* vs. *Vigneault*, *supra* No. 63. But see *Drapeau* vs. *Pacaud*, *infra* No. 89, and cases there noted.

87. —— **Province of Canada.**—And where an affidavit for *capias* set out that defendant was about immediately to leave the "Province of Quebec"—*Held*, insufficient. *Doyer* vs. *Walsh*, S. C. 1880, 3 L. N. 304.

88. —— **Reasons for Belief.**—*Capias* where founded on belief, it is sufficient to give the name of an informant without specifying other reasons of belief. *McRae* vs. *Miller*, C. R. 1881, 28 L. C. J. 268.

89. —— —— In an affidavit for *capias* where the deposant alleges that he believes the defendant is secreting his property with intent to defraud, it is not necessary to state the grounds of such belief. (1) *Drapeau* vs. *Pacaud*, C. R. 1880, 6 Q. L. R. 9. And see *Montgomery* vs. *Lyster*, *infra* No. 97, and *Holte* vs. *Currie*, *supra* No. 70. But see *Mullarky* vs. *Phaneuf*, *supra* No. 86. *Bell* vs. *Vigneault*, *supra* No. 63.

90. —— **Establishing Secretion.**—An affidavit for a *capias ad respondendum*, under article 798 Code of Procedure, in which, as to the alleged secreting, the deponent swears: *Qu'il est informé d'une manière croyable, à toute raison de croire, et croit vraiment en sa conscience, etc.*, and gives the names of his "informants."—*Held*, good. Reference made to *Brooke* vs. *Baltimore*, 6 R. L. 657, and *Griffith* vs. *McGovern* (reported in appeal in Montreal Herald, June, 1873. And see 6 L. N. at p. 4. See Foran's Code of Procedure, p. 492 for decision of Court of Review which was reversed) in which affidavits for attachment before judgment, under article 834 of the Code of Procedure, in the same form as to the secreting, were held good by Court of Appeals. *Croteau* vs. *Demers*, S. C. 1881, 7 Q. L. R. 277. See also *Hurtubise* vs. *Leriche*, *supra* No. 54.

91. —— **Reasons for Belief—Leaving Canada.**—On appeal from a judgment maintaining a *capias*. *Per curiam.*—The affidavit in this case sets out no fact beyond the departure of the defendant and his failure to pay what he owes. It has now been so often laid down that this is not sufficient that the jurisprudence must be considered settled on the point. How a departure is to become "with intent to defraud" otherwise than by the non-payment of the debtor's liability it is not easy to understand; but the law would cease to be interesting if it had not its little mysteries. I take it, however, that the recent rulings have completely annihilated "the seafaring man doctrine." *Caffrey* vs. *Lighthall*, Q. B. 1881, 4 L. N. 282, 2 Dorion's Q. B. Rep. 10. See also *Mitchell* vs. *Bean*, *infra* No. 111.

92. —— **Time of Debt.**—Petition to quash a *capias* on the ground that the affida-

(1) This case refers to conflicting cases on the subject.

vit did not allege the secretion to have taken place since the indebtedness. It said that in February, 1879, there had been a conversation between the parties, and since that time the defendant had secreted. The debt was contracted some months after that. It was not expressly said that there was a debt at the moment of secretion. *Held*, that the affidavit was wanting in precision and therefore technically deficient. *McAllen* vs. *Ashby*, C. R. 1881, 4 L. N. 50. See *Trudeau* vs. *Renaud*, *infra* No. 112.

93. —— An affidavit for capias, under C. C. P. 798, in which as to the alleged secreting the deponent swears: "the deponent is credibly informed, and in his conscience doth verily believe that the said O. B. has secreted and made away with, and is about immediately to secrete and make away with his property with intention," etc., is sufficient. *Blake* vs. *Wadleigh*, Q. B. 1882, 6 L. N. 3.

94. —— **"Or."**—An affidavit for capias, alleging in the alternative that the defendant is secreting or is on the point of secreting his property and effects, etc., is insufficient. *Gannon* vs. *Wright*, S. C. 1882, 5 L. N. 404. See *Ostell* vs. *Peloquin*, *supra* No. 65. See *Mc Master* vs. *Robertson*, *supra* No. 66.

95. —— **Province of Canada.**—An affidavit is insufficient which alleges that the defendant is about to depart from "the province of Quebec;" it should be from "the province of Canada." *Maury* vs. *Durand*, S. C. 1882, M. L. R., 1 S. C. 347.

96. —— **Reasons for Belief.**—An affidavit for *capias* made after the institution of an action for the recovery of the debt and containing only the allegation, that since the institution of the action the defendant has secreted and made away with his goods, debts and effects, with the intention of defrauding his creditors in general and the plaintiffs in particular, is sufficient and legal, and it is not necessary in such affidavit to give the grounds of deponent's belief. *D'Anjou* vs. *Thibaudeau*, Q. B. 1882, 11 R. L. 512.

97. —— **"Or"—Reasons for Belief.**—The allegation in an affidavit for capias that "the defendant is secreting his property with the intention of defrauding his creditors in general *or* the deposant in particular," as also that the defendant has secreted and is about to secrete his property are sufficiently positive, nor is it necessary for the deponent to enumerate the reasons which he has for so believing. *Montgomery* vs. *Lyster*, C. R. 1882, 8 Q. L. R. 375. See *Holte* vs. *Currie*, *supra* No. 70. *Drapeau* vs. *Pacaud*, *supra* No. 89. *Talbot* vs. *Donnelly*, *supra* No. 40.

98. —— The quality of the person who received the affidavit is sufficiently indicated by terms which permit the Court to recognize its officer. (*Ib.*)

99. —— **Time.**—An affidavit alleging that the defendant "has secreted" his property, or "has absconded," without indicating any time when such secretion or absconding has taken place, is insufficient, and does not comply with article 834 C. C. P. *Weinrobe* vs. *Solomon*, S. C. 1884, 7 L. N. 109. See *Trudeau* vs. *Renaud*, *infra* No. 112.

100. —— **Art. 799 C. C. P.**—An affidavit for *capias*, under Art. 799 C. C. P., alleging that the defendant is a trader, that he is notoriously insolvent, that he has refused to make terms with his creditors or to make an assignment of his property for their benefit, that he continues to trade although insolvent, is insufficient. *Cie. d'Imprimerie La Minerve* vs. *Barnett*, S. C. 1884, 13 R. L. 385. See *Warren* vs. *Morgan*, *supra* No. 36.

101. —— **"Will lose Recourse."**—The statement that the departure of the defendant will cause the plaintiff to lose his debt and to suffer damages, is equivalent to the allegation that it will make him lose his recourse, and, therefore, suffices. *Piché* vs. *Bernier*, C. R. 1884, 10 Q. L. R. 351. See also *Lefièvre* vs. *Donnelly*, *supra* No. 27. See also *Lampson* vs. *Smith*, *supra* No. 29.

102. —— **Erasures and Marginal Notes.**—One affidavit which contains all the necessary averments, suffices for the issuance of a writ of *capias* and of a writ of attachment in the same case; and the fact that the words which may have been erased and the marginal notes which may have been added to the affidavit are not summarized at the end thereof, does not make it null. *St. Michel* vs. *Vöddler*, S. C. 1885, M. L. R., 1 S. C. 163.

103. —— **Pleadings.**—Where the plaintiff in such case prayed for no further condemnation in the declaration attached to the attachment before judgment than what he had claimed in the declaration attached to the *capias*, the defendant was not allowed to file two sets of pleadings. (*Ib.*)

104. —— **"Or."**—An allegation in an affidavit for *capias* "that the defendant has secreted and made way with his property, and is about to secrete *or* make away with his property with intent to defraud his creditors in

general *or* the plaintiff in particular" is sufficient. *Senécal* vs. *Hart*, S. C. 1885, M. L. R., 1 S. C. 371.

105. —— Neither is there any uncertainty in the allegation "that the defendant is about to leave immediately the Province of Canada, comprising the Provinces of Ontario and Quebec, with the intention of defrauding his creditors in general *or* the defendant in particular;" such allegation is sufficient. (*Ib.*)

106. —— Art. 799 C. C. P.—In order to obtain a *capias ad respondendum*, it is only necessary that, in addition to the debt, the affidavit should state that the defendant is a trader, that he has ceased his payments and has refused to make an assignment of his property for the benefit of his creditors. *Parent* vs. *Trudel*, C. R. 1887, 13 Q. L. R. 136.

107. —— **Time.**—An allegation in an affidavit for capias that the defendant has secreted and made away with his property with the intention of defrauding the plaintiff, his creditor, is sufficient, and need not enumerate the time when the secretion took place. *Trenholme* vs. *Hart*, S. C. 1888, 16 R. L. 318; *Leblanc* vs. *Fortin*, S. C. 1891, 14 L. N. 90.

108. ——**"May lose Recourse."**—In such an affidavit as the above, based on secretion, it is not necessary to allege "that the plaintiff will be deprived of his recourse against the defendant unless he has a *capias* against him." (*Ib.*)

109. —— **Province of Canada.** Art. 799 C. C. P.—An affidavit for *capias* which alleges that the defendant is about to leave immediately the Province of Quebec, that he has secreted and made away with some of his effects, that he is notoriously insolvent, and has refused to make an assignment of his property for the benefit of his creditors, is insufficient in that it does not state that the defendant is about to leave immediately the Province of Canada, as it existed at the time when the provisions of Art. 798 C. C. P. were enacted; also that it does state that the defendant has secreted or made away with, or is about to secrete or make away with the intention of defrauding his creditors in general, or the plaintiff in particular; and that it omits to state that the defendant has ceased his payments, as required by Art. 799 C. P. C. *Lambe* vs *Read*, S. C. 1886, 14 R. L. 344.

110. —— Art. 799 C. C. P.—An allegation in an affidavit for *capias*, that the defendant is notoriously insolvent, is insufficient under C. C. P. 799 and 48 Vict. (Q.), ch. 22, s. 12, which requires the affidavit to establish that the defendant has ceased his payments. *Nerelle* vs. *Carrière*, S. C. 1886, 10 L. N. 28.

111. —— **Reasons for Belief.**—An affidavit for *capias* which alleges that the defendant is about to leave immediately the former Province of Canada, with the intention of defrauding his creditors, but which does not state the deponent's reasons for so believing, is irregular. *Mitchell* vs. *Benn*, S. C. 1888, 16 R. L. 131. See *Caffrey* vs. *Lighthall*, *supra* No. 91.

112. —— **Allegations of Secretion.**—An affidavit for *capias* merely alleging that the defendant has secreted his property is insufficient; but an allegation that the defendant has secreted, is secreting and is about to secrete his property, is sufficient. *Trudeau* vs. *Renaud*, S. C. 1889, 17 R. L. 617, 34 L. C. J. 102. See *McAllen* vs. *Ashley*, *supra* No. 92; *Weinrobe* vs. *Solomon*, *supra* No. 99.

113. —— **Clerical Error.**—Where the affidavit alleges that the plaintiff is secreting, etc., instead of that the defendant is secreting, the *capias* will be quashed. *Blondin* vs. *Desjardins*, S. C. 1890, M. L. R., 6 S. C. 283.

114. —— **Names of Informants, etc.**—It is not necessary, in an affidavit for *capias* alleging fraudulent secretion, to indicate the mode in which the deponent was informed of the facts of secretion alleged, nor to give the names of the persons who furnished the information, as is required in an affidavit for *capias* on the ground that the defendant is about to leave immediately the heretofore province of Canada, with intent to defraud his creditors. *Lachance* vs. *Gauthier*, S. C. 1890, M. L. R., 6 S. C. 279, confirmed in Review, 30 June, 1890.

115. ——**Allegations of Indebtedness.**—In an affidavit for *capias*, it is not necessary to allege specially that the debt was contracted within the province; but, in the present case, the receipt and fraudulent conversion of goods by the defendants in Montreal being alleged, a personal indebtedness here was sufficiently disclosed. *Hemken* vs. *Slayton*, C. R. 1890, M. L. R., 7 S. C. 118.

116. —— **Fiat.**—An appearance and *fiat* for the issue of a writ of *capias* are not essential where the issue of the writ is asked by the affidavit. (*Ib.*)

117. —— **Allegations of Indebtedness —Account annexed.**—An affidavit for *capias* is not void for uncertainty because it sets out several causes of indebtedness for a like

amount (as in a declaration with the common counts), so long as it is clear that the allegations all relate to one and the same sum of money. *Pike River Mills Co.* vs. *Priest*, C. R. 1891, 15 L. N. 360.

118. —— The omission to annex an account referred to in the affidavit is not material, the law requiring only the oath of the creditor or his agent. (*Ib.*)

III. AFTER JUDGMENT. (See also "CONTESTATION OF.")

1. A writ of *capias* may issue after judgment, and in a new action, and in such a case it is competent to the defendant, on the merits of the cause, to disprove the allegations of the affidavit upon which the *capias* has issued. *Perry* vs. *Milne*, S. C. 1861, 8 L. C. J. 225.

2. The *capias* issued against defendant on a judgment already obtained. The affidavit merely referred to this judgment, and the declaration merely alleged that the amount of the judgment was still unpaid and demanding a *capias*—*Held*, that, as a *capias* issuing after judgment was not a demand in the sense of Art. 50 C. C. P., but only a means of preventing the defendant from leaving the country until the debt should be paid, that a reference to the judgment as a ground of *capias* was sufficient. *Trust & Loan Co.* vs. *Cassidy*, S. C. 1880, 3 L. N. 117. And see *Malo* vs. *Labelle*, 2 L. C. J. 194, which held that, in an affidavit for *capias pendente lite*, a reference to the declaration filed in the cause for the cause of debt is sufficient.

3. The affidavit on which a *capias* after judgment has issued is the only proof required of the allegations of fraud on which the *capias* is founded, and additional proof in such case is no more necessary than if the *capias* had issued before judgment. *Drapeau* vs. *Pacaud*, C. R. 1880, 6 Q. L. R. 140.

4. The issue of a *capias* after judgment does not result in a new judgment condemning the defendant to pay what he has already been ordered to pay by the judgment on which the *capias* is based, but the effect is simply to join the *capias* to such judgment and have it declared valid. *Drapeau* vs. *Pacaud*, C. R. 1880, 6 Q. L. R. 140.

5. A writ of *capias ad respondendum* after judgment cannot issue in another judicial district than that in which the judgment was rendered. *Mathewson* vs. *Bush*, Q. B. 1883, 3 Dorion's Rep. 195, 28 R. L. 7, confirming S. C. 1881, 4 L. N. 342; also *Hay* vs. *Caddy*, K. B., 3 R. de L. 306, holding "a *capias ad respondendum* cannot be obtained (in the district of Quebec) in an action founded on a judgment of King's Bench, Montreal.

6. A *capias* may issue in a separate action for a debt composed in part of the amount of a judgment previously obtained against the defendant, such *capias* being a proceeding entirely distinct and separate from the judgment. *Sénécal* vs. *Hart*, S. C. 1885, M. L. R., 1 S. C. 371.

7. It is not necessary that a *capias* issued after judgment should be issued as an incident of the action giving rise to such judgment, and bear the same number as such action. *Trudeau* vs. *Renaud*, S. C. 1889, 17 R. L. 647.

8. The defendant arrested on a writ of *capias* issued after judgment, cannot, upon petition to quash, have it declared void, because the plaintiff concluded for a condemnation for the amount of the debt for which he already had judgment. (*Ib.*)

9. Res Judicata.—Where a *capias* is based on a judgment, the question of indebtedness as fixed by the judgment is *chose jugée*, and the defendant is precluded from questioning the correctness of the amount so found to be due by him *Cushing* vs. *Fortin*, S. C. 1892, 1 Que. 512, confirmed in Review, p. 551.

IV. AGAINST.

1. Husband—Bail.—A wife separated as to bed and board can *capias* her husband where he is disposing of his property with a view to depriving her of the alimentary allowance claimed by her in an action therefor, and in such case the defendant must give security for bail to the extent of the judgment that may be rendered, the court not having the power to limit the amount in such case. *Wheeler* vs. *Smith*, S. C. 1887, 19 R. L. 190.

2. Minors—A *capias* will not lie against a minor even for necessaries. *Morgan* vs. *Le boutillier*, S. C. 1879, 5 Q. L. R. 242.

3. —— But, *held*, a minor carrying on trade may legally bind himself for his board and lodging, and in such case may be arrested under *capias ad respondendum*. *Browning* vs. *Vale*, S. C. 1862, 12 L. C. R. 292.

4. —— The defendant, a music teacher, being arrested by *capias* for a debt due for clothes, pleaded by exception to the form that he was a minor, and on the same ground presented a petition under Art. 819 of the Code

of Procedure for his discharge. The plaintiff answered that, although he was a minor, he was still subject to *capias*, inasmuch as he was a trader, and the things for which he was indebted were necessaries—*Held*, that the petition under Art. 819 of the Code of Procedure was independent of all other proceedings, even though based on the same grounds. *Morgan* vs. *Lehoutillier*, S. C. 1879, 5 Q. L. R. 212.

5. **Person acting under another's Influence.**—A *capias* will be set aside on evidence that the party arrested was young, that he acted under the influence of his father, although he, being bookkeeper of the concern of which he was a partner, made fraudulent entries in the books to the damage of the creditors. *Leclaire* vs. *Dastous*, Q. B., Montreal, rendered at Quebec, 8 Oct., 1883.

6. **Septuagenarian.**—A septuagenarian, who deteriorates hypothecated property, is not exempt from arrest under *capias*. *Ouimet* vs. *Monnier*, S. C. 1893, 3 Que. 43, confirmed in Review 28 Feb., 1893.

V. BAIL.

1. **Bail to Sheriff.** Art. 828 C. C. P.—The bail given to the sheriff in a case of *capias* is null if it contain a clause that the party should furnish a special bail on the day of the return, and not at any time before or after judgment. *Raymond* vs. *Walker*, Q. B. 1818, 3 Rev. de Lég. 297, 2 R. J. R. Q. 291.

2. **Bail under Art. 825 C. C. P.—Insolvent Act, 1875.**—The Insolvent Act, 1875, s. 127, did not repeal Art. 825 C. C. P. *McMaster* vs. *Robertson*, C. R. 1878, 1 L. N. 77.

3. **Bond—Breach—Nature of Bond—Sureties.**—The plaintiff having caused the arrest by *capias ad respondendum* of one Morin, the defendants became special bail, the condition of the bond being that Morin should not leave the Province of Canada. Morin, during a hunting excursion, unwittingly crossed the frontier into the United States, but afterwards returned to his residence in Canada, and was subsequently surrendered by his bail. The plaintiff then, Morin being still in gaol, brought suit against the present defendants upon the bond. *Held*, that Morin's absence, under the circumstances, was not a breach of the conditions of the bail bond, and that, in any case, his surrender by his bail discharged them from the bond. *Roy* vs. *Beaudet* et al., S. C. 1885, 14 Q. L. R. 259; *Thompson* vs. *Lacroix*, 1 Q. L. R. 312, questioned.

3a. —— A bail bond is considered to be a judicial proceeding in the interests of justice, and not a mere contract between individuals to be construed in favor of the plaintiff, according to the letter of the document. (*Ib.*)

4. —— **Contra.**—Where the defendant gives bail, the condition of the bond being that he shall not leave the Province of Canada, he does not thereto cease to be under detention; such bail has merely the effect of enlarging the limits within which he is confined, and of substituting the sureties as guardian instead of the sheriff; therefore, even the temporary absence of the defendant from the province constitutes a breach of the conditions of the bond, and gives the creditor recourse against the sureties. *Thompson* vs. *Lacroix*, S. C. 1878, 4 Q. L. R. 312.

5. **Bond under Art. 824 C. C. P.—Sufficiency of.**—The bail authorized by Art. 824 C. C. P. can be furnished by more than two sureties in different amounts, provided these different sums aggregate the total amount required, and provided also that each of these different sums be guaranteed by two good and sufficient sureties. *Reid* vs. *Guest*, S. C. 88, 16 R. L. 377.

6. **Bond—Forfeiture—Notice of Transfer.—Provisional Discharge.** Art. 828 C. C. P.—Where the debtor has forfeited his bond given to the sheriff under Art. 828 C. C. P. to obtain his provisional discharge, it is not necessary that the transfer of the bond by the sheriff to the creditor should be signified to be accepted by the surety. *Guillet* vs. *Lemieux*, C. R. 1893, 3 Que. 413.

7. **Bond under Art. 825 C. C. P.—Sufficiency.**—(By the Court of Review, confirming the judgment of the Superior Court, Taschereau J., *dissentiente*.) A bail bond given in satisfaction of the above provisional bail, and reading as follows: "Know that we, Chas. Lemieux and David Lemieux, bind ourselves towards V. B. Scott, sheriff of the district, in the sum of $350, to be paid to the said sheriff or to his attorney, administrator, etc. Whereas, the said Charles Lemieux was arrested by the said sheriff at the instance of Joseph Guillet, and surrendered into the hands of the said sheriff, according to law; the present obligation provides that the said Charles Lemieux shall, at any time between now and the rendering of the judgment in this matter, surrender himself into the hands of the sheriff when so required by an order of the Court or a judge in the terms of the law, and, in default

of so doing, he shall pay the said sum of $350. In that event the present obligation shall be void and of no effect, but, in the contrary event, it shall remain in full force, vigor and effect"—satisfies the requirements of Art. 825 C. C. P.

8. —— At all events, the presence of the plaintiff's attorney when such bond was given, and the failure of plaintiff to raise objections thereto, either then or since, the defendant still being within the delays to give another bond, and especially the fact that the defendant had demanded his permanent discharge on the ground that he had made an abandonment of his property, and deposited his statement, which had not been contested,—prevent the plaintiff from now claiming that the second bond was null, and that the surety has become his personal debtor under the bond for provisional discharge, on the ground that the surety was not renewed within the proper time by a regular bond under Arts. 824 and 825 C. C. P. (*Ib.*)

9. —— The fact that such bond was given in favor of the sheriff does not render it null, the sheriff being for the purposes of the suretyship the agent of plaintiff. (*Ib.*)

10. Form of Judge's order under Art. 801 C. C. P.—The following form of the judge's order, required by 801 of the Code of C. P., is sufficient:—"Seeing the foregoing affidavit, the amount of bail to be given under Art. 801 of the Code of C. P. is hereby fixed at——" *Moisie Iron Co.* vs. *Olson*, Q. B. 1873, 18 L. C. J. 29.

11. Special Bail, Art. 825 C. C. P.—Provisional Discharge, Art. 828 C. C. P.—Where judgment was rendered in the Superior Court, maintaining a writ of capias, and the defendant presented a petition supported by affidavit, praying to be allowed to put in bail or security, that he would surrender himself to the sheriff within a month after service upon himself or his sureties of a judgment requiring such surrender—*Held*, that he would on cause shown be allowed to put in such bail in place of the bail given to the sheriff. *Henderson* vs. *Lamoureux*, S. C. 1867, 17 L. C. R. 114.

12. Special Bail, Arts. 824 and 825 C. C. P.—In an action upon a recognizance of special bail—*Held*, that the omission in such recognizance of the conditions required in the provincial statute, 5 Geo. IV., cap. 2, regarding the liability of the cognizor, makes the recognizance null and void. *Stuart* vs. *Hamel*, Q. B. 1845, 1 Rev. de Lég. 212, 2 R. J. R. Q. 12.

13. —— A defendant who has given special bail is not bound to file a statement and make the declaration mentioned in Article 766 of the Code of Procedure. *Poulet* vs. *Lavoie*, S. C. 1872, 6 Q. L. R. 314.

14. —— Special Bail under Art. 824 C. C. P.—Statement and Declaration under Art. 766 C. C. P.—Contempt. —V., arrested under a writ of *capias*, gave special bail as required by Art. 825 C. C. P. The *capias* was contested but maintained, and V. ordered to file a statement in accordance with Arts. 764, 765 and 766 C. C. P. within 15 days from service of the judgment, which he failed to do, and by another judgment was declared to be in contempt of Court, and condemned to be "detained in jail until otherwise ordered by this Court"—*Held*, in Superior Court, that, under Art. 766 C. C. P., the debtor who is at liberty on bail is obliged to furnish a statement within 30 days of the judgment in the suit, and that there is no distinction in this respect between the cases in which such special bail is given and others. *Vincberg* vs. *Ranson*, Q. B. 1886, 33 L. C. J. 192.

15. —— But *held*, in appeal, that a commitment for contempt must be for a given time, or until the person in contempt does or is willing to conform to the order of the Court. That a commitment which is general and during pleasure will be quashed and set aside. (*Ib.*)

16. —— And *held*, by Cross J., approving *Poulet* vs. *Lavoie* (6 Q. L. R. 314), that a defendant, who has given special bail under C. C. P. 824, is not bound to file a statement and make the declaration mentioned in articles 764 766 C. C. P., and the defendant in this case, not being bound by law to file such statement, could not be in contempt for failing to do so. *Vincberg* vs. *Ranson*, 1886, M. L. R., 2 Q. B. 315.

17. Special Bail under Art. 824 C. C. P.—Imprisonment.—Where a debtor, under a writ of *capias ad respondendum*, has given bail, under Article 824 C.C.P., that he will not leave the Province of Quebec, he cannot be condemned to be imprisoned until he has paid the debt with interest and costs. *Sabras* vs. *Brien dit Durocher*, Q. B. 1885, 29 L. C. J. 143.

18. Special Bail, Art. 824—Provisional Discharge, Art. 828 C. C. P.—A defendant arrested under *capias*, who has given,

by virtue of Art. 828 C. C. P., the bail-bond mentioned in form No. 44 of the Code of Procedure, can, after a delay of eight days from the day fixed for the return of the writ, and even after judgment maintaining the *capias*, obtain leave to put in special bail under Art. 824 C. P. C. *Lightstone* vs. *Bercovitch*, C. R. 1890, 20 R. L. 456.

19. **Special Bail.— Imprisonment.— Sureties.**—A defendant arrested under a writ of *capias*, and who has given bail under Art. 825 C. C. P., cannot be imprisoned before the delay of one month from the service of an order of the Court ordering him to surrender himself to the sheriff; and the only obligation incurred by the sureties is the payment of the debt upon defendant's default to so surrender himself. *Thibaudeau* vs. *Villeneuve*, S. C. 1889, 17 R. L. 714.

20. **Sureties—Justification of. Art. 827 C. C. P.—Capias—Bail.** The sureties offered in a case of *capias* may justify on oath, and need not justify on real estate. *Hochelaga Bank* vs. *Goldring*, S. C. 1879, 2 L. N. 276, 10 R. L. 234.

21. **Sureties.—Judicial Abandonment. —Effect of.**—The creditor cannot compel the sureties of a debtor arrested under *capias* to deliver up the debtor, or in default to pay the debt in capital, interest and costs where the debtor has made a judicial abandonment of his property in the regular way, and gave notice thereof to the plaintiff, although the abandonment arose out of another case. *Friedman* vs. *Lilienthal*, S. C. 1893, 3 Que. 158.

22. **Sureties—Deposit in lieu of Bail, under Art. 828 C. C. P.—Agreement to give Bail—Conditional Obligation—Time of Performance—Default.** ARTS. 1067-1069 C. C.—T. being arrested upon a *capias*, gave the bail (Feb. 18, 1888) required by Art. 828 C. C. P. for his provisional discharge. The sureties, by consent, deposited $200 with the prothonotary in place of a bond, the terms of the written consent being: "The parties agree to and accept the deposit . . . . to satisfy the amount of the judgment to be rendered in this case in capital, interest and costs, if he fails to give the security required by Art. 824 or 825 C. P. C. on the 1st March, 1888." The contestation of the *capias* was dismissed Feb. 22, and on March 5 T. gave notice that he would put in bail under Art. 824 or 825, and bail was given under Art. 825 C. C. P. by permission of the Court, the rights of the parties being reserved. The plaintiff then attached the deposit in the hands of the prothonotary for the costs on the contestation of the *capias*. On an intervention by the sureties, each claiming half of the deposit—*Held* (Tait, J. *diss.*):—That the date (1st March) mentioned in the consent applied only to bail under Art. 824 C. C. P., which must be given within eight days from the day fixed for the return of the writ; and that T. having the right to put in bail under Art. 825 C. C. P. at any time before judgment, the case did not come within Art. 1068 C. C., nor under Art. 1069 C. C., which applies to contracts of a commercial nature only. The intervention of the sureties was therefore maintained. *Bourassa* vs. *Thibaudeau*, C. R. 1889, M. L. R., 5 S. C. 439, 19 R. L. 239.

23. **Sureties—Liability of.**—Where a *capias* has been declared good and valid, and the defendant, in appealing from the judgment, gives security for costs only, and files a declaration that he does not object to the execution of the judgment, the appeal does not suspend proceedings against the bail on their bond to the sheriff. *Lajoie* vs. *Mullin*, Q. B. 1876, 21 L. C. J. 59, 9 R. L. 48; *Smith* vs. *David*, S. C. 1877, unreported.

24. **Sureties—Liability of, to Imprisonment.**—The bail under Art. 825 Code of C. P. for a defendant arrested under a writ of *capias ad respondendum* are judicial sureties, and liable to imprisonment to compel payment of a judgment against them on their bond. *Winning* vs. *Leblanc*, S. C. 1870, 14 L. C. J. 298.

25. ——And thus, with bail under Art. 828 C. C. P. *Belle* vs. *Coté*, C. C. 1868, 13 L. C. J. 26.

26. **Sureties—Liability of—When absolute.**—After the expiration of the delay of one month accorded for the surrender of a defendant by his bail, under a bond, in terms of sec. 11 of ch. 87 of the Cons. Stat. of L. C., the liability of the bail to pay the plaintiff's debt becomes *absolute*. *Lynch* vs. *Macfarlane*, Q. B. 1868, 12 L. C. J. 1.

27. **Sureties—Liability of—Discharge** —Where the bail of a party originally arrested under a writ of *capias* has caused him to be imprisoned under a writ of civil imprisonment, issued at their instance, in order that he should undergo the imprisonment imposed as a punishment under sub-section 2 of sec. 12 of ch. 87 of the Cons. Stat. of L. C., the bail cannot, for that reason alone, claim that their bail bond should be cancelled and dis-

charged. *Macfarlane* vs. *Bell*, S. C. 1865, 1 L. C. L. J. 99.

28. Sureties—What amount liable for.—In action against the sureties of a person arrested under *capias*, where the plaintiff sought to hold them for an amount greater than that originally sued for—*Held*, that notwithstanding the sureties had given bail for double the amount endorsed on the writ and sworn to in the affidavit, and although the plaintiff had afterwards obtained judgment for an amount greater than that sworn to in the affidavit, that he could recover for the amount thus sworn to with costs, and no more. *Torrance* vs. *Gilmour*, S. C. 1851, 2 L. C. R. 231, 3 R. J. R. Q. 155.

29. —— The bail to the sheriff for a defendant arrested on *capias* is only liable for the amount stated in the bail bond, and not for full amount of the judgment rendered. *Joseph* vs. *Cuvillier*, S. C. 1855, 5 L. C. R. 94, 4 R. J. R. Q. 297.

30. Sureties — Liability of — Provisional Discharge. ART. 828 C. C. P.—The sureties under Art. 828 C. C. P. are freed if on the return day they deliver up defendant to the sheriff. *Angers* vs. *Trudel*, Q. B. 1879, 10 R. L. 566.

31. Sureties — Liability of — Surrender. ART. 825 C. C. P.—A judgment, condemning a defendant to be imprisoned for three months after contestation of his statement and abandonment of property, is not an order to surrender himself within the meaning of Art. 825 of the Code of C. P., and therefore a service of such judgment on the defendant and on his bail does not create any liability in the bail under said article. *Brossard* vs. *Bertrand*, Q. B. 1875, 20 L. C. J. 125.

32. Sureties—Liability of.—The sureties of a debtor arrested on *capias* are only obliged to pay the plaintiff the amount of his judgment when the debtor has been ordered to be imprisoned for not filing his statement within the delay, and has not surrendered or been surrendered by the sureties to undergo such imprisonment. *Leclerc* vs. *Latour*, S. C. 1886, M. L. R., 2 S. C. 102.

33. Sureties— Release of.—Where the defendant made motion to be allowed to put in special bail, and the motion was rejected—*Held*, that this was no compliance with the requirements of the writ, so as to release the bail to the sheriff. *Torrance* vs. *Gilmour*, S. C. 1851, 2 L. C. R. 231, 3 R. J. R. Q. 155.

34. Sureties under Article 828 C.C.P.—The sureties of a debtor arrested under *capias* and provisionally discharged under Art. 828 C. C. P., who obliged themselves to pay the debt in the event of the defendant not giving, within eight days from the return of the writ, either one of the securities mentioned in Arts. 824 and 825 C. C. P., will be held to the payment of the debt if the defendant does not provide such security within the delay, the judge having no power to extend it. *Leroux* vs. *Renaud*, S. C. 1890, 19 R. L. 221.

35. Surrender. ART. 825 C. C. P.—In the case of a *capias*, wherein bail has been given under Art. 825 of the Code of C. P., and wherein the condemnation is for a sum less than $80, the Court will grant a peremptory order to the defendant to surrender himself into the hands of the sheriff within one month from the service upon him or his sureties of such order, on a simple motion to that effect by plaintiff made after the final judgment declaring the *capias* good and valid. *Brossoit* vs. *Crevier*, C. R. 1879, 2 L. N. 102, 25 L. C. J. 11.

36. When it may be put in. ART. 824 C. C. P.—A defendant arrested on *capias* can put in special bail at any time after judgment, although the bond to the sheriff has been assigned to a third party who has brought action on it. *Campbell* vs. *Atkins*, S. C. and Q. B. 1857, 9 L. C. R. 74.

37. ——The bailsman, even when sued, and two years after judgment, may be allowed to put in special bail. *Lefebvre* vs. *Vallée*, S. C. 1858, 3 L. C. J. 117, 9 L. C. R. 49.

38. —— On a motion to be permitted to put in special bail after eight days from the return day where the motion did not set forth special grounds in support thereof—*Held*, that it could not be received. *Begin* vs. *Bell*, S. C. 1858, 8 L. C. R. 138, 6 R. J. R. Q. 172.

39. —— On cause shown, a defendant arrested under *capias* will, on his own petition, be allowed to give special bail after the eight days after return of cause, and even at any reasonable time thereafter, depending on cause shown and diligence done. *Miles* vs. *Jarvis*, S. C. 1862, 7 L. C. J. 125.

40. —— The bond to be given by a special bail is the same as was required by the laws of Lower Canada in force before the passing of the 12th Vic., cap. 42, viz., by the 5 Geo IV., cap. 2. *Sewell* vs. *Vanneror*, Q. B. 1864, 14 L. C. R. 239 and 9 L. C. J. 265.

41. —— And *held*, also, that the defendant may put in such special bail or security at any time, and even after judgment rendered in the original suit, upon special application therefor and on satisfactory cause shown for extending the time for putting in such special bail. (*Ib.*)

42. —— And in default of the defendant putting in such special bail, his sureties, who have given bail to the sheriff for his appearance, may do so at any time upon application for that purpose, and sufficient cause shown. (*Ib.*)

43. —— ART. 821 C. C. P.—Bail may be put in by leave of the Court even after judgment. *Belanger* vs. *Balfour*, S. C. 1872, 2 R. C. 237.

VI. CONTESTATION OF.

1. **Admission of Evidence.**— Upon a petition to quash a writ of *capias*, the plaintiff ought not to be restricted to proof of facts constituting secretion, known to himself when he swore out the process; he should be allowed to prove other grounds known to other people in answer to the defendant's pretensions against the truth of the affidavit. *Mean* vs. *Giroux*, C. R. 1889, 18 R. L. 289.

2. **By Petition.** ART. 821 C. C. P.—*Held*, the concluding portion of Art. 821 C. C. P. is permissive only, and does not oblige the defendant, when the exigibility of the debt depends upon the truth of the allegations of the affidavit, to contest the writ together with the merits of the case. *Madore* vs. *Robert*, S. C. 1893, 4 Que. 389, confirmed in Review, Jan. 13, 1894.

3. **Burden of Proof.**— Under a petition to be discharged from arrest under a *capias ad respondendum* (Art. 819 Code of C. P.), it is incumbent on the defendant to establish that the allegations of the affidavit are false or insufficient. *Molson* vs. *Carter*, Q. B. 1880, 25 L. C. J. 65; *Egart* vs. *Laidlaw*, S. C. 1862, 7 L. C. J. 227.

4. —— Under the circumstances of the case, proof that the defendant was not immediately about to abscond, where it appeared that he had himself declared that, under certain not improbable conditions, he would go to Chicago, and where intention to defraud was evident, was not sufficient to disprove plaintiff's affidavit. *McRae* vs. *Miller*, S. C. 1881, 28 L. C. J. 268.

5. —— The *capias* issued upon the affidavit of plaintiff's bookkeeper, who alleged that the defendants were indebted to plaintiff in a sum of $14,561, money feloniously stolen by defendants; that defendants had, shortly after the larceny, been arrested for the crime, and committed for trial; that they had presented an application for *Habeas Corpus*, which was dismissed by the Court of Queen's Bench. That, subsequently, the Crown had given a consent for the admission of defendants to bail, and an order was being prepared for their liberation, *Held*—in review, reversing the judgment of the S. C., that in such case the burden was on the defendant to disprove the allegations of the affidavit. *McNamee* vs. *Jones*, C. R. 1880, 10 R. L. 683, 3 L. N. 371.

6. **Capias after Judgment.**—*Capias* after judgment must be contested by petition as provided by Art. 819 *et seq.* C. C. P. *Drapeau* vs. *Pacaud*, C. R. 1880, 6 Q. L. R. 140.

7. —— A defendant to an action in the Circuit Court, whose name is improperly described, and who fails to take exception to the misnomer, cannot afterwards set it up as a ground of contestation of a *capias* issued under Art. 802 C. C. P. *Giroux* vs. *Plamondon*, C. R. 1888, 14 Q. L. R. 222.

8. **Defendant examining Plaintiff.**— The defendant on a petition to quash a *capias* against him cannot cross-examine a deponent as to the allegations of his affidavit, but must call him as his own witness. *D'Anjou* vs. *Thibaudeau*, Q. B. 1882, 11 R. L. 512.

9. **Deteriorating hypothecated Immovable—Contestation.**—On contestation of a *capias* issued under chapter 47 of the Consolidated Statutes of L. C., it is not competent for the defendant to plead in avoidance that the plaintiff bought the property at the sheriff's sale at a certain price, and sold it afterwards at a large profit. *Doutre* vs. *McGuinnis*, S. C. 1861, 5 L. C. J. 158.

10. **Exception to the Form—Delay.**— The delay for filing an exception to the form in an action of *capias* runs only from the day of return mentioned in the writ, and not from the day when the writ was returned under an order of a judge. *Mercadot* vs. *Varet*, C. R. 1881, M. L. R., 1 S. C. 109.

11. **In Appeal.**—A defendant arrested under a writ of *capias* must raise all his objections, *in limine litis*, against the sufficiency of the affidavit, and not merely in appeal. *Heyneman* vs. *Smith*, Q. B. 1877, 21 L. C. J. 298; *Brown* vs. *Canadian Bank of Commerce*, Q. B., Montreal, Jan., 1876.

12. **Petition to quash.**—A judge in chambers cannot render judgment quashing a

capias, but may order the release of the defendant on petition to that effect. *Hogan* vs. *Gordon*, S. C. 1858, 2 L. C. J. 161; *Emmanuel* vs. *Hagens*, S. C. 1871, 6 R. L. 209; *Canadian Bank of Commerce* vs. *Browne*, S. C. 1874, 6 R. L. 26.

13. Petition to quash—Delay.—Petition was brought for the release of the defendant after issue joined—*Held*, that there was no presumption of waiver of right to petition for release arising from delay or from pleading to the action. *Chapman* vs. *Blennerhasset*, S. C. 1857, 6 R. J. R. Q. 371, 2 L. C. J. 71, and see *Matthewson* vs. *Bush*, 3 Dorion's Q. B. Rep. at p. 200.

14. —— Defendant, after filing a plea to the merits, may disprove the allegations of the affidavit upon which the *capias* issued. *Perry* vs. *Milne*, S. C. 1864, 8 L. C. J. 222.

15. —— A defendant may apply by petition in term for the quashing of a writ of *capias*, and such proceeding is more regular under the Code than to apply by motion. *Worthen* vs. *Holt*, S. C. 1871, 15 L. C. J. 161.

16. Petition to quash.—Motion to set aside a petition to quash as containing mixed matters of law and fact. *Per curiam.*—There is nothing in this motion, and it must be dismissed. Under 819 C. C. P., the defendant is allowed to show that the allegations of the affidavit are false or insufficient. Petitioner says that the allegations of the affidavit are false, and that they are insufficient. Motion dismissed. *Baxter* vs. *Sills*, S. C. 1881, 4 L. N. 221.

17. —— A defendant may apply, by petition in term, for the quashing of a writ of *capias*, and such proceeding is more regular, under the Code of C. P., than to apply by motion. *Worthen* vs. *Holt*, S. C. 1871, 15 L. C. J. 161.

18. —— When the writ has issued on the order of a prothonotary, acting in the absence of a judge, on a claim for "unliquidated damages," a petition, concluding with a general prayer to quash the writ and to discharge the defendant, includes an application to revise the order of the prothonotary. (*Ib.*)

19. —— Even when the amount of bail fixed is not excessive, the Court will quash the writ if it appear that, under the circumstances disclosed by the affidavit, it was indiscreet in the prothonotary to allow the remedy afforded by *capias*, and this without ordering an *enquete*. (*Ib.*)

20. —— Art. 819 C. C. P.—*Capias* cannot be set aside, nor party arrested be discharged, on petition presented to that end after final judgment in the suit. *Hogan* vs. *Gordon*, S. C. 1858, 2 L. C. J. 162; *Heyneman vs. Smith*, Q. B. 1877, 21 L. C. J. 298; *Germain* vs. *Poutiot*, 21 Jan., 1889 (Que.), No. 1522.

21. —— A defendant arrested on *capias*, after contesting the *capias* by petition to quash, under Art. 819 C. C. P., may afterwards plead an exception to the form. *Lefebvre* vs. *Boudreau*, S. C. 1885, M. R. L., 2 S. C. 9.

22. —— The want of a sufficient affidavit to hold to bail is not a subject for an exception to the form. *Patterson* vs. *Hart*, K. B. 1841, 3 Rev. de Lég. 195; *Lawrence* vs. *Hinckley*, 3 R. de L. 348; *Barney* vs. *Harris*, Stuart's Rep., p. 52.

23. —— Where a petition to quash setting up matters of law is rejected, the defendant will not be allowed to present another petition as to the facts. *Phillips* vs. *Sutherland*, Q. B., Ramsay's Dig., p. 113.

24. —— Where a *capias* has issued in a case before judgment upon the principal demand, but is returned after such judgment has been rendered, it can be contested notwithstanding such judgment. (*Hogan* vs. *Gordon*; *Heyneman* vs. *Smith*; *Germain* vs. *Poutiot*, *supra*, distinguished.) *Goulet* vs. *Bernard*, C. R. 1891, 17 Q. L. R. 75.

25. The Defence.—In a petition to quash a writ of *capias*, the petitioner is not entitled to urge grounds relating to irregularities in the issue of the writ. *Chaput* vs. *Forgeron*, S. C. 1890, M. L. R., 6 S. C. 326.

VII. DAMAGES FOR FALSE ARREST.

1. Departure with intent to defraud—Reasonable and probable Cause. F., a member of the firm respondents, in the course of conversation with McL., accountant of a local bank, was informed, as a bit of news, that McL. had heard that the appellant was about to leave Canada and was about to start a saloon in Cleveland, O. Without investigating the correctness or making any inquiries as to the origin of this report—which inquiries, it made, would have shown that it was founded on a misunderstanding, and that appellant was merely going to Cleveland on a visit to his brother—F., on behalf of the respondents, caused appellant to be arrested under a writ of *capias* for a debt due to the firm —*Held*, it was the duty of F. to have made

further inquiries as to the correctness of the report before acting upon it. In the absence of such inquiries, and of any verification or confirmation of the report, there was not probable and reasonable cause for the arrest, and $150 damages were allowed. *Burrows* vs. *Ransom*, Q. B. 1893, 3 Que. 152.

2. —— Appellant, a debtor, resident in Ontario, being on the eve of departure for a trip to Europe, passed through the City of Montreal, and, while there, refused to make a settlement of an overdue debt with respondents, his creditors, who had instituted legal proceedings in Ontario to recover their debt, which proceedings were still pending. Respondents thereupon caused him to be arrested on *capias*. The debt was thereupon paid, and appellant claimed damages for the malicious issue and execution of the *capias*. Respondents, on appeal, relied upon a plea of justification, alleging that when they arrested appellant they acted with reasonable and probable cause. In his affidavit, on which the *capias* issued, the deponent (one of respondents) gave as his reasons of belief that the appellant was about to leave the Province of Canada. "That "Mr. P., the deponent's partner, was informed "last night in Toronto by one H., a broker, "that the said W. J. S. was leaving immediately the Dominion of Canada to cross over "the sea for Europe or parts unknown; and "deponent was himself informed this day by "J. R., a broker, of the said W. J. S.'s departure for Europe and other places." Appellant was carrying on business as a wholesale grocer at Toronto, and was leaving with his son for the Paris Exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker and all his business friends knew he was only leaving for a trip, and there was no evidence that the deponent had been informed that appellant was leaving *with intent to defraud*. There was also evidence that after the issue of the *capias*, but before its execution, the deponent asked appellant for the payment of what was due to him, and that plaintiff answered him "that he would not pay him, and that he might get his money the best way he could". —*Held*, that the affidavit was defective, there being no sufficient reasonable and probable cause stated for believing that the debtor was leaving *with intent to defraud* his creditors, and that the respondents had no reasonable and probable cause for issuing the writ of *capias*, and judgment reversed. Damages $500. *Shaw* vs. *McKenzie*, Supreme Ct. 1881, 6 Can. S. C. R. 181, 4 L. N. 89, reversing Q. B., 25 L. C. J. 40.

3. **Effect of issuing a Capias.** — The grounds on which a *capias* issues impute a delict to the defendant. *Mansfield* vs. *Dodd*, S. C. 1886, M. L. R., 2 S. C. 324.

4. **Fraudulent Concealment of Mortgage.**—Damages for taking out a *capias* improvidently. The appellant, a jeweller, desiring to increase his business, obtained advances from the respondent, a wholesale dealer, and gave as security an hypothec on his property, on which he declared there were mortgages, but he only specified one of a certain amount. There was really another. Shortly after appellant became insolvent, and respondent arrested him on a *capias*. The court confirmed the judgment of the court below, that there was probable cause for the arrest, although it seems the appellant did not intend fraudulently to conceal the mortgage. *Grothé* vs. *Saunders*, Q. B. 1886, 16 Jan., Montreal, Ram. Dig. 232.

5. **Prescription.**—The action to recover damages for illegal arrest and imprisonment under *capias* is prescribed by two years. *Mansfield* vs. *Dodd*, S. C. 1886, M. L. R., 2 S. C. 324.

6. —— And such prescription is not interrupted by the mere issue of the action, but by the effective service of the action before the expiration of the ten years following the judgment quashing the *capias*. *(Ib.)*

7. **Presumption of Malice.**—Malice is presumed where a creditor issues a *capias* against his debtor without probable cause and based upon false allegations in the affidavit, and the creditor will therefore be liable to damages. *Desjean* vs. *Desauriers*, Q. B. 1888, 16 R. L. 133, 32 L. C. J. 191.

8. **Settlement of Debt without Reserve.**—Where a *capias* was taken out under circumstances which might justify a suspicion of unfair dealing, but without sufficient probable cause to justify the issue of the writ, and the parties, on the matter being explained, settled about the payment of the debt without any reserve, and the defendant was at once released without having been taken to gaol—*Held*, reversing the judgment of the court below, that the court would readily presume that the defendant had waived any claim to damages. *Lapierre* vs. *Gagnon*, Q. B. 1877, 1 L. N. 32 and 8 R. L. 727; *Desautels* vs. *Filiatrault*, S. C. 1889, M. L. R., 6 S. C. 248.

VIII. DISCHARGE.

1. Effect of.—The plaintiff cannot object that the defendant's statement and declaration are void for not having been notified to him, where he failed to raise objection thereto at the time defendant demanded his permanent discharge, such discharge having, as regards the plaintiff, the force of *res judicata* as to all proceedings prior to the petition for discharge. *Guillet* vs. *Lemieux*, C. R. 1893, 3 Que. 411.

2. Second Capias.—Where a party has been arrested under a *capias*, and the arrest declared illegal, he must be completely and fully restored to his liberty before he can be arrested under a second *capia* , and consequently the service of a writ of *capias* or the arrest of a party already in custody is illegal. *Hamel* vs. *Ouh*, S. C. 1861, 11 L. C. R. 179.

3. Warrant of Arrest issued by Commissioner. Art. 813 C. C. P.—In the case of a *capias* issued by a commissioner, the defendant cannot be legally detained in custody after 48 hours from the time of his arrest, and the service of a writ of *capias* on the defendant after the 48 hours, and while he is still held in custody under the first writ, is consequently illegal. *Hingston* vs. *McKenly*, S. C. 1867, 12 L. C. J. 25.

IX. DURING ACTION.

1. Declaration.—In affidavit for *capias pendente lite*, a reference to the declaration filed in the cause for the cause of debt is sufficient. *Malo* vs. *Labelle*, S. C. 1858, 2 L. C. J. 191.

2. Pending in Circuit Court.—Where the plaintiff in a case pending before the Circuit Court has caused a *capias* to issue in the Superior Court, it is not sufficient for him, on the *capias*, to allege and prove the pendency of such action, but he must allege and prove the existence of a claim to the amount of $10, and pray judgment thereon in the *capias* case. *Cheratier* vs. *King*, S. C. 1885, M. L. R., 2 S. C. 185.

X. EXECUTION OF WRIT.

1. Alias Writ.—Where a writ of *capias* could not be executed, and the delay for the return was consequently insufficient—*Held*, that the plaintiff may take an *alias* writ to detain his debtor. *Richard* vs. *Wurtele*, Q. B. Quebec, 7 Dec., 1877, 1 L. N. 32.

2. Delay.—In the case of a *capias*, the delay between the deposit of the copy of declaration in the prothonotary's office and the return day of the writ need *not* be the same as between the service and the return day of an ordinary writ of summons. *Raphael* vs. *McDonald*, S. C., 10 L. C. J. 19.

3. Duties of Bailiff.—The bailiff who has arrested a person under a writ of *capias* can take him to the prothonotary's office to enable him to give the bail provided for in Art. 825 C. C. P. Art. 816 C. C. P., which requires the bailiff to deliver the defendant over to the sheriff, is not imperative, and merely directs what the bailiff shall do when the defendant is not able to give bail. *Germain* vs. *Poulain*, S. C. 1889, 17 Q. L. R. 324.

4. Jurisdiction of Bailiff.—A bailiff charged with a writ of *capias*, ordering him to arrest the defendant in the district of Montreal, cannot legally arrest him in another district. *Lefebvre* vs. *Boudreau*, S. C. 1885, M. L. R., 2 S. C. 9.

5. —— A bailiff of the district of Montreal charged with the execution of a writ of *capias* can execute the writ in another district. *Tidman* vs. *Renaud*, S. C. 1889, 17 R. L. 647, 1 L. C. J. 102; *Laurence* vs. *Chandler*, C. C. 1873, 17 L. C. J. 83.

6. On Sunday. Art. 786 C. C. P. writ of *capias* may issue on Sunday, on sufficient cause shown. *Redpath* vs. *Gibling*, S. C. 1863, 9 L. C. J. 225.

7. —— The execution of a writ of *capias* on Sunday is not governed by Art. 786 C. C. P. *Maisic Iron Co.* vs. *Olsen*, Q. B. 1874, 18 L. C. J. 29.

XI. EX PARTE PROCEEDINGS.

Sufficiency of Declaration.—When a *capias ad respondendum* is issued, it is essential for the plaintiff to allege in his declaration that the defendant is secreting or has secreted his estate, or that he intends to leave the heretofore Province of Canada with intent to defraud, or at the least to refer to the affidavit which led to the *capias*; and, failing such allegations, the court will take cognizance of the defect, even when the defendant has not contested the declaration. *Howard* vs. *Howard*, S. C. 1883, 9 Q. L. R. 172.

XII. GROUNDS OF. (See also *supra* No. VII.)

1. Criminal Proceedings pending.—Plaintiff brought action of damages for malicious arrest, commencing by a *capias* which was allowed by a judge to issue for

$1,500. The defendant moved to quash on the ground of insufficiency of affidavit, and especially because the declaration contained no averment that the criminal proceedings complained of were determined. Plaintiff replied that, as defendant was about to leave the country, he was forced to take his action before the determination of the charge—*Held*, that the capias was properly issued; and, as the criminal proceedings had since ended, plaintiff's motion to amend the declaration to that effect was granted. *Fraser* vs. *Gerrie*, S. C. 1872, 2 R. C. 477.

2. **Disposing of Property.**—A vendor with a privileged claim duly registered may maintain a *capias* against the debtor who is dissipating his moveables, without proving in any way that the property hypothecated has depreciated in value, so as to render his debt more precarious than at the time of sale. *Benoit* vs. *Pelletier*, Q. B. 1877, 9 R. L. 385, 1 L. N. 32.

3. **Deteriorating hypothecated Immoveables.** Art. 800 C. C. P.—The plaintiff in an action to recover an hypothecary debt cannot join thereto the remedy of *capias* on the grounds that the defendant is disposing of his effects and deteriorating the immoveables hypothecated. The recourse by *capias* must be by a separate and distinct action. *Goulet* vs. *Bernard*, C. R. 1891, 17 Q. L. R. 75.

4 —— The damages stated in Art. 800 C. C. P. are unliquidated damages; consequently, a *capias* based on this Article cannot issue without an order of the judge as provided by Art. 801 C. C. P. *Ouimet* vs. *Meunier*, S. C. 1893, 3 Que. 13. Confirmed in Review 28 Feb., 1893.

5. **Foreign Debt.** Art. 806 C. P. C.—A debt arising out of a contract made in Scotland to deliver a passenger's luggage in the port of Montreal, and where delivery failed to be made, and for which judgment has been rendered in the district of Montreal, is not a foreign debt within the meaning of the Statute ch. 87 of the Cons. Stat. of L. C., sec. 7, sub.-sec. 2. *McDougall* vs. *Torrance*, S. C. 1861, 5 L. C. J. 148.

6 —— The colony of Barbadoes is a "foreign country," within the meaning of the 8th section of chapter 87 of the Consolidated Statutes of L. C., and consequently a party arrested under a *capias ad respondendum*, founded on a debt alleged in the affidavit to have been contracted in Barbadoes, will be discharged. *Trobridge* vs. *Morange*, S. C. 1862, 6 L. C. J. 312.

7. —— On a motion to quash a capias—*Held*, that under the C. S. L. C., cap. 87, sec. 8, England must be considered a foreign country, and the defendant arrested in Lower Canada for a debt contracted for goods purchased in England, for which he had accepted bills of exchange drawn upon him at his then place of business at Toronto, but made payable at a bank in England, must be discharged, and the *capias* quashed, notwithstanding the disclosure of evident fraud in the affidavit. *Bottomley* vs. *Lumley*, S. C. 1863, 13 L. C. R. 227, Q. B. 1863, 15 L. C. R. 213.

8. —— Where the contracts for the sale of goods were made with the defendants in Montreal through the agent in Montreal of the plaintiffs, who were a foreign company, and the invoices were sent to the agent, so that the defendants could not have got the goods from the Custom House in Montreal without applying to the agent, but where they were at defendant's risk the moment they were placed on the railroad at Boston, the cause of action did not arise in a foreign country. *Gregory* vs. *The Boston & Sandwich Glass Co.*, Q. B. 1865, 9 L. C. J. 134.

9. —— In the case of a *capias* issued for the recovery of the value of certain United States Government securities, alleged to be the property of the plaintiff, and in the possession of the defendants in Montreal, and there illegally detained by the defendants, and secreted by them, so as to prevent their revendication by plaintiff; on proof that the securities were stolen by the defendants from the plaintiff in New York, and brought into Montreal, the *cause of action* will be held to have *arisen in a foreign country*, and, consequently, the *capias* will be quashed. *Royal Insurance Company* vs. *Knapp*, S. C. 1867, 11 L. C. J. 1, 2 L. C. L. J. 189 and 201.

10. —— A debt under a bill of lading signed at Marseilles, in France, for the delivery of goods at Montreal, where the carrier made default in delivery, and the value of the goods is demanded, is not a foreign debt, nor is it a claim for unliquidated damages. *Vanden Koornhuyse* vs. *Grondin*, S. C. 1870, 14 L. C. J. 218.

11. —— Damages claimed for the breach of a contract made in Norway, but to be executed in the Province of Quebec, do not constitute "a debt created out of the Province

of Canada." *Moisie Iron Co.* vs. *Olsen*, Q. B. 1873, 18 L. C. J. 29.

12. — A writ of *capias* cannot be taken out by one alien against another alien (both parties being only temporarily in the Province of Quebec) for an alleged debt arising out of a contract entered into in a foreign country, where the allegation in the affidavit alleges the immediate departure of defendant with intent to defraud. *Ventini* vs. *Ward*, S. C. 1879, 23 L. C. J. 267, 9 R. L. 529.

13. Fraudulent Departure. Art. 797 C. C. P.—Although the special grounds of belief set out in an affidavit for *capias*, that the defendant is immediately about to leave the Province with fraudulent intent, be not only not proved, but disproved, [illegible] be established that the plaintiff's apprehensions as to defendant's intended departure with fraudulent design were well founded, the *capias* will be maintained. *Blackenstaff* vs. *Sharpley*, Q. B. 1860, 6 L. C. J. 288, 10 L. C. R. 240. But see *Contra*, *Shaw* vs. *McKenzie*, in Supreme Ct., 6 Can. S. C. R. at p. 192. Remarks of Taschereau J.

14. — The plaintiff is justified in his belief of the defendant being immediately about to leave the Province of Canada, with intent to defraud the plaintiff, from the fact of the defendant being a seafaring man resident without Canada and in Great Britain, and temporarily within the Province, in command of a seagoing vessel which is immediately about to leave, and from the defendant having made and making no attempts to pay the plaintiff's debt, and from the defendant having absented himself from the Province in 1860, immediately after the rendering of the judgment against him, although in each of the three years next preceding he had been in the Province in command of a ship. *MacDougall* vs. *Torrance*, S. C. 1861, 5 L. C. J. 118.

15. — A plaintiff is justified in his belief that the defendant is immediately about to leave the Province of Canada, with intent to defraud the plaintiff, from the fact that the defendant had bought from the plaintiff a large quantity of wheat, payable cash on delivery, and had received delivery of the wheat, but had only paid a portion of the price, and that the defendant, upward of two months afterwards, was about to go abroad to Scotland, his original domicile, where his family had resided for five years, without paying the plaintiff the balance, and without leaving any property in Canada out of which the plaintiff could get paid, and after repeated applications had been made to him for payment. *Burns* vs. *Ross*, Q. B. 1864, 10 L. C. J. 89, confirming S. C., 7 L. C. J. 35.

16. — A writ of *capias* issued on the ground of fraudulent departure from the Province will not lie, when the defendant is domiciled in the United States, and is merely returning home after a temporary sojourn here, and there is no allegation of any special circumstances of fraud. *Renaud* vs. *Vandusen*, Q. B. 1872, 21 L. C. J. 44.

17. — Defendant petitioned to be liberated from arrest under a *capias*, and his petition was dismissed. The writ issued in an action of damages for $5,000, and bail was fixed at $1,000. The affidavit was made by B as agent of the plaintiffs. It alleged a sale by the defendant to them of the sole right to manufacture and sell a medicine, under the name of Smith's Mountain Renovator, throughout all Canada, the defendant furnishing the ingredient and making up the medicine, in quantities not less than 100 gallons, at $3 a gallon; that the plaintiffs had fulfilled their part of the contract, and paid $695; but the defendant, in contravention of his agreement and by malice, and with a view to injure them, had, in the course of November preceding, manufactured quantities (*plusieurs quantités*) of the aforesaid medicine, known as Green Mountain Renovator, for other persons, and under the proper price. It then alleged that the plaintiffs had spent nearly $3,000 in bottles, boxes, advertisements and lithographing to bring this medicine before the world, and have been prevented from making a profit, and suffered damage to the amount claimed; and that the deponent was informed that the defendant was immediately about to leave the Province, etc., etc. His reason for thus believing was that the defendant *has his residence in the United States*, and is only temporarily in Montreal, and will return immediately to Vermont, where he lives. The petition to quash was founded as well on the illegality and insufficiency of the affidavit as on its untruth, and on contestation the parties went to enquête, and the petition was dismissed because the allegations of it had not been proved. *Per Curiam*—the breach of contract is one thing, and the *meditatio fugæ* is another. There must not only be a right of action; but there must be a right to arrest. What was there, assuming the truth of the facts in the affidavit, to show any right of arrest whatever? It specially mentioned a deed between the par-

ties, and referred to it as a part of the affidavit. The plaintiff's contract dated with him as "Silas Smith, of East Georgia, Franklin county, State of Vermont, manufacturer." They knew that was his domicile—that it was no evidence of fraud for him to go there, he had a perfect right to go there, undiminished by any stipulation to the contrary. For this reason alone, the petition ought to have been granted and the *capias* quashed as having issued upon an affidavit that was not true. Judgment reversed and petition granted. *Wingate Chemical Co. vs. Smith*, C. R. 1876.

18. —— The defendant had been arrested under a *capias ad respondendum*, and made a *cessio bonorum*—which was contested by the plaintiff on the ground of concealment. Three witnesses deposed to his leaving his house a day or two before the bailiff went to make the seizure. One of them gave to his removal a suspicious aspect; but he only removed his effects to St. Jacques, and also removed to that place himself—*Held*, that this was not a concealment, and contestation dismissed. *Delisle vs. obert*, S. C. 1877.

19. —— A *capias* was issued against defendant, on the ground that he was about to leave for Europe, and the plaintiff would be defrauded of his debt. It appeared, however, that the defendant was not about to leave immediately, and had no fraudulent intention in his proposed trip, which was for the purpose of visiting the Paris exhibition, all his interests being in Montreal. The *capias* must be quashed. *Ambrois vs. Malleval*, S. C. 1879, 2 L. N. 159.

20. —— The defendant, a marine insurance agent, a native of Canada, and who had resided in Quebec for about three years, at the close of the season of navigation, being without the means of supporting his family, and unable to get work during the winter season, was about to go to Boston, in the hope of obtaining employment there. He at the time owed the plaintiff for board about $80, and was about to leave without paying her, the fact being that he had not the means of doing so—*Held*, that, under the circumstances, the plaintiff was not justified in swearing that the defendant was about to leave with intent to defraud her, the plaintiff, and *capias* quashed. (1) *Henderson vs. Duggan*, S. C. 1879, 5 Q. L. R. 364.

21. —— Where there was evidence that the defendant himself had said that the plaintiff might "go to the devil," that he would never pay him a cent, but would go off to Montana, and his family would follow—*Held*, reversing the judgment of the judge *a quo*, that this was quite sufficient to support the affidavit, and the petition to quash should have been dismissed. *Valade vs. Bellehumeur*, C. R. 1879, 2 L. N. 116.

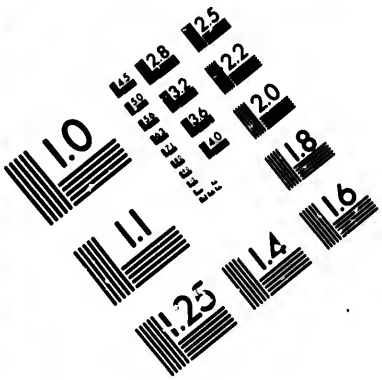
22. —— A debtor is not liable to be arrested on *capias* for intended departure to a foreign country without paying his debt unless the circumstances be such as to make him chargeable with intent to defraud. *Paulet vs. Antaya*, C. R. 1880, 10 R. L. 329 and 3 L. N. 151. See also Art. 3 L. N. at p. 153.

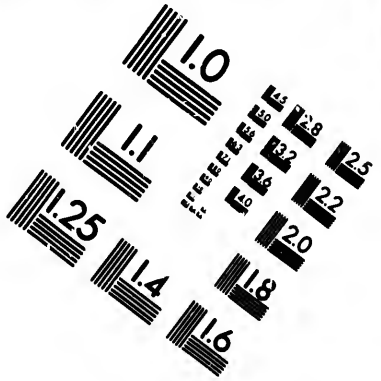
23. —— Leaving Canada with unsatisfied debts unsecured is not, of itself, conclusive proof of fraud. *Lagacé vs. Agathe*, Q. B. 1880, 6 Q. L. R. 88, confirming C. R., 5 Q. L. R. 240.

24. —— The evidence showed that the defendant, a sewing machine agent, took a lease from plaintiff, jointly with another, at a rental of $240 *per annum*, and secretly removed the furniture in May to Brockville, where his employer required him to locate himself for a time as local agent. He had previously resided in New York, whence he had removed to Montreal, and he had said that, if he did not succeed in Brockville, he would go back to the States. He had bought the furniture in Montreal with money advanced by the tenant, some $500. At the time he left in May, he said to his co-tenant that he would try to get bonds for the Brockville office, and, if he could not get them, he would try to remain there without bonds, and, if he could not remain without bonds, he would go to the States. *Per curiam.*—These facts prove that plaintiff had grounds for believing that defendant might at any time remove into the States, as he had, so far as he was concerned, fraudulently removed from Montreal without settling with him, but secretly taken away his furniture. *Held*, sufficient. *McCrae vs. Miller*, S. C. 1881, 1 L. N. 324.

25. —— Action of damages by plaintiff (appellant) for malicious arrest on a *capias*. Appellant was a wholesale grocer in Toronto, and was leaving with his son for the Paris exhibition. On reaching Montreal he was arrested on an affidavit of one of the defendants. Appellant owed defendants some $2,[illegible] overdue, which, on being applied for

(1) *Hurtubise vs. Bourret*, *supra*, "Affidavit, sufficiency of."





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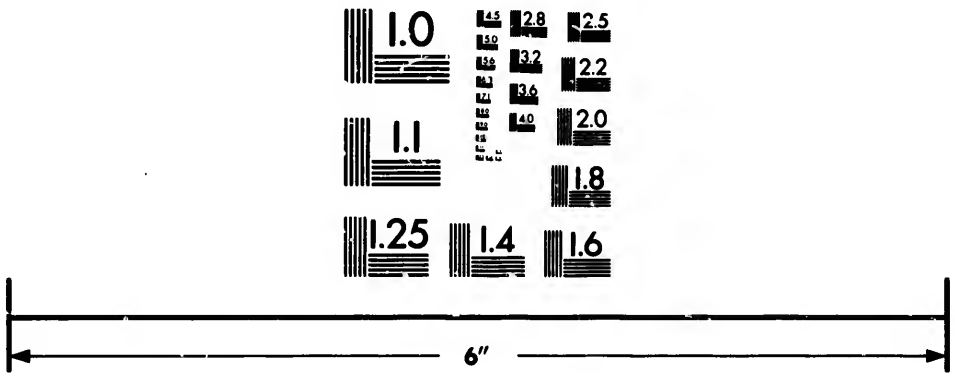

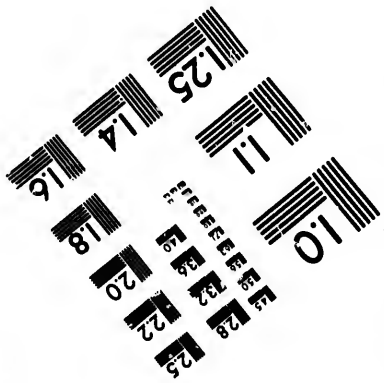

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in Toronto by defendants' agent there, the latter was informed that it was settled, the only settlement, as it subsequently proved, being a note at four months, which plaintiff had sent to defendants at Montreal by mail. On his arrival at Montreal, one of the defendants called upon him at the hotel where he was stopping with reference to the amount, and plaintiff admitted that he was going to Europe, and, moreover, intimated that until his return defendants would not be paid, and they could get their money in the best way they could. On the other hand, there was proof that plaintiff was still carrying on his business, and that he was in the habit of crossing to Europe almost every year. *Held*, reversing the judgment of the Courts below (Q. B., 3 L. N. 369, 25 L. C. J. 40, 1 Dorion's Rep. 25; S. C., 2 L. N. 5, 23 L. C. J. 52), that these circumstances did not disclose an intent to defraud sufficient to justify a *capias*, and damages to the amount of $500 was awarded. *Shaw* vs. *McKenzie*, Supreme Ct. 1881, 6 Can. S. C. R. 181, 4 L. N. 89.

26. —— On the contestation of a *capias*, it appeared that defendant had received delivery in Winnipeg, where he carried on business, of a large quantity of goods from plaintiff, but whether purchased or on consignment the evidence differed. He had been in Montreal for several weeks trying to arrange a settlement with his creditors, and was about to return home by way of New York when he was *capiased* on the usual affidavit of *meditatione fugæ*. Judgment setting aside the *capias* on the ground of want of proof of intent to defraud was confirmed. *Marcotte* vs. *Moody*, C. R. 1882, S. C., 11 R. L. 460, 5 L. N. 359.

27. —— In another case the evidence was that the defendant, on pretence of making use of plaintiff's bank account to draw on a firm in New York, with whom he claimed to have dealings, persuaded plaintiff to advance him $100 on the strength of his draft for that amount, which he said was sure to be honored. The draft was dishonored. While being threatened with criminal proceedings he removed to Toronto, and from there obtained from plaintiff through a lawyer a promise in writing not to prosecute on condition of furnishing an accepted draft from the New York firm payable in sixty days. Defendant, after remaining in Toronto a short time, went to the States where he obtained employment. The accepted draft was dishonored the same as the first, and plaintiff was still out of his money, when defendant came to Montreal on a visit, which it was known would only detain him a few days, and was arrested on the usual affidavit for *capias*. The intention to return to the States was not denied, as the defendant was about to leave for the railway depot to return home when arrested. *Held*, on petition to quash, that there was no proof of intent to defraud. *Carter* vs. *Graham*, S. C. 1884.

28. —— *Held*, that where a debtor who in 1875 had secreted his property and left Canada with intent to defraud, came temporarily into the Province in 1882, and was *capiased* as he was again leaving, that the secretion and departure in 1875, coupled with intention of again leaving in 1882, were sufficient ground for the arrest, and the *capias* was declared good. *McFarlane* vs. *McNiece*, S. C. 1884, 7 L. N. 398.

29. —— The mere intended departure of a debtor will not justify his arrest by *capias* where it was not proved that his departure was with intent to defraud his creditors. *Senécal* vs. *Tranchant*, S. C. 1886, 14 R. L. 556.

30. —— When a debtor has judicially abandoned his property for the benefit of his creditors, and, after unsuccessfully endeavouring to secure employment and to earn a livelihood in this province, finally accepts a position abroad, intent to defraud is not to be presumed from his intended departure, and the *capias* under which he has been arrested should be quashed. *Shotton* vs. *Lawson*, 1890, M. L. R., 6 S. C. 451.

31. —— The simple fact that the defendant is leaving the country without paying a debt does not constitute by itself a fraud on the part of the debtor, and it is necessary to prove an intent to defraud in order to maintain a *capias*. *Tramblay* vs. *Graham*, 1891, M. L. R., 7 S. C. 374.

32. —— The defendant, after having made a judicial abandonment, went to New York. On his return he was arrested under a writ of *capias*. By profession, he was a dentist, and it appeared that he had frequently visited New York previously in connection with his business. *Held*, that there was no evidence to sustain the allegation of departure with intent to defraud. *S. S. White Dental Manufacturing Co.* vs. *Dixon*, C. R. 1893, 3 Que. 399.

33. Personal Indebtedness—Accounting.—*Held*, where the action is by a partner, praying for the dissolution of the partnership and for the rendering of an

account, the personal indebtedness in a sum amounting to or exceeding $40, which must be alleged in the affidavit for *capias*, cannot be considered to exist until such account has been rendered and accepted or settled. *Phillips* vs. *Kurr*, S. C. 1892, 2 Que. 444.

34. —— —— A *capias* cannot issue in an action to account based on the claim which may exist after the rendering of an account. *Gay* vs. *Denard*, C. R. 1887, M. L. R., 3 S. C. 125, 15 R. L. 585.

35. —— —— *Held*, thus even where the plaintiff in an action to account claims a definite sum. (*Ib.*)

36. —— **Holder of negotiable Paper.** —The holder of negotiable paper, indorsed to him merely to adopt any course he may think proper against the maker, and without his becoming owner thereof, may legally arrest the maker as his *personal debtor*, and an application to reduce the bail in such a case will not be allowed. *Winning* vs. *Fraser*, S. C. 1869, 13 L. C. J. 167.

37.— — **Joinder of Debts**—The joinder of debt, for which an action is pending, to another debt exceeding $60 does not invalidate the *capias* for the latter debt. *Parent* vs. *Trudel*, C. R. 1887, 13 Q. L. R. 136.

38. —— **Liquidated Damages.**— *Held*, that the affidavit showed no legal indebtedness in alleging that the defendant was personally indebted to the plaintiff in the sum of £150 for the amount of the penal sum or penalty stipulated and specified in and by his bond, made and executed by the defendant at Stanbridge aforesaid, on the twenty-ninth of April, 1843, conditioned and contingent, the said penalty, upon his, the said defendant, giving to the said deponent a good and sufficient warranted deed of two lots described, to be divided between them, notwithstanding an allegation of a division of the lots as agreed upon, and the granting of a deed of one of the lots to the deponent; that the defendant had been called upon and had refused to give a deed to the plaintiff of the other lot; the right of the plaintiff being to obtain a deed, and in default thereof the sum stipulated as damages. *Allen* vs. *Allen*, S. C. 1855, 6 L. C. R. 478, 5 R. J. R. Q. 146.

39. —— **Refusal to return Horse.**— In an action by a livery stable keeper to recover £30, being £5 for four days' hire of a horse and £25 for the value of a horse not returned--*Held*, on motion to quash a *capias* issued in the cause, that the refusal of the defendant, as alleged in the affidavit, to return the horse therein mentioned, does not create a debt for the sum of £25, the alleged value of the horse, but only gives to the plaintiff a right to recover the said horse with damages suffered in consequence of his detention, and for the value of the said horse as damages in case of his non-delivery from judgment. *Dumaine* vs. *Guillemot*, S. C. 1855, 6 L. C. R. 477.

40. —— **Transfer.** ART. 1571 C. C.— The affidavit upon which a *capias* issued stated that the defendant was indebted to the plaintiff in the sum of £24 13s 10½d, whereof the sum of £4 16s 10½d was for work and labor done and performed by the plaintiff for the defendant, and the balance was the amount of a claim transferred to him by another by a deed of assignment or transfer before notaries. On motion to quash—*Held*, that notwithstanding that no notice of such transfer had been given to defendant, except by the service of the action, that it was sufficient to support the writ and the motion was dismissed. *Quinn* vs. *Atcheson*, S. C. 1854, 4 L. C. R. 378, 4 R. J. R. Q. 203. See *Laidlaw* vs. *Barns*, Q. B. 1866, 16 L. C. R. 318.

41. **Province of Manitoba.**—The Province of Manitoba does not make part of Canada in terms of 797 C. C. P., and consequently the debtor who leaves the province of Quebec for that part of the Dominion cannot claim to be exempt from arrest under *capias* on that ground. *Lainé* vs. *Clarke*, C. R. 1872, 2 R. C. 232.

42. **Refusal to make judicial Abandonment.**—A debtor who, with the consent of his creditors, made a voluntary assignment to a third party, as trustee for the benefit of his creditors, of all his property, under the law as it stood previous to the 48 Vic., ch. 22 (Que.), is not subject to arrest under a *capias* at the instance of one of the consenting creditors for not afterwards making a judicial abandonment of his property under the said 48 Vic., cap. 22, if he shows, as in this case, that he has acquired no property since such assignment, and has nothing to abandon. *Channel* vs. *Becket*, C. R. 1888, 17 R. L. 678, confirming S. C. 1887, 11 L. N. 42.

43. —— A trader who had ceased to trade prior to the enactment of 48 Vic. (Que.), ch. 22, sec. 12 (1885), amending Art. 799 C. C. P., and who refuses to make a judicial abandonment of his property, is not subject to arrest under *capias* at the instance of a creditor prior to the

amendment. *Henry* vs. *Brouillet*, C. R. 1886, 16 R. L. 206.

43*a*. —— Assignment by Debtor in Trust.—*Held*, affirming the judgment of Wurtele, J., M. L. R., 6 S. C. 234, that where a creditor, by filing his claim with the trustee and receiving dividend, has acquiesced in a voluntary assignment in trust made by his debtor for the benefit of his creditors, such creditor is estopped from demanding, immediately after, that the debtor shall make a judicial abandonment; and therefore he is not entitled to obtain the issue of a writ of *capias* on the ground that his debtor has refused to make a judicial abandonment. *Boston Woven Hose Co.* vs. *Fenwick*, C. R. 1890, M. L. R., 6 S. C. 487.

44. Secretion—Alienation of Real Estate.—The fraudulent assignment of real estate is a secreting of property within the meaning of the Statute 12 Vic., ch. 42, and a *capias* may issue in such a case, even after the lapse of 6 months from the execution of the deed. *Langley* vs. *Chamberlain*, S. C. 1858, 5 L. C. J. 49.

45. —— —— But *held*, the alienation of real estate alone is not a sufficient cause for the emanation of a writ of *capias*. *Dumont* vs. *Gourt*, S. C. 1862, 7 L. C. J. 119.

46. —— —— When a debtor alienates his estate, and declares he has received for it a less sum than he actually received, there is an intention on his part to deceive his creditors if he has no property to meet his liabilities; and an affidavit containing such allegations will be sufficient to maintain a *capias ad respondendum* against him. (*Ib.*)

47. —— Debtor resident in Ontario found in this Province.—A writ of *capias* on the ground of secretion of property may issue against a debtor resident in Ontario for secreting property in Ontario if the debtor be found in this Province. *Gault* vs. *Robertson*, C. R. 1877, 21 L. C. J. 281; confirmed in Q. B., Montreal, 22 March, 1878.

48. —— Disappearance of Assets.—A *capias* against an insolvent may be maintained for secreting his property, and this charge will be sustained by evidence to show that large sums sufficient to account for the insolvency have been made away with and not accounted for. *Downey* vs. *Winning*, Q. B. March, 1875.

49. —— —— *Held* (affirming the decision of Brooks, J.), that a debtor, who in April, 1889, prepared and furnished to his principal creditors a detailed statement of his affairs, showing a surplus of upwards of $15,000, and who subsequently, in Oct. of the same year, made an abandonment of his property, with a statement showing a deficit of $20,500, and who failed, at a meeting of his creditors, to give a satisfactory explanation as to the discrepancy, may be arrested on *capias* for secretion, and he is bound to give reasonable explanation as to the difference exhibited by the statements, failing which his petition for discharge will be rejected. *Eastern Townships Bank* vs. *Parent*, C. R. 1889, M. L. R., 5 S. C. 288.

50. —— Disposing of Property.—Defendant was arrested by a *capias* issued for $197.87, amount of three notes given by him to plaintiff for materials supplied for his business as a blacksmith and carriagemaker at Vaudreuil. The ground was that he had secreted his estate with intent to defraud. The transactions between the parties began early in 1877. At that time there was a judgment for $160 and $24 of costs against the defendant, and in May, 1877, his moveables were taken in execution under it, and a sale took place on the 30th May, 1877, on which day the judgment was acquired by his brother, P. G., from the then plaintiff before the sale, and the entire stock sold for $51.31, in 66 different lots, and they were all acquired by P.G. He sold them to his father, A. G., on the 25th October, 1877, for $35.31, and other considerations then stated to have been given before. On the 8th July, 1878, A. G. made an agreement with the defendant, his son, by which the latter agreed to carry on the business as his employee, and did so. The agreement referred to a verbal agreement made between the parties on the 5th October, 1877, for the same purpose, and by it A. G. agreed to pay the son, the defendant, $76 per month for salary of himself and workmen. On the 21st February, 1879, the defendant sold his real estate in the village of Vaudreuil to B., notary public, reserving possession, if he thought proper, till September next. This property included the shop where the defendant had carried on his business, and which he continued to occupy from the sale of his moveables in May, 1877. On the 5th March, 1879, A. G. sold to B. all the stock-in-trade and moveables for the sum of $511.39, and the defendant was party to the sale, renouncing his rights under a lease he had from his father. The plaintiffs had no knowledge of these transactions. On the contrary, there were of record two letters from defendant to plaintiffs, of date 6th February and 27th

March, in which he promises payment of two of the notes in a few days by collections which he was about to make. Not a word was said of the interest of others in stock-in-trade and moveables—*Held*, there was the strongest presumption of fraud between the relatives. Judgment to maintain the *capias*. *Heney* vs. *Girard*, S. C. 1879.

51. —— Fraudulent Preference to Creditors.—Fraudulent preferences to creditors by a defendant, after his insolvency, do not amount to "secretion," and therefore form no ground for a *capias*; but, the defendant's intention to go to Boston, and the fraudulent preferences shown to other creditors, and his treatment of plaintiff's agent when he called upon him to make an assignment by telling him not to bother him, are circumstances sufficiently strong to show that his intention was to defraud plaintiff. *Tremain* vs. *Sansum*, S. C. 1860, 4 L. C. J. 48 (overruled by *Gault* vs. *Dussault*, *infra* No. 58).

52. —— —— On a petition to quash—*Held*, that a fraudulent preference given by a debtor to one of his creditors, by selling him goods as security for a debt, is not a secreting, and does not constitute sufficient ground for a *capias*. *Gault* vs. *Donnelly*, S. C. 1866, 1 L. C. L. J. 119. Confirmed by Q. B. 1867, 3 L. C. L. J. 56, but overruled by *Gault* vs. *Dussault*, *infra* No. 58.

53. —— —— Proof of undue preference and insolvency does not constitute secretion or making away with the property so as to justify a *capias*. *Emmanuel* vs. *Hagen*, S. C. 1874, 6 R. L. 209.

54. —— —— A payment made in the ordinary course of business, although it may be in some sense a preferential payment, does not justify a *capias*, but a preferential payment may be of such a character as to amount to a secreting, and to justify a *capias*. *Ferland* vs. *Neild*, Q. B., Quebec, 3 Sept., 1877.

55. —— —— The sale of moveables by a debtor for value received, during the pendency of the suit of his creditor, does not amount to secretion of his estate. *Robertson* vs. *Overing*, S. C. 1876, 20 L. C. J. 299. Overruled by *Gault* vs. *Dussault*, *infra* No. 58.

56. —— —— The sale by a debtor of all his property to a part of his creditors is not a secreting, and does not constitute sufficient ground for a *capias*. *Dominion Type Founding Co.* vs. *Lafond*, C. R. 1879, 10 R. L. 15. Overruled by *Gault* vs. *Dussault*, *infra* No. 58.

57. —— —— The appellant gave the bank corn for advances, by transferring the bill of lading under a special receipt by which the bank was to be paid out of the proceeds. The appellant's firm sold the corn and appropriated the money to pay another creditor.

The petitioner contended that the corn was not that of himself or of his firm—that, if it was, they had dealt with it as the bank had directed, and that he had personally no part in the fraud, if any, and that at most the payment was merely a preference, not secreting.

The *capias* was maintained. The corn was sold as the property of petitioner's firm, and the proceeds were funds in their hands destined to the payment of the bank. The payment to another was a fraudulent secreting of this money, and they are liable for it as for any other funds in their hands. Their excuse is virtually that this is not secreting: it is an offence under the larceny act. It is therefore more than a mere preference. *Brown* vs. *Can. Bank of Commerce*, Q. B., Montreal, 27 Jan., 1876.

58. —— —— An affidavit for *capias* set out that, prior to the attachment and within the three months preceding it, defendant had disposed of a portion of his stock-in-trade to one D., the purchase price of which remained unpaid. *Held*, overruling *Gault* vs. *Donnelly*, *supra* No. 52, that there was no distinction between "secreting" and "fraudulent preference," and that the acts of the defendant were equivalent to a *recel*. (1) *Gault* vs. *Dussault*, Q. B. 1881, 4 L. N. 321.

59. —— —— A fraudulent preference by a debtor in favor of one of his creditors constitutes secretion and renders such a debtor liable to *capias*. *Mackinnon* vs. *Kerouack*, Q. B. 1887, 15 R. L. 34. Confirmed in Supreme Court 1887, 15 Can. S. C. R. 111, 11 L. N. 35, the Court being evenly divided. *Nash* vs. *Bethune*, C. R. 1889, 16 R. L. 699.

60. —— —— But held, that where an insolvent trader gives a preference to a creditor which, if judged directly, might be considered as a fraudulent preference, yet, where such trader acted in the matter without any intention to defraud and in good faith, he could not be considered as secreting his property with intend to defraud within the meaning of Art. 798 C. P. C. *Riordan* vs. *Bennett*, Q. B. Montreal, 8 April, 1886. See note of case 15

(1) Ramsay, J., intimated that the Privy Council in *Molson* vs. *Carter* 3 L. N. 261) concurred in this view. See 15 Supreme Ct. Rep. at p. 118.

R. L., p. 34, and see *Vipond* vs. *Weldon*, *infra* No. 62.

61. —— —— An insolvent debtor who grants a hypothec on his immoveables to one of his creditors with the view of giving him a fraudulent preference, is guilty of a secreting which gives rise to *capias*. *Banque de la Nouvelle Ecosse* vs. *Lallemand*, S. C. 1890, 19 R. L. 66.

62. —— —— Fraudulent preferences by an insolvent trader in favor of one of his creditors can, according to circumstances, constitute a secreting giving rise to *capias*. *Vipond* vs. *Weldon*, S. C. 1889, 18 R. L. 422; *Labranche* vs. *Cassidy*, Q. B. 1888, 32 L. C. J. 95.

63. —— **Making Notes — Fraud — Prête-nom.**—A *capias* was issued against the defendant B. F. B. on the ground of secretion. It was alleged that the defendant had been doing business at St. John's, P.Q., under the name of B. & Co., and had made promissory notes in the name of the said firm, on which there was a balance due of $704.67; that he had secreted his effects, etc. The defendant in his petition to quash the *capias* denied the making of the notes, but did not file any affidavit to show that the signature was forged. He pretended that he was merely acting under a power of attorney from the registered firm of B. & Co. S. H., who constituted the registered firm of B. & Co., was examined, and stated that she signed the notes, and that the signatures were in her own handwriting—*Held*, that the person registered as the firm of B. & Co. was merely a *prête-nom* for the defendant, who was the actual owner of the business. *Capias* maintained. *Graham* vs. *Bennett*, S. C. 1883, 6 L. N. 298.

64. —— **Pledgee diverting Proceeds of Goods pledged to him.** ART. 798 C. C. P.—Where a defendant is arrested on the ground of secretion or making away with property, for the purpose of defrauding his creditors in general and the plaintiff, and that the act proved consisted of a fraudulent misapplication of moneys arising from the sale of goods pledged to the plaintiff, but which the plaintiff authorized the defendant to sell, the charge of secretion or making away with property is not sustainable. *Molson's Bank* vs. *McMinn*, C. R. 1874, 24 L. C. J. 256.

65. —— **Pledging unpaid Goods.**—The fact that the defendant purchased a quantity of flour from plaintiff for cash, to be paid immediately after delivery, and then obtained advances on the flour, and pledged the same for such advances, and wholly failed to pay the vendor, asserting as his reason for not doing so that he was insolvent, is a sufficient ground for the issuing of a writ of *capias ad respondendum*. *Raphael* vs. *McDonald*, S. C. 1865, 9 L. C. J. 336.

66. —— **Refusal to deliver Wood according to Contract.**—The defendant refused to deliver wood according to contract, demanding a higher price than had been stipulated in a notarial agreement—*Held*, that this was not a secreting, and the *capias* issued against him was quashed without costs. *Mantha* vs. *Séguin*, S. C. 1882, 6 L. N. 12.

67. —— **Removal of Goods by Tenant at Night.**—The removal by a tenant of his furniture at night constitutes secretion justifying the issue of a *capias* against him, and the lessor is not bound to find the goods made away with in order to attach them by seizure in reception; he can resort to the issuing of a *capias* against his lessee when the latter refuses to divulge the place where the said goods have been moved to. *Mitcheson* vs. *Burnett*, S. C. 1892, 2 Que. 260.

68. —— —— The sale and removal by defendant of his effects in the evening without plaintiff's knowledge and to his damage, and defendant's refusal to pay plaintiff and to disclose the place to which the effects have been taken, constitute secretion justifying the issue of a *capias* and attachment, although part of the price may have applied to the payment of a privileged claim. *St. Michel* vs. *Vidler*, S. C. 1885, M. L. R., 1 S. C. 163.

69. —— **Secreting another's Goods.**—Where it was proved that the defendant had no effects of his own, and that the goods he was disposing of were his wife's, the *capias* was set aside and quashed. *Gendron* vs. *Lemieux & Lemieux*, S. C. 1857, 12 L. C. R. 222.

70. —— —— Where the effects alleged to have been secreted are not the property of the debtor, but of the plaintiff, it is not a case for the issue of a *capias*. *Gay* vs. *Denard*, C. R. 1887, M. L. R., 3 S. C. 125, 15 R. L. 585.

71. —— **Selling out at a Sacrifice.**—An insolvent who disposes of his moveables at a sacrifice upon the eve of his assignment and who fails to render an account of the proceeds, is liable to be arrested on *capias*. *Létang* vs. *Renaud*, S. C. 1889, M. L. R., 6 S. C. 232.

72. —— —— The right which the creditors have of contesting the insolvent's statement does not deprive them of their recourse by *capias* where the insolvent has secreted and fraudulently disposed of his goods. (*Ib.*)

73. —— Selling out Business—Lessor—Costs.—A sale by a restaurant-keeper of his effects and business and the leasehold of his restaurant, will not sustain a charge of secretion if it be established by him that he acted with the concurrence of his lessors, his principal creditors, who had the right at any moment to sell him out and take the proceeds by privilege for rent due, and who received the price in payment of their claim. But where the defendant acts thus, without the knowledge of his other creditors, no costs will be allowed him on the quashing of a *capias* issued by one of them. *Cushing* vs. *Fortin*, S. C. 1892, 1 Que. 512. Confirmed in Review at p. 551.

74. —— Selling out to Minor at a long Credit.—Defendant who sold his property to a minor at a long credit without consulting his creditors, is not for that alone liable to *capias*. *Beaudette* vs. *Audette*, Q. B. 1878, 8 R. L. 581.

75. Suspension of Payment.—The expression "ceased his payments" in Art. 797 C. C. P. means a general suspension of payments in the ordinary course of business, and not a default to pay in an isolated case. *Herman* vs. *Lewis*, S. C. 1890, M. L. R., 6 S. C. 208.

76. Unliquidated Damages. Art. 801 C. C. P.—Bail for preliquidated damages may be had, but not for a penalty. *Patterson* vs. *Farran*, K. B. 1811, 3 R. de L. 348.

77. —— Before the Code *capias ad respondendum* did not lie for unliquidated damages. *Pollard* vs. *Irving*, Q. B. 1870, 2 R. L. 623.

78. —— Where, in an affidavit for *capias*, the plaintiff, a bank, set up that the defendant had received from its cashier large sums of money, which had been fraudulently taken from the funds of the bank to defendant's knowledge, and alleged a consequent indebtedness in damages—*Held*, sufficient to justify the *capias*. *Goldring* vs. *Hochelaga Bank*, Q. B. 1879, 2 L. N. 230. Appeal to P. C. quashed for want of jurisdiction, 10 L. N. 122.

79. —— And a pretension that the defendant was indebted to the cashier and the cashier to the bank would not hold. (*Ib.*)

80. Where Debt secured by Hypothec.—Although the creditor whose claim is secured hypothecarily is liable to an attachment before judgment and even *capias*, yet in such case the Court will require a very clear case of fraud to justify the issuing of a writ, all the presumptions being against the existence of fraud. *Lagacé* vs. *Ayotte*, Q. B. 1880, 6 Q. L. R. 88.

XIII. IMPRISONMENT.

Imprisonment, under the 8th section of the 12th Vict., ch. 42, can only be effected after *personal* service on the defendant of the judgment and notice therein referred to. *Benjamin* vs. *Wilson*, S. C. 1856, 1 L. C. J. 4, 5 R. J. R. Q., 361.

XIV. JUDICIAL ABANDONMENT.

(See Bail.—Sureties.)

1. Delay to make Statement.—*Held*, on petition of defendant to that effect, that on cause shewn he would be permitted, even five months after judgment, to file the statement of affairs required by C. S. L. C., cap. 87, sec. 12, and that plaintiff's petition for imprisonment would be dismissed in consequence of such permission. *Henderson* vs. *Lamoureux*, C. R. 1867, 17 L. C. R. 114.

2. Effect of.—That the effect of a judicial abandonment made by a debtor imprisoned under a *capias* is to entitle the debtor to his liberation; and where the abandonment, on the contestation thereof by the plaintiff, is declared fraudulent and insufficient, the Court has no power under the existing law, after the debtor has undergone the term of imprisonment not exceeding one year, to which he may be condemned under Art. 776 C. C. P., to sanction his further detention under the *capias* until he discloses assets alleged to have been fraudulently secreted. *Ogilvie* vs. *Farnan*, C. R. 1889, M. L. R., 5 S. C. 380, 18 R. L. 208, confirming S. C. 1889, 18 R. L. 162.

3. —— A debtor imprisoned under a *capias*, and who makes a judicial abandonment of his property, cannot be released at once in consequence of such abandonment, but must wait the expiration of the delays allowed by Arts. 773 and 774 C. C. P. for the contestation of the statement. *Ogilvie* vs. *Farnan*, S. C. 1889, 17 R. L. 471.

4. —— The mere filing of the statement in conformity with Art. 764 of the Code of C. P. does not entitle the party arrested to be released from custody, such statement being subject to

attack by any creditor within the delays mentioned in Art. 773. *Bruckert* vs. *Moher*, S. C. 1876, 21 L. C. J. 26.

5. —— On the ground of secretion committed previous to an assignment a *capias* may issue after or concurrently with the making of the assignment. *Stevenson* vs. *McOwen*, S. C. 1867, 3 L. C. L. J. 38, 11 L. C. J. 46.

6. —— *Held*, reversing the judgment of the Superior Court, that a *capias* on the ground of fraud and secretion may issue at the suit of a creditor after the assignment by the debtor in insolvency and the appointment of an assignee, but an attachment of the debtor's effects in the hands of third parties will not be maintained. *Neild* vs. *Ferland*, C. R. 1875, 1 Q. L. R. 228.

7. —— And this charge will be sustained by evidence to show that large sums sufficient to account for the insolvency have been made away with and not accounted for. *Bowney* vs. *Winning*, Q. B. Montreal, March, 1875.

8. —— A *capias ad respondendum* may issue against a debtor after he has made an assignment under the Act. *Beaudin* vs. *Roy*, Q. B. 1875, 20 L. C. J. 308; *Desjardins* vs. *Thibaudeau*, Q. B. Montreal, June, 1875.

9. —— A creditor who brings action against the insolvent, accompanied by *capias* for a sum of money due at the time, is not bound to proceed in the name of the assignee. *Roy* vs. *Beaudin*, S. C. 1873, 5 R. L. 232.

10. —— Where defendant released on bail makes a judicial abandonment to his creditors, and notifies the plaintiff creditor thereof, the latter cannot demand his imprisonment because the abandonment arose out of another case. *Friedman* vs. *Lilienthal*, S. C. 1893, 3 Que. 458.

11. Refusal to make. — Art. 776 as amended by R. S. Q., Art. 5963, provides that if the debtor, discharged upon bail, does not produce his statement and declaration within the thirty days mentioned in Art. 766, such debtor is subject to imprisonment for a term not exceeding one year.

Thus negativing the decision of *Carter* vs. *Molson* decided in 1883 by the Privy Council, before the amendment reported (27 L. C. J. 157), to the effect that inasmuch as the Code of C. P. failed to attach any penalty whatever for not filing the statement required by Art. 766, the penalty enforced by Art. 2274 of the C.C., and by ch. 87 of the Cons. Stat. of L. C., sec. 12, sub-sec. 2, cannot be enforced. Also *Goldring* vs. *La Banque d'Hochelaga*, Q. B. 1885, 29 L. C. J. 192, reversing S. C. 4 L. N. 324.

12. Retroactive Effect of 48 Vic. (Q.), ch. 22, sec. 9 (1885), amending Art. 776 C. C. P.—The Act 48 Vict. (Q.), ch. 22, s. 9, inflicting a penalty for not producing statement, etc., is not mere matter of procedure, and has not a retroactive effect. Hence, it does not apply to a debtor whose bail bond and the judgment declaring the *capias* valid were in force previous to the passing of the Act in question. *Nick* vs. *Arpin*, S. C. 1885, 9 L. N. 186.

13. —— But a defendant arrested under *capias* on the 8th July, 1884, is subject to the imprisonment imposed by the Act 48 Vic. (Q.), ch. 22, sec. 9 (1885), amending Art. 776 C. C. P., for failure to produce his statement and declaration within the thirty days of the judgment upholding the *capias*, where such judgment was rendered *after* the coming into force of the above amendment. *Bellerive* vs. *Taylor*, S. C. 1887, 15 R. L. 582.

XV. JURISDICTION.

1. Superior Court.—The quashing of a writ of *capias* in an action for less than £15 does not deprive the Superior Court of jurisdiction over such action as to future proceedings therein. *Elwes* vs. *Francisco*, S. C. 1857, 1 L. C. J. 188.

2. Pleading want of.— After pleading to the merits and moving to quash, it is not competent for the defendant to move to reject the writ and declaration for want of jurisdiction. *Brisson* vs. *McQueen*, 1862, 7 L. C. J. 70.

3. Art. 808 C. C. P.—In an action for $72.65, commenced by *capias*, the S. C. has jurisdiction to condemn the defendant to pay the amount, notwithstanding that the writ of *capias* has been quashed. *Prévost* vs. *Ritchot*, S. C. 1874, 18 L. C. J. 72.

XVI. LIS PENDENS.

The transferee before maturity of a promissory note who is aware that his transferor has sued the maker and issued a *capias* against him, which latter was quashed, cannot, before a decision on the first action, sue the maker of the note and issue a *capias* against him. *McLaughlin* vs. *Grenier*, C. R. 1892, 1 Que. 312.

XVII. ORDER FOR.

Art. 801 C. C. P.—Where a writ of *capias* issues without a judge's order in a case where the principal right of action consists in the recovery of damages, such writ will be quashed on motion. *Goyette* vs. *McDonald*, C. R. 1873, 1 R. L. 538.

XVIII. REVIEW.

1. Delay. Art. 823 C. C. P.—In the provision of Art. 823 C. C. P., which requires that in order to obtain a suspension of the order discharging the defendant, the plaintiff must declare immediately that he intends to have the decision reviewed and deposit the amount required by Art. 197, such declaration is only required to prevent the defendant from getting his immediate release, and therefore where the defendant has already been released upon bail, the plaintiff can have a review of the judgment quashing the *capias* without the above declaration. (1) *Richardson* vs. *Fortin*, C. R. 1886, 13 Q. L. R. 18.

2. —— The plaintiff in an action accompanied by *capias* can, within eight days after judgment, demand the revision of an order declaring defendant to be discharged, although he had not immediately declared under Art. 823 that he intended to have the decision reviewed, and deposited the amount required by Art. 497. (1) *Channel* vs. *Beckett*, C. R. 1888, 17 R. L. 678.

XIX. RETURN OF WRIT.

1. On application of the defendant the sheriff was ordered to return the writ on the 17th April, it being made returnable on the 29th. *Moss* vs. *Wilson*, 1863, 14 L. C. R. 26.

2. A defendant need not present a petition under Art. 819 Code of C. P. in order to have a writ of *capias* returned immediately, but a judge may order such return upon simple motion to that effect. *Moisie Iron Co.* vs. *Olsen*, S. C. 1873, 17 L. C. J. 322.

XX. WRIT.

1. Art. 808, 810, 811 C. C. P.—A writ of *capias* signed "F. H. Marchand, Clerk of the Circuit Court," attested with the seal of the Circuit Court, St. Johns, returnable into the Superior Court, and headed in the margin "in the Superior Court" is irregular, as such writ is not a writ in the Superior Court as required by the Judicature Act. *Hitchcock* vs. *Meigs*, S. C. 1856, 6 L. C. R. 175, 5 R. J. R. Q. 61.

2. Art. 803 C. C. P.—The rule of practice which requires the plaintiff to indorse on a *capias* the sum for which bail is to be taken, is only directory to the sheriff, and if it be not obeyed the omission does not involve the nullity of the proceedings. *Fitzgerald* vs. *Ellis*, K. B. 1813, 3 Rev. de Lég. 306.

3. Declaration.—Even where the plaintiff has already issued an attachment before judgment, accompanied by a declaration, a *capias* issued in the same cause, and for the same reasons, should also be accompanied by a declaration. *Marandat* vs. *Varet*, C. R. 1884, M. L. R., 1 S. C. 109.

4. Several Defendants.—A writ of *capias* under which one of several defendants is arrested, although it be headed as if there were only one defendant, the affidavit being properly headed and referring to the defendants is sufficient. *Phillips* vs. *Sutherland*, Q. B., Montreal, March, 1875.

(1) Art. 823 was amended by 54 Vic., ch. 41, sec. 3, adding after the word depositing "before the expiration of the next juridical day."

CARRIERS. (1)

I. Attachment in Hands of.

II. Express Co.—Money Package—Evidence of Value.

III. Lien of.

Attachment in Revendication—Freight—Art. 1679 C. C. 1.
Delivery—Art. 1679 C. C.—*Damages*—Art. 1077 C. C. 2-3.
Delivery—Art. 1679 C. C. 4.
For Storage. 5.
Freight indivisible. 6-6*a*.
Previous Debt. 7.
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IV. Of Goods.

Conditions of Bill of Lading limiting Liability, etc.
Notice of. 1-3.
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Railways—Limiting Liability. 8-9.
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(1) See Act respecting the liability of Carriers by water, R. S. C. ch. 82; Articles of Civil Code relating to Carriers, 1672-1682, and see "Affreightment."

Connecting Lines. 16-20.—(See also *supra* "Conditions of Bill of Lading limiting Liability, etc.")
Consignee, Rights and Duties of. 21-24.
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Presumption of Negligence—Vis Major. 31-34.
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I. ATTACHMENT IN THE HANDS OF.

A carrier, bailee of a quantity of corn, put on board his ship, can plead the same defence to an attachment in revendication as would be good in the month of the consignor. It is to urge his own interest and not to plead in the name of another. *Borrowman* vs. *Bass*, Q. B. Montreal, December, 1876.

II. EXPRESS CO.—MONEY PACKAGE.—EVIDENCE OF VALUE.

Where a person deposits with an Express Company at its office a sum exceeding $50 to be forwarded, parol testimony is admissible to prove that the Company's agent counted the sum, even when the written receipt given by

him states that it was represented to him that the package contained a certain sum. *Canadian Express Co.* vs. *Letourneau*, Q. B. 1884, 13 R. L. 693.

III. LIEN OF.

1. Attachment in Revendication — Freight. Art. 1679 C. C.—A carrier cannot claim payment of freight before delivery of all the goods he has undertaken to carry.

Where a carrier demanded payment of freight before completion of the carriage, and did not afterwards renew the demand with an offer to deliver the goods, he cannot set up his lien thereon in an action of revendication against him by the owner. *Stout* vs. *King*, S. C. 1893, 3 Que. 51.

2. Delivery—Art. 1679 C. C.—**Damages**—Art. 1077 C. C.—A carrier who transports lumber by barge has a right to retain the lumber until payment of the freight, and can attach the same by conservatory process after it has been unloaded, in order to preserve his privilege. *Varieur* vs. *Rascony*, S. C. 1889, 17 R. L. 105, M. L. R., 5 S. C. 123.

3. —— If the carrier's departure has been delayed by the necessity of taking such proceedings, he can only claim as damages therefor interest on the sum due for freight as provided by Art. 1077 C. C. (*Ib.*)

4. —— *Held*, A carrier who has put the thing transported in the particular place specified in the contract of carriage, is not considered to have thereby dispossessed himself of it, and his right of retention under Art. 1679 C. C. until he is paid for the carriage, still exists, and may be asserted by conservatory seizure against parties claiming title by purchase. *Groulx* vs. *Wilson*, C. R. 1892, 1 Que. 546, and see *Patterson* vs. *Davidson*, 2 R. de Lég. 77.

5. For Storage—1812 C. C.—Action was brought to revendicate a large quantity of wheat seized in the possession of the defendant The wheat had arrived in Montreal from Cleveland, and was to be delivered on board another vessel lying in the harbor of Montreal, but the lighter not being ready to receive it the carriers stored it with defendant, in whose hands it was seized. The judgment of the Court below condemned defendant, but recognized his lien for storage, and also that of the carrier for freight, holding that they were justified in storing under the circumstances, and the judgment was confirmed. *Watt* vs. *Gould & Jacques*, Q. B. 1866, 2 L. C. L. J. 19.

6. Freight indivisible. Art. 1679 C. C.—A common carrier by water has a lien upon every portion of goods carried for the payment of the whole freight due by the owner or consignee of the goods, and a tender by the owner of the cargo, of the freight due on each load as discharged and loaded on a cart, is insufficient. *Brewster* vs. *Hooker*, S. C. 1857, 7 L. C. R. 55, 1 L. C. J. 90, 5 R. J. R. Q. 172.

6a. —— But *held* later, that the payment of freight and the delivery of the cargo are concomitant acts, which neither party is bound to perform without the other being ready to perform the correlative act, and, therefore, that the master of a vessel cannot insist on payment in full of his freight and of a cargo of coals before delivering any portion thereof. *Beard* vs. *Brown*, C. R. 1870, 15 L. C. J. 136.

7. Previous Debt—The carriers claimed a lien on goods for previous debt due for freight, not by the owners of the goods shipped but by the intermediate shipping agents for goods shipped for other parties. The bill of lading stipulated that the carriers should have a lien on the goods "for all previously unsatisfied freights and charges due to them by the shippers or consignees"—*Held*, that the owners of the goods could not be held liable in the absence of specific proof of a particular mode of dealing between them and the carriers to meet the case. *Leaf* vs. *The Canada Shipping Co.*, S. C. 1878, 1 L. N. 220.

8. Rafting Timber — Dernier Equipeur.—A person who undertakes the rafting of timber down a river is a *dernier équipeur* and has a privilege on such timber, but only for his charges and expenses in rafting the timber. He is also a carrier and has a lien thereon until payment of his charges, and can protect his right by conservatory attachment. *Trudel* vs. *Trahan*, S. C. 1874, 7 R. L. 177.

9. —— But this does not apply to one of the raftsmen engaged on the raft. *Graham* vs. *Côté*, Q. B. 1872, 4 R. L. 3.

IV. OF GOODS. (1)

1. Conditions of Carriage — Notice of. Art. 1676 C. C.—Proof to the effect that the defendant had previous to and at the time of the fire posted up in all the company's stations with other printed conditions a notice that the company would not be responsible "for damages occasioned by delays

(1) See an Act relating to Bills of Lading, 52 Vict. (D), c. 30 (1889).

from storms, accidents, or unavoidable causes, or for damages from fire, heat, etc.; " that a similar notification and similar conditions were printed on the back of the company's advice notes to consignees as to the arrival of goods, and that the plaintiff had been seen on a previous occasion reading such condition and notification, does not constitute an agreement between plaintiff and defendant that the goods in question were to be carried on those terms, particularly in the face of a simple unconditional receipt given by the company for the goods as in the present case. *Huston* vs. *Grand Trunk Railway Co.*, S. C. 1859, 3 L. C. J. 269. Confirmed in Q. B. 1860, 6 L. C. J. 173, *sub. nom. Grand Trunk Railway Co.* vs. *Mountain & Huston.* (1)

2. —— —— A common carrier cannot be exempted from liability, even when such agreement is proved, if he be guilty of negligence. (*Ib.*)

3. —— —— The conditions of a bill of lading as well as the delivery receipt which contains a printed acknowledgment that the goods were received in good condition only bind those who have had notice of the conditions. (2) *Delorme* vs. *Can. Pac. Ry. Co.*, C.Ct. 1888, 11 L. N. 166; *Vanier* vs. *Can. Pac. Ry.*, Mag. Ct. 1889, 13 L. N. 19; and see *Allan* vs. *Woodward*, *infra* No. V. 2.

4. —— Railways —Goods transferred to another Company. Art. 1676 C.C.—The railway company, defendant, received a case of goods from the plaintiff's agent at Winnipeg, consigned to the plaintiff at Montreal, and issued a bill of lading, among the conditions of which were that the company would not be responsible for loss by fire, or while the goods were not on the defendant's railway. The plaintiff's agent at Winnipeg signed a shipping bill requesting the company to receive the goods on these conditions. The goods were destroyed by fire on a steamer running from Port Arthur through Lake Superior—a route connecting two portions of the defendant's railway, but the steamer was not under the defendant's control—*Held*, that the conditions were reasonable, and that the plaintiff had sufficient notice and was bound thereby, and the company were relieved from responsibility, in the absence of any averment or proof, that the loss was caused by the fault of the carrier (defendant) or of those for whom it was responsible. *Dionne* vs. *Can. Pac. Ry. Co.*, S. C. 1885, M. L. R., 1 S. C. 168. Confirmed in Review, Jan. 30, 1885.

4a. —— —— The G. T. R. Co. are not responsible for the loss of goods received by them for delivery at Jersey City, N.Y., if they prove that they duly forwarded the goods from the terminus of their own railway; the bill of lading of the Company containing the clause that " the Company will not be responsible for any goods missent, unless they are consigned to a station on their railway." *Charter* vs. The *G. T. R. W. Co.*, S. C. 1873, 17 L. C. J. 26.

5. —— —— The condition on the back of a through bill of lading, relieving a railway company from responsibility as soon as goods entrusted to them for carriage have been delivered to the next succeeding carrier at the extremity of the line of the railway company issuing said bill of lading, is a legal and reasonable condition, and is binding on the shipper, who either has, or from the circumstances is presumed to have, knowledge thereof, and to have accepted the contract subject to such condition. *Beaumont* vs. *Can. Pac. Ry. Co.* 1889, M. L. R., 5 S. C. 255.

6. —— —— It is competent for a railway company which undertakes to carry goods over their line destined for a point beyond their own line, and receives the freight for the whole distance, to stipulate by an express condition in the bill of lading that they will not be responsible for any loss or damage to the goods other than that which may occur while the goods are being carried on their line; and where such condition exists, and the defendants prove that the goods were carried safely over their line and delivered in good order to the connecting company, they will be relieved from responsibility for any damage sustained thereafter. (1) *Can. Pac. Ry. Co.* vs. *Charbonneau*, 1890, M. L. R., 6 Q. B. 287, 19 R. L. 317.

7. —— —— Art. 1676 C. C., Sec. 246, 3 Ry. Act, 1888.—C. delivered goods at New York to a railway company which undertook to carry them to Quebec partly over its own line and partly over those of two other companies. The respondents, upon receiving the freight receipt from the first company at New York, delivered a bill of lading to C., mention-

(1) As to conditions on passenger ticket, see *supra* " of Baggage—Condition on back of ticket " and note thereto.

(2) See sec. 246 (3) Dom. Ry. Act, 1888, and *Vogel* vs. *G. T. R.*, 11 Can. S. C. R. 612.

(1) See *Grand Trunk Ry. Co.* vs. *McMillan*, 1888, 16 Can. S. C. R. 543, distinguishing *Vogel* vs. *G. T. R.*, 11 Can. S. C. R. 612.

ing therein the first contract made by C. with the original company, and undertaking thereby to carry the goods over their line from Prescott to Quebec on the express condition that they should not be liable for damages or loss to the goods occurring while they are under the control of intermediate carriers and before they arrived at Prescott.

Held, that the agreement of the respondents limiting their liability to damage done on their own line was not prohibited by Art. 1676 C.C., or by sec. 246, § 3, of the Railway Act, 1888, and the damage having occurred before the goods arrived on their line, they were not responsible therefor. *Gauthier* vs. *Can. Pac. Ry. Co.*, Q. B. 1893, 3 Que. 136, and see *Robichaud* vs. *C. P. R.*, S. C. 1885, 8 L. N. 314.

8. —— Limiting Liability. Sec. 246 (3) Dom. Ry. Act 1888—Art. 1676 C. C.—Notwithstanding the notice of conditions limiting a railway company's liability, such company will be liable for damage arising through its fault or the fault of those for whom it is responsible. (1) *Campbell* vs. *Grand Trunk Ry. Co.*, C. C. 1871, 3 R. L. 451.

9. —— —— Railway companies may by contract relieve themselves from responsibility for loss, damage or detention of goods unless caused by negligence on their own part or that of their servants, but such condition must be brought to the notice of and signed by the parties thereto. *Vanier* vs. *C. P. R.*, Mag. Ct. 1889, 13 L. N. 19, and see *Redgrave* vs. *Can. Pac. Ry.*, an Ontario County Court case reported pp. 19 and 26 of 11 L. N.

10. —— Fragile Goods. Art. 1676 C. C. **—Special Rates for perishable Goods.** —*Held*, where, by a condition of the bill of lading, it is stipulated that the carrier will not be responsible for loss or breakage of fragile goods unless a higher rate of freight be paid therefor, and the shipper has not paid such additional rate, the carrier is not bound to use greater care in respect to such goods than is usual in the case of goods for which ordinary rates are charged. *Mongenais* vs. *Allen*, Q. B. 1892, 1 Que. 181.

10a. —— —— A carrier is not relieved from liability arising from negligence when the bill of lading contains the clause "not liable for leakage, breakage and rust." *Harris* vs. *Edmondstone*, C. C. 1859, 4 L. C. J. 40.

11. —— Negligence—Presumption—Exception—Evidence—Onus Probandi. Art. 1675 C. C.—It is sufficient for the shipper to prove the reception of the goods by the carrier, and that they have not been delivered to the consignee, to place upon the carrier the burden of proving that the loss was caused by a fortuitous event or irresistible force, or has arisen from a defect in the goods or thing itself. *Cie. de Nav. R. and O.* vs. *Fortier*, 1889, M. L. R., 5 Q. B. 224, 18 R. L. 83.

12. —— —— The fact that the bill of lading contained a clause exempting the carrier from responsibility for "the acts of God, the Queen's enemies, fire, and all and every the dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind," does not necessarily cast the burden of proof on the plaintiff,—so far, at least, as to oblige him to make proof of the carrier's negligence by his evidence in chief. (*Ib.*)

13. —— —— The exception "dangers and accidents of the seas, rivers and navigation of whatsoever nature and kind" covers only such losses as are of an extraordinary nature, or arise from some irresistible force which cannot be guarded against by the ordinary exertion of human skill and prudence. (*Ib.*)

14. —— —— The sinking of a steamer at the entrance to a canal, on a calm clear night, was not such an accident. (*Ib.*)

15 —— Theft by Servants of Shipowner.—Theft by company's own servants not covered by clause in bill of lading exempting company from liability by "thieves of whatever kind, whether on board or not, or by land or sea." *Steinman* vs. *Anchor Line*, English Ct. of Appeal 1891, 14 L. N. 300.

16. Connecting Lines. (1) (See also *Supra* "Conditions of Bill of Lading" —A carrier who undertakes to convey goods from Quebec to Chicago, with power to tranship at Kingston, complies with the usage of that port by transhipping from a steamer into a sailing craft, and is further not responsible for the loss of such goods occasioned by tempestuous weather, in which such sailing craft is wrecked. *Warren* vs. *Henderson*, S. C. 1858, 8 L. C. R. 108, 6 R. J. R. Q. 154.

16a. —— Clause in bill of lading to effect that carrier may at his option tranship at Quebec and forward goods to Montreal, at ship's expense and *merchant's risk*, does not

(1) See *Vogel* vs. *G. T. R.*, 11 Can. S. C. R. 612.

(1) See U. S. Supreme Ct. case of Michigan Central RR. Co. vs. Myrick, reported 6 L. N. 69, as to the general doctrine regarding transporting by connecting lines of carriers.

relieve carrier from liability arising from negligence and want of care in the handling and landing of the goods at Montreal. *Samuel* vs. *Edmonstone*, S. C. 1856, 1 L. C. J. 89.

17. — Where the place of destination of goods is beyond the carrier's route, and he receives the goods under a bill of lading to the terminus of his route, and carries them safely to that point, to which alone he received the freight, the fact that at the request of the shipper he undertook to deliver the goods to another carrier to complete the transportation, does not make the first carrier responsible for the delivery of the goods at the place of destination. *Jeffrey* vs. *Can. Shipping Co.*, Q. B. 1891, 7 M. L. R. 1.

17a. — In the case of goods carried by The Ocean Steamship Co. to Portland and there delivered to The Grand Trunk Railway Co. and by them carried to Montreal, the railway company are responsible for damage to the goods caused by their negligence, and such negligence will be presumed if it be shown that they received the goods in apparent good order and delivered them in bad order. *Grand Trunk Ry. Co.* vs. *Atwater*, Q. B. 1873, 18 L. C. J. 53, confirming C. R., 17 L. C. J. 1.

18. — A carrier who receives goods *en route* from another carrier, enters them on its way-bills and collects all its charges from the consignee, is not liable for such of the goods as were lost by the first carrier. *Benan Bros.* vs. *Grand Trunk Ry. Co.*, S. C. 1891, 17 Q. L. R. 299.

19. — But, as the consignee was misled by the way-bills of the second carrier, the latter will be condemned to the costs of the action for damages. (*Ib.*)

20. — A carrier who receives goods *en route* from another carrier is not responsible for delay in the delivery of the goods, where such delay is caused by an error in the way-bill of a previous carrier, delivered to the succeeding carrier with the goods, which way-bill stated a place of destination which was erroneous. *Trester* vs. *Can. Pac. Ry. Co.*, Q. B. 1892, 1 Que. 12.

21. Consignee—Payment of Freight.—Where goods were to be delivered to the holder of a bill of lading on payment of freight, and they were in fact delivered to the holder of the bill, a carrier, without paying freight, and on the sole credit of the carrier, who had funds from the real unknown consignee to pay the freight, the carrier having become insolvent, the captain cannot recover freight from the consignee. *Fletcher* vs. *Bickford*, Q. B. Montreal, Sept., 1875.

22. —— Rights and Duties of.—The consignee cannot refuse to accept goods from the carrier because a portion thereof have been damaged; he must have recourse to an action of damages for the loss he has sustained. *Halcrow* vs. *Lemesurier*, Q. B. 1884, 21 R. L. 28, 10 Q. L. R. 239

22a. — In general, a consignee who complains of short delivery or damage to goods ought at once to protest and hold a survey after due notice to the parties interested, but, in a case like the present, where the party did not intend to keep the damaged goods and the extent of loss could be rightly ascertained by a public auction, and the damage was admitted, such protest and survey were unnecessary. *Gaherty* vs. *Torrance*, Q. B. 1862, 6 L. C. J. 313.

22b. — In a case like the above, the burden of proof is on the carrier to show that the damage was occasioned by the dangers of navigation. (*Ib.*)

23. — The consignee cannot refuse to accept goods from the carrier who agreed to deliver them within a certain time and fails to do so; he must have recourse to an action of damages for the loss he has sustained. *Bailly* vs. *Cie. de Nav. R. & O.*, C. Ct. 1885, 20 R. L. 127.

24. — Where the consignee refuses to accept goods from the carrier at the place of delivery, the carrier is not justified in selling the same by private sale, without notice to the consignor or consignee; and a pretended authorization to sell by the consignee who has refused to accept the goods is without effect. The consignor in such case is entitled to recover the value of the goods less freight and storage. *Cottingham* vs. *Grand Trunk Ry. Co.*, S. C. 1891, M. L. R., 7 S. C. 385.

25. Delay in Delivery—Connecting Line—Error in Way-bill.—*Held*, that a carrier who receives goods *en route* from another carrier is not responsible for delay in the delivery of the goods where such delay is caused by an error in the way-bill of a previous carrier, delivered to the succeeding carrier with the goods, which way-bill stated a place of destination which was erroneous. *Trester* vs. *Can. Pac. Ry. Co.*, Q. B. 1892, 1 Que. 12.

26. —— Damages.—A railway company is liable for damages caused by its failure to deliver goods entrusted to it for carriage within a reasonable time, and, when the company's time-tables show that the distance which the goods have to be carried should be covered in two hours, a delay of twenty-four hours in summer for transporting fresh meat over such distance is unreasonable, and the company will be condemned to pay the price of the meat which was damaged. *Delorme* vs. *Can. Pac. Ry. Co.*, C. Ct. 1888, 11 L. N. 106.

27. —— —— A railway company is liable for damages caused by its failure to deliver goods entrusted to it for carriage within a reasonable time. *Pontbriand* vs. *Grand Trunk Ry. Co.*, S. C. 1887, 3 M. L. R. 61.

28. —— Measure of Damages—Loss of Custom.—Where the circumstances justify the presumption that a carrier undertaking to convey goods was aware that they were intended for immediate sale, he may be held liable for the loss of profits on such sale caused by his failure to deliver them. *Behan* vs. *Grand Trunk Ry. Co.*, S. C. 1885, 11 Q. L. R. 60.

29. —— —— Damages for loss of custom arising from such non-delivery are too remote to be held to have been in the contemplation of the parties and cannot be recovered. (*Ib.*)

30. Delay in Starting—Injury to Cattle—Acts of Agents. Art. 1676 C. C. —T. and others were cattle exporters who shipped 100 head of cattle on board a steamer belonging to A. and others, the defendants, to be conveyed from Montreal to Glasgow in Scotland. The cattle were ordered on board by the vessel's authorities about daybreak on the 9th July, 1885, it being understood that the vessel should sail before eight o'clock in the morning. Owing to the lading of the vessel not having been completed, she did not sail until afternoon of the said 9th July, and, on account of the intense heat 21 head of the cattle died, and the remainder were deteriorated in quality and sold at a lower price than they would otherwise have brought.

T. brought an action against A. to recover the price of the cattle which had died and the amount of loss sustained through the deterioration of the others.

Held, that A. *et al.* were responsible for the acts of the master and other authorities of the vessel in ordering said cattle on board as they did. That in ordering said cattle on board as they did before the vessel was ready to sail, the said master and other authorities of the vessel were guilty of gross negligence, which caused the death of the cattle which were suffocated; that the defendants were liable for the price of the cattle, which were suffocated. That the loss from the deterioration of the remainder of said cattle had not been proved to be caused by the delay of said vessel in sailing. *Thompson* vs. *Allan*, S. C. 1887, 32 L. C. J. 69.

31. Delivery— Bill of Lading—Short Delivery.—The plaintiffs sued for $67.70, value of eight barrels of flour, short delivered at Montreal. At the trial the proof established that in June, 1881, the Missouri Pacific Railway Company signed a bill of lading to forward and deliver one hundred and fifty barrels of flour, consigned to plaintiffs at Montreal; a way-bill was made out, and the car sealed, and delivered to a company known as the Red Line Transportation Company, by whom the car was delivered at Brockville to defendants. The defendants received the sealed car at Brockville and conveyed it to Montreal, there notifying the plaintiffs by usual advice note of its arrival, and as containing one hundred and fifty barrels of flour, consigned to their order; the information contained in the advice note having been obtained from the way-bill before the car was opened. On opening the car only 142 barrels were found which were duly delivered to the plaintiffs, who subsequently sued in revendication for the balance of eight barrels, alleging a contract at St. Louis and setting up the bill of lading and advice note. The defendants pleaded that they were not parties to the bill of lading; that they only received the car at Brockville, it being then sealed, and that they conveyed it to Montreal, with the seals intact, and in the same condition as when received, and that the advice note was merely a notice sent by custom of trade, contents of which were taken from the way-bill, and could not amount to a binding admission. The Court held that the defendants not being parties to the original bill of lading were not bound by it; but that they had fulfilled all their obligations by delivering the contents of the sealed car. That plaintiffs had not shown, as they were bound to do, that the car contained 150 barrels at St. Louis or at Brockville, the advice note not being such an admission as would relieve them from so doing, or estop the defendants from making proof to the contrary if necessary. *Wade* vs. *Canadian Pacific Ry. Co.*, C. C. 1885, 8 L. N. 348.

32. ——Chains attached together.—

The plaintiffs sued for the value of two chains which, together with a third, the defendant, as master of the steamship "Anglo-Saxon," received for the plaintiffs in Liverpool, and undertook to deliver to them or their assigns in like good order and condition at Quebec, but two of which chains, while in the custody of defendant at Quebec, fell overboard and were lost—*Held*, confirming the judgment of the court below, that the chains having been attached together for the purpose of delivery they composed one whole, and delivery of one could not be made unless the whole were delivered. *McMaster* vs. *Walker*, Q. B. 1858, 8 L. C. R. 171, 6 R. J. R. Q. 193.

33. —— Ends Reponsibility — When.—If goods are put on shore by the master of a ship, and lost, he is not answerable for the loss unless it appear that the loss was occasioned by some neglect on his part of the regular and common duties of a shipmaster. *Rivers* vs. *Duncan*, K. B. 1819, 2 Rev. de Lég. 75, 1 R. J. R. Q. 176.

34. —— —— Short Delivery, etc. Arts. 1053 and 1674 C. C.—Several packages of goods were shipped from London to a merchant at Quebec, where, upon arrival of the vessel, and after delivery of the packages, it was ascertained that some of the goods were missing from one of the packages. Notice not having been given until several months afterwards, it was thereupon *held* that the master was not responsible for the deficiency. *Swinburne* vs *Massue*, Ct. of Appeals 1834; Stuart's Rep., p. 569, 1 R. J. R. Q. 419.

35. —— —— In general, a consignee who complains of short delivery or damage of goods ought at once to protest in order that the disputed facts may be investigated. In general, a survey ought to be had without delay upon goods delivered in a damaged state, and this after notice to the parties interested, especially in cases where the consignee intends to retain the goods. *Gaherty* vs *Torrance*, Ct. of Appeal 1862, 6 L. C. J. 313.

36. —— —— Where under a bill of lading goods were "to be delivered from the ship's deck where the ship's responsibility shall cease, at Montreal, unto the Grand Trunk Ry. Co., and by them to be forwarded thence by railway to Toronto, and there delivered" to plaintiff, the provision "no damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed"—*Held*, to apply to the removal from the ship at Montreal, and to be strictly binding on the consignees. And such a condition is not an unreasonable one and covers all damage, latent as well as apparent. And if any limitation of the condition could be implied, it could not reasonably go further than to exclude such damage only as could not have been discovered on an examination of the goods, conducted with proper care and skill at the place of removal. But a delay of several weeks in making a claim for damage done to goods on the ship would not of itself, and apart from the above stated condition, be a sufficient answer to the action. *Moore* vs. *Harris*, Privy Council 1876, 2 Q. L. R. 147.

37. —— —— Responsibility as a common carrier ceases the moment the goods are delivered into the possession of the consignee, delivery on to a public wharf being such delivery, and if the goods are damaged by the bad condition of the wharf, the carrier will not be liable. *Leclerc* vs *Gaherty*, C. Ct. 1880, 7 Q. L. R. 30.

38. —— Instructions not to deliver—Damages.—Action was brought to recover the value of three cases of goods which the defendant had undertaken to deliver to the consignee of the plaintiff at Toronto, but which they had notice subsequently not to deliver, as the consignee had stopped payment, and the defendant disregarded the notice and delivered the goods—*Held*, that he was liable to pay to the plaintiff the price of said goods as sold to the consignee. *Campbell* vs. *Jones*, S. C. 1858, 3 L. C. J. 96, 9 L. C. R. 10.

39. —— Perishable Goods.—A carrier who transports perishable goods must use extra diligence in delivering them, and when the consignee does not call for them, the carrier must, if possible, notify the forwarder thereof, and upon default of so doing, the carrier will be held liable in damages for the loss occasioned thereby. *Gauvreau* vs. *Dom. Express Co.*, C. Ct. 1889, 18 R. L. 301.

40. —— What constitutes.—The defendants were a company who undertook the delivery of parcels and messages. The plaintiff had entrusted them with a parcel addressed to one B., a purser on board the Richelieu Company's steamer "Montreal." The message-boy, not finding B. there, left it with a man in charge of the Richelieu Co.'s sheds on the wharf. The parcel did not reach its destination, but was lost—*Held*, that the Company was liable. *Nelson* vs. *The Canadian Telegraph Co.*, C. Ct. 1883, 6 L. N. 184.

41. —— Way-bills — Agent.—A way-bill by a common carrier for goods may be transferred by indorsement like a bill of lading. Being so transferred, and the carrier being notified of the transfer, the goods can only be delivered to the holder.

The agent of a railway company in charge of one of its stations will be presumed to be authorized to give such way-bill, and the company will be bound by his acts in this respect. *Grand Trunk Ry. Co.* vs. *Shaw*, Q. B., Dec., 1875.

42. Liability of, as Warehousemen as distinct from Carriers.—Carriers under the law of Quebec have no responsibility distinct from that which arises from their liability as carriers. *Leclerc* vs. *Gaherty*, S. C. 1880, 7 Q. L. R., at p. 31, per Caron J.; *Pelland* vs. *C. P. Ry. Co.*, S. C. 1891, M. L. R., 7 S. C., at pp. 135, 136, per Pagnuelo J. Confirmed Q. B. 1892, 1 Que. 311.

43. —— Contra.—Where a railway company sends a notice to the consignee that his goods have arrived and remain entirely at his risk for all damages, and that, if stored, a certain charge would be made for storage, which was paid to the company by the owners —*Held*, that, although the responsibility of the company as carriers had ceased, yet they remained liable as warehousemen or bailees, but that the evidence did not show any negligence on their part. *Grand Trunk Ry. Co.* vs. *Gutman*, Q. B. 1871, 3 R. L. 452, 1 Rev. Crit. 177.

44. —— Per Badgley & Drummond (*contra*) that negligence is presumed if damage shown, and the *onus* of proof of case was on the company, who had made no proof whatever to rebut the presumption against the company. (*Ib.*)

45. Negligence—Evidence of—Burden of Proof.—In appeal from a judgment dismissing appellant's action to recover from defendant the value of three crates of earthenware—*Held*, reversing the decision of the court below, that if merchandise in good order is entrusted to a carrier, and arrives at its destination in a damaged state, where he holds it subject to freight, he is liable for the damage. *Hart* vs. *Jones*, K. B. 1831, Stuart's Rep. 589.

46. —— —— And, if he pretend that fraud or concealment have been practiced, the burden of proof is on him. (*Ib.*)

46a. —— —— The liability of a forwarder for a quantity of wheat shipped on board a barge, established by an acknowledgment in writing of its receipt, cannot be affected by parol testimony that the barge was not his, or that he acted only as agent for the owner. *Syme* vs. *Janes*, S. C. 1857, 2 L. C. J. 169.

46b. —— —— When the measurement and delivery of a cargo of wheat have been properly commenced in presence of both the carrier and the consignee, or their representatives, it is their duty to attend till delivery is completed; and if either party absent himself the other may proceed without him. (*Ib.*)

46c. —— —— Common carriers are responsible for damages caused by fire breaking out on board of a steamboat, unless such fire was not attributable to their negligence; and the *onus probandi* is upon the carriers to account for the fire and prove that it did not arise from their fault. *Canadian Navigation* vs. *Hayes*, Q. B. 1875, 19 L. C. J. 269.

46d. —— —— In an action against a carrier, if he decline swearing to the value of the goods lost and claimed, the court will submit the matter to the decisory oath of the plaintiff. *Hobbs* vs. *Séncal*, S. C. 1857, 1 L. C. J. 93.

47. —— —— A carrier is responsible for loss or damage to goods entrusted to him, when he is unable to show that the loss was caused by irresistible force, or by a defect in the thing itself. *Ouimet* vs. *Can. Express Co.*, Q. B. 1889, M. L. R., 5 Q. B. 292, 17 R. L. 225, 32 L. C. J. 319; *Gaherty* vs. *Torrance*, Q. B. 1862, 6 L. C. J. 313; *Vanier* vs. *Can. Pac. Ry. Co.*, 13 L. N. 19.

48. —— —— The burden of proving irresistible force or defect in the thing is on the carrier. (*Ib.*)

49. —— —— A carrier who contracts to carry goods, and receives the freight, is responsible for the goods to the place of their destination, notwithstanding the fact that on the road he transferred them with the consent of the owner to another carrier, to be carried by him on to their destination. (*Ib.*)

50. —— —— It is sufficient for the shipper to prove the reception of the goods by the carrier, and that they have not been delivered to the consignee, to place upon the carrier the burden of proving that the loss was caused by a fortuitous event or irresistible force, or has arisen from a defect in the goods or thing itself. *Cie. de Nav. R. & O.* vs. *Fortier*, Q. B. 1889, M. L. R., 5 Q. B. 224, 34 L. C. J. 9.

51. —— Damage to Cargo — Notice.—Action for damages to cargo of tea by the

use of chloride of lime, which it was alleged had impregnated the tea with an offensive odour—*Held*, that the evidence did not establish the fact of damage satisfactorily, so as to charge the ship, and that due diligence had not been used to notify the ship-owner of the damage. *Moore* vs. *Harris*, Q. B. Montreal, Sept., 1871.

52. —— Dog—Broken Fastenings.—A railway company is liable for the value of a dog entrusted to it for transportation where the dog escapes owing to the breaking of its fastenings. *Puchen* vs. *Cie. du Nord*, Tribunal de la Seine, Jan., 1885; reported 8 L. N. 111.

53. —— Goods destroyed by Fire—Vis major.—By the law of Lower Canada carriers are liable for all losses not resulting from the act of God, the Queen's enemies, or from *vis major or* inevitable accident. *Huston* vs. *G. T. R.*, S. C. 1859, 3 L. C. J. 269. Confirmed by Q. B. 1860, 6 L. C. J. 173, *sub. nom. Grand Trunk Ry.* vs. *Mountain & Huston.*

54. —— —— By the law of Lower Canada *vis major* and inevitable accident are equivalent terms. (*Ib.*)

55. —— —— Proof to the effect that the goods placed by the plaintiff in the custody of the defendant were destroyed by a fire which could not be accounted for otherwise than by the presumption that it was the result of spontaneous combustion caused by waste kept by the carrier in the building where he temporarily stored the goods, does not constitute inevitable accident or *vis major*. (*Ib.*)

56. —— Goods destroyed by Fire after arrival at Station—The defendants, common carriers, after the arrival of the plaintiff's goods at their railway station, notified the consignees, the notice stating that after a certain delay storage would be charged. One of the cases of goods was left at the station by the consignees, for the purposes of the Customs examination, and was destroyed by a fire which resulted from the negligence of defendants' employees in transferring a quantity of gasoline in open pails, from a leaking tank to a barrel, with a hot stove in the immediate vicinity—*Held*, 1. The notice to the consignee implied that the carriers would keep the goods safely until their removal, and they were bound to take due care of them while they remained in their custody. 2. The occurrence of a fire under the circumstances above stated was sufficient evidence of negligence to make the carriers responsible. *Simpson, Hall, Miller & Co.* vs. *Grand Trunk Ry. Co.*, C. R. 1893, 4 Que. 148.

57. —— Short Delivery—Shrinkage.—The defendant carried a large quantity of oats for the plaintiff to Burlington, and the plaintiff brought action for short delivery. The defendant pleaded evaporation caused by heating, due, as he alleged, partly to the excessive warmth of the season and partly to delay on the part of the plaintiff in taking delivery of the cargo, which was the fault of plaintiff himself—*Held*, that a carrier is bound to deliver all the cargo entrusted to him, unless the loss or damage is proved to have been occasioned by causes for which he is in no way responsible, and the heating of the cargo during the voyage must be held to be a sufficient cause of diminution up to three per cent. of the cargo in such case. *Seymour* vs. *Sincennes*, C. R., 1 L. C. L. J. 118, Q. B. 1869, 1 R. L. 716.

58. —— Short Delivery—Arts. 1053 and 1674 C.C.—Notice.—Several packages of goods were shipped at London to a merchant at Quebec. Upon the arrival of the vessel and delivery of the packages it was ascertained that some of the goods were missing from one of the packages. Notice not having been given until several months afterwards—*Held*, that the master was not responsible for the deficiency. *Swinburne* vs. *Massue et al.*, K. B. 1834, Stuart's Rep. 569, 1 R. J. R. Q. 419.

59. Refusal to carry—Railway Act. C. S. C., ch. 66, secs. 96 and 98. (1)—All railway companies, subject to the Railway Act of the late Province of Canada, are bound to carry all goods that are offered at any of their stations to any other station on their line of railway, unless some valid reason be assigned for refusing to do so. They cannot, therefore, by a mere notice stating that they have ceased to carry any particular class of goods, rid themselves of their obligation to carry the same. (1) *Rutherford* vs. *The Grand Trunk Railway Co.*, Q. B. 1875, 20 L. C. J. 11, reversing S. C. 1873, 5 R. L. 483.

V. OF PASSENGERS AND THEIR BAGGAGE. (2)

1. Baggage—Conditions on Ticket—Commercial Traveller.—Where a railway issues tickets at a reduced rate, and the condi-

(1) Now secs. 246 (2), (3), 253, 254 Dominion Ry. Act, 1888.

(2) See R. S. C., ch. 82, sec. 3, as to liability of carriers by water for loss or damage to personal baggage of passengers, also sec. 2.

tion is written or printed thereon that the passenger will not hold the company responsible for goods or merchandise, a commercial traveller with such ticket, who carries samples checked as baggage, cannot recover the value thereof when destroyed by fire. (1) *Packard* vs. *Can. Pac. Ry. Co.*, S. C. 1889, M. L. R., 5 S. C. 64.

2. —— Condition on back of Ticket—Proof of Loss.—A condition printed on the back of passenger ticket, exempting the carrier from responsibility for safe-keeping of baggage during the voyage, does not relieve him from liability for loss unless it be proved that the passenger had notice of the limitation of liability. (2)

The fact that a trunk, when opened by a passenger towards the close of the voyage, bore traces of the lock having been tampered with, raised a presumption that goods, afterwards discovered to be missing, had then been abstracted, though no examination was made by the passenger at the time. *Allen* vs. *Woodward*, Q. B. 1878, 22 L. C. J. 315; 1 Legal News 458, confirming S. C., 21 L. C. J. 17.

3. —— Custody of Baggage after arrival at destination—Burden of Proof.—A passenger by railway did not call for his trunk on arriving at the end of his journey at ten o'clock in the forenoon, but for his own convenience left it all day and over night in the baggage room without any arrangement with the company, and it was destroyed by fire early the next morning by the accidental burning of the station—*Held*, that the company was not responsible. *Hogan* vs. *Grand Trunk Railway Company of Canada*, S. C. 1876, 2 Q. L. R. 142.

4. —— —— The plaintiff sued for the value of a trunk and contents stolen from the Grand Trunk Station at Montreal. The trunk in question was part of the baggage of a commercial traveller of plaintiffs, and had been put on board of the cars by him at Napanee for conveyance to Montreal, and extra charges paid therefor. The baggage arrived in town on Thursday but was not called for until the Monday following—*Held*, that, without evidence of a new contract, after the arrival of the baggage the company was not responsible. *Kellert* vs. *Grand Trunk Ry. Co.*, S. C. 1877, 22 L. C. J. 257.

5. —— —— A carrier who retains the custody of baggage after it has reached the place of destination, and deposits it in a room assigned to unclaimed baggage, is responsible for its safe-keeping, and is bound to deliver the thing or pay its value, unless delivery has become impossible without his act or fault. *Pelland* vs. *Canadian Pacific Ry. Co.*, S. C. 1891, M. L. R., 7 S. C. 131. Confirmed by Q. B. 1892, 1 Que. 211.

6. —— —— The burden of proving that the loss or destruction of the thing has occurred without his act or fault is on the carrier, the presumption being that he is in fault if he fails to deliver the thing. Hence, if no explanation be given of the disappearance of baggage before delivery, the carrier is liable for the value. (*Ib.*)

7. —— —— A passenger on an Atlantic vessel has a reasonable delay wherein to remove his baggage on arrival, and during such delay, and before the Customs House officers have taken the baggage away, the carrier remains liable therefor as carrier, and can only be relieved from such liability for its loss by proving that it was lost through causes beyond its control. *Canadian Shipping Co.* vs. *Davidson*, Q. B. 1892, 1 Que. 298, confirming S. C., M. L. R., 6 S. C. 388, 19 R. L. 558, and see *Cadwallader* vs. *Grand Trunk Ry. Co.*, *infra* No. 8.

8. —— Evidence of Value—ART. 1677.—Proof may be made by the plaintiff's oath of the value of baggage lost or destroyed while in the custody of the carrier after arrival at place of destination. *Pelland* vs. *Canadian Pacific Ry. Co.*, M. L. R., 7 S. C. 131; confirmed in appeal 1892, 1 Que. 311. *Cadwallader* vs. *Grand Trunk Ry. Co.*, S. C. 1859, 9 L. C. R. 169; *Robson* vs. *Hooker*, 3 L. C. J. 86.

8a. —— —— In an action against a carrier, the plaintiff's own oath will be received as to the contents of trunk which had been broken open, and the value of such contents, although consisting of jewelry, will be recovered where the party claiming was a *lady*. *MacDougall* vs. *Torrance*, S. C. 1860, 4 L. C. J. 132.

9 —— Loss by Fire—Vis major.—A steamboat company is liable for the value of passengers' baggage destroyed by a fire on the

(1) See *contra Dixon* vs. *Richelieu Navigation Co.*, 18 Can. S. C. R. 704 (1890).

(2) *Held*, by the House of Lords in 1894, that if, in the opinion of the jury a passenger receiving a ticket from a shipping company does not see or know that there are any conditions thereon, he is not bound by the conditions. If he knew there was writing on the ticket it is a question of fact whether he had reasonable notice that the writing contained conditions, and he is or is not bound thereby, according as he had such notice or not. *Richardson* vs. *Spence*, 6 "The Reports," p. 95, see also sec. 246 (3) Dominion Ry. Act, 1888, and see *Bate* vs. *Can. Pac. Ry.*, 18 Supreme Ct. Rep. 697.

steamer, unless it be clearly proved that the fire occurred from some cause over which the company had no control. *Can. Nav. Co.* vs. *McConkey*, Q. B. 1877, 1 L. N. 23.

10. —— Measure of Damages for lost Baggage.—The measure for damages for lost baggage is the value of the goods lost; the expenses incurred by the owner in looking after it and damages caused to him by the delay which prevented him going forward to take his situation cannot be recovered. *Provencher* vs. *Can. Pac. Ry.*, S. C. 1889, M. L. R., 5 S. C. 9; *Breton* vs. *Grand Trunk Ry. Co.*, S. C. 1872, 2 R. C. 237.

11. —— —— Where baggage has been found after suit has been issued, and has been accepted by the owner, the railway company is only responsible for the taxable costs incurred up to date of delivery. *Provencher* vs. *Can. Pac. Ry.*, S. C. 1889, M. L. R., 5 S. C. 9.

12. —— Merchant Shipping Act—Disclosure of Value.—Where to an action for the recovery of the value of jewellery forming part of the luggage of a passenger on board a vessel from Glasgow to Montreal, the defendants pleaded the limitation of their liability under the 503rd clause of the Merchant Shipping Act, and that the plaintiff, not having inserted in a bill of lading or otherwise disclosed in writing the true nature and value of the articles, the owners were not liable for their loss; and the plaintiff demurred to the plea on the ground that the action was taken under the common law relating to carriers, and that, consequently, the clause of the Merchant Shipping Act referred to did not apply—*Held*, that the defendants were entitled to plead as they had done, and the demurrer was dismissed. *McDougall* vs. *Allan*, S. C., 6 L. C. J. 233 and S. C. 1861, 12 L. C. R. 321.

12a —— Overcoat.—The liability of common carriers does not extend to articles of wearing apparel such as an overcoat, which may be thrown off and laid aside, unless specially deposited in the charge of the carriers' servants, and that defendants in this case were not liable, because no such deposit was made. *Torrance* vs. *Richelieu Co.*, C. Ct. 1866, 2 L. C. L. J. 133, 10 L. C. J. 335.

13. —— Sleeping Car Company—Necessary Deposit. Art. 1814 C. C.—*Held*, That a sleeping-car company, which, by arrangement with a railway company, provides sleeping accommodation for first class passengers travelling by the railway, is responsible, like the keeper of an inn or boarding-house, for the things brought by travellers who engage such accommodation. *Sise* vs. *Pullman Palace Car Co.*, S. C. 1892, 1 Que. 9.

14. —— —— In appeal, judgment of S. C. was confirmed but solely on the ground that the defendants were guilty of negligence; the Court holding that where an employee of a sleeping-car company accepts an article of baggage from a passenger before the departure of the train, and after placing it in the drawing-room department engaged by such passenger, leaves the door unlocked, and the article is not forthcoming, the company is guilty of negligence, and is bound to indemnify the passenger. *Pullman Palace Car Co.* vs. *Sise*, Q. B. 1894, 3 Que. 258.

15. —— Reception of Baggage by Employee of Company.—Where a person in the employment of the carriers assumes the charge of baggage delivered on board the vessel, the carrier is liable for such baggage, though the person who received the baggage was there merely during the temporary absence of the officer whose duty it was to receive the baggage. *Morrison* vs. *The Ontario & Richelieu Navigation Company*, S. C. 1882, 5 L. N. 71.

16. —— —— And, *held*, that delivery of baggage to a constable in the employ of a railway company at one of its depots, several hours before the departure of the train, and in the absence of the baggage agent, was a sufficient delivery to bind the company where the plaintiff had not knowledge of the company's by-law whereby it would not hold itself liable for baggage lost unless checked. *Tessier* vs. *Grand Trunk Ry. Co.*, C. Ct. 1871, 3 R. L. 31.

16a. —— —— The respondent was not responsible for the loss of a trunk said to contain a large sum of money, which the appellant left in charge of the baggage keeper, contrary to the advice and instructions of the captain of the steamer, who indicated the office as the proper place of deposit; the appellant stating at the time, in answer to the captain, that he would take care of the trunk himself. *Séguéal* vs. *The Richelieu Co.*, Q. B. 1869, 15 L. C. J. 1.

17. —— Tow-boat — Baggage on deck —Arts. 1675-1677 C. C.—Action was brought against the owner of the steamboat "Alliance" for the recovery of the value of a portmanteau and certain articles of wearing apparel which it contained, belonging to the plaintiffs, and lost on the voyage from Quebec to Montreal—*Held*, that, where a tow-boat

takes the place of an ordinary passenger boat, her owner assumes the liability of a common carrier with respect to the luggage of the passengers; and, where a passenger on board such boat leaves luggage on the deck and is told by an employee on board the boat that it is safe in such place, the owner of the steamboat, in the event of such luggage being taken away and lost, is liable for the value thereof. *Bankier et ux.* vs. *Wilson*, C. Ct. 1855, 5 L. C. R. 263, 4 R. J. R. Q. 339; *Borne* vs. *Perrault*, K. B. Quebec, 1821.

18. —— Value of Contents—Art. 1677 C. C.—The plaintiff, a passenger from England, on arriving at Portland placed his luggage in charge of the defendants for conveyance to Point Levi, for which he received checks. The plaintiff was a passenger on the cars himself, but, instead of going straight through, diverged at some point, and then went to Montreal, where he remained a few days, and from there went to Point Levi. On application to the defendants at the latter place he found that one of his checked trunks was lost, and action was brought—*Held*, that defendants were responsible for money taken for personal expenses to such an amount as a prudent person would deem necessary and proper to be placed in a traveller's trunk; that they were liable also for a dressing case, and for a night glass or telescope, the plaintiff being a ship master, but that they were not responsible for articles of jewellery, such as could not be regarded as part of a mariner's baggage. *Cadwallader* vs. *Grand Trunk Railway Co.*, S. C. 1858, 9 L. C. R. 169.

19 Passengers — Contributory Negligence—Damages—Stoppage at Passenger's Destination.—Even where a railway company is in fault for not stopping its train at a station to which it has contracted to carry a passenger, nevertheless an action of damages will not be maintained against the company for injuries received by a passenger in jumping from a train in motion, such damages being the result solely of the passenger's imprudence. *Central Vermont Ry. Co.* vs. *Lareau*, Q. B. 1886, M. L. R., 2 Q. B. 258, 30 L. C. J. 231, reversing M. L. R., 1 S. C. 433.

20. ——— Contributory Negligence — Damages—Train longer than Platform.—L. was the holder of a ticket and passenger of the company's train from Levis to Ste. Marie, Beauce. When the train arrived at Ste. Marie station the car upon which L. had been travelling was some distance from the station platform, the train being longer than the platform, and L., fearing that the car would not be brought up to the station, the time for stopping having nearly elapsed, got out of the end of the car, and the distance to the ground from the steps being about two feet and a half, in so doing he fell and broke his leg which had to be amputated.

The action was for $5,000 damages, alleging negligence and want of proper accommodation. The defence was contributory negligence. Upon the evidence the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, gave judgment in favour of L. for the whole amount.

On appeal to the Supreme Court of Canada —*Held*, reversing the judgments of the Courts below, that, in the exercise of ordinary care, L. could have safely gained the platform by passing through the car forward, and that the accident was wholly attributable to his own fault in alighting as he did, and therefore he could not recover. *Quebec Central Ry. Co.* vs. *Lortie*, Supreme Ct. 1893, 22 Can. S. C. R. 336.

21. —— Embarking and Landing Place.—The plaintiff, an advocate, residing at Montreal and passing the vacation with his family at Murray Bay, embarked with his son and daughter on the steamer "Union," belonging to the defendants, on the 15th July, 1876, for a trip up the Saguenay and back to Murray Bay. At this place the embarkation and landing of passengers was effected by means of a wharf L-shaped, occupied for the purposes of their business by the defendants. In the front part of the wharf was a slip, the steps of which were bound with iron. The "Union" returned to Murray Bay on the following evening about 10 p. m. The night was dark, and the wharf excessively crowded. The state of the tide rendering it inconvenient to land the passengers through the slip, as usual, a gangway was laid from the main deck to the top of the wharf, and at a distance of five or six feet from the edge of the slip. The plaintiff having given up his ticket at the gangway passed on to the wharf, followed by his son and daughter, and while making his way through the crowd fell into the slip from a height of eight or ten feet, sustaining a very severe injury to the ankle joint, which, in the opinion of the doctors, might cause lameness for life, and in any case his recovery would be very slow—*Held*, in an action for damages, that there is an implied engagement on the part of public carriers of passengers for hire that the latter shall not be exposed to undue

or unreasonable danger in embarking upon or landing from the vessels of such carriers, and that a steamboat company, under such circumstances, is bound to take all proper precautions for the prevention of accidents by the crowding of the public on the wharf. *Borlase* vs. *St. Lawrence Steam Navigation Co.*, S. C. 1877, 3 Q. L. R. 329, Q. B. 1877, 1 L. N. 32.

21a. —— —— And, *held*, also, that in such cases any dangerous portion of the wharf should be sufficiently lighted at night to ensure the safety and protection of passengers. (*Ib.*)

22. —— **Expulsion from Cars—Ticket for specified time.**—A person purchasing from a railway company a ticket which is declared to be good for a specified term only, enters into a special contract which is at an end as soon as such term has expired, and the holder of a return ticket, attempting to return after the expiration of the term for which the ticket was granted, may be lawfully ejected from the train on refusal to pay full fare. (1) *Regina* vs. *Phaneuf*, Q. B. (Crown side), 1861, 5 L. C. J. 167; *Grand Trunk Ry. Co.* vs. *Cunningham*, Q. B. 1865, 11 L. C. J. 107, reversing S. C, 9 L. C. J. 57.

23. —— —— **Ticket good for continuous Trip—Stopping off.**—Where a passenger having purchased a ticket from Montreal to Toronto, marked "good only for continuous trip within two days from date," stopped off for some days at Kingston, and afterwards attempted to continue his journey on the same ticket, it was *held*, that, in default of other payment, the company had a right to eject him from the train. (1) *Livingstone* vs. *Grand Trunk Ry. Co.*, C. R. 1876, 21 L. C. J. 13.

24. —— **Expulsion from berth in Sleeping Car—Husband and Wife.**—See article in 11 Leg. News 217. *Pullman Palace Car Co.* vs. *Bales*, Tex. Supreme Ct. 1890.

25. —— —— **Ticket Agent.**—*Per curiam.*—In this case an action of damages was brought by the respondent for expulsion from a sleeping-car berth. If the allegations were proved it would appear to be an extraordinary outrage. The respondent, after taking a ticket for a sleeping-berth from New York to Montreal, and paying for it, was put out of the car. It was one of those things for which a company should be held strictly responsible. But at present the case came up, not on the merits, but on a judgment dismissing two preliminary pleas. The action had been served on the company's alleged agent in Montreal. The question had been raised whether Mr. V. was an agent. It was proved that he sells tickets like that sold to respondent. He had an office in Montreal, and was publicly advertised as their agent. He also offered to get back the respondent's money for him when he heard of the difficulty. Upon the whole, this court was not disposed to disturb the judgment which held the proof of agency sufficient. With regard to the omission to allege where the principal business of the company was, that was not obligatory in the case of foreign companies. The trespass was continuous from New York to Montreal, and was a trespass in Canada. *New York Central Sleeping Car Co.* vs. *Donovan*, Q. B. 1882, M. L. R., 4 Q. B. 392.

(1) Sec. 248 Railway Act, 51 Viet., ch. 29 (D).

26. —— —— **Production of Ticket.**—A passenger has an action for damages against a railway company for being hastily and roughly expelled from a railway car, because he could not immediately produce his ticket. (1) *Perrault* vs. *Cie. du Chemin de Fer C. P. R.*, S. C. 1890, 20 R. L. 321.

27. —— —— **Line not open to Public.**—A railway company which has not yet opened its line for the public conveyance of passengers is not subject to the obligations which attach to common carriers, though it may have occasionally carried passengers for hire for the special accommodation of persons applying for passage. *McRea* vs. *C. P. Ry. Co.*, C. R. 1888, M. L. R., 4 S. C. 186.

28. —— **Negligence — Vis major.**—"Plaintiff was a passenger on the 13th August, 1874, on the defendants' railway, and the accident occurred at a point between the station of Abercorn and the station of Sutton, the distance from one to the other being about five and a-half miles. The line between the two stations is intersected by a number of streams which are all spanned by bridges, and at times, perhaps generally, contain but little water, but are apt to be flooded after storms. It appears that on the evening before the accident, the 12th August, a violent and most unusual storm had occurred, perhaps in the nature of a waterspout, which carried away five out of six bridges between the two stations. The next morning,

(1) See English Court of Appeal Case, *Butler* vs. *Manchester, Sheffield & Lincolnshire Ry. Co.*, 1888, 21 Q. B. D. 207, 11 L. N. 407, and *Grand Trunk Ry. Co.* vs. *Beaver*, 1893, Supreme Ct., 22 Can. S. C. R. 498, and sec. 248 Railway Act, 51 Vic., ch. 29 (D).

at half-past six, the train in which the plaintiff was travelling dashed into the bed of one of these streams, of which the bridge had been demolished, without any warning whatever having been given to the driver of the train. The result was that some persons were killed and many injured—the plaintiff among them. It was the duty of four men, headed by one who is sometimes called 'the boss,' to look after the railway between the two stations, a part which would appear to require more than usual attention. It was the duty of these men, upon the occurrence of the storm, and some of the bridges being washed away to their knowledge on the previous evening, to use all exertions in their power to stop the train which was coming in the morning. Of two of these men we hear nothing. A third, Doran, who lived at a house rather more than a mile from Sutton, was called; and he speaks of a bridge close to his house being carried away, and of his apprehension that other bridges would be carried away, and says that upon starting on the line in the direction of the Abercorn station in the morning at about four o'clock he was unable to proceed. He then went to Sutton station, and requested the station-master to telegraph to Abercorn, but it was ascertained that the telegraphic communication was interrupted. Doran, who had borrowed a horse, returned to his own house and planted a flag at the place where the bridge opposite to his house had been demolished; but instead of riding on to ascertain the state of the bridges between his house and Abercorn, he put the horse up and contented himself with remaining where he was. It appears to their Lordships that the jury might have come to the conclusion fairly upon the evidence that if he had ridden on he might have arrived at the place where the accident occurred in time to stop the coming train. White, the foreman, or 'boss,' was not called. He appears to have done but little. He was aware, according to some evidence, that one of the bridges had been washed away as early as four o'clock in the morning. He appears to have made no effort to go beyond the bridge at Doran's house. The time he arrived there is not very clearly fixed. If it was, as Doran says, at a quarter before six, he would have had time to stop the coming train, which, although due before, did not arrive till half-past seven. Whether he was there at that time or not, it appears to their Lordships that upon the evidence the jury were warranted in the conclusion that he was guilty of negligence." *Lambkin* vs. *South Eastern Ry. Co.*, P. C. 1880, 5 App. Cas. 352, 3 L. N. 162.

29. —— Person unlawfully on Train —Collision—Damages.—Where a person, by giving a tip or bribe to the conductor of a train not intended for the conveyance of ordinary passengers, as he had reason to know, induces the conductor of such train to permit him to travel on the train contrary to the regulations of the railway company, he travels at his own risk; and if, while so travelling, he is injured by a collision, he is not entitled to be indemnified by the company for any damage to person or property sustained by him. *Can. Pac. Ry. Co.* vs. *Johnson*, 1890, M. L. R., 6 Q. B. 213, 19 R. L. 21.

30. —— Presumption of Negligence—Street Railway.—A company engaged in the conveyance of passengers is responsible for injuries sustained by a passenger while being carried in the company's vehicles, unless it be proved by the company that it was impossible for them to prevent the accident. *Montreal City Passenger Ry. Co.* vs. *Irwin*, Q. B. 1886, 2 M. L. R. 208.

31. —— —— Vis major.—In an action of damages against a railway company for personal injury—*Held*, that the testimony for the company's servants, that there was no negligence, will not absolve the company from the presumption of negligence arising from the accident. *Germain* vs. *Montreal & New York Ry. Co.*, S. C. 1856, 1 L. C. J. 7, 6 L. C. R. 172, 5 R. J. R. Q. 59-364.

32. —— —— The breaking of a bolt whereby the rear wheels of a car were separated from the car, and the car thrown off the track, is sufficient evidence of negligence and insufficiency of the car conveying passengers; the train having at the time just left a station, and proceeding at the rate of from 4 to 5 miles an hour, there being no obstruction on the track, and nothing out of the usual course of things, notwithstanding evidence by the defendants' servants that the car had been recently examined, and that no indication presented itself to the eye of any defect either in the bolt or car. *(Ib.)*

33. —— —— A railway company is bound to carry its passengers safely to their destination, and in an action of damages for injuries arising from an accident, the court will presume negligence on the part of the company or its employees unless the company can

prove that the accident resulted from causes over which it had no control. *Wood* vs. *Compagnie de Chemin de Fer du Sud-Est*, S. C. 1885, 13 R. L. 567; *Murray* vs. *South Eastern Ry.*, 13 R. L. 567.

34. —— —— (Reversing the judgment of the court below, M. L. R., 3 Q. B. 324, and 31 L. C. J. 261), where the breaking of a rail is shown to be due to the severity of the climate and the suddenly great variation of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selection, testing, laying and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail. (Fournier, J., dissenting on the ground that as the accident was caused by a latent defect in the rail in use, the company was responsible.) *Canadian Pacific RR. Co.* vs. *Chalifoux*, Supreme Ct. 1887, 22 Can. S. C. R. 721, 11 L. N. 315.

35. —— Street Railway — Collision between Tramway Car and Cart—Negligence of Conductor of Car.—*Held* (affirming the decision of the Court of Review, M. L. R., 4 S. C. 193), where the respondent, a passenger on a street car, while standing on the platform or step of the car, was injured by a passing cart loaded with planks, that, as the immediate cause of the accident was the conductor's want of vigilance in failing to stop the car (as he might have done) in time to avoid the collision, the appellants, his employers, were responsible. The fact that the respondent was standing on the platform at the time of the accident did not relieve the appellants from responsibility, inasmuch as the car was crowded, and he was permitted to stand there by the conductor, who had collected fare from him while he was in that position. *Cie. du Chemin de Fer* vs. *Wilscam*, Q. B. 1889, M. L. R., 5 Q. B. 340, 18 R. L. 544.

36. —— —— Negligence of Passenger —Art. 1675 C. C.—Question of "Contributory Negligence" Discussed.—The appellant took a seat on one of the respondents' cars. The car was open at the sides and was furnished with a foot board running the length of each side. The appellant first took a seat in front, but being there inconvenienced by the sun, he stepped down on to and along the foot-board with the intention of taking a seat further back, holding on to the posts of the car. While in this position he was caught by one of the respondent's cars coming in an opposite direction and was severely injured thereby. At the point where the accident took place there was only a space of three feet and three inches between the two tracks, thus leaving but a space of seven inches between the foot-boards of the two cars. The company pleaded that the foot-board was reserved for its employees and that the public had no right thereon, but the appellant had not been warned not to stand thereon, nor was there any notice posted up warning the public of the danger of standing on it, and, further, it was proved that the company habitually allowed passengers to remain thereon—*Held*, reversing judgment of court below, that there was sufficient negligence on the part of the company to render them liable. That Art. 1675 C. C. was applicable to the carriage of passengers as well as of goods. *Carrière* vs. *Montreal Street Ry. Co.*, Q. B. 1893, 2 Que. 399. Appeal to Supreme Ct. quashed for want of jurisdiction, 22 Can. S. C. R. 335.

VI. WHO ARE.

1. Ferryman (1)—**Liability as common Carrier—Burden of Proof.**—The proprietor of a ferryboat is liable as an ordinary carrier for an accident occurring to a horse while being carried on board his vessel across the ferry. The burden of proof is on the carrier to prove exemption from liability under Art. 1675 C. C. (1) *Robert* vs. *Lauvin*, C. R. 1882, 5 L. N. 362. Reversing S. C. 5 L. N. 179.

2. Telegraph and Messenger Service.—The Canadian District Telegraph Company is a common carrier. *Nelson* vs. *Canadian District Telegraph Co.*, C. Ct. 1883, 6 L. N. 184.

3. Tug-Boats.—When a tow-boat takes the place of an ordinary passenger boat, the owner assumes the liability of a common carrier with respect to the luggage of the passengers. (2) *Bankier* vs. *Wilson*, C. Ct. 1855, 5 L. C. R. 203, 4 R. J. R. Q. 339.

CARTERS' LICENSES.

See MONTREAL.

CATERPILLARS.

There is no obligation on the part of proprietors of land to destroy the caterpillars thereon. *Ferguson* vs. *Joseph*, Q. B. 1868, 12 L. C. J. 72.

(1) See Article in 4 Themis, p. 173, on this question by E. Lafontaine.
(2) See Article on this question in 3 Rev. Crit. 234, by D. Girouard.

CATTLE.

Horses do not come under the designation "Cattle." (1) *Champlain* vs. *St. Lawrence Ry. Co.*, Q. B. 1864, 14 L.C.R. 406.

CAUSES CELEBRES.

See 14 L. N. 253, 274, 285, 291, 310, 311, 366.

CEMETERIES. (2)

I. Parochial. 1-2.
II. Right of Fabrique over.
III. Right to Damages for Profanation of.
IV. Right to Establish.
V. When Unsaleable.
See Burial.

I. PAROCHIAL.

1. The curate and churchwardens are proprietors of the parochial cemetery, subject to the rights of the parishioners to be buried therein. *Brown* vs. *The Curé of Notre Dame de Montréal*, P.C. 1871, 6 R.L. 379, 20 L.C.J. 228.

2. Burial in the reserved part of a parochial cemetery implies degradation, not to say infamy. (*Ib.*)

II. RIGHTS OF FABRIQUE OVER.

The plaintiffs complained that the defendant had deposited in a vault belonging to one P., in the parish cemetery of St. Hyacinthe, the body of a child, without the permission of the Fabrique or of its officers, and without notice to the proper authorities. Plaintiff alleged, further, that by a by-law of the parish passed in 1874 it was ordered that no stranger should be interred in the vault in question until the sum of ten dollars had been paid to the Fabrique, and for this sum they prayed judgment. Defendant pleaded that the vault in which he had deposited the body of his child belonged of full right to another, who could authorize him to place any bodies there without the permission of the Fabrique or any of its officers, and that the by-law imposing a payment of $10 for every body deposited there was illegal, inasmuch as it had been passed long after the grant to P. of the right to the vault—*Held*, that it was a question of public order, and that all cemeteries in Catholic parishes were under the control of the Fabriques, and no bodies could be deposited there without their permission; that it was necessary that this should be so in order that the causes and circumstances of the death should be known, which was a matter of importance to public order and the public health; that for this reason all clandestine interments, even in private vaults, were prohibited by law; that in the case in question the right of P. in the vault which belonged to him was strictly personal and could not be transferred, but that even he could not deposit the bodies of his dead there without the notice required by the law; but as the plaintiffs had offered to accept $5 from defendant he would be condemned only in that amount. *Curé et Marguilliers de St. Hyacinthe* vs. *Renaud*, C. Cr. 1878, 9 R. L. 417.

III. RIGHT TO DAMAGES FOR PROFANATION OF.

Action against a *curé* for damages for profanation of the parish cemetery. Plaintiff alleged that he resided in the parish of St. Jean Chrysostôme, where he had practised as a physician since 1860, and was a Roman Catholic; that he had three children buried in the cemetery of that parish, and their burial place marked by a marble headstone on which their names, etc., were inscribed, which was done with the approbation and consent of the *curé* and wardens of the parish, according to custom; that the cemetery had been duly consecrated as such; that the cemetery adjoined the church, and had been properly enclosed and protected from the intrusion of animals, etc.; that since the arrival of the defendant in the parish he had carried on an organized persecution against plaintiff; that he had, without proper reason, but by malice, and for the purpose of injuring plaintiff in his sensibilities, had a part of the cemetery known as the old cemetery ploughed; that before doing so he had taken away the tombstone placed at the head of plaintiff's children, and put it in some place unknown to plaintiff; that he had ploughed over the graves of his children and destroyed the grass and herbage, and had done all this without the authorization of the Fabrique, and against the will and consent of the plaintiff, and prayed for $175 damages for injury to his feelings and $25 for loss of his tombstone. Defendant pleaded that what he had done had been done in good faith, and for the purpose of improving the cemetery; that he had done so with the approbation of a large number of the parishioners and in conformity with the wish of the Bishop of

(1) See Agricultural Act Consol. Stats. L. C., ch. 26, secs. 5, 8.

(2) See Que., 39 Vic., ch. 19, and see Que., 54 Vic., ch. 31, Expropriation for Cemeteries.

Montreal; that he had ploughed over lots of graves and taken away other headstones, but which, as well as the plaintiff's, had since been replaced. The proof did not show malice on the part of the defendant—*Held*, that what was done in good faith and for the improvement of the cemetery, even to introducing horses and ploughing across graves, did not constitute profanation, as it was in the intention only that such profanation existed, and that, therefore, the action of plaintiff must be dismissed. *De Lamartellier* vs. *Sears*, C. Ct. 1878, 8 R. L. 601.

IV. RIGHT TO ESTABLISH.

A parochial cemetery cannot be established by the civil authorities alone; the decree of the bishop ordering its establishment must also be obtained. *Morier* vs. *Loupret*, S. C. 1885, 8 L. N. 411.

V. WHEN UNSALEABLE.

Where a certain piece of land has been chosen for the purpose of a cemetery, but has never been legally established or consecrated as such, it does not cease to be saleable. *Webster* vs. *Taylor*, Q. B. 1890, 33 L. C. J. 333.

CERTIORARI.

I. Application for. (See also "Delays in.")
II. Conviction. 1-49.
III. Costs. 1-4. (See also under title "Costs.")
IV. Delays in. 1-9.
V. Deposit in.
VI. Effect of.
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Motion to Proceed. 1.
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Canonical Decree for the Erection of Parishes. 1.
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Right taken away by Statute—French Version 34. (See also Nos. 18 to 23 *supra*.)

See also Intoxicating Liquors.
" Jurisdiction.
" Indian Act.

I. APPLICATION FOR. (See "Delays in.")

The application for *certiorari* may be made after one clear day's notice. *Exp. Gates*, S. C. 1878, 23 L. C. J. 62, 9 R. L. 628.

II. CONVICTION. (1)

1. Contempt of Court.—In the Court of Quarter Sessions a defendant makes affidavit of his intention to remove the indictment into the King's Bench because it involved important questions of law, and because certain of the judges were personally interested in the prosecution. Thereupon he is ordered to show cause why an attachment for contempt against him should not issue. This he declines, and rests his case upon the prudence and discretion of the court. He is then declared guilty of two contempts, apprehended and imprisoned—*Held*, that a *certiorari* will not lie to remove his conviction. *Valliers de St. Réal exp.*, K. B. 1831, Stuart's Rep. 593, 1 R. J. R. Q. 425.

2. Uncertainty. Art. 5551 R. S. Q. —A conviction in which it is stated that the offence complained of was committed within about eight days, is bad for uncertainty. *Hook exp.*, S. C. 1853, 3 R. J. R. Q. 43, 3 L. C. R. 196.

3. Magistrate — By-law — Summons — Conviction for two Offences, one Penalty.—On a rule to quash a conviction by a magistrate on the complaint of the Harbor Commissioners of Montreal for the infraction of a by law of the city against allowing firewood to remain on the wharves—*Held*, that the service of a copy of the summons, certified by the clerk of the place and followed by the appearance of the defendant, was sufficient. *Carignan* vs. *The Harbor Commissioners*,

(1) See now Crim. Code 1892.

Montreal, S. C. 1855, 5 L. C. R. 479, 4 R. J. R. Q. 464.

4. —— —— And *held*, also, that complaint could be made and summons issued for two offences, provided the object was not to arrest the defendant on the first summons, and that a conviction for one of such offences, specifying which, was good.

5. —— —— And *held*, also, that it was not necessary in such complaint to insert the by-law, or make a distinct allegation that it was in force. (*Ib.*)

6. —— —— And, further, that the case could be returned before one magistrate and adjourned from day to day by one or more, and that it was sufficient if the trial took place before one and the same magistrate, but that a conviction for two offences and inflicting only one penalty was bad. (*Ib.*)

7. **Summons — Where Offence committed.**—A conviction will be quashed if the summons states no place where the offence was committed, although the place appear on the face of the conviction. *Leonard exp.*, S. C. 1855, 6 L. C. R. 480, 5 R. J. R. Q. 147.

8. **Against Bailiff — Information — Amendment — Date of Offence.**—*Held*, on *certiorari*, that a conviction against a bailiff for exacting more than his legal fees would be quashed on the ground that the magistrate permitted the information to be amended, and because no precise date of the offence was given. *Nutt exp.*, S. C. 1856, 6 L. C. R. 188, 5 R. J. R. Q. 151.

9. **Recorder's Court — Notes of Proceedings.**—On an application for *certiorari* from a conviction by the recorder of the City of Montreal for erecting a wooden building within the city limits, contrary to a by-law of the city—*Held*, that as no notes had been taken or transmitted to the court to show whether the applicant fell within the provisions of the by-law as being a proprietor, or whether, as sworn to in the affidavit, he was merely a workman employed by the proprietor, that the court would be justified in quashing the conviction. *Ledoux exp.*, S. C. 1858, 8 L. C. R. 255, 6 R. J. R. Q. 236.

10. **Municipal Road Act — Justice of the Peace — Jurisdiction — Error.** On appeal from a conviction by a justice of the peace under the Lower Canada Municipal Road Act of 1855—*Held*, that such conviction must show the jurisdiction of the justice of the peace, whether the road in question was a front road or by-road, and whether there was or was not a *procès-verbal*. *Malte* vs. *Brown*, C. Ct. 1861, 11 L. C. R. 443.

11. —— And *held*, also, that the conviction must be quashed if the defendant was complained of in relation to a road, and convicted by reason of a bridge. (*Ib.*)

12. **Under Municipal By-Law.**—Where a conviction was had before the recorder of the City of Montreal for selling fresh pork in a shop then occupied by the defendant, without the public markets, notwithstanding the provisions of the by-law setting forth that no person should sell or expose for sale in any street, square, lane or any other public place in the city, other than in one of the public markets, any kind of fresh provisions or butcher's meat, or fresh pork or salt meat or fowl, or other animal produce or effects generally sold in public markets, etc.—*Held*, on *certiorari*, that the conviction being had for selling "at the domicile of the defendant," that it did not come within the provisions of the by-law, which mentioned only streets, squares, lanes or other public places, and the conviction was quashed. *Daigle exp.*, S. C. 1861, 5 L. C. J. 224, and 11 L. C. R. 289.

13. **For disturbing the Peace.**—A conviction for disturbing the public peace "in premises on McGill street" does not come under the statute. *Gareau exp.*, S. C. 1865, 1 L. C. L. J. 63.

14. **Costs.**—The convicting magistrate has the right to grant costs either upon conviction or dismissal of the prosecution and even to attorneys. *Moley* vs. *Bellemare*, S. C. 1862, 7 L. C. J. 1.

15. **Sessions of the Peace—Appeal to Quarter Sessions.**—An appeal lies to the general quarter sessions of the peace from a conviction rendered by the judge of the sessions of the peace in and for the city of Montreal, under section 50 of ch. 6 of the Cons. Stat. of L. C. *Exparte* Thompson, S. C. 1863, 7 L. C. J. 10.

16. **Judgment for one Month instead of two—Order—Amendment.**—A conviction for one month instead of two months' imprisonment is bad, inasmuch as a judgment for too little is as faulty as a judgment for too much, and will be quashed for want of jurisdiction. *Exparte* Stack, S. C. 1862, 7 L. C. J. 6.

17. —— An order instead of a conviction, in a case like the above, could have been amended by the Superior Court. (*Ib.*)

18. —— In a case like the above, no costs will be given against a collector of inland revenue prosecuting in the execution of public duty. (*Ib.*)

19. Judge of Sessions of the Peace.—The judge of the Sessions of the Peace, being vested with all the powers of two justices of the peace by section 61, ch. 102, and section 82, ch. 103 of the Cons. Stat. of Canada, and by section 3, cl. 102, of the Cons. Stat. of L. C., no appeal lies from a conviction rendered by him under ch. 6 of the Cons. Stat. of L. C. *Exparte* Slack, S. C. 1862, 7 L. C. J. 6.

20. Keeping a house of public entertainment.—A conviction for "keeping a house of public entertainment" will be quashed on the ground that a charge so worded constitutes no offence known to the law. *Exparte* Mogé, S. C. 1862, 7 L. C. J. 107.

21. Justice of the Peace — License Act — Averments — Imprisonment. — Where the petitioner asked for a writ of *certiorari* against a conviction of a Justice of the Peace for selling liquor without a license, on the ground that the revenue inspector prosecuting had not alleged that he, the petitioner, was not a distiller or wine merchant; and because there were no other negative averments than that the defendants were not licensed as required by law; and because the conviction did not mention the precise day on which the alleged offence was committed; and because the judgment ordered that the defendant be imprisoned in default of sufficient moveables to meet the fine and costs; and because the judgment had ordered an imprisonment of two months, counting from the day of incarceration. — *Held*, that the judgment of the court below, rejecting the petition, would be confirmed with costs. *Exparte* Beauparlant, C. R. 1865, 1 R. L. 467.

22. Conviction of another Offence than that charged.—Conviction must exactly conform to the charge in the information, and where the Statute creates several offences, one of which is charged in an information, a conviction of another offence, though subject to the same penalty, will be held bad and be quashed. *Thompson* vs. *Durnford*, C. C. 1868, 12 L. C. J. 285.

23. Magistrate's Return.—Full faith and credit will be given to a magistrate or officer's return to a writ of *certiorari*, and, if the return shows that the conviction was had upon the confession of the defendant, the defendant will not be permitted to go behind the return and show by affidavits of parties present that he made no confession and that the return is false, and that the conviction was really had without any proof or confession whatever. *Exparte* Morrison, S. C. 1869, 13 L. C. J. 295, 1 R. L. 437.

24. By-law.—A conviction is bad which orders imprisonment in default of immediate payment of a sum of money when the by-law upon which it is based is in the alternative, imposing a fine or imprisonment. A conviction is bad which gives costs when the by-law upon which it is based gives no jurisdiction as to costs. *Exparte* Marry, S. C. 1869, 14 L. C. J. 163.

25. —— The court will examine into the legality of a by-law on a motion to quash a conviction rendered in accordance with its provision. *Exparte Rudolphe*, S. C. 1856, 1 L. C. J. 47.

26. By Justice of the Peace—Disturbing the Peace, etc.—A conviction before a Justice of the Peace for having disturbed the public peace by gravely insulting a party, and by committing an assault on him, and by crying out and threatening to beat him, is bad and will be quashed. *Exparte Roulean*, S. C. 1872, 17 L. C. J. 172.

27. By-law—Statute—Where a conviction was had for repairing a roof with shingles, and it was shown that the Statute on which the by-law was based only mentioned *covering* a roof with shingles.—*Held*, that the by-law could not go beyond the Statute and that the conviction was bad. *Exparte Lachapelle*, S. C. 1872, 3 R. C. 87.

28. —— —— A conviction based on a by-law making a penalty for every day that a thing is done, while the Statutes upon which the by-law is framed do not clearly give authority to impose more than *one* penalty will be quashed. *Exparte Brown*, S. C. 1874, 18 L. C. J. 194, and on *Habeas Corpus*, see 5 R. L. 163, Q. B. 1873.

29. Mayor of Municipality.—Conviction quashed, the mayor of the municipality having prosecuted in the name of such municipality, and the offence, as stated in the information and conviction, being different. *Exparte Hamelin*, S. C. 1871, 1 R. C. 216.

30. What it should specify.—Where a conviction is for two offences, incurring two penalties, the conviction should specify for each offence the time, place and penalty in-

curred. *Paige* vs. *Griffith*, S. C. 1873, 18 L. C. J. 119.

31. Quebec License Act.—The tribunal constituted to adjudicate upon complaints under the Quebec License Act consists of "two Justices of the Peace for the district," and a conviction by three justices is illegal. (*Ib.*)

32. A conviction for selling liquor in the house of another is null. (*Ib.*)

33. The conviction should be separate from the complaint. (*Ib.*)

34 Statute—New Punishment. — The imposition of a new punishment for an offence abrogates the former punishment for the same offence, and therefore, where a statute imposed a punishment of two months' imprisonment, with or without hard labor, for vagrancy, and by a subsequent statute, it was enacted that the imprisonment might be extended to six months (without mentioning hard labor) this was an alteration equivalent to a new punishment; and a conviction under the later Act adjudging six months' imprisonment with hard labor was bad. *Ex parte Williams*, S. C. 1875, 19 L. C. J. 120.

35. Facts constituting the Offence.—Petition for *certiorari*. One ground was that the fact upon which the conviction was based was not stated; it stated that an assault was committed, without stating how it had been committed. Conviction quashed. *Exparte Laggett*, S. C. 1877; *exparte Holden*, S. C. 1855, 6 L. C. R. 481, 5 R. J. R. Q. 118.

36. —— The validity of a conviction was questioned in the case. There was one defect which was fatal; the conviction did not set up the particular facts constituting the offence so as to enable the court to see whether there was really a violation of the law or not. Under the authority in Paley, conviction quashed with costs. *Exparte Bass*, S. C. 1877.

37. Punishment not sanctioned by law.—A conviction for assault was set aside on *certiorari*, because the defendant was illegally condemned to pay for sewing up the plaintiff's lip. *Exparte Gauthier*, S. C. 1881, 4 L. N. 132.

38. Summary Convictions' Act. (1)—No *certiorari* lies for a defect of form from a conviction for an offence within the meaning of Summary Convictions Act (32-33 Vic., cap. 31), where the merits of the case have been tried, and the defendant has not appealed under sec. 60. *Exparte Wait*, S. C. 1878, 1 L. N. 620.

39. Two Convictions for same Offence.—The petitioner had been convicted of assault in carrying away the windows of a house, and leaving the family residing therein liable to injury from exposure, and condemned to $25 and costs, with imprisonment in the alternative, and afterwards a similar conviction in the same words, the same day, with the addition that the imprisonment was to count "from the expiration of another term of imprisonment which the said, etc., was condemned to undergo for another offence of which he had this day been found guilty," etc.—*Held*, not to be two convictions for same offence, and *certiorari* quashed. *Exparte Dubuc*, S. C. 1879, 2 L. N. 334.

40. Question not raised before Magistrate. ART. 119 C. C. P.—The affidavit for a *certiorari* complained that the magistrate issued his warrant for the arrest of petitioner under 32 and 33 Vic., cap. 31, sec. 6, without causing a copy of the warrant to be served at the time of the arrest—*Held*, that as the question was not raised before the magistrate, it could not be raised by *certiorari*. *Morin & Marion*, S. C. 1879, 2 L. N. 180.

41. Magistrate—Erroneous designation.—The petitioner was imprisoned under a conviction for assaulting a constable in the performance of his duty. He was brought before Thomas S. Judah, Esquire, described in the complaint and conviction as Magistrate of Police for the District of Montreal, which was error, as he was merely a Justice of the Peace, acting under 33 Vic., cap. 12 (Que.)—*Held*, that there was no jurisdiction on the face of the proceedings, and the prisoner was discharged. *Exparte Senécal*, S. C. 1880, 3 L. N. 267.

42. Costs.—Where the conviction is for a penalty, the complainant cannot free himself from his liability to costs on *certiorari*, by renouncing the conviction, especially if he contests the *certiorari*. *Hébert* vs. *Paquet*, S. C. 1885, 11 Q. L. R. 19.

43. Minors.—A complainant, having obtained a conviction against minors, cannot set up their minority against them when they seek redress from that conviction by means of *certiorari*. (*Ib.*)

44. For Vagrancy.—Under the Vagrant Act, 32-33 Vict., cap. 28, it is not sufficient to allege that the accused was drunk on a public

(1) See Criminal Code.

street, without alleging further that he caused a disturbance in such street by being drunk. *Despatie exp.*, S. C. 1886, 9 L. N. 387.

45. Indian Act.—Under section 90 of the Indian Act (1880) a justice of the peace acting alone has no jurisdiction to convict an offender against the provisions of that act, and that the conviction in such case is void, even when the proceedings up to the date of such conviction have been correctly signed by the same magistrate acting in a capacity which would give him jurisdiction under the act. *Exparte Kelly*, S. C. 1886, 14 R. L. 238.

46. By Recorder.—Where a case before the Recorder's Court was adjourned to a stated day and hour, a judgment and conviction pronounced against the defendant in the absence of his witnesses, and of his counsel who had obtained adjournment, is null, and may be quashed on *certiorari*. *Martin* vs. *DeMontigny*, S. C. 1888, M. L. R., 4 S. C. 53.

46a. Guilty and acquitted at same time.—A conviction by the Recorder's Court which declares that the accused had been found guilty, and at the same time acquits him, is contradictory and illegal, and will be annulled on writ of *certiorari*. *Cardinal* vs. *City of Montreal*, S. C. 1890, M. L. R., 6 S. C. 210.

47. Summary Convictions Act — Vagrancy — Costs — Amended Conviction. R. S. C., Ch. 157, Sec. 8.—*Held*, the provisions of the Summary Convictions Act apply to section 8 of chapter 157 of the Revised Statutes of Canada, respecting vagrants. *Reg.* vs. *Denis*, S. C. 1892, 2 Que. 175.

48. A mere informality in the drawing up of a conviction is not a sufficient cause for quashing it, nor (there being no substantial defect in the justice and legality of the proceedings before the convicting justice) any reason for the removal of such conviction into the Superior Court by *certiorari*. (1) (*Ib.*)

49. Any such informality may be amended and a substituted conviction returned by the convicting justice. (*Ib.*)

III. COSTS. (2) (See also under title "Costs.")

1. Costs on *certiorari* will not be allowed against the Justice who has manifestly acted merely in the execution of his duty. *Exparte DeBeaujeu*, S. C. 1856, 1 L. C. J. 15.

2. A motion for a writ of *certiorari* against a conviction of a justice of the peace would be rejected with costs, notwithstanding that the magistrates alone appeared by an advocate. *Beauparlant* vs. *Gervais*, C. R. 1865, 1 R. L. 467.

3. On a motion to compel a magistrate to return the original papers in a case under *certiorari*, the motion will be granted, but without costs against the magistrate. *Demers exp.*, S. C. 1857, 7 L. C. R. 428, 5 R. J. R. Q. 335.

4. *Contra* as to costs. *Terrien Exp.*, S. C. 1857, 7 L. C. R. 429, 5 R. J. R. Q. 335.

IV. DELAYS IN.

1. A *certiorari* allowed before the expiration of six months from the date of the conviction to be removed, but not sued out until the six months had expired, was quashed. *Allard* vs. *Chillas*, K. B. 1819, 2 Rev. de Lég. 32.

2. *Contra. Exp. Fiset*, S. C. 1877, 3 Q. L. R. 102.

3. Where the petitioner for *certiorari* allows more than six months to elapse without taking any proceedings to have the conviction in the court below quashed, he will be declared to have forfeited all rights under the *certiorari* granted him, on motion to that effect by the complainant in the court below. *Exp. Boyer*, S. C. 1856, 2 L. C. J. 188, also *Exp. Préfontaine*, S. C. Montreal, 27 March, 1858, No. 251.

4. Upon motion by the commissioners for the trial of small causes, the writ of *certiorari* should be quashed where the petitioner has taken no proceedings during the six months after his demand for the writ. *Chagnon* vs. *Lareau*, S. C. 1858, 2 L. C. J. 189.

5. A notice of application for a writ of *certiorari* within the six months following conviction is not sufficient, if the application itself be not made until after the expiration of such six months. *Exparte Palmer*, S. C. 1872, 16 L. C. J. 253.

6. An applicant for *certiorari* who, after the granting of his petition, allows a considerable time to elapse without taking out the writ, may be declared to have forfeited his right to have the writ issued. *Hough* vs. *Corporation of Quebec*, S. C. 1879, 5 Q. L. P. 314.

(1) See now Crim. Code 1892.
(2) Art. 1233 C. C. P. "The Court in rendering judgment upon the writ may award costs in its discretion," and *Exp. Leonard*, 1 L. C. J. 255.

7. On the merits of a *certiorari* to which the Crown had given its consent after the lapse of six months from date of conviction—*Held*, that the Crown could waive the objection arising from failure to proceed within the delay prescribed. *Laviolette exp. & Trudel & Cazelais*, S. C. 1880, 3 L. N. 159, and see *Exp. Thayer, infra* No. 8.

8. *Held*, a writ of *certiorari* will not be granted where more than six months have elapsed between the date of the conviction and the application for the writ. *Exp. Thayer*, S. C. 1893, 3 Que. 244.

9. A declaration in writing on the part of the Crown that it will not take advantage of the delay, cannot revive the petitioner's right where the prosecution was a private one and private interests are involved. (*Ib.*)

V. DEPOSIT IN.

In an action under the license act by the city of Montreal, the defendant has no right to a *certiorari* until he has made the deposit required by law. *Doray exp.*, S. C. 1874, 6 R. L. 507.

VI. EFFECT OF—RETRAXIT, ETC.

On a demand for the issuing of a writ of *certiorari*, or at the final hearing on the merits of the same, no *retraxit, desistement*, or abandonment of the conviction or of the penalty payable by the accused (the petitioner) in virtue of such conviction, can have any effect in the case, and the petitioner is entitled to the full benefit of his demand for the quashing of the conviction complained of in spite of said *retraxit, desistement*, or abandonment, even if such proceeding be made with the consent and approval of the Crown. *Exp. Kelly*, S. C. 1886, 14 R. L. 238.

VII. FORM OF WRIT.

1. Art. 1228 C.C. P.—On the hearing of a writ of *certiorari* issued under 12 Vic., cap. 41—*Held*, that it should be addressed to the justice of the peace making the conviction and not to the bailiff effecting the service of such writ, and if addressed to the bailiff, is a nullity and will be set aside. *Regina* vs. *Barbeau*, S. C. 1851, 1 L. C. R. 320, 3 R. J. R. Q. 20.

2. Art. 1228 C. C. P.—The writ of *certiorari* should be addressed to the judge and not to the prothonotary of the court, and a writ issued contrary to that rule will be quashed. *Grant* vs. *Lockhead*, Q. B. 1866, 16 L. C. R. 308, 10 L. C. J. 183.

VIII. QUESTIONS OF FACT IN.

1. On a writ of *certiorari* to quash a conviction of a justice of the peace condemning the city inspector for pulling down a fence erected by private individuals, the court has not the power to inquire into the matters of fact contained in the evidence, or as to the amount of malice which entered into the act with which the accused is charged. *Lanier* vs. *Loupret*, S. C. 1874, 6 R. L. 350.

2. The Superior Court cannot, upon *certiorari*, inquire into the facts in order to ascertain whether the justice of the peace had jurisdiction, and whether he decided correctly or otherwise. *Ruckwart* vs. *Bagin*, S. C. 1890, 19 R. L. 655.

IX. PROCEEDINGS TO QUASH.

1. The merits of a *certiorari* may be heard on a rule to quash without inscription for hearing. *Exp. Marry*, S. C. 1869, 14 L. C. J. 191.

2. Upon the inscription for hearing on the merits of a *certiorari* a motion to quash the conviction is necessary. *Exparte Whitehead*, S. C. 1870, 14 L. C. J. 267; *Lanier* vs. *Loufret*, S. C. 1874, 6 R. L. 350.

3. No motion to quash is necessary in cases of *certiorari*. *Exparte Thompson*, S. C. 1876, 5 Q. L. R. 200.

4. When necessary the motion to quash need not contain any reasons, and the motion itself is not even necessary—the inscription on the merits being sufficient. *Exparte Gates*, S. C. 1878, 23 L. C. J. 62.

5. A conviction may be quashed upon an inscription on the merits of the *certiorari*, without motion to quash, if the quashing has been prayed for in the petition for *certiorari*. *Hebert* vs. *Paquet*, S. C. 1885, 11 Q. L. R. 19.

X. PROCEDURE IN.

1. Motion to proceed.—A defendant under a writ of *certiorari* cannot compel the plaintiff or petitioner to proceed under his writ by a mere motion to that effect, the proper course being by means of a *procedendo*. *Regina* vs. *Currier*, S. C. 1852, 2 L. C. R. 302, 3 R. J. R. Q. 197.

2. Inscription. Art. 1231 C. C. P.—The parties cannot be heard on a writ of *certiorari* until the case has been inscribed on the role in conformity to Art. 1231 C. C. P. *Bombardier* vs. *Joly*, S. C. 1883, 12 R. L. 97.

XI. RETURN IN. (See also "Conviction.)

1. Art. 1229 C. C.P.—On a *certiorari* a return of affidavit and warrant only, is insufficient. *Rex* vs. *Desgagné*, K. B. 1819, 2 Rev. de Lég. 32.

2. A magistrate has no right to refuse to make a return to a writ of *certiorari* because the fees due in such case have not been paid to the clerk of the peace, but a rule *nisi* for attachment will not issue *de plano* without notice to the magistrate. *Davies exp.*, S. C. 1853, 3 L. C. R. 60, 3 R. J. R. Q. 125.

3. The commissioners to whom a writ of *certiorari* has been addressed, and who have failed to make a proper return, will be mulcted in costs. *Exparte Leroux*, S. C. 1866, 10 L. C. J. 193.

XII. SERVICE.

1. Art. 1228 C. C. P.—Upon a *certiorari* from a conviction of two justices of the peace—*Held*, that the original writ of *certiorari*, and not a copy, must be served upon the convicting justice, and it is not necessary to serve a copy of such writ upon complainant. *Filion exparte*, S. C. 1854, 4 L. C. R. 129, 4 R. J. R. Q. 107.

2. *Held*, on motion, that a writ of *certiorari* would be quashed, a copy of the writ having been served on the magistrate and his return made thereon. *Lahaye exp.*, S. C. 1856, 6 L. C. R. 486.

3. Notice of Motion. Art. 1223—The certificate of service by a bailiff of the notice of motion for a writ of *certiorari* must be sworn to. *Exparte Adams*, S. C. 1865, 10 L. C. J. 176.

4. Contra.—*Exparte Roy*, S. C. 1863, 7 L. C. J. 109.

XIII. WHEN IT LIES.

1. Canonical Decree for the Erection of Parishes.—The Ecclesiastical decree of His Grace the Archbishop of Quebec for the erection of a parish is not a civil proceeding subject to the revision of the Superior Court by means of a writ of *certiorari*. Such proceeding is purely ecclesiastical, without the jurisdiction of the Superior Court, so long as no proceedings are had for the purpose of attaining a ratification of such decree by the civil authorities. *Exparte Guay*, S. C. 1852, 2 L. C. R. 292, 3 R. J. R. Q. 191.

2. Commissioners for the Erection of Civil Parishes.—A petition in *certiorari* will not lie from a decision of a commissioner appointed for the erection of parishes, the powers granted to and exercised by them not being of a judicial character. *Lecours exp.*, S. C. 1853, 3 L. C. R. 123, 3 R. J. R. Q. 462.

3. —— The court expressed the opinion that the majority of the interested parties mentioned in the said ordinance should come to an amicable understanding with the inhabitants of the new parish or division. (*Ib.*)

4. —— The fact that there are irregularities and illegalities in the proof and in the proceedings in a cause before the commissioners for the civil erection of parishes, etc., etc., and the fact that the commissioners refused to admit proof offered by the opposants, and that they admitted illegal proof on the part of the *Syndics*, does not constitute an excess of jurisdiction, and a writ of *certiorari* based on these reasons ought to be dismissed. *Exparte Boucher*, S. C. 1862, 6 L. C. J. 333, 15 R. L. 368, note.

5. —— The powers devolving upon and belonging to the commissioners for the civil erection of parishes, by virtue of the provisions of sec. 4 of the Ordinance, 2 Vic., ch. 29, reproduced in sec. 11 of ch. 18 of R. S. Q., and by virtue of the commission under which they act, are not of a judicial character, and a *certiorari* will not lie from their decision. *Fabrique de Montréal* vs. *Hudon*, S. C. 1872, 1 R. L. 271.

6. —— The commissioners for the erection of civil parishes do not constitute an inferior court in the sense of Art. 1220 C. C. P., and a *certiorari* will not lie to quash their decision. *Samoisette* vs. *Les Commissaires*, S. C. 1891, 20 R. L. 631.

7. Commissioners' Court. Art. 1221 and 1188 C. C. P.—When a judgment of the Commissioners' Court is bad in form, the Superior Court will not grant a writ of *certiorari* unless it appear that there has been excess of jurisdiction. *Exp. Gibeault*, S. C. 1852, 3 L. C. R. 111, 3 R. J. R. Q. 454; *Exp. Gauthier*, S. C. 1853, 3 L. C. R. 498, 4 R. J. R. Q. 44.

8. —— *Held*, that a *certiorari* would lie from a judgment of the Commissioners' Court on the ground that the action was at the suit of a party styling himself president of a committee to collect the salary of the "Rev. T. D.," or to recover a tax for the support of a missionary. *Saltry exp.*, S. C. 1855, 6 L. C. R. 176.

9. —— An application for a writ of *certiorari* on the part of the defendant, residing in a neighboring locality to that where the judgment was rendered, will be refused if it is to the personal knowledge of the judge that there is no Commissioners' Court in the locality in which the defendant resides, and the distance between the two localities is also known to him, although it does not appear by the copy of judgment produced with the application that the debt was contracted in the locality where the action was brought, nor that the defendant resided in that locality, nor that any of the provisions of Art. 1188 C. C. P. giving jurisdiction to this court have been observed. *Exparte Dubois*, S. C. 1875, 7 R. L. 430.

10. —— But in another case, *held*, that a writ of *certiorari* supported by the ordinary affidavit would be granted, if it appears by the copy of the writ of summons and the copy of the judgment rendered by the Commissioners' Court, filed with the petition, that the defendant did not reside in the same locality, and it does not appear that the debt was contracted in the locality for which the court was established, or that the defendant resided in a neighbouring locality in which there were no commissioners, or in which the commissioners could not sit by reason of sickness or other disability. *Dupas exp.*, C. C. 1875, 7 R. L. 431.

11. —— And a judgment rendered by the Commissioners' Court against a defendant residing in a neighbouring locality where there is a Commissioners' Court will be annulled if the jurisdiction of the court which pronounced the judgment does not appear on the face of the proceedings. (*Ib.* p. 432.)

12. ——But such judgment will be set aside without costs where it is through clerical error only that the jurisdiction of the court does not appear, and where the defendant, although he did not appear, was personally served with the action, and knew of its existence. (*Ib.*)

13. —— The dismissal of an opposition to seizure, by the Commissioners' Court, for default of the opposant to proceed on the return day, is an excess of power, which is ground for the issue of a *certiorari*. *Exparte Senécal*, S. C. 1889, M. L. R., 5 S. C. 412.

14. Court of Queen's Bench—Right to Order.—Application by a prisoner committed for trial for a writ of *certiorari*, on the ground that, as the alleged offence was committed in the United States, the court here had no jurisdiction. Prisoner was charged with inciting certain individuals residing in New York to the commission of a certain felony, viz., to forge a quantity of Canada postage stamps—*Held*, by the Queen's Bench, that that court had no right to order a *certiorari* in such cases. *Narbonne exp.*, Q. B. 1879, 3 L. N. 14.

15. Commissioners for the building and repairing of Churches.—*Certiorari* will lie for excess of jurisdiction and illegality in the proceedings of commissioners appointed by the governor of the province under 31 Geo. III, cap. 6, for the building and repairing of churches. *Rex & Gingras et al.*, K. B. 1833, Stuart's Rep. p. 561, 1 R. J. R. Q. 113.

16. Court-Martial.—A writ of *certiorari* will lie to bring the record and proceedings of a court-martial before the Superior Court, and the fact that the petitioner has a remedy in trespass is no bar to his right to ask a reversal of the judgment by *certiorari*, and that a *prima facie* case, showing want or excess of jurisdiction, or that the court was illegally convened and irregularly constituted, will be sufficient to obtain the writ. *Thompson exp.*, S. C. 1876, 2 Q. L. R. 115.

17. —— Where *certiorari* was brought from a court-martial, and was objected to on the ground of jurisdiction, it was *held* that these courts are inferior jurisdictions, and subject to the controlling and reforming power of the Superior Court. *Thompson exp.*, S. C. 1876, 5 Q. L. R. 200.

18. General Principles. — Where the defendant was convicted by default for selling liquor without license, and the delay between the issue and return of the writ was proved to have been insufficient—*Held*, that a writ of *certiorari* would be granted, notwithstanding that it was especially taken away by the statute under which the conviction was had. *Church exparte*, S. C. 1863, 11 L. C. R. 318.

19. —— Although the right of *certiorari* has been taken away, under the Agricultural Act, still there are cases in which the court will allow it. *Exparte Lalonde*, S. C. 1871, 15 L. C. J. 251, 3 R. J. 450.

20. —— But this right of the Court must be exercised with the utmost precaution, and only in those special cases of manifest want or excess or mere colour of jurisdiction, which the statute cannot have meant wrongfully to protect. *Exparte Duncan*, S. C. 1782, 16 L. C. J. at p. 194.

21. —— Where it is not plain that the inferior tribunal had juristiction, the Superior

Court or judge will grant a *certiorari*, notwithstanding that the right to it, as respects judgments of such inferior tribunal, has been expressly taken away by statute. *Matthews exparte*, S. C. [illegible], 1 Q. L. R. 353.

22. —— Proceedings had under section 18 of Act 31st Vic., ch. 42, are of such a character as to be susceptible of being removed by *certiorari*; and a writ of *certiorari* will be granted, notwithstanding the same is expressly taken away by the Statute (sec 21), provided there be ground for the belief that the conviction was had without proof, where the Act provides that it shall be on proof to the satisfaction of the magistrate. *Exparte Morrison*, S. C. 1869, 13 L. C. J. 295, 1 R. L. 437.

23 —— Where recourse to a writ of *certiorari* is expressly taken away by statute, yet it should be allowed in cases of usurpation of jurisdiction by inferior courts. *Nadeau* vs. *Corporation of Levis*, S. C. 1890, 16 Q. L. R. 210.

24. —— Orders, judgments and ordinances which are not of a final character are not susceptible of review by *certiorari*. *Exparte Fabrique de Montréal*, S. C. 1872, 4 R. L. 271.

25. —— **Papers material to the Case.**—Where affidavits are produced to establish that a material paper has not been sent up with the record in appeal, a *certiorari* will be granted. *De Gaspe* vs. *Asselin*, Q. B., Montreal, September, 1875.

26. —— But where the materiality of papers not produced is denied, and it does not appear by the affidavits that they are material, the writ will be refused. *Quesnel* vs. *Corporation of Princeville*, Q. B., Quebec, March, 1875.

27. —— Motion for *certiorari* to bring up papers not returned with the record. Consent was offered for the production of the papers, but the court refused to allow them to be filed without a regular return. *Bouffard* vs. *Nadeau*, Q. B., Quebec, December 4, 1875.

28. —— Papers wanting in the record were allowed to be filed with a certificate without the issue of a *certiorari*. *Dunning* vs. *Wurtele*, Q. B., Quebec, December 1, 1877.

29. —— Where the petitioner merely complains that the judge of the inferior court decided wrongly, there is no ground for *certiorari*. The writ of *certiorari* issues only where there is excess or absence of jurisdiction, or where the proceedings contain grave informalities, and there is reason to believe that justice has not been done. *Valois* vs. *Muir*, S. C. 1889, M. L. R., 6 S. C. 212.

30. —— **Judgment of inferior Jurisdiction.** Arts. 1220, 1221 C. C. P. Mens rea.—Where a magistrate dismissed a charge of selling intoxicating liquors to minors, on the ground that the complainant had not proved that the defendant knew the persons to be minors, this was not a case for the issue of a writ of *certiorari* under § 1 or 3 of Art. 1221 C. C. P., there being neither want nor excess of jurisdiction, nor any gross irregularity in the proceedings. *Exparte Hamilton*, 1889, M. L. R., 5 S. C. 330.

31. Quebec License Act — Pedlar Clauses—District Magistrate.—A writ of *certiorari* does not lie from a conviction of the District Magistrate, under the pedlar clauses of the Quebec License Act. *Exparte Duncan*, S. C. 1872, 16 L. C. J. 188.

32. Recorder's Court — Demurrer. — A judgment of the Recorder's Court dismissing a demurrer is not susceptible of appeal by *certiorari*. *Beaudry* vs. *City of Montreal*, 1884, M. L. R., 1 S. C. 237.

33. —— A writ of *certiorari* will not lie to review a decision of the Recorder's, when the latter has jurisdiction, and the Superior Court cannot upon a *certiorari* inquire into the facts of a case. *Gravel* vs. *City of Montreal*, S. C. 1887, 15 R. L. 367.

34. Right taken away by Statute (1) **—French Version.**—Where a statute takes away the right to a writ of *certiorari*, the French version being restrictive, and contradicting the English version, the restrictive prohibition must be considered as not having been enacted. *Nadeau* vs. *Corporation de Lévis*, S. C. 1890, 16 Q. L. R. 210.

CESSION DE BIENS.

See Insolvency.

CHAMPERTY.

Action by Creditor in his own Name. —Where a creditor enters into a champertous contract with a third party relative to the suit to be entered in his own name against his debtor, such champerty does not entitle the debtor to have the action dismissed on account thereof. *Ritchot* vs. *Cardinal*, Q. B. 1893, 3 Que. 55; *Dussault* vs. *Chemin de Fer du Nord*, Q. B. 1886, 12 Q. L. R. 50, 14 R. L. 207, reversing C. R., 11 Q. L. R. 165.

(1) See *Supra* "General Principles."

But where the right of action is transferred to the champertor, and the action is brought in his name, the action will be dismissed on demand of the debtor. *Power* vs. *Phelan*, Q. B. 1884, 4 Dorion's Rep. 57.

CHEMIST.

See DRUGGIST.

CHEQUE.

See BILLS AND NOTES—BANKS AND BANKING.

CHILDREN.

I. CUSTODY OF. 1-7.
II. MEANING OF WORD. 1-7.
See ALIMENTS.
" SUBSTITUTION.
" PATERNAL AUTHORITY.
" PATERNITY.
" STATUS.
" SEPARATION FROM BED AND BOARD, ETC.

I. CUSTODY OF.

1. When illegitimate.—In our law the authority of the father and mother of a natural child is absolutely equal, and when necessary, the courts, which have discretionary authority in such matters, may give the custody to one or the other of them as their conduct and circumstances may seem to justify. *Côté* vs. *Doucault*, C. R. 1884, 10 Q. L. R. 115.

2. The object of *habeas corpus* is to see that no person is deprived of his liberty illegally or against his will, and not to determine the respective rights of parties over one another, and it cannot, therefore, be used by a father to enforce his right to have the custody of his child. *Stoppelbein* vs. *Hall*, S. C. 1876, 2 Q. L. R. 255. Confirmed in Review. See 33 L. C. J. at p. 7.

3. Where a minor child is brought before the judge, under *habeas corpus*, her own statement, if of sufficient age to judge for herself, will be taken as to whether she is under restraint or not. (*Ib.*)

4. When legitimate.—The mother has an absolute right to the charge of a child aged 12 (the father being dead), unless it be established that she is disqualified by misconduct, or is unable to provide for the child. *Exparte Ham*, Q. B. 1883, 27 L. C. J. 127, 6 L. N. 115.

5. —— But where it appeared that the mother was a domestic servant and the child was well cared for by another, the court, before granting to the mother the custody of the child, required the production of affidavits showing that the mother was in a position to provide for the child's wants. (*Ib.*)

6. —— Where children who are, in the opinion of the judge, of sufficient intelligence and mental capacity to be able to determine their choice of domicile with relatives who brought them up, and they are not under restraint, *habeas corpus* will not lie on the part of the father to obtain their custody. *Riley* vs. *Grenier*, S. C. 1882, 33 L. C. J. 1.

7. —— In the case of the parents being separated from bed and board, the father, who has thereby been deprived of the custody of his child, is not also deprived of the right of superintending its education, and where the mother abuses the trust imposed upon her in regard to the child, the father can demand the interference of the courts; for decisions of the courts in respect of the custody of children are always susceptible of modification on account of altered conditions. *Valade* vs. *Corbeil*, C. R. 1889, 33 L. C. J. 207.

II. MEANING OF WORD.

1. In the case submitted, the terms "children still living" comprehend the grand-children, descendants of the testatrix in the direct line, and that by right of representation the said grand-children held directly under their great-grand-mother, and not from their mother, their right to the legacy of the immoveable property by them claimed. *Glackmeyer* vs. *The Mayor, etc.*, S. C. 1860, 11 L. C. R. 18.

2. A legacy by which a testatrix makes a bequest "to all her children living at the time of her decease" does not include her grand-children, issue of one of her children who died before the making of her will. (1) *Martin* vs. *Lee*, P. C. 1861, 11 L. C. R. 84.

3. *Semble*, that a more extensive signification is frequently given by the old French law which prevails in Canada to the word "enfants" than is generally given by the English law to the word "children." (1) *Martin* vs. *Lee*, Privy Council 1861, 11 L. C. R. 84.

4. The word "enfant" employed in matters of testamentary succession, and substitution in

(1) See now Art. 980 C. C. and *Marcotte* vs. *Noel*, 6 Q. L. R. at p. 218 and *infra* No. 5.

the direct line descending, comprises not only the children of the testator or of the institute, as the case may be, but also their descendants in any degree, in default of the degree indicated in the deed, those of the nearest, however, always excluding the others. *Brunette* vs. *Peloquin*, S. C. 1870, 3 R. L. 52.

5. In an action concerning a succession—*Held*, that the designation of the substitutes by the words "children born of my marriage" in a will creating a substitution, is the manifestation of the intention of the testator that representation should take place, and that it needs very clear and precise words to take away from the word "children" the meaning that the law expressly gives it. *Marcotte* vs. *Noel*, C. R. 1880, 6 Q. L. R. 245.

6. ART. 980 C. C.—In a deed of donation creating a substitution, the term "children" was held to include grand-children, it not appearing from the terms of the deed that the word "children" was used in a restrictive sense. *Joubert* vs. *Walsh*, C. R. 1884, 7 L. N. 134, 28 L. C. J. 39, S. C. 1884, 12 R. L. 334.

7. **"To his eldest Child."** — Where a deed of donation drawn up in the English language donates property to the son of the donor, with the charge that it shall descend "to his eldest child" at the donee's death, such property will revert to the eldest child whether a boy or girl, the word "child" being equally applicable to boys or girls. *Grace* vs. *Higgins*, S. C. 1892, 1 Que. 32.

CHURCHES. (1)

I. ACTION BY BUILDER.

II. AUTHORITY OF BISHOP OF EPISCOPAL CHURCH TO BIND HIS SUCCESSOR IN OFFICE TO PAY MONEY.

III. ASSESSMENTS.
- *Action for Recovery of.*
  - Trustees—Costs. 1.
  - Proof—Extract from Assessment Roll. 2.
  - Circuit Court—Jurisdiction over Commissioners. 3-4.
- *Commissioners for Erection of Civil Parishes.* 5.
- *Extension of Time for Payment.* 6.
- *Liability for—Protestant or Catholic.* 7-10.
- *Liability for—Effect of Homologation.* 11.
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- *Ordinance of Commissioners—Nullity.* 13.

IV. CHURCH-WARDEN.
- *Election of*—23 Vic., ch. 67, sec. 3. 1-3.
  - Announcement of Elections. 4.
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V. CHURCH-WARDEN IN CHARGE.
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VI. COMMISSIONERS FOR CONSTRUCTION OF.
- *Judgment of.* 1.
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VII. CANONICAL DECREE FOR CONSTRUCTION OF—REVOCATION.

VIII. COMMISSIONERS FOR ERECTION OF CIVIL PARISHES. 1-3.

IX. FABRIQUES.
- *Action by.*
  - Authorization to sue—Appeal. 1-5.
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  - Right of, to preside over meetings of. 9-10.
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X. ORDER IN.
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XI. PARISHIONERS.
- *Rights of.* 1-2.

XII. PEWS.
- *Lease—Failure to pay Rent—Comminatory Clause.* 1-2.
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- *Rights of Children.* 4-5.
- *Rights of Seigniors.* 6-7.
- *Rights of Seigniors—Possessory Action.* 8-9.
- *Rights of Lessee—Disturbance of Possession.* 10-13.
- *Title to.* 14-16. (See also RIGHTS OF LESSEE.)

XIII. REGISTERS. 1-3.

(1) Litterature—Church and State, 1 Rev. Crit. 431; 2 Rev. Crit. 1-33-113. Legal Status of the Church of England in the Colonies, 3 L. C. J. L. 39. Liberté Religieuse en Canada, by S. Pagnuelo, 1 vol. 8vo, 1872.

XIV. Trustees.
Mandamus—New Trustee. 1.
Right of Survivorship. 2.
XV. Trustees for Building.
Actions by. 1.
Resolutions of. 2.
Tenders by. 3-6.
Status of. 7.
See also Certiorari.
" Curate.
" Presbyterian Church.
" Tithes.

I. ACTION BY BUILDER.

The contractor who builds a church cannot reimburse himself for his outlay by an attachment in the hands of the contributories of the parish who are liable for its construction.

Semble, that the plaintiff should have demanded the rendering of an account by the trustees. *Allard* vs. *Syndics de la Paroisse de St. Jean Baptiste de Roxton*, Q. B. 1870, 36 L. C. J. 35.

II. AUTHORITY OF BISHOP OF EPISCOPAL CHURCH TO BIND HIS SUCCESSORS IN OFFICE TO PAY MONEY.

The Trust and Loan Company, in 1875, recovered judgment against Bishop O. in his corporate capacity for the amount of their loan on mortgage to Trinity Church, one of the Episcopal churches in Montreal, the Bishop being vested with the property on which the church was erected. An attachment was then taken out by the plaintiff in the hands of a number of persons to whom the Bishop had from time to time loaned money in his corporate capacity. In these proceedings the Synod of the Diocese of Montreal intervened, and claimed that all these moneys thus loaned form part of the Episcopal endowment fund, which was vested in the Synod as their property, subject, etc. Bishop B., the successor of Bishop O., also intervened and claimed that the only fund out of which his salary as Bishop could possibly be paid was the revenue arising from said loans, and that the same was not liable to attachment for the debt of Trinity Church. *Held*, that the loan as authorized by Act of Parliament 38 Vic., cap. 63, was for the benefit of Trinity Church and intended to bind the property of Trinity Church and no other, and therefore did not authorize the Bishop to bind his successors in office; that in any case the money belonged to the Synod and not to the Bishop, and all the contestations were dismissed. *Trust and Loan Company* vs. *Bishop of Montreal*, S. C. 1881, 4 L. N. 338.

III. ASSESSMENTS.

1. Action for recovery of—Trustees—Costs.—Trustees for the erection of a church, suing under the provisions of the C. S. L. C., ch. 18, for the amount of an assessment imposed by them, may be stayed in their suit by dilatory exception, until they shall have rendered the account provided for by sec. 33 of the Act. Under the circumstances disclosed by this case, the trustees *personally* condemned in the costs. *Trustees St. David* vs. *Layneux*, C. C. 1886, 12 Q. L. R. 102.

2. ——Proof.—In an action for recovery of assessment for the construction of a church, to which the defendant pleaded a demurrer, an extract from the assessment roll duly certified is authentic proof and sufficient on which to base judgment. *Syndics de la Paroisse de Ste. Cunégonde* vs. *Forte*, C. C. 1886, 10 L. N. 20.

3. ——Circuit Court—Nullities in Deed of Repartition.—The Circuit Court has no right to take cognizance of nullities in a deed of repartition for the construction of a church, resulting from certain omissions therein and the fraud of the *Syndics*, and must render judgment on the deed as homologated. *Syndics, etc., de St. Norbert d'Arthabaska* vs. *Pacaud*, C. Ct. 1862, 6 L. C. J. 290.

4. —— —— Contra.—But, *held* in a later case, that the Circuit Court had jurisdiction to declare that an ordinance and the assessment roll made thereunder were insufficient in law to base an action upon. *Fabrique de la Paroisse du St. Enfant Jésus* vs. *Poirier*, C. Ct. 1879, 23 L. C. J. 155.

5. Commissioners for Erection of Civil Parishes.—The commissioners for the civil erection of parishes may order the raising of a sum of money less than that which is due by the *Fabrique*. *Fabrique du Saint Enfant Jésus* vs. *Roy*, and *Fabrique de Saint Paul* vs. *Pigeon*, C. Ct. 1879, 5 Q. L. R. 327.

6. Extension of Time for Payment.—Trustees for the erection of churches can grant contributories an extension of time for payment of the amount due by them. *Allard* vs. *Syndics, etc.*, Q. B. 1870, 30 L. C. J. 35.

7. Liability for—Protestant or Catholic.—A Roman Catholic who becomes a Pro-

testant cannot be assessed for the erection of a Roman Catholic church, although he may have done acts which only Roman Catholics could do, and although he may have signed a petition praying for the erection of such church. *Syndics de Lachine* vs. *Laflamme*, C. Ct. 1862, 6 L. C. J. 226.

8. —— A person born a Roman Catholic cannot avoid the civil obligations which his religion imposes on him, by the fact alone that he has ceased to practice his religion and has attended Protestant worship, and a refusal to answer on *faits et articles* respecting the nature of his religious faith will be interpreted as tantamount to an avowal that he has not changed his religion. *Syndics de la Paroisse de Lachine* vs. *Fallon*, C. Ct. 1862, 6 L. C. J. 259.

9. —— A person ceasing to profess the Roman Catholic religion must notify the *curé* in writing, in order to be exempt from church dues. *Goulet* vs. *Dupuis*, S. C. 1865, 1 L. C. L. J. 94. (But see under title "Tithes.")

10. —— A judgment dismissing an action against the defendant at the suit of the present plaintiffs, for the recovery of an instalment claimed as assessment for the building of a Roman Catholic church, on the ground that the defendant was not a Roman Catholic, but a Baptist, is *chose jugée* between the parties, and could be so pleaded against a subsequent action for another instalment, notwithstanding that the plaintiffs, in such subsequent action, allege and prove a confession of faith as a Roman Catholic antecedent to the homologation of the report of the *Syndics*. *Syndics de Lacolle* vs. *Duquette*, C. Ct. 1871, 15 L. C. J. 304.

11. Liability for—Effect of Homologation.—The homologation, by the commissioners for the erection of parishes, of an assessment for the construction of a church, creates a legal title in favor of the trustees to the sums therein set out, and, so long as such assessment has not been annulled by a competent authority, the persons therein assessed cannot refuse to pay the amounts for which they are assessed, nor have them returned if already paid. *Lemieux* vs. *Syndics de St. David de l'Aubé-Rivière*, S. C. 1884, 10 Q. L. R. 325.

12. Liability for—Incorporated Company.—An incorporated company, all the shareholders of which are Catholics, is liable for its share of the assessments for the repair of the parish church, according to ch. 18 Con. Stat. of L. C. *Curé, etc., de St. Thomas de Pierreville* vs. *La Cie. des Moulins à Vapeur de Pierreville*, C. Ct. 1878, 9 R. L. 505.

13. Ordinance of Commissioners — Nullity. — The *Ordinance* of the commissioners for the civil erection of parishes, of date the 26th November, 1876, by which the *Fabrique* of the parish of *St. Enfant Jésus* is permitted to assess the Roman Catholic freeholders of that parish for $20,000, is null; the same not being justified by the Statute 29 Vic., ch. 52, sec. 4. *Fabrique de la Paroisse du Saint Enfant Jésus* vs. *Poirier*, C. Ct. 1879, 23 L. C. J. 155.

IV. CHURCH-WARDEN.

1. Election of. 23 Vic., ch. 67, sec. 3.—On a writ of mandamus arising out of the election of a warden or *marguillier* of a church —*Held*, that all the *notables*, that is, all the parishioners, who contribute to the support of the church have the right to participate in the election. *Exparte Renouf*, Q. B. 1844, 1 Rev. de Lég. 310. (To same effect case cited in Langevin *Manuel des Paroisses*, 2nd edit., p. 33, referring to report in *La Minerve*, 5 Dec. 1877. See Mignault, Droit Paroissial, p. 237, and see remarks of Privy Council approving of *Exp. Renouf*, 19 L. C. J. 148.)

2. —— And *held*, also, that the *curé* and *marguilliers* could be compelled, by means of a writ of mandamus, to call the *notables* to the meeting for such election, and that a return made by the *curé* and *marguilliers* that they had offered to admit certain persons according to their position and rank, to the exclusion of the other parishioners, is insufficient and illegal. (*Ib.*)

3. —— 23 Vic., ch. 67, sec. 4.—On a petition to annul an election of a church-warden—*Held*, that under 23 Vic., ch. 67, sec. 4, a regular proposal is required to nominate as candidate a person to fill such office, and that a simple expression of the desire of one or more parishioners that a person other than the one first proposed should be elected, does not import a regular nomination of such person as church warden. *Bélanger* vs. *Cyr*, S. C. 1862, 12 L. C. R. 470.

4. —— **Announcing.**—The curate must announce the election eight days in advance. *Exparte Rioux*, Q. B. 1848, 3 Rev. de Leg. 180.

5. —— **Curate.**—The curate has no voice

in the election of church-wardens. (1) *In re Leduc*, K. B. 1832, Montreal Condensed Reports, p. 96.

6. —— Registration of Votes.—Where, at an election of church-wardens, registration of the vote is demanded by two or more voters, the curate presiding over the meeting must proceed to do so, even when such a course has never been pursued before in the parish, the usual custom having been to ascertain the majority by calling a division. The president of the meeting is bound to register such votes even when the demand for registration is made after the division has been made, but before the president has declared any candidate to be elected; and, if he fails to register the votes when so demanded, the election will be null. *Champoux* vs. *Paradis*, C. R. 1892, 2 Que. 419.

6a. —— —— An election void for the above cause cannot be validated at a subsequent meeting which refuses to accept the resignation of the candidate thus illegally elected; such election must stand or fall on its merits judged in the light of the first election. (*Ib.*)

7. —— Usage.—The parishioners have a right to elect as church-warden any one of their number whom they may choose, and this notwithstanding any usage to the contrary which may be proved to have existed in the parish. *Moreau* vs. *Collin*, Q. B. 1874, 19 L. C. J. 26.

8. —— Art. 3438 R. S. Q.—Notice of Meeting.—It is sufficient that the meeting of the *Fabrique* be convoked according to the usage in force in the parish. *Auger* vs. *Labouté*, Q. B. 1892, 2 Que. 38.

9. —— —— Where the usage is to send a notice in writing to each church-warden convoking him to the meeting, and to announce such meeting during church service, any irregularity in the latter announcement will be covered by the written notice made in due form and addressed to each warden. (*Ib.*)

10. —— —— The usage in force in the parish of Notre Dame de Montréal being to announce the object of the meeting but in two cases—the election of church-wardens and the rendering of accounts—it was not necessary to specify the object of a meeting convoked to accept the resignation of church-wardens who had resigned. (*Ib.*)

11. —— —— The petitioners to void the election of church-wardens on account of their being refused a part in the election, cannot enter a valid objection to the election unless they can show that the election would have had a different result had they participated in it. (*Ib.*)

12. —— —— *Semble*, to the majority of the Superior Court, but not touched upon in appeal, that a church-warden who resigns his functions as active church-warden cannot retain his position as retired church-warden. (*Ib.*)

(1) Except where the meeting is equally divided. *Mignault*, Droit Paroissial, p. 244.

V. CHURCH-WARDEN IN CHARGE.

1. Accounting. — A Roman Catholic Bishop of Quebec has no authority to compel the church wardens of a parish to account. He can require a statement of their proceedings for his information as to the manner in which they have expended the money of the parish, but it belongs to the secular power exclusively to compel judicially an accounting by means of an action instituted in the name of *L'Œuvre et Fabrique* for that purpose. *Fabrique de St Jean & Chouinard*, 2 Rev. de Leg. 276, K. B. 1820.

2. —— The action to compel the church-warden retiring from office to render an account, may be brought without the authorization of the parishioners, contributories, as being a suit necessary for the recovery of the ordinary revenues of the *Fabrique*. This case is therefore within the exception of Art. 24 of the decree of *Saint Jean en grève*, whereas the case of *Verchères* vs. *Verchères* is within the rule of the article. In a case like this it is the duty of the new church-warden to recover by suit, after having notified the *bureau ordinaire* of the action, under penalty of personal liability in case of omission to do so. On the merits it is no answer in the mouth of the retiring church-warden to say that he cannot get access to the books, and therefore to ask dismissal of the action. *Curé et Marguilliers de Beauharnois* vs. *Robillard*, Q. B. Montreal, March 16, 1877.

3. Curate acting for Church-warden in charge.—Where the curate undertakes to keep the accounts of the *Fabrique* and to collect the revenues, he becomes the clerk and employee of the church-warden in charge, and his acts in this connection bind the *Fabrique* and discharge all parties accounting to him as validly as if they were paid to the church-warden. *Giroux* vs. *Fabrique de Beauport*, S. C. 1892, 1 Que. 476.

4. Functions of. (See also "FABRIQUE" — "CURATE ACTING FOR CHURCH-

WARDEN IN CHARGE.") — On a proceeding in the nature of a *quo warranto* against a person holding the office of church-warden in charge — *Held*, that the church-warden in charge had alone the right of receiving moneys due to the *Fabrique*, and that the appointment by the retired church-wardens of *procureur fabricien* was illegal, and the party so appointed was ordered to abstain from exercising the duties of his office. *Taillefer* vs. *Bélanger*, S. C. 1851, 1 L. C. R. 322, 3 R. J. R. Q. 21.

5. —— Where action was brought by an insurance company as subrogated in the rights of a *Fabrique*, the loss on whose property by fire they had been obliged to pay, in consequence of the fault, etc., of the defendant—*Held*, that the wardens in charge had power to receive the money under such insurance, grant a discharge, and subrogate the plaintiffs in their rights, but could not legally make an assignment by way of sale of any such rights and actions without special authority. *Quebec Fire Assurance Co.* vs. *Molson*, 2 P. C. 1851, 1 L. C. R. 222, 2 R. J. R. Q. 472.

6. —— The church-warden in charge is responsible for all the moneys of the *Fabrique*, and has therefore the sole charge of them. Such moneys should be deposited in the *Fabrique's* safe, if it has one, or if not they should be placed in the hands of the church-warden in charge. In either case the church-warden in charge is alone responsible for them. Hence it follows that the church-warden in charge has a right to receive the moneys had from the balance of account of the retiring church-warden in charge, and it is not in the power of the *Fabrique* to order that they be placed in the hands of any other person, so as to have the effect of discharging the church warden in charge of his responsibility in regard to such balance of account, and of depriving him of his right to receive it. *Girard* vs. *Choquet*, Q. B. 1869, 1 R. L. 629.

7. —— And *held*, also, that in the case in question there had been no valid deposit made of the said moneys in the hands of the plaintiff. (*Ib.*)

VI. COMMISSIONERS FOR CONSTRUCTION OF CHURCHES.

1. Judgment of.—The judgment of the commissioners cannot be declared null by the Circuit Court on a plea, except where the judgment is null on its face; nor can it be attacked except as the judgment of an inferior court. *Fabrique de St. Enfant Jésus* vs. *Roy*, and *Fabrique de St. Paul* vs. *Pigeon*, C. Ct. 1879, 5 Q. L. R. 327.

2. Judicial qualities of.—In an action against a proprietor for the amount of his assessments for the erection of a church parsonage—*Held*, confirming decision of court below, that such commissioners are a special tribunal exercising judicial authority within certain limits, and that an act *de repartition* by such commissioners makes *primâ facie* evidence of its contents. *Reniere* v. *Malette*, Q. B. 1855, 5 L. C. R. 87, 1 R. J. R. Q. 293.

VII. CANONICAL DECREE FOR CONSTRUCTION OF—REVOCATION.

A canonical decree for the construction of a new church in an old parish can only be revoked by another decree in the same form as the first. *Syndics de la Paroisse St. Ours* vs. *Allair*, C. Ct. 1875, 7 R. L. 3.

VIII. COMMISSIONERS FOR ERECTION OF CIVIL PARISHES.

1. Commissioners for erection of civil parishes have no right to delegate to one of their number power to proceed to take evidence in the case in question; and such delegation is an excess of jurisdiction, and the proceedings had thereunder are consequently liable to be set aside under a writ of *certiorari*. (1) *Exparte Robert*, S. C. 1858, 4 L. C. J. 316.

2. The commissioners for the erection of civil parishes may order the raising of a sum of money less than that which is due by the *Fabrique*. *Fabrique du St. Enfant Jésus* vs. *Roy*, and *Fabrique de St Paul* vs. *Pigeon*, C. Ct. 1879, 5 Q. L. R. 327.

3. The ordinance of the commissioners for the civil erection of parishes, of date the 26th November, 1876, by which the *Fabrique* of the Parish of Saint Enfant Jésus is permitted to assess the Roman Catholic freeholders of that parish for $20,000 is null, the same not being justified by the Statute 29 Vic., ch. 52, sec. 1. *Fabrique de la Paroisse du Saint Enfant Jésus* vs. *Poirier*, C. Ct. 1879, 23 L. C. J. 155.

IX. FABRIQUES.

1. Action by—Authorization—Appeal—Procedure.—The ordinary bureau of a Fabrique may authorize actions for the recovery of the ordinary revenues of the

(1) But see now Art. 3368 R. S. Q., and Mignault, Droit Paroissial, p. 103.

Fabrique, and for a new title. This authorization need not be special; a general authorization to take legal proceedings against those who are indebted to the Fabrique, without specifying the name of each debtor, is sufficient. *Curés et Marguilliers de l'Œuvre et Fabrique de Varennes* vs. *Choquet*, Q. B. 1885, M. L. R., 1 Q. B. 333 (Dorion, C. J. and Cross, J. dissenting).

2. —— The absence of authorization to appeal in an action by a Fabrique cannot be invoked at the hearing in appeal, when it was not invoked in the course of the procedure, and the attorneys for the appellant were not put in default to produce their authorization. *(Ib.)*

3. —— *Semble*, that an appeal in such matters should be authorized with the same formality as the original action, and that the ordinary bureau of the Fabrique could give the authorization required for such appeal. *(Ib.)*

4. —— Church Fabriques cannot enter into a law suit for anything beyond the current administration of their trust or the collection of their ordinary income or debts without the authorization of the body of the parishioners, and where they are only authorized by the present and ex-church-wardens they must be non-suited. *Curés et Marguilliers de l'Œuvre et Fabrique de Verchères & Corporation of the Parish of Verchères*, Q. B. 1875, 4 R. L. 87, Privy Council 19 L. C. J. 111, 6 R. L. 691.

5. —— It is not necessary that a Fabrique be specially authorized by a meeting called for that purpose in order to sue in recovery of an assessment due when it refers merely to acts of administration and receipt, as they are sufficiently authorized by the law itself. *Fabrique du St. Enfant Jésus* vs. *Roy* and *Fabrique de St. Paul* vs. *Pigeon*, C. Ct. 1879, 5 Q. L. R. 327.

6. —— **Authorization to plead—Compensation.**—Authorization to plead to an action, given at a meeting of the ordinary bureau, no question having arisen as to an action by the Fabrique against the plaintiff, would not authorize the Fabrique to plead compensation. *Giroux* vs. *Fabrique de Beauport*, S. C. 1892, 1 Que. 476.

7. —— **Corporate Title.**—Fabriques can only sue in their collective corporate title of *Le Curé et les Marguilliers, etc.*, and an action instituted in their name by a so styled attorney is bad. *Exparte LeFort*, C. Ct. 1862, 6 L. C. J. 200.

8. —— —— The Fabrique can only sue in its corporate name and not by its officers, and the curate is an essential member of such corporation, and his name should appear as part of the corporate name of the Fabrique. *Marguilliers, etc., en office de l'Œuvre et Fabrique de la Paroisse du St. Enfant Jésus* vs. *Beaulieu*, C. C. 1878, 8 R. L. 744.

9. **Curate—Right of Curate to preside over Meetings.**—At meetings of the Fabrique the *curé* has no right to preside, the church warden in charge being the proper officer so to preside; and any such meetings presided over by the *curé* are null. And when the church-warden in charge cannot read nor write, a minute of the deliberations of the meeting ought to be drawn up by a notary. *D'Amour* vs. *Guinque*, S. C. 1857, 1 L. C. J. 94.

10. —— —— **Contra.**—But *held*, overruling the above decision, in respect of the right of the curate, that he has the right to preside at such meeting. *Séguéal* vs. *Jarret*, Q. B. 1860, 4 L. C. J. 213, and see *Exp. Turcot*, 2 R. de Leg. 83.

11. —— **Acting for Warden in charge** (See also CHURCH-WARDEN IN CHARGE.)—Where the curate keeps the accounts of the Fabrique and collects its revenues, he is to be regarded to such extent as the clerk or employee of the church-warden in charge (who is the person upon whom this duty legally devolves), and what the curate does in this respect binds the Fabrique and discharges the parties settling with him quite as effectively as if made with the church-warden in charge. *Giroux* vs. *Fabrique de Beauport*, S. C. 1892, 1 Que. 476.

12. **Liability of.**—Where a workman had contracted with a parish as a body represented by wardens—*Held*, that he could not bring his action against the Fabrique. *Comte* vs. *Le Curé, etc., of the Parish of St. Edouard*, K. B. 1835, 2 R. de L. 127.

13. **Possession of Property by.**—The actual possession of buildings erected on the part of a Fabrique is sufficient to meet the requirements of 29 Vic., cap. 52, sec. 7, without the necessity of making proof of ownership. *Fabrique du St. Enfant Jésus* vs. *Roy* and *Fabrique de St. Paul* vs. *Pigeon*, C. Ct. 1879, 5 Q. L. R. 327.

14. **Powers of—Ultra Vires Acts—Ratification.**—Resolution of church-wardens for the purpose of indemnifying one of such church wardens for the loss sustained by him

through an action of damages directed against him as such church-warden is illegal and *ultra vires—Held*, that such resolution is in reality a donation, and such church-wardens have no power to adopt the same. *Curé, etc., de St. Isidore* vs. *Perras*, Q. B. 1888, 32 L. C. J. 176, confirming S. C. 1887, M. L. R., 3 S. C. 56.

15. —— The fact that such sum was entered in the account rendered by the church-warden in charge, which account was submitted to a meeting of senior and junior church-wardens and approved by them, without protest on the part of the contestant who was present at the meeting, and the account was subsequently approved by the Bishop, did not constitute such ratification by the contestant as to estop him from contesting the legality of the said resolution, especially as he had previously protested the resolution, and, further, such resolution being *ultra vires*, ratification thereof by the contestant would be of no effect. (*Ib.*)

16. —— In an action to annul such illegal resolution it is not necessary to make the warden in charge (who had paid over the money in pursuance of the terms of the resolution) a party to the cause. (*Ib.*)

X. ORDER IN.

1. Breach of Decorum.—The petitioner was fined by a justice of the peace for having insulted a church-warden outside the church door after service. The conviction was had under the statute Geo. IV., cap. 3, providing for the maintenance of good order in churches—*Held*, that there was no offence committed under such statute, the act not having been committed during Divine service. *Dumouchel exp.* vs. *Dalton exp.*, S. C. 1853, 3 L. C. R. 493, 4 R. J. R. Q. 40.

2. —— On a *certiorari* from a conviction by two justices of the peace—*Held*, by the Superior Court, unanimously setting aside such conviction, that an information setting out that the defendant had conducted himself in a disorderly manner at a church door, by keeping his hat on his head during the procession of the Holy Sacrament, discloses no legal offence whatever. *Filiau exp.*, S. C. 1854, 4 L. C. R. 129, 4 R. J. R. Q. 107.

3. —— But had the information been properly drawn up, the defendant could not justify himself. The information should have stated that the defendant was on the property of the church, etc. (*Ib.*)

4. —— Persons professing the Catholic faith must, while they are in a Catholic church, obey the rules of such church and stand or kneel as the service requires, and in default to do so the constable can force them to do so. *Wilhelmy* vs. *Brisebois*, C. Ct. 1883, 12 R. L. 424.

5. —— Such officer in the performance of his duties is a public officer and therefore entitled to notice of action under Art. 22 C. C. P. (*Ib.*)

6. Choir.—According to the law and custom in force in the Catholic Church in this country, the curate of the parish has an absolute control over the direction of the choir of his church, and can expel therefrom such persons as he deems unfit to remain therein. *Boudreault* vs. *Curé et Marguilliers, etc., de l'Œuvre et Fabrique de la Paroisse de la Visitation du Sault au Récollet*, C. Ct. 1869, 1 R. L. 663.

7. —— In the present case, the plaintiff having behaved in an irreverent manner in the choir, the curate was justified in expelling him therefrom and dismissing him from his position as a chorister. (*Ib.*)

8. —— The curate and the choir-master of a Catholic church can make rules for the admission of choristers or other persons to the choir, and can expel them therefrom if they fail to comply with these rules. *Jodoin* vs. *Payette*, S. C. 1893, 3 Que. 461.

XI. PARISHIONERS.

1. Rights of.—In a proceeding in the nature of a writ of prerogative by parties styling themselves *citoyens notables* against a person as illegally exercising the office of warden of a parish—*Held*, that such parties, without taking the quality of *fabriciens*, or *paroissiens*, could not maintain such application. *Crebassa* vs. *Péloquin*, S. C. 1851, 1 L. C. R. 247, 3 R. J. R. Q. 4.

2. —— On the 1st November, 1874, at a meeting of the Marguilliers du Banc de l'Œuvre et Fabrique de Notre Dame de la Victoire, it was resolved to purchase for the purpose of a cemetery certain land belonging to the Fabrique de St. Joseph de Lévis, for the sum of £600. Conformably to this resolution a deed of purchase was passed some time afterwards between the two Fabriques. In July, 1876, at a meeting of the "Marguilliers anciens et nouveaux de la Paroisse Notre Dame de la Victoire," it was resolved to pay a part of the purchase money then falling due,

and to commence the work of establishing a new cemetery. The curé and two of the marguilliers appointed were to employ for this purpose the money of the Fabrique, according to the authorization which they had received. The action of the plaintiffs attacked the two resolutions of November, 1874, and July, 1876, on the ground that at the time of the passing of the first resolution the Fabrique had not in hand sufficient money to pay the amount agreed upon; that the price was too high to be paid out of the ordinary revenues of the Fabrique; and that, with regard to the second resolution, the meeting at which it was held was illegally convoked, and its proceedings were irregular. Conclusions for the nullity of the two resolutions, and that the Fabrique be enjoined not to use the money or credit of the Fabrique in carrying them out —*Held*, that the action must fail for want of interest both *ratione personæ and ratione materiæ*. *Currier* vs. *Les Curé et Marguilliers de l'Œuvre et Fabrique de la Paroisse de Notre Dame de la Victoire*, S. C. 1876, 3 Q. L. R. 27.

XII. PEWS.

1. Lease—Failure to pay Rent—Comminatory Clause.—Where the plaintiff sought to recover possession of a pew in a church of which he had a lease for three years from the defendant, but the defendant pleaded that by a clause in the lease it was to become null and void *de plano*, without notice or other formality, on default by the lessee of payment of the rent, as stipulated and alleged, also that the plaintiff was in such default, and that they had a right, notwithstanding offer of the plaintiff to pay the rent, and the deposit of the amount with his action, to sublet the pew and to deprive the plaintiff of the enjoyment thereof—*Held*, confirming the decision of the court below, that a stipulation such as that pleaded could not be considered as comminatory, but must be strictly enforced. *Richard* vs. *Le Curé et Marguilliers de l'Œuvre et Fabrique de Québec*, Q. B. 1854, 5 L. C. R. 3, 4 R. J. R. Q. 260.

2. —— But, *held*, in a later case of a lease containing a clause which provided that the lessee of the pew should forfeit all right thereto in the event of his not paying the rent at a stated date, thereby necessitating its recovery by action on the part of the Fabrique, that the Fabrique could not sell the pew upon failure of the lessor to pay the rent which had not been demanded, but who paid when the rent was demanded; such a right would only accrue to the Fabrique in virtue of such clause where there was a persistent refusal to pay the rent demanded, necessitating an action to recover it. *Curé, etc., de N. D. des Trois Pistoles* vs. *Bélanger*, Q. B. 1886, 14 R. L. 575, 12 Q. L. R. 189, 9 L. N. 346.

3. Destination of.—A pew, which had been erected in the parish church of Chateauguay for the use of the choir on holidays, having been rendered useless for that purpose by a gallery being built above it, to which the choir was removed, one of the wardens took upon himself to sell it, and it was sold by auction to the highest bidder. On action to set aside the sale as made without authority, and for damages—*Held*, that the destination of a pew in a church cannot be changed without the consent and after deliberation of the church Fabrique, and that a meeting of the parishioners to authorize the Fabrique to bring such action was properly called and presided over by the curé. *Reid* vs. *Le Curé and Marguilliers de Chateauguay*, Q. B. 1856, 6 L. C. R. 290, 5 R. J. R. Q. 113.

4. Rights of Children.—The eldest son, on the marriage of his father's widow, is entitled to his pew in the parish church. *Borne* vs. *Wilson*, K. B. 1819, 2 R. de L. 276.

5. —— Children, without distinction of age or sex, have a joint right to be preferred to the highest and last bidder for pews which formerly belonged to their deceased father or mother, but if there be but one child he can only have a preference for one pew. *Tremblay* vs. *Fabrique de St. Irénée*, C. R. 1886, 13 Q. L. R. 26, 16 R. L. 182.

6. Rights of Seigniors—Honorary rights, such as the use of a pew in churches, were only granted to seigniors in their quality of high justiciers, as one of the attributes of the power they held and of the jurisdiction they exercised; and by the effect of the conquest, the jurisdiction which they exercised having ceased, and their judicial power having become extinct, they have ceased to be entitled to these rights, and more particularly to pews in churches. *Larue* vs. *Curé et Marguilliers de la Paroisse de St. Pascal*, S. C. 1851, 1 L. C. R. 175.

7. —— In an action by the wardens of a parish against the seignior, in which they set up that he had been in the habit of using a double pew in the church for a number of years without paying anything therefor, and asking that they be declared exempt from the

obligation of furnishing such pew, and that they be allowed to take it away—*Held*, the seignior was no longer entitled to the use of a pew in church as *haut justicier*, but he could claim it as patron if he had granted the fund to build the church, and if he had a title to that effect and the possession. *Curé, etc., de la Paroisse du Cap St. Ignace* vs. *Beaubien*, S. C. 1854, 4 L. C. R. 321, 4 R. J. R. Q. 175.

8. Right of Seigniors—Possessory Action.—The plaintiff was purchaser at sheriff's sale of the Seigniory of Deschambault, and had been in possession of all the rights belonging to such seigniory, including that of occupying the seigniorial pew, or *banc patronal*, in the parish church for some time, when the *Fabrique*, denying his right to such pew, caused it to be demolished—*Held*, confirming the decision of the court below, that the first seignior having built the first parish church in the seigniory, on land which belonged to him, by so doing, among other privileges, acquired that of the first seat in the church, and by law this privilege passed to the proprietor of the seigniory, whoever he may be, to which it remained attached. *Fabrique de Deschambault* vs. *Dubeau*, Q. B. 1871, 2 Q. L. R. 6.

9. —— And, *held*, that an action to recover the use of such pew was a possessory action, pure and simple, and such action exists in law to reinstate the patron in the *banc patronal*, without it being necessary to allege or produce any title. (*Ib.*)

10. Rights of Lessee—Disturbance of Possession.—An action in disturbance cannot be maintained by one parishioner against another for a disturbance caused by entering a pew in a church. *Auger* vs. *Gingras*, K. B. 1819, Stuart's Rep. p. 135.

11. —— An action in disturbance cannot be supported against the *Fabrique* for the disturbance of a parishioner in the possession of his pew. A parishioner cannot have possession of a pew. *Wexler* vs. *Fabrique de Québec*, K. B. 1820, 2 R. de L. 277.

12. ——J., an elder and member of the congregation of St. Andrew's Church, Montreal, had been a pew holder in St. Andrew's Church continuously from 1867 to 1872, inclusive. In 1869 and 1872 he occupied pew No. 68 and received for the rental of 1872 a receipt in the following words:

Montreal, Jan. 9, 1872.

"$66.50.

"Received from James Johnston the sum of sixty-six dollars and fifty cents, being rent of first class pew No. 68 in St. Andrew's Church, Beaver Hall, for the year 1872.

"For the Trustees, J. CLEMENTS."

On the 7th December, 1872, the trustees notified J. that they would not let him a pew for another year. J. thereupon tendered them the rental for next year in advance. On several occasions in 1873, and while still an elder and member of the congregation, he was disturbed in the possession of pew No. 68 by the respondents, the pew having been placarded "For strangers," strangers seated in it, his books and cushions removed, etc. For these torts he brought an action against respondents, claiming $10,000 damages—*Held*, that J., being an elder and member of the congregation of St. Andrew's Church, Montreal, as such lessee, having tendered the rent in advance, was, under the by-laws, custom and usage and constitution of St. Andrew's Church, entitled to a continuance of his lease of the pew for the year 1873, and that reasonable, but not vindictive, damages should be allowed, viz: $300. *Johnston* vs. *The Minister and Trustees of St. Andrew's Church*, Supreme Court, 1877, 1 Can. S. C. R. 235. Appeal to P. C. refused, 3 App. Cas. 159.

13. —— The lessee of a pew has an action *in factum* against third parties who trouble him in his possession, and an action of damages in the case of assault.

The lessee's rights are based upon his title, which must be alleged and proved, for it is the defendant's absence of title which renders him liable for trespass or assault. *Champagne* vs. *Goulet*, C. R. 1884, 10 Q. L. R. 379.

14. Title to. (See also RIGHTS OF LESSEE).—The entry in the register of the *Fabrique* of the proprietor's name, the number of the pew and of the row in which it is situated, and the terms of the concession, constitute a sufficient title to the pew. *Tremblay* vs. *Fabrique de St. Irénée*, C. R. 1887, 13 Q. L. R. 26, 10 L. N. 82.

15. —— The mention in the register of the pew as being in a row other than that in which the proprietor occupied a pew with a similar number, during the 20 years following the concession, does not destroy the rights of the proprietor of such pew. (*Ib.*)

16. —— The concession of more than one pew to the same parishioner by the *Fabrique* with the tacit consent of the *fabriciens*, who made no objection, is valid. (*Ib.*)

XIII. REGISTERS.

1. There are succursal churches in this Province, but succursal parishes are not recognized. *In re* Mercier, S. C. 1872, 4 R. L. 376, 2 R. C. 441.

2. A succursal church can obtain a register, but only on the demand of the curate of the parochial church. (1) (*Ib.*)

3. The church of a canonical parish cannot be considered as a succursal. (*Ib.*)

XIV. TRUSTEES.

1. Mandamus—New Trustee. — One member of a religious congregation cannot by action at law compel the trustees of the church property to adopt the formalities necessary to secure the appointment of a new trustee to fill a vacancy, the remedy being by prerogative writ and not by action. *Smith* vs. *Fisher*, S. C. 1857, 2 L. C. J. 74.

2. Right of Survivorship.—Where property was vested in four trustees, two of whom are dead, for the use of a Presbyterian congregation in connection with the Church of Scotland, one of the surviving trustees cannot sue the other to give possession of the property in order that he may dispose of it by handing it over to another religious body, constituted out of an amalgamation of different religious bodies calling itself "The Presbyterian Church in Canada." *Morrison* vs. *McCuaig*, Q. B. Montreal, Jan. 20, 1883, confirming S. C. 1881, 4 L. N. 151.

XV. TRUSTEES FOR BUILDING.

1. Actions by—Authorization. — The pleas of trustees for building, etc., of churches will not be rejected for want of allegation that they were authorized by the parish to file such pleas. *Ducharme* vs. *Morison*, S. C. 1864, 8 L. C. J. 160.

2. Resolutions of.—A resolution adopted at a meeting of trustees for the erection of a parish church is irregular and null when the *procès-verbal* thereof does not state at what hour nor at what place the meeting was held, and where notice of the meeting was not given to all the trustees and some of them did not attend. *Chevrefils* vs. *Les Syndics de la Paroisse de Ste. Hélène*, S. C. 1869, 2 R. L. 162.

(1) See now 36 Vic., ch. 16, sec. 1. See Article in 2 Rev. Crit. 430.

3. Tenders by.—Tenders for the construction of a church when the price exceeds $50, cannot be proved by parol testimony. *Chevrefils* vs. *Syndics de la Paroisse de Ste. Hélène*, S. C. 1869, 2 R. L. 161.

4. One of the trustees for the construction of a church cannot make and present such tender to the trustees on behalf of a third party, for his position as trustee and as agent for a third party wishing to contract with the trustees are incompatible. (*Ib.*)

5. The acceptance of such a tender by the trustees cannot be proved by parol evidence, the price being above $50, and the trustees being a corporation can only bind themselves by writing. (*Ib.*)

6. But such trustees are individually competent as witnesses, when their private interests are not concerned, in a matter of religious concern to the whole body of parishioners. (*Ib.*)

7. Status of. — Trustees elected for the construction of churches before the operation of C. S. L. C., cap. 18, sec. 21, do not form a corporation. *Ducharme* vs. *Morrison*, S. C. 1864, 8 L. C. J. 117; and *Joly* vs. *Les Syndics de la Paroisse de Ste. Marthe*, S. C. 1867, 11 L. C. J. 74 and 17 L. C. R. 141.

CIRCUIT COURT. (See "JURISDICTION" —"WRIT OF SUMMONS")

Actions under $60.—In cases in the Circuit Court under $60, a deposit is required with preliminary pleas, and in such cases copies must be served on the plaintiff's attorney. *Lusher* vs. *Parsons*, C. Ct. 1873, 17 L. C. J. 196.

In actions under $60, the clerk cannot charge a fee on the plea to the merits when he has already been paid one on a preliminary plea. *Compagnie d'Assurance des Cultivateurs* vs. *Beaulieu*, C. Ct. 1878, 25 L. C. J. 24; *Palenaude* vs. *McCulloch*, C. Ct. 1878, 25 L. C. J. 164.

In cases in the Circuit Court for and under $60, no deposit is exigible. *Compagnie d'Assurance des Cultivateurs* vs. *Beaulieu*, C. Ct. 1878, 22 L. C. J. 267, 1 L. N. 566, 9 R. L. 432.

In an action under $60, no deposit is necessary with an exception to the form. *Desjardins* vs. *Chrétien*, C. Ct. 1870, 15 L. C. J. 56.

In cases under $60, no deposit can be exacted with a preliminary plea. *Allie* vs. *Pamelin*, C. Ct. 1869, 14 L. C. J. 134.

CIRCUS.

A "circus" within the meaning of the Quebec License Act, 1878, applies only to equestrian shows given in circular inclosures, and not to mere acrobatic exhibitions, without the presence of horses. *Sparrow* vs. *Desnoyers*, S. C. 1886, M. L. R., 2 S. C. 273.

CIVIL DEATH.

ART. 38 C. C.—A party condemned to death by the court-martial which sat in Lower Canada in 1839, and subsequently pardoned, is not legally qualified to enter suit or take proceedings to revendicate his property forfeited by reason of his attainder. *Rochon* vs. *Leduc*, S. C. 1850, 1 L. C. J. 252, 6 R. J. R. Q. 52.

ART. 31 C. C.—A person confined in the provincial penitentiary, under a conviction for forgery, is not civilly dead, and a signification of a transfer during that period on his wife is valid. *Roweell* vs. *Darah*, S. C. 1858, 2 L. C. J. 208, 7 R. J. R. Q. 13.

CIVIL RIGHTS.

The civil rights of an individual in this country are not affected by the sentence of the courts of a foreign state, as the enforcement of such sentence by a foreign power would be a violation of public law and of the law of nations. *Addams* vs. *Worden*, Q. B. 1856, 6 L. C. R. 237, 5 R. J. R. Q. 93.

CIVIL STATUS. (See also "INTERDICTION.")

Proof of.—ARTS. 51 AND 232 C. C.—In the absence of registration, the civil status of a person can be proved by the sayings of his parents and by witnesses. *Motz* vs. *Moreau*, S. C. 1855, 5 L. C. R. 433, 3 R. J. R. Q. 347. Q. B. 7 L. C. R. 147, 3 R. J. R. Q. 369.

Registers of. (See also "CURATE.")—A minister of a Presbyterian congregation, in communion with the Church of Scotland, is entitled to keep registers for baptisms, marriages and burials, notwithstanding that, in the place where he officiates, another church, also in communion with the Church of Scotland, has been previously established under the authority of the government. *Clugston exparte*, K. B. 1831, Stuart's Rep. 448.

A dissenting minister of a Protestant congregation is not a public officer nor a person in holy orders recognized by law, and, therefore, cannot keep or authenticate a register of baptisms, marriages and sepultures. (1) *Spratt exparte*, K. B. 1816, 2 Rev. de Lég. 332 and Stuart's Rep. 90 and 149, 1 R. J. R. Q. 154.

Change of—Effect upon party to suit.—When the change of *status* of a party to a suit only occurs after the proceedings by way of execution against him have commenced, such proceedings may continue, notwithstanding such change of *status*. *Symes* vs. *Farmer*, S. C. 1883, 27 L. C. J. 185.

Change of — Judicial adviser. — The appointment of a judicial adviser does not change the *status* of the party, and therefore it is not necessary to have him intervene for the purpose of continuing the suit. *Rolland* vs. *Michaud*, Q. B. Mont., 2 March, 1876.

CLUB.

Suspension.—A member of a club who was suspended on account of his misbehaviour during a public ball given by it, has an action of damages against it where they did not observe the formalities required by the by-laws of the club. *Cushing* vs. *Victoria Skating Club*, S. C. 1873, 5 R. L. 299; same case repeated 1 R. L. 705.

CODES.

Amendments to.—*Held*, that notwithstanding the Statute (Que.), 31 Vic., ch. 7, sec. 10, articles of the Civil Code and Code of Procedure may be affected or repealed by subsequent legislation, without express mention being made of the articles so affected or repealed. *Brossoit* vs. *Turcotte*, Q. B. 1875, 20 L. C. J. 141.

Interpretation.—The works of learned French authors, whether written before or after the promulgation of the *Code Napoléon*, are useful only in so far as they explain what may be ambiguous or doubtful in the Canadian Civil Code; they cannot control its plain letter or express provisions. *Herse* vs. *Dufaux*, P. C. 1872, 9 Moore (N. S.) 281, 310.

When the Civil Code refers to existing laws, not formulated in its articles, or in so far as on any subject it is silent, inquiry is permissible into the old law, and it will in many cases become a question of construction what and how much of that law remains in force, or is abrogated as being contrary to or inconsistent with the provisions of the Code. *Abbott* vs. *Fraser*, P. C. 1874, L. R., 6 P. C. 96, 117.

(1) See now Art. 5429 R. S. Q. and Arts. 39 to 78 C. C. and Arts. 1236 to 1241j. C. P. C.

French version to control English in certain cases.—If there be any difference between the French version and the English, in a matter which is one of French law, the French version using a French technical term should be the leading one. *Exchange Bank* vs. *The Queen*, P. C. 1886, 11 App. Cas. 157.

COERCIVE IMPRISONMENT. (1)

(*Contrainte par Corps.*)

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I. ALIMENTARY ALLOWANCE.

(See also under title "Aliments.")

A person who is imprisoned for resisting process of the court until payment, is entitled to an alimentary allowance. *Coté* vs. *Vermette*, S. C. 1883, 9 Q. L. R. 340.

(1) See series of articles by E. Lareau, 6 R. L. 84, 277, 7 R. L. 379, and Thesis by R. Lemieux (Montreal, 1896).

II. DEFENCE.

1. Where a rule for coercive imprisonment has been made absolute, it is not competent to the party condemned, by a subsequent petition, to allege payment and non-indebtedness previous to the judgment on the rule. *Généreux* vs. *Howley*, S. C. 1877, 21 L. C. J. 162.

2. The defendant can set up the same grounds of defense against plaintiff's motion for a rule of coercive imprisonment as he could against the rule itself. *Crevier* vs. *Crevier*, S. C. 1877, 9 R. L. 313.

3. Art. 792 C. C. P.—A rule for coercive imprisonment can be revoked by the same court that granted it, upon petition of the debtor. *Leduc* vs. *Cusson*, C. Ct. 1896, 2 Rev. de Jurisprudence 9.

III. DISCHARGE FROM.

1. Judicial Abandonment—Effect of.—Art. 793 C. C. P.—Art. 2275 C. C.—The defendant having closed his doors and obstructed a judicial sale of his effects of which he was guardian, was ordered to be imprisoned, under Art. 782 C. C. P., until he should have satisfied the judgment against him. Previous to the date of this order he had made an abandonment of all his effects for the benefit of his creditors. At the date of the judgment ordering his imprisonment his *bilan* was being contested by the plaintiff on the ground of fraud, and the result of the contestation was that the defendant was condemned to ten days' imprisonment for fraud. This punishment he underwent. The abandonment was acted upon in the usual manner, the goods which had been secreted by the defendant were returned to the estate, and a final distribution of the assets was made amongst the creditors. On a petition by the defendant for his liberation—*Held*, Art. 793, § 4, C. C. P., under which the debtor may obtain his discharge by the abandonment of his property, is general in its terms and applies without distinction to all cases of coercive imprisonment in civil matters, and to all the preceding articles of the section, including Art. 782; and therefore the defendant, after undergoing the sentence of imprisonment for fraud, was entitled to his liberation. *Chartrand* vs. *Campeau*, C. R. 1893, 4 Que. 163, and see *Winning* vs. *Leblanc*, 14 L. C. J. 335.

2. But the debtor will not be entitled to discharge, where he makes an abandonment of his property, until four months have elapsed

from the filing of the schedule and declaration of abandonment. *Winning* vs. *Leblanc*, S. C. 1870, 14 L. C. J. 335 ; *Coté* vs. *Vermette*, S. C. 1883, 9 Q. L. R. 340.

IV. DISCRETION OF COURT.

1. The court has not the power to order the imprisonment of a person until he has done a specific deed, such as to make a return of effects seized, if there be no specific law authorizing it. *Early* vs. *Moon*, Q. B. 1846, 2 Rev. de Lég. 121, 2 R. J. R. Q. 178 ; and see *Whitney* vs. *Dansereau*, S. C. 1860, 4 L. C. J. 211.

2. The court can exercise its discretion in granting coercive imprisonment, and can order it for a limited time. *Quenneville* vs. *St. Aubin*, S. C. 1892, 2 Que. 72 ; *Houle* vs. *Desautels*, C. Ct. 1889, 18 R. L. 315 ; *Goyette* vs. *Berthelot*, S. C. 1889, 19 R. L. 147.

3. But will not exceed a limit of one year. *Goyette* vs. *Berthelot*, S. C. 1889, 19 R. L. 147.

4. It is within the discretion of the court to refuse coercive imprisonment in the case of a condemnation for personal damages, and in civil cases it is against the dictates of humanity to order the imprisonment of a sick person. *McNamara* vs. *Gauthier*, S. C. 1893, 3 Que. 370.

5. And where such damages have been paid the defendant will not be imprisoned for the costs of the action which have not been paid, such costs being no longer an accessory of the debt. (*Ib.*)

V. NATURE OF.

1. Coercive imprisonment is a mode of executing judgment. *Coté* vs. *Vermette*, S. C. 1883, 9 Q. L. R. 340 ; *Roy* vs. *Bétournay*, S. C. 1882, 1 Que. 139.

2. It is therefore not necessary to mention it in the judgment on the suit. *Roy* vs. *Bétournay*, S. C. 1892, 1 Que. 140.

VI. PROCEDURE.

1. Alias Writ.—An alias writ of coercive imprisonment issued without a previous order from the court is void, as being contrary to Art. 781 C. C. P. *Lamoureux* vs. *Gilmour*, C. R. 1886, 17 R. L. 608.

2. Discussion.—It is not necessary to execute against the defendant's property before demanding a rule for coercive imprisonment. *Roy* vs. *Bétournay*, S. C. 1892, 1 Que. 140.

3. —— It is not necessary to discuss the defendant's immoveables previous to demanding a rule for coercive imprisonment against him. *Quenneville* vs. *St. Aubin*, S. C. 1892, 2 Que. 72.

4. —— But, *held*, in an action for damages resulting from false arrest by *capias*, the court will not adjudicate upon a demand for coercive imprisonment where the plaintiff has not shown that he has first executed against the defendant's property. *Kenna* vs. *Clarke*, S. C. 30th June, 1884. Noted at 16 R. L., p. 122.

5. Fol Adjudicataire.—In a rule for coercive imprisonment against a *fol adjudicataire*, to compel payment of the loss occasioned by the resale of the property originally adjudged to him, it is not necessary to describe the property. *Delisle* vs. *Sauche*, C. R. 1881, 26 L. C. J. 162.

6. Formalities necessary. — Coercive imprisonment may be accorded, in the case of damage resulting from personal injury, after the judgment awarding damages, and even if it be not demanded by the conclusions of the declaration. *Ouellette* vs. *Vallières*, C. Ct. 1882, 26 L. C. J. 391, and see *Perrault* vs. *Charbonneau*, S. C. 1882, 5 L. N. 204 ; *Labelle* vs. *Pelletier*, S. C. 1895, 8 Que. 114 ; *Lozeau* vs. *Charbonneau*, S. C. 1880, 3 L. N. 255 ; *Barthe* vs. *Dagg*, S. C. 1880, 25 L. C. J. 161.

7. —— The formalities required in proceedings for coercive imprisonment are absolute, and must be observed under pain of nullity. *Hudon* vs. *Miller*, C. R. 1888, 32 L. C. J. 253.

8. —— Where the formalities prescribed by the judgment granting the rule had not been complied with, the defendant was discharged from custody on motion. *Gugy* vs. *Donahue*, S. C. 1859, 9 L. C. R. 274.

9. —— Art. 787 C. P. C.—In case of application for imprisonment the rule must contain all the essential allegations contained in the motion or petition therefor. *Varin* vs. *Cook*, S. C. 1861, 5 L. C. J. 160.

10. Judgment — Procès-verbal. — Against his imprisonment under a rule the petitioner urged that the judgment by which he was imprisoned should have simply ordered him to appear and show cause ; that the judgment itself did not order the imprisonment, but that a writ should issue *condemning the defendant to be* imprisoned ; that the *procès-verbal* of arrest by the sheriff did not show that a copy of the *procès-verbal* had been served upon defendant. Petition dismissed

on all grounds. *Lozeau* vs. *Charbonneau*, S. C. 1880, 3 L. N. 255.

11. Judgment — Service. — Judgment went against the defendant for a certain amount of damages for assault. The plaintiff moved for his commitment, in default of payment. The plaintiff did not say anything about signification of copy of the judgment. He should have set up that four months had elapsed since the copy of the judgment had been served on the defendant. For want of that allegation, the application for a rule was dismissed. *Simard & Marsan*, C. R. 1880.

12. Married Women.—In obtaining a rule for coercive imprisonment against a married woman who has been authorized by her husband to defend the action taken against her, it is not necessary to serve the rule upon the husband. *Roy* vs. *Bétournay*, S. C. 1892, 1 Que. 139. But see *Cloutier* vs. *Cloutier*, S. C. 1860, 10 L. C. R. 457.

13. —— But, *held*, a rule for coercive imprisonment against a woman, separated only as to property, will be rejected, unless notice of the rule be given to the husband. *McDonald* vs. *McLean*, S. C. 1860, 11 L. C. R. 6.

14. Motion.—An application for coercive imprisonment cannot be granted on a simple motion therefor after notice. *Higgins* vs. *Bell*, S. C. 1873, 17 L. C. J. 274.

15. Notice to Defendant.—Art. 781 C. P. C.—In proceedings for coercive imprisonment, the party proceeded against should have notice from the beginning. *Roy* vs. *Beaudry*, S. C. 1861, 6 L. C. J. 85.

16. —— Notice is not required in the case of a guardian. *Rodier* vs. *McAvoy*, S. C. 1876, 20 L. C. J. 305.

17. —— But, *held*, that no man could be imprisoned without previous notice to himself personally. *Benjamin* vs. *Wilson*, S. C. 1856, 1 L. C. J. 4, 5 R. J. R. Q. 361.

18. —— Service of the motion for the rule *nisi* is not necessary, personal service of the rule being sufficient. *Watzo* vs. *Labelle*, C. Ct. 1882, 26 L. C. J. 121; *Roy* vs. *Bétournay*, S. C. 1892, 1 Que. 139.

19. —— A demand of payment and notice that application for coercive imprisonment will be made in default of payment, after the delay fixed by law, must be made and given before coercive imprisonment for non-payment of the amount of the judgment can be granted. *Blais* vs. *Barbeau*, C. Ct. 1871, 1 R. C. 246.

20. —— Personal service of the rule is not necessary, personal service of the motion being sufficient. *Delisle* vs. *Sauché*, C. R. 1881, 26 L. C. J. 162.

21. —— The rule cannot be issued without notice *personally* served upon the defendant. *Leduc* vs. *Cusson*, C. Ct. 1896, 2 Rev. de Jurisprudence 9.

22. Return.—A rule for coercive imprisonment against a guardian, made returnable on a day when the court is not sitting, is void and null. *Lepage* vs. *Garon*, C. R. 1885, 11 Q. L. R. 370.

23. Service of New Rule.—Service of a rule for coercive imprisonment upon a person while he is in custody and restrained of his liberty under a previous order of the court in the same cause, and not made by personal service between the wickets as required by Art. 70 C. P. C., is null and of no effect. *Lamoureux* vs. *Gilmour*, C. R. 1886, 17 R. L. 611, M. L. R., 2 S. C. 437, 31 L. C. J. 212.

VII. TIME AND PLACE OF ARREST.

1. Imprisonment of a defendant condemned to coercive imprisonment for default of paying the amount of a judgment, should take place in the district where the defendant resides, and not in the district where the judgment was rendered. *Lacoste* vs. *Castagne*, S. C. 1882, 11 R. L. 337.

2. —— So held also where the defendant was condemned to coercive imprisonment for resisting execution. *Massue* vs. *Crébassa*, Q. B. 1866, 2 L. C. L. J. 22; S. C., 8 L. C. J. 122, and 16 L. C. R. 446.

VIII. WHEN IT LIES.

1. Amount, etc.—Coercive imprisonment for personal wrongs is left to the discretion of the court, but it only lies where the damages awarded amount to $16.66⅔ or over, and four months after service upon the defendant of the judgment awarding them; it cannot be executed within the fifteen days after the judgment ordering it. *Nysted* vs. *Darbyson*, S. C. 1883, 9 Q. L. R. 322; *Morrison* vs. *Mullins*, S. C. 1888, 16 R. L. 114.

2. —— Coercive imprisonment will lie for damages granted for slander, even where the amount awarded is only $5, provided that such amount added to the costs exceeds $16.66. *Houle* vs. *Desautels*, C. Ct. 1889, 18 R. L. 315; and see *Goyette* vs. *Berthelot*, S. C. 1889, 19 R. L. 147. But see *Nysted* vs. *Darbyson*, S. C. 1883, 9 Q. L. R. 322.

3. —— Coercive imprisonment may be accorded in respect of an award of damage for only $25. *Ouellette* vs. *Vallières*, C. Ct. 1882, 26 L. C. J. 391.

4. Action between Husband and Wife.—An order for coercive imprisonment may be granted in an action for separation from bed and board. *Gravel* vs. *Lahoulière*, 1886, M. L. R. 2 S. C. 294.

5. Delay to produce Account.—There is no right of imprisonment against the holder of an immoveable who has been condemned to give up possession of it and to render an account of the fruits and revenues because he has not produced his account within the delay fixed by the court. *Crowley* vs. *Chrétien*, S. C. 1882, 11 R. L. 375.

6. —— Curator to a vacant estate, who has been ordered to deposit with the prothonotary the balance shown on the face of his account, to be in his hands before contestation of such account or final judgment thereon, is not subject to coercive imprisonment for non-compliance with such order. *Wood* vs. *McLennan*, S. C. 1861, 5 L. C. J. 253.

6a. Costs. — Coercive imprisonment does not lie for costs. *McNamara* vs. *Gauthier*, S. C. 1893, 3 Que. 370; and see *Quenneville* vs. *St. Aubin*, S. C. 1892, 2 Que. 72.

7. False Arrest.—The plaintiff obtained judgment against the defendant in $200 damages for having caused his arrest without probable cause. On a rule for coercive imprisonment, in satisfaction of the judgment—*Held*, that the imprisonment of the defendant may be asked for by motion after judgment, though imprisonment was not asked for by the action. *Barthe* vs. *Dagg*, S. C. 1880, 3 L. N. 316.

(In this case the defendant did not raise the question as to the validity of coercive imprisonment for enforcing judgment for false arrest.)

8. —— And in another case a rule for imprisonment was granted in the case of damages for false arrest on *capias*, but here again the defendant did not raise the question as to the right to a rule in such case. *Kenna* vs. *Clark*, S. C. 30 June, 1884; noted at p. 122, vol. 16, R. L.

9. "Personal Injuries." — The words "personal injuries" include anything that is said, written or done with the express object of injuring or offending a person, but do not include corporal injuries caused accidentally, such as a bite from a vicious horse. *Morrison* vs. *Mullins*, S. C. 1888, 16 R. L. 114.

10. —— But, *held* otherwise, where the injury is caused by the gross negligence of the defendant, such as rapid driving in the streets whereby a person was knocked down and severely injured, and the defendant did not stop to see what damage he had done. *Girard* vs. *Gignac*, S. C. 1886, 9 L. N. 196.

11. Resistance to Execution or Seizure.—A sheriff's return to a writ of execution, setting forth that the defendant has refused to open the door of his dwelling-house, in order that the sheriff might seize, is only *primâ facie* evidence of the fact, and is not sufficient evidence of itself to justify a condemnation for imprisonment. *Kemp* vs. *Kemp*, S. C. 1858, 2 L. C. J. 280.

12. —— But *held*, later, that a rule for imprisonment may issue upon the return of the sheriff that the debtor refuses to open his doors to the sheriff charged with the sale of the debtor's goods, under a writ of execution. *Massue* vs. *Crebassa*, S. C. 1864, 8 L. C. J. 122, Q. B. 1866, 2 L. C. L. J. 22; *Desharnais* vs. *Amiot*, C. Ct. 1853, 4 L. C. R. 43.

13. —— On appeal from a judgment of the Superior Court, dismissing an appeal from the Circuit Court by a person condemned to civil imprisonment for refusing to open his doors to a bailiff—*Held*, that, by the ordinance of 1785, the defendant was liable to coercive imprisonment, and that by a writ in the nature of a *capias ad satisfaciendum*, and that there was error in the judgment of the Superior Court dismissing the appeal. *Mercure* vs. *Laframboise*, Q. B. 1855, 5 L. C. R. 168, 4 R. J. R. Q. 322.

14. —— No mitigating circumstances could prevent the issue of the writ where the resistance was established. *Campbell* vs. *Beattie*, S. C. 1858, 3 L. C. J. 118.

15. —— A defendant is liable to coercive imprisonment, under C. C. P. 782, for conveying away and secreting his effects under seizure, where said effects have been transferred to his father-in-law by a sale through the medium of an assignee, and which sale is manifestly fraudulent and simulated. *Jacques Cartier Permanent Building Society* vs. *Roy*, C. Ct. 1880, 3 L. N. 314.

16. —— On a motion for a rule of coercive imprisonment against the sheriff on the ground that he was the guardian of the goods when the defendant offered none, and, as such, was liable therefor, and on a rule for coercive

imprisonment it was not necessary to offer any alternative on default of producing the movables seized. *Leverson* vs. *Boston*, Q. B. 1858, 2 L. C. J. 297, and see *Watzo* vs. *Labelle*, C. Ct. 1882, 26 L. C. J. 121; *McCaffrey* vs. *Claxton*, Q. B. 1880, 25 L. C. J. 191, 3 L. N. 292.

17. —— But, *held*, by the Superior Court, that, notwithstanding such judgment of the Court of Appeals, the rule would be dismissed altogether on the ground that it did not itself give the alternative of paying the value of the effects seized. *Leverson* vs. *Cunningham*, S. C. 1858, 3 L. C. J. 97, and 7 L. C. R. 275, and see *Lord* vs. *Moir*, C. Ct. 1863, 7 L. C. J. 80.

18. —— A rule against a guardian should enumerate the goods to be delivered by him and their value, so that the guardian can free himself from the rule by paying the value of such goods. *Morin* vs. *Robitaille*, C. R. 1888, 32 L. C. J. 124.

19. —— **Contra.**—C. C. P. 792 applies to all the cases in Section VII, C. C. P. 781-795. And in the commitment of a guardian for not producing effects placed under his guardianship it is not essential that there should be an enumeration of the effects he has to deliver up in order to obtain his liberation. *McCarthy* vs. *Jackson*, C. Ct. 1886, 10 L. N. 53.

20. —— Upon petition for coercive imprisonment for resisting process of the court the proof must be based solely on the bailiff's return and affidavits. *Lefebvre* vs. *Gingras*, C. Ct. 1885, 9 L. N. 43.

21. —— The bailiff's affidavit cannot be admitted to prove an essential act omitted in his return, and to correct an error as to date. (*Ib.*)

22. —— Neither will the bailiff be allowed to produce another return. (*Ib.*)

23. —— Coercive imprisonment for resistance to the process of the court must be likened to imprisonment in civil matters, to obtain which a close adherence to the necessary formalities is necessary. (*Ib.*)

24. Slander.—Coercive imprisonment will not lie for damages for slander where such slander was merely an incident to an action taken by the defendant against the present plaintiff, and although such slander was malicious and made with intent to injure the present plaintiff. *Riverin* vs. *Lessard*, S. C. 1892, 2 Que. 70.

25. —— But, *held*, by the same judge in the same year that where a *woman* accuses a person of committing perjury, even she will be liable to coercive imprisonment for the damages awarded by the court, such injury being a "personal" one. *Roy* vs. *Betournay*, S. C. 1892, 1 Que. 139.

IX. WHO LIABLE TO.

1. Invalids.—See *supra* "Discretion of Court No. 4." *McNamara* vs. *Gauthier*, S. C., 3 Que. 370.

2. Married Women.—Arts. 2272, 2273 and 2276 C. C.—In an action to recover a penalty from a married woman separate as to property, trading in her own name, for not having made the declaration required by Art. 981 C. C. P., coercive imprisonment will not lie, and a judgment ordering it under such circumstances will be void. *Guay* vs. *Durand*, C. R. 1893, 3 Que. 250.

3. —— A rule for coercive imprisonment against a married woman upon a judgment for principal, interest and costs, cannot be obtained. *Scott et al.* vs. *Prince*, K. B. 1831, Stuart's Rep. 467, 1 R. J. R. Q. 358.

4. Septuagenarian.—*Held*, that a sheriff is liable to imprisonment for failure to produce the things seized, although he be over seventy years of age. *Leverson* vs. *Boston*, Q. B. 1858, 2 L. C. J. 297; and see *Ouimet* vs. *Meunier*, S. C. 1893, 3 Que. 43.

5. —— And it would appear that judicial sureties over 70 years of age are liable to coercive imprisonment. See remarks of Ramsay, J., in *Ouimet* vs. *Desjardins*, Q. B. 1880, 3 L. N. 108.

6. Sureties in Appeal.—Sureties in appeal are judicial sureties, and as such are liable to coercive imprisonment. *Dumont* vs. *Dorion*, S. C. 1871, 3 R. L. 360; *Ouimet* vs. *Desjardins*, Q. B. 1880, 3 L. N. 108.

7. —— Judicial sureties are not entitled to a delay of four months before becoming subject to coercive imprisonment. *Dupras* vs. *Sauvé*, S. C. 1881, 4 L. N. 299.

8. Women.—*Held*, that the neglect or refusal on the part of a woman to comply with a judgment of the court, which orders the making of an inventory, does not make her liable to coercive imprisonment for contempt, and that the right of coercive imprisonment does not exist against women guilty of such neglect or refusal. *Larochelle* vs. *Mailloux*, Q. B. 1866, 16 L. C. R. 407.

9. —— *Held*, that, under Arts. 2272 and 2276 C. C., a woman may be imprisoned when

condemned to damages for personal injuries, which damages are unsatisfied. *Quenneville* vs. *St. Aubin*, S. C. 1692, 2 Que. 72; *Roy* vs. *Betournay*, S. C. 1892, 1 Que. 139.

COLLECTORS.

Collectors have no right to charge $1.50 nor any other sum for cost of writing a letter to a debtor claiming the debt, and where such sum has been collected it must be refunded. *Lachapelle* vs. *Larose*, C. Ct. 1884, 7 L. N. 353.

COMMERCIAL MATTERS. (1)

I. Commercial Debts. 1.

II. What are Commercial Matters. 1-24.

1. Commercial Debts.—The alterations made in the old law by the Civil Code as to commercial debts are too radical to allow of the jurisprudence based thereon being of present value. *McGreevy* vs. *McGreevy*, C. R. 1891, 17 Q. L. R. 278.

II. WHAT ARE COMMERCIAL MATTERS.

1. A contract by a carpenter and joiner to build a house for a person not a trader is a commercial matter. *Kennedy* vs. *Smith*, Q. B. 1856, 6 L. C. R. 260.

2. A contract to furnish materials for a house and to build it was *held* to be a commercial contract. *McGrath* vs. *Lloyd*, S. C. 1856, 1 L. C. J. 17.

3. A contract made by two persons, by which they obligated themselves to furnish to a railway company a quantity of railway ties at so much a thousand, the price to be divided between them, constituted a commercial partnership between them within the meaning of 65 C. S. L. C. and Art. 1834 C. C., requiring the registration of a declaration of the formation of such partnership. *Larose* vs. *Patton*, S. C. 1872, 17 L. C. J. 52.

4. A partnership between a sheriff and a lawyer for working a sawmill is a commercial partnership. *Couturier* vs. *Brassard*, C. Ct. 1873, 18 L. C. J. 8.

5. A contract to construct a railing with granite posts round a cemetery lot by a marble cutter who supplies the material is a commercial contract. *Morgan* vs. *Turnbull*, S. C. 1888, 14 Q. L. R. 121.

6. A blacksmith who furnishes the iron which he forges is a trader. *Sirois* vs. *Beaulieu*, C. R. 1887, 13 Q. L. R. 293.

7. A farmer selling cordwood from his land is a trader dealing in similar articles within the meaning of Art. 1489 C. C. *Canada Paper Company & British American Land Company*, Q. B. 1882, 5 L. N. 310.

8. A partnership formed between two contractors for the purpose of carrying on the business of building railways is a commercial partnership. *McRae* vs. *McFarlane*, C. R. 1891, M. L. R., 7 S. C. 288; *McLea* vs. *McDonald*, Q. B. Montreal, Feb. 3, 1876.

9. A contract between an individual and the government to supply stone for the locks of the Lachine canal was held by the Privy Council to be a commercial contract. *McKay* vs. *Rutherford*, P. C. 1848, 6 Moore, P. C. 413, 13 (Eng.) Jurist 17.

10. A loan by a non-trader to a commercial firm is not subject to the limitation of six years (before the Code) or to the prescription of five years (under the Code). (*Wishaw* vs. *Gilmour*, 15 L. C. R. 177 approved.) *Darling* vs. *Brown*, Supreme Ct. 1877, 21 L. C. J. 169, 1 Can. S. C. R. 360, confirming Q. B., 21 L. C. J. 92; *MacDonald* vs. *Dillon*, S. C. 1883, 27 L. C. J. 214.

11. An action by a non-trader to recover moneys loaned and advanced by him to the defendants, merchants and co-partners, and for which they gave an acknowledgment in writing by means of a letter, is not susceptible of trial by jury, and the option therefor, in the pleadings of the defendant, will be struck therefrom upon motion, upon the ground that the contract is not of a mercantile nature only. *Gilmour* vs. *Wishaw*, Q. B. 1865, 15 L. C. R. 177, confirming S. C., 6 L. C. J. 320, 13 L. C. R. 91.

12. The plaintiff, a tavernkeeper, sued the defendant, a lieutenant in the army, on two promissory notes made by the latter—*Held*, that this was not a commercial matter so as to justify a *capias ad satisfaciendum*. (1) *Herald* vs. *Skinner*, K. B. 1810, P. R. 1.

13. *Held* (reversing the judgment of the Court below), that a covenant to sell and deliver hemlock-bark is a commercial matter, and can be proved by oral testimony, notwithstanding Article 1233 of the C. C. *Fee* vs. *Killett*, C. R. 1886, 10 L. N. 186.

14. The sale of a wagon and harness by a

(1) Commercial Law of Lower Canada. See Articles 2 Rev. de Leg. 442, 3 R. de L. 1-41, defining who are traders and what constitutes a commercial contract.

(1) The capias *ad sat*. no longer exists.

hotel-keeper to the defendant, described as a farmer and trader, is a commercial fact, and can be proved by parole evidence. *Vandal* vs. *Grenier*, S. C. 1855, 6 L. C. R. 475, 5 R. J. R. Q. 144.

15. The sale and use of a patent for manufacturing purposes is a commercial matter. *Dery & Hamel*, Q. B. 1884, 7 L. N. 405, 11 Q. L. R. 24.

16. A music teacher who buys pieces of music and re-sells them to his pupils at a profit does not thereby become a trader. *Morgan* vs. *Leboutillier*, S. C. 1879, 5 Q. L. R. 212.

17. The plaintiffs and others, bricklayers and masons, having undertaken to make certain masonry under a written agreement from the defendant on the Quebec and Richmond Railway, and having, during the progress of the work, been employed with their men at extra work, by the day, brought action against the defendant, and produced their brother as a witness to prove such extra work; but, upon objection, the evidence of the brother was declared to be inadmissible. Subsequently, the defendant attempted to prove by parol evidence payment of such extra work, and, after objection, the evidence was allowed to be taken *de bene esse*. Eventually, the action was dismissed, and the case having been carried to appeal—*Held*, to be a commercial action, and the judgment of the court below reversed. *Fahey* vs. *Jackson*, Q. B. 1857, 7 L. C. R. 27.

18. Insurance against fire, by an insurance company, is a commercial transaction. *Smith* vs. *Irvine*, Q. B. 1845, 1 Rev. de Lég. 47, 1 R. J. R. Q. 452.

19. *Held*, that an action for the non-delivery of a cargo, which the defendants, who were merchants, had, as alleged in the declaration, bargained and sold to the plaintiff, a blacksmith, a trial by jury might be had. *Hunt* vs. *Bruce*, K. B. 1810, 1 R. J. R. Q. 53, Pyke's Rep. 3.

20. In an action by a merchant against a brewer for a quantity of beer stored in his cellar, it was held to be a commercial matter, so as to be within the Statute of Frauds. *Pozer* vs. *Meiklejohn*, K. B. 1809, Pyke's Rep. 11, Stuart's Rep. 122.

21. A tavern-keeper is a trader and dealer, and his note to a merchant, payable to his order, may be transferred by a blank indorsement; it is a commercial note. *Patterson* vs. *Welsh*, K. B. 1819, 2 Rev. de Lég. 30; and *McRoberts* vs. *Scott*, K. B. 1821, 2 Rev. de Lég. 31.

22. *Semble*, that, notwithstanding the generality of the language of Art. 2260, transactions between traders, outside of their regular business relations, and *à fortiori* between traders and those who are not, are not of a commercial nature. *Filiatrault* vs. *Goldie*, Q. B. 1893, 2 Que. 368.

23. A sale by a trader of an article in which he does not deal, to a non-trader, is not a commercial matter within the meaning of article 2260 of the Civil Code. *Gray* vs. *L'Hôpital du Sacré Cœur*, S. C. 1887, 13 Q. L. R. 85.

24. For a trader to be considered as a trader in respect of the sale which he makes, the article sold must be one of a kind in which he trades. See *LeBlanc* vs. *Rasconi*, Mag. Ct. 1873, 4 R. L. at p. 601.

COMMERCIAL TRAVELLERS.

I. Claim for Salary.
II. Privilege for Salary. 1-3.
III. Taxation of. 1-4.

I. CLAIM FOR WAGES.

When a commercial traveller, engaged by the year, quits the service of his employer without legal cause and against the will of his employer, and without previous legal notice, he forfeits all claim to wages accrued to the time of his quitting said service. *Nixon* vs. *Darling*, S. C. 1883, 27 L. C. J. 78.

II. PRIVILEGE FOR SALARY.

1. *Held*, that the word "clerk" in article 2006 of the Civil Code includes a commercial traveller whose services were also required in the store of his employer containing the goods on which the privilege is claimed. *Harris* vs. *Heyneman*, S. C. 1885, M. L. R, 1. S. C. 191.

2. But, in appeal, although not determined by the Court, the correctness of the above holding was doubted. M. L. R., 2 Q. B. 466.

3. And in another case, *held*, rejecting the claim as to privilege, that a commercial traveller was not a "clerk" within the meaning of that article. *Ross* vs. *Fortin*, S. C. 1881, 8 Q. L. R. 15.

III. TAXATION OF.

1. A merchant who sends out agents and travellers to take orders on samples or sell

goods is a travelling merchant within the terms of the by-law of the city of Quebec, 12 Oct., 1866, imposing a tax on such, and if he is not provided with a license, his clerk or agent should take out one in his own name. *Piché* vs. *Corporation de Québec*, S. C. 1882, 8 Q. L. R. 270.

2. The by-law of the city of Quebec (12 Oct. 1866), imposing a special tax upon commercial travellers, etc., and obliging them to take out a license, is in conformity with the act of the late Province of Canada, 29 and 30 Vic., ch. 67, sec. 20, and neither the act nor the by-law are *ultra vires*. (1) (*Ib.*)

3. Discrimination in taxation between residents and non-residents is only an objection, when unjust and oppressive. (1) *Corporation of Three Rivers* vs. *Major*, Q. B. 1881, 8 Q. L. R. 181, 11 R. L. 238, 2 Dorion Q. B. Rep. 84.

4. Such taxes are not in restraint of trade. (*Ib.*)

COMMINATORY CLAUSE.

A clause in a deed of donation to the effect that, if the donee should alienate the property given, he should be obliged to pay 2000 livres to the donors, is not comminatory. *Cheval* vs. *Morrin*, S. C. 1862, 6 L. C. J. 229.

ARTS. 1536, 1537, 1538 C. CODE.—A stipulation in a deed, that in default of purchaser paying his first instalment when due, vendor might treat deed as null, on notifying purchaser to that end, accompanied by an express declaration that such stipulation was *de rigueur*, and one without which the vendor would not have signed the deed, is comminatory, and therefore not executory *à la rigueur*. (2) *Homier* vs. *Demers*, 1856, 1 L. C. J. 12, 5 R. J. R. Q. 368.

ART. 1131 et seq. C. CODE.—A clause in an obligation stipulating "that in case the debtor should make default in the payment of the interest to accrue and become due on a principal sum for the space of thirty days after the interest payments should become due and payable, then and in that case the whole of the principal sum, with all interest then due, should immediately become due and exigible," is not a covenant which will be regarded as a *clause comminatoire*, but will be enforced. *McNiven* vs. *Board of Arts and Manufactures for Lower Canada*, S. C. 1862, 6 L. C. J. 222, 12 L. C. R. 535.

(1) In the Supreme Court case of Jonas *vs.* Gilbert (New Brunswick) the by-law taxing commercial travellers was held *ultra vires*, because it discriminated between licenses taken out by local travellers and those from outside, which the court held was not authorized by the Statute under which the by-law was enacted. (5 Can. S. C. R. 356, 4 L. N. 93). But, in Piché *vs.* Corp. of Quebec, such discrimination was expressly allowed by the Statute.

(2) But see Richard *vs.* Fabrique de Quebec, Q. B. 1854, 5 L. C. R. 3, 4 R. J. R. Q. 260, apparently *contra*.

And see Beaudry *vs.* Bareille, Q. B. 1845, 1 R. J. R. Q. 447.

COMMISSAIRES D'ECOLES.

(See "SCHOOLS.")

COMMISSION MERCHANTS.

(See also "AGENCY.")

Who are.—In three cases the plaintiffs sued to recov $50 levied on them by the City of Montreal a by-law imposing a tax on brokers, m nders nd commission merchants, and which they had paid under protest. The plaintiffs were ship agents, and in two of the cases were part owners of the vessels of which they were the agents—*Held*, that the question was governed by the Arts. of the Code 1735 and 1736, defining brokers and commission merchants, and that, as the plaintiffs did not come within that definition, they were not liable to the tax and had a right to recover. *Thompson* vs. *City of Montreal*, *Shaw* vs. *City of Montreal*, and *Sidey* vs. *City of Montreal*, C. Ct. 1881, 4 L. N. 327.

A commission merchant who receives money as the price of wheat for a party for whom he deals, has no right to pay it into his own account to be applied generally to the creditors of the purchaser. *Kershaw* vs. *Kirkpatrick*, Q. B., Sept., 1876. Confirmed in Privy Council 1878, 3 App. Cas. 345.

COMMISSION TO TAKE EVIDENCE.

I. AFFIDAVIT.
II. APPLICATION FOR. 1-2.
III. DELAY TO SUE OUT THE COMMISSION. 1-2.
IV. EXECUTION OF WRIT.
V. FOREIGN — WITNESS.
VI. GRANTED IN CHAMBERS.

I. AFFIDAVIT.

For old cases relating to necessity, or otherwise, of affidavit, see *Willis* vs. *Pierce*, S. C. 1858, 2 L. C. J. 77; *Lane* vs. *Ross*, S. C. 1860, 4 L. C. J. 295; *Johnson* vs. *Whitney*, S. C. 1862, 6 L. C. J. 29; *Lane* vs. *Campbell*, Q. B. 1863, 8 L. C. J. 68.

II. APPLICATION FOR—DELAY TO DEMAND.

1. A commission to take evidence will not be granted after the expiration of the ordinary delays, unless sufficient reasons are given to satisfy the judge that the party demanding it is in good faith. *Dessaules* vs. *Higginson*, Q. B. 1865, 12 R. L. 665; *Harvey* vs. *Phillips*, S. C. 1869, 14 L. C. J. 279.

2. An application for a commission to take evidence against the validity of a power of attorney, not attacked by any pleading, cannot be allowed. *Canada Tanning Extract Co.* vs. *Foley*, Q. B. 1875, 20 L. C. J. 180.

III. DELAY TO SUE OUT THE COMMISSION—316 C. C. P.

1. The *mere order* for the issuing by the defendants of a commission to take evidence is sufficient to prevent the plaintiffs from inscribing their cause for judgment, although the plaintiffs formally notify the defendants in writing to use due diligence, and although an interval of fifteen days has elapsed between the date of the order and the day named in the inscription for hearing *without any attempt being made by the defendant to sue out the commission so allowed to issue.* *Tarratt* vs. *Barber*, S. C. 1865, 10 L. C. J. 27.

2. In the absence of the return of a commission to take evidence issued by the plaintiff, the defendant cannot be compelled to proceed with his *enquête*. *MacFarlane* vs. *Bresler*, S. C. 1852, 2 L. C. R. 238, 3 R. J. R. Q. 159.

IV. EXECUTION OF WRIT.

Where a commission has been addressed to six commissioners, of whom three have been named by each party, and the writ directs that *any two* of the commissioners may execute the writ, the execution of it by two of the plaintiff's commissioners, without explanation why the others did not join, is sufficient. *Tarratt* vs. *Foley*, S. C. 1865, 11 L. C. J. 140.

V. FOREIGN—WITNESS.

In consequence of the Dominion Act, 31 Vic., ch. 76, a witness may be compelled to give evidence under a commission issued out of a foreign court. *Exparte Smith*, S. C. 1872, 16 L. C. J. 140.

VI. GRANTED IN CHAMBERS.

In a case of *capias*—*Held*, that a consent motion for a commission to examine witnesses in Upper Canada would be granted in chambers. *Moss* vs. *Wilson*, S. C. 1863, 14 L. C. R. 26.

COMMISSIONER OF RAILWAYS.

Cannot be impleaded before the ordinary Tribunals.—The Commissioner of Railways under the Quebec Railway Act 1880, being a member of the Executive Council of the Province, represents the sovereign authority, and cannot be impleaded before the Civil Courts of the Province for an act performed by him in the discharge of his duties as such commissioner. *Molson* vs. *Chapleau*, S. C. 1883, 6 L. N. 222.

COMMISSIONERS' COURT.

I. JURISDICTION OF. 1-11.
II. JUDGMENT. 1-3.
III. POWERS OF CLERK OF.
IV. PROCEDURE IN.
V. RECUSATION OF COMMISSIONERS.

I. JURISDICTION OF.

1. ARTS. 398 and 1042 MUNICIPAL CODE.—The Commissioners' Court has no jurisdiction to hear an action for the recovery of rates imposed by the road inspector for work done. *Gauthier* vs. *Corporation de Ste. Marthe*, S. C. 1892, 2 Que. 432.

2. Nor an action to recover a license imposed by the Town of St. Henry upon pedlars. *L'Abbé* vs. *Fichaud*, S. C, 1893, 4 Que. 409.

3. ARTS. 1188 and 1189 C. C. P.—Nor an action of damages *ex delictu*. *Legendre* vs. *Lemay*, K. B. 1820, 2 Rev. de Leg. 337.

4. Nor action for tithes. *Roy* vs. *Bergeron*, 2 R. L. 532.

5. Nor in a case for the recovery of £6 5s., sued for as due on a note for a larger amount, without remission of the balance. *Exparte* vs. *Desparois*, S. C. 1859, 7 L. C. J. 35.

6. ART. 1188 C. C. P.—The Commissioners' Court has jurisdiction for the recovery of the balance of a sum exceeding $25, provided such balance does not exceed that sum. *Bourbeau exp.*, S. C. 1862, 13 L. C. R. 65.

7. ART. 1187 C. C. P.—The Commissioners' Court for the trial of small causes extends to cases against a party sued as an

heir. *Exparte Charbonneau*, S. C. 1863, 7 L. C. J. 122.

8. *Held*, on *certiorari*, that in an action before a Commissioners' Court, praying for a condemnation of £6 5s or for an account of the defendant's gestion as tutor, that a judgment condemning the defendant to pay a sum of money would be quashed. *De Montigny exp.*, S. C. 1856, 6 L. C. R. 484, 5 R. J. R. Q. 149.

9. A Commissioners' Court has jurisdiction to hear and determine a cause against an Indian, and to issue a writ of execution upon judgment rendered in such cause; and the fact that goods have been seized which are by law declared to be exempt from seizure, does not justify the issue of a writ of prohibition to the court from which the execution issued. *Cherrier* vs. *Terihonkow*, Q. B. 1889, M. L. R., 5 Q. B. 33.

10. The proper proceeding in such circumstances is an opposition *afin d'annuler*. (*Ib.*)

11. In suits in the Commissioners' Courts the jurisdiction must be manifest on the face of the writ, and, therefore, a summons of a party residing in the village of Acton Vale, to appear before the Commissioners' Court for the township of Acton is bad, unless it appear on the face of the writ or otherwise in the proceedings that the village is within the township. *Exparte MacFarlane*, S. C. 1872, 16 L. C. J. 221.

II. JUDGMENT OF.

1. When a judgment of a Commissioners' Court has been once pronounced, it cannot be altered so as to increase the amount of condemnation. *MacFarlane* vs. *Bourgeault*, S. C. 1872, 16 L. C. J. 221.

2. A judgment rendered by a commissioner who can neither read nor write is null and illegal, and will be quashed upon *certiorari*. *Meloche* vs. *Brunet*, S. C. 1892, 3 Que. 128; *McCormack* vs. *Loiselle*, S. C. 1888, 11 L. N. 413.

3. ART. 1183 C. C. P.—Cause heard before and taken *en delibéré* by two commissioners for trial of small causes, cannot be adjudged by *one* of such two commissioners *alone*. *Exparte Brodeur*, S. C. 1857, 2 L. C. J. 97, 6 L. R. Q. 400.

III. POWER OF CLERK OF.—ART. 1191 C. C. P.

Clerks of Commissioners' Courts have no authority under 14 and 15 Vic., cap 18, to receive the necessary affidavit and issue a writ of attachment before judgment. *Carpenter exp.*, S. C. 1854, 4 L. C. R. 319, 4 R. J. R. Q. 174.

IV. PROCEDURE IN.—ARTS. 1206, 1208, 1214 C. C. P.

An opposant in a case before the Commissioners' Court is not bound to proceed to proof on the return day, but is entitled to have a subsequent day fixed for trial. *Lamoureux* vs. *Luttrell*, S. C. 1881, 4 L. N. 298.

V. RECUSATION OF COMMISSIONERS.

Commissioners of Commissioners' Courts may be recused like other judges. A judgment rendered by a commissioner personally interested in the suit will be annulled though the ground of recusation was not invoked at the trial. *Radiger exp.*, S. C. 1881, 4 L. N. 305.

COMMISSIONERS FOR THE ERECTION OF PARISHES.—See CHURCHES.

COMMISSIONERS FOR ERECTION OF PUBLIC BUILDINGS.—Arts. 1041 and 1715 C. C.

A contractor for a public building can maintain an action against the commissioners with whom he contracts to erect it, if they have received from Government the money which is due him. *Larue* vs. *Crawford*, 1819, 2 Rev. de Lég. 124, Stuart's Rep., p. 141, 1 R. J. R. Q. 177.

COMMISSIONERS FOR TAKING EVIDENCE.

Where a commissioner had been appointed to take evidence in an election case, and having transferred his claim for fees, etc., for such services, the transferee brought action against the parties—*Held*, that such transfer was legal, and that the parties were jointly and severally liable for the amount. *McCord* vs. *Bellingham*, S. C. 1857, 2 L. C. J. 42, 6 R. J. R. Q. 333.

COMMISSIONERS OF THE PEACE.

The words "commissioner of the peace" and "justice of the peace" are synonymous. *Falconbridge* vs. *Tourangeau*, 1847, 2 Rev. de Lég. 188.

COMMISSIONS OF INQUIRY. (1) (2)

I. Powers of Commissioners. 1-4.

II. Proceedings by Mandamus against Commissioners.

I. POWERS OF COMMISSIONERS.

1. Commissioners appointed under Arts. 596 and 598 R. S. Q. to inquire into certain matters affecting a corporation, have not a general power to order the production of the stock book of the corporation, but it has first to be shown that the stock book contains matter pertinent to the inquiry, and then they only have the right to the inspection of such portions as might have reference to the subject matter of their inquiry. *In re Armstrong*, S. C. 1892, 1 Que. 408.

2. A commission of inquiry issued by the Lieut.-Governor-in-Council, under section 596 R. S. Q., has the same power to enforce attendance of witnesses, and to compel them to give evidence before it, as is vested in any court of law in civil cases, and has, therefore, the power to punish by fine or imprisonment, or both, any contempt of its authority by any person summoned as a witness refusing to appear, or to answer questions put to him concerning the matters which are the subject of such inquiry. *Turcotte* vs. *Whelan*, Q. B. 1891, M. L. R., 7 Q. B. 263, reversing S. C., M. L. R., 6 S. C. 289.

3. Even if the commissioners, in the course of the inquiry which they were duly authorized to make, had permitted some irregular or illegal questions to be put to a witness, their improper ruling on the subject could not have authorized the issue of a writ of prohibition, which only applies to cases of want of jurisdiction, and not to cases of erroneous judgments, for which other remedies are provided. (*Ib.*)

4. An inquiry into an alleged attempt to influence and corrupt members of the provincial legislature is a matter connected with the good government of the Province, and the conduct of the public business therein, within the meaning of R. S. Q. 596. (*Ib.*)

II. PROCEEDINGS BY MANDAMUS.

The respondent, a commissioner appointed by the governor in council under 32 Vic., cap. 8, to inquire into the conduct of appellant as a justice of the peace, was required by the latter to furnish a detailed statement of the accusation, to allow him the assistance of counsel, to allow him the right to cross-examine the witnesses, and to allow him to produce witnesses on his own behalf, which demand having been refused, appellant petitioned for and obtained a writ of mandamus addressed to respondent as such commissioner, directing him to accede to appellant's demand or show cause to the contrary—*Held*, confirming the decision of the court below, that respondent was not bound to grant the four things so demanded, that the appellant had no specific legal right to the same, and that the writ of mandamus must be quashed. *Belleville* vs. *Doucet*, Q. B. 1875, 1 Q. R. L. 250.

(1) Inquiries concerning public matters: R. S. Q., secs. 596-598, as amended by 53 Vic., ch. 14 (Que.), 55-56 Vic., ch. 6 (Que.), 59 Vic., ch. 11 (Que.).

(2) Inquiries concerning public matters: R. S. C., ch. 114, as amended by 52 Vic., ch. 33.

COMMUNITY.—(See "Marriage Covenants.")

Continuation of community abolished by 60 Vict., c. 52, and instead a legal usufruct in certain cases substituted.

COMMUNICATION PRIVILEGIEE.

(See "Libel and Slander—Evidence.")

COMPANY AND CORPORATION LAW. (1)

I. Agents. (See also under title "Agency.")

Contractors as Agents — Appointment of Sub-Agents. 1.

Liability of Corporation for Acts of. 2-3.

Powers of. 4.

II. Agreement to pay in Stock of Company.

III. Books of.

Contempt of Court for not producing. 1-3.

Right of Members to Examine. 4-6.

(1) Quebec Joint Stock Companies Act amended, 58 Vict, c. 37 (1895): Increase or decrease of number of directors.
" amended, 56 Vict. c. 35 (1893). Repeal of 52 Vict. c. 42: Effect of charter.
" amended, 54 Vict. c. 35 (1890): Authority to issue notes and bonds, etc.: Registration of bonds.
Dominion Joint Stock Companies Act amended, 60-61 Vict. c. 27: Exception to restrictions of borrowing powers.
" amended, 58-59 Vict. c. 21 (1895): Power of Loan Companies to hold real estate necessary for business. Limitation as to other real estate.
An Act respecting Safe Deposit Companies, 60 Vict. (Q.), c. 76 (1897).
An Act respecting Taxes upon Commercial Corporations and Companies, 59 Vict. (Q.), c. 15 (1895).

Rule against Bank to produce in Court. 7.

IV. By-Laws—Contestation of Validity.

V. Calls—(See also Nos. XXX and XXXIV *infra*).
Action for—Certificate of Shares—Evidence—Pleading. 1.
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VI. Ceasing to do Business—Rights of Creditors.

VII. Directors. (See also "Members.")
Election of. 1-7.
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IX. Dissolution — Appointment of Curators.

X. Dividends.

XI. Fine payable under Art. 1025 C. C. P.—To whom payable—Mandamus.

XII. Foreign Corporations. (See also "Incorporation and Registration.")
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Disabilities of. 2.
Order of Ontario Court. 3.
Powers of, to carry on Business in Quebec. 4.
Receivers and Liquidators of.
Quality to sue. 5-7.
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XIV. Incorporation and Registration. (See also "Interference of Attorney-General.")
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XV. Interference of Attorney-General. (See also "Incorporation".) Art. 997 C. C. P. 1-5.

XVI. Land and Loan Company.
Powers of. 1.
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XVII. Letters Patent, Cancellation of (See also "Incorporation and Registration," No. 1.) (See also "Shares—Subscription to—Conditional.")

XVIII. Libel by. 1-2.

XIX. Meetings.
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XX. Members of Corporations.
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XXV. Rights of Creditors Generally.

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XXX. Shares.

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XXXI. Transfer of Immoveables of a Company.

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See also Acquiescence.
" Agency.
" Banks.
" Benefit Society.
" Bills and Notes.
" Building Societies.
" Club.
" Constitutional Law.
" False Arrest.
" Mandamus.
" Municipal Corporation.
" Quo Warranto.
" Railway Companies.
" Ratification.
" Service.
" Taxation.
" Telephone Companies.
" Turnpike Trustees.

I. AGENTS. (See under title "AGENCY.")

1. Contractors as Agents — Appointment of Sub-Agents.—See *Quebec and Richmond Ry. Co.* vs. *Quinn*, P. C., 1858, 12 Moore P. C. 232. Noted under title "Agency."

2. Liability of Corporation for Acts of.—Corporations are bound by the acts of their agents in the same way and to the same extent as persons are. *Ferrie & The Wardens of the House of Industry*, Q. B. 1845, 1 Rev. de Lég. 27.

3. ——Where the charter of a corporation does not provide for the exercise of its powers otherwise than by giving it the right to make by-laws for the "government of the institution and of the officers and servants belonging thereto," and no such by-laws are made, the persons who are admitted to have, *de facto* and by common consent, acted as the governing board of the body will be held to be its duly authorized agents, whose acts, performed within the limits of the charter, are binding upon it. *Hôpital du Sacré-Cœur* vs. *Lefebvre*, S. C. 1891, 17 Q. L. R. 35.

4. Powers of.— ARTS. 1704 and 1727 C. C. — (See "SECRETARY — POWERS OF.") —Action was brought against an insurance company for the value of advertising ordered by its agent at Quebec. The defendants denied all knowledge of the advertising, and all power on the part of the agent to order it—*Held*, confirming the judgment of the court below, that under the circumstance the agent had not exceeded his powers, and the company must be held responsible. *Commercial Union Insurance Company* vs. *Foote*, Q. B. 1872, 3 R. C. 40.

II. AGREEMENT TO PAY IN STOCK.

Appeal was from a judgment condemning appellant to pay respondent the sum of $194,317.40, as commission and for advances. Plaintiff and defendant entered into an agreement in 1872 for the purpose of carrying on the works of the Montreal, Portland and Boston Railway, under which appellant was to make certain advances. Subsequently, by another agreement, plaintiff was authorized to proceed to England to obtain a loan not exceeding $750,000, and was authorized to take a commission *in Company's bonds* of one-fourth of the estimated joint profit on the contract. The action was under this agreement, and judgment went for the amount claimed—*Held*, that the judgment was erroneous in condemning defendant to pay in money instead of in the Company's bonds. *Hibbard & Baylis*, Q. B. 1879, 2 L. N. 208.

III. BOOKS OF CORPORATION.

1. Rule to produce in Court—Contempt of Court for not producing.—The commissioners appointed by virtue of Articles 596 and 598 R. S. Q. to inquire into the affairs of an incorporated company, have not the power to order indiscriminately the production of the corporation's books; they can only order the production of books containing entries concerning the matter they are appointed to investigate. *In re Armstrong*, S. C. 1892, 1 Que. 408.

2. —— Before committing a witness for contempt in not producing the books of a corporation, such witness should be allowed to show cause why he should not be committed. (*Ib.*)

3. —— Commissioners appointed under Art. 596 R. S. Q. have by virtue of Art. 598 the same powers as courts of law to compel witnesses to appear and give evidence before them; and can punish for contempt of court by fine or imprisonment, or both, all witnesses who refuse to appear or answer questions put to them relating to the matter under inquiry. *Turcotte* vs. *Beique*, Q. B. 1891, 21 R. L. 452.

4. Right of Members to examine.—A person proving himself to have an interest in the affairs of a joint stock company is entitled to a mandamus to compel the directors to allow him to have communication of the books. *Hibbard* vs. *Barsalou*, S. C. 1865, 1 L. C. L. J. 98.

5. —— Where the plaintiff caused a writ of mandamus to issue to compel the company defendants to allow him, as a shareholder, to inspect the register of letters sent and received by the company—*Held*, that a shareholder had no right to insist upon an inspection of the register of letters when orders to the contrary have been given by the directors. *Murphy* vs. *La Compagnie des Remorqueurs du St. Laurent*, C. C. 1866, 16 L. C. R. 300.

6. —— The shareholders and creditors of a joint stock company have a right to demand inspection of the minute books of the directors, when it appears by the evidence that said minute books may contain certain entries required to be kept in the company's books under 40 Vic., cap. 43, § 36. *Anders & Hagar*, S. C. 1883, 6 L. N. 83.

7. Rule against Bank to produce in Court.—In an action against the directors of a bank for having issued false statements and

reports, a rule, after much difficulty, was granted against the bank in its corporate capacity for refusing to bring up its books and papers in obedience to a subpœna *duces tecum*, the court remarking that on the signification to the bank of the subpœna it was its duty to appoint an attorney in order to conform with the injunction. *Cowie* vs. *Trudeau*, S. C., see 2 L. N., p. 60, and *Stephen's Joint Stock Companies* at p. 234.

IV. BY LAWS — CONTESTATION OF VALIDITY.

A stockholder in a joint stock company may bring an action to account against the corporation, and thereby contest the validity of a by-law made by a board of its directors. *Keys* vs. *The Quebec Fire Assurance Co.*, K. B. 1830, Stuart's Rep., p. 425.

V. CALLS. (See also under title "BANKS AND BANKING.")

1. Action for — Certificate of Shares — Evidence—Pleading.—In an action by a joint stock company for calls on shares—*Held*, that the certificate which the law makes *primâ facie* evidence is not rendered ineffectual by the mere denial of the defendant, but continues to be operative until some evidence be adduced tending to disprove the facts of which the certificate is offered as evidence. The failure of plaintiffs to answer a plea denying that the proper formalities have been observed in respect of such calls, cannot be regarded as an admission of the allegations of the plea, under C. C. P. 114. *Stadacona Ins. Co.* vs. *Trudel*, C. R. 1879, 6 Q. L. R. 31, reversing S. C., 5 Q. L. R. 133.

2. Debentures accepted in payment of —Resiliation of Agreement. (See also under title "ACTION — WHERE IT MAY BE BROUGHT.")—In an action by liquidators for calls—*Held*, that the company, now represented by the plaintiff, having accepted railway debentures in payment of calls, and disposed of the debentures, the plaintiff could not ask for the resiliation of this transaction, especially without offering back what had been received. *Ross* vs. *Angus*, S. C. 1883, 6 L. N. 292.

3. Foreign Company.— In an action for calls in this province by the receiver of a company incorporated in Ontario, the action will be dismissed in the absence of proof that the calls were made regularly according to the laws of Ontario, and that the directors had the right to make such calls at the time they were demanded. *Primeau* vs. *Giles*, Q. B. 1887, 31 L. C. J. 271.

4. Action for—Formalities for making.—The enactment of a by-law to regulate the mode in which the calls shall be made is not imperative; where no by-law exists, the calls may be made as prescribed by the directors. *Rascony* vs. *Cotton Manufacturing Co.*, C. R. 1886, M. L. R, 2 S. C. 381.

5. —— No call can be made upon shares subscribed to a company unless the conditions precedent to such demand have been fulfilled. *Massawippi R. R. Co.* vs. *Walker*, S. C. 1871, 3 R. L. 450.

6. Notice of—Proof.—Proof that notices claiming payment of calls were mailed to the shareholders was sufficient evidence that such calls were made. *Ross* vs. *Converse*, Q. B. 1883, 27 L. C. J. 143, 6 L. N. 67.

7. On increased Capital—Failure to make Calls.—By sec. 11, 31 Vic., ch. 25 (Que.), it is provided that "no by law for increasing or decreasing the capital of the company shall have any force or effect whatever until it shall have been sanctioned by a vote of not less than two-thirds in amount of the shareholders at a general meeting of the company, duly called for considering the same, and afterwards confirmed by supplementary letters patent."

In virtue of the above provisions, on the 9th March, 1875, at a meeting of the board of directors of the St. John Stone Chinaware Company, a by-law was passed increasing the capital stock of the company by the issue of 250 additional shares, each payable by monthly instalments of ten per cent each.

At the general meeting of the stockholders held on the 8th June, 1875, for the election of directors and other business, the by-law passed by the directors for the increased capital was confirmed. There was no evidence as to whether the by-law was sanctioned by two-thirds in amount of the shareholders. There was no day appointed for the payment of the calls, and the books of the company contained no other entry relating to the calls for the decreased stock than the minutes of the meeting of the board of directors of the 9th March, 1875, and of the general meeting of the 8th June, 1875, aforesaid. In an action brought by the assignee of the company against W., an original stockholder and director, for calls of 20 shares of new stock, it was *held*, affirming the judgment of the

Court of Queen's Bench for Lower Canada, that there was no evidence of calls for the payment of the shares in question having been duly made, and therefore W. was not liable.

Per Fournier and Henry, JJ., there was no evidence that the by-law had been sanctioned by a vote of not less than two-thirds in amount of the shareholders at a general meeting of the company duly called for considering the same, and on that ground also the appeal should be dismissed. *Knight* vs. *Whitfield*, Supreme Ct., 16 Nov., 1885, confirming Q. B., Cassel's Digest, 2nd edit., p. 187.

8. —— But *held*, that shareholders of railway companies, incorporated after the passing of The Railway Clauses Consolidation Act, 14 and 15 Vic., ch. 51, are liable to the creditors for an amount equal to the amount unpaid on their stock, and in an action to recover the same it is not necessary to allege that the directors called in all such stock. *Cockburn* vs. *Starnes*, S. C. 1857, 2 L. C. J. 114.

VI. CEASING TO DO BUSINESS.

Rights of Creditors.—Although an incorporated company has ceased to do business and to elect directors for carrying it on, the creditors do not cease thereby to have the right to execute their judgments against the company. *Hughes* vs. *Lalonde*, C. R. 1889, 18 R. L. 205.

VII. DIRECTORS. (1)

1. Election of—Delay—28 Vic., Ch. 32 (Can.)—Insurance Co.—An election of directors made at a meeting called by a certain number of shareholders of the defendant company, before the expiration of the delay fixed by 28 Vic., ch. 32 (Can.), is irregular and void. *Williamson* vs. *Demers*, S. C. 1881, 12 R. L. 71.

2. —— The sale of the Kay stock referred to in the plaintiff's declaration was regular and legal, and was made in good faith, and was also acquiesced in by plaintiffs. *Gilman* vs. *Robertson*, 1884, M. L. R., 1 S. C. 5.

3. —— The defendants, Archer, Ostell, Hodgson and Moss, had no need of re-election as directors on the 7th of February, 1884, and such re-election did not legally affect their then status of directors until the annual meeting of the company in 1885. (*Ib.*)

4. —— The remaining directors were all duly and legally elected at the meeting of the company held on the 7th of February, 1884; all the said directors were duly qualified under the charter of the company. (*Ib.*)

5. —— **Notice of Meeting — Litispendence.**—Where an action has been taken to set aside new issue of shares, an action will at the same time lie to have the election of directors, who owe their position to such issue of shares, declared void. *Milot* vs. *Perreault*, C. R. 1886, 12 Q. L. R. 193.

6. —— An election of directors made at a meeting, of which all the shareholders have not been notified, is void. (*Ib.*)

7. —— A resolution whereby other directors are named does not exclude from their charge the directors in office, although the meeting had the power so to do, unless their dismissal is declared. (*Ib.*)

8. Liability of, for Torts of Company. (See also under title "Master and Servant.") —*Held*, the directors and shareholders of a joint stock company are not, as a general rule, responsible for the contracts and torts of the company; to render them so, there must have been some individual fault on their part personal to themselves.

In the absence of such gross fault, or fraud, there is no *lien de droit* between the directors of a company and non-shareholders as regards the public; the directors occupy merely the position of agents of a disclosed principal, viz., the company. *Thérien* vs. *Brodie*, S. C. 1893, 4 Que. 23.

9. —— **For false Representations—Damages.**—Directors of a company are personally liable for injury caused to third parties by false representations contained in a report of directors to the shareholders, but the injury must be immediate, and not the remote consequence of the representation, and it must appear that the false representation was made with the intent that it should be acted upon by such third persons. *Rhodes* vs. *Starnes*, S. C. 1878, 22 L. C. J. 113, 1 L. N. 314, and see Article 1 L. N., p. 313.

10. —— A shareholder cannot claim damages against directors for having been induced to purchase shares by misrepresentation, if he has continued to hold them without objection long after he had knowledge, or full

(1) Art. 4713 R. S. Q., amended by 58 Vic. (Q.), ch. 37, providing for increase or decrease of number of directors.

means of knowledge, of the untruth of the representations on which he bought them. (*Ib.*)

11. —— **For declaring fictitious Dividend.**—The directors of a joint stock company are personally liable toward the company, its shareholders and creditors, for all direct and immediate injury arising to them by the fault of the directors; for instance, where they have declared a dividend out of capital without the concurrence of the company, its shareholders or creditors, and when third parties have been induced to purchase stock in the company at exaggerated prices, owing to the declaration of fictitious dividends by said directors. *Banque d'Epargne de Montréal* vs. *Geddes*, S. C. 1890, 19 R. L. 684, M. L. R., 6 S. C. 243.

12. —— And, although the creditors of an insolvent company may complain of the payment of fictitious dividends by the directors, based on augmentation of the value of the company's real property, yet shareholders who attended the annual meeting of the company at which statements were produced by the directors, showing that the dividends were based upon the increased value of the property of the company added to the annual profits, and who approved of such dividends, cannot claim that they were misled by such dividends, and that they would not have purchased shares in the company at such a high price had they known how the dividend was compiled. (*Ib.*)

13. —— Shareholders who did not attend the meetings are equally without grounds of complaint, as they had a right to attend the meetings, and their ignorance of the statements then made arises from their own negligence. (*Ib.*)

14. —— **Mandate—Bank—Action of shareholder against director—Prescription—Litigious rights—Responsibility for acts of employees.**—The action of a shareholder of a bank against the directors, to recover loss occasioned by their gross negligence and mismanagement, being the action of mandate, is prescribed only by thirty years. *McDonald* vs. *Rankin*, S. C. 1890, M. L. R., 7 S. C. 44.

15. —— The action against the directors for maladministration appertains to the corporation, but in default of suit by the corporation it is competent to a shareholder to institute it. (*Ib.*)

16. —— Where several shareholders assign their claims to one of their number, not selling them to him, but constituting him procurator *in rem suam*, the defence of litigious rights cannot be pleaded; this form of association *ad litem*, *i. e.*, the joinder of several creditors to bring a joint action against the same defendant, being recognized by the civil law. (*Ib.*)

17. —— Directors of a corporation are bound to exercise the care of a prudent administrator in the management of its business. Such acts as allowing overdrafts by insolvent persons without proper security, the impairment of the capital of a bank by the payment of unearned dividends, the furnishing of false and deceptive statements to the Government, the expenditure of the funds of the bank in illegal purchases of its own shares, are acts of gross mismanagement amounting to *dol*, and render the directors personally liable, jointly and severally, for losses sustained by the shareholders by reason thereof. (*Ib.*)

18. —— Directors cannot divest themselves of their personal responsibility. While they are at liberty to employ such assistants as may be required to carry on the business of the corporation, they are nevertheless responsible for the fault and misconduct of the employees appointed by them, unless the injurious acts complained of be such as could not have been prevented by the exercise of reasonable diligence on their part. (*Ib.*)

19. —— **Company for Acts of — Ratification.**—Unlawful acts of the managing director of a company, designed to bring about the ruin of a copartnership firm, do not bind the company or make it responsible for damages, unless approved or ratified by the company. *Bury* vs. *Corriveau Silk Mills Co.*, 1887, M. L. R., 3 S. C. 218.

20. —— **Duration of**—See article in 14 Legal News, 407 — English Case.

21. **Powers of — Illegal increase of Capital.**—Even where the charter of a company allows the capital to be increased, the directors cannot augment the original capital where the business of the company (in this case a toll bridge company) does not require it, and there is sufficient cash on hand to meet all the requirements of the business, and especially where such increase is sought to be made with a view to maintaining the directors in office. *Perreault* vs. *Milot*, Q. B. 1886, 14 R. L. 417.

22. —— To dismiss Manager.—Directors may dismiss manager of company without notice when the latter is insolent and insubordinate. *Dick* vs. *Canada Jute Co.*, S. C. 1886, 30 L. C. J. 185.

23. Quorum—Where the quorum of directors of a railway company was fixed at three, by a special statutory provision, and the company was subsequently amalgamated with another company, and it was provided by the Act of Amalgamation that the board of directors of the amalgamated company should not be less than five nor more than seven directors (without expressly changing or regulating the quorum), that the original provision, making three directors a quorum, continued in force. *Fairbanks* vs. *O'Halloran*, 1888, M. L. R., 4 Q. B. 163.

24. Resolution of Board of—A resolution of a board of directors to enter into a contract with a third party gives no right of action to such third party until formally communicated to and accepted by him. *Girard* vs. *Bank of Toronto*, 2 L. N. 406 and 3 L. N. 115, C. R. 1879.

25. Sale by, to Company — Ratification at General Meeting — Vendor's Right to vote as Shareholder.—Ontario case appealed to Privy Council, reversing Supreme Ct. *Northwest Transportation Co.* vs. *Beatty*, 12 App. Cas. 589.

VIII. DISABILITIES OF. (1)

1. Acquiring Lands Mortmain—ART. 366 C. CODE.—Action was brought against the Grand Trunk Railway Company to recover the sum of £1852 3s 2d, being amount of *lods et ventes* and indemnity due by defendants on the acquisition by them of the St. Lawrence and Atlantic Railway, which passed through the seigniory of the plaintiff, together with the indemnity due to the seignior because the defendant was a corporation holding in mortmain—*Held*, that the defendant was a mere trading corporation, incorporated for commercial purposes, with perfect freedom of acquisition and alienation of its property, and the fact that its existence and succession was continuous and perpetual did not make it a corporation holding in mortmain. *Kierzkowski* vs. *The Grand Trunk Railway Co. of Canada*, 4 L. C. J. 86 and 8 L. C. R. 3, S. C. 1857, and 10 L. C. R. 47, Q. B. 1859; 6 R. J. R. Q. 93, S. C.; 6 R. J. R. Q. 124, Q. B.

2. —— Modern civil corporations established for commercial and trading purposes, as joint stock companies or incorporated banking, manufacturing or railway companies, cannot be considered mortmain corporations, nor do the restrictions placed by law on the latter apply to them. (*Ib.*)

3. —— Foreign Corporation.—A corporation cannot acquire land without the permission of the Crown or authority of the Legislature, and, therefore, a foreign corporation, not having such permission or authority, has no right of action by way of damages against the vendor of lands in the Province of Quebec sold to such corporation, by reason of eviction from such lands. *Chaudière Gold Mining Co.* vs. *Desbarats*, P. C. 1873, 17 L. C. J. 275, L. R., 5 P. C. 277, confirming Q. B., 15 L. C. J. 44 and S. C., 13 L. C. J. 132, 1 R. L. 82.

4. —— The charter granted to a building society by the Dominion Parliament is not *ultra vires*. *Colonial Building and Investment Association* vs. *Attorney-General*, P. C. 1883, 27 L. C. J. 295.

5. —— The fact that the operations of the company (allowed by the charter over the whole Dominion) have been limited so far to the Province of Quebec did not affect the validity of the charter. (*Ib.*)

6. —— Under the Dominion charter the appellant had a right to deal in real property in the Province of Quebec in the absence of any prohibition in the laws of the province to the doing so. (*Ib.*)

7. —— Under the issues as raised the court had no right to pronounce any opinion regarding the effect of the laws of the Province of Quebec on such dealings. (*Ib.*)

8. —— The provisions of C. C. 364-366 are general and apply to all corporations without distinction, and therefore a building society incorporated by the Dominion Parliament to carry on operations throughout the Dominion is subject to the disabilities imposed by C. C. 366, and cannot acquire immoveable property in the province of Quebec without the permission of the Crown or the authority of the local legislature. (1) *Cooper* vs. *McIndoe*, Q. B. 1887, 15 R. L. 276, M. L. R., 7 Q. B. 481, confirming S. C., M. L. R., 2 S. C. 388.

9. —— The defendant being sued for part of the price of an immoveable purchased from

(1) Sec. 94 Dominion Companies' Act R. S. C., ch. 119, replaced by 58 and 59 Vic., ch. 21, *re* Powers to hold real estate necessary for business and limitation as to holding other real estate and reversion thereof.

(1) But see Art. 4762 R. S. Q. as to lands necessary for occupation or prosecution of business only.

the plaintiff, pleaded that the plaintiff had acquired the immoveable in question by purchase from another without having the power so to do, being a corporation and by Art. 366 C. C. incapable of acquiring or holding real property in mortmain without special authorization. Plaintiff demurred on the ground of want of interest in defendant to so plead, the purchase by the plaintiff being *res inter alios acta*—*Held*, that the incapacity referred to in Art. 366 was not absolute, and the burden was on the defendant to show that it existed in the case in question, which he had not done. *St. Ann's Mutual Building Society* vs. *Brown*, S. C. 1881, 4 L. N. 184.

10. Bequests to—Arts. 366 and 836 C. Code.—The Code contains no restriction as to bequests in favour of corporations to be thereafter formed; and as to the devise, the prohibitions contained in Arts. 366 and 836 C. Code relate to the acquisition of immoveable property by corporations already formed. A devise by which property is given, not to trustees with power of perpetual succession, but simply to trustees directed to convey to a corporation only in the event of its being lawfully created with permission to possess it, is not within the scope of the said articles. (1) *Abbott* vs. *Fraser*, P. C. 1874, 20 L. C. J. 197, 6 R. L. 365.

11. —— Lapsed Legacy.—And the bequest of a sum of money for the benefit of a corporation not *in esse*, but in expectancy, is not to be considered a lapsed legacy. *Desrivières & Richardson*, K. B. 1826, Stuart's Rep. 218.

IX. DISSOLUTION OF.

Appointment of Curator —Judge in Chambers.—A judge in chambers has no jurisdiction to appoint a curator to a dissolved corporation until its dissolution has been judicially pronounced in due course of law. *In re Montreal Patent Guano Company*, S. C. 1874, 18 L. C. J. 129.

X. DIVIDENDS.

A company cannot declare a dividend based on the augmentation of value of the company's real property, but a dividend may legitimately be declared, based on a reconstruction fund appropriated from the annual profits, where it appears that the line and plant of the company were maintained in good order. *Banque d'Epargne* vs. *Geddes*, S. C. 1890, M. L. R., 6 S. C. 243, 19 R. L. 684.

(1) For arguments of counsel before the Court of Appeal in the "Fraser Institute" case, see 2 Rev. Crit. 249.

XI. FINE PAYABLE UNDER ART. 1025 C. C. P.

To whom Payable—Mandamus.—The fine which a corporation may be condemned to pay under Article 1025 C. C. P. should be ordered to be paid one half to the Crown and one half to the petitioner. *Montreal P. and B. Ry. Co.* vs. *Hatton*, 1885, M. L. R., 1 Q. B. 351, modifying S. C., M. L. R., 1 S. C. 69.

XII. FOREIGN CORPORATIONS.

1. Action against—Service—Arts. 34, 49, 64 C.C.P.—**Cause of action.**—A corporation whose principal place of business is in a foreign country may be served with process at any place in the Province of Quebec where it has an office for the transaction of business. So, where a foreign corporation had an office at Montreal, for the sale of sleeping car tickets, and the plaintiff, who had bought a ticket from the defendants at New York for a sleeping-car berth from that city to Montreal, brought an action of damages, alleging that he had been unlawfully expelled from the sleeping car. It was *held* that the service of his action at the office of the company in Montreal was a sufficient service to give the court at Montreal jurisdiction. Further, that, although the expulsion took place beyond the province line, yet as it continued until the plaintiff reached Montreal (he being forced to ride in a first-class car), the cause of action arose in this province. *New York Central Sleeping Car Co.* vs. *Donovan*, Q. B. 1882, M. L. R., 4 Q. B. 392.

2. Disabilities of.—Where a foreign corporation had purchased land in the Province of Quebec without permission of the Crown or Legislature—*Held*, that the corporation could not acquire land without such permission, and having done so it had no action of damages against the vendor. *Chaudière Gold Mining Co.* vs. *Desbarats*, P. C. 1873, 17 L. C. J. 275, 4 R. L. 645.

3. Order of Ontario Court. Sec. 84, 85, R. S. C. Ch. 129.—Under 45 Vic. (D), ch. 23, sec. 86, the courts in the Province of Quebec will enforce an order for the execution of a judgment, issued from a competent court in Ontario, in like manner as if it had been issued from a court in Quebec. *Queen City Refining Co.* vs. *Calcutt*, S. C. 1886, M. L. R., 2 S. C. 425, 16 R. L. 45.

4. Powers of, to carry on Business in Quebec.—Question whether the Niagara District Mutual Insurance Company, organized in Ontario, under 6 William IV., had power to carry on business in the Province of Quebec —*Held*, that the company, by subsequent statutes passed by the Legislature of the late Province of Canada, extended the powers of the company, and gave them full authority to transact business in Lower Canada. The action brought by plaintiff to annul the policy, and to recover the cash premium paid and premium note given, dismissed with costs. *Quintal & The Niagara District Fire Insurance Co.*, S. C. 1877.

5. Receivers and Liquidators of — Quality to sue.—A receiver, duly appointed and authorized under the laws of Ontario to represent in judicial proceedings a corporation (in liquidation) domiciled in that province, may also appear in his quality of receiver in judicial proceedings before the courts of the Province of Quebec. *Giles* vs. *Faneuf*, S. C. 1885, M. L. R., I S. C. 322.

6. —— —— *Held* (reversing the judgment of Taschereau, J., M. L. R., I. S. C. 166), where an action was brought in the Province of Quebec by the plaintiff as receiver to a corporation in liquidation domiciled in Ontario, and it was proved by the production of the Ontario Statute that the plaintiff, as receiver, was duly authorized to represent the corporation in judicial proceedings, he may also appear in his quality of receiver in judicial proceedings before the courts of the Province of Quebec. *Giles* vs. *Jacques*, 1887, M. L. R., 7 Q. B. 456; *Pacaud* vs. *Tourigny*, C. R. 1883, 10 Q. L. R. 54, and see *Giles* vs. *Giroux*, S. C. 1885, 13 R. L. 652.

7. —— —— But, where the foreign law is not proved, the court will take it for granted that it is the same as the local law, and where a case similar to the above was decided at the same time, and the Ontario Statute was only produced in the former case, the court decided that they could only look at it in the particular case in which it is produced, and for that reason dismissed this action. *Primeau* vs. *Giles*, Q. B. 1887, M. L. R., 7 Q. B. 467, 31 L. C. J. 271.

8. —— Right to Monies attached in this Province.—A receiver appointed under the Statutes of New York to an insolvent insurance company (whose powers and functions are the same as those of a foreign assignee in bankruptcy) cannot intervene in a case in Superior Court here, wherein monies belonging to the company have been attached before judgment, on the ground of insolvency and secretion of estate, and claim to be paid the monies so attached (less plaintiff's costs) for distribution in New York, the legal domicile of the company. *Osgood* vs. *Steele*, Q. B. 1871, 16 L. C. J. 141, and see *Bruce* vs. *Anderson*, K. B. 1818, Stuart's Rep. p. 127.

9. —— —— The plaintiff sued and took a seizure before judgment in the hands of the Niagara District Fire Insurance Company, against which the defendant had a claim for loss. The plaintiff obtained judgment against the defendant and the insurance company by default. In execution he took a new seizure against some of the members of the company who were indebted to him. The receiver intervened, setting up his appointment in the Court of Chancery in Ontario, the incorporation of the company and its insolvency. The defendant previous to this had filed his claim, and the pretension of the receiver was that the plaintiff could only be substituted in the place of the defendant and receive his dividend. The plaintiff contested this intervention upon a number of grounds of a formal character by which he attacked the appointment and status of the intervenant—*Held*, that the courts of the province to which the company in liquidation belonged had the sole right to take cognizance of any defects in the status of the receiver. *Pacaud* vs. *Tourigny*, C. R. 1883, 10 Q. L. R. 54.

10. —— —— And, *held*, also that the receiver so named could only *ester en jugement* in this province by alleging and proving his appointment, and the law which authorizes him to exercise that right in the province in which he was appointed. (*Ib.*)

11. —— —— *Held*, also, that the claims which a corporation, belonging to another part of the Dominion, possesses in this province are moveables which may be seized in execution of a judgment of the courts of this province, and the money arising from them may be distributed according to the rights of the creditors in this province, and the person appointed by a court outside of this province to liquidate the affairs of such a corporation cannot oppose the seizure and distribution of such claims. (*Ib.*)

12. —— —— *Held*, the liquidator appointed in the course of the voluntary winding up of a company formed in England under the Joint Stock Companies' Acts 1862-83, has no right to the possession of monies of the company in this province, previously attached by process under a judgment rendered against it, and an

intervention by him to quash the attachment and obtain such possession is properly dismissed on demurrer. *Powis* vs. *Quebec Bank*, Q. B. 1893, 2 Que. 566, S. C. 1893, 3 Que. 122.

13. Rights of, in this Province. — A foreign corporation, legally incorporated, may validly enter into contracts in this province, and sue in the courts of this province the persons with whom they contract, to compel them to fulfil their obligations. *Connecticut and Passumpsic River Ry. Co.* vs. *Comstock*, Q. B. 1870, 1 R. L. 589.

14. Winding up Order, —R. S. C. ch. 129, sec. 3.—**Constitutional Law.**— Sec. 3 of the "Winding-up Act," Revised Statutes of Canada, ch. 129, which provides that the act applies to incorporated trading companies doing business in Canada wheresoever incorporated, is *intra vires* of the Parliament of Canada. *Allen* vs. *Hanson*, in re *The Scottish Canadian Asbestos Co.*, Supreme Ct. 1890, 18 Can. S. C. R. 667, confirming Q. B., 16 Q. L. R. 79.

15. —— A winding up order by a Canadian court, in the matter of a Scotch company, incorporated under the Imperial Companies' Acts, doing business in Canada and having assets and owing debts in Canada, which order was made upon the petition of a Canadian creditor with the consent of the liquidator previously appointed by the court in Scotland as ancillary to the winding-up proceedings there, is a valid order under the said Winding-up Act of the Dominion. (*Merchants' Bank of Halifax* vs. *Gillespie*, 10 Can. S. C. R. 312, distinguished.) (*Ib.*)

XIII. IDENTITY OF INCORPORATED ASSOCIATION.

An incorporated body bearing the name under which appellants sue, brought an action against respondents, formerly office bearers in said association, to account. Respondents answered they were not accountable to appellant, that the association had ceased to exist by that name, that they were officers of the old company under another name representing the old association. In fact respondents contended that they represented the old association which had only changed its name. On the other hand, appellant contended that the facts did not bear that colour, that the office bearers had been expelled from the association, that they had gathered together with other members of the association, forming a majority of the association, and formed a new company under another name, determining to appropriate the funds of the old association. The majority of the court, affirming the judgment of the court below, *held* that the respondents were not accountable to the appellant. (Ramsay J., dissenting.) *Court Mount Royal Ancient Order of Foresters* vs. *Boulton*, Q. B., Montreal, 22 Nov., 1881, Ram. Dig. p. 329, M. L. R., 6 Q. B. 231.

XIV. INCORPORATION AND REGISTRATION. (1) (See "Interference of Attorney-General.")

1. Annulling Letters Patent. — The Crown alone has the right of demanding that letters patent, granted under the great seal of the province, be annulled. *Compagnie de Nav. Union* vs. *Rascony*, S. C. 1876, 20 L. C. J. 306.

2. For what Purpose Incorporation may be had — Navigation.—A company may be incorporated by letters patent for the purpose of navigation within the limits of this province under the Provincial Statute. *MacDougall* vs. *Union Navigation Company*, Q. B. 1877, 21 L. C. J. 63.

3. Forfeiture of Charter. — The fact that a railway company has not made the necessary deposit, nor commenced construction within the three years prescribed by its charter, does not *ipso facto* extinguish the company nor revoke its charter; and at all events extinction can only be procured upon special suit by the Attorney-General, *Roy* vs. *Cie. de Ch. de Fer Q. M. & O.*, S. C. 1888, 14 Q. L. R. 255.

4. ——The appellant company, by its act of incorporation, 14 Vic., ch. 61 (D.), was authorized to carry on business, provided $100,000 of its capital stock were subscribed for, and thirty per cent. paid thereon within six months after the passing of the act, and the Attorney-General of Canada having been informed that only $60,500 had been *bonâ fide* subscribed prior to the commencing of the operations of the company, the balance having been subscribed for by G. *in trust*, who subsequently surrendered a portion of it to the company, and that the thirty per cent. had not been truly and in fact paid thereon, sought at the instance of a relator, by proceedings in the Superior Court for Lower Canada, to have the

(1) Charters by Letters Patent may be granted, etc. R. S. Q. Art. 4696, as replaced by 56 Vic., ch. 35, sec. 2.
Granting of Letters Patent under Art. 4710 R. S. Q., amended by 58 Vic., ch. 37, omitting words "in Council."

company's charter set aside and declared forfeited.

Held, that the *bona fide* subscription of $100,000 within six months from the date of the passing of the act of incorporation, and the payment of the thirty per cent. thereon, were conditions precedent to the legal organization of the company, with power to carry on business, and as these conditions had not been *bonâ fide* and in fact complied with within such six months, the Attorney-General of Canada was entitled to have the company's charter declared forfeited. *Dominion Salvage and Wrecking Co.* vs. *Atty.-General*, Supreme Ct. 1892, 21 Can. S. C. R. 72.

5. Illegally acting as Corporation.—Art. 997 (1) C. C. P.—Petition under Art. 997 C. C. P. (1) to restrain defendants from acting illegally as a corporation under the name of the Silver Plume Mining Company. Plea that defendants were a private association and never held themselves out as a corporation to the knowledge of the relator. The proof was that they were regularly organized as a company. The capital was set down as a million, divided into 10,000 shares. One of the defendants was president, another vice-president, another secretary and others directors. Under the constitution and by-laws the stock was to be issued to a trustee who was to sign all transfers and certificates to shareholders. By Art. 1 of the constitution the company was to be a corporation, and by Art. 7 it was to have a corporate seal. Certificates were issued with the corporate seal, showing the number of shares which each represented. *Per Curiam.*—The court has no difficulty in deciding this case. The constitution of the company shows it to be a corporation. It has a corporate seal. It has a board of directors with power to make by-laws. All these circumstances show that the defendants have assumed to act as a corporation, and under the Art. in question was clearly illegal, and the conclusions of the Attorney-General should be granted. *Dorion* vs. *Attorney-General*, 4 L. N. 108, S. C. and 4 L. N. 372, Q. B. 1881.

6. Proof of Incorporation.—Proof of incorporation of a company can only be made by production of the letters patent granted it, or of a copy of the *Official Gazette* containing notice of the granting of the letters patent. Secondary proof will not suffice. *Garrick* vs. *Canada Pipe & Foundry Co.*, S. C. 1883, 3 Que. 383.

7. Registration of Declaration—Interference of Attorney-General.—12 Vic., cn. 41.—On a contestation to an opposition by the plaintiff, the principal ground of contestation being that the plaintiffs were not a body politic and corporate duly constituted, inasmuch as the requirements of the 12 Vic., cap. 57, sec. 1, regarding the filing of a declaration in the prothonotary's office, under the seal of the corporation, had not been complied with, the parties forming the corporation not having fixed their seals to it—*Held*, that as the declaration filed answered the object of the statute in making known the names of the parties originally composing the society, that it was sufficient, and that *moreover the legal existence of the corporation could not be questioned by a merely incidental proceeding, such as a plea in a cause, but must be regularly attacked under* 12 *Vic., cap.* 41. *Union Building Society* vs. *Russell*, S. C. 1858, 8 L. C. R. 276, 6 R. J. R. Q. 240.

8. —Foreign Corporation.—An incorporated company is not bound to enregister the certificate of incorporation required by 40 Vic., cap. 15, amended by 45th Vic., cap. 47, in a district where it has no branch house or office or place of business, but merely sells its goods to or through local agents selling on commission, and therefore is not liable to the penalty of $100 imposed by said acts. *Armitage* vs. *Massey Mfg. Co.*, S. C. 1886, 14 R. L. 666.

9. — Where an action *qui tam* was taken against the defendant as one of the shareholders of the Three Rivers Navigation Company for not having registered the company at Montreal in accordance with the provisions of the Statute 12 Vic., ch. 45, and the defendant pleaded by declinatory exception that the company's business was not transacted there—*Held*, dismissing the action, that the company was only bound to register under the said act at the place where their head office was situated. *Sénécal* vs. *Chenevert*, 4 L. C. J. 239, C. C., and 6 L. C. J. 46, and 12 L. C. R. 145, Q. B. 1860.

10. — The production of a notice and power of attorney by the agent of a foreign company filed in the office of the prothonotary in conformity with the Federal law is not sufficient for the purpose of the Provincial Act (1876), 40 Vic., ch. 15 and (1882) 45 Vic., ch. 47, which requires a declaration to be filed and *registered* in the office of the prothonotary. *Brown* vs. *Lord*, Q. B. 1889, 18 R. L. 383.

11. — Railway Company—Penalty.—R. S. Q., Art. 4757, 4754. — A railway

company which has no portion of its track within the province, and no place of business therein, except that of an advertising and canvassing agent who does not make any contracts for the conveyance of passengers or goods, is not liable to the penalty enacted by R. S. Q. Art. 4757 for omission to register the declaration required by R. S. Q. Art. 4754. *Bertin* vs. *Northern Pacific Ry. Co.*, S. C. 1893, 4 Que. 321.

XV. INTERFERENCE OF ATTORNEY-GENERAL. (See "Incorporation.")

1. Art. 997 C. C. P. — Petition by the Attorney-General, under C. C. P. 997, praying that the defendants, for reasons given, should be declared to have forfeited their charter. The case was before the court on the merits of an *exception à la forme* made by defendants on the ground that the proceedings should have been in the name of the Attorney-General of the Province of Quebec—*Held*, that the Attorney-General for the Province of Quebec had a right to petition, under C. C. P. 997, to have it declared that the Montreal Telegraph Company had forfeited their charter. *Loranger* vs. *Montreal Telegraph Company*, S. C. 1882, 5 L. N. 429.

2. —— The Attorney-General for the Province of Quebec can prosecute, under Art. 997 C. C. P., a company incorporated under a Dominion charter. *Turcotte* vs. *Cie. de Ch. de Fer Att. au Nord-Ouest*, S. C. 1889, 17 R. L. 398, and see *Pacaud* vs. *Rickaby*, Q. B. 1875, 1 Q. L. R. 245; *Roy* vs. *Cie. du Ch. de Fer Q. M. & O.*, S. C., 14 Q. L. R. 255.

3. —— In the case of a Dominion statutory charter, proceedings to set it aside were properly taken by the Attorney-General of Canada. *Dominion Salvage & Wrecking Co.* vs. *Attorney-General*, Supreme Ct. 1892, 21 Can. S. C. R. 72.

4. —— Such proceedings taken by the Attorney-General of Canada, under Arts. 997 *et seq.* C. C. P., if in the form authorized by those articles, are sufficient and valid though erroneously designated in the pleadings as *scire facias*. (*Ib.*)

5. —— The Attorney-General of the Province of Quebec is the sole *dominus* of a suit instituted by him in his official capacity, whether there be a relator or not. Accordingly, a *mandamus* will not lie at the instance of a relator to compel him to continue proceedings under Art. 997 C. C. P., nor need he obtain the leave of the court before discontinuing such proceedings. A succeeding Attorney-General cannot retract a discontinuance by his predecessor. *Casgrain* vs. *Atlantic & North West Ry. Co.*, P. C. 1894, 11 "The Reports," 449; [1895] A. C. 282. Confirming Q. B. 1892, 2 Que. 305.

XVI. LAND AND LOAN COMPANY.

1. Powers of.—The Montreal Loan & Mortgage Company can by virtue of its charter (Que. 1875, 39 Vic., ch. 63, sec. 14) contract for the lease of immoveables with promise of sale and delivery without such promise of sale having effect according to Art. 1478 C. C., and it is not necessary that the deed should recite that the contract was made under the provision of the said charter. *Macdougall* vs. *Roy*, S. C. 1887, 15 R. L. 406.

2. Purchase of speculative Claim.—A company incorporated as a land and loan company cannot lawfully purchase or deal in claims of a speculative character. *Land & Loan Co.* vs. *Fraser*, S. C. 1889, M. L. R., 5 S. C. 392.

XVII. LETTERS PATENT—CANCELLATION OF. (1) (See "Shares, Subscription to." And see "Incorporation and Registration.")

XVIII. LIBEL.

1. A corporation is responsible in damages for libel. *Brown* vs. *The Mayor of Montreal*, S. C. 1871, 17 L. C. J. 46.

2. An action for libel may be brought by one corporation against another corporation. *L'Institut Canadien* vs. *Le Nouveau Monde*, S. C. 1873, 17 L. C. J. 296.

XIX. MEETINGS.

1. Interference of Court with—Injunction.—An individual shareholder in a railway company is not entitled to an injunction forbidding a special meeting for the purpose of sanctioning a lease of the road to another railway company, until a meeting has been called at which the accounts of the company have been submitted, unless fraud by the majority or corrupt influence upon the minority have been proved. *Angus* vs. *The Montreal, Portland & Boston R. W. Co.*, S. C. 1879, 23 L. C. J. 161, 2 L. N. 203.

(1) Granting of letters patent under Art. 4710 R. S. Q., amended by 58 Vic., ch. 37, omitting words "In Council."

2. —— The petitioners by agreement with B., a shareholder holding the majority of shares in railroad company, obtained an option to acquire within two years a certain proportion of B.'s interest, and in the meantime until such option was declared, B. was to hold his shares as trustee for the petitioners, but he reserved the right to vote on the shares. B., after obtaining large advances from petitioners, became insolvent and left Canada, and petitioners applied for an injunction to prevent the annual meeting on the ground that, as they were precluded from voting by the reservation to B., the meeting of shareholders would be controlled by the minority, and they asked that the *status quo* be preserved until their option expired—*Held*, that the petitioners had not established a case justifying the interference of the court, and the injunction was dissolved. *Stephen* vs. *Montreal, Portland & Boston Railway*, S. C. 1884, 7 L. N. 85.

3. Railway Company—Railway Act, 42 Vict. (D), ch 9—Mandamus—Duty of President.—The annual meeting of the railway company defendant (a company subject to the provisions of the Consolidated Railway Act, 42 Vict. [Can.], c. 9), did not take place on the day appointed therefor, in consequence of an injunction suspending the holding of such meeting. This injunction was subsequently dissolved at the instance of a shareholder (7 L. N. 85)—*Held*, that service of notice upon the president and secretary that the injunction had been dissolved, together with a copy of the judgment dissolving the injunction, was sufficient to put the company *en demeure* to call the meeting, and a mandamus might issue in the name of a shareholder, under C. C. P. 1022, to compel the company to call the meeting. *Hatton* vs. *Montreal, Portland & Boston Ry.*, S. C. 1884, M. L. R., 1 S. C. 69. Confirmed in appeal, M. L. R., 1 Q. B. 351.

4. —— It was the duty of the board of directors, as soon as the injunction was dissolved, to proceed to call the said meeting, in order that the election of directors might be held, as provided by sect. 19 of the Consolidated Railway Act (42 Vict. [Can.], cap. 9.) (*Ib.*)

5. —— The calling of the annual meeting is not a duty specially appertaining to the office of president, the Railway Act (42 Vict., cap. 9) making it the duty of the "directors" to cause such meeting to be held. (*Ib.*)

XX. MEMBERS OF CORPORATIONS.

1. Action of Guarantee against.—It is not competent for one set of corporators who may be sued, in respect of debts due by the corporation of which they are members, as if they were members of a *mere co-partnership*, to call in their co-corporators in an action of guarantee, to indemnify them against their proportionate share of loss. *Howard* vs. *Childs*, S. C. 1857, 1 L. C. J. 160, 5 R. J. R. Q. 473. Confirmed in appeal, 12 Oct., 1857, the court being equally divided.

2. Expulsion of.—At common law, associations have the right to expel a member for legitimate causes.

Where a member refuses to submit to the rulings of the president at meetings, and interrupts the meetings, preventing them from proceeding with their regular business, and uses language calculated to annoy and irritate the other members present, he can be expelled from such association. *Lapointe* vs. *Association des Commerçants Licenciés, etc.*, S. C. 1888, M. L. R., 4 S. C. 1.

3. Impleading.—The individual members of a corporation cannot be impleaded in respect of the affairs of such corporation. *Cartier, Atty.-Gen.*, vs. *Yule*, S. C. 1857, 1 L. C. J. 289, 6 R. J. R. Q. 91.

4. Liability of.—Where the members of a corporation have regularly passed a resolution, they cannot be held personally responsible therefor, even when such resolution was in contravention of a statute which established punishment by fine for such contravention. *Audette* vs. *Duhamel*, S. C. 1868, 1 R. L. 52.

5. Rights of.—An action will not lie by a member who considers himself aggrieved to correct even errors or illegal acts in the government and administration of a corporation, until the remedies, by way of appeal to the domestic tribunal of the corporation, provided by the by-laws or the constitution, have been exhausted. *McIver* vs. *Montreal Stock Exchange*, S. C. 1888, M. L. R., 4 S. C. 112.

6. —— **Voting—Quo-warranto.**—That members of a corporation or public body are not disqualified from voting at the election of its officers, although fines which are still unpaid may have been imposed on such members under the by-laws of such corporation, if such fines have not been formally pronounced, and such members have not had an opportunity of giving their reasons why such fines should not be paid by them. *Heffernan* vs. *Walsh*, Q. B. 1886, 33 L. C. J. 46, M. L. R.,

2 Q. B. 482, reversing C. R., 14 R. L. 243. Appeal to Supreme Ct. quashed for want of jurisdiction, 14 Can. S. C. R. 738.

7. —— That an appeal provided by the by-laws of such corporation to a higher officer of the same does not take away the jurisdiction of the courts, unless such appeal is expressly provided for in the statute incorporating such society or public body. (*Ib.*)

XXI. POWERS OF DOMINION PARLIAMENT TO GRANT EXTENDED POWERS TO COMPANY INCORPORATED UNDER LOCAL ACT.

See discussion in Dominion Parliament on this subject reported 6 Legal News 126.

XXII. PROMOTERS.

1. Liability of—Incorporation under R. S. O., ch. 172.—Partnership.—Six persons, the plaintiff and defendant being among the number, signed a declaration under Revised Statutes of Ontario, chap. 172, and became incorporated under the name of the Home Benefit Life Association, and thereupon the association incurred certain liabilities in connection with its affairs, but the proposed business was not proceeded with, it being beyond the provisions of the statute under which the association was incorporated. Judgment being subsequently obtained against the plaintiff and his associates as partners, for a debt of the association, he paid the same, and now sued the defendant in the Superior Court of the Province of Quebec for half of the amount, alleging the above facts, and that the other members were insolvent and unable to contribute—*Held*, the articles of the association did not make the corporators liable as partners; there was no individual responsibility for the debts of the association, which, though unable to carry out the contemplated object, still exists as a corporate body, and the defendant never having become personally responsible for the payment of the debts the action could not be maintained. *Ellis* vs. *Drummond*, S. C. 1893, 4 Que. 473.

2. Solicitor's Fees.—A. was employed, through the instrumentality of W., by divers persons who had signed a petition for the purpose of obtaining letters patent for the incorporation of a company. The parties failed to pay for the services of A., who issued an action to recover the amount—*Held*, confirming the judgment of the Superior Court, that the parties signing the petition were benefited by the services of plaintiff, and were liable for the value of such services. (1) *Atwater* vs. *Importers and Traders Co.*, C. R. 1886, 31 L. C. J. 52.

3. —— Provisional Directors.—Where persons allow their names to be used as provisional directors of a proposed company for the purpose of obtaining a charter for such company, and who sign petitions to that effect, such persons are liable for the fees of the attorney whose services have been retained by the promoter of such company. *Auger* vs. *Corneillier*, Q. B. 1892, 2 Que. 293.

4. Obligations contracted on behalf of Corporation—Repudiation.—The party who contracts obligations on behalf of a company not at the time incorporated, but which it is proposed to incorporate, is personally liable for the execution of such obligation if the company after its incorporation repudiates it. *Irwin* vs. *Lessard*, Q. B. 1889, 17 R. L. 589.

5. Who are.—(See article 2 Legal News, 265.)

XXIII. QUASI-CONTRACTS WITH.

A corporation can come under a liability by a quasi-contract in the same manner as an ordinary person, and therefore a municipal corporation which avails itself of, and is benefited by, services rendered in procuring its act of incorporation is liable for such service. (2) *DeBellefeuille* vs. *Municipality of Mile End*, S. C. 1880, 4 L. N. 42, 25 L. C. J. 18.

XXIV. RELIGIOUS CORPORATIONS.

1. Acquiring Immoveables.—A body corporate empowered by its charter to acquire property, "for the use and objects of its incorporation," is not limited in making a purchase of an immoveable by the nature of the latter or the use which has hitherto been made of it, and it is sufficient that such immoveable is susceptible of yielding revenue or value applicable to the use and objects of the incorporation to bring the purchase within the charter power. *Hôpital du Sacré Cœur* vs. *Lefebvre*, S. C. 1891, 17 Q. L. R. 35.

2. Actions by.—The Superioress of the *Hôtel Dieu* cannot in her own name solely, sue on behalf of the community. *L'Hôtel Dieu* vs. *Denéchaud*, K. B. 1816, 2 Rev. de Lég. 276.

(1) See De Bellefeuille vs. Municipality of Mile End, S. C. 1880, 4 L. N. 42, 25 L. C. J. 18.

(2) See article on this subject, 22 Themis 193.

3. Exercise of Powers.—The powers of a corporation created by an act of the legislature, and the mode of exercising them, are only to be found in or deduced from such act, or in and from the general rules of law applicable to all corporations. So, where it is not so provided in the act incorporating a religious body, the approval of the bishop of the denomination to which it belongs is not required to make its acts lawful. *Hôpital du Sacré-Cœur* vs. *Lefebvre*, S. C. 1891, 17 Q. L. R. 35.

4. Powers of.—In an action by a church committee entrusted with the management of the temporalities of the church against the defendants as trustees under the will of the Rev. James Somerville, requiring the latter to account for the execution of a trust in disposal of a legacy of £1,000 with which it was alleged they had purchased property, etc., and the defendant contended they were not liable to account to the plaintiffs—*Held*, that the ordinance 2 Vic., cap. 26, was intended to vest property in religious bodies, and their powers must extend to the performance of acts necessary to the preservation of their rights. *Leslie* vs. *Shaw*, Q. B. 1848, 3 Rev. de Lég. 246.

XXV. RIGHTS OF CREDITORS OF.

Whatever may be the state of disorganization into which a company has fallen, the creditors are entitled to exercise their rights against it and the shareholders. *Hughes* vs. *La Cie. de Villas du Cap Gibraltar*, C. R. 1889, 34 L. C. J. 24, confirming S. C. 1889, M. L. R., 5 S. C. 129.

XXVI. SECRETARY.

1. Authority of.—See Article 10 Legal News 311. English Cases.

2. Powers of.—Where the secretary of a company signed a deed of composition and discharge without special authority to that end—*Held*, not binding on the company. *Bolt & Iron Company vs. Gougeon*, S. C. 1884, 7 L. N. 40.

XXVII. SECRETARY-TREASURER OF CORPORATION—SURETYSHIP.

The secretary-treasurer of a building society who has left the service of the society and handed over all his books and vouchers to the society, is entitled to a judgment discharging his security, and to radiate the hypothec on his property given as security for his faithful administration, within a delay fixed by the court, and in default of giving such deed the judgment to stand therefor. *Société Permanente de Construction* vs. *Longtin*, Q. B., 22 June, 1878.

XXVIII. SEQUESTRATOR—APPOINTMENT OF.

Semble, that if the interests of shareholders or petitioners were jeopardized by the proceedings at an annual meeting, the court pending suit might appoint a receiver or sequestrator to hold the company in the interests of all concerned. *Stephen* vs. *Montreal, Portland & Boston Ry. Co.*, S. C. 1884, 7 L. N. 85.

XXIX. SHAREHOLDERS. (See "SHARES—SUBSCRIPTION TO.")

1. Action against—Default—Evidence.—In a default case, evidence that the defendant is shareholder in an insurance company can be proved by the production of a statement of account, and a deposition declaring that the defendant is a shareholder for the amount stated in the declaration. *Champagne* vs. *Ross*, Q. B. 1889, 18 R. L. 452.

2. Liability of—Promissory Note—(See "SHARES—SUBSCRIPTION TO").—The members of a joint stock company incorporated under the Act 13th and 14th Vic., ch. 28, are jointly and severally responsible for the amount of a promissory note, signed under their preliminary articles of association and before the incorporation has been perfected. *Edmonstone* vs. *Childs*, Q. B. 1868, 12 L. C. J. 133.

3. —— An incorporation under the Stat. 13th and 14th Vic., ch. 28, commenced on the 22nd July, 1854, and completed on the 24th February, 1855, was legal. *Brewster* vs. *Chapman*, Q. B. 1875, 19 L. C. J. 301.

4. —— Promissory notes granted by a company so incorporated, during the period between July, 1854, and February, 1855, for goods sold and delivered by the plaintiffs and renewed by notes of the company after the completion of the incorporation (the old notes being surrendered and given up to the company), were, together with the original debt for the goods, novated and paid. (*Ib.*)

5. —— In the absence of fraud, in effecting the exchange of notes as above, the shareholders who paid up their stock in full, and caused the fact to be duly registered, were free from all liability to pay said notes, or the original price of said goods. (*Ib.*)

6. —— **Discharge by Company—Rights of Creditors.**—A joint-stock company sold off its whole stock and effects, and by resolution discharged its shareholders of the payment of the ten per cent. still due on its stock—*Held*, that on attachment against a shareholder then in arrear, he might be condemned to pay the balance *so* due on his stock to a judgment creditor of the company. *Dancose* vs. *Richards*, Q. B. Que., 5 Sept., 1876.

7. —— **After Insolvency.**—To an action for calls defendant pleaded a discharge under the Insolvent Act of 1875—*Held*, that all the assignment could pass the assignee was the beneficial interest in the shares, and as defendant's disability was not included in the list furnished to the assignee it was not covered by the discharge. *Compagnie d'Assurance de Stadacona* vs. *Rice*, C. R. 1879, 2 L. N. 244.

8. **Rights of—Action to Account—By-Law.**—A shareholder in a joint-stock company can bring an action to account against the corporation, and thereby contest the validity of a by-law made by a board of its directors. *Keys* vs. *The Quebec Fire Assurance Company*, K. B. 1830, Stuart's Rep. p. 425.

9. —— **Retrocession.**—A shareholder of a company is not entitled to exercise the rights of the company in his own name, and cannot oppose the sale of an immovable belonging to the company. *McNaughton* vs. *Exchange National Bank*, 1891, M. L. R., 7 Q. B. 180.

10. —— A promise of retrocession by the majority of the shareholders of a company is null, the company alone having the power to make such an agreement. (*Ib.*)

11. **Voting at Meetings.**—Where a shareholder asked for an interim order to restrain persons from voting on certain shares, and it appeared that the shares had been held by the defendants for more than a year, to the knowledge of the petitioner, an injunction was refused, more especially as the petitioner had a remedy by *quo warranto* if he were wronged by an illegal vote. *Gilman & Robertson*, S. C. 1884, 7 L. N. 60.

XXX. SHARES.

1. **Donation of—Formalities.**—In the absence of a contrary rule, in the law incorporating a company, in its by-laws or in a special act affecting the company, a donation of shares in its stock to be valid as regards third parties is not subject to any other formalities than those required in the donation of corporeal moveables. *Whitehead* vs. *McLaughlin*, C. R. 1882, 8 Q. L. R. 373, and see *Bank of Montreal* vs. *Henderson*, Q. B. 1870, 14 L. C. J. 169.

2. **Forfeiture of — Sufficiency of Notice.**—Action to have certain calls made by the directors of the Hochelaga Bank declared null and void, and certain resolutions by them under which the plaintiff's stock was confiscated declared illegal, and to have the defendants ordered to restore the said stock and to register plaintiff as owner of it. The judgment turned on want of notice. The cashier wrote to plaintiff three times: 1st. That the bank will take legal proceedings to recover if he do not pay. 2nd. "If you do not pay, the account will be sent to our attorneys for collection." 3rd. "If you do not pay, the directors will serve themselves as regards you to the privileges which the law gives them"—*Held*, insufficient. *Robertson* vs. *Hochelaga Bank*, S. C. 1881, 4 L. N. 314.

3. —— **Sale of forfeited Stock.**—The shares of stock in question in this cause were duly and legally forfeited. The intention and purpose of the directors of the company defendant to sell the forfeited shares, as if all past due calls were paid up, and subject to the payment only of all future calls, was and is regular and legal. The charges of mal-administration and fraud alleged in the plaintiff's declaration were untrue. *Gilman* vs. *Royal Can. Ins. Co.*, S. C. 1884, 1 M. L. R. (S. C.) 1.

4. —— **Sale by Company of transferred Shares.**—The sale of the Kay stock referred to in the plaintiff's declaration was regular and legal, and was made in good faith, and was also acquiesced in by plaintiff. *Gilman* vs. *Robertson*, S. C. 1884, M. L. R., 1 S. C. 5.

5. **Issue of, at a discount.**—See Privy Council case of *Ooregum Gold Mining Co. of India*, noted 15 Legal News 128.

6. **Subscription to—After incorporation.**—An allotment of stock is not necessary before instituting an action for calls against a shareholder who has subscribed for a specific number of shares after incorporation. (1) *Rascony Woollen Co.* vs. *Desmarais*, C. R. 1886, M. L. R., 2 S. C. 381; *Banque d'Hochelaga* vs. *Garth*, 1885, M. L. R., 2 S. C. 201. (This latter case went to the Privy Council, where it turned upon the ques-

(1) See remarks of Henry, J., in *Nasmith* vs. *Manning*, 5 Can. S. C. R. at p. 441.

tion of the fraudulent entry of the subscriber's name in the letters patent, which were thereby held to be totally invalidated. Reported *sub. nom. Banque d'Hochelaga* vs. *Murray*, 15 App. Cas. 414)

7. —— —— A subscription for shares accepted and acquiesced in by the directors of the company, constitutes the subscriber a shareholder as to such shares, so as to render him eligible for election as a director. *Alley* vs. *Trenholm*, S. C. 1892, 3 Que. 163.

8. —— **Before Incorporation—Name inserted in Letters Patent—Taking no part in Affairs.**—The fact of the defendant's name appearing in the Act incorporating the company, as one of the provisional directors, will not be considered as authorizing the court to presume he ever became a subscriber for shares; more especially when there is no proof of his having acted as a provisional director, or that he had attended any of the meetings of the company. *Rogers* vs. *Hersey*, S. C. 1864, 15 L. C. R. 141.

9. —— —— A number of persons, among whom was C., agreed to form a company; but at a subsequent meeting in which C. took part, it was resolved that as they could not obtain an expected subsidy from the government they would not go on; later, some of those interested applied for letters patent and a company was formed, C.'s name being inserted in the letters patent. C. never attended any meeting or took any part in the affairs of the company, and the directors of the company subsequently passed a resolution to exonerate those who had signed the original paper, but who had refused to become shareholders when it was found that no subsidy could be obtained. H., a creditor of the company, obtained judgment against it, and having discussed the company, sued C. as a contributory for the amount of his unpaid shares—*Held*, reversing the judgment of the Superior Court, that C. was not liable. *Cantin* vs. *La Banque d'Hochelaga*, Q. B. 1888, 32 L. C. J. 22.

10. —— —— **Names fraudulently entered in Petition for Letters-Patent.**—The respondents had subscribed to shares in a company proposed to be incorporated, but had, before the presentation of the petition for letters patent, wholly withdrawn from the scheme, and had given notice of their withdrawal to the parties concerned; they had also never been notified of the application for or the grant of letters patent; no stock was ever allotted to them nor did they ever become shareholders in the company. The letters patent in which the respondents' names appeared were obtained fraudulently and irregularly. The Superior Court held the respondents liable (M. L. R., 2 S. C. 201), but the Court of Queen's Bench ordered their names to be struck out of the letters patent, and dismissed the action against them with costs (19 May, 1888). The judgment of the Queen's Bench was reformed by the Privy Council, which held that the Arts. 1034 and 1035 C. Code do not authorize a partial annulment of letters patent, but that they ought to be entirely annulled, and that the terms of the prayer were wide enough to authorize an order to that effect. In all other respects the judgment of the Queen's Bench was affirmed. *Banque d'Hochelaga* vs. *Garth* in Superior Ct. Appeals to P. C. consolidated *sub. nom. Banque d'Hochelaga* vs. *Murray et al.*, P. C. 1889, 15 App. Cas. 114, 13 L. N. 257.

11. —— —— **Name not mentioned in the Patent—Allotment.**—A subscriber to a company to be incorporated under letters patent, but who never subscribed after the incorporation, nor paid calls after such incorporation, is not liable to be sued on the stock thus subscribed for. (1) *Union Navigation Company* vs. *Couillard*, Q. B. 1877, 21 L. C. J. 71, confirming S. C. 1875, 7 R. L. 215.

12. —— —— A person who has subscribed to a corporation to be incorporated by letters patent, but whose name is not mentioned in the patent, and who never subscribed after the organization of the company as incorporated, and who never took part in the affairs of the corporation, is not liable for calls. (1) *Rascony* vs. *Compagnie de Navigation Union*, Q. B. 1878, 24 L. C. J. 133.

13. —— —— *Semble*, that a purchaser subsequent to incorporation of shares subscribed *prior* to incorporation, and who has paid a call after his purchase, is estopped from contesting the validity of the original subscription. (2) *MacDougall* vs. *Union Navigation Co.*, Q. B. 1877, 21 L. C J. 63.

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(1) And see *Nasmith* vs. *Manning*, 5 Can. S. C. R. 417. The above principle has also been affirmed by the Privy Council in *Banque d'Hochelaga* vs. *Murray*, 15 App. Cas. 414, which confirmed the judgment of the Q. B. in this respect. See 15 App. Cas. 425 and 428.

(2) "This question was raised on a *requête civile*, but the petition did not bring appellants within the terms of Art. 505 C. C. P. Strictly speaking, therefore, the petition was not dismissed on the merits." Ramsay's Dig., p. 166.

14. —— —— The appellant signed an undertaking to take stock in a company to be incorporated by letters patent under Q. 31 Vict., c. 25, but was not a petitioner for the letters patent, nor was his name included in the list of intending shareholders in the schedule sent to the Provincial Secretary with the petition. The appellant's name was not mentioned in the letters patent incorporating the company, nor did he become a shareholder at any time after its incorporation.

Held (reversing the judgment of the S. C., Cross J., dissenting), 1st. That the appellant never became a shareholder of the company, and could not be held for calls on stock. 2nd. *The Union Navigation Co. & Couillard, supra No.* 11, and *Rascony and the same Co., supra No.* 12, followed and approved. *McDougall et al. and the same Co., supra No.* 13, distinguished. 3rd. (Per Tessier J.) That a subscription to stock in a company to be incorporated is a mere proposition and not a binding promise to take and pay. 4th. (Per Ramsay J.) That under the terms of the Statute 31 Vict., Q., cap. 25, the only persons who are shareholders in a company incorporated thereunder are those named in the letters patent as such and those who become members after incor. poration. *Arless* vs. *Belmont Manufacturing Co.*, 1885, M. L. R., 1 Q. B. 340, 29 L. C. J. 204.

15. —— —— Contra.—A stock subscription to a company to be incorporated is binding on the subscriber, notwithstanding that the Act of Incorporation subsequently obtained by persons other than the subscriber declares that the corporation shall consist of the persons named in the Act (of whom the subscriber is not one) and of such persons as should thereafter subscribe for shares in said corporation, and notwithstanding that the person so subscribing never renewed his subscription and never took part in any way in the affairs of said corporation. (1) *Windsor Hotel Co.* vs. *Date*, S. C. 1881, 27 L. C. J. 7.

16. —— —— R. signed a subscription list for a company which it was proposed to form, and which subsequently obtained letters patent. For some reason, which was not shown, R.'s name was not inserted in the letters patent, and there was nothing to show that he afterwards made any application for membership in or had any connection with the company. H., a creditor of the company, against which he obtained judgment, having first discussed the property of the company, brought an action against R. for an amount as for unpaid calls on shares—*Held*, confirming the judgment of the court below, that R. was not liable, as he had never been a member of the company, and that the circumstances which led to his withdrawing his name from the subscription list could be proved by verbal testimony. *Darling* vs. *Rielle*, 32 L. C. J. 28, Q. B. 1888.

17. —— —— P. signed a subscription list, undertaking to take shares in the capital stock of a company, to be incorporated by letters patent under 31 Vict., chap. 25 (P. Q.), but his name did not appear in the notice applying for letters patent, nor as one of the original corporators in the letters patent incorporating the company. The directors never allotted shares to D., as required by 31 Vict., chap. 25, sec. 25, and he never subsequently acknowledged any liability to the company. In an action brought by the company against D. for calls due on the company's stock—*Held*, affirming the judgment of the Court of Queen's Bench (12 Q. L. R. 200), that P. could not be held liable for calls on stock. *Magog Textile and Printing Co.* vs. *Price, Supreme Ct.* 1887, 14 Can. S. C. R. 664, 10 L. N. 331, Q. B. 1886, 12 Q. L. R. 200; *Magog Textile and Printing Co.* vs. *Dobell, Supreme Ct.* 1887, 14 Can. S. C. R. 664, Q. B. 1886, 12 Q. L. R. 204, 14 R. L. 600.

18. —— Compensation of Liability on Shares.—A shareholder in an insolvent railway company cannot avoid his liability to a judgment creditor of the company for the amount due on his unpaid stock, by claiming to compensate the same with a debt due him by the company where no calls on the unpaid stock have been made by the company. *Ryland* vs. *Delisle*, P. C. 1869, 14 L. C. J. 12, reversing Q. B., 12 L. C. J. 29.

19. —— Conditional. — The defendant subscribed for stock in a company about to be formed, and received a letter from the secretary stating that his stock was taken on the same condition as that subscribed by three persons whose names preceded his on the book, and who had appended the condition to their subscription that the company was to be a hydraulic company. The defendant did not append such condition. The hydraulic company was not formed but a cotton mill company only — *Held*, that the defendant

(1) But in this case the defendant had signed the stock book and thereby bound himself to pay 10 p. c. of the amount subscribed by him for defraying the expenses of incorporation. As to the question of partnership mentioned in this case, see also *Ellis* vs. *Drummond*, S. C. 1893, 4 Que. 473, *supra* p. 345.

having signed the book unconditionally was not entitled to be relieved from liability for calls. *Jones* vs. *The Montreal Cotton Co.*, Q. B. 1878, 1 L. N. 450, and 24 L. C. J. 108.

20. —— —— The plaintiffs, a railway company, sued for $1,000, the amount of ten shares subscribed by the defendant in a small book opened by the secretary of the company, as a special subscription list, by which the defendant agreed to pay for the ten shares when the railway in question ran to West Farnham, and on condition that it was constructed to Granby, "or within three-quarters of a mile from my tannery"—*Held*, that although the railway in question did not run to within three-quarters of a mile of defendant's tannery, that as it ran near to it, the condition was substantially fulfilled, and that the defendant was liable to pay for the said shares, and that, without regular calls having been made therefor, the subscription being a special one. *Stanstead, Shefford and Chambly Railway Co.* vs. *Brigham*, S. C. 1866, 17 L. C. R. 54.

21. —— —— Subscription for stock in a railway company may be conditional, and in such case the non-fulfilment of the condition will operate as a bar to any right of action for calls on stock. *Rodgers* vs. *Laurin*, Q. B. 1863, 13 L. C. J. 175.

22. —— —— An agreement between a promoter of a company and a subscriber for shares, that the latter shall pay for his stock in services, will not bind the company. *National Ins. Co.* vs. *Hatton*, Q. B. 1879, 24 L. C. J. 26.

23. —— —— Even if the shares of those who subscribed before the respondent were reduced, without his knowledge, after he subscribed, yet if he, after obtaining knowledge of that fact, did not immediately repudiate his stock, but, on the contrary, paid a first instalment thereon, and took an active part, both as solicitor and shareholder, in promoting the affairs of the company, he will be liable to pay the calls on the stock held by him as they are made by the directors. (*Ib.*)

24. —— —— The plaintiff, an American railway company, were induced to extend their railway to the Canadian line on the condition that those in the neighborhood of the line would subscribe a certain amount of the money necessary to do so. The defendants subscribed for two shares on the following condition: "If I obtain my money from the St. Lawrence road." Subsequently the defendant refused to pay the instalment or call upon his shares, and to an action by the company pleaded that the money had been subscribed on the understanding that the terminus of the road was to be fixed at Derby Line Village, whereas it was fixed, contrary to the wishes of the defendant, at Walker Place, which was some distance off—*Held*, confirming the judgment of the Superior Court and reversing that of Court of Review, that the company were not bound to fix the terminus of the road at the place indicated by the defendant, but were at liberty to select as its terminus any convenient place on the boundary line, and that defendant could not be relieved from his obligation under such contract in consequence thereof. *Connecticut & Passumpsic River Ry. Co.* vs. *Comstock*, Q. B. 1870, 1 R. L. 589.

25. —— —— The Dominion Salvage Company could only organize conformably with the provisions of its charter. Subscriptions to the capital stock of the company are presumed to be made under the guarantee that the company will be organized on the lines laid down in its charter. *Brown* vs. *Dominion Salvage Co.*, Q. B. 1891, 20 R. L. 557. (An appeal from this decision to the Supreme Court was quashed for want of jurisdiction. 20 Can. S. C. R. 203. Afterwards proceedings against this company were taken by the Attorney General and the charter declared forfeited for non-compliance with conditions precedent to the legal organization of the company. 21 Can. S. C. R. 72.)

26. —— —— **Severed condition.**—Respondent, to an action for calls on the shares subscribed by him in the company appellant, pleaded that he had subscribed the shares only on the solicitation of the company's agent, and on his express promise that he would never be called upon to pay—*Held*, reversing the judgment of the court below, and without deciding as to the legality of the plea, that the respondent had not proved his allegations, and on the contrary that the production by the company of the secretary's certificate that respondent held so many shares was sufficient proof of his liability to support the action. (1) *Stadacona Insurance Co. & Cubana*, Q. B. 1882, 2 Dorion's Rep. 380.

27. —— **Conditional.—Parole Evidence.**—The plaintiff in warranty alleged that the defendants in warranty, who were directors

(1) See *Barnet's Banking Co.* vs. *Reynolds*, 40 Q. B. Upper Can. Reports 435, and Supreme Ct., Cassel's Dig., 2nd Edit., 170-173.

of the company plaintiff, had induced him to subscribe the stock on an express guarantee that they should take merchandise in payment—*Held*, that the guarantee, which was a formal guarantee, could not be proved by parole. *Compagnie de Navigation Union* vs. *Christin & Valois*, S. C. 1878, 2 L. N. 27.

28. —— —— And *held* in appeal, confirming the judgment, that in such cases the admission of the defendants on interrogatories could not be divided so as to obtain a commencement of proof in writing sufficient to admit parole evidence. *Ib.*, 3 L. N. 59, Q. B. 1880.

29. —— —— Parole evidence is not admissible to prove that a subscription of stock was conditional, when the writing contains on the face of it an absolute promise. *Wilson* vs. *Société de Construction de Soulanges*, S. C. 1880, 3 L. N. 79; and see *National Insurance Co.* vs. *Chevrier*, S. C. 1878, 1 L. N. 591; *Dick* vs. *Canada Jute Co.*, S. C. 1886, 30 L. C. J. at p. 188; *Banque d'Hochelaga* vs. *Garth*, S. C. 1886, M. L. R., 2 S. C. 202; *Jones* vs. *Montreal Cotton Co.*, Q. B. 1878, 24 L. C. J. at p. 110. But the case of *Banque d'Hochelaga* vs. *Garth* was reversed by the Q. B., May 19, 1888, on this point, and the judgment of Q. B. was affirmed with modifications by the Privy Council *sub. nom. Banque d'Hochelaga* vs. *Murray*, 15 App. Cas. 414, 13 L. N. 257.

30. —— **Defects in Organization.**—To an action for unpaid calls the defendant pleaded that the corporation had no legal existence for want of compliance with certain preliminary formalities—*Held*, following *Windsor Hotel Company & Murphy* (*infra No.* 39) and *Windsor Hotel Company & Lewis* (*infra No.* 31), that defects in the organization of a company cannot be pleaded in answer to an action for call. *Cie. de Chemin de Fer de Péage Pointe Claire* vs. *Valois*, C. C. 1881, 4 L. N. 334.

31. —— —— In a suit for calls, a shareholder who has assumed a position as such and paid a portion of the calls made from time to time cannot set up alleged irregularities in the original organization of the company as a valid reason for avoiding payment of the remainder of the calls. *Windsor Hotel Co.* vs. *Lewis*, Q. B. 1881, 26 L. C. J. 29, 4 L. N. 331.

32. —— —— Subscriptions to the capital stock of a company are presumed to be made under the guarantee that the company will be organized on the lines laid down in its charter. And when the capital of a company is not subscribed within the required delay, and other conditions precedent are not performed, a subscriber to the capital stock of the company who notifies the provisional directors that in consequence of the defective organization he wishes to withdraw his subscription and have no further relations with the company, will not be held liable on an action against him for calls. *Brown* vs. *Dominion Salvage Co.*, Q. B. 1891, 20 R. L. 557. Appeal to Supreme Ct. quashed for want of jurisdiction, 20 Can. S. C. R. 203. (See *supra* No. 25.)

33. —— —— Que. 31 Vic., ch. 24, sec. 19, and Can. 40 Vic., ch. 43, sec. 56.—A shareholder in chartered joint stock company may, to an action brought against him by such company, plead a non-compliance with its acts of incorporation, and that, by reason of such non-compliance, the company is not legally in existence. *Quebec & Richmond Railway Company* vs. *Dawson*, S. C. 1851, 1 L. C. R. 366, 3 R. J. R. Q. 41.

34. —— —— **Cessation of Operations—Garnishment.**—Plaintiff obtained judgment against the defendant, and attached moneys in the hands of the stockholders. L., the garnishee, appeared, and answered that the question of his indebtedness was pending in another case, and he could not tell until that case was decided whether he was bound to pay up his stock or not. Plaintiff contested the said declaration of the garnishee, denying the pretension of non-indebtedness, and setting up at length the grounds of his liability to the company as a stockholder. The garnishee answered, alleging want of organization, cessation of operations and several other grounds of non-liability as a shareholder of the said company. The record in the case referred to by the garnishee was united with the present case, and by the judgment rendered in the case the action of the company against the garnishee was dismissed, on the ground that the company had no directors, had held no meeting, and had given no authority to sue (so *held* in *Company du Cap Gibraltar* vs. *Lalonde*, S. C. 1889, M. L. R., 5, S. C. 127), but—*Held*, that the garnishee was a debtor to the company, and condemned him to pay the plaintiff the amount found to be due the said company. That the defendants were a corporate body which had never been dissolved, and the question as to whether they had or had not carried out their charter, so far as to enable them to authorize suits at law to be brought, could not be invoked to discharge the garnishee from liability

as a shareholder of the said company. That whether the company was in regular operation, or whether it was insolvent or not, the debts due by said company to its creditors still remained exigible by such creditors if they hold judgments against said company. *Hughes* vs. *The Cape Gibraltar Villa Co.*, C. R. 1889, 34 L. C. J. 24, confirming S. C. 1889, M. L. R., 5 S. C. 129.

35. —— Disorganization and Insolvency of Company.—Action by Company.—Although an incorporated company which has become completely disorganized and insolvent always retains its legal existence so long as it is not extinct, yet it cannot take an action to recover from shareholders the balance due on their subscriptions to stock, unless it has been duly and previously authorized to do so. *Compagnie du Cap Gibraltar* vs. *Lalonde*, S. C. 1889, M. L. R., 5 S. C. 127.

36. —— —— But in an action against a shareholder for the amount of his unpaid shares in a joint stock company—*Held*, on proof that the officers and directors of the company had resigned and had not been replaced, that, notwithstanding Q. 31 Vic., cap. 25, sec. 20, the court would order the company to proceed to the election of new officers or of a curator according to 371 C. C., and produce *acte* thereof before proceeding with the case in question. Costs reserved. *Compagnie d'Instruments Agricoles* vs. *Hébert*, C. Ct. 1875, 2 Q. L. R. 182.

37. —— Effect of Transfer on Liability.—Shareholders of railway companies, incorporated after the passing of "The Railway Clauses Consolidation Act," 14 and 15 Vic., ch. 51, are liable, notwithstanding they may have transferred their stock, if the plaintiff's debt accrued and was due whilst the shares stood in defendant's name. *Cockburn* vs. *Beaudry*, S. C. 1858, 2 L. C. J. 283.

38. —— Erasure on Stock Book.—Burden of Proof.—Defendant subscribed on the stock subscription book of a joint stock company for ten shares, and wrote his signature as follows: "T. A. Trenholme in trust for H. Trenholme," but the words "in trust for H. Trenholme" were erased on the stock book—*Held*, in the absence of evidence as to the time when said words were erased, the presumption was that they were erased at the time defendant signed the stock book rather than that the book was subsequently falsified; and it was for the party alleging that the erasure was made subsequently to prove it. *Alley* vs. *Trenholme*, S. C. 1892, 3 Que. 163.

39. —— Forfeiture of Charter.—Where a shareholder, who had already paid some calls, was sued for the amount of others, and pleaded that the company had forfeited its charter by non-compliance with preliminary conditions—*Held*, that the forfeiture should have been first pronounced, and the plea was dismissed. *Windsor Hotel Co.* vs. *Murphy*, 1 L. N. 74, S. C. 1877, and confirmed in appeal. See 26 L. C. J. 34.

40. —— —— And where the same plea was raised to an action on a note, on which the same company appeared as indorsers, the plea was dismissed on the same grounds. *Bank of Montreal* vs. *Thompson*, S. C. 1877, 1 L. N. 76.

41. —— —— The defendant being sued for the balance of his subscription to the stock of the company plaintiff, pleaded that the promoters promised to take goods for the amount of the subscription and called them in in warranty, which being dismissed he further pleaded that the company had forfeited its charter by non-user during three years, and was therefore not in existence. *Per Curiam.*—The non-user of the charter during three consecutive years at one time is not applicable under the provisions of the Act 31 Vic., cap. 25, sec. 32. It may be true that the company plaintiff has been for three years without any books, but during this same period the plaintiff availed itself of its charter for the collection of its debt, and for the winding up of its affairs generally. Moreover, it is very doubtful if such a forfeiture as is claimed here has not to be declared before it takes effect. *Vide* 1st Broom and Hadley's Commentaries 586-7 and Articles 1016, 1017 and 998 C. C. P. *Compagnie de Navigation Union* vs. *Caristin*, S. C. 1880, 4 L. N. 162.

42. —— —— And on proof of the sale of all the assets of the company to the intervenants, together with the debts and claims, defendant was condemned to pay the amount sued for to them. (*Ib.*)

43. —— Irregularities in appointment of Directors.—The liability of shareholders of railway companies under "The Railway Clauses Consolidation Act" cannot be affected by any irregularities in the nomination or appointment of the original directors. *Ryland* vs. *Ostell*, S. C. 1858, 2 L. C. J. 274; *also Cockburn* vs. *Tuttle*, S. C. 1858, 2 L. C. J. 285.

44. —— Illegal Acts of Directors as a Defense in Action for Calls.—Illegal acts on the part of the directors of a company cannot be set up in defence to an action for calls by liquidators or assignees representing the creditors of the company. *Ross* vs. *The Canada Agricutural Insurance Company*, S. C. 1881, 5 L. N. 23.

45. —— Liability not affected by failure to make Calls.—Shareholders of railway companies, incorporated after the passing of "The Railway Clauses Consolidation Act," 24 and 25 Vic., ch. 51, are liable to the creditors to an amount equal to the amount unpaid on their stock, and in an action to recover the same it is not necessary to allege that the directors called in all such stock. *Cockburn* vs. *Starnes*, S. C. 1857, 2 L. C. J. 114. But see *Knight* vs. *Whitfield* in Supreme Ct., 16 November, 1885, affirming Q. B., Cassel's Dig., 2nd Edit., p. 187.

46. —— Mandatary.—Under Art. 1716 C. C. a mandatary who subscribes stock in a company in his own name is liable to creditors of the company as a shareholder, without prejudice to the creditors' rights against the mandator also. *Molson's Bank* vs. *Stoddard*, S. C. 1890, M. L. R., 6 S. C. 18.

47. —— Name of Company changed.—In an action for unpaid calls where the defendant denied that he had subscribed for stock, and in the subscription book produced, the word "Windsor" had been substituted for that of "Royal" (in the designation of the Company), the action could not be maintained in the absence of evidence that the change of name had been made before the defendant subscribed. *Windsor Hotel Co.* vs. *Laframboise*, C. R. 1878, 22 L. C. J. 144, confirming S. C. 1877, 1 L. N. 63.

48. —— Obtained by Fraud and Surprise.—ART. 991 AND 1,000 C. C.—Subscriptions of stock obtained by surprise, fraud and false statements of the affairs of the company made by its officers and directors are null, and produce no obligation, and the shareholders thus deceived may even recover what they have paid on their shares. *Glen Brick Company* vs. *Shackell* and *Shackell* vs. *The Glen Brick Company* and *Welsh* vs. *The Glen Brick Company*, S. C. 1870, 1 R. C. 121, 2 R. L. 625.

49. —— —— Ratification.—But where the purchaser of shares who claims he was deceived as to their value ratifies the contract by acting as shareholder of the company, he cannot plead fraud in action against him by the company for the value of the shares. *Montplaisir* vs. *Banque Ville Marie*, Q. B. 1889, 18 R. L. 153, 33 L. C. J. 317.

50. —— —— The Stadacona Insurance Company, incorporated in 1874, employed local agents to obtain subscriptions for stock in the district of Quebec, such local agents to receive a commission on shares subscribed. At the solicitation of one of these local agents, F. X. C., intending to subscribe for five paid-up shares, paid $500 and signed his name to the subscription book, the columns for the amount of the subscription and the number of shares being at the time left in blank. These columns were afterwards, in the presence of appellant, filled in with the number of shares (50 shares) by the agent of the company, without F. X. C.'s consent. Having discovered his position, one of appellant's brothers, who had also subscribed in the same way, went next day to Quebec and endeavored, but ineffectually, to induce the company to relieve them from the larger liability. At the end of the year 1875, the company declared a dividend of 10 per cent. on the paid-up capital, and the plaintiff received a cheque for $50, for which he gave a receipt. In the following year the company suffered heavy losses, and, notwithstanding F. X. C.'s repeated endeavors to be relieved from the larger liability, brought an action against him to recover the 3rd, 4th, 5th and 6th calls of five per cent. on fifty shares of $100 each, alleged to have been subscribed by F. X. C. in the capital stock of the company. —*Held* (Sir W. J. Ritchie, C.J., *dubitante*), reversing the judgment of the Court below (10 R. L. 289), that the evidence showed the appellant never entered into a contract to take 50 shares, that this receipt given for a dividend of 10 per cent. on the amount actually paid was not an admission of his liability for the larger amount, and he therefore was not estopped from showing that he was never in fact holder of fifty shares in the capital stock of the company. (1) *Coté* vs. *Stadacona Insurance Co.*, Supreme Ct. 1881, 6 Can. S. C. R. 194, reversing Q. B., 10 R. L. 289, 6 Q. L. R. 147.

51. —— Obtained by Misrepresentation.—In an action against a shareholder of a company for calls due on two shares, it is no defence for the shareholder to plead that he was induced to subscribe to the shares by false representation, it having been repre-

(1) See remarks on this decision Ramsay's Dig., pp. 166, 167.

sented to him that the capital already subscribed to was *bonâ fide*, whereas such subscriptions were really fictitious and simulated, and that the directors had been discharged of their subscriptions, and demanding a nullity of the letters patent. The Crown alone has the right of demanding that letters patent, granted under the great seal of the Province, be annulled. *Compagnie de Navigation Union* vs. *Rascoay*, S. C. 1876, 20 L. C. J. 306.

52. —— —— **Parole Evidence.**—Action for three calls of 10 p.c. each on $1,000 worth of stock subscribed by defendant. The plea was that the defendant's signature had been got by improper representation the agent of the company, and that he was not held by his subscription—*Held*, that verbal testimony of what the agent said at the time of the subscription could not be received to vary the written consent of the party. *National Ins. Co.* vs. *Cherrier*, S.C. 1878, 1 L. N. 391.

53. —— **Where Capital has not been wholly subscribed.**—The fact that the capital stock of a company has not been wholly subscribed, is not a defence to an action by the company against a shareholder for calls on shares subscribed for by him. *Rascoay* vs. *Cotton Mfg. Co.*, C. R. 1886, M. L. R., 2 S. C. 381.

54. **Transfer of (1)—Art. 1022 C. P. C. —Mandamus.**—Where a petition for a mandamus was demanded against a railway company to compel it to make the necessary entries in their book of the sale to the petitioner of a number of shares in the capital stock of the company—*Held*, to be the duty of a clerk or secretary to enter the names and places of residence of the owners of stock in the company, and that the Superior Court had jurisdiction to enforce such duty under 12 Vic., cap. 41. *McDonald* vs. *Montreal and New York Railway Company*, S. C. 1855, 6 L. C. R. 232, 5 R. J. R. Q. 89.

55. —— **Agreement to—Refusal of Company — Effect of.**—The respondent agreed with plaintiff, appellant, to pay him $500 cash and to transfer him certain shares which he held in the stock of the Montreal Railway and Newspaper Advertising Company, on which $55 per share had been paid and $45 remained to be paid. The company, however, refused to accept the plaintiff as a transferee, and the respondent wrote him to that effect, informing him he would be unable to carry out the agreement. The plaintiff then took action for paid-up shares or their equivalent in cash—*Held*, that he was only entitled to the shares as they stood, and, as the company refused to transfer, the agreement was at an end. *O'Brien* vs. *Weaver*, Q. B. 1880, 3 L. N. 111.

56. —— **Liability of Transferee.**—To an action for calls the defendant pleaded a variety of pleas, *inter alia*, that the company was insolvent at the time the shares were transferred to him, that the transfer had been obtained by fraud, that the company was illegally incorporated, etc. Evidence that defendant fully understood the position of the company when he accepted the transfer. Plea dismissed and judgment for amount claimed. *Colonial Building Association* vs. *Fletcher*, S. C. 1881, 4 L. N. 374.

57. —— *Semble*, that a purchaser, subsequently to incorporation, of shares subscribed prior to incorporation, and who has paid a call after his purchase, is estopped from contesting the validity of the original subscription. *MacDougall* vs. *Union Navigation Co.*, Q. B. 1877, 21 L. C. J. 63.

58. —— **Mandamus to compel.**—The transfer of shares in joint stock companies is by Art. 1573 C. C. regulated by the charter and by-laws of such companies, and, whatever claim the transferee of shares may have against his transferor, the transfer can only be made by the company defendant in so far as its by-law No. 11 has been complied with, viz., that the transfer of shares can only be made by writing in its books, signed by the transferor and the transferee, the latter as accepting the transfer, and as in this case the appellant had not accepted the transfer on the company's books, but the shares had been transferred to another party who had accepted the transfer, the appellant could compel the company to transfer said shares in its books, especially as it was proved that the transferor had no other shares to transfer than those whose transfer was already made to and accepted by the other party. *Hart* vs. *Montreal Manufacturing Co.*, Q. B. Montreal, 14th Dec., 1858.

59. —— **Effect of**—Where a shareholder transfers stock, not fully paid, to a solvent party, all the calls then due being paid, and the transfer has been acquiesced in by the company, the original stockholder cannot

(1) As to signification of transfer of shares, see Art. 1573 C. C.

afterwards be called upon to make good the remaining calls. *Ross* vs. *Baribault*, Q. B., Quebec, 7th May, 1888.

XXXI. TRANSFER OF IMMOVEABLES OF.

The principal shareholders of a company cannot individually transfer an immoveable belonging thereto; such transfer can only be made by the company. *McNaughton* vs. *Exchange Nat. Bank*, Q. B. 1891, 21 R. L. 301.

XXXII. TRUSTS AND TRUSTEES.

1. Charitable Association—C. S. C., ch. 71—Division among Members—Disposal of Assets.—The majority of the members of a Friendly Association constituted under C. S. C., ch. 71, being expelled from the association met in another place, and organized themselves for objects similar to those of the original association, but taking a different name. The trustees of moneys belonging to the old association were among the number. In an action, brought in the name of the old association, calling on the trustees to account—*Held* (Ramsay J., *dis.*), that the members of the new association, although they had changed the name of the society, constituting as they did a majority, and the members claiming to be the old association being a minority, the latter were not entitled to demand the moneys in the hands of the trustees. *Court Mount Royal, etc.*, vs. *Boulton*, 1881, M. L. R., 6 Q. B. 231.

2. Trust—Where a fund has been entrusted to a corporation in trust, subject to the payment of annuities to its founders and others, each founder has an interest beyond the mere reception of his annuity, and can claim that the fund be administered in strict accordance with law. *Dobie* vs. *The Board of Temporalities*, P. C. 1882, 26 L. C. J. 170, 7 App. Cas. 136.

XXXIII. ULTRA VIRES ACTS.

1. Increase of Capital.—The directors of an incorporated company, even where the act of incorporation authorizes an increase of the capital, have not the right to order such increase if it be proved, as in the present case, that the company's bridge is in good order and has no need of repairs, if there be sufficient funds on hand, all debts paid, and if such increase be ordered simply to secure to the directors the control of the affairs of the company. *Verreault* vs. *Milot*, Q. B. 1886, 12 Q. L. R. 248, 14 R. L. 447.

2. Lease of Franchise—or Lease and Hire of Work.—An agreement between the Montreal Telegraph Co. and the Great Northwestern was substantially as follows:—The former company agreed with the latter to lease all its lines to it for the term of 97 years. The Great Northwestern Company to manage, administer and work the lines and to pay to the Montreal Company the sum of $165,000 per annum in quarterly payments. The Montreal Company reserved its offices and some lands in Montreal and Ottawa. During these 97 years the company were to have nothing to do with the management, the collection of tolls, etc. The Great Northwestern had the control of all that, the only reservation being that, if the above mentioned payment was not made, the Montreal Company would have power to resume possession. It was stipulated that the tolls should not be altered by the Great Northwestern, but the latter might request the Montreal Company to alter the tolls, and the Montreal Company would have to alter them—*Held*, that the Montreal Telegraph Company had sufficient power under its charter to make and carry out such an agreement. (Dorion, C.J., and Ramsay, J., *dissenting*.) *Montreal Telegraph Co.* vs. *Low*, Q. B. 1883, 27 L. C. J. 257, reversing S. C., 25 L. C. J. 332.

3. —— When a single shareholder sues to have an agreement declared *ultra vires*, he must show or prove that damage has been thereby occasioned to himself personally. (*Ib.*)

4. Reduction of Capital Stock.—The defendant was the holder of 70 shares in the capital stock of the Canada Agricultural Insurance Company. The capital stock of the company was $1,000,000, of which, at the time defendant subscribed for his stock, 10 p. c. had been paid up. In February, 1877, the directors made a subsequent call of 10 p. c., but the company being in difficulties, it was resolved to apply to Parliament for an act to reduce their capital stock to $250,000. As this would take some time, a resolution was passed that any shareholder having already paid 10 p. c. upon his stock should have the option of paying 15 p. c. more, and might then transfer the stock for which he had subscribed to the managing director, who would transfer to the stockholder one fourth of the amount of stock, the same being fully paid up. Money was raised sufficient to pay up a certain amount of stock, which was placed in the hands of the managing director for this purpose, and nearly one half of the capital stock of the company

was reduced in consequence. The plaintiffs were appointed assignees of the company under chap. 38, 41 Vic., Canada, and proceeded to notify the commuted stockholders that they would not recognize the transfer so made—*Held*, that a transfer of shares from a stockholder in a joint stock company which is made with the object and has the effect of reducing the capital stock of the company is null, and all resolutions of the company and of the directors authorizing such transfer is illegal and *ultra vires*. *Ross* vs. *Worthington*, S. C. 1882, 5 L. N. 140.

5. —— **Surrender of Shares, etc.**—An incorporated company cannot, unless authorized by its charter or a special law, reduce its capital, purchase its own shares, or accept a surrender of its shares. Such transactions are *ultra vires* and void, and do not release the shareholders from their obligation to pay the value of their shares. *Ross* vs. *Fisel*, S. C. 1882, 8 Q. L. R. 251; *Ross* vs. *Dusablon*, Q. B. 1883, 10 Q. L. R. 74.

6. —— Where the Act incorporating a company provided that the capital stock should be $600,000, and that the company might commence business when that amount should have been subscribed and one third of it paid in, that a resolution whereby the directors pretended to reduce the capital stock to a less amount than $600,000 was *ultra vires* and null and void. *Molson's Bank* vs. *Stoddart*, S. C. 1890, M. L. R., 6 S. C. 18.

XXXIV. WINDING UP. (See "Foreign Companies."—See "Constitutional Law.")

1. **Applicability of 45 Vic., ch. 23 (D.)**—The Act 45 Vict., ch. 23 (D.), applies to incorporated commercial companies, the *erratum* distributed by the Queen's Printer with the statutes, which supplied an omission in section one, forming an integral part of the Act in question. *Corporation des Commissaires d'Ecoles d'Hochelaga* vs. *Montreal Abattoir Co.*, Q. B. 1887, 15 R. L. 196, M. L. R., 3 Q. B. 116; *Mackay* vs. *Association Colonial de Construction, etc.*, 13 R. L. 383, S. C. 1884.

2. —— **To Provincial Companies.**—Sec. 3 of "The Winding-up Act" (R. S. C., ch. 129), which provides that the Act applies to incorporated trading companies doing business in Canada *wheresoever incorporated*, is *intra vires* of the Parliament of Canada. *Allen* vs. *Hanson*, Supreme Court 1890, 18 Can. S. C. R. 667, confirming Q. B., 16 Q. L. R. 79.

3. **Immoveables of Company.**—Under the Statute 45 Vic., ch. 23 (D.), an immoveable belonging to an incorporated commercial company, which is being wound up, cannot be sold by the municipal authorities for school taxes. *Corporation des Commissaires d'Ecoles d'Hochelaga* vs. *Cie. des Abattoirs*, Q. B. 1887, 15 R. L. 196.

4. **Jurisdiction**—The Superior Court in the district wherein a trading company has its seat or head office, is the court which has jurisdiction to grant a winding-up order. *Dupont* vs. *La Cie. de Moulin à Bardeau Chanfreué*, S. C. 1888, 11 L. N. 225.

5. **Order for winding up—Petition—Delay.**—A winding-up order may be obtained against an incorporated company when it is in fact insolvent, though sixty days have not elapsed since the service on such company of a demand for payment of an over-due debt; but, when a petition for a winding-up order is presented before the expiration of such delay, the petitioner is required to prove the insolvency of the company, unless it be acknowledged, or unless one of the other cases in which a company is deemed insolvent exists. *Eddy Mfg. Co.* vs. *Henderson Lumber Co.*, 1890, M. L. R., 6 S. C. 137.

6. —— Where a company is insolvent, and the insolvency is alleged in the petition, the creditor demanding the winding-up order is not bound to allege and prove that he made a demand of payment to the company in conformity with sec. 10 of the Statute 45 Vic., ch. 23 (D.). *Mackay* vs. *Association Colonial de Construction*, 13 R. L. 383, S. C. 1884.

7. **Liquidator — Authorization to Sue**—R. S. C., Ch. 129, Sec. 31.—The liquidator of a company should be specially authorized to sue for a claim due the company. A general authorization to sue is not sufficient. *Freygang* vs. *Darelay*, S. C. 1892, 2 Que. 505.

8. —— —— 45 Vic., Ch. 23 (D.)—No action or proceedings against an insolvent company can be commenced or continued without special permission; and a case taken *en délibéré* under such circumstances, without the order appearing on the docket, can be discharged from the *délibéré* upon demand of one of the parties. *Molleur* vs. *Cie. de Pulpe de Papier du St. Laurent*, S. C. 1887, M. L. R., 3 S. C. 273.

9. —— —— 45 Vic., Cu. 24 (D.)—Under section 20 of said Act, when a winding-up order has been made, no proceeding can be taken against the company in liquidation without the permission of the Court, and, therefore, in the present case the immovables of the company could not be sold in ordinary course for school taxes without such permission. *Corp. des Commissaires d'Ecole d'Hochelaga* vs. *Montreal Abattoir Co.*, Q. B. 1887, M. L. R., 3 Q. B. 116.

10. —— —— The liquidator of an insolvent company cannot take proceedings against the company's debtors without the previous authorization of the Court, and on such notice to the creditors, contributors, shareholders, etc., as the Court may prescribe. Such authorization of the Court cannot be demanded after proceedings have been taken; it must be obtained before. *Ross* vs. *Perras*, S. C. 1891, 5 Que. 470; confirmed in appeal.

11. —— **Disqualification.**—Purchase of claims against insolvent company by liquidator of company a reason for dismissal of liquidator. *Agricultural Assurance Co. of Canada* vs. *Ross*, S. C. 1889, 33 L. C. J. 265. (*Cie. d'Assurance Agrico'e du Canada* vs. *Ross.*)

12. —— **Intervention in his own Name.**—The liquidator of an insolvent corporation is entitled to intervene in an action by a creditor against a shareholder of such corporation for unpaid calls. *Banque d'Hochelaga* vs. *Garth*, S. C. 1885, M. L. R., 2 S. C. 201.

13. —— —— But *held* later, that such intervention must be in the name of the insolvent company, and not in the name of the liquidator. *Banque d'Hochelaga* vs. *Banque des Cantons de l'Est*, S. C. 1890, 20 R. L. 99.

14. —— —— **Contra.**—Notwithstanding the terms of sec. 33, ch. 23, 45 Vic. (Can.), the liquidator of an insolvent company can take valid proceedings in his own name and stating the quality in which he is acting, as well as in his sole quality of "Liquidator of the Company." *Banque d'Hochelaga* vs. *Mason*, S. C. 1884, M. L. R., 1 S. C. 62; *Samson* vs. *Manicouagan Fish and Oil Co.*, C. R. 1891, 17 Q. L. R. 65.

15. —— **Power to Make "Calls"**—41 Vic. Cu. 38.—Action by the plaintiffs as assignees of the Canada Agricultural Insurance Company for $200, amount of four calls. The first two calls were made by the directors of the company prior to liquidation; the latter calls were made by the plaintiffs *es qualité* as liquidators of the company's affairs—*Held*, that under 41 Vic., cap. 38, by which the company was placed in liquidation, the liquidators were duly qualified to make calls. *Ross* vs. *Guilbaut*, S. C. 1881, 4 L. N. 415.

16. —— —— Liquidators of an Agricultural Insurance Company appointed under 41 Vic., ch. 38, by virtue of that Act, and 41 Vic., ch. 21, and sec. 147 of the Winding-up Act of 1875, have the same powers as directors in regard to making calls, and where such calls have been made regularly they are not bound in an action on such calls to establish their necessity. *Ross* vs. *Fiset*, S. C. 1882, 8 Q. L. R. 251.

17. —— **Procedure—Interrogatories—Appointment of Liquidator—Effect of.**—The company defendant, before the appointment of a liquidator, was summoned to answer interrogatories upon articulated facts, but a liquidator was appointed before the day fixed for answering. The rule was continued by consent to a subsequent day, and on that day, no one appearing to answer, default was entered—*Held*, inasmuch as by section 31 of the Winding-up Act, upon the appointment of a liquidator, all the powers of the directors cease, except in so far as the court or the liquidator sanction their continuance, the directors, after the appointment of a liquidator, could not authorize any persons to answer for them, unless their powers had been specially continued to that effect. The company was, therefore, relieved from the default, and the liquidator allowed to answer. *Graham* vs. *The Casselman Lumber Co.*, S. C. 1893, 4 Que. 91.

18. —— **Right to Sums paid into Court.**—Funds paid into court by a company with opposition to an execution of a judgment against it, and to cover the amount of such judgment, belong to the plaintiff; and where the company becomes insolvent before such funds have been paid over to him the liquidator cannot claim them. *Samson* vs. *Manicouagan Fish and Oil Co.*, C. R. 1891, 17 Q. L. R. 65.

COMPENSATION. (1)

I. Action by Crown—Lawyer's Fees.

II. Action by Heir of deceased Insolvent Debtor.

III. Action Qui Tam.

(1) See Article in *Revue de Législation*, Vol. 1, 289.

IV. Action to account.

V. Agreement to compensate—Goods purchased from Firm.

VI. Alimentary Allowance.

VIa. Attorney and Client.

VII. Auctioneer—Debt due by.

VIII. Cheque given for Price of Land.

IX. Community of Property—Donation.

X. Consignment of Goods—Debt due by Consignor.

XI. Debts easily Liquidated. 1-6.

XII. Deed of Sale—Rescission—Rents and Profits.

XIII. Deed of Sale—Indication of Payment.

XIV. Damages.
Connected with Debt claimed. 1-10.
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Arising ex Contractu. 18-23.
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XV. Insolvency.
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Bill of Exchange—Accommodation Bill. 6.
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XIX. Partnership Debts. 1-8.

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XXI. Judgments.

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XXIII. Prescribed Debt—Unprescribed Judgment.

XXIV. Pledge—Money Lent.

XXV. Purchaser of an Immoveable.

XXVI. Return of Deposit.

XXVII. Same Debt offered in Compensation in two Actions.

XXVIII. Shareholder's Liability — Debt due by Corporation. 1-3.

XXIX. Universal Legatee — Doctor's Bill, etc. 1-2.

See also Insolvency.

I. ACTION BY CROWN—LAWYER'S FEES.

In an action by the Crown against an advocate to recover a tax imposed upon lawyers, such advocate can plead in compensation professional services rendered to the Crown. *Fortier* vs. *Langelier*, S. C. 1894, 5 Que. 323.

II. ACTION BY HEIR OF DECEASED INSOLVENT DEBTOR.

In an action by the heir of a deceased insolvent debtor to recover a debt contracted with his executors—*Held*, that a debt due by the deceased to the defendant could be pleaded in compensation. *Moss* vs. *Brown & Hardy*, S. C. 1861, 12 L. C. R. 202.

III. ACTION QUI TAM.

A penal action is neither divisible nor subject to compensation. *Normandin* vs. *Berthiaume*, S. C. 1884, M. L. R., 1 S. C. 393. Confirmed in appeal Jan. 21, 1887.

IV. ACTION TO ACCOUNT.

In an action to account the defendant cannot plead compensation of the amounts for which an account is demanded: the creditor's right to an accounting being absolute, such a defence can only be pleaded on the contestation of the account. *Cotton* vs. *McCord*, S. C. 1893, 4 Que. 112.

V. AGREEMENT TO COMPENSATE—GOODS PURCHASED FROM FIRM.

Where it was proved that the account due by the defendant to a commercial firm was incurred under a special arrangement by which it was to be paid by *contra* account incurred by any of the members of said commercial firm, and such *contra* account was proved to exist —*Held*, that the plaintiff's claim was compensated and the action should have been dismissed. *Fortin* vs. *Dupuis*, Q. B. 1889, 33 L. C. J. 163.

VI. ALIMENTARY ALLOWANCE.

Debts due to the testator's estate by an alimentary beneficiary cannot be set up in compensation of the alimentary allowance. *Muir* vs. *Muir*, P. C. 1874, 18 L. C. J. 96, 19 R. L. 228, confirming Q. B. 1871, 15 L. C. J. 309.

VIa. ATTORNEY AND CLIENT.

An account due to a defendant's attorneys cannot be opposed in compensation of a claim against the client, and evidence of such alleged contra account is inadmissible. *Fulton* vs. *Darling*, S. C. 1887, M. L. R., 3 S. C. 475.

VII. AUCTIONEER—DEBT DUE BY.

A debt due by an auctioneer to a purchaser at auction, who knows that the seller is agent for another and not the principal, cannot be set up by way of compensation against the price of the goods so bought. *Rex* vs. *Melvin*, K. B. 1819, 2 R. de L. 76.

VIII. CHEQUE GIVEN FOR PRICE OF LAND.

Action to recover the amount of a cheque given by the defendant to plaintiff for the amount of $3,333.21, of date 4th February, 1880, for part of the price of a piece of land; plea of compensation for the amount of $5,790.96, consisting of the following items: 1. $414.16 for commutation money in favor of the Seminary of Montreal. 2. Corporation assessments paid by defendant for plaintiff, $979.96. 3. $1,000, being the amount of a promissory note paid by defendant on the 31st of March, 1880, in discharge of the plaintiff. 4. $1,632, being £408 contained in a discharge and subrogation, of date 25th April, 1866, by S. D. to defendant, who paid him this sum as surety for plaintiff. The pretensions of the plaintiff were: 1. That defendant could not oppose in compensation any of his claims, because the action was founded upon a cheque given in payment of the price of a piece of land, and anterior claims could not be set up in compensation, nor subsequent claims not clear and liquidated. 2. That all the payments that he could make for plaintiff were made with the moneys of plaintiff which he had in hand to the amount of more than $100,000. 3. That he owes to plaintiff and owed at the date of these pretended payments, the three written acknowledgments of 1873, 1871, for $2,881, $1,050, $1,000, with interest, further $1,000, brewery, &c. *Per Curiam.*—What the defendant may have paid for the plaintiff will enter into the account which he owes him, and what is now claimed is beyond the particulars of this account. It was part of the price of the land considered as paid cash by a cheque. The court is of opinion that the sum of $414 for commutation, and the sum of $979.90 for taxes, should go in deduction of the cheque sued upon, but no others. *Dorion* vs. *Dorion*, 5 L. N. 130, S. C. 1882.

IX. COMMUNITY OF PROPERTY—DONATION.

In an action on a deed of donation pure and simple, a claim arising out of a community which formerly existed between the parties cannot be offered in compensation. *Foucault* vs. *Foucault*, S. C. 1886, M. L. R., 2 S. C. 255.

X. CONSIGNMENT OF GOODS—DEBT DUE BY CONSIGNOR.

A merchant who receives a consignment of goods has a right to apply the proceeds of such goods in compensation of a debt due him by the consignor. *Stabb* vs. *Lord*. S. C. 1873, 5 R. L. 181. Reversed by Q. B., March, 1875, see Ram. Dig., p. 113.

XI. DEBTS EASILY LIQUIDATED—1188 C. C.

1. Action to recover freight under a charter party. Plea *inter alia* that the cargo was damaged by plaintiff's fault, and the freight should be compensated by the damage *pro tanto*. Demurred to on the ground that a plea of compensation for damage will not lie against a liquidated claim. *Per Curiam.*—I overrule the demurrer. It is merely a matter of form and under our procedure quite unimportant. It may be admitted that the demurrer would lie in England, but unless the English procedure is to govern here I must adhere to our practice of allowing easily liquidated damages to be made ground of compensation. The case of *Gaherty* vs. *Torrance* (Q. B. 1862, 6 L. C. J. 313) is directly in point. The judgment there, in express terms, allowed the plea of compensation for damage against the action for freight. *Bazzo* vs. *Moffatt*, S. C. 1881, 4 L. N. 61.

2. A debt need not be absolutely *claire et liquide* to be set up in compensation against a debt certain, provided it be easily proved; consequently an account for goods sold and delivered may be opposed to a debt due under a notarial instrument. *Hall* vs. *Beaudet*, Q. B. 1856, 6 L. C. R. 75, 5 R. J. R. Q. 15.

3. **Board.**—*Held*, that an account for board, where the debt is easily proved, is a debt *claire et liquide*, and such as may be offered in compensation of a debt under an obligation. *Desjardins* vs. *Tassé*, C. R. 1866, 2 L. C. L. J. 89.

4. —— A debt not liquidated may sometimes be offered in compensation when it is easily liquidated (as the price of board), and when it is connected with the debt claimed by the plaintiff, which is itself contested. *Décary* vs. *Pominville*, S. C. 1889, M. L. R., 5 S. C. 366.

5. In order that a claim be subject to compensation, it is sufficient that it be susceptible of easy liquidation. *Ross vs. Brunet*, S. C. 1873, 5 R. L. 229.

6. A judgment against the defendant can be compensated by the latter by an account for groceries due by the judgment creditor to the defendant, an action for which is pending in another court. But unless the tender of compensation includes interest on the judgment, it will be rejected. *Thibaudeau* vs. *Girouard*, Mag. Ct. 1889, 12 L. N. 186.

XII. DEED OF SALE—RESCISSION—RENTS AND PROFITS.

In an action in rescission of a deed of sale—*Held*, that the rents, issues and profits of the property from the date of sale would be declared to have been compensated, and would be set off against any sums paid to the plaintiff or on his behalf by his immediate vendee. *Poirier* vs. *Tassé*, S. C. 1863, 13 L. C. R. 159.

XIII. DEED OF SALE—INDICATION OF PAYMENT.

An action by the party indicated in a deed of sale as the person to whom the money is to be paid, will be dismissed upon plea of compensation by the defendant as the holder of notes previously made by the plaintiff, the indication of payment not having been accepted by the plaintiff, and that the registration of the deed by the plaintiff does not affect the defendant's right in such cases. *Scarer* vs. *Nye*, S. C. 1857, 8 L. C. R. 221, 6 R. J. R. Q. 216.

XIV. DAMAGES.

1. Connected with Debt claimed.—Damages for the non-performance of a special agreement for the transportation of goods, where a part has been transported, delivered and accepted, cannot be pleaded against a *quantum meruit* for freight earned for such part so delivered and accepted, the proper course being by a cross-demand or a separate action for damages. *Guay* vs. *Hunter*, K. B. 1810, Pyke's Reports, p. 36, 1 R. J. R. Q. 73.

2. —— A plea of perpetual exception, by which it is alleged that the sum claimed by the plaintiff is set off by a sum claimed by defendant for damages suffered by him in consequence of the neglect and carelessness of the plaintiff in the doing of certain works and labor by the plaintiff for the defendant, and for the value which he claims by his action, is a good plea and well founded if proved; and it is not necessary in such a case that such damages should be claimed by an incidental cross-demand. *Beaulieu* vs. *Lee*, S. C. 1856, 6 L. C. R. 33, 4 R. J. R. Q. 480.

3. —— In an action by a contractor A. for the price of stones delivered to B., the latter cannot offer in compensation damages alleged to have been incurred in the building of B.'s house by A. as sub-contractor under C. (1) *Sauvisse* vs. *Hart*, S. C. 1857, 1 L. C. J. 190. Confirmed in appeal 1st March, 1858.

4. —— Damages, resulting from fraud, may be offered in compensation against the purchase money of real estate. *Prévost* vs. *Leroux*, S. C. 1859, 3 L. C. J. 321. (See *infra* No. 8.)

5. —— Damage occasioned to the ship by the misconduct of the pilot may be set up against his claim for pilotage, and in such action the master may be admitted as a witness. *The Sophia in re*, V. A. C. 1836, Stuart's Vice Adm. Rep., p. 96.

6. —— Where, to an action by a shipwright for repairs done to a barge, the defendant pleaded in compensation a claim for damages for the unnecessary detention of the barge in the dock after the repairs were finished, by which he suffered loss—*Held*, that such damages, being proved, could be set up in compensation of the amount due for repairs. *Tate* vs. *Curan*, C. Ct. 1867, 17 L. C. R. 199.

7. —— In an action of revendication by a landlord to recover from the tenant who had left the building some effects taken by him from the building leased; the tenant admitted he was responsible for a certain value of such effects, but set up in compensation a claim of damages which he alleged to have been suffered by him through the fault of the plaintiff in and during his occupancy of the premises leased—*Held*, that such damages could not be set up in compensation of the action in revendication; that the defendant might set up by incidental cross-demand to the action in revendication such claim for damages, both claims

(1) See similar French case reported Vol. 11, p. 135, of Legal News.

arising out of the same contract. *Lockie* vs. *Mullin*, S. C. 1886, M. L. R., 2 S. C. 262.

7a. —— In an action of ejectment accompanied by an attachment for rent, the tenant cannot set up unliquidated damages in compensation. Such plea will be dismissed on demurrer. *Chaperon* vs. *Boucher*, C. C. 1885, 11 Q. L. R. 367. But see Lockie vs. Mullin, *supra*, No. 7.

7b. —— Where a lessee was entitled by a clause of the lease to become proprietor of the premises leased upon payment of a specified sum, he could not plead, when sued in ejectment, that this sum had been compensated by damages suffered by him through the interruption of his business. *Bell* vs. *Court*, Q. B. 1886, M. L. R., 2 Q. B. 80.

8. —— In an action on a deed for balance of price of sale, the buyer cannot set off unliquidated damages resulting from alleged violation of the conditions of sale by the vendor. *Gagnon* vs. *Gaudry*, 1885, M. L. R., 1 S. C. 318. (See *supra*, No. 4.)

9. —— A demand for indemnity under a fire insurance policy cannot be set off against an amount due for premium, the former not being *claire et liquide* in the terms of Art. 1188 C. C., and the latter being a condition precedent to the acquirement of any rights on the part of the insured under the policy. *Giles* vs. *Giroux*, S. C. 1885, 13 R. L. 652.

10. —— When the damages claimed by the defendant flow from the contract between the parties on which the action is founded, he is entitled to compensate them against the plaintiff's demand. *Davidson* vs. *Gagné*, S. C. 1890, 20 R. L. 301, and see *Décary* vs. *Pominville*, M. L. R., 5 S. C. 366.

11. Debt against Damages awarded. — Where the plaintiff brought action against the defendant for maliciously and unlawfully issuing out a writ of capias, and against the prothonotary for issuing the same without the affidavit required by law, and the first defendant endeavored to set up, in compensation of so much of the amount which might be awarded the plaintiff as damages, his claim against the plaintiff for rent—*Held*, maintaining the demurrer of the plaintiff, that such compensation could not be pleaded against a demand for damages which was not *claire et liquide* at the time of filing the plea. *Jordeson* vs. *McAdam*, S. C. 1863, 13 L. C. R. 229.

12 —— But *held*, overruling the above, that damages awarded for illegal and unwarranted attachment, *saisie arrêt*, may be compensated by the debt due on which the *saisie arrêt* was issued. *Belleisle* vs. *Lyman*, C. R. 1870, 15 L. C. J. 305.

13. —— And again, in action of damages for malicious prosecution—*Held*, that a judgment obtained by defendant in right of his wife against plaintiff might be placed in compensation. *Landa* vs. *Poulenc*, S. C. 1878, 1 L. N. 614.

14. —— Also damages for personal injuries can be compensated by a debt due by the offended party to the person liable for the damages. *Williams* vs. *Rousseau*, S. C. 1886 (Per Casault, J.), 12 Q. L. R. 116, 17 R. L. 537.

15. —— *Quære*—as to the right to oppose other claims in compensation of the damages a party has been condemned to pay for a delict or *quasi* delict, or to seize in his own hands the sums so awarded to his debtor. In the court below sibi was decided in the affirmative. *Archambault* vs. *Lalonde*, Q. B. 1887, M. L. R., 3 Q. B. 486, 18 R. L. 191; S. C. 1886, M. L. R., 2 S. C. 410, 31 L. C. J. 312.

16. —— Although an unliquidated debt cannot be compensated against a liquidated one, yet if in an action of damages the defendant, without admitting the plaintiff's claim, sets up in compensation of the damages that may be found against him a debt due to him by the plaintiff, the court in its final judgment declaring the damages will allow the compensation, but only from the date of judgment, defendant being condemned to pay costs. *Lapalme* vs. *Elliot*, C. R. 1890, 34 L. C. J. 228.

17. —— But *held*, that in an action of damages the defendant cannot set up in compensation a liquidated debt due by the plaintiff. *Roy* vs. *McShane*, S. C. 1889, 17 R. L. 667.

18. Unliquidated Damages. — In an action on a notarial obligation, the defendant cannot set up in compensation a claim for damages for non-delivery of bricks which the plaintiff had undertaken to furnish him. *Chapdelaine* vs. *Morrison*, S. C. 1856, 6 L. C. R. 191, 5 R. J. R. Q. 153.

19. —— Where to a claim founded on authentic documents the defendant set up a claim for goods sold and delivered—*Held*, in the Superior Court, that compensation does not arise, but reversed in appeal on the ground that the default of the plaintiff, against whom the compensation was set up, to answer the articulation of facts of the defendant, had the effect of an admission of the facts alleged, so

as to make the claim in compensation *claire et liquide*, and to extinguish the adverse claim. *Archambault* vs. *Archambault*, 10 L. C. R. 422, Q. B. 1860.

20. —— **Arising ex-contractu and not connected with the Debt claimed**—In an action by the vendor of goods to recover the value thereof, the defendant cannot set up in compensation thereof a claim for damages for delay in delivery of a former consignment of goods. *Morin* vs. *Hardy*, S. C. 1889, 17 R. L. 657.

21. —— —— Such damages must be claimed by direct action or incidental demand. *(Ib.)*

22. —— —— Defendant sued for price of goods sold and delivered cannot offer in compensation a claim for damages due him by the plaintiff for former goods sold to plaintiff, but which were refused by him, and in consequence were stored and re-sold by the defendant at a loss to him which, he claims, exceeds the amount plaintiff has sued him for, but which claim plaintiff denies, thus rendering it litigious. *Verret* vs. *Major*, S.C. 1889, 17 R. L. 91. See also *DeLact* vs. *Malbeltz*, Q.B. 1890, 34 L. C. J. 334.

23. —— —— A claim of damages resulting from a different contract cannot be pleaded in compensation to an action on a contract, but should be urged by incidental demand. *Lafrenière* vs. *McBean*, S. C. 1890, M. L. R., 7 S. C. 37.

24 —— **Arising ex-delicto**—A claim of unliquidated damages ex-delicto, e. g., damages caused by wrongful issue of capias, cannot be pleaded in compensation to an action for goods sold. *Lucke* vs. *Wood*, S. C. 1883, 6 L. N. 98; *Brizard dit St. Germain* vs. *Sylvestre*, C. R. 1890, 20 R. L. 205; *Banque d'Ontario* vs. *Foster*, S. C. 1883, 13 R. L. 13.

24a —— —— But *held*, a person whose effects are seized under an attachment before judgment issued without probable cause, may in the same action claim, by incidental demand, the damages thereby suffered, and oppose to the action a plea of compensation based on the damages claimed by him in the incidental demand. *Furniss* vs. *Bleault*, S. C. 1886, M. L. R., 2 S. C. 119.

25. —— —— Compensation does not arise under Art. 1188 C. C. in matters of delicts, but a defendant sued in damages for libel can plead provocation on the part of the plaintiff. *Martineau* vs. *Roy*, S. C. 1887, 16 R. L. 257; *Roberge* vs. *Moquin*, S. C. 1885, 17 R. L. 634.

XV. INSOLVENCY

1. **General Principles.**—The very instant a debtor becomes insolvent and makes an assignment of his estate, all his unsecured creditors acquire a right to be paid by contribution out of the proceeds of his estate, without any priority or preference between them. From that moment the rights of his creditors are finally determined, and no compensation which did not exist before the assignment can be claimed to the prejudice of the other creditors after the assignment has been made.

A quantity of timber was pledged for the payment of a draft, and if the draft was not paid, the holder was to sell the wood and place the proceeds to the owner's credit. The draft was not paid; the owner of the wood became insolvent, and the pledgee sold the wood, of which he had never had actual delivery—*Held*, that the pledgee could not place the balance of the price of sale, after paying the draft, to the credit of a former indebtedness of the owner. *Perkins* vs. *Ross*, Q. B. 1880, 6 Q. L. R. 65.

2 —— And so a dividend under a dividend sheet, under the Insolvent Act of 1875, cannot be retained by the assignee of the estate by way of set-off or compensation against a debt due to the assignee by the creditor collocated, as indorser of certain notes given in payment of a sale of the stock in trade of the insolvent by the assignee to another party. *Walker* vs. *Doutre*, Q. B. 1878, 23 L. C. J. 317.

3 —— There can be no compensation of a debt due to an abandoned estate, at the time of abandonment, by an unprivileged claim for unearned wages. *Chinic & Lefaivre* vs. *Rattray*, S. C. 1888, 14 Q. L. R. 167.

4. —— A debt of an insolvent transferred to [illegible] is a debtor of such insolvent, within the thirty days preceding the assignment by the insolvent under the Act, cannot set up by compensation by such debtor, even in a case where his own debt was not due at the time of such transfer and did not become due until after the assignment by the insolvent. *Riddell* vs. *Reay*, S. C. 1874, 18 L. C. J. 130.

5. —— The indemnity which a surety can exact from an insolvent debtor does not permit him to set off the debt for which he has

[illegible]ty against the insolvent's debt. [illegible] *Beaulieu*, C. R. 1887, 13 Q. L. R. 293.

6. **Bill of Exchange—Accommodation Bill.**—On the 25th June, 1888, the defendant accepted G.'s accommodation draft for $ 19.75 at three months. On the 21th July, 1888, the defendant purchased goods from G. to the amount of $215. On the 26th July, 1888, G. made a judicial abandonment for the benefit of his creditors. On the 28th September, 1888, defendant paid the accommodation draft. In a suit by the curator to G.'s estate for the recovery of the $215. price of goods, defendant pleaded that he was entitled to compensate this sum with the amount he had paid on the draft for G.'s accommodation—*Held*, 1. That the judicial abandonment definitely settles the relative positions of the insolvent and his debtors and creditors. 2. That from the date of the abandonment all the unsecured creditors acquire the right to be paid by contribution out of the proceeds of the debtor's estate. 3. That compensation cannot take place to the prejudice of rights acquired by the insolvent's creditors by reason of the abandonment, and therefore that creditors are without right of compensation for claims maturing after the abandonment. *Riddell* vs. *Goold*, 1889, M. L. R., 5 S. C. 179.

7. **Fair Claim.**—In an action by the trustees of a savings bank which had become insolvent, on an obligation for a loan by the bank, the defendant pleaded compensation by an amount transferred to him by a depositor with the bank—*Held*, that as the amount of deposits could only be paid out of the deposit fund and the interest accrued thereon, and as the deposit fund in this case was not sufficient to meet the deposits which had been made, that the plea of compensation would not lie. *Morris* vs. *McGinn*, S. C. 1848, 1 L. C. R. 110, 2 R. J. R. Q. 124.

7a. —— A shareholder of a bank cannot offer in compensation of calls on stock after its suspension claims against the bank which he has purchased since the suspension. *Gilman* vs. *Court*, Q. B. 1882, 13 R. L. 619.

8. —— A depositor who is also a shareholder of a bank in liquidation under the Banking Act, and which was insolvent when it suspended payment, is not entitled to offer the amount of his deposit in compensation of calls made upon his stock by the liquidators under the double liability clause of the Banking Act, sec. 58 of 31 Vic., chap. 5. *Exchange Bank* vs. *Burland*, S. C., 1885, 8 L. N. 18.

9. —— *Held* (reversing the decision of Torrance, J., M. L. R., 1 S. C. 225), where drafts and notes are paced with a bank by a debtor of the bank, not as collateral security, but for collection, that compensation does not take place until the bank has received the amounts collected by them on such notes; and in the present case, the debtor having become insolvent before any amounts were received on such notes, compensation did not take place between the amount collected by the bank and the debt due to it. *Exchange Bank of Can.* vs. *Canadian Bank of Commerce*, 1886, M. L. R., 2 Q. B. 176.

10. —— But *held* that compensation can take place against an insolvent bank if the debts became due before the order for winding up the bank, although after its suspension. *Banque d'Echange du Canada* vs. *St. Amour*, S. C. 1885, 13 R. L. 413.

XVI. INTEREST ON LOAN—SERVICES RENDERED.

An account for services rendered by a working laborer may be set up in compensation of an amount due as interest on money lent. *Corporation Ste. Marie Mannoir* vs. *Beaudelle*, S. C. 1882, 12 R. L. 110.

XVII. MUST BE SET UP IN GOOD FAITH.

Compensation must be set up in good faith, and a creditor holder of a note who buys from his debtor under pretence that he is going to pay cash, while keeping back the information that he is the transferee of said debtor's note, cannot in an action against him for the goods bought set up the note in compensation thereof. *Doucet* vs. *Geoffrion*, C. Ct. 1883, 12 R. L. 401.

XVIII. PAYMENT IN ERROR.

The right to compensate an amount paid in error or without legal cause arises the moment the payment is made, and not merely at the date of the action *en répétition* for such amount. *Brandt* vs. *Buckley*, C. R. 1871, 19 L. C. J. 98.

XIX. PARTNERSHIP DEBTS.

1. A defendant sued for a personal debt cannot set up in compensation a claim due jointly and severally to him by a partnership of which the plaintiff is a member. *Button*

vs. *Desbarats*, S. C. 1853, Montreal Condensed Reports, p. 5.

2. A debt due by one of the members of a partnership individually, cannot be set up in compensation of an amount due to the partnership itself. *Howard* vs. *Stewart*, S. C. 1862, 6 L. C. J. 256.

3. The defendant bought wood from one of the partners in a firm, in ignorance of the existence of a partnership. The partner owed him money, but the wood was the property of the partnership—*Held*, confirming decision of court below, that the defendant could not set up the amount of his purchase against the debt due him by the partner from whom he bought, although the latter managed the affairs of the partnership. *Rolland* vs. *St. Denis*, Q. B. 1866, 2 L. C. L. J. 110.

4. The debtor of a firm can, after its dissolution, set up in compensation of its claim against him a claim which he has against one of the partners, and to the extent of that partner's interest in the firm. *Gauthier* vs. *Lacroix*, Q. B. 1868, 12 R. L. 508.

5. Where defendant is sued for a personal debt, he cannot set up in compensation the plaintiff's share of a partnership debt, which the defendant as one of the partners paid in its entirety. *McLean* vs. *Bickerdike*, Q. B. 1889, 18 R. L. 277.

6. Where defendant is sued for the value of goods sold and delivered, he cannot set up in compensation a claim transferred to him by the plaintiff's ex-partner arising from their partnership relations, where there has not been an accounting between the partners. *DeLael* vs. *Mallette*, Q. B. 1890, 34 L. C. J. 334.

7. In November, 1886, G. B., by means of a counter-deed, became interested in certain real estate transactions in Montreal, effected by one P. S. M. In December, 1886, G. B. brought an action against P. S. M. to have a sale made by the latter to one Barsalou declared fraudulent, and the new purchaser restrained from paying the balance due to the parties named in the deed of sale. A plea of compensation was filed, and pending the action a sequestrator was appointed to whom Barsalou paid over the money. In Sept., 1887, another action was instituted by G. B. against P. S. M., asking for an account of the different real estate transactions they had conformably to the terms of the counter-deed. To this action a plea of compensation was also filed. The Superior Court dismissed the first action, on the ground that G. B. had no right of action, but maintained the second action ordering an account to be taken. The Court of Queen's Bench affirmed the judgment of the Superior Court dismissing the first action, and P. S. M. acquiesced in the judgment of the Superior Court on the second action. On an appeal to the Supreme Court from the judgment of the Court of Queen's Bench dismissing the first action—*Held*, reversing the judgment of the Court below, that the plea of compensation was unfounded, G. B. having the right to put an end to P. S. M.'s mandate by a direct action, and therefore, until the account which had been ordered in the second action had been rendered, the moneys should remain in the hands of the sequestrator appointed with the consent of the parties. *Bury* vs. *Murphy*, Supreme Ct. 1893, 22 Can. S. C. R. 137.

8. Case of *McLean* vs. *Stewart*, Q. B. 1894, 3 Que. 431. Reversed by Supreme Court. Restored by Privy Council, 19 L. N. 17.

XX. PROMISSORY NOTES.

1. The amount of a note not payable to order, but transferred by notarial act at a time when a much larger sum was due and owing by the payee to the maker, will not support an action, both claims at the time of the transaction being compensated *pro tanto*. *Gibsone* vs. *Lee*, K. B. 1814, 1 R. de L. 347.

2. In an action on a promissory note—*Held*, reversing the judgment of the court below, that the maker could set up another note made by the payee and bearer more than five years previous, but endorsed to the maker of the first note, before the time acquired for prescription. *Hayes & David*, Q. B., 3 R. J. R. Q. 155, 3 L. C. R. 112.

3. And *held*, that in such case compensation takes place without any notice of the endorsement and transfer of the note set up in compensation being required, and that the date appearing on such endorsement is sufficient evidence in the absence of contradictory proof. (*Ib.*)

4. Where to an action on a promissory note the defendant pleaded that, at the time the note became due, the plaintiffs had in their possession goods belonging to the defendant of the value of the note, and that the debt was therefore compensated, the plea was held to be bad, inasmuch as the value of goods or merchandise cannot be pleaded in compensation of a demand for a sum of money. *Ryan* vs. *Hunt*, S. C. 1860, 10 L. C. R. 474.

5. A debt alleged to be due by plaintiff (but not evidenced by any writing) as part of a sum borrowed by plaintiff from a third party, the transfer of which has been signified only after the institution of plaintiff's action, cannot be pleaded by way of compensation against defendants' own promissory note. *Parsons* vs. *Graham*, S. C. 1870, 15 L. C. J. 41.

6. Compensation takes place only between debts equally liquidated and demandable, so that where the defendant endeavours to set up against a promissory note, an alleged claim for his share of a harvest, which the plaintiff had neglected to render him an account of—*Held*, that such a claim did not give rise to compensation. *Perrault* vs. *Herdman*, C. R. 1871, 3 R. L. 440, 2 R. C. 106.

7. The appellant, who was plaintiff in the court below, sued the respondent upon two promissory notes. He selected these two notes out of seven or eight that were due to him. One of these notes became due on the 16th Dec. and the other on the 1st of the same month. The defendant answered this action, alleging that he had sold the plaintiff, before the 16th Dec., four boilers and a lot of other articles, and that the plaintiff's claim was compensated and paid. This plea had been established by the evidence. It was possible the plaintiff might have other claims, but he should have shown them; plea of compensation sustained. *Gilbert* vs. *Lionais*, Q. B. 1876, 7 R. L. 339.

8. The defendant was entitled to plead, to [illegible] on a promissory note, that the plaintiff was under an obligation to deliver to him a note for a larger amount in payment of goods sold and delivered, but had made default; and to ask that the note sued on be declared compensated by so much of what was due by the plaintiff. *Quintal* vs. *Aubin*, C. R. 1883, M. L. R., 1 S. C. 110.

9. Compensation must be set up in good faith, and a creditor, holder of a note who buys from his debtor under pretence that he is going to pay cash and keeping back the information that he is the transferee of said debtor's note, cannot in an action against him for goods bought set up the note in compensation. *Dhoust* vs. *Geoffrion*, C. Ct. 1883, 12 R. L. 401.

10. H. gave the note of C., endorsed by H., to his creditor L. in payment of his debt. the note passed into the hands of T., wife of L., and she settled with C., the maker, for the note by deed passed before the institution of the action of L. against H.—*Held*, the debt of H. was paid and compensated by these transactions. *Lepage* vs. *Hamel*, Q. B., 8 May, 1884.

11. Respondent being indebted to one Turcotte, obtained from him delay by means of two promissory notes at 12 and 24 months. These notes were transferred by Turcotte to the appellant, who took action against the respondent, in Turcotte's name, not upon the notes, but upon the original obligations. Respondent then purchased a debt due by Turcotte, and caused a signification of the transfer to be served upon him, whereupon the appellant discontinued his suit, without notice to, or leave of, respondent, and brought a new action, in his own name, upon the notes—*Held*, that respondent's plea of compensation was good; Turcotte was only a *prête-nom* for the appellant, but *quoad* the respondent he was the real creditor. *Hould* vs. *Tousignant*, Q. B. 1892, 1 Que. 561.

XXI. JUDGMENTS.

One judgment may be set up against another, or by opposition *afin d'annuler*, for payment *pro tanto*. *Frosle* vs. *Esson*, K. B. 1821, 3 Rev. de Lég. 175.

XXII. PLEADING.

Where compensation can be urged it should be pleaded by peremptory exception. *Brunet* vs. *Lee*, K. B. 1812, 3 Rev. de Lég. 197.

XXIII. PRESCRIBED DEBT—UNPRESCRIBED JUDGMENT.

Where a debt, which under ordinary circumstances would be prescribed, is offered in compensation to an unprescribed judgment, the action on the latter will be dismissed, if it appear that, prior to the prescription of the former, both debts had come within the conditions necessary for compensation. *Lyndon* vs. *Casey*, Q. B. 1887, 13 Q. L. R. 237.

XXIV. PLEDGE—MONEY LENT.

A claim for money lent is not of the same nature as one for the return of a pledge, and one cannot compensate the other. *Pauzé* vs. *Senécal*, S. C. 1881, 28 L. C. J. 161. Reversed by C. R., M. L. R., 1 S. C. 165. Restored by Q. B.; Q. B. confirmed by P. C., 12 L. N. 330.

XXV. PURCHASER OF AN IMMOVEABLE.

The purchaser of an immoveable who settles a claim against such immoveable for which he is guaranteed, can set off the amount paid to settle such claim against the purchase price of the immoveable. *Forbes* vs. *Burns*, C. R. 1891, 21 R. L. 203, confirming S. C., 21 R. L. 163.

XXVI. RETURN OF DEPOSIT.

An ordinary debt cannot be set up in compensation against a claim for the return of a deposit. C. C. 1190. *Rattray* vs. *McPhail*, Q. B. 1890, 16 Q. L. R. 263.

XXVII. SAME DEBT OFFERED IN COMPENSATION IN TWO ACTIONS.

In an action for the amount of a promissory note, where the defence set up was that of compensation of a certain amount due the appellant as his costs in an action formerly pending between them, and it was urged that the same claim had been pleaded in compensation in three different cases before—*Held*, confirming the decision of the court below, that the amount of a debt already offered in compensation in a cause where such compensation had already been pleaded could not be re-offered in another cause even though the first cause be still pending before the court. *Gagy* vs. *Brown*, Q. B. 1865, 16 L. C. R. 302.

XXVIII. SHAREHOLDER'S LIABILITY —DEBT DUE BY CORPORATION.

1. A shareholder of an insolvent corporation cannot offer a debt due to him by the corporation, whatever may be the character of the debt, in compensation of a claim against him by a creditor of the company. *Ryland* vs. *Routh*, C. R. 1866, 1 L. C. L. J. 114.

2. *Held*, reversing the judgment of the Court of Queen's Bench (12 L. C. J. 29), that compensation does not take place *pleno jure* of the debt due by a shareholder in a bankrupt railway company to a judgment creditor of the company, with a debt due by the company to the shareholder for arrears of salary as president of the company, where the first mentioned debt is for stock not paid up, and where no calls have been made by the company on such unpaid stock. *Ryland* vs. *Delisle*, P. C. 1869, 14 L. C. J. 12.

3. A shareholder of a bank cannot offer in compensation of calls on stock after its suspension, claims against the bank which he has purchased since the suspension. *Gilman* vs. *Court*, Q. B. 1882, 13 R. L. 619.

XXIX. UNIVERSAL LEGATEE—DOCTOR'S BILL, ETC.

1. *Held*, that an indebtedness arising out of an alleged joint transaction between the defendant and a deceased person cannot be pleaded in compensation to an action by the universal legatee of the latter for a *prix de vente*. *Martin* vs. *Dansereau*, S. C. 1884, 7 L. N. 109.

2. But moneys paid out by defendant for deceased, moneys received by the deceased to the use of defendant, and the amount of a bill for professional services rendered by the defendant as medical attendant to the deceased, may be pleaded in compensation to an action of the nature mentioned above. (*Ibid.*)

COMPETENCE.

See JURISDICTION.

COMPOSITION.

See INSOLVENCY.

CONFISCATION.

See CROWN.

CONFLICT OF LAWS.

See INTERNATIONAL LAW.

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CONSTITUTIONAL LAW. (1)

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I. BANKS AND BANKING.

1. Although § 14 of sec. 91 of the British North America Act of 1867 gives to the Dominion Parliament the exclusive right to enact laws relating to banks and banking, the administration of such laws belongs to the provinces, and the Attorney-General for Canada is not governed by Art. 997 C. C. P. as to the issue of his *fiat* for a writ of *scire facias*. *Sarazin* vs. *Banque de Saint Hyacinthe*, Department of Justice, 1881, 20 R. L. 580.

2. The words "Banking, Incorporation of Banks and the issue of paper money" in section 91 (15) of the British North America Act, 1867, cover the case of warehouse receipts taken as security by a bank in the course of the business of banking. Notwithstanding section 92 of the same Act, the Dominion Parliament has power to legislate with respect to such securities, though with the effect of modifying the law of the province in relation hereto. (1) *Tennant* vs. *Union Bank of Canada*, Privy Council, [1893] "The Reports," 382 [1894] App. Cas. 31.

II. COMMISSION OF INQUIRY.

1 Executive Power- R. S. Q. 596, 598.—*Held*, reversing the judgment of Wurtele, J. (M. L. R. 6 C. 289), an inquiry into an alleged attempt to influence and corrupt members of the Provincial Legislature is a matter connected with the good government of the province and the conduct of the public business therein, within the meaning of R. S. Q. 596. *Turcotte* vs. *Whelan*, 1891, M. L. R., 7 Q. B. 263.

2. A commission of inquiry issued by the Lieutenant-Governor in Council under the said section has the same power to enforce the attendance of witnesses, and to compel them to give evidence before it, as is vested in any Court of law in civil cases, and has therefore the power to punish by fine or imprisonment, or both, any contempt of its authority by any person summoned as a witness refusing to appear, or to answer questions put to him concerning the matters which are the subject of such inquiry. *Turcotte* vs. *Whelan*, 1891, M. L. R., 7 Q. B. 263.

3. Under the provisions of the B. N. A. Act, 1867, the Provincial Legislature was empowered to enact the provisions contained in Articles 596 and 598 of the Revised Statutes of Quebec. *Turcotte* vs. *Whelan*, 1891, M. L. R., 7 Q. B. 263.

(1) *Cushing* vs. *Dupuy*, 5 App. Cas. 393, followed.

III. CONTRACT WITH GOVERNMENT.

1. Consent of Chief Executive—Order-in-Council — Functions of Cabinet — Powers of Ministers as heads of departments—Ratification.—It is essential to the validity of a contract made by the Provincial Government, for the carrying out of which a money vote must be obtained from the Legislature, that the consent of the Lieutenant-Governor to it appear in an Order-in-Council.

2. Ministers of the Crown as heads of the departments have power to dispose of matters of ordinary routine, but cannot enter, for the government, into contracts of the nature above stated. As regards more particularly which the Department of Agriculture and Colonization is concerned, Art. 1583 R. S. Q. requires that they be signed by the Commissioner, or his assistant, and countersigned by the secretary of the department.

3. A contract, for the validity of which the approval of the Lieutenant-Governor is required as stated above, entered into by a minister alone, is not rendered effective and binding on the government by a part payment made, on the order of such minister, out of a departmental fund for other purposes, nor by the delivery under it of goods to subordinate officials, nor by the vote by the Legislature, in the bill of supply, of a sum of money "towards providing for the settlement of claims under consideration." *Regina* vs. *Waterous Engine Works Co.*, Q. B. 1893, 3 Que. 222.

IV. CORPORATIONS.

1. The Legislature of the Province of Quebec has no power to amend an act of incorporation of the late Province of Canada creating a corporation extending over two provinces, even although it be proved that the corporation had its domicile, chief place of business, and the whole of its property in the Province of Quebec. *Dobbie* vs. *Board Temporalities*, P. C. 1882, 26 L. C. J. 170, 5 L. N. 58; Q. B. 1880, 3 L. N. 241.

2. The Dominion Parliament alone has power to incorporate an association for the purpose of buying, leasing and selling landed property and buildings in the whole Dominion, although the operations of a society for such purpose affect exclusively property and civil rights within the province where they are carried on; and therefore the Act 37 Vic. (Can.), cap. 103, incorporating the Colonial Building and Investment Association for such objects, was *intra vires*. *Lorangeer, Atty.-Gen.*, vs. *Colonial Building and Investment Association*, P. C. 1883, 9 App. Cas. 157, reversing Q. B. 1882, 5 L. N. 116.

3. Letters patent issued by the Lieutenant-Governor-in-Council, incorporating a Telephone Company with power to carry on business in this Province under the provisions of section 8 of 31st Vict., chap. 25, now Revised Statutes of Quebec 4705, in which power is granted to the Sherbrooke Telephone Association "to construct, maintain and operate a line or lines of telephone through, under or along the streets, highways, bridges or water courses of towns, cities, or other incorporated or rural municipalities in said Province where said Association shall at any time carry on its operations, provided the passage or traffic in said streets or highways shall not be impeded or interfered with," are *ultra vires* of the Lieutenant-Governor-in-Council, and the letters patent should not have extended or interpreted the words of the law, 1705 R. S. Q., which simply confer upon any company incorporated by letters patent all the powers, privileges and immunities required for the carrying on of its undertaking; and the control and use of the streets of the city of Sherbrooke and other municipalities of the Province can only be taken away by direct legislative enactment. *Corporation of Sherbrooke* vs. *Sherbrooke Telephone Co.*, S. C. 1889, 12 L. N. 354. Confirmed in Appeal 1890, M. L. R., 6 Q. B. 100.

4. The act incorporating the Jesuits is *intra vires* of the Quebec Legislature. *Comp. de Jésus* vs. *Mail Ptg. Co.*, S. C. 1890, 20 R. L. 30.

5. R. S. C., ch. 129, sec. 3, which provides that the Winding-up Act applies to incorporated trading companies "doing business in Canada, wheresoever incorporated," is not *ultra vires* of the Dominion Parliament. *Allen* vs. *Hanson*, Supreme Ct. 1890, 18 Can. S. C. R. 667, confirming Q. B., 13 L. N. 129, 16 Q. L. R. 79.

V. DISSOLUTION OF LEGISLATURE.

See article in 15 Legal News 4, containing opinion of Dr. Bourinot *re* dissolution of Quebec Legislature, 22 Dec., 1891.

VI. ELECTION ACTS. (See also under title "ELECTIONS.")

1. The Dominion Controverted Elections Act of 1874 is constitutional. *Valin* vs. *Lan-*

glois, Supreme Ct. 1879, 3 Can. S. C. R. 1; leave to appeal to P. C. refused, 5 App. Cas. 117; *Owens* vs. *Cushing*, C. R. 20 L. C. J. 86; *Ryan* vs. *Derlin*, C. R., 20 L. C. J. 57.

2. The Contested Elections Act of 1873 is constitutional. *Dural* vs. *Casgrain & Michaud*, Election Court 1874, 19 L. C. J. 16, 5 R. L. 712.

VII. INSOLVENCY AND BANKRUPTCY.

1. The Quebec Legislature has power to pass an Act granting relief to a Union Association which has become embarrassed financially, and such an Act is not one relating to Bankruptcy and Insolvency within the meaning of the B. N. A. Act. *Union St. Jacques de Montréal* vs. *Belisle*, P. C. 1874, 20 L. C. J. 21, L. R., 6 P. C. App. 31, 5 R. L. 622.

2. But the Parliament of Canada has no power to provide for the liquidation of building societies (whether insolvent or not) in the Province of Quebec. *McClanaghan* vs. *St. Ann's Mutual Building Society*, Q. B. 1880, 24 L. C. J. 102. Reversing S. C. 1879, 10 R. L. 23.

3. The Quebec License Act of 1870 is *ultra vires* in so far as it affects the Insolvent Act of 1869. The Insolvent Act of 1869 relating exclusively to commercial matters, the local legislature cannot restrict its operations by imposing a duty on the sale of an insolvent's estate, or by restricting the powers of the liquidators under the Act. *Coté* vs. *Watson*, S. C. 1877, 3 Q. L. R. 157.

4. The power to legislate on bankruptcy and insolvency comprises legislation not only for a discharge of the debtor from his contracts, but also for the distribution of his estate among his creditors, either with or without a discharge from his liabilities. *Dupont* vs. *La Cie. de Moulin à Bardeaux Chantrenés*, S. C. 1888, 11 L. N. 225.

5. The legislative authority of the Parliament of Canada extends to laws providing for the distribution of the property of insolvent debtors without a discharge from their contracts, and "The Winding Up Act" (R. S. C., ch. 129), which provides for the distribution of the assets of insolvent trading companies, is constitutional. (*Ib.*)

6. The Act 48 Vic., ch. 22 (Que.), relating to abandonment of property is not *ultra vires* of the Quebec Legislature. The abandonment of property and its distribution among creditors, and the issue of the writ of *capias ad respondendum* thereby provided, are all comprised in the subjects upon which the B. N. A. Act empowers the legislature to enact. *Parent* vs. *Trudel*, C. R. 1887, 13 Q. L. R. 136; and see *Braddy* vs. *Stuart*, and *Clarkson* vs. *Ontario Bank*, Ontario Cases, 10 *Legal News*, 57.

VIII. INTOXICATING LIQUORS.

1. **Canada Temperance Act, 1878.**— By the B. N. A. Act, 1867, plenary powers of legislation are given to the Parliament of Canada over all matters within the scope of its jurisdiction, and they may be exercised either absolutely or conditionally; in the latter case the legislation may be made to depend upon some subsequent event, and be brought into force in one part of the Dominion and not in the other. *City of Fredericton* vs. *The Queen*, Supreme Ct. 1880, 3 Can. S. C. R. 505.

2. —— And under B. N. A. Act, sec. 91, ss. 2, "regulation of trade and commerce," the Parliament of Canada alone has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it, and the court has no right whatever to enquire what motive induced Parliament to exercise its powers. (*Ib.*)

3. —— And *held*, in the Privy Council, that such an Act was not a fiscal Act, that it did not properly belong to the class of subjects "property and civil rights," nor to the class of subjects falling under sub-section 16 of section 92—"Generally all matters of a merely local or personal nature in the Province;" and that the local option condition attached to it, by which the inhabitants of a municipality could adopt it or not as they saw fit, did not give it this character. (*Ib.*) P. C. 1882, 5 L. N. 234.

4. —— The regulation of the traffic in intoxicating liquors is within the jurisdiction of the Parliament of Canada. *Ex parte Cooey*, C. Ct. 1877, 21 L. C. J. 182. Reversed in appeal, but on other grounds. See 17 Q. L. R., pp. 228, 229.

5. —— The Canada Temperance Act, 1878, is constitutional and within the power and authority of the Dominion of Canada. *Russell* vs. *Reginam*, P. C. 1882, 12 R. L. 664, 7 App. Cas. 829.

6. **Brewer's License, etc.** — Provincial Legislatures cannot legislate upon questions affecting trade and commerce unless with the view of increasing the provincial revenue,

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Hart vs. *Corporation of Missisquoi*, C. Ct. 1876, 3 Q. L. R. 170.

7. —— S., after the passing of the Act O. 37 Vic., cap. 32, entitled "An Act to amend and consolidate the law for the sale of fermented or spirituous liquors," then being a brewer licensed by the Government of Canada, under 31 Vic., cap. 8 (D), for the manufacture of fermented, spirituous and other liquors, did manufacture large quantities of beer, and did sell by wholesale for consumption within the Province of Ontario a large quantity of said fermented liquors so manufactured by him without first obtaining a license as required by the said Act of the Legislative Assembly of the Province of Ontario. The Attorney-General of Ontario thereupon filed an information for penalties against S. On demurrer to the information the special matter for argument was that the Legislature of the Province of Ontario had no power to pass the statute under which the penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by wholesale as stated in the information—*Held*, that the Act of the Provincial Legislature of Ontario 37 Vic., cap. 32, was not within the legislative capacity of that Legislature, and that the power to tax and regulate the trade of a brewer being a restraint and regulation of trade and commerce falls within the class of subjects reserved by the 91st section of the British North America Act for the exclusive legislative authority of the Parliament of Canada, and that the license imposed was a restraint and regulation of trade and commerce and not the exercise of a police power. *Severn* vs. *Regina*, Supreme Ct. 1878, 2 Can. S. C. R. 70. But see *Molson* vs. *Lamb*, *infra No.* 16.

8. —— And the right conferred on the Provincial Legislatures by ss. 9, sec. 92, of the said Act to deal exclusively with shop, saloon, tavern, auctioneer and "other licenses" does not extend to licenses on brewers, or "other licenses" which are not of a local or municipal character. (*Ib.*)

9. Municipal Regulation of. — On the 3rd of April, 1877, an amendment was passed to a by-law made in 1871, requiring that a license fee of $200 should be paid by any one authorized to retail liquors, before the certificate of the corporation to enable the party to obtain a license was granted. This was done under authority of an Act of the Local Legislature, 38 Vic., cap. 76, giving to the council power to make by-laws—"For determining under what restrictions and conditions, and in what manner "the Collector of Inland Revenue for the "District of Three Rivers shall grant licenses "to merchants, traders, shopkeepers, tavern-"keepers and other persons to sell such "liquors"—*Held*, that under a proper interpretation of sub-section 8, the right to pass a prohibitory law for the purposes of municipal institutions has been reserved to the Local Legislatures by the B. N. A. Act. *Corporation of Three Rivers* vs. *Sulte*, 5 L. N. 330, Q. B. 1882. Confirmed in Supreme Ct., 11 Can. S. C. R. 25.

10. —— Article 561 of the Municipal Code as amended by 51-52 Vic., ch. 29, s. 6 (R. S. Q. 6118), by which a municipality is authorized to prohibit the sale of intoxicating liquors in quantities less than two gallons, within the limits of the municipality, is within the powers of the Provincial Legislature. *Corp. of Huntingdon* vs. *Moir*, 1891, M. L. R., 7 Q. B. 281, 20 R. L. 684; appeal to Supreme Ct. quashed, 14 L. N. 378, the by-law having, in the meanwhile, been repealed.

11. —— Section 39 of 53 Vic. (Que.), ch. LXXIX (an Act to incorporate the town of Magog) which gives the Municipal Council (of Magog) power "to make by-laws to restrain, regulate or prohibit the sale of any spirituous, vinous, alcoholic or intoxicating liquors, by retail or wholesale, within the town," is *intra vires* of the Legislature of the Province of Quebec. *Lépine* vs. *Laurent*, S. C. 1891, 17 Q. L. R. 226, 14 L. N. 369. But see *Desserveau* vs. *Lasalle*, decided at Three Rivers by Bourgeois, J. Noted 17 Q. L. R., at pp. 234, 235.

12. Police Regulation of. — 42 and 43 Vic., cap. 4, sec. 1 (Que.), ordering the closing of taverns, etc., on Sunday, is a police regulation, and is within the competence of the Quebec Legislature. (1) *Poulin* vs. *Corporation of Quebec*, Supreme Ct. 1884, 28 L. C. J. 105, 18 R. L. 480, 9 Can. S. C. R. 185, Court equally divided; Q. B. 1881, 7 Q. L. R. 337, S. C. 1881, 12 R. L. 486; *Cité de Montréal* vs. *Doyle*, Recorder's Court 1880, 2 Themis 182.

13. —— The provision of the Provincial Statute, 38 Vic., ch. 74, sec. 4, ordering houses in which spirituous liquors are sold, to be closed on Sundays, and every day from 11 of the clock at night until 5 of the clock in the

(1) See article in 4 Themis, p. 321, concluded at p. 61; by B. A. T. de Montigny.

morning, is a police regulation, within the power of the Provincial Legislature. *Blouin* vs. *Corp. of Quebec*, S. C. 1880, 7 Q. L. R. 18.

14. —— But the License Act of Quebec in so far as it imposes a penalty of imprisonment with hard labour is unconstitutional and *ultra vires* of the Quebec Legislature. *Collopy* vs. *Corporation of Quebec*, S. C. 1879. Noted 7 Q. L. R. at p. 19.

15. —— In a license case—*Held*, that the fact that a prohibitory by-law existed in virtue of the Municipal Code does not affect the right of the Legislature of the Province of Quebec to impose a fine greater than that imposed by the by-law. *Coté* vs. *Paradis*, Q. B. 1881, 1 Dorion's Q. B. R. 374.

16. Quebec License Act, 1878.—The Quebec License Act, 41 Vic., ch. 3, is *intra vires* of the Legislature of the Province of Quebec. (1) *Sulte* vs. *Corporation of Three Rivers*, Supreme Ct. 1883, 11 Can. S. C. R. 25, confirming Q. B. 1882, 5 L. N. 330; *Molson* vs. *Lambe* Supreme Ct. 1887, 15 Can. S. C. R. 253, confirming Q. B. 1886, 31 L. C. J. 59' M. L. R., 2 Q. B. 381, and S. C., M. L. R., 1 S. C. 264; *Exp. Edson*, S. C. 1883, 27 L. C. J. 312; *Coté* vs. *Paradis*, Q. B. 1881, 11 R. L. 1; *Ruckwart* vs. *Bazin*, S. C. 1870, 19 R. L. 655; *Exp. Molinari*, S. C. 1883, 6 L. N. 395.

17. —— As also the amendments thereto. *Molson* vs. *Lambe*, Supreme Ct. 1887, 15 Can. S. C. R. 253.

18. —— The Legislature of the Province of Quebec was duly vested, under the British North America Act, 1877, with the power to enact the provisions contained in the 2nd and 71st sections of "The Quebec License Law of 1878." *Dion* vs. *Chauveau*, S. C. 1883, 9 Q. L. R. 220.

19. —— 34 Vic., ch. 2 — Dom. Temperance Act, 1864.—The Quebec License Act, 34 Vic., cap. 2, and the Municipal Code are *ultra vires* of the Quebec Legislature in so far as they pretend to repeal the procedure clauses or any part of the Temperance Act of 1864. *Griffiths & Rioux*, S. C. 1883, 6 L. N. 211.

IX. INSURANCE.

On the question as to the right of the Local Legislature to legislate in matters of insurance, the Privy Council said :—Without attempting to define the limits of the authority of the Dominion Parliament in this direction it is enough for the decision of the present case to say that its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade such as the business of fire insurance in a single province, etc. *Parson* vs. *Sundry Insurance Companies*, P. C. 1881, 5 L. N. 25.

(1) *Hodge* vs. *The Queen*, 9 App. Cas. 117 followed.

X. JURY LAW.

The Parliament of Canada, in declaring, by 32 and 33 Vic., ch. 29, s. 44, that "every "person qualified and summoned as a grand "juror, or as a petty juror, in criminal cases, "according to the laws which may be then in "force in any Province of Canada, shall be "and shall be held to be duly qualified to "serve as such juror in that Province, etc." did not legislate *ultra vires*, and therefore the Jury Act of the Province of Quebec is constitutional. *Reg* vs. *Provost*, 1885, M. L. R., 1 Q. B. 477.

XI. LICENSE ACTS. (See "Intoxicating Liquors.")

1. Auctioneer's License. The License Act of Quebec, in so far as it pretends to limit the powers of assignees under the Insolvent Act in selling the estates of insolvents, is unconstitutional. *Coté* vs. *Watson*, S. C. 1877, 3 Q. L. R. 157.

2. Butchers' Stalls—37 Vic. (Q.), ch. 51, Sec. 123, sub-secs. 27, 31.—An Act of the Provincial Legislature, authorizing the City of Montreal to make a by-law imposing a license tax on butchers keeping stalls or shops for the sale of meat, fish, etc., within the city, elsewhere than on the public markets, is not *ultra vires* of the Legislature. *Angers* vs. *The City of Montreal*, S. C. 1876, 24 L. C. J. 259; also *Mallette* vs. *The City of Montreal*, S. C. 1879, 24 L. C. J. 263, and see article 2, *Legal News*, 377.

3. —— Sub-sections 27 and 31 of sec. 123 of 37 Vic. (Q.), ch. 51, by which the Council of the City of Montreal is authorized to regulate, license or restrain the sale, in any private stall or shop in the city outside of the public meat markets, of fresh meats, vegetables, fish, or other articles usually sold in markets, are within the powers of the Provincial Legislature. *Pigeon* vs. *Cour du Recorder*, Supreme Ct. 1890, 17 Can. S. C. R. 495, affirming Q. B., M. L. R., 6 Q. B. 60, S. C.,

16 R. L. 348; *Corbeil* vs. *City of Montreal*, 1890, M. L. R., 6 Q. B. 271.

4. —— The by-law passed by the City Council under the authority of the above-named sub-sections, fixing the license to sell in a private stall at $200, is valid. (*Ib.*)

5. Insurance Companies.—The Statute of 39 Vic. (Que.), ch. 7. intituled "An Act to compel assurers to take out a license," is unconstitutional. *Angers* vs. *Queen Insurance Co.*, P. C. 1878, 22 L. C. J. 307.

6. Storage of Gunpowder — 41 Vic. (QUE.), CH. 3, SECS. 170, 171.—A powder manufactory, where a quantity of powder exceeding 25 lbs. is kept, is a powder magazine within the meaning of 41 Vic. (Q.), cap. 3, sec. 170. *Hamilton Powder Co.* vs. *Lambe*, 1885, M. L. R., 1 Q. B. 460, 30 L. C. J. 13.

7. —— (By the majority of the Court):—That the Act above cited, which imposes a penalty for failing to take out a license, is not *ultra vires*, being in the nature of a police regulation, and as such, within the powers of the local legislature, even supposing the provision of the Act requiring a fee of $50 to be paid for a license were *ultra vires* as a revenue tax. (*Ib.*)

8. —— (By Ramsay, J.):—That the Act is valid, not as a police regulation, but as a license Act, the local legislatures having power, under the B. N. A. Act, sec. 92, ss. 9, to pass an act for raising revenue by a license fee. (*Ib*)

9. Traders and others.—*Held*, affirming the judgment of Tait, J. (5 Que. 47, Superior Court): 1st. The Act 55-56 Vic. (Que.), ch. 10, which requires licenses to be taken out each year by traders and others, is not *ultra vires* of the Provincial Legislature. It is neither an interference with the exclusive authority of the Parliament of Canada to regulate trade and commerce, nor do the taxes thereby enacted constitute indirect taxation. 2nd. Where an Act of the local legislature is within the powers conferred upon it by sec. 92 of the B. N. A. Act, the courts will not declare it unconstitutional or refuse to give it effect on the ground that the taxes imposed by it are unequally apportioned, the authority of the local legislature in this respect being supreme. *Lambe* vs. *Fortier*, C. R. 1894, 5 Que. 355.

XII. LOTTERIES.

Chapter 159 of the Revised Statutes of Canada, 1886, entitled "An Act respecting Lotteries, Betting and Pool-selling," is *intra vires* the Federal Parliament. *Reg.* vs. *Harper*, special session, S. C. 1892, 1 Que. 327.

XIII. MATTERS OF PROCEDURE.

1. An Act of the Province of Quebec passed in 1872 (36 Vic., ch. 12, sec. 3), limited the right of appeal in certain cases that had gone to the Court of Review, and it was *held* that this controlled the right of appeal in cases of insolvency, and that it was not beyond the powers of the local legislature to regulate by general rules the appeals to its courts, provided such rules did not contravene a positive law regulating insolvency. *Studay* vs. *Angers*, Q. B., Montreal, 1874.

2. On a contestation of a *scisie gagerie* for rent due by an insolvent estate, which was in the hands of an assignee under the Insolvent Act of 1875—*Held*, that the Parliament of Canada had the right to change the ordinary procedure in matters such as insolvency, falling within the powers exclusively assigned to it under the B. N. A. Act. *Beausoleil* vs. *Frigon*, Q. B. 1880, 1 Derion's Q. B. R. 70.

3. The Dominion Parliament had power to take away the right of appeal to the Supreme Court and the Privy Council, as they claimed to do by the Act 40 Vic., ch. 41, sec. 28, amending "The Insolvent Act of 1875." *Cushing* vs. *Dupuy*, P. C. 1880, 24 L. C. J. 151.

4. Where an appeal in insolvency was brought after the eight days allowed by the Insolvent Act, 1875, and the appellant contended that the Dominion Parliament had no power to shorten the delays provided by the ordinary procedure—*Held*, that the Dominion Legislature had a right to legislate on matters of procedure incidental to the subjects assigned to it. *Girouard* vs. *Germain*, Q. B. 1880, 3 L. N. 109.

5. Matters of police regulation are under the control of the Provincial Legislature, which can therefore designate certain courts for the trial of infraction of the police regulations, and to provide a mode of procedure to follow in conducting such trial. *Cité de Montréal* vs. *Doyle*, Recorder's Court 1880, 2 Themis 182.

6. The Act 57-58 Vic., ch. 55 (Canada) declares the first Monday in September to be a non-juridical day (Labor Day). On the 30th Aug., 1894, the Lieutenant-Governor of Quebec issued a proclamation declaring the same day a non-juridical one, and, in consequence, the

Prothonotary's offices at Montreal were closed on the 3rd Sept., 1894, being the first Monday of that month. On the 21st Aug., the plaintiff had taken an attachment after judgment against the defendant, returnable the 3rd September—*Held*, that the Act 57-58 Vic., ch. 55 (Can.) should be interpreted as affecting only those matters coming within the jurisdiction of the Federal Parliament, and as not affecting in any way the administration of justice and the sittings of the courts in this Province. As regard the proclamation of the Lieutenant-Governor, even had it the effect of rendering the 3rd September a non-juridical day, it could not have a retroactive effect. *Richer* vs. *Gervais*, S. C. 1894, 6 Que. 254.

XIV. MONTREAL NORTHERN COLONIZATION RY. ACT.

Is constitutional. *Molson* vs. *Mayor of Montreal*, Q. B., 23 L. C. J. 169.

XV. NAVIGATION.

1. The Quebec Government can issue letters patent to incorporate a navigation company within the limits of the Province. *Union Navigation Co.* vs. *Couillard*, S. C. 1875, 7 R. L. 215. Confirmed by Q. B. 1877, 21 L. C. J. 71.

2. Action of damages against the St. Lawrence Navigation Company, for having wintered their boats in the mouth of the River St. Maurice during the winter of 1874-75. The action was based on letters patent granted to the plaintiffs by the Quebec Government, which conceded to them, as proprietors, all rights in the waterlots at the point in question extending to low water mark and along the bank of the river. The plaintiffs pretended that the defendants should pay damages for having wintered their boats within the limits of such grant, and having themselves and their employees passed and repassed along the land of the plaintiffs during the winter in going to and from the said boats, the whole without the permission of the plaintiff. The defendants pleaded that the Quebec Government had no right or authority to make such grant, as the shores of the river and extending to the part of the river where their boats had been anchored was under the exclusive control of the Dominion Government as being a navigable and public river, and that therefore the letters patent under which the plaintiffs claimed were null and void. The Superior Court maintained this pretension, but in appeal—*Held*, that the authority of the Quebec Government did extend to the water lots along the bank of a navigable river, but subject to the tacit restriction that they should do nothing which should in any way injure or interfere with the requirements of navigation, and therefore, while the letters patent were perfectly good and valid, the plaintiffs could not claim anything or impose anything on the defendants for having wintered their boats, at least so long as they had constructed no quays, wharves or other improvements of which the defendants had availed themselves, and as the plaintiffs had not proved that they had suffered any damage from the passing and repassing of the defendants' employees to and from their boats, that they had no right of action against defendants; but, as defendants had raised a contestation which had not been sustained in appeal, no costs in appeal would be ordered. *Normand* vs. *La Cie. de Navigation du St. Laurent*, Q. B. 1880, 10 R. L. 513. 5 Q. L. R. 215, reversing S. C., 4 Q. L. R. 1.

3. The Legislature of the former Province of Canada had the power of conferring upon the City of Quebec the right to enact by-laws inflicting a penalty upon whomsoever might in any manner prevent the ice bridge at Quebec from forming or to destroy it when formed. And the Recorder of that city had jurisdiction to hear the complaint laid against the appellant in this case for violation of such by-law. *Barras* vs. *Corporation of Quebec*, Q. B. 1885, 11 Q. L. R. 42.

4. That the clause in the Act of Incorporation of the Town of St. Johns, P.Q., extending the limits of the town to the middle of the Richelieu River, a navigable river, is *intra vires* of the Legislature of the Province of Quebec. *Corporation of St. Johns* vs. *Central Vermont Ry. Co.*, P. C. 1889, 12 L. N. 290, 14 App. Cas. 590, confirming Supreme Ct., 14 Can. S. C. R. 288, Q. B., M. L. R., 4 Q. B. 466, S. C., 13 R. L. 343.

XVI. POWERS OF LEGISLATURE.

1. To compel attendance of Witnesses.—The Legislative Assembly of Quebec has power to compel the attendance of witnesses before it, and may order a witness to be taken into custody by the sergeant-at-arms if he refuses to attend when summoned. *Exp. Dansereau*, Q. B. 1875, 19 L. C. J. 210.

2. —— The omission to state in the speaker's warrant of arrest the grounds and reasons therefor is not a fatal defect. (*Ib.*)

3. —— The Quebec Stat. 33 Vic., ch. 5, is within the powers of the local legislature. (*Ib.*)

4. To order arrest for Contempt.—The Legislature of Quebec has not the power to order the arrest of any one for contempt. *Coté exp.*, Q. B. 1875, 6 R. L. 582.

XVII. PUBLIC HEALTH.

1. The Legislature of Quebec has jurisdiction in all matters affecting the public health, the establishment of hospitals and the enforcement of such regulations as may become necessary by the presence of an epidemic,—the subjects of quarantine and the establishment and maintenance of marine hospitals alone being assigned to the Parliament of Canada. *Municipality of St. Louis of Mile End* vs. *City of Montreal*, C. R. 1885, M. L. R., 2 S. C. 218; *Rolland* vs. *Dugas*, S. C 1885, 15 R. L. 266.

2. All matters concerning public health, with the exception of quarantine stations and marine hospitals, are within the exclusive purview of Provincial, and not of Dominion legislation. *Rinfret* vs. *Pope*, Q. B. 1886, 12 Q. L. R. 303, 14 R. L. 605.

3. The Statute of Canada, 31 Vic., ch. 63, was *ultra vires* of the Dominion Parliament in so far as it assumed to repeal chapter 38 of the C. S. C. affecting public health. (*Ib.*)

4. The Legislature of Quebec can authorize the City of Montreal to pass a by-law regulating the standard of milk and penalties for infraction of such by-laws, such a measure being a municipal sanitary regulation, and not a general restriction on trade and commerce. *Dooley* vs. *Cour du Recorder*, S. C. 1894, 6 Que. 126.

XVIII. QUASI CRIMINAL MATTERS.

1. The petitioner was imprisoned by the fire commissioner on the ground of incendiarism, and prayed for release on the ground that the statute creating the office of fire commissioner was contrary to the Confederation Act, inasmuch as it established a criminal procedure, which by the Act is restricted to the Federal Parliament—*Held*, that the Statute in question had no reference to criminal procedure, and was perfectly constitutional. *Dixon exp.*, Q. B. 1872, 2 R. C. 231.

2. *Held*, by the Privy Council, that the Constitution of the Court of Fire Marshal by the Que. Stat. 31 Vic., c. 31, and 32 Vic., c. 29, with the powers given to it, was within the competency of the Provincial Legislature. *Reg* vs. *Coote*, P. C. 1873, L. R., 4 P. C. 599, 18 L. C. J. 103, 9 Moore N. S. 463.

3. The Provincial Legislature has jurisdiction to provide procedure for enforcement of penal statutes enacted with reference to subjects comprised within its powers, and penal statutes are not part of the criminal law as contemplated by the British North America Act, which gives exclusive power to the Parliament of Canada to determine the procedure in criminal matters. *Page* vs. *Griffith*, Q. B. 1873, 17 L. C. J. 302.

4. The power conferred by the B. N. A. Act to impose "fine, penalty *or* imprisonment" does not restrict the power of the Provincial Legislature to the exercise of only one of these modes of punishment at a time by any particular Act. *Paige* vs. *Griffith*, S. C. 1873, 18 L. C. J. 119.

5. But *held*, the Act of the Province of Quebec, 32 Vic., ch. 70, s. 17, is in excess of the powers conferred by the British North America Act in that it allows fine *and* imprisonment instead of fine *or* imprisonment. *Exparte Papin*, S. C. 1872, 16 L. C. J. 19.

6. And the License Act of Quebec in imposing a penalty with hard labour is unconstitutional. *Poitras* vs. *Corporation of Quebec*, S. C. 1879, 9 R. L. 531.

7. While the local legislatures have no jurisdiction to deal with an indictable misdemeanour, that being a matter of criminal law assigned exclusively to the Parliament of Canada, they have authority to legislate for the prohibition of things hurtful to public health, not matter for indictment at common law, such as factory chimneys "sending forth smoke in such quantity as to be a nuisance." The local legislatures possess this power as coming under "municipal institutions" under B. N. A. Act, S. 92, No. 8; and the fact that a term of the criminal law ("nuisance") is used in a local Act to characterize an offence within the jurisdiction of the local legislature does not make the enactment *ultra vires* when the offence is not *per se* an indictable offence under the criminal law. *Pillow* vs. *Recorder's Court of Montreal*, 1885, M. L. R., 1 Q. B. 401, 30 L. C. J. 1, confirming S. C. 1883, 27 L. C. J. 216, 6 L. N. 209.

XIX. QUEEN'S COUNSEL.

The British North America Act has not invested the Legislatures of the Provinces with any control over the appointment of

Queen's Counsel, and as Her Majesty forms no part of the Provincial Legislatures, as she does of the Dominion Parliament, no act of any such local legislature can in any manner impair or affect her prerogative right to appoint Queen's Counsel in Canada directly or through Her Representative the Governor-General, or vest such prerogative right in the Lieutenant Governors of the Provinces. *Lenoir* vs. *Ritchie*, Supreme Ct. 1879, 3 Can. S. C. R. 575, 2 L. N. 373.

XX. PREROGATIVE—EXERCISE BY LOCAL GOVERNMENT. (1)

The government of each Province of Canada represents the Queen in the exercise of her prerogative as to all matters affecting the rights of the Province. (1) (*The Queen* vs. *The Bank of Nova Scotia*, 11 Can. S. C. R. 1 followed.) *Liquidators of the Maritime Bank* vs. *Receiver General of New Brunswick*, Supreme Ct. 1889, 20 Can. S. C. R. 695. Confirmed in Privy Council, 8 *Times Law Reports*, 677.

XXI. RETROSPECTIVE LEGISLATION.

Action for the recovery of a mortgage debt of $1,000 and $120 interest. The respondents acted under the authority of a statute of the Legislature of the Province of Quebec, which purported to authorize the formation of the Board, respondent, in a different manner from that settled by the original Act of incorporation. The object of this amendment was to enable a new body, to be called "The Presbyterian Church in Canada," being a union of certain Presbyterian Churches, under certain conditions, to take possession of the property formerly belonging to a body known as the Presbyterian Church of Canada in connection with the Church of Scotland. The appellant pleaded that the plaintiff, respondent, was not the party to whom he was indebted, that the Act of the Province of Quebec in question, 38 Vic., c. 64, was beyond the powers of a local legislature, and that, therefore, the Board respondent was not organized by law and could not recover—*Held*, that the Dominion Parliament had power to enact a statute confirming and ratifying all acts and doings of the Board of Temporalities, since the passing of the 38th Vic., cap. 64, although the Privy Council had by their judgment in *Dobie* vs. *Temporalities* declared the Board to be illegally constituted. *Minister & Trustees, &c.*, vs. *Board for the Management, &c.*, Q. B. 1883, 6 L. N. 27.

(1) See Article in 5 *Themis* 72, by E. L. de Bellefeuille, "Is the Queen represented in Provincial Governments?"

XXII. TAXATION.

1. Tax on Exhibits in Court—Direct or indirect.—*Held*, that the Quebec Act (43-44 Vic., ch. 9), which imposed a duty of ten cents upon every exhibit filed in court in any action pending therein, is *ultra vires* of the Provincial Legislature. *Attorney-General* vs. *Reed*, P. C. 1884, 8 L. N. 50. 10 App. Cas. 141, confirming Supreme Ct., 8 Can. S. C. R. 408, reversing Q. B. 1882, 26 L. C. J. 331.

2. Commercial Corporation Tax.—45 Vic. (Que.), cn. 22.—By the Act 45 Vic. (Q.), ch. 22, "to provide for the exigencies of the public service," a tax was imposed on every bank, insurance company and other commercial corporation doing business in the Province, in proportion to their paid-up capital, together with a tax on each office—*Held*, that the tax in question is a personal and direct tax within the Province, such as authorized by the B. N. A. Act, 1867, s. 92, ss. 2, and any corporation doing business in the Province may be subjected thereto, even though its head-office be not situate therein, and though all its shareholders be domiciled without the Province. (1) *Bank of Toronto* vs. *Lambe*, P. C. 1887, 13 Q. L. R. 196, confirming, though not wholly for the same reasons, the judgment of Q. B., M. L. R., 1 Q. B. 122, 13 R. L. 68, which confirmed the S. C., M. L. R., 1 S. C. 32.

3. Ferries. By 39 Vic., chap. 52, sec. 1, sub-sec. 3, the city of Montreal is authorized to impose an annual tax on "ferrymen or steamboat ferries." Under the authority of the said statute the corporation of the city of Montreal passed a by-law imposing an annual tax of $200 on the proprietor or proprietors of each and every steamboat ferry conveying to Montreal for hire travellers from any place not more than nine miles distant from the same, and obtained from the Recorder's Court for the city of Montreal a warrant of distress to levy upon the appellant company the said tax of $200 for each steamboat employed by them during the year as ferry-boats between Longueuil and Montreal. In an action brought

(1) The remainder of the holding as reported 13 Q. L. R. 196, viz., that "even assuming that the tax in question could be considered an indirect tax, the Legislature has power to impose the same as being a matter of a merely local or private nature in the Province within the meaning of the B. N. A. Act, sec. 92, ss. 16," is not justified by the report.

by the appellant company, claiming that the Provincial statute was *ultra vires* of the Provincial Legislature, and that the by-law was *ultra vires* of the corporation, and asking for an injunction, it was *held*, affirming the judgment of the Court of Queen's Bench, Montreal (M. L. R., 3 Q. B. 172, 15 R. L. 242), which confirmed the judgment of the Superior Court (M. L. R., 2 S. C. 18, 1885), that the provincial legislation was *intra vires*. *Longueuil Navigation Co.* vs. *Corporation of Montreal*, Supreme Ct. 1888, 12 L. N. 13, and 15 Can. S. C. R. 566.

4. Interest on Arrears of Assessments —Where ten per cent. per annum on arrears of taxes was imposed by the city of Montreal under the name *increase*, addition or penalty, and by authority of a statute of the Quebec Legislature—*Held*, to be interest, and to be *ultra vires*. *Ross* vs. *Torrance*, S. C. 1879, 2 L. N. 186, 9 R. L. 565. *City of Montreal* vs. *Perkins*, 2 L. N. 371.

5. —— But *Ross* vs. *Torrance* overruled by Supreme Court in *Lyneh* vs. *Canada N. W. Land Co.*, 1891, 19 Can. S. C. R. 204.

6. License — Insurance Companies.— The Legislature of Quebec has no power to compel insurance companies doing business in the Province of Quebec to take out a license, the price of which should be paid by stamps affixed to the policies issued, and an Act passed to that effect was held to be unconstitutional, *ultra vires* and void. *Angers, Attorney-General pro Regina*, vs. *The Queen Insurance Co.*, 21 L. C. J. 77, 7 R. L. 545, S. C., 1 L. N. 3, 410, Q. B. and P. C., and 22 L. C. J. 307, P. C. 1878.

7. Medical Profession.—The provisions of sec. 16, ch. 37, 42 and 43 Vic. (Que.), imposing upon members of the College of Physicians and Surgeons of the Province of Quebec the payment of the sum of $2 per annum for the use of the College, and affecting thereby, doctors admitted to practice medicine under the Act 10 and 11 Vic., ch. 26, 1847, are not *ultra vires*. *College des Médicins* vs. *Brigham*, S. C. 1888, 16 R. L. 283.

8. Municipal Corporation — Wholesale Liquor Dealers. — 47 Vic. (Que.), ch. 84, Sec. 8.—An Act authorizing a municipal corporation to levy an annual tax for municipal purposes, on wholesale liquor dealers doing business within the municipality, is within the powers of the local legislature. *McManamy* vs. *Corp. of City of Sherbrooke*, 1890, M. L. R., 6 Q. B. 409, 19 R. L. 423. Appeal to Supreme Ct. quashed for want of jurisdiction, 18 S. C. R. 594.

9. Transfers of Real Estate—Direct Tax.—A tax on transfers of real estate collected by means of a stamp to be affixed to a register kept for that purpose is a direct tax within the meaning of § 2, sec. 92, B. N. A. Act of 1867. Therefore the Act 55 and 56 Que., ch. 17, is constitutional. *Lamonde* vs. *Lavergne*, Q. B. 1894, 3 Que. 303, affirming *Choquette* vs. *Lavergne*, S. C. 1893, 5 Que. 108.

XXIII. TOLL BRIDGE.

1. An Act of the local legislature authorizing the Lieutenant-Governor to forfeit the right of exacting tolls on a toll bridge, and to transfer the property to others, is constitutional. *Municipality of Cleveland* vs. *The Municipality of Melbourne*, Q. B. 1881, 4 L. N. 278, 1 Dorion's Q. B. Rep. 354, 26 L. C. J. 1.

XXIV. SCHOOLS.

1. Correspondence of Law officers of the Crown *in re* New Brunswick School case, 5 R. L. 650.

2. Judgment of Privy Council in Manitoba School case. *City of Winnipeg* vs. *Barrett*, 15 Legal News 293.

XXV. VACANT SUCCESSIONS.

1. Under the British North America Act vacant successions belong to the Provincial and not to the Federal Government. *Church* vs. *Blake*, Q. B. 1876, 2 Q. L. R. 236, reversing S. C. 1876, 1 Q. L. R. 177.

2. And *held* by the Privy Council that lands in Canada escheated to the Crown for defect of heirs belong to the province in which they are situated, and not to the Dominion. *Attorney General of Ontario* vs. *Mercer*, *Privy Council*, 1883, 8 App. Cas. 767.

CONSUL GENERAL.

A Consul General does not enjoy exemption from liability to the civil jurisdiction of the Courts of the country. But, *semble*, that if he is charged with some special mission in which he represents his government, and, as such, holds his *exequatur*, he enjoys such exemption. *Leonard* vs. *Premio-Real*, S. C. 1885, 11 Q. L. R. 128.

CONTEMPT OF COURT. (1)

I. By.
Attorney. 1.
Bailiff. 2.
Employee of Municipal Corporation. 3.
Master of Vessel. 4.
Secretary of Company. 5.
Woman. 6.
Witnesses. 7-10. See also *infra* X, 18-21.

II. Commitment. 1-4.

III. Defendant to be allowed to explain. 1-2.

IV. Commission of Inquiry—Powers of Commissioners.

V. Evidence—Admission.

VI. Imprisonment for. See also "Coercive Imprisonment."

VII. Jurisdiction in. 1-4.

VIII. Motion for.

IX. Service of Motion for.

X. What Constitutes.
Acts not committed in face of the Court. 1.
Accounting. 2.
Adjudicataire. 3.
Assignee. 4.
Costs of Incidental Proceeding. 5.
Cutting Timber. 6.
Garnishee. 7.
Guardian. 8.
Judgment where person holding moveable Property in contempt of Order of Court is adjudged the lawful Owner. 9.
Pleadings. 10.
Oppositions. 11-14.
Resistance to Process. 15-18.
Witnesses—Interference with. 19.
Witnesses. 20-23.

I. BY.

1. Attorney.—An attorney guilty of contempt in the face of the court may be immediately interdicted. *Binet exp.*, K. B. 1818, 2 Rev. de Lég. 438.

2. Bailiff.—A bailiff who proceeds to sell goods seized, notwithstanding that he has been served with an opposition and an order to suspend the sale, will be imprisoned for contempt of court. *Leroux* vs. *Deslauriers*, S. C. 1881, 12 R. L. 298.

3. Employee of Municipal Corporation.—Where a writ of prohibition was addressed to a municipal corporation prohibiting it from proceeding with the execution of a certain by-law, a person directed by the corporation to execute work required by the by-law was held not subject to imprisonment for contempt of court. *Exparte Archambault*, S. C 1[illegible], 2 R. L. 105.

4. Master of Vessel.—Where a vessel had been attached and the master carried it out of the jurisdiction of the court—*Held*, that he had rendered himself liable to attachment for contempt. *The Friends in re*, S. V. A. C. 72, V. A. C. and *The Delta in re*, S. V. A. C. 207, V. A. C. 1838.

5. Secretary of Company.—The secretary of a railway company cannot be condemned for contempt of court for having refused to conform to a writ of injunction addressed to the company in an action where the secretary is not a party. *Tiernan* vs. *Compagnie du Chemin de Fer, M. O. & O.*, Q. B. 1876, 8 R. L. 374.

6. Woman—Arts. 2273-2276 C. C.—The neglect or refusal of a woman to comply with a judgment of the court, which orders the making of an inventory, does not render her liable to coercive imprisonment for a contempt, and the right of coercive imprisonment does not exist against women guilty of such refusal or neglect. *Larochelle* vs. *Mailloux*, Q. B. 1866, 16 L. C. R. 407.

7. Witnesses.—On a rule for contempt against witnesses it was said that the form asking that they "be imprisoned until they have given evidence" was wrong, as they would, in that case, have to give evidence in gaol for which there was no provision, or stay there forever. *Fair* vs. *Cassils*, C. R. 1881, 4 L. N. 102.

8. —— A witness who has made default to appear and give evidence, and against whom a rule has issued for contempt, must appear in person to answer the rule. *Fair* vs. *Cassels*, S. C. 1880, 3 L. N. 337.

9. —— A rule for a contempt against a witness who has not answered a *subpœna ad testificandum* will not lie, unless proof be made by affidavit of personal service, tender of reasonable expenses, and of wilful disobedience. *Sexton* vs. *Boston*, S. C. 1861, 5 L. C. J. 334.

(1) See notes on the Ramsay case, 2 L. C. L. J. 217. See notes on the McDermott case noticed in the judgment of the Court of Queen's Bench in the Ramsay case, 2 L. C. L. J. 241.

10. —— But *held* later that on an application for imprisonment of a witness resident in Montreal, for contempt, in not obeying a *subpœna* personally served, it is not necessary to prove the service of the *subpœna* by affidavit, nor that the original writ was exhibited to the witness, nor that tender was made of fees or expenses. *Joseph* vs. *Joseph*, S. C. 1863, 8 L. C. J. 41.

II. COMMITMENT.

1. Delay to commit.—Where, in a case of contempt of court *in facie curiæ*, the judge presiding adjourned the court from the morning until the afternoon, in order to consult with another judge—*Held*, that the adjournment did not vitiate the commitment. *McNamee exp.*, Q. B. 1880, 3 L. N. 197, 10 R. L. 311.

2. Must be for stated time.—A commitment for contempt must be for a given time, or until the person in contempt does or is willing to conform to the order of the Court.

A commitment which is general and during pleasure will be quashed and set aside. *Vineberg* vs. *Ransom*, Q. B. 1886, 33 L. C. J. 192, M. L. R., 2 Q. B. 345.

3. Must state offence.—Even the highest Courts must state fully the nature of the offence in the commitment for contempt of court *in facie curiæ*. The commitment in this case (by the Court of Sessions of the Peace) was held sufficiently explicit. *Exparte McNamee*, Q. B. 1880, 10 R. L. 311, 3 L. N. 197.

4. Signature.—A commitment for contempt issuing from the Court of Sessions of the Peace should be signed by the Clerk of the Peace. *Exparte McNamee*, Q. B. 1880, 10 R. L. 311.

III. DEFENDANT TO BE ALLOWED TO EXPLAIN.

1. In case of contempt of court *in facie curiæ*, it would appear that it is not necessary that the defendant should be allowed to explain his conduct. *McNamee exp.*, Q. B. 1880, 3 L. N. 197, 10 R. L. 311.

2. Before committing for contempt for non-production of books, a witness should be allowed to explain his conduct. *In re Armstrong*, S. C. 1892, 1 Que. 408.

IV. COMMISSION OF INQUIRY.

A commission of inquiry issued by the Lieutenant-Governor-in-Council under Section 596 R. S. Q. has the same power to enforce the attendance of witnesses, and to compel them to give evidence before it, as is vested in any Court of law in civil cases, and has therefore the power to punish by fine or imprisonment, or both, any contempt of its authority by any person summoned as a witness refusing to appear, or to answer questions put to him concerning the matters which are the subject of such inquiry. *Turcotte* vs. *Whelan*, Q. B. 1891, M. L. R., 7 Q. B. 263, reversing S. C., M. L. R., 6 S. C. 289.

V. EVIDENCE—ADMISSION.

An admission by the party charged, at the instance of the judge, for the purpose of settling the dispute between them, must be held to have been written without prejudice, and cannot avail as evidence in support of the rule for contempt, in case the judge refuse to accept it as a sufficient apology. *Exparte Ramsay*, P. C. 1871, 15 L. C. J. 17.

VI. IMPRISONMENT FOR. (See also "Coercive Imprisonment.")

A person over 70 years of age is not exempt from imprisonment for contempt of court. *Ross* vs. *O'Leary*, S. C. 1883, 27 L. C. J. 220.

VII. JURISDICTION IN.

1. A judge of the Court of Q. B., whilst sitting alone in the exercise of the criminal jurisdiction conferred upon that court, has no jurisdiction over an alleged contempt for publishing a libel concerning one of the justices of the Court, in reference to the conduct of such justice while acting in his judicial capacity, on an application to him in Chambers for a writ of *habeas corpus*,—the matter being only legally and properly cognizable by the full Court of Q. B. *Exparte Ramsay*, P. C. 1871, 15 L. C. J. 17.

2. The issuing of a rule for contempt by the judge himself against whom the contempt is alleged to have been committed, without any evidence that the party charged had committed the contempt, is most irregular. (*Ib.*)

3. A fine imposed, under circumstances such as above, will be remitted. (*Ib.*)

4. Where a contempt has been committed in the presence of the Court, and the offender immediately after leaves the Court room, going into another room in the same building, the Court still has jurisdiction, at least on the

day of the offence, to order his arrest and imprisonment, without first ordering an attachment to bring him before the Court. *In re Terry*, United States Supreme Ct. 1888, 12 L. N. 25.

VIII. MOTION FOR.

A motion for a rule against a witness for contempt must be notified to the party moved against, and the rule must be served personally, unless the party absconds in order to avoid such personal service. *In re Downey, Doherty et al.*, S. C. 1874, 18 L. C. J. 283.

IX. SERVICE OF MOTION FOR.

Where a motion against witnesses for contempt was served on the 7th and returned on the 8th—*Held*, that there should have been a clear day's notice. *Fair* vs. *Cassels*, C. R. 1881, 4 L. N. 102.

X. WHAT CONSTITUTES.

1. Acts not committed in face of Court. — Interference with Justice.—English Case. *In re Johnson*, Ct. of Appeal London, Nov. 7, 1887, 10 L. N. 397.

2. Accounting.—A defendant who has been ordered by the Court to render an account is not guilty of contempt of court for refusing to do so, such order being in the nature of an ordinary judgment. *Crowley* vs. *Chretien*, S. C. 1882, 8 L. N. 68.

3. Adjudicataire.—Petitioner applied for a rule for contempt against an *adjudicataire* of a property purchased at a sheriff's sale, the conditions of which were that the *adjudicataire* should pay half down and give security for the other half. The *adjudicataire* paid half down and received a title, which made no mention of the security to be given for the other half—*Held*, that this was not a ground for contempt, but at most an error on the part of the officer of the court. *O'Reilly* vs. *O'Reilly*, S. C. 1879, 2 L. N. 414.

4. Assignee.—An assignee of an insolvent estate under the Insolvent Act of 1875, who is ordered by the Court to sell goods of the insolvent in order to liquidate a privileged claim, and who refuses to obey such order, will be adjudged guilty of contempt. *In re Blouin & Bouchard*, S. C. 1876, 7 R. L. 445.

5. Costs of Incidental Proceeding.—A rule for contempt of court will not lie against a defendant for default to pay the costs of an incidental proceeding, but the plaintiff is entitled to demand an execution for such costs during the pendency of the case. *Ferguson* vs. *Gilmour*, 5 L. C. R., S. C. 1855, 421, 4 R. J. R. Q., 462.

6. Art. 646 C. C. P.—Cutting Timber.—A person entitled to cut timber on a lot of land subsequently taken in execution, and who has no notice of the seizure and does not know of it, cannot be imprisoned under Art. 646 C. C. P. for cutting wood on the land seized. *Contier* vs. *Cinq Mars*, Q B., Que., 5 June, 1877.

7. Garnishee.—A garnishee who refuses to deliver up articles seized in his possession is guilty of contempt. *Ferguson* vs. *Millar & Hooker*, K. B. 1813, 3 Rev. de Lég. 305.

8. Guardian.—A defendant will be held guilty of contempt of court who fails to represent goods seized and left in his possession by voluntary guardian named by him, unless he pays their value or the plaintiff's claim. *Brady* vs. *Courville*, C. R. 1883, 28 L. C. J. 165.

9. Judgment where person holding moveable property in contempt of order of Court is adjudged the lawful owner.—While an action of revendication of some machinery was going on, the plaintiff obtained an order of a judge, giving him provisional possession of the machinery. Nevertheless, by collusion between the defendants, the property was put into the possession of White, intervenant. The plaintiff having taken a rule for contempt, the defendants and intervenant were ordered to give over the property within three days, which order was disobeyed. *Held* (reforming the judgment of the Superior Court, M. L. R., 1 S. C. 288), that White was guilty of contempt, and should be fined $100; but that it was no longer expedient to order him to give up the machinery, because in another action, in which judgment was rendered at the same moment as that on the rule, White was declared to be lawful proprietor of the machinery. *Kieffer* vs. *Whitehead*, Q. B. 1886, M. L. R., 4 Q. B. 239.

10. Pleadings.—In a petition for a writ of prohibition to defendants to prevent them proceeding with an execution for costs, which had been taxed by order of the judge, was the following plea: "3. Because this judgment appears on its face to have been rendered at the immoral suggestion of the Hon. M. A. Plamondon." The word *immoral* had been effaced with a stroke of the pen, and in the margin the word illegal substituted, without, however, any mention at the foot of the peti-

tion of the erasure or marginal note. The judge, to whom the petition was presented, being the same thus referred to, held the expression thus used to be a contempt of court, ordered the petition to be locked up by the prothonotary, and the attorney signing it to appear to answer the contempt at the opening of the next term of the Court. On appeal, the Queen's Bench refused to interfere with the judgment. *Champagne* vs. *Bélanger*, Q. B. 1877, 9 R. L. 328.

11. Opposition.—An unfounded opposition is a contempt of court, for which attachment may be granted. *Quironet* vs. *Wilson*, K. B. 1818, 3 Rev. de Lég. 472; *Hunt* vs. *Perrault*, K. B. 1820, 3 Rev. de Lég. 475.

12. —— Contra.—The mere filing of a fraudulent opposition is not a ground for imprisonment for contempt of court. It is only in the case of a repetition that it gives rise to contempt. *Girard* vs. *Audette*, S. C. 1885, 13 R. L. 418.

13. —— A party filing an opposition *repeatedly* for the mere purpose of retarding the sale of goods seized, is liable to imprisonment for contempt of court. *Thomas* vs. *Pepin*, C. Ct. 1861, 5 L. C. J. 76.

14. —— Where a defendant after judgment and execution filed an opposition founded on the allegation of his pleas—*Held*, that he could not be condemned to imprisonment for contempt of court until the merits of the opposition had been adjudicated upon. *Dawson* vs. *Ogden*, Q. B. 1877, 8 R. L. 716.

15. Resistance to Process.—Art. 569 C. C. P.—2273 C. C.—Where a party against whom execution has gone out, barricades his door and removes his effects before they can be actually seized and entered in the *procès verbal* of the bailiff, he is not guilty of *rebellion de justice*. *Terroux* vs. *Dupont*, C. Ct. 1866, 10 L. C. J. 143.

16. —— Art. 2273 C. C.—On motion of the plaintiff—*Held*, that a rule for coercive imprisonment would issue against a defendant refusing to open his doors to a bailiff, charged with the execution of a writ to seize the effects therein, and that where the defendant has made use of neither force nor violence. *Desharnois* vs. *Amiot*, C. Ct. 1853, 4 L. C. R. 43, 4 R. J. R. Q. 59.

17. —— A defendant who induces a bailiff, charged with a writ of execution against him, not to seize his goods and effects, but to accompany him to the plaintiff's for the purpose of effecting a settlement, and in the interval between the bailiff's leaving the place and returning again to make the seizure, removes part of the goods, will be declared to be in contempt of court under Arts. 782 C. C. P. and 2273 C. C., and will be imprisoned in the common gaol until he satisfies the amount of the debt, interest and costs. *Ross* vs. *O'Leary*, S. C. 1883, 6 L. N. 173.

18. —— It appeared that on the merits of a rule taken against the opposant, on the 27th Dec. last, the plaintiff obtained judgment against the defendant for the sum of $134.93 due for rent. He took out an execution against the movables furnishing the premises leased, and it was now charged against the opposant that he fraudulently, and without motive, claimed the property seized by his opposition, which was on the 28th April, 1881, dismissed with costs, and costs taxed against the opposant, amounting to $77.05, in favor of the plaintiff. Thereupon the plaintiff took out a *venditioni exponas* to sell the movables seized, and could not find them, and he charged that B. had concealed, hidden and diverted the goods and refused to deliver them to the guardian, with the intent to defraud plaintiff and evade the judgments against the opposant and defendant, and was in contempt of this court. Plaintiff therefore asked that B. be declared to be in contempt of court and imprisoned until he had paid $7.55, balance due on the original judgment, $154, costs on the original action, $4 for subsequent costs, $9.20 for additional costs on the execution, $77.05 costs on the opposition—*Held*, on the evidence, that there was no proof of a contempt having been committed. *Perrault* vs. *Charbonneau*, S. C. 1882, 5 L. N. 204.

19. Witness—Interference with.—Interference with a witness on the way to court to give evidence, in order to prevent the evidence of such witness being given, is a contempt of Court. *Regina* vs. *Hollis*, Q. B. 1885, 8 L. N. 229.

20. Witness.—A witness who has been ordered to withdraw from the Court room is guilty of contempt if, *after* his examination, he communicates facts disclosed in evidence at the trial to another witness not yet examined. *Reg.* vs. *McCorkill*, Q. B. 1857, 8 L. C. J. 282.

21. —— A witness neglecting to appear before an accountant appointed by the Court in obedience to a *subpœna* duly served on him is guilty of contempt. *Prévost* vs. *Gauthier*, S. C. 1879, 23 L. C. J. 323.

22. —— A witness living in Montreal who has been summoned on Saturday night to appear in Sorel on Monday will not be held to be in contempt of Court. *Barthe* vs. *Lajoie*, Q. B., Montreal, 21 Sept., 1878.

23. —— A person accidentally in a place other than his domicile, summoned to appear in a suit going on there *instanter*, will not be held to be in contempt of the court if he declines to appear. *Barthe* vs. *Thibaudeau*, Q. B., Montreal, 21 Sept., 1878.

CONTRACTOR.

See also title "Builder."

1. Liability of.—In an action in assumpsit—*Held*, confirming decision of court below, that a party who contracts for the performance of certain works will not be held responsible toward third parties who furnish material to the contractor, unless it be established by evidence that the sale and delivery of the material were made to the party so contracting. (1) *Bridgman* vs. *Ostell*, Q. B. 1856, 9 L. C. R. 445.

2.——The defendant *en garantie* was digging a sewer in a public street, and the plaintiff drove into it, with a result of more or less injury to himself, his horse and his carriage. He sued the corporation as primarily liable, and they called in defendant *en garantie*, who contested the case with the plaintiff. The amount of damages asked by the action was $400, and the defendant offered with his plea, and also before the action, $25 damages and costs. He also pleaded that the accident was due entirely to the plaintiff's own negligence. Evidence at some length was heard, and the judgment was for $100 damages and costs of that class. Judgment confirmed in review. *Charpentier* vs. *City of Montreal*, C. R. 1882.

3. Action by.—A contractor contracted to do work as well in his own name as in the name of another, and afterwards action was taken for the price in the name of both, and the defendant pleaded that the other was no party to the contract, and therefore could not join in the action—*Held*, that, although the other never ratified the contract or participated in its execution, that, under the terms of the contract, the action could be brought in the name of both. *Newcomb* vs. *Grant*, S. C. & Q. B. 1862, 14 L. C. R. 40.

(1) See now the "Augé law," 57 Vic., ch. 46, amended by 59 Vic., ch. 42.

4. And *held* also, that were it otherwise, the recognition of the plaintiff by the defendant by the terms of his articulation of facts would be sufficient to cover his exception. (*Ib.*)

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" Damages.
" Deeds.
" Fraud.
" Gaming Contracts.
" Restraint of Trade.

I. ACCEPTANCE. (1)

1. A intervened in a deed, and agreed to pay a debt due to B, not a party to the document. B brings his action for the amount against A, without previous acceptance of the delegation. —*Held*, that B had no right of action. *Proulx* vs. *Dorion*, Q. B. 1871, 1 R. C. 476.

2. Action to compel the defendants, the Bank of Toronto, to complete a deed in conformity with a resolution of the board of directors. The deed was to grant delay to plaintiff to pay a debt due from him to the bank on certain conditions—*Held*, that as the resolution had never been formally communicated to plaintiff nor accepted by him, it gave him no right of action. *Girard* vs. *Bank of Toronto*, S. C. 2 L. N. 406, C. R. 1880, 3 L. N. 115.

3. The plaintiff, being indebted to a bank, wrote to the manager, proposing a compromise. The bank stated that they had agreed to accept the proposal "with some slight modifications." A notarial deed was subsequently executed containing considerable modifications of the original proposal—*Held*, that the terms of the deed must prevail, bad faith not being proved. *Macdonald* vs. *Merchants Bank of Canada*, S. C. 1882, 5 L. N. 126.

4. Contract for purchase of property, when made in writing, the acceptance may be verbal or implied. *Green* v. *Mappin*, S. C. 1887, 31 L. C. J. 163.

II. ACTION ON.

1. All parties jointly interested must be joined in an action *ex contractu*. *McLeish* vs. *Lees*, 2 Rev. de Lég. 207, K. B. 1818.

2. If the plaintiff sue on an implied contract, and it appear by the evidence that there is a written contract, the action must be dismissed. *Huot* vs. *Cremazie*, K. B. 1819, 2 Rev. de Lég. 335.

3. Art. 13 C. C. P.—If a written agreement be made with one person only, that

(1) See "Consent in Contracts," by W. H. Kerr, 3 Rev. Crit. 162.

person must bring his action alone, although others be jointly interested with him. *Gariepy* vs. *Rochette*, K. B. 1818, 1 Rev. de Lég. 348.

4. Art. 1830 C. C. S.—Where three persons entered into a contract to furnish a fourth with stone, who afterwards refused to allow them to complete the contract, and action was brought for breach—*Held*, on demurrer, that the action should have been brought in the name of all three, they being to all intents and purposes co-partners. *Bosquet* vs. *McGreevy*, S. C. 1859, 9 L. C. R. 266, 7 R. J. R. Q. 230.

5. Arts. 1122 C. C., 15 C. C. P.—A creditor cannot divide his claim so as to subject the debtor to several actions on one contract. *Legaré* vs. *The Queen Ins. Co.*, S. C. 1874, 18 L. C. J. 134, and see remarks of Baron Parke in *Quebec Fire Assurance Co.* vs. *Molson*, P. C. 1851, 1 L. C. R. at page 235.

6. Where action is brought against a purchaser for the price of sale, and he pleads grounds for the rescission of the contract, he must not only pray for the dismissal of the action but also that the contract be rescinded. *Frigon* vs. *Russell*, S. C. 1874, 5 R. L. 559.

III. ACTION ON.—ELECTION OF DOMICILE.

Action on a subscription to a publication issued in a stated number of parts, one of the conditions of the contract being "The work will be published in parts, at sixty cents each, payable on delivery; *it being agreed that the city of Montreal is the place of making this contract, and that all proceedings for breach of same are to be taken there.*" *Held*, that, when action is brought on a contract such as above, in a district which is not that of the domicile of the debtor, the plaintiff must prove conclusively that the condition containing the election of domicile which is relied on to give jurisdiction was pointed out to the defendant by the agent when obtaining the subscription, and that the defendant agreed to be bound by such condition;

That a condition in a contract such as the present is in the same position and is governed by the same rules as a condition on the back of a railway ticket or bill of lading. *Belden* vs. *Christie*, C. Ct. 1889, 33 L. C. J. 335.

IV. ALEATORY.

A sale of the usufruct of a farm for a sum certain, but to be held for a period dependent upon an uncertain event, is a contract *aléatoire* upon which an action will lie. *Lagassé* vs. *Dionne*, K. B. 1820, 2 Rev. de Lég. 207.

V. ALTERNATIVE OBLIGATION.

1. Municipal Subscription to Railway—Debentures or Money.—Where no delay is fixed by the contract for the performance of an alternative obligation, the debtor can only be deprived of his option by the expiration of a delay fixed by a judgment against him, and, therefore, where the amount of a municipal corporation's subscription to a railway company was payable either in debentures or money, the corporation could not, by a mere notarial protest served on it, fixing a time for the delivery of the debentures, be deprived of its option to pay in debentures, and the action against the corporation should have given the alternative. *Compagnie du Chemin de Fer des Laurentides* vs. *Corporation de la Paroisse de St. Lin*, Q. B. 1879, 24 L. C. J. 191.

2. Interference by Court.—*Held*, where one of the parties to a contract has the privilege of doing something thereunder in such manner as he may elect, as where he has the option, as to lands pledged to him, of selling the same (in default of fulfilment of conditions of contract) either *en bloc* or in several lots, the Court will not interfere with the exercise of his discretion unless it be clearly shown that the creditor would not be prejudiced and that the debtor would be benefited by such interference. *Re Little* S. C. 1892, 2 Que. 240.

VI. BREACH OF.

1. Action of Damages for procuring Breach of Contract.—A party to a contract for the sale of goods cannot maintain an action against one who maliciously, and with design to injure him, and to benefit himself by becoming a purchaser in his stead, advises and procures the other party to break the contract. *Chambers* vs. *Baldwin*, Kentucky Ct. of Appeals, 1891, reported 14 L. N. 395.

2. Agreement to form Partnership.—Immoral Conduct.—The plaintiff sued for damages for breach of contract arising out of a letter written by one partner in the name of the firm, promising to pay plaintiff so much a year for two years, and at the end of that

time to take him into the partnership "upon such terms as should be mutually satisfactory"—*Held*, that immoral conduct, such as keeping a mistress, or frequenting brothels, would be a sufficient justification for refusing to carry out such an agreement. *Higginson* vs. *Lyman*, S. C. 1860, 4 L. C. J. 329.

2*a*. And *Held*, in appeal, that, in defining the facts to be found by a jury, questions should have been put in respect of such immoral conduct, as material to the defence, also as to the alleged immoral and irregular character of the plaintiff. *Lyman* vs. *Higginson*, Q. B. 1869, 10 L. C. R. 392.

3. **Contractor—Advances.** Upon contracts for the performance of work, the contractor may bring his action of damages upon default of the other contracting party to furnish the advances agreed upon. *Corporation of Terrebonne* vs. *Valin*, Q. B. 1859, 9 L. C. R. 436.

4. **Covenant in Contract of Sale to build Road — Damages — Interest.** — Where in a contract of sale of land to a railway company, upon condition that the company should build a road for the use of the vendor, the vendor can sue the company for damages for non-performance of this condition without giving them the option of building the road. *Cie du Ch. de Fer Québec Central* vs. *Letourneux*, Q. B. 1885, 14 R. L. 324. (1)

5. —— Such damages bear interest from the last day given the company by the protest in which to perform the obligation if any protest has been made. (*Ib.*)

6. **Contractor—Building for special purpose—Delay in completing.**—Where a person lets out a contract for a building for manufacturing purposes, to be completed by a certain time, he has no action of damages against the contractor for loss of business by non-completion of the building at the period stated, where he has sufficient funds in hand to have the work completed and charged against the contractor. *Benoit* vs. *Long*, Q. B. 1888, 17 R. L. 50.

7. —— But *held* that a contractor for repairs at contract price cannot recover for his work, which is payable upon completion, unless he has entirely performed the work contracted for, and the judgment of the Superior Court granting such contractor a sum proportionate to the work done was reversed in Review as being contrary to law and the agreement between the parties. *Sauvure* vs. *Commissaires d'Ecole*, C. R. 1888, 16 R. L. 214.

8. —— **Railway—Delay in completion.** —And, again, a railroad contractor cannot demand payment for work done on the road until he has fulfilled his part of the contract, and where he fails to complete his portion of the road within the time stipulated in the contract, the company can let the work out to another contractor without incurring any liability toward the former. *Stanton* vs. *Cie du Ch. de Fer Atl. Can.*, Q. B. 1891, 21 R. L. 168.

9. —— **Partial Performance.—Certificate of Engineer, whether a progress estimate or a final estimate.**—Plaintiffs claimed $19,142.44, balance due for work done and material furnished by them to defendant, in virtue of a contract executed between the parties at Quebec. Defendant pleaded that the plaintiffs had not fulfilled their obligations according to the contract and at the time agreed upon, by which the defendant had suffered damage and loss—*Held*, that when it is stipulated in a contract for the construction of part of a railroad, that the price, which is fixed at so much per foot, should be payable monthly, on the certificate of the engineer of the party giving out the contract, and that it does not contain one price for all the work to be done, the contractors have the right to be paid for the work done and the materials provided even if they have not completed the whole of their work, if the completion of it or the dissolution of the contract or the permission to complete it at their expense has not been demanded, and the proprietor, on the contrary, has continued and completed the work himself, and used the materials prepared by the contractors. *McCreevy* vs. *Boomer*, Q. B. 1879, 9 R. L. 587. Confirmed in Supreme Court, 10 June, 1880, Cassel's Dig., 2nd edit. p. 139.

10. **Damages — Measure of —** ARTS. 1073 ET SEQ. C. C.—The plaintiff sued for £1000 damages for breach of contract on the part of the defendants, a Music Hall Association, in not giving him possession of the music hall so leased by him, setting up by way of damages that he was unable to give the representations there which he had intended to give and the loss of profit thereby occasioned, and, moreover, the loss of what he might have received from the Government for a transfer of his lease to them, the legislative building at Quebec having been destroyed by fire since his contract with

(1) And see *Gregory* vs. *Canada Improvement Co.*, *Performance, infra.*

defendants was entered into, and the only building fit for the use of the Legislative Assembly being the music hall in question—*Held*, that he could only recover the damages which were the immediate result of non-execution or breach, and not consequential damages, which the parties could not have foreseen. (1) *Lee* vs. *Music Hall Association*, S. C. 1855, 5 L. C. R. 134, 4 R. J. R. Q. 316.

11. —— Legality of Conditions — 52 Vict., ch. 41.—P. and R. entered into an agreement whereby the latter consented not to buy logs on the river Charest and the former not to saw lumber for the county of Champlain. R. having purchased some 3000 logs on the river Charest, P. sued him for breach of contract —*Held*, 1st, The plaintiff had a right to recover damages suffered by him through the defendant's purchase of timber on the river Charest, the measure of damages being merely the profit to be had from sawing such timber, and not the profits which might accrue from the sale of such lumber in the county of Champlain, the plaintiff having agreed to abstain from sawing lumber for that county. 2nd, Such a covenant was perfectly lawful and not in restraint of trade or in contravention of the Dominion Act 52 Vict., ch. 41. *Picher* vs. *Rousseau*, C. R. 1891, 17 Q. L. R. 239.

12. —— A manufacturer who contracts with an individual to supply him certain goods needed by him, can, upon refusal of the latter to receive the goods, recover damages to the extent of the loss sustained by him in the sale of such goods which he manufactured of a special quality. *New England Paper Co.* vs. *Berthiaume*, C. R. 1892, 1 Que. 65.

13. Insolvency—Termination of Contract.—Where the plaintiff had agreed with the defendant M. and his partner to furnish all the malt which they would require for their brewery during five years, on certain conditions, and M. and his partner became insolvent—*Held*, that such contract was only binding as long as the malt was required, and therefore the insolvency of defendants, and their ceasing to employ the brewery, terminated the contract, and no damages could be claimed on the ground of subsequent non-performance. *Oakley* vs. *Morrough*, K. B. 1810, Pyke's Reports 74.

14. Lease and Hire of Work—Termination—Damages.—One party to a contract of lease and hire of work cannot terminate the contract before its completion without the consent of, and indemnifying the other party. *Longtin* vs. *Robitaille*, Q. B. 1889, 17 R. L. 228.

15. Non-Delivery — Damages — Mantle.—The plaintiff complained of the non-delivery of a mantle. It was alleged that in September, 1880, this mantle was delivered to defendants, to be finished on or before the 24th of November; and that there was also a muff to be delivered for $17. The sum of $80 was to be payable by plaintiff on delivery. The sum of $100 is claimed for inconvenience and damages owing to non-delivery, and the conclusions are that defendants be held to deliver, and in default to pay $150 for value of the mantle and $100 damages—*Held*, that the contract to deliver on the 24th was not proved, and there was no ground for damages. Action dismissed. *Beauvais* vs. *Lanthier*, S. C. 1882, 5 L. N. 194.

16. —— "Getting out of the hands of the Guardian."—Action of damages was brought for the non-performance of a contract for the sale of certain spars and timber, "to "be delivered free of charge to morrow, or as "soon as they can be got out of the hands of "the guardian, but the purchasers not bound "to take them if not delivered in one week, "unless they like." No delivery having been made within the time specified, by reason of the guardian in possession of the spars insisting on retaining them, in consequence of a writ of *saisie-arret* issued in an action against the ostensible owner of the spars and timber, whose mark they bore, having been served on him, notwithstanding he was released by subsequent proceedings and might have legally given them up—*Held*, that not having done so, the parties contracting for the sale of the spars and timber were relieved from the damages awarded by the court below for the non-delivery thereof, on the ground that the reasonable construction of the words getting "out of the hands of the guardian" was the actual and not the constructive or legal title to the possession, which alone could insure the delivery. *Maclaren* vs. *Murphy*, Privy Council 1872, 9 Moore N. S. 1.

17. Penalty for—1131 et seq. C. C.—A penalty in a contract is not held to be stipulated damages, unless upon the face of the contract it is declared to be so. *Mure* vs. *Wiley*, K. B. 1810, 2 Rev. de Lég. 207.

18. —— A sum fixed by way of penalty in case of non-performance of a contract cannot

(1) Measure of Damages, see American case reported 9 L. N. 307.

be considered as liquidated damages if it be not distinctly stated to be so. *Patterson* vs. *Farran*, K. B. 1811, 2 Rev. de Lég. 124.

19. —— 1134 C. C. — The plaintiff could only claim the penalty for breach of contract where it had been stipulated for simple delay in the execution of the contract, and as there was a great disproportion between the amount of the penalty and the contract, all presumption that the penalty was stipulated as liquidated damages for delay was destroyed. *Lépine* vs. *Fiset*, Q. B. 1879, 10 R. L. 153.

20. —— In giving effect to a penal clause in a contract, there must be the clearest evidence of its breach, and where the evidence is contradictory the benefit of the doubt must be given to the party subject to the penalty. *Racette* vs. *Desmarteau*, Mag. Court 1889, 13 L. N. 90.

21. **Pleading in Action for.**—Breach of contract insufficiently alleged must be pleaded by exception to the form. *Pacaud* vs. *Hooker*, K. B. 1811, 2 Rev. de Lég. 207.

22. —— If the breach of a contract be imperfectly alleged in the declaration, an exception to the form is the proper plea, but if the breach is not at all alleged, advantage may be taken of the omission by demurrer. *Wagner* vs. *Farren*, K. B. 1811, 3 Rev. de Lég. 195.

23. **Rescission.**—The plaintiffs in Montreal were bound by a contract to pay for the goods supplied by defendants in Scotland upon receipt of invoice and bill of lading. They failed to pay for one lot until 15 days after receipt of bill of lading—*Held*, that the defendants were justified in cancelling the contract. *Russell* vs. *Maxwell*, S. C. 1883, 6 L. N. 91.

24. **Running of Trains.—Connection with Steamboat.**—Action of damages against the lessee of the Q. O. & O. RR. for breach of contract. The defendant agreed to run the railroad trains between Hochelaga & Calumet, in connection with a steamer run by plaintiff between Ottawa and Calumet. The chief complaint was that defendant had failed to provide a proper wharf and shed at Calumet or to deepen the channel so as to allow his steamer to approach the landing place; that on or about the 18th June he had suddenly changed the hours of departure and arrival of his trains so as to break the connection with plaintiff to his great damage, and he had also broken his agreement as to an excursion train on the Queen's birthday in 1877. Evidence that defendant changed the hours of his trains as complained of without the consent of plaintiff, and in a manner which was not justified by the contract. Damages to the extent of $105 awed. *Belcourt* vs. *Macdonald*, S. C. 1881, 4 L. N. 226.

25. **Sale — Conditions — Repairs to House, etc.**—Where the vendor of a property reserves the right to occupy part of the house and other buildings on the property, one of the conditions of sale being that the purchaser is to render certain services to the vendor and to keep the house and buildings in repair, the vendor has an action against the purchaser for the money value of the repairs which the latter has failed to make, and of the services which he has failed to render. *Dufresne* vs. *Bergeron*, Q. B. 1890, 19 R. L. 293.

26. —— **Time for delivery—Damages.**—An action for damages for non-execution of the following contract: "Montreal, October 26th, 1880. I agree to deliver 50 tons first-class merchantable hay, at $13 per ton, to Mr. Charles Larin, in his yard, delivered as required, till the 1st of May, 1881." The plaintiff declared upon this that the defendant was often required to deliver, but he never got more than 23 and one-third tons which he paid for; and that on the 23rd May he protested, and required delivery, of rest. That at the stipulated time of delivery, 1st May, 1881, hay was worth $16 a ton, so that he lost the chance of making $3 a ton, and he sued for that difference on the 26 tons not delivered, making with the cost of his protest, $84. *Per curiam*. It appears to me that the defendant here, undertaking to deliver when required, within a certain time, and at a certain price, must be held to have contemplated being able to buy below that price (so as to make a profit) up to that time, and no longer. Therefore the demand made by the plaintiff on the 23rd was too late. Besides this, in order to prove his damages, the plaintiff was bound to show the increased price of hay at the time of the breach which was on the 1st May, and he only shows the price on the 23rd May. Action dismissed. *Larin* vs *Kerr*, S. C. 1882, 5 L. N. 163, C. R., 5 L. N. 218.

27.——**Terms of Delivery—Reasonable Time—Damages.**—ARTS. 1067, 1073, 1544 C. CODE.—The plaintiff, May 7th, sold defendant 500 tons of hay, deliverable "at such times and in such quantities" as defendant should order. The defendant having ordered only a portion of the hay, the plaintiff, July 28th, notified his readiness to deliver the

balance, and then disposed of it by private sale—*Held*, that the terms of the contract bound the purchaser to order the hay within a reasonable time before the new hay was put on the market, and that the vendor was at liberty to sell at private sale and hold the first purchaser responsible for any loss, viz., the difference at the place of delivery between the value when the acceptance was refused and the contract and other necessary expenses, the amount of which, being a matter of evidence, is properly within the province of the Court below to determine. *Chapman* vs. *Larin*, 1879, Supreme Court, 4 Can. S.C.R. 349, Q. B. 1878, 1 L. N. 458.

28. —— Of Tea—Reasonable time for delivery—Change of terms from cash to credit.—C. sold to T. on the 26th Sept. a quantity of tea, to arrive ex steamer, for prompt cash. On the 11th Oct. following, C. sent a delivery order to T., who refused to accept the tea unless the terms were changed, and delay given for payment of the price, on the ground that the tea had not arrived in a reasonable time. C. refused to agree to a change of the terms of sale, and stopped the delivery order. After serving a protest on P., he sold the tea at a loss, and entered an action against him to recover the amount of the loss, which action was dismissed in the Superior Court.

Held, in appeal, reversing the judgment of the Superior Court, that the breach of contract occurred by the respondent P. refusing to accept the tea unless the conditions were changed so as to convert the sale for cash into a sale for credit;

That on such refusal C. was justified in stopping the delivery of the tea until satisfied that he would be paid according to the terms of his contract, and should not be obliged to give credit for the payment;

That in a sale "to arrive" a delay of fifteen days is not excessive, and will not justify a refusal to accept the goods which are purchased;

That in a sale for "prompt cash" payment must be made on delivery of the goods. *Cox* vs. *Turner*, Q. B. 1886, 30 L. C. J. 253.

29. Stipulated Damages. (1)—ART. 1076 C. C.—Where it is stipulated in a contract for work on buildings, that a certain sum per day shall be paid for any delay in the completion of the work, caused by the negligence of the party undertaking it—the amount to be determined by the architect superintending the construction—the creditor is entitled to the sum so determined. *Kneen* vs. *Mills*, S. C. 1891, M. L. R., 7 S. C. 352.

(1) See article in Vol. 1 Revue Critique, p. 391, by F. Langelier on Breach of Contracts.

VII. BY CORRESPONDENCE. (See under title "ACTION—CAUSE OF.")

1. A person resident in another district may be sued in Montreal for the price of goods, the greater part of which were bought by him in Montreal and the remainder ordered by letter. *Cartwright* vs. *McCaffrey*, M. L. R., 7 S. C. 41.

2. The defendant telegraphed to the plaintiff inquiring the price of his hay delivered at Sherbrooke. The plaintiff replied by telegraph, giving the price. Thereupon the defendant ordered from the plaintiff by telegraph 200 bushels of barley. The grain was forwarded and delivered to the defendant at Sherbrooke.

Held, that the contract was completed at Sherbrooke, where the offer was made, and the acceptance notified to the offerer by his receiving the hay. *McFee* vs. *Gendron*, S. C. 1889, Pagnuelo J., 18 R. L. 230.

3. But where a letter is written not in the terms of a proposition, but of an order to send certain goods, the contract is completed not only by its express acceptance by the person to whom it is addressed, but by the mere fact of his executing it, and the cause of action arises where the order was executed. *Gratton* vs. *Brennan*, S. C. 1887, 15 R. L. 713.

VIII. COMMERCIAL. (See under title "COMMERCIAL MATTERS.")

A contract between a contractor and a government commissioner to supply stone for making a canal is a commercial matter, and can be proved according to English law by parol evidence. *McKay* vs. *Rutherford*, P. C. 1848, 6 Moore P. C. 413.

IX. CAPACITY TO CONTRACT.

Notorious insanity or imbecility does not render the acts of persons suffering from it null unless the parties be interdicted, and such acts are only annullable for lesion. *D'Estimauville* vs. *Tousignant*, S. C. 1874, 1 Q. L. R. 39.

X. CONDITIONAL

1. ART. 1081 C. C.—A promise to pay wages to a mariner in advance upon condition that he proceed to sea in the ship, is an agree

ment to pay so much absolutely, upon the performance of the condition, whether the ship and cargo be afterwards lost upon the voyage, or not. *Mullin* vs. *Jeffrey*, Com. Ct. 1816, 1 Rev. de Lég. 362, 2 R. J. R. Q. 59.

2. The purchaser of an immoveable who promises to pay part of the purchase money as soon as he obtains from the government letters patent for the right to work the minerals on the land purchased, is not bound to pay such balance of the purchase price upon being merely put in default by notarial act on the part of the vendor to obtain the letters patent and to pay such balance, no delay having been fixed in which to obtain said letters-patent. *Bartley* vs. *Breakey*, Q. B. 1885, 19 R. L. 556.

XI. CONNEXION.

Sub-contract — Legal Connexion — Warranty.—The appellants, who had a contract with the city of Three Rivers to supply and set up a complete electric plant, sublet to the respondents the part of their engagement which related to the steam engine and boilers. The original contract with the City of Three Rivers embraced conditions of which the defendants had no knowledge, and included the supply of other totally different plant from that which they subsequently undertook to supply to the appellants.

The appellants, upon completion of the works, having sued the city of Three Rivers for the agreed contract price, the city pleaded that the work was not completed, and set up defects in the steam engine and boilers, and the appellants thereupon brought an action of simple warranty against the respondent.

Held, affirming the judgments of the courts below, that there was no legal connexion (*connexité*) existing between the contract of the defendant and that of the plaintiffs with the city of Three Rivers, upon which the principal demand was based, and therefore the action in simple warranty was properly dismissed. *Royal Electric Company* vs. *Leonard*, Supreme Court 1894, 23 Can. S. C. R. 298.

XII. CONSENT. (See "Acceptance.")

Article in 3 Revue Critique 162, by W. H. Kerr.

XIII. CONSIDERATION. (See "Illegal and Immoral.")

1. Illegal—Lesion—The plaintiff was a rich brewer in Pennsylvania, and defendant was in his employ as driver, and was known to be a person of intemperate habits. The latter was suddenly reported to be left heir of an estate in Australia. He entered into an agreement with his employer that the latter should supply him with ten dollars a week, and also disburse the money necessary to obtain information, for which he was to be indemnified, and to receive one-half of the estate. The amount realized was over $14,000. Plaintiff had disbursed $1,783, and when the moneys of the estate were lodged in the Bank of B. N. A. plaintiff took the action to recover his share under the agreement. Defendant pleaded his intemperate habits, and that he was not on equal terms with plaintiff when the agreement was made—*Held*, that the consideration was not lawful, and plaintiff would only get judgment for the amount he had disbursed. *Rhodes* vs. *Black*, S. C. 1878, 1 L. N. 268.

2. Marriage.—Marriage is a good consideration for a *bona fide* stipulation in a contract of marriage in favor of the wife. *Barbour* vs. *Fairchild*, S. C. 1856, 6 L. C. R. 113, 5 R. J. R. Q. 39.

3. Municipal Corporation—Erection of Market in specified locality.—A contract or agreement to pay a village corporation a certain subscription towards the erection of a public market, provided it be built in a specified locality, is valid, and the amount thereof may be recovered if the condition be complied with. *Corporation of the Village of Waterloo* vs. *Girard*, C. Ct. 1872, 16 L. C. J. 106.

4. When need not be expressed.—In a contract in the nature of a *remise* or liberation —*Held*, that the consideration need not be expressed, and that with respect to such contracts the formalities required by law in relation to donations are not necessary *à peine de nullité*. *Robertson* vs. *Jones* (1), S. C. 1858, 8 L. C. R. 364, 6 R. J. R. Q. 272.

XIV. DEFAULT.

1. An action of resiliation for the non-performance of the conditions of an emphyteutic lease, cannot be maintained if the defendant have not been put in default. *Belston* vs. *Pozer*, 1 Rev. de Lég. 349 and 2 Rev. de Lég. 440, K. B. 1818.

2. 1067 C. C.—Where action was brought to compel the defendant to grant a notarial discharge of a hypothec which had been paid in

(1) Meredith, J., herein discusses the law of consideration in contracts, comparing the English doctrine with our own.

full—*Held*, that the defendant must have been put in default to do so, and such default must have been alleged in the declaration. *Gagnon & Clouthier*, Q. B. 1872, 3 Rev. Crit. 50.

3. Where a party complains of a failure to deliver hay sold to him, and i is established that subsequently he had bought hay from the same party at a higher price, without protest, and he has never put the vendor in default to deliver the hay, it will be presumed that he has acquiesced in the non-delivery, and his action of damages will be dismissed. *Prefontaine* vs. *Brodeur*, Q. B., Montreal, 18 Sept., 1878.

4. Where a contract of hire of grain bags for a voyage did not fix the time when the bags should be returned, but stipulated only that bags not returned should be paid for at a fixed rate, the lender was bound to put the party hiring the bags in default to return them before he could sue for the price, and a tender of the bags was a good defence to the action. *American Bag Loaning Co.* vs. *Steidleman*, 1889, M. L. R., 5 S. C. 398.

5. Where a merchant contracts with another party for a certain quantity of wood to be delivered to him within a stated time, he cannot have the wood cut by another party upon non-fulfilment of the contract by the former party, and claim damages from him, unless he has been put in default. *Prouty* vs. *Stone*, Q. B. 1889, 18 R. L. 284.

6. Where no delay is fixed for the performance of a contract, the defendant must be placed in default before action brought. *Beaudry* vs. *Les Curés & Marguilliers, &c., of Montréal*, Q. B. 1880, 3 L. N. 218.

7. The plaintiff alleged that defendant authorized him in writing to purchase for her certain real property for $2,700, and agreed that, if he could obtain it for less than $2,700, the difference should belong to him as commission. Plaintiff sued for $200, alleging that he had purchased the property for $2,500. —*Held*, before plaintiff could recover the sum claimed, he was bound to prove that he had effectively purchased the property in question at the price, $2,500, and had put defendant in default to accept a validly executed title to the same. *Globensky* vs. *Morrissette*, S. C. 1893, 4 Que. 386.

XV. ENGINEER'S CERTIFICATE.

1. A covenant in a contract for the construction of railway works, between the chief contractor and a sub-contractor, that the qualities and quantities of the work done by the sub-contractor and the amount of the payments to be made by the chief contractor to the sub-contractor should be ascertained and determined before an engineer to be named by the contractor in chief, is a valid covenant; and under the pleadings in this case the defendant was entitled to the benefit of the said covenant, but he could not have the advantage thereof as regards works done by the sub-contractor not alleged by either of the parties to have been done under the contract, although alleged and proved to have been done in connection with and whilst the works contracted for were in progress. *Savard* vs. *McGreevy*, C. R. 1881, 7 Q. L. R. 97.

2. **Necessity for—Laches** — (See also "BREACH OF.")—McG. *et al.*, appellants, entered into a contract with McG., respondent, the contractor for the construction of the North Shore Railway between Montreal and Quebec, to do and perform certain works of construction on a portion of the road, and by a clause in his contract agreed " to keep open at certain times and hours at his own cost and expense the main line for the passage of traffic or express trains run by McG. without any charge to the latter ; but there was a proviso that " any time occupied on the road over and above what may be required by the hours hereinbefore mentioned, or any expense caused thereby, shall be paid by the contractor McG. on a certificate to that effect signed by the superintendent of the contractor."

On an action brought by the appellants against the respondent for damages caused by the interruption of the work on said road by the passing of the respondent's trains—

Held, affirming the judgment of the Court below, that it was the duty of the appellants to get the superintendent's certificate within a reasonable time, and not having taken any steps to get it until six years after the superintendent had left the respondent's employment, the failure to produce such certificate was sufficient ground for dismissing the appellant's action. *McCarron* vs. *McGreevy*, Supreme Court, 13 Can. S. C. R. 378, confirming Q. B. 1885, 14 R. L. 422, 12 Q. L. R. 373.

3. —— Where it is agreed between the parties to a sub-contract for the construction of a railway that the head contractor should, upon a certificate of his engineer that the work had been fully completed by the sub-contractor, pay such

sub-contractor for the same in full at certain specified rates contained in a schedule immediately following, and that all questions as to amounts and quantities of work performed, and all other questions which may arise etween the parties relative to the execution thereof, shall be determined by the contractor's engineer, whose decision shall be final, it was held that the final certificate of the engineer is a condition precedent to his right to recover. *Guilbault* vs. *McGreevy*, Supreme Court 1890, 18 Can. S. C. R. 609, affirming judgment Q. B. & S. C.

4. The final certificate of the engineer is a condition precedent to the right of recovery. *Reg.* vs. *Cimon*, Supreme Court 1893, 23 Can. S. C. R. 62.

5. In a bulk sum contract for various works and materials, executed, performed and furnished on the Quebec Harbour Works, the contractors were allowed by the final certificate of the engineers a balance of $52,011. The contract contained the ordinary powers given in such contracts to the engineers to determine all points in dispute by their final certificate. The work was completed and accepted by the commissioners on the 11th Oct., 1882, but the certificate was only granted on the 4th Feb. 1886. In an action brought by the contractors (appellants) for $181,241 for alleged balance of contract price and extra work—

Held, 1st, that the certificate of the engineers was binding on the parties, and could not be set aside as regards any matters coming within the jurisdiction of the engineers, but that the engineers had no right to deduct any sum from the bulk sum contract price on account of an alleged error in the calculation of the quantities of dredging to be done, stated in the specifications, and therefore the certificate in this case should be corrected in that respect. 2nd, that interest could not be computed from an earlier date than from the date of the final certificate fixing the amount due to the contractors under the contract, viz., 4th Feb., 1886. Fournier J., dissenting.

Strong & Gwynne J. J. were of opinion that the certificate could have been reformed as regards an item for removal of sand erroneously paid for to other contractors by the commissioners and charged to the plaintiffs. *Peters* vs. *Quebec Harbour Commissioners*, Supreme Court 1881, 19 Can. S. C. R. 685, reversing Q. B., 16 Q. L. R. 130.

XVI. ERROR.

1. A contract for a lawful consideration is not the less valid though the consideration be incorrectly expressed therein. *O'Brien* vs. *Thomas*, Q. B., 24 L. C. J. 43, confirming 21 L. C. J. 287. A similar judgment was rendered on the same day in the Q. B. in the case No. 38, *O'Brien*, appellant, and *Molson*, respondent.

2. A deed of ratification of an obligation for a loan of money consented to by an illiterate man will be voided for error where it is proved that the deed was not read to him, and if it contains obligations other than those he intended to consent to. *Cie. de Pret et de Crédit Foncier* vs. *Santerre*, S. C. 1886, 11 R. L. 453.

XVII. EVIDENCE. (See under title "Evidence.")

1. Commercial Matters—Art. 1203 of C. C.—Statute of Frauds—1235 C. C.—In an action by a blacksmith against the defendant, a merchant, for the non-delivery of coal purchased from him by the plaintiff, a jury trial being granted, the plaintiff was about to make proof of the purchase by parole evidence when the defendant objected—*Held*, that under 25 Geo. III., cap. 2, the 17th sec. of the Statute of Frauds was in force in Canada in commercial cases, and therefore a sale of goods to a greater value than £10 could not be proved where no part of the goods had been delivered, no earnest given, and no memorandum in writing made of the contract. *Hunt* vs. *Bruce*, K. B., Pyke's Rep. p. 8, 1 R. J. R. Q. 57, and *Pozer* vs. *Meiklejohn*, K. B. 1809, Pyke's Rep. p. 11, 1 R. J. R. Q. 59.

2. Parol—Usage—Place of Performance.—One D. made a written agreement with Miss K., whereby he undertook to furnish her with work, knitting, for space of nine months, and also to furnish her with one knitting machine valued at $37, payable $2 weekly until paid—*Held*, in an action by Miss K. against D. for breach of contract, that parole evidence was admissible to prove the price agreed upon as to the rate at which such work was to be paid, but that such evidence could not be admitted to prove where the work was to be supplied; in the absence of a special agreement upon that point, it should be governed by usage. *O'Keefe* vs. *Desjardins*, Q. B. 1886, 30 L. C. J. 280.

3. Proof of Contract.—Action by the appellants for $5,396.34, being for ties and other materials furnished by the appellants to the

respondent for a railway to St. Césaire. In their declaration the appellants alleged that, on the 9th January, 1872, an agreement was entered into between respondent and them and one B., by which the latter undertook to perform certain work of grading, etc., and furnish materials along the proposed line of railway from West Farnham to St. Césaire; that during the winter they supplied a large quantity of ties and other materials; that in spring they were ready to commence the grading, but were prevented from proceeding, as the defendant did not acquire the right of way for the proposed road. The conclusions were for the value of materials supplied, loss of profits, etc. The defendant pleaded that, at the time referred to, he was contractor for the South Eastern Counties Junction Railway, the terminus of which was at West Farnham; that an extension to St. Césaire was contemplated, and plaintiffs solicited a sub-contract. But the Legislature subsequently refused authority to make the extension, and the plaintiffs had, therefore, no right to recover, as there never was any contract. The action was dismissed by the court below—*Held*, that there was no sufficient evidence to show that there was a contract. There was no commencement of proof in writing; the property had never been acquired, and respondent had refused to make a contract. Judgment confirmed. *Meigs* vs. *Foster*, Q.B. 1876.

4. Warranty — Parol Evidence. — Where the defendant contracted to dig a well for the plaintiff, and the evidence showed that a contract of warranty as to the supply of water existed, this is sufficient "commencement of proof by writing" to render parol evidence admissible to determine the duration of the warranty. *Guy* vs. *Chenette*, C. R. 1889, 33 L.C. J. 151.

XVIII. HIRE OF STABLING.

Defendant lodged a horse with plaintiff, a livery stable keeper, to take care of, for which he was to pay seventeen dollars a month, but at the end of a week took him away and tendered $4.25. This the plaintiff refused, alleging that the price should be greater for a short period—*Held*, that the plaintiff could not recover more than was offered. *Avery* vs. *Lawler*, S. C. 1872, 3 Rev. Crit. 77.

XIX. ILLEGAL AND IMMORAL.

1. Agreement to suppress Prosecution.—An agreement to suppress a prosecution for a crime—although not a felony, if a misdemeanor of a public nature—is illegal, and not a valid consideration for a promise to pay money. *Couture* vs. *Marois*, S. C. 1879, 5 Q. L. R. 96.

2. —— But where a clerk embezzled a sum of money belonging to his employer, and, with a view to avoid criminal proceedings, gave his employer certain effects in payment of the amount due, it was held that such payment or settlement was not without lawful consideration, and could not be set aside on a contestation of the employer's declaration as garnishee. *Paquette* vs. *Bruneau*, C. R. 1888, M. L. R., 6 S. C. 96.

3. Agreement between Butchers not to supply Meat to Individual.—To give right of action the interest must be lawful. So it seems that a contract by which two butchers agree that they will not supply a certain party with meat is illicit, and no action will lie by the one against the other who breaks the contract. *Bayard* vs. *Versailles*, Q. B. Montreal, Dec., 1875.

4. Books—Unlawful Consideration—Good Morals.—ARTS. 989-990 C.C.—The works of an author are not contrary to good morals within the meaning of Art. 990 C. C., unless they are so immoral as to be punishable under the criminal law. The mere fact that a book has been placed in the *index librorum prohibitorum* by the Congregation of the Index will not affect the validity of a contract made by a bookseller with an agent for procuring subscribers to such work. *Taché* vs. *Derome*, S. C. 1890, 6 M. L. R. 178. Reversed in Appeal; apparently not reported.

5. Influencing Member of Parliament.—An agreement whereby the defendant promised $50 to the plaintiff for using his influence with certain electors, friends of the member of Parliament for the county where he resided, in order to obtain for them a government situation, and for which sum he gave his promissory note, is void. *Raymond* vs. *Fraser*, C. Ct. 1892, 1 Que. 103.

6. Lottery.—Action was brought for the recovery of the purchase money stipulated in a deed of sale arising out of a lottery—*Held*, that the sale was null, and action dismissed. *Ferguson* vs. *Scott*, K.B. 1843, 2 Rev. de Lég. 305.

7. Public Office—Sale or Transfer of.—Where the clerk of the crown agreed with his son to resign his office to him as such, on condition of sharing the revenue during the

remainder of his life—*Held*, on an action subsequently had by the heirs of the father for a portion of the revenue, that the action, as regarding the transfer of the office, was null and void. *Delisle* vs. *Delisle*, Q. B. 1848, 3 Rev. de Lég. 244.

8. —— On demurrer by the defendant, an agreement between a registrar and another person, to the effect that, on the registrar resigning his office, so as to allow that other person to be appointed registrar in his place, the new registrar should pay to his predecessor one half yearly of the new registrar's fees of office, is null and void, and an action based on such an agreement must be dismissed. *Thurber* vs. *Lemay*, S. C. 1885, 9 L. N. 188.

9. —— **Fees of.**—The consideration of a contract between two persons appointed jointly to a public office that one of them shall receive all the fees and emoluments attached to it and pay a salary to the other, is contrary to public policy and illegal, and the contract itself is therefore void. *Remillard* vs. *Trudelle*, S. C. 1889, 15 Q. L. R. 328.

10. To abstain from Bidding. — A contract or agreement to pay a bidder at a judicial sale a certain amount to refrain from bidding, is an immoral and illegal contract, and cannot be enforced. *Perrault* vs. *Couture*, C. Ct. 1872, 16 L. C. J. 251, 4 R. L. 73.

11. To abstain from opposing passage of Act—Potash Inspection.—In an action based on agreement between plaintiff and defendant, who were inspectors of pot and pearl ashes, to the effect that, so long as an act entitled "An act to regulate the inspection of pot and pearl ashes," and a bill then before the legislature entitled "An act to regulate the inspection of pot and pearl ashes," but in any event for the period of three years from that date the plaintiff should cease to act or carry on business directly or indirectly as an inspector of pot and pearl ashes, and that he would forthwith close his inspection store in Montreal, etc., in consideration of which the defendant should not endeavor to prevent the passing of the said act, but should pay the plaintiff certain sums of money therein mentioned, and defendant pleaded that the contract was illegal and without consideration—*Held*, that such an agreement was not against public policy, and was a valid consideration for a contract to pay money. *Henshaw* vs. *Dyde*, S. C. 1857, 7 L. C. R. 124, 1 L. C. J. 124, 5 R. J. R. Q. 196.

12. To Marry.—An action against a tutor for non-performance of a contract by which he undertook to marry his ward to the plaintiff cannot be maintained. *Chabot* vs. *Morrisel*, K. B. 1812, 2 Rev. de Lég. 79.

XX. IMPLIED.

1. An action will lie upon an implied contract for board, lodging and washing. *Spats* vs. *Meyers*, K. B. 1811, 2 Rev. de Lég. 124.

2. An action by a merchant against the master of a ship to recover the value of goods lost during a voyage from England to Quebec, is a case of an implied contract between a merchant and a trader. *Rivers* vs. *Duncan*, K. B. 1819, 2 Rev. de Lég. 124.

3. The use and occupation of a house creates an implied contract between the landlord and tenant, on which an action in debt or assumpsit can be maintained by the former against the latter. *Burns* vs. *Burrell*, K. B. 1822, 2 Rev. de Lég. 205.

4. An action for money paid for the necessary repair of a *mur mitoyen* can be maintained on the implied contract of the co-proprietor of the wall with his neighbor. *Latouche* vs. *Rollman*, K. B. 1821, 2 Rev. de Lég. 207.

5. A consignee is liable on an implied contract to pay the freight of goods which he receives. *Oldfield* vs. *Hutton*, K. B. 1812, 2 Rev. de Lég. 207.

XXI. INSTALMENT CONTRACTS. (See also *Supra* "ACTION ON—ELECTION OF DOMICILE.")

D. subscribed for a set of the Encyclopædia Britannica, agreeing to pay $5 per volume for the same in monthly payments, the books to be delivered at D.'s address as issued, but to remain the property of C., the plaintiff, until the whole of the payments were made; D., by the agreement, to return any volumes delivered, and forfeit all payments made on notice to him to do so, which C. had the right to give should D. make default of his payments during 30 days. D. received in all 21 volumes, paid in all $46, but paid nothing for a year before date of action, although repeatedly notified by C., who discovered that the books were in the possession of S. C. brought an action, asking that they be declared owners of the books, and that D. be declared to have forfeited the payments already made. On an absentee return D. was summoned by advertisement, and made default. S. pleaded, 1st, that D. had been irregularly summoned as an absentee when he resided in the city; C. demurred, and the allegation was struck out; and, 2nd, that he was the

owner in good faith of the books, having acquired them in good faith from D., who had possessed them as owner, and paid for them.

Held, that the conditions of the contract entered into by D. were not contrary to law, and C. had the right to enforce them.

That, as regards the possession of said books by S., it did not come within the exceptions provided for in Arts. 1487 and following of the Civil Code. That where the absence of a defendant has been established by a bailiff's return, such return can only be attacked by an inscription *en faux* under Art. 79 C. C. P., or by motion under Art. 159 C. C. P., and a plea that such service is irregular, because the defendant was not an absentee, will be struck out on a demurrer. *Canadian Subscription Co.* vs. *Donnelly*, C. R. 1890, 34 L. C. J. 191, 19 R. L. 578.

XXII. IN FRAUD OF CREDITORS.

(See under title "FRAUD.")

XXIII. INTERPRETATION.

1. Agreement for Sale — Debentures.—Several persons having claims against a railway company executed an agreement to deliver to one G. the debentures of the company held by them, on payment of the respective amounts shown opposite their respective names. It was proved that this agreement was executed at G.'s request, but it was not accepted nor acted upon by G. until after the insolvency and death of P., one of the signatories—*Held*, that this document was not to be regarded as an unilateral agreement binding the signatories for an indefinite time to sell their debts to G. at a certain price; but rather as an arrangement for the purpose of defining their respective claims against the company, and it was not competent for G. to treat the document as an agreement for sale of which he might avail himself whenever he chose. *Sénécal* vs. *Panzé*, P. C. 1889, 12 L. N. 330, confirming Q. B., M. L. R., 5 Q. B. 4, which reversed C. R., M. L. R., 1 S. C. 465, and restored S. C., 7 L. N. 30.

2. In any case, an acceptance of the agreement by G. and a transfer of his rights thereunder to a third person, after the insolvency and death of P., one of the signatories, could not bind P.'s estate. (*Ibid.*)

3. Agreement between Banks—Action of one Bank.—Where three banks, creditors of B. Bros., who required extension of time, agreed together to grant it and make further advances to them, declaring it a matter of common cause—*Held*, that one of them advancing funds to renew a draft, part of the indebtedness, and not making sure that the funds were so employed, incurred a loss for which the other two were not liable. And that the stipulation in the agreement that A. K., to whom the funds for renewal were handed, should supervise the affairs of B. Bros. during the period covered by the agreement, did not constitute him the agent of the banks. *Union Bank* vs. *Quebec Bank*, Q. B. 1887, 11 Q. L. R. 69.

4. Agreement between Partners—By *acte* of dissolution of partnership the plaintiff received, as part of his interest in the firm, two promissory notes with a stipulation that he should be at liberty within three weeks to return the notes and to take such goods from the stock of the partnership as he would select to an amount equal to such notes and interest at 65 per cent. advance upon the cost thereof. In an action of damages against the defendant for refusing to permit the selection under the contract, the notes having been duly tendered back—*Held*, reversing the decision of the court below, that the plaintiff was not limited to any particular description of goods, nor obliged to allege or prove what kind of goods he would have selected, and on refusal that he was entitled to damages in a sum equal to the amount of profit on the sale of the goods, if delivered according to the terms of the contract. *Foley* vs. *Eliott*, Q. B. 1858, 9 L. C. R. 349.

5. Bonds—Agreement to pay Debts of Railway Company in consideration of.—Where R. undertook, in consideration of receiving a certain number of bonds, or a certain sum in cash in lieu thereof, to pay certain liabilities of a railway company, of which he was president, and procure for the company a discharge therefrom, and it appeared that he used the earnings of the company pending negotiations prior to the execution of the agreement to pay part of such claims, which were due at the date of the agreement, and for which under the agreement he was personally liable, that he was not entitled to the equivalent portion of the bonds or cash. *Quebec Central Railway Co.* vs. *Robertson*, P. C. 1891, 17 Legal News 358, reversing Q. B. 1893, 2 Que. 273, restoring S. C. 1891, 14 Legal News 354.

6. Conditional—Default.—Under an undertaking by appellant to pay respondents $75 as boot on an exchange of lots in two cemeteries, when he should have erected a vault or monument on his lot in the Côte des

Neiges Cemetery, it was not facultative in him to erect or not erect such vault or monument as he pleased, and he was bound to erect the same within a reasonable delay; specially so, as the respondents were bound to keep the bodies of appellant's family, taken from the old cemetery, in their vault, until the appellant should have erected his vault or monument for the reception of said bodies. *Beaudry* vs. *Curé, etc., de Notre Dame de Montréal*, Q. B. 1880, 3 L. N. 218, 25 L. C. J. 285, reversing C. R. 1879, 2 L. N. 126, and S. C., 9 R. L. 376.

7. —— Said amount, however, could not be exacted until after the appellant had been put *in morâ* to erect said vault or monument. (*Ib.*)

8. Contract to be cancelled on certain Conditions — Option — Notice. — The respondents sold to the appellant from 300 to 350 tons of coal, subject to the condition that, if at any time the operations or business of the company at the mines or on its railways or canals were interrupted by floods, etc., or by strikes among the miners, etc., the obligations of the company to deliver coal under its contract or agreement might be cancelled at the option of the company, and the company should not be liable for damages by reason of such non-delivery—*Held*, that an interruption in the operations of the company caused by a strike among the miners, which lasted from the 25th of July to the 15th of October, although begun at the date of the contract, was such an interruption as justified the company in cancelling the contract, and, although the company might have procured coal elsewhere to fulfil its contracts, it was not obliged to do so, and no demand or judgment was required to cancel the contract, which was cancelled by a mere notice given by the company. *Mason* vs. *Delaware & Lackawanna & Western Railway Co.*, Q. B. 1881, 1 Dorion's Q. B. R. 204.

9. Deeds—Stipulation for Resiliation—Penalty—Third Party—Transferee.— If terms of contract be altered by two other deeds stipulating for its resiliation, one of which provides for the payment of a penalty by the party seeking for resiliation, and if one of the contracting parties, with the consent of the other, transfers his rights to a third party, alluding in general terms to the right to resiliate under one of such deeds, without specifying which, and without any reference being made to a penalty, such third party is relieved from any liability for such penalty. *Monaghan* vs. *Benning*, S. C. 1857, 1 L. C. J. 150, 5 R. J. R. Q. 466.

10. Deeds — Conflicting Clauses. — Where two clauses in a deed conflict,—the one written and the other printed,—the written clause should have effect, as more likely to contain the real intention of the parties. *Desrosiers* vs. *Lamb*, 1888, M. L. R., 4 Q. B. 45.

11. Deed of Sale—Discount—Interest. —Plaintiff in 1879 sold defendant 50 acres of land for $2,000, payable in twenty annual instalments of $100 each, the whole at four per cent. per annum. The deed contained a clause to the effect that plaintiff was to allow defendants eight per cent. on all payments made in advance from the date of payment until the time they should have become due. Defendants paid two instalments of $100 each when they became due, then tendered $500 in full of the balance ($1,800), claiming a discount of $1,300 under the clause in question. Plaintiff brought action for $248, one instalment of principal and two years' interest — *Held*, rejecting defendant's tender, that the intention of the parties must be determined by interpretation rather than by adherence to the literal meaning of the words of the contract. *Eaton* vs. *Unwin*, S. C. 1883, 7 L. N. 7.

12. Executory Contract—Non-fulfilment of—Action for Price—Incidental demand—Damages—Cross-Appeal — In March, 1883, B. contracted with C. *et al.* for the delivery of an engine in accordance with the Herreshoff system to be placed in the yacht "Ninie," then in course of construction. The engine was built, placed in the yacht, and upon trial was found defective. On the 31st August, C. *et al.* took out a *saisie-conservatoire* of the yacht "Ninie," and claimed $2,199.37 for the work and materials furnished. B. petitioned to annul the attachment, and pleaded that the amount was not yet due, as C. *et al.* had not performed their contract, and by incidental demand claimed a large amount. After various proceedings the *saisie-conservatoire* was abandoned, and the Court of Queen's Bench, on an appeal from a judgment of the Superior Court in favor of B., both on the principal action and incidental demand, ordered that experts be named to ascertain whether the engine was built in accordance with the contract, and report on the defects. A report was made by which it was declared that C. *et al.*'s contract was not carried out, and that work and material of the value of $225 were still necessary to complete the contract. On motion to homologate the

expert's report the Superior Court was again called upon to adjudicate upon the merits of the demand in chief and of the incidental demand, and that Court held that as C. *et al.* had not built an engine as covenanted by them, B.'s plea should be maintained, but as to the incidental demand held the evidence insufficient to warrant a judgment in favor of B. On appeal to the Court of Queen's Bench, that court, taking into consideration the fact that the yacht "Ninie" had since the institution of the action been sold in another suit at the instance of one of B.'s creditors, and purchased by C. *et al.*, the proceeds being deposited in court, to be distributed amongst B.'s creditors, credited B. with $225 necessary to complete the engine, allowed $750 damages on B.'s incidental demand, and gave judgment in favor of C. *et al.* for the balance, viz., $1,225 with costs. The fact of the sale and purchase of the yacht subsequent to the institution of the action did not appear on the pleadings. On appeal to the Supreme Court of Canada, and cross appeal as to amount allowed on incidental demand by Court of Queen's Bench, it was *Held*, reversing the judgment of the Court of Queen's Bench, Sir W. J. Ritchie, C. J., and Taschereau, J., dissenting, that, as it was shewn that at the time of the institution of C. *et al.*'s action, it was through faulty construction that the engine and machinery therewith connected could not work according to the Herreshoff system, on which system C. *et al* covenanted to build it, their action was premature—*Held*, also, that the evidence in the case fully warranted the sum of $750 allowed by the Court of Queen's Bench on B.'s incidental demand, and therefore he was entitled to a judgment for that amount on said incidental demand with costs. *Bender* vs. *Carrière*, Supreme Court 1887, 15 Can. S. C. R. 19.

13. Guarantee—Instalments—Notice.—In a contract of warranty given to the appellant by the respondent, the following clause occurred: "The bank, as additional security for the payment of the interest, hereby guarantee that the same will be promptly paid to you as the instalments of interest fall due, provided always that the bank may, after the payment of any instalment, terminate this guarantee by notice to you in writing three months previous to any following instalment." These instalments fell due on the 8th February, May, April and November—*Held*, (reversing the judgment of the court below): —That in order to terminate such guarantee the bank should give three months notice before each instalment commenced to run and not before it became due. Therefore, a notice given on the 1st October would not exempt the bank from its obligation to guarantee the instalment due the 8th February following. *Cross* vs. *Ontario Bank*, Q. B. 1893, 2 Que. 363.

14. Guaranteeing Insolvency of Firm—Option.—An undertaking to give a purchaser an introduction to a firm whose responsibility and standing should be satisfactory to him, meant satisfactory at that date, and did not imply in any way the continued solvency of the firm. *Bowen* vs. *Gordon*, Q. B. 1882, 5 L. N. 300.

Where a commission was payable in cash or bonds at the option of the debtor, part payment in cash was making an option, and gave the creditor the right to demand the balance in cash. (*Ib.*)

15. Insurance—Marine—"Premises"—Rules of Construction of Contracts—Evidence.—The appellants insured a ship belonging to the respondent, and used for the contract a form generally employed to insure houses, which contained the following condition: "That if more than 20 lbs. of gunpowder should be on the premises at the time any loss happened, such loss should not be made good." The ship having been burned an action was taken by the insured for the amount of the policy.

The Judicial Committee held that the word "premises" being in the conditions of the policy, it must be understood to mean the ship, that is the subject and thing previously expressed and referred to, and that, according to the policy, the ship should not have carried more than 20 lbs. of gunpowder.

In construing instruments the real contract must be gathered from the contract itself, and the words and sentences used must be taken in their natural and ordinary sense; the intention of the parties is not to be searched for in external evidence or considerations.

In order to construe a term in a written instrument where it is used in a peculiar sense, different from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word, but it is not admissible to contradict or vary what is plain. *Beacon Life & Fire Assurance Co* vs. *Gibb*, P.C. 1862, 1 Moore N. S. 73, 7 L. C. J. 57, 13 L. C. R. 81.

16. Lease of Oxen—Sale — Terms of Payment.—The declaration of the plaintiff sets

up in effect that the defendant, in September, 1862, leased from him a pair of three-year old steers for two years, when they were to be returned in good working order. This agreement was evidenced by a paper writing to that effect, signed by defendant. At the end of the two years the defendant did not return the oxen, and their value was set down at $91, for which plaintiff concluded. Defendant pleaded that, after the expiration of the lease, plaintiff agreed to his keeping the oxen until the following spring, and that therefore the agreement of lease became extinct, and that, moreover, while the oxen were still in his, the defendant's, possession, plaintiff agreed to sell them to him for $55 in presence of witnesses. In answer to interrogatories plaintiff admitted having promised to sell them to defendant for the price named, provided that defendant paid such price, and that the oxen were to be security for themselves—*Held*, that plaintiff had never relinquished his claim under the lease, and that he was consequently entitled to the full amount sued for. *Woodard* vs. *Auriager*, S. C. 1865, 1 L. C. L. J. 113.

17. Notice.—The Quebec Street Railway Company were authorized under a by-law passed by the Corporation of the City of Quebec, and an agreement executed in pursuance thereof, to construct and operate in certain streets of the city a street railway for a period of forty years, but it was also provided that "at the expiration of twenty years (from the 9th of February, 1865), the corporation might, after a notice of six months to the said company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of said railway upon payment, etc., etc." On the 9th of January, 1884, the Corporation of the City of Quebec gave a notice to the company of their intention to take possession, but afterwards gave a second notice on the 21st November, 1884, whereby the corporation informed the company that the previous notice was annulled, and that after the 9th of February, 1885, at the expiration of the time and in the manner prescribed by the by-law, they would assume possession, and subsequently, on the 21st of May, they tendered $23,806.30 for the property. In an action brought to declare the tender valid and for a decree declaring the corporation entitled to take possession—*Held*, reversing the judgment of the Court below, Fournier J. dissenting, that the company were entitled to a full six months' notice prior to the 9th of February, 1885, to be given within twelve months preceding the 9th of February, 1885, and therefore the notice relied on was defective. *Quebec Street RR. Co.* vs. *Corp. of the City of Quebec*, Supreme Ct. 1888, 15 Can. S. C. R. 164.

18. Opening Streets.—Contract to "open, level, form and make" certain streets and squares in the City of Montreal, necessarily involves the making of side-walks, but not the making of fences along the line of such streets and around such squares and the repairing of the road-way. *Anderson* vs. *Mayor*, etc., *of Montreal*, S. C. 1859, 3 L. C. J. 157.

19. Reference to Arbitration.—The plaintiffs by their declaration sought an account from the defendant of the value of two vessels which had been built by them, and concerning which a number of written agreements had passed between the parties, in one of which a reference to arbitration was stipulated in event of dispute—*Held*, confirming the judgment of the Court of Appeal, that such clause was not to be construed so as to admit of a reference to arbitration for the purpose of defeating the appellant's construction of the deed, and the object of the parties thereto. *Shaw* vs *Jeffrey*, P. C. 1860, 10 L. C. R. 340.

20. Right of Passage—Interruption—Waiver.—Where road trustees commuted for an annual payment the tolls payable by a street railway company for travelling on a certain road, and the company agreed that the trustees, or the municipalities within whose limits the road was situated, should have the right to take up the road for certain purposes without the company being entitled to any compensation or damages therefor, that the company was estopped not only from claiming damages, but also any diminution of the annual commutation payment for loss of use. *Trustees Montreal Turnpike Roads* vs. *Montreal Street Ry.*, C. R. 1888, M. L. R., 5 S. C. 434.

21. Rule of Interpretation.—Where a document is drawn up by one of the parties thereto in the absence of the other, and without that other taking any part therein, and is signed by both the parties, any ambiguity therein should be interpreted against the party drawing it up. *Rooney* vs. *Fair*, Q. B. 1879, 10 R. L. 103.

22. Sale—Delivery.—Defendant sold to plaintiff certain spars and timber "to be deli-" vered free of charge to-morrow, or as soon as

" they can be got out of the hands of the guar-
" dian, but the purchasers are not bound to
" take them if not delivered in one week unless
" they like." No delivery having been made within the time specified, by reason of the guardian in possession of the spars insisting on retaining them, in consequence of a writ of *saisie arrêt* issued in an action against the ostensible owner of the spars and timber, whose mark they bore, having been served on him, notwithstanding they had been released by subsequent proceedings, and might have legally given them up—*Held*, that, not having done so, the parties contracting for the sale of the spars and timber were relieved from the damages awarded by the court below for the non-delivery thereof, on the grounds that the reasonable construction of the words " getting out of the hands of the guardian " was the actual, and not constructive or legal title to the possession, which could alone insure the delivery. *Maclaren* vs. *Murphy*, P. C. 1872, 9 Moore N. S. 1.

23. Sale of Cord Wood.—By a writing *sous seing privé* plaintiff purchased from defendant 2,265 cords of wood, " as now corded at Port Lewis," for the sum of $4,520, and by the same writing acknowledged receipt of the wood, declared himself satisfied therewith, and discharged the vendor *de toute garantie ultérieure*. The purchaser, having measured the wood, found it 423 cords short, and a portion of it rotten. Suit for value of wood not delivered and the part that was rotten—*Held*, that by the terms of the agreement the sale was *en bloc*, and not by the cord, and the purchaser could not recover. *Lalonde* vs. *Drolet*, Q. B. 1877, 1 L. N. 29.

24. Sale of Spruce Bark—Condition Precedent to Payment.—A stipulation in a contract of sale of a determinate quantity of spruce bark, that advances at the rate of $2 per cord shall be made to the vendor before such bark has been peeled, and that the balance of the price of each cord shall be paid on delivery the next winter, is only a term of payment, and not a condition which makes payment for what bark has been delivered dependent upon the delivery of the whole. And even were the delivery of the whole a condition precedent to the payment of the balance due for the part delivered, the fact that the defendant failed to make the advances at the time agreed upon will estop him from denying his liability to pay such balance, his failure to perform his part of the contract having been material in preventing the plaintiff from fulfilling his part. *Weil* vs. *Gagnon*, S. C. 1887, 13 Q. L. R. 357.

25. Sale — Quantity — " Say " or " About."—Where, in a contract for the sale and delivery of goods, the quantity is only determined in an uncertain manner by the terms " say " or " about," these words are words of expectation and estimate only, and do not amount to an undertaking that the quantity should be so much. In this case a contract for " say about 600 spars " was maintained, although 496 only were delivered. *McConnell* vs. *Murphy*, P. C. 1873, L. R., 5 P. C. 203.

26. Special Price for doing certain number of things.—Where a person undertakes to do a certain number of things (*e. g.*, to tow a certain number of vessels) at a rate of so much each, he is not bound to perform a lesser number at the same price. *Battis* vs. *Anderson*, S. C. 1888, 14 Q. L. R. 181.

27. Security for Payment of Debt—Hypothecation of House with right to live therein until payment of Debt—Tacit reconduction.—Action was brought on a notarial obligation, the rights under which had been transferred to the plaintiff with the knowledge and consent of the defendant, and wherein it was stipulated that, as security for the payment of the sum of $120, which the defendant acknowledged to owe and promised to pay to the *auteur*, he hypothecated a certain lot of land with house thereon, etc., and stipulated, moreover, that, until the payment of the amount of such obligation, the mortgagee should have the right to live in the house, etc.—*Held*, confirming judgment of court below, that such covenant having the effect of a lease of the house, there could be no tacit reconduction from year to year, so as to cause a presumption of delay for the payment of the principal. *King* vs. *Conway*, C. R. 1866, 16 L. C. R. 401.

28. " Summer."—The word " summer," used in a contract to indicate a period within which timber should be delivered in Quebec, means, under the circumstances disclosed in the case, the season of navigation, which begins in the commencement of May and terminates about the end of November, and cannot be understood as limiting the time strictly to the three months which form the season of summer as the year is divided in the calendar. *Thibodeau* vs. *Lee*, Q. B. 1857, 7 L. C. R. 230, 5 R. J. R. Q. 213.

29. **Title to registered Vessel.**—Under the terms of an agreement, whereby the respondents took over the vessel "Cambria," and assumed all debts due by her, they were responsible for the sum demanded, though not a privileged or mortgage claim on said vessel. And such responsibility was incurred by the actual transfer and delivery of the vessel, although the title had not yet been regularly vested in respondents by registration at the Shipping Office. *Samson* vs. *Ross*, Q. B. 1890, 16 Q. L. R. 271.

XXIV. LEASE OF STEAM POWER.

Sub Lease.—A contract of lease of steam-power to the extent of six-horse power, was not violated by sub-letting a portion of the motive power, there being no more power used than was mentioned in the lease, and there being no prohibition against sub-letting. *Sharpe* vs. *Cuthbert*, 1885, M. L. R., 1 Q. B. 479.

XXV. LEASE AND HIRE OF WORK.

Medical Examiner for Insurance Co. —Breach—Damages.—The respondent was appointed an "alternate medical examiner" of the company appellant for the city of Montreal, the terms of the appointment being as follows: "This commission entitles the holder to the privilege of such of the medical examinations as may be assigned to him by the chief medical examiner, or of examinations during the absence, etc., of the chief examiner." Without disturbing the respondent in his position as alternate examiner, another alternate medical examiner was appointed, with the result that the respondent ceased to obtain any medical examinations, the agents of the company being, however, at liberty to refer examinations to him if they pleased. In an action by respondent for the recovery of damages from the company for breach of agreement and loss of patronage—*Held* (reversing the judgment of Jetté, J., S. C. 1893, 3 Que. 334):—As the appointment of the respondent as "alternate medical examiner" was expressly limited to such examinations as the chief medical examiner might assign to him, and as it had not been proved that this contract was varied by the verbal agreement alleged by respondent, or by the rules and regulations of the company, he had no claim to damages. *Equitable Life Association* vs. *Laberge*, Q. B. 1894, 3 Que. 513. Affirmed by Supreme Court 1895, 18 L. N. 327.

XXVI. LESION (See also "CONSIDERATION —ILLEGAL.")—ART. 1012 C. C.

Lesion, in contract of sale or quasi-sale, of other contracts, is no longer a cause of restitution or of nullity since the Code by virtue of Art. 1012. *Wilson* vs. *Lacoste*, Q. B. 1890, 20 R. L. 284, M. L. R., 6 Q. B. 316. Confirmed in Supreme Court, 20 Can. S. C. R. 218.

XXVII. MODIFICATION—EVIDENCE—STATEMENT OF ACCOUNT BY BOOKKEEPER.

The respondent, by notarial agreement, leased to appellant the right to mine for asbestos on certain property belonging to the respondent. Subsequently, the respondent agreed to reduce the amount of royalty he was to receive, but to what extent the appellant and respondent did not agree. The appellant kept no regular books, but his son-in-law and agent, at all events for some purposes, kept full accounts, and the appellant was in the habit of referring those who dealt with him to this agent, and he had even paid respondent on the statements of this agent—*Held*, that the appellant was bound by the statement of account of such agent, the amount so fixed being less than the respondent would be entitled to under the original agreement. *Jeffrey* vs. *Webb*, 1886, M. L. R., 3 Q. B. 147.

XXVIII. NATURE OF.

The alienation of an immoveable for a specific purpose which will materially benefit the person alienating it, although made at a nominal price, is not a donation subject to Art. 776 C. C., but is a synallagmatic contract *do ut facias*. *Turriff* vs. *Cie. du Ch. de Fer Québec Central*, Q. B. 1893, 2 Que. 559.

XXIX. OBTAINED BY FRAUD AND MISREPRESENTATION.

1. Intoxication—Donation.—A notarial act, consented to by a person in a state of intoxication brought about fraudulently by the person in whose favor the act was made, is subject to rescission. *Verdon* vs. *Verdon*, S. C. 1869, 13 L. C. J. 223.

2. Misrepresentation — Estoppel. — Where the plaintiff sold to the defendants the right to manufacture and sell a certain churn for which plaintiff had a patent, and afterwards in an action for the price of such sale the defendants pleaded that plaintiff falsely

pretended that his churn was a new and useful invention, and that the principle was new, whereas it was not new; that the plaintiff was to protect the defendants in their sale of the churn, whereas he had allowed others to sell them—*Held*, that, as defendants subsequently to the sale to them had written that the churn was a success, they were estopped from proving misrepresentation. *Campbell* vs. *James*, S. C. 1881, 4 L. N. 210.

3. Sale of Shares—Company not incorporated.—Where shares were sold, purporting to be the shares of an incorporated company, when, in fact, no such corporation was in existence, the error into which the purchaser was led was held sufficient to annul the contract. *Chrétien* vs. *Crowley*, Q. B. 1882, 5 L. N. 268, and 2 Dorion's Q. B. R. 385.

XXX. OBTAINED BY VIOLENCE AND FEAR.

1. The defendant mortgaged certain property to the plaintiff, the amount of which was to be paid in butter tubs in monthly payments. Shortly afterwards defendant sold the property to one J. B. F. with *faculté de réméré*, but making no mention of plaintiff's mortgage. F. discovering this, with the aid of defendant and his son L., endeavored to compel plaintiff to give him priority upon the land—threatening to prosecute plaintiff criminally for having forged the name of defendant's son L. to a promissory note. Yielding to this threat, which was made under circumstances and by the aid of accessories calculated to more effectually intimidate him, the plaintiff signed a discharge and accepted a new obligation from defendant by which the monthly payments of butter tubs was to continue until the claim was extinguished—*Held*, that an obligation extorted by violence is null, and payments made to and received by the party seeking for the nullity of an obligation by suit on such grounds is not an acquiescence. *Dugrenier* vs. *Dugrenier*, S. C. 1883, 6 L. N. 234.

2. Art. 998 C. C.—Defendant allowed a judgment to be obtained against him *ex parte*. When execution issued thereon, after obtaining delay from time to time, he paid the costs in cash and gave a note for the debt—*Held*, violence or duress could not be pleaded as a defence to an action on the note, the duress being only the fear of a party doing that which he had a right to do. (Art. 998 C. C.) *Ewing* vs. *Hogue*, S. C. 1893, 4 Que. 494.

XXXI. OFFER TO FULFIL.

The plaintiff was the transferee of two notes accepted by his employer in part settlement of a note for £250, given by defendant in consideration of one thousand shares of the capital stock of certain salt works sold by him on the understanding that the vendor was to hold the stock as collateral security until the maturity of the note, at which time, if the note were met, he bound himself to execute the transfer of the stock to the defendant, otherwise to sell it and retain the amount of the note out of the proceeds. The note at maturity was only partly met, and his other notes given for the balance, which were the notes sued on by the plaintiff as transferee—*Held*, confirming judgment of court below, that, as the plaintiff had not set up in his declaration any offer to transfer the shares in question to defendant, and having refused such transfer, that the action must be dismissed. *Hempsted* vs. *Drummond*, Q. B. 1859, 10 L. C. R. 27.

XXXII. PERFORMANCE. (1) (See "Breach.")

1. Advertisement—Circulation.—The plaintiff sued for a sum of $50, alleged to be due for the insertion and circulation of the defendant's advertisement in their publication called the "Farmer's Almanac" in virtue of a contract in the following terms:—"To "the publishers of the Farmer's Almanac, "please insert our advertisement, to occupy "a space of one half page (op. April), top "page half, for which we promise to pay fifty "cents for each thousand *circulated*."

"(Signed), H. R. Ives & Co."

The plaintiffs claimed to have circulated 100,000 copies of the almanac and to be entitled to $50. Plea that the almanacs had not been circulated under the terms of the contract, or according to the custom of trade. Proof by receipts of customers for quantities of the almanac, ranging from 250 to 5,000, and that, before the signing of the contract, plaintiffs had explained to defendant the company's method of doing business, which was to sell the almanac in quantities upon the orders of their customers, with the advertisement of that particular customer upon the outside cover. Judgment for plaintiffs. *Montreal Printing Co.* vs. *Ives*, C. Ct. 1883, 6 L. N. 328.

2. Agent.—The plaintiff sold to the defendant a quantity of futtocks of a certain size set forth in written contracts signed by them

(1) See Article on non-performance of contracts by F. Langelier, 1 Revue Critique 391.

respectively. It was agreed, also, that the defendant should send a man to work for the plaintiff and superintend the getting out of the futtocks, the defendant agreeing to receive everything marked off for her by the man she would select for that purpose. The plaintiff tendered to the defendant a quantity of futtocks which were, although marked off as agreed upon, under size and of an inferior quality, so that defendant refused to accept—*Held*, on action brought, reversing the judgment of the court below, that the power of the man sent by defendant to mark off only extended to the quality of the futtocks, and that he had nothing to do with their size, which was fixed by the contract, and that he had no power or authority to bind the appellant by marking off futtocks which were not of the size and quality stipulated. *Vanfelsen* vs. *Mann*, Q. B. 1855, 16 L. C. R. 243.

3. Electric Plant—Reference to Experts by Court—Adoption of Report by two Courts—Appeal on Question of Fact—Arbitration Clause in Contract—Right of Action.—The Royal Electric Company having sued the City of Three Rivers for the contract price of the installation of a complete electric plant, which under the terms of the contract was to be put in operation for at least six weeks before payment of the price could be claimed, the court referred the case to experts on the question whether the contract had been substantially fulfilled, and they found that owing to certain defects the contracts had not been satisfactorily completed. The Superior Court adopted the finding of fact by the experts, and dismissed the action. The Court of Queen's Bench for Lower Canada (appeal side) on an appeal affirmed the judgment of the Superior Court, and on an appeal to the Supreme Court of Canada—*Held*, affirming the judgments of the courts below, that, it being found that the appellants had not fulfilled their contract within the delay specified they could not recover—*Held*, also that, when a contract provides that no payment shall be due until the work has been satisfactorily completed, a claim for extras made under the contract will not be exigible prior to the completion of the main contract—*Quære*, whether a right of action exists, although a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration (see this point under title "Arbitration.") *Royal Electric Company* vs. *City of Three Rivers*, Supreme Ct. 1894, 23 Can. S. C. R. 289.

4. Non-fulfilment—Action for Price—Temporary Exception—Incidental Demand — Damages — Cross-Appeal. — In March, 1883, B. contracted with C. *et al.* for the delivery of an engine in accordance with the Herreshoff system, to be placed in the yacht "Ninie," then in course of construction. The engine was built, placed in the yacht, and upon trial was found defective. On the 31st Aug., C. *et al.* took out a conservatory attachment of the yacht "Ninie," and claimed $2,199.37 for the work and materials furnished. B. petitioned to annul the attachment, and pleaded that the amount was not yet due, as C. *et al.* had not performed their contract, and by incidental demand claimed a large amount. After various proceedings the conservatory attachment was abandoned, and the Court of Q.'s Bench, on an appeal from the judgment of the Superior Court in favour of B., both on the principal action and incidental demand, ordered that experts be named to ascertain whether the engine was built in accordance with the contract, and report on the defects. A report was made by which it was declared that C. *et al.'s* contract was not carried out, and that work and materials of the value of $225 was still necessary to complete the contract.

On motion to homologate the experts' reports, the Superior Court was again called upon to adjudicate upon the merits of the demand in chief and of the incidental demand, and that Court held that, as C. *et al.* had not built an engine as covenanted by them, B.'s plea should be maintained, but as to the incidental demand held the evidence insufficient to warrant a judgment in favour of B. On appeal to the Court of Queen's Bench, that Court taking into consideration the fact that the yacht "Ninie" had since the institution of the action been sold in another suit at the instance of one of B.'s creditors, and purchased by C. *et al.*, the proceeds being deposited in Court to be distributed among B.'s creditors, credited B. with $225 necessary to complete the engine, allowed $750 damage on B.'s incidental demand, and gave judgment in favor of C. *et al.* for the balance, viz. $1,225, with costs.

The fact of the sale and purchase of the yacht subsequent to the institution of the action did not appear on the pleadings.

On appeal to the Supreme Court of Canada and cross appeal as to the amount allowed on incidental demand by the Court of Queen's Bench, it was—*Held*, reversing the judgment of the Court of Queen's Bench (19 R. L. 203, 12 Q. L. R. 19), Sir W. J. Ritchie, C. J., and

Taschereau, J., dissenting, that, as it was shown that at the time of the institution of C. *et al's* action, it was through faulty construction that the engine and machinery therewith connected could not work according to the Herreschoff system, on which system C. *et al.* covenanted to build it, their action was premature.

Held, also, that the evidence in the case fully warranted the $750 allowed by the Court of Queen's Bench on B.'s incidental demand, and therefore he was entitled to a judgment for that amount on said incidental demand with costs.

Taschereau, J., was of the opinion, on cross appeal, that B.'s incidental demand should have been dismissed with costs. *Bender* vs. *Carrier*, Supreme Ct. 1887, 15 Can. S.C.R. 19.

5. Part Performance.—Where a contract was not carried out to the letter, but in the failure to do so there was no fraud, the contractor will be entitled to receive the price of the work he has done less what it will cost the employer to finish the work. *Atkinson* vs. *Plamondon*, Q.B. Que., 8 Sept. 1881.

6. Quality.—When an article contracted for has been delivered, but not in proper order for the purpose intended, the purchaser is well founded in protesting and requiring the same to be put in proper order, and in his offer to give back or allow the contractor to take it away. *Kimmond* vs. *Beaudry*, C. R. 1871, 15 L. C. J. 248.

7. Vis Major—Acts of Princes.—The acts of Princes cannot be considered as *vis major*, releasing the debtor from his obligation unless its performance has become absolutely impossible; the mere fact that its performance has become more onerous or difficult will not release him. And, even in the former case, where the debtor has been in any way instrumental in bringing about that state of affairs, he will be liable in damages for breach of contract; and such damages may be demanded by the creditor without allowing his debtor the alternative of performing the original obligation. (1) *Gregory* vs. *Canada Improvement Co.*, S. C. 1883, 5 Thémis 10.

XXXIII. PRIVITY OF. (See also under title "ACTION—PRIVITY OF.").

1. Cheese Factory—Transfer — Contracts to Supply Milk.—An agreement whereby a certain number of persons bind themselves to supply milk to a certain cheese factory to the exclusion of all others for a period of twenty years, under certain conditions on the part of the proprietor of the factory, does not constitute a partnership between such parties, but simply a contract of lease and hire, giving rise to merely personal obligations.

Therefore, where the proprietor of such cheese factory disposes thereof with all rights accruing under the above contract, the purchaser has no privity of contract with the other parties to the contract, and has no right of action against any of such parties for breach of contract under the above agreement. *Beaubien* vs. *Bernatchez*, Q.B. 1886, 14 R. L. 193, reversing C. Ct. Reported sub. nom. *Bernatchez* vs. *Beaumont*, 13 R. L. 281.

2. Contract to Supply Flour—Transfer.—Where a contract to supply flour was transferred to another firm, and they agreed to carry on the business on condition of cash on delivery or security on draft at thirty days, no action will lie against the second party for insisting on these conditions, although they were not stipulated by the party originally applied to. *Tourigny* vs. *Wheeler*, Q. B., Que., 7 May, 1884, confirming C. R. 1883, 9 Q. L. R. 198.

3. Contract to Supply Malt—Transfer.—The plaintiff agreed with the defendant M. and his partner that he, the plaintiff, would make and deliver to them all the ..... malt for brewing as they would require it during the term of five years, M. and his partner to furnish all the materials necessary for that purpose, the whole under a penalty of £300, binding on both parties. Subsequent to this agreement M. and his partner became insolvent and the brewery in question having passed into the hands of the defendant D., and M.'s partner having died, D. undertook with M. to do and perform all that he (M.) and his partner had bound themselves to do. On action against M. for non-performance, and D. as surety—*Held*, that the plaintiff had no right of action against D., as there was no agreement and no privity of contract between them. *Oakley* vs. *Morrough*, K. B. 1810, Pyke Rep. 74.

4. Contractor—Landlord and Tenant.—A contractor cannot sue the landlord for work ordered by the tenant. His recourse is solely against the latter. *Larochelle* vs. *Baxter*, C. Ct. 1891, 21 R. L. 87.

5. —— Fabrique.—A workman or contractor, who has contracted with a parish as a body, represented by wardens, cannot bring his action against the *Fabrique*. *Comte* vs.

(1) As to damages. See *Cie. du Ch. de Fer Quebec Central* vs. *Letourneau*, *supra* "Breach of," No. 4.

Le Curé et Marguilliers de la Paroisse de St. Edouard, K. B. 1835, 2 Rev. de Lég. 127.

6. —— **Building.** — The defendant, who was building a house, gave it out to be built by contract to two individuals from the foundation to the roof. The roof was to be covered with a particular material, and this roofing was done by the plaintiff. Finding, probably, that he could not get his money from the contractor, the plaintiff turned round upon the defendant, the proprietor, and alleged that the roof was covered at his request. There was no doubt the roof was covered by plaintiff, but the proof was conclusive that the defendant never had anything to do with him, and would have nothing to do with him about the matter. The engagement was between plaintiff and the contractor.—*Held*, confirming judgment of the court below, that the action must be dismissed. *Cowan* vs. *McCready*, C. R. 1865, 1 L. C. L. J. 66.

7. **Curator — Sale of Book-debts — Withdrawal — Damages.** — The defendant, curator of an insolvent estate, advertised for sale the stock, book-debts, etc., of the estate. The plaintiff took a trip to the locality to bid for the book-debts at such sale, but, in consequence of the satisfactory collections that had been made in the meanwhile, the book-debts were withdrawn from auction. Thereupon the plaintiff sued the curator for his expenses in travelling to the locality—*Held*, that there was no privity of contract between the parties. *Dussault* vs. *Bédard*, C. Ct. 1888, 11 Q. L. R. 69.

8. **Land—Building — Usufructuary —** The bare owner of land upon which his co-proprietor, who is also usufructuary of the whole thereof, has erected a house, is not liable to the builders for the price of its construction where they dealt exclusively with the latter. *Beaudry* vs. *Carrière*, C. R. 1890, 20 R. L. 338.

9. **Legatees—Third Party.** — In an action by certain legatees against a third party, charged by the universal legatee to pay them the amounts coming—*Held*, that the action would not lie, there being no privity of contract. *Ramsford* vs. *Clarke*, Q. B. 1848, 3 Rev. de Lég. 250. *Quære*—Could several legatees join in the same action?

10. **Partnership — Work done by Firm.** — *Held*, where work was executed by a firm of printers, duly registered, composed of three persons, they have a right to recover the value of such work, although the parties entrusting them with the work believed they were dealing with two members only of the firm, who were at the same time carrying on business as a registered firm of publishers—more especially as the two persons composing the publishing firm were parties to the suit, and similar work, previously executed by the printing firm on the order of the same agents, had been paid for on accounts rendered by the printing firm. *Fulton* vs. *Darling*, 1887, M. L. R., 3 S. C. 475.

11. **Transferee of Business—Contract—Draft—Refusal—Bank.** — One M., carrying on the business of packing meat under the name of the North American Packing Co., made contract with P., of Paris, for the delivery of about 150,000 kilograms of boiled beef, and he shipped to P., late in February, 1876, about 50,000 kilograms, of the value of $16,143. The respondents then discounted for him a draft on P. for $13,943.30, taking as security the bill of lading of the meat so shipped, thus leaving an estimated margin reverting to M. of $2,200. P. refused acceptance of the draft, and the beef was, in October, 1876, sold for the benefit of the bank as holder of the bill of lading, realizing an amount insufficient to pay the advance made by respondents to M. Before the sale respondents claimed payment of the entire draft from appellant, offering back to him the meats they held as security for the draft. The appellant refused to pay it on the ground that he had never undertaken to pay the draft, and had nothing to do with it, his interest being only in the margin of the shipment of meat after the draft had been paid out of it—*Held*, reversing the judgment of the first court, that he was not liable. *Hood* vs. *Bank of Toronto*, Q. B. 1880, 3 L. N. 234.

12. **Warranty—Purchaser of Immoveable.** — The purchaser of an immoveable has no action against a second purchaser of the same immoveable, founded on the allegation that the second purchaser undertook, by a *contre-lettre*, to warrant the vendor against the first purchaser. *Houle* vs. *Melançon*, S. C. 1891, M. L. R., 7 S. C. 275.

XXXIV. RATIFICATION.

When a plaintiff demands the amount of damages stipulated in a contract, he thereby affirms the contract, and consequently cannot call on the defendant to refund any sums of money which he, the plaintiff, has advanced and paid in execution of the contract on his part. *Patterson* vs. *Conant*, K. B. 1819, 2 Rev. de Lég. 124.

XXXV. RESTRAINT OF TRADE.

P. and R. entered into an agreement whereby the latter was to abstain from purchasing logs on the river Charest, and the former to abstain from sawing lumber for the county of Champlain—*Held*, that such a covenant was not in restraint of trade nor in contravention of the Dominion Act, 52 Vict. ch. 41. *Richer* vs. *Rousseau*, C. R. 1891, 17 Q. L. R. 239.

XXXVI. RIGHTS OF THIRD PARTIES.

The annulling a sale for fraud does not invalidate an hypothec given previously by the purchaser to a lender in good faith. *Normandin* vs. *Normandin*, C. R. 1882, 11 R. L. 596, 5 L. N. 250, 27 L. C. J. 45.

XXXVII. TIME FOR FULFILMENT.

1. M., against whom a *capias* had issued, deposited a cheque in the hands of appellants, the agreement being that, if he appeared with his bail at their office by eleven o'clock on the following morning, the cheque was to be returned; if he did not appear, the cheque was to be applied to the payment of debt and costs. There was a conflict of evidence as to whether M. appeared at eleven or a few minutes after, and (as the majority of the Court viewed the evidence) one of the bondsmen agreed upon was not present—*Held* (by the whole Court), that a difference of a few minutes in a contract of this nature was too slight to be material, and would not have justified the application of the cheque to the payment of the debt and costs if M. had appeared with his bail as agreed; but *held*, by the majority of the Court, the absence of one of the bondsmen was a non compliance with the agreement, which justified the application of the cheque to the payment of the debt and costs. *McMaster* vs. *Moffat*, 1885, M. L. R., 1 Q. B. 387.

2. Where an architect binds himself to deliver plans of a building within a stated time, he cannot recover the price of such plans where he has not tendered them even with his action. *Resther* vs. *Frères des Ecoles Chrétiennes*, Q. B. 1890, 19 R. L. 252.

3. When no delay is fixed for the fulfilment of an obligation, it is presumed that a reasonable time was intended, and the time may be determined by the Courts. *Guy* vs. *Paré*, C. R. 1892, 1 Que. 443.

XXXVIII.—TO FIND SECURITY FOR GOVERNMENT CONTRACT.

An agreement by which a contractor obliges and binds himself to pay a commission on a certain sum to a person who furnishes security to the Government, with whom he has a contract, is legal and can be enforced. *Devlin* vs. *Benner*, C. R. 1880, 10 R. L. 681.

XXXIX. WHICH LAW GOVERNS.

Contract made in Foreign Country.—ART. 8 C. C.—The law of a country in which a contract is made and its usages in trade must govern in mercantile cases. *Allen* vs. *Seaife*, 2 Rev. de Lég. 77, K. B. 1816, 1 R. J. R. Q. 163.

XL. WITH PUBLIC OFFICER. (See also *supra* "COMMERCIAL.")

He who contracts with one whom he knows to be an officer of the Government gives credit to the Government if, in point of fact, the debt is contracted for the public, and he cannot support an action against the officer. *Fisback* vs. *Pinguet*, 2 Rev. de Lég. 469, K. B. 1821, and *Hébert* vs. *Vallée*, 1817. (*Ib.*)

XLI. WITH GOVERNMENT. (See under title "CONSTITUTIONAL LAW—CONTRACT WITH GOVERNMENT.")

XLII. WITH SUSPENSIVE CONDITION.

Petitioner, who had obtained a contract from the Provincial Government, with a condition that he should furnish satisfactory security for its fulfilment, sought to obtain a declaration of the security desired, but the Government avoided giving it. On petition of right, claiming damages—*Held*, that the Government had thus deprived itself, until it should choose to indicate the security, of the right to invoke the suspensive condition; and it was not necessary for petitioner to shew that he could have given the security that the Government might have demanded. *Mackay* vs. *The Queen*, S. C. 1891, 17 Q. L. R. 337.

CONTRAINTE PAR CORPS.

See COERCIVE IMPRISONMENT.

CONTRAT.

See CONTRACTS.

CONVENTIONS MATRIMONIALES.

See MARRIAGE COVENANTS.

CONVICTION.

See CERTIORARI.

COPYRIGHT. (1)

I. Infringement. 1-7.
II. In Lectures.
III. In Photographs.
IV. In Newspaper Articles.
V. Who can Obtain. 1-2.

I. INFRINGEMENT—ARTISTIC PROPERTY—ASSIGNEE—DAMAGES.

1. An action of damages will lie at common law for invasion of property in artistic works, and is not taken away by the copyright act giving an action for penalty. *Bernard* vs. *Bertoni*, S. C. 1888, 14 Q. L. R. 219.

2. The affixing of his signature by a sculptor to a bust made by him is sufficient proof, under the statute, of publication of his privilege as author. (*Ib.*)

3. The certificate of registration of a copyright is *prima facie* evidence that the requirements of the law, previous to its issuing, have been complied with. (*Ib.*)

4. The assignee of a copyright may recover for infringements made before the registration of the assignment, but after the registration of the copyright. (*Ib.*)

5. The measure of damages sustained in a case of violation of copyright is the amount realized by the party guilty of infringement. (*Ib.*)

6. But *held*, in appeal, that where there is clear proof of the counterfeiting of a copyright, the damages will not be measured merely by the price realized through the sale of the counterfeit, but vindictive damages will be allowed. (*Ib.*) Q. B. 1889, 16 Q. L. R. 73.

7. Penalty under R. S. C., ch. 62, sec. 32.—In order to recover the penalty laid down in sec. 32, ch. 62, R. S. C., it must be alleged that the defendant was in *possession* of the number of copies for which infringement is claimed, as the penalty consists of so much for each copy found in the *possession* of the defendant, and not for each copy sold. *Ashdown* vs. *Lavigne*, S. C. 1892, 2 Que. 361.

II. IN LECTURES.

Articles in Legal News, vol. 10, pp. 209-316.

(1) Copyright Act R. S. C., ch. 62, as amended by 52 Vic. ch. 29; 53 Vic., ch. 12; 54-55 Vic., ch. 34; 58-59 Vic., ch. 37.

See Articles 2 Thémis, pp. 289, 367; 3 Thémis, pp. 1, 43, 65, 97, by P. B. Mignault.

III. IN PHOTOGRAPHS—IMPLIED CONTRACT NOT TO SELL COPIES—INJUNCTION.

English case reported, 12 Legal News 212.

IV. IN NEWSPAPER ARTICLES.

Article in 12 Legal News, p. 233.

V. WHO CAN SECURE—REGISTRATION.

1. No one but the author, or his legal representatives, can avail himself of the copyright law. *Langlois* vs. *Vincent*, S. C. 1874, 18 L. C. J. 160.

2. No one can invoke the benefit or protection of the copyright law unless his work has been registered before putting any copy thereof in circulation. (*Ib.*)

CORONERS. (1)

I. Deputy—Liability for Fees of Stenographer.
II. Inquest. 1-3.

I. DEPUTY—LIABILITY FOR FEES OF STENOGRAPHER.

Where a deputy coroner employs a stenographer at an inquest upon a body, he is not personally liable for the stenographer's fees. *Cartier* vs. *Leprohon*, C. Ct. 1883, 12 R. L. 377.

II. INQUEST—MOTION TO QUASH VERDICT.

1. Coroner's Inquest—At an inquisition held by the coroner on the body of R. L., one of the victims of the Cape Diamond landslide, as to the cause of his death, the jury found by their verdict "that one J. K. was taken alive out of the *débris* on the morning of the 24th of September, and that he died on the evening of the same day; and that his death

(1) R. S. Q., secs. 2687 *et seq.*, as amended by 55-56 Vic., ch. 26, Que.; an Act respecting Coroners' inquests, when Coroner can hold inquest, when Coroner can claim fees for inquest held. And 58 Vic., ch. 33, Que., Account for disbursements, etc., may be sworn to, etc. Salary may be granted to Montreal Coroner. No fees thereafter.

See an Act to amend the law respecting inquiries held by Coroners in cases of fire (Coroner not to hold inquiry until certain affidavit produced), 58 Vic., ch. 34, Que.

Coroners cannot act as Justices of the Peace in certain cases, 57 Vic., ch. 26, Que.

An act relating to the summoning of jurors by Coroners, etc., 54 Vic., ch. 24, Que.

No trial upon any coroner's inquisition, Art. 642 Crim. Code, Coroner's Inquisition, Art. 568 Crim. Code.

Legal Bibliography—Boys on Coroners, 3rd Edit., Toronto, 1893.

is due to the gross negligence of the municipal authorities of the City of Quebec in not procuring or furnishing the requisite implements to extricate him; and furthermore they say that more lives would have been saved had such implements been procured and had not too much time been lost in extricating the dead "—*Held*, that the City of Quebec, a body corporate by statute declaring it to be formed of the inhabitants of the City of Quebec, had no *locus standi* before the court to move that the above verdict be quashed. *Exparte* "*The City of Quebec*," Q. B. 1889, 15 Q. L. R. 292.

2. An improper finding of a coroner's inquest may be quashed on a rule. *Exparte Brydges*, Q. B. 1874, 18 L. C. J. 141.

3. A coroner's inquisition is identical with an indictment, and the omission of the words "feloniously" and "slay" in an inquisition of manslaughter is fatal. (*Ib.*)

CORPORATION.

See Company and Corporation Law.
See also Club.

CORPORATIONS MUNICIPALES.

See Municipal Corporations.

CORPORATIONS SCOLAIRES.

See Schools.

COSTS.

I. Against Party suing Es-Qualité.

II. Appealable Case.

III. Appeal in Questions of. See also under title "Appeal," and No. IX *infra*.

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XXXVII. Witness' Fees. 1-2.

I. AGAINST PARTY SUING *ES-QUALITÉ.*

In order to charge a party, who has continued an action in his quality of beneficiary heir, *personally* with the costs, it is necessary that the judgment should specially state so. If the word "personally" does not occur in the judgment, it should be interpreted as having being rendered against the party in the special quality assumed by him when he took up the action. *Ogden* vs. *Dawson,* Q. B. 1885, 11 Q. L. R. 159, 13 R. L. 448.

II. APPEALABLE CASE.

Where a defendant has pleaded in a case as if it were an appealable one, he must be held to have waived any objection to the form of the action, and must pay costs as though it were appealable. *Corporation de St. Aimé* vs. *Contoir,* C. Ct. 1868, 1 R. L. 666.

III. APPEAL IN QUESTIONS OF. (See also under title "APPEAL.")

Where the only matter in dispute between the parties is a question of costs, the Court will not entertain the appeal. *Moir* vs. *Corporation of Village of Huntingdon*, Supreme Court, 19 Can. S. C. R. 363.

IV. APPEARANCE.

Appellant had appeared too late, and moved to be allowed to file a regular appearance. Respondent also moved to have the regular appearance rejected. Respondent's motion was rejected without costs, and appellant was allowed to file a regular appearance on payment of the costs of this motion. *Bickle* vs. *Richard*, Q. B. Quebec, 1 Dec., 1877.

V. CHARACTER OF. (See also "WHAT ARE LAW COSTS.")

Costs incurred in preserving to a legatee a property declared to be *alimentaire inaliénable et insaisissable* are alimentary in character, and a *hypothèque* granted therefor may be legally enforced. *Wilson* vs. *Leblanc*, C. R. 1872, 16 L. C. J. 197.

VI. CONFESSION OF JUDGMENT.

Action for $109.59. Defendant offered by his plea $28.64, which plaintiff accepted—*Held*, that plaintiff should pay costs of defendant's plea, and obtain costs as in a Circuit Court action for $28.64. *Olivier* vs. *Demontigny*, S. C. 1879, 2 L. N. 158.

VII. COMPENSATION. (See "DISCRETION OF COURT AS TO.")

The costs due on a judgment may be legally paid to and compensated by a debt due by the attorney of record of the party to whom such costs are awarded, notwithstanding that such costs have not been awarded by distraction to the attorney in the absence of proof by the client that he had paid his attorney's costs. *Kilgour* vs. *Harvey*, C. R. 1882, 27 L. C. J. 138.

VIII. DEFAULT OF PLAINTIFF. ("CONGÉ-DEFAUT.")

1. No costs will be allowed with *congé-défaut* on motion served and not made. *Grant* vs. *Lavoie*, Q. B. 1880, 3 L. N. 392. And on a rule. *Larin* vs. *Delorge*, S. C. 1877, 21 L. C. J. 206.

2. To obtain *congé-défaut* with costs, defendant must make his application diligently. *Siegert* vs. *Hartland*, S. C. 1880, 3 L. N. 347.

3. Defendant should, when filing his copy of the writ, pay the costs of the return. *Cherrier* vs. *Torcapel*, C. Ct. 1880, 6 Q. L. R. 377.

IX. DISCRETION AS TO.

1. Plaintiff successful for Part of Demand.—In an action of damages in the Superior Court for $400, and to reconstruct fences, judgment went in favor of plaintiff for $50 and full costs of action. The Court of Review held this was an excessive adjudication as to costs, and reversed the judgment as to costs. The Court of Queen's Bench refused to interfere, and the appeal was dismissed, each party paying his own costs. *Sœurs de la Congrégation de Notre Dame* vs. *La Corporation de St. Cunégonde*, Q. B. Montreal, 15 June, 1882.

2. —— When a plaintiff recovers no more than is paid into court, and the sum so paid in was tendered before the action was instituted, the action must be dismissed with costs against the plaintiff. *Woodrington* vs. *Taylor*, K. B. 1820, 3 Rev. de Lég. 393.

3. —— In an action where judgment is rendered for a larger amount than admitted and tendered by plea, but where the defence is in the main sustained, the plaintiff will be condemned to pay the costs of contestation. *Routh* vs. *Dougall*, S. C. 1858, 2 L. C. J. 286. But see *Macfarlane* vs. *Roblen*, No. 2418, 28 June 1854, noted at foot of page 286, vol. 2, L. C. J.

4. —— (Mathieu, J., diss.)—In an action for damages, for personal injury sustained, where the plaintiff obtains judgment for only a portion of the amount demanded, he will not, where the defendant made no tender, or an insufficient tender, be condemned to pay the difference between the costs of the contestation of an action for the amount recovered and of the action as brought. *Charron* vs. *Corporation St. Hubert*, C. R. 1888, M. L. R., 4 S. C. 431.

5. —— Where a distinct portion of the demand is wholly unfounded, the plaintiff in such case should be condemned to payment of difference of costs. *Hogle* vs. *Racine*, C. Ct. 1886, 9 L. N. 170.

6. —— Where the plaintiff sued for $774, and the defendant tendered $334, but without costs, and the tender was held sufficient as to principal, but the plaintiff proceeded with the

suit for the whole amount, the plaintiff should be condemned to pay all costs after filing plea, including costs of *enquête*. *McCartney* vs. *Linsley*, Q. B. 1888, M. L. R., 5 Q. B. 455.

7. —— A judgment which condemns the plaintiff, who succeeds for part of the amount sued for, to pay the defendant costs of contestation as of an action for a sum representing the difference between the amount sued for and the amount recovered, is erroneous in principle, and such an adjudication as to costs is not within the discretion allowed the Court by Art. 478 C. C. P. *McCartney* vs. *Linsley*, Q. B. 1888, M. L. R., 5 Q. B. 455. *Couture* vs. *Can. Pac. Ry.*, C. R. 1890, 20 R. L. 477. Confirmed in appeal 1892, 2 Que. 502.

8. —— Where an action was instituted for $300.38 and a tender of $99 and costs, made before the return, was held insufficient, and judgment was given in favour of plaintiff for $126 50; costs were allowed plaintiff. *Kippen* vs. *Stirling*, S. C. 1887, 10 L. N. 99.

9. —— Where plaintiff only succeeds on part of his demand, no costs will be allowed him. *Banque d'Hochelaga* vs. *Banque des Cantons de l'Est*, S. C. 1890, 20 R. L. 99.

10. —— Where plaintiff sues for $430, and his demand is upheld to the extent of $217, and dismissed as to the remainder, he will be granted the costs of his action against the defendant, who will not be allowed costs of his contestation. (1) *Lapensée* vs. *Wright*, C. R. 1890, 20 R. L. 482; *Burroughs* vs. *Wilton*, C. R. 1890, 19 R. L. 166.

11. —— A judgment will be revised or reformed by the Court of Review on a question of costs, where the Court below, in adjudicating on the costs, acted on a wrong principle. (Reversing the judgment of Mathieu, J.) Where the action is brought to recover a claim not composed of distinct parts, or where the plaintiff cannot with some exactitude fix the amount for which judgment may be rendered (as in actions for damages and cases of a like nature), and the plaintiff's demand is maintained in part, it is error for the Court to condemn him to pay the defendant (who has made no tender or confession of judgment) the difference of costs of contestation between an action for the amount recovered and the action as brought. Such an award of costs is not within the discretion
d the Court by Art. 478 C. C. P., and
e reversed on appeal to the Court of Review. *Clermont* vs. *McLeod*, M. L. R., 6 S. C. 36, and *Daoust* vs. *Dumouchel*, *ib.* 40, approved and followed; *Labelle* vs. *Didier*, C. R. 1891, M. L. R., 7 S. C. 439; *Royal* vs. *Lajeunesse*, C. R. 1886, 30 L. C. J. 224; *Can. Pac. Ry.* vs. *Couture*, S. C. 1890, M. L. R., 7 S. C. 431. Confirmed in appeal 1892, 2 Que. 502 (Q. B.); *Huot* vs. *Noiseux*, Q. B. 1892, 2 Que. 521.

(1) Mathieu, J., in a dissenting judgment, reviews all the decisions and authorities.

12. —— Successful Party should not be condemned to pay Costs to Opponent—Review.—*Held*, where the plaintiff has succeeded in the first court and the conclusions of his action have been maintained with costs against the defendant, and, on the inscription of the defendant, the judgment has been affirmed as to the merits by the Court of Review, it is error for the latter court to deprive the plaintiff of the costs of the action in the court below and to condemn him to pay costs in Review, and the Court of Queen's Bench sitting in appeal will rectify such judgment, more especially where the Court of Review assigned a reason for such condemnation to costs, which the Court of Queen's Bench considers erroneous. *Cie. du Chemin de Fer Atl. Can.* vs. *Tardieu*, Q. B. 1892, 2 Que. 514.

13.—— Discharge of Hypothec.—*Held*, where appellant had agreed to discharge a hypothec in his favor, registered against an immoveable, and it appeared that he had instructed his notary to prepare the discharge, but through inadvertence no discharge was executed or registered until after the institution of an action against him *en radiation d'hypothèque*, the Court of Appeal will not interfere with the discretion exercised by the court below in condemning the appellant to pay the costs of such action,—more especially as the hypothec in question was not in fact included in the registered transfer of his rights pleaded by appellant. *MacLaren* vs. *Lapierre*, Q. B. 1892, 1 Que. 359.

14. Compensation — Husband and Wife.—Where the defendant called his wife into the cause, and, after the dismissal of the principal action, the suit was continued between the husband and wife, and carried to the Court of Appeal, notwithstanding that the pecuniary interest was extremely small, and the litigation appeared to be prolonged for the gratification of mutual ill-feeling, the Court has a discretion under Art. 478 C. C. P. to compensate the cost and put the parties *hors de Cour*, each paying his own costs. *Mainville* vs. *Corbeil*, Q. B. 1889, M. L. R., 5 Q. B. 50.

15. Fees to Counsel on Arbitration.—A judge of the Superior Court may, in his discretion, allow fees to counsel on an arbitration to fix the indemnity to be paid for lands taken by a railway company, conducted under the provisions of the Quebec Consolidated Railway Act, 43-44 Vic., c. 43, s. 9; and there is no power in the Court to revise such taxation. *Compagnie du Chemin de Fer de Montréal and Sorel* vs. *Vincent*, Q. B., 1884, M. L. R., 4 Q. B. 404, 17 R. L. 36.

16. Interference of Appellate Courts.—*Held*, where the Superior Court dismissed the plaintiff's action, but without costs, the Court of Review would not interfere in a mere matter of costs. *O'Halloran* vs. *Sweet*, C. R. 1872, 16 L. C. J. 318; *MacDonald* vs. *Molleur*, 13 L. C. J. 189.

17. —— When an appeal involves merely a question as to costs, the judgment will not, as a general rule, be disturbed. *Montrait* vs. *Williams*, Q. B. 1879, 24 L. C. J. 144.

18. —— Where costs have been awarded on false principles, the judgment will be reversed in appeal. So, where plaintiff goes to evidence on his whole case, regardless of admissions made by defendant, which admissions are not a confession of judgment within the terms of Art. 91 C. C. P., and only recovers what defendant by his plea admitted to be due, the costs of the contestation should fall on plaintiff, and, if defendant be condemned to pay such costs, the judgment will be reformed in appeal with costs. *Poulin* vs. *Prevost*, Q. B. Montreal, 21 Dec., 1875; see report of this case, 25 L. C. J., at page 170, modifying or overruling. *Lathan* vs. *Martin*, C. R., 1874, 18 L. C. J. 287, and see *Bertram* vs. *Hincrth*, S. C. 1881, 25 L. C. J. 168.

19. —— The adjudication as to costs is entirely in the discretion of the Court, except in such cases as are specially provided for by statute. *McClonaghan* vs. *St. Ann's Mutual Building Society*, Q. B. 1880, 24 L. C. J. 162.

20. —— **Court of Review.**—Where the Court of Review has merely reformed the judgment of the S. C., by disallowing the condemnation for costs, the Court of Q. B. will not interfere with the discretion as to costs thus exercised by the Court of Review. *Bayard* vs. *Martin*, Q. B. 1878, 23 L. C. J. 211.

21. —— **Error of 10 Cents.**—The Court of Appeal will sustain a judgment of the Superior Court (although reversed in Review) where the judge of the Superior Court in the exercise of his discretion considered that an error of ten cents in the costs was too small to be taken into consideration. *Coté* vs. *Samson*, Q. B. 1882, 8 Q. L. R. 357.

22. —— The plaintiff brought his action against the defendants, husband and wife, to cancel the effect of the registration of a will of the mother of the female defendant, deceased. Before action plaintiff, by letter, requested the defendants to sign a cancellation, but they refused, the female defendant specially replying that she would not sign any deed at all. The male defendant confessed judgment, but his wife contested. Judgment granting the cancellation, but ordering plaintiff to pay all costs, was reformed in review as to costs. *Hall* vs. *Brigham*, C. R. 1880, 3 L. N. 219.

23. —— Where the defendant is condemned to pay costs, the Court of Appeal will not interfere to quality how the costs are to be taxed, and to say whether the attorney's fees are included. *McKenna* vs. *Vandal*, Q. B. 1884, Montreal, 21 Feb.; *Nadeau* vs. *St. Jacques*, Q. B. 1887, 15 R. L. 232.

24. —— Where the adjudication as to costs in the judgment below involves a violation of principle, the Court of Review may revise it upon this question alone. *Lamarche* vs. *La Banque Ville Marie*, C. R. 1884, M. L. R., 1 S. C. 203, and see *Nadeau* vs. *St. Jacques*, C. R. 1884, M. L. R., 1 S. C. 302. In appeal from this case the Court of Appeal refused to interfere although the judgment appealed from appeared to it to be erroneous. (See 15 R. L. 232.)

25. —— Where no principle of law is involved, the Court of Review will not interfere with the discretion as to costs exercised by the Court below under Art. 478 C. C. P., and it is not necessary that the judgment of the Court below should set forth the "special reasons" for which the losing party is exempted from the payment of costs. *Andrews* vs. *Wulff*, C. R. 1888, M. L. R., 4 S. C. 392.

26. —— **Discretion as to.**—Where the Court below enunciates an erroneous principle in the adjudication of costs, the Court of Appeal will reverse the decision, though the appeal involves costs only. *Prowse* vs. *Nicholson*, Q. B. 1889, M. L. R., 5 Q. B. 151; *Molson* vs. *Griffin*, Q. B. Montreal, June, 1874.

X. DISTRACTION FOR. (1)

1. Execution in Name of Client.—A party who has succeeded in a cause may take execution for the costs *distraits* to his attorney, if it appear that he has paid such attorney, or that the attorney has abandoned such distraction, or has given a consent that such execution should be sued out in his name. *Beauchêne* vs. *Pacaud*, S. C. 1865, 15 L. C. R. 193; *Bissonnette* vs. *Dunn*, S. C. 1885, M. L. R., 1 S. C. 235, 29 L. C. J. 155.

2. —— Where the plaintiff had obtained judgment for the amount of his claim with costs *distraits* in favor of his attorneys, and had given the defendant a discharge for the debt, that he still retained sufficient interest in the suit to entitle him to take proceedings in execution of the judgment of distraction in favor of his attorneys (more especially when the attorneys signed the *fiat* for the writ), and a seizure by garnishment for the costs, issued in the plaintiff's name, was maintained. *Morin* vs. *Langlois*, C. R. 1886, M. L. R., 2 S. C. 400.

3. —— An attorney, to whom distraction of costs has been awarded, is the personal creditor for such costs, and if his client pays them and obtains a transfer, the transfer must be served upon the debtor before action can be brought therefor. *Bury* vs. *Corriveau Silk Mills Co.*, 1887, M. L. R., 3 S. C. 218.

4. —— Distraction of costs granted to a party's attorney vests the attorney alone with the right to claim such costs, as long as the client has not obtained from the attorney a transfer followed by service on the adverse party. *Millette* vs. *Gibson*, 1889, M. L. R., 5 Q. B. 239, 17 R. L. 600.

5. —— An execution taken in the name of the attorney *distrayant's* client against the adverse party is null, even if it has been issued upon the *fiat* of the attorney *distrayant*, if such execution was not preceded by the transfer and notice above mentioned. (*Ib.*)

6. —— The claim for costs of the attorney *distrayant*, due by the adverse party, is subject to the same laws as apply to ordinary debts with regard to transfer, service and subrogation. (*Ib.*)

7. —— When an attachment by garnishment (*saisie-arrêt*) has been served upon the judgment debtor for costs, by a creditor of the attorney *distrayant*, the attorney *distrayant's* client cannot, by alleging payment by him to his attorney, or transfer by his attorney to him of said costs, claim the same in his own name, to the prejudice of the attorney's seizing creditor, if notice of such payment and transfer has not been served upon the judgment debtor before the attachment by garnishment was issued. (*Ib.*)

8. —— In such a case the judgment debtor is not obliged, before judgment is rendered upon the attachment by garnishment of the attorney's creditor, to deposit in court, to be paid to whom it may appertain, the amount of such costs, but on the contrary must retain the same in his own hands, as he is ordered to do by the writ of attachment by garnishment, until the Court may decide thereon. (*Ib.*)

9. —— Transfer of Judgment from Attorney to Client—And *held* that plaintiff, whose attorney has obtained distraction of costs, can take an attachment in his own name for the same costs, where he has previously obtained a transfer in his favour of his attorney's judgment and served the same upon the defendant. *McGreevy* vs. *Langelier*, S. C. 1893, 4 Que. 447.

10. Execution by Client—Waiver.—The attorney who has obtained distraction of costs, and who issued in the name of his client an execution for the amount of judgment, capital, interest and costs, can nevertheless subsequently execute in his own name his judgment for costs accorded him. The issue of the first writ cannot be considered as a waiver of his right of distraction. *McNamara* vs. *Gauthier*, S. C. 1892, 2 Que. 131.

11. Execution — Opposition to by Client.—Although an attorney has obtained distraction of costs, his client still remains ultimately liable toward him for the payment of such costs, and this liability gives him sufficient interest to contest an opposition to a seizure upon such costs. *Craig* vs. *Peatman*, S. C. 1890, 20 R. L. 315. Confirmed in appeal *sub nom. Fee* vs. *Peatman*, Q. B. 1893, 2 Que. 159.

12. Judgment awarding.—When the attorney of a party has asked distraction of costs, such distraction follows as a matter of course the judgment rendered in favor of his client for costs, although the draft of judgment given to the prothonotary does not mention it. In such a case the entry in the margin of the register of judgments, made subsequently

(1) See now Art. 553 C. P. "Every condemnation to costs involves, by the operation of law, distraction in favor of the attorney of the party to whom they are awarded."

to the enregistration of such judgment of such distraction, will not be considered as an alteration of the judgment. *Morency* vs. *Fournier*, C. R. 1880, 7 Q. L. R. 9.

13. Restitution by Attorney.—An attorney who has been paid costs for which he has obtained distraction cannot be obliged to return them if the judgment under which he was paid is reversed in appeal. *Holton* vs. *Andrews*, 1876, 3 Q. L. R. 19.

14. Action not returned.—Demand for distraction of costs in an action not returned can produce no legal effect in favor of the attorneys demanding the same. *Rolland* vs. *Larivière*, S. C. 1857, 1 L. C. J. 82.

15. Right to.—If *distraction* of costs be not demanded when the judgment is pronounced, it cannot afterwards be awarded without the presence of the parties. *Ireland* vs. *Stephens*, K. B. 1819, 2 Rev. de Lég. 62, 3 Rev. de Lég. 392.

16. —— An attorney prosecuting his own action for costs due in a former cause cannot have judgment for costs. He is entitled to the amount of his disbursements, and no more. *Valliers* vs. *Duhamel*, K. B. 1819, 3 Rev. de Lég. 392.

17. —— The attorney's right to the costs by *distraction de frais* is personal and vested in him. *Esson* vs. *Black*, K. B. 1821, 3 Rev. de Lég. 393.

18. —— No distraction of costs can exist, or does take place, until ordered by a judgment of the Court. *Hébert* vs. *La Fabrique St. Jean*, Q. B. 1861, 13 L. C. R. 66.

19. —— Where counsel for respondent moves for distraction of costs only in the term following that in which judgment was rendered, the motion will be granted, in the absence of proof, by affidavit on the part of the appellant that the costs have been paid to the respondent personally. *Water Works Co. of Three Rivers* vs. *Dostaler*, Q. B. 1874, 18 L. C. J. 196.

20. —— The attorney has not an incontestable right to distraction of costs unless he moves for it on or before the day on which judgment is given, and therefore the costs due by one side may be set off by an amount due by the principal on the other side. *Latour* vs. *Campbell*, S. C. 1878, 1 L. N. 163.

21. In Appeal.—A motion made in appeal for distraction of costs in the Court below will be granted. *Converse* vs. *Clark*, Q. B. 1862, 12 L. C. R. 402.

22. —— Where the attorney asks for distraction of costs in the Court below, he is not bound to renew his demand in appeal. *Fiola* vs. *Hamel*, *Gagnon* vs. *Hamel*, Q. B. 1878. See note to *Morency* vs. *Fournier*, 7 Q. L. R. at p. 12.

23. Settlement between the Parties.—Where the attorney has demanded *distraction* of costs by his action, the parties cannot settle the costs between them. *Stigny* vs. *Stigny*, Q. B. 1842, 2 Rev. de Lég. 120. But in the case of *Guay* vs. *Guay*, 1845, No. 1641, noted in this decision, it was held that in an action for alimentary allowance *in forma pauperis*, where distraction of costs had been demanded, the parties to the action could settle between themselves both as to the principal sum and costs.

24. —— Especially where the plaintiff is insolvent. *Picard* vs. *Gosselin*, C. Ct. 1871, 3 R. L. 447

25. —— Where an action was settled as to the principal only, and defendant afterwards neglected to pay the costs—*Held*, that the action might be returned into court and proceeded with for the costs only. *Darche* vs. *Dubue*, S. C. 1851, 1 L. C. R. 238, 2 R. J. R. Q. 470.

26.—— Where it appeared that the parties, plaintiff and defendant, had settled a case between them with a view to defrauding the plaintiff's attorney of his costs—*Held*, that the action would be dismissed with costs against the defendant. *Richards* vs. *Ritchie*, S. C. 1856, 6 L. C. R. 98, 5 R. J. R. Q. 29.

27. —— Where *distraction* of costs is claimed by the declaration, the attorney *ad litem* of the plaintiff may obtain judgment therefor, notwithstanding the parties may have settled after the return of the action by notarial deed. *Charlebois* vs. *Coulombe*, S. C. 1863, 7 L. C. J. 300.

28. —— But, *held*, that where the parties have settled the suit between themselves, the attorney cannot continue it for costs although he have prayed distraction thereof in his declaration. *Lafaille* vs. *Lafaille*, C. R. 1869, 1 R. L. 90, 14 L. C. J. 262; *Quebec Bank* vs. *Paquet*, C. R. 1869, 13 L. C. J. 122; *Castongué* vs. *Perrin*, S. C. 1870, 14 L. C. J. 304.

29. —— When plaintiff's attorney has, by the conclusions of his declaration, demanded distraction of costs, and plaintiff's demand is substantially proved, a settlement between the parties, without the attorney's consent, by which a sum of money is paid by defendant

to plaintiff, and the latter abandons his action, does not deprive plaintiff's attorney of his right to obtain judgment for costs against the defendant. *Laplante* vs. *Laplante*. S. C. 1864, 3 L. N. 330.

30. —— Where the plaintiff compromises with the defendant, the latter agreeing to pay costs, the plaintiff cannot enter his action for the costs, nor does the demand for distraction of costs in the conclusion of the plaintiff's declaration take away from him the right to compromise. *Hébert* vs. *La Fabrique St. Jean*, Q. B. 1861, 13 L. C. R. 66.

31. —— Costs were allowed defendant in an action on a promissory note upon proof that plaintiff agreed after the institution of the action to withdraw the same upon payment of the debt alone, although the debt was not paid at the rendering of the judgment, and under the circumstances plaintiff's attorney was not allowed distraction of costs. *Eastman* vs. *Roland*, C. Ct. 1866, 2 L. C. L. J. 216.

32. —— Where the parties have settled the action before return, the attorney for the plaintiff cannot recover his costs against the defendant who was led to believe proceedings were ended even where he demanded distraction of costs. His only recourse is against his own client. *Watkins* vs. *Denman*, C. Ct. 1872, 4 R. L. 383.

33. —— On the 2nd of June, 1877, the plaintiff instituted an action against one S. The defendant pleaded to the merits, and then died, leaving a last will whereby the now defendants were nominated his executors. The present suit was instituted to compel the defendants to take up the instance in the former suit. It was returned into court on the 12th of December, 1877. The defendants pleaded to the action *en reprise* that they had settled with the plaintiff before the institution of the action. The plaintiff answered that the pretended settlement was illegal and null, especially as to his attorneys, and had been obtained by fraud, and with the view of defrauding plaintiff's attorneys out of their costs. Issue having been joined on this plea, judgment was rendered on the 28th February, maintaining the plea of the defendants—*Held*, in review, that the judgment was in conformity with the jurisprudence of the courts as to the effect of settlements out of court, and their binding operation upon the attorneys *ad litem*. *Saunders* vs. *Alloway*, C. R. 1878.

34. —— Where it appears that the parties have agreed to a settlement in order to deprive the attorney of one of them of his costs, the Court will condemn the party to whose favour the settlement seems to be made to pay costs. Thus, where it seems a wife has been induced by her husband to discontinue a suit in separation from bed and board, the husband will be condemned to pay costs. *Montrait* vs. *Williams*, Q. B. 1879, 3 L. N. 10, 21 L. C. J. 144.

35. —— The effect of reconciliation between husband and wife is to extinguish an action in separation from bed and board pending between them, and, consequently, the plaintiff's attorneys could not legally continue the proceedings to recover their own costs. *Gerard* vs. *Lemire*, C. R. 1879, 24 L. C. J. 42.

36. —— Action of damages for slander, and the question was as to costs, the plaintiff having only called the defendant to prove his case, which, however, the latter did not do; but admitted that since the action was taken he had settled with the plaintiff, and paid him $25. He was asked if he did not do this by connivance with the plaintiff to cheat his attorney, and he did not deny it. Distraction of costs asked by the plaintiff's attorney, and granted against the defendant. *Stonehouse* vs. *Sonne*, S. C. 1878.

37. —— Action to set aside a deed of obligation between father and son for want of consideration. After issue joined the case was inscribed for trial, and the defendant was examined for the plaintiff. The case was then adjourned to a later day, and meanwhile the parties made an arrangement by which plaintiff agreed to discontinue his action on payment to him of $300, which was done, each party paying his own costs. Subsequently defendant applied to the Court to be allowed to produce an additional plea based on the above arrangement. This was allowed, and the new plea concluded for the dismissal of the action, each party paying his costs. The plaintiff answered this new plea by alleging that the arrangement had been made in a fraudulent manner, and with the view of depriving the attorneys of plaintiff of their costs, of which they had claimed distraction. The contest was now to ascertain whether the arrangement could be made to the prejudice of the attorneys—*Held*, that the plaintiff was not entitled to answer this plea by alleging that the settlement was fraudulent, and made with the view of depriving the attorneys of plaintiff of their costs. *Gosselin* vs. *Gosselin*, S. C. 1882, 5 L. N. 378.

38. —— The parties, before the case was returned into court, came to a settlement which did not provide for the payment of the plaintiff's costs by the defendant, although the declaration prayed for distraction of costs —*Held*, that the plaintiff's attorney could not continue the case for his costs. *Carrier* vs. *Coté*, C. R. 1880, 6 Q. L. R. 297; *Lepage* vs. *Lepage*, C. R. (Que.) 1875, 30 June, No. 691.

39. —— Where the defendant in an action settles with the plaintiff and obtains a discharge from him without special mention as to costs, he is bound to pay them to the plaintiff's attorney. *Langlois* vs. *Maynard*, Q. B. 1887, 34 L. C. J. 280.

40. —— The attorney of record in Court below, who has been awarded distraction of costs there, cannot be allowed to intervene for the purpose of compelling the appellant to discontinue his appeal in consequence of an agreement so to do extended between appellant and respondent. *McCord* vs. *McCord*, Q. B. 1883, 29 L. C. J. 77, 2 Dorion Q. B. Rep. 367.

41. —— So long as distraction of costs has not been granted to him, an attorney *ad litem* can only look to his client for the payment of his costs, and such attorney has no right in the ordinary course to continue a suit, which has been settled by the parties in their own interests, to obtain judgment for his costs against the adverse party, unless such settlement has been effected by the parties, or by one of them with the connivance of the other, to defraud such attorney of his rights. *Farquhar* vs. *Johnson*, S. C. 1889, 34 L. C. J. 139, M. L. R., 6 S. C. 25.

42. Effect of — Bond. — Distraction of costs is equivalent to a transfer duly signified. *Fournier* vs. *Cannon*, Q. B. 1861, 6 Q. L. R. 228.

43. —— An attorney obtaining distraction of costs can sue upon a bond given to secure the payment of such costs. *Fournier* vs. *Cannon*, Q. B. 1861, 6 Q. L. R. 228.

XI. ERROR OF PROCEDURE.

When there is an error of procedure in which both parties have participated, the one ultimately successful will not be allowed the costs arising from his own neglect. *Doyon* vs. *Perron*, Q. B. Que., 8 Sept., 1875.

XII. EXECUTION FOR. (See "Distraction of," *supra* No. X., and *infra* "Taxation of—Execution before" No. XXVI—7.)

XIII. EXEMPT FROM ATTACHMENT DURING SUIT.

Costs in a case cannot be attached by a creditor during the pendency of the case, as belonging to the party, to the prejudice of the attorney. *Gauthier* vs. *Lemieux*, S. C. 1858, 2 L. C. R. 273, 3 R. J. R. Q. 179.

XIV. IN.

1. Action to resiliate Deed of Sale.—Judgment declaring null a deed of sale for non-payment of price, in virtue of a comminatory clause in the deed, renders the purchaser (defendant) chargeable with costs of action, even where it allows him the value of his improvements, which equal the balance of purchase price due by him. *Plourde* vs. *Brisson*, C. R. 1889, 16 Q. L. R. 229. Confirmed in appeal May 6, 1890.

2. Action between Landlord and Tenant.—In an attachment for rent, which is declared *tenante* as to rent to become due, the costs will be determined by the amount of rent due and to become due, and not by the amount of rent due at the institution of the action. *Simmons* vs. *Gravel*, C. Ct. 1884, 13 Q. L. R. 263.

3. Action on Promissory Note.—The maker of a promissory note is not liable for the costs of an action on such note against the endorser. *McDonald* vs. *Seymour*, S. C. 1855, 6 L. C. R. 102, 5 R. J. R. Q. 31.

4. Action Confessoire.—In an *action confessoire* the costs will be regulated by the nature of the action and not by the amount of damages awarded. *Monastesse* vs. *Christie*, S. C. 1864.

5. Action for Damages.—In an action for damages before a jury, where a verdict had been returned for the plaintiff for an amount under 40 shillings sterling, and costs were awarded generally—*Held*, confirming judgment of Court below, that the judgment for costs would be interpreted as meaning a sum equal to that awarded by the jury for damages. *Leduc* vs. *Busseau*, Q. B. 1857, 1 L. C. J. 191.

6. —— In an action of damages for personal wrongs in Superior Court, where judgment awards only £10 cy. *and costs*, the costs will

be taxed as in a case in the Circuit Court of that amount. *Wilson* vs. *Morris*, S. C. 1857, 1 L. C. J. 266.

7. —— When the verdict, in an action for £500 damages, is for £25, and judgment is entered accordingly on the verdict for that amount and costs, such costs will be taxed as in an action for £25, but the costs of the trial by jury will be allowed according to their actual amount. *Dessaulles* vs. *Taché*, S. C. 1864, 8 L. C. J. 342.

8. —— Where several debtors are condemned individually to pay certain damages, they will be jointly and severally condemned to pay the costs of suit. *Génier* vs. *Woodman*, S. C. 1868, 13 L. C. J. 201.

9. —— In a case of damages for personal wrongs, in which the Court has awarded only $5 for the damages, no greater amount than $5 for costs can be awarded. *Warner* vs. *Rolf*, C. R. 1873, 17 L. C. J. 292.

10. —— In an action of damages for $25, if the court only awards $2 for damages, it may award more than $2 for costs. *Bouchard* vs. *Girard*, C. Ct. 1881, 10 L. N. 250.

11. —— In an action in the Circuit Court for $25 for slander, judgment was given for $1.00—*Held*, costs could not be taxed beyond $1.00. *Lawrence* vs. *Hubert*, S. C. 1882, 12 R. L. 109.

12. —— **Personal Wrongs.**—Art. 478 C. C. P., which provides that, in actions of damages for personal wrongs, if the damages awarded do not exceed forty shillings sterling, no greater sum can be allowed for costs than the amount of such damages, deprives the Court of power to allow the plaintiff the costs of the action where no damages whatever are awarded. And this restriction exists even where it appears that the plaintiff, by a statement in writing, waived his claim to any condemnation in his favor except for the costs of the suit. *Browning* vs. *Spackman*, C. R. 1888, M. L. R., 7 S. C. 369.

13. **Action of Warranty.**—The costs of an action in warranty will be given against a plaintiff suing before the expiry of the delay of payment, when the defendant calls in his *garant formel*. *Aylwin* vs. *Judah*, S. C. 1857, 7 L. C. R. 128, 5 R. J. R. Q. 201.

14. —— In an action in warranty against a corporation on a guarantee given by its secretary-treasurer without authority, and the corporation disavowed the act of the latter therein—*Held*, that he should pay all costs. *Decarie* vs. *Corporation of Lachine*, S. C. 1873, 5 R. L. 453.

15. **Action by Transferee.**—Where the transferee of the balance of certain constituted rents brought action against the debtor without notice of the transfer—*Held*, that no costs would be allowed, but that on the other hand he would be condemned to pay costs where the latter had tendered the amount due and paid it into court. *Paré* vs. *Derouselle*, S. C. 1850, 6 L. C. R. 411, 5 R. J. R. Q. 122.

16. —— A transferee is entitled to his costs of an opposition necessary for the purpose of establishing his title, though the deed of transfer be not registered. *Lacoste* vs. *Jodoin*, C. R. 1866, 2 L. C. L. J. 41, 16 L. C. R. 393.

17. **Action in Forma Pauperis.**—The plaintiff who sues *in forma pauperis* may recover costs. *Giroux* vs. *Menard*, K. B. 1819, 3 Rev. de Leg. 391.

18. **Action of Ejectment.**—In an action of ejectment, where no rent is due, the costs will be taxed according to the amount of the annual rent. *Smith* vs. *Noad*, C. R., 1 L. C. L. J. 67, Q. B. 1866, 2 L. C. L. J. 59.

19. **Action of Trespass.**—Where two defendants join in an action of trespass, if one be acquitted he is entitled to his costs against the plaintiff, notwithstanding that his co-defendant be found guilty. *Henderson* vs. *Thompson*, K. B. 1817, 3 Rev. de Lég. 392.

20. **Action by subrogated Party.**—The respondent paid to the appellant a debt due by M., and took a subrogation of the claim. He sued M., and appellant had knowledge of the action, and furnished the names of witnesses to prove the debt. Respondent obtained judgment for part only—*Held*, that respondent was entitled to recover by direct action, but, as he had not called appellant in as *garant*, respondent was not entitled to recover the costs incurred in the suit against M. *Carreau* vs. *McGinnis*, Q. B. 1880, 3 L. N. 362, 1 *Dorion* Rep. 12.

21. **Action of Boundary.**—(See "Boundaries.")—A defendant who pleads by demurrer, and by general denial and exceptions, in which he pretends to be willing to have the bounds fixed, but which contain pretentions that the court rejects, will be condemned to pay the costs of suit. *Forest* vs. *Heathers*, S. C. 1881, 11 R. L. 7.

22. —— The defendant who resists the *bornage* will be condemned to the costs of the

action. *Grenier* vs. *Giroux*, Q. B., Quebec, 9 Sept., 1877; *Libby* vs. *Wyman*, Q. B., Montreal, March, 1875.

23. **Action between Husband and Wife.**—In an action between husband and wife, where the question is one of costs only, each party will have to pay his or her own costs. *Mainville* vs. *Corbeil*, Q. B. 1889, 18 R. L. 30.

24. —— A husband suing his wife in nullity of marriage must furnish his wife with funds for defending the action, such funds to be proportionate to the husband's means. *Tombyll* vs. *O Neill*, S. C. 1888, M. L. R., 5 S. C. 101.

25. **Hypothecary Action.**—An hypothecary creditor, who sues his debtor personally, cannot, in a subsequent hypothecary action against an incumbrancer, claim the costs incurred in the first action unless they have been registered against the immoveable hypothecated. *Saucer* vs. *Thibeau*, S. C. 1888, M. L. R., 4 S. C. 473.

26. **Patent Cases.**—No costs are allowed in cases before the Minister of Agriculture under the Patent Act of 1872. *Mitchell* vs. *Hancock Inspirator Co.*, Patent Office, 1886, 9 L. N. 50.

27. **Matters of Expropriation.**—In a matter of expropriation, where $600 was awarded by judgment in excess of that offered by the Commissioners, the attorney's bill was taxed as in a first class case in the Superior Court. *In re Grace*, S. C. 1881, 5 L. N. 119.

28. —— A judge of the Superior Court may, in his discretion, allow fees to counsel on an arbitration to fix the indemnity to be paid for lands taken by a railway company under 43 and 44 Vic., cap. 43, sec. 9, pars. 20 and 37. *Montreal & Sorel Ry. Co.* vs. *Vincent*, Q. B. Montreal, 24th Nov., 1884.

29. **Small Cases.**—In a case before the Circuit Court—*Held*, that where the case is within the jurisdiction of the Commissioners' Court, that the Circuit Court, upon confession of judgment of the defendant, would only render judgment for costs of the Commissioners' Court, particularly if there exist and be in operation such a court in the township wherein the defendant resides. *Pacaud* vs. *St. Hilaire*, C. Ct. 1865, 15 L. C. R. 211.

30. **Appeal.**—Where in appeal an action brought in the name of the Municipal Council of Westchester was set aside on the ground that such a body had no legal existence—*Held*, that no costs of appeal could be granted the appellant upon reversal of the judgment. *Lemesurier* vs. *The Municipal Council of the Township of Westchester*, Q. B. 1862, 12 L. C. R. 314.

31. —— Where the delay in returning the writ of appeal was caused by the neglect of the prothonotary, and not of the party appellant, the latter may nevertheless be condemned to pay the costs of the respondent's motion to have the appeal dismissed, his recourse being by direct action against the prothonotary. *Ferrier* vs. *Dillon*, Q. B. 1866, 2 L. C. L. J. 160.

32. —— A party is entitled to have the costs of printing in appeal taxed at the rate of $2 per page, even although he may have paid a less sum per page to the printer. *Ogilvy* vs. *Jones*, Q. B. 1872, 17 L. C. J. 25.

33. —— Where a deposit of £500 has been made as a security under Article 1179 C. C. P., on an appeal to the P. C., and the judgment appealed from is confirmed in the P. C., but without costs in the P. C., the deposit will nevertheless avail to liquidate the costs in the courts below, and cannot, therefore, be withdrawn by the appellant. *Lemoine* vs. *Lionais*, Q. B., 1877, 22 L. C. J. 23.

34. —— Where a defendant succeeds in appeal upon a plea which he did not raise in the court of first instance, he will not be allowed costs against the plaintiff. *Banque d'Echange du Canada* vs. *Gilman*, Q. B. 1890, 19 R. L. 194.

35. **Cases of admission without Deposit.**—In an insurance case there had been a reference to arbitration, and the sum of $646.10 found to be due by the defendant company to plaintiff. Plaintiff sued for $1,173, and the defendant pleaded acknowledging the amount found on the arbitration, but made no deposit. Judgment for the amount admitted by plea, with costs against plaintiff after plea filed. *DeMartigny* vs. *The Watertown Agricultural Insurance Co.*, S. C. 1879, 4 L. N. 132.

36. **Non-contentious cases—Taxation—Review—Family Council.**—Articles 478 and 479 C. C. P., which declare that the losing party must pay all costs, and that such costs are to be taxed by the prothonotary, subject to revision by the judge, do not apply to non-contentious proceedings adopted for the appointment by the court or the judge of a testamentary executor to replace one who is deceased. And if in such case the bill of costs has been taxed, it has been done without juris-

diction, and is therefore not subject to revision. *Exparte Gagnon*, S. C. 1893, 3 Que. 288.

37. —— The costs incurred in calling a family council, including the costs of displacing some of the relatives who were convened, are at the charge of the succession, and are to be defrayed by the representatives of such succession as being costs of administration. However, the taxation of the bill of costs does not give it an executory character, and such costs can only be recovered from the succession by ordinary action. (*Ib.*)

38. —— The costs incurred by a relative or executor in a demand for a family council, but which was not acted upon by him, or which was made to oppose or promote the appointment of a person as executor, where there was no dissent as to the necessity of such appointment, but merely as to the choice of the person to fill it, will not be charged to the succession. (*Ib.*)

39. Admiralty Cases.—Costs are not usually decreed in Courts of Admiralty against seamen who are unsuccessful in their suits. *The Washington Irving*, 13 L. C. R. 123.

40. —— The court may exercise a legal discretion as to costs. *The Aynes in re*, S. V. A. C. 53, V. A. C. 1836.

40*a*. If a suit be brought by a seaman for wages, a settlement without the concurrence of the promoter's proctor does not bar the claim for costs. The Court will enquire whether the claims were or were not just, and relieve the proctor if it were not so. *The Thetis in re*, S. V. A. 363, V. A. C. 1856.

40*b*. It is the practice of the Court of Vice-Admiralty not to give costs on either side where the damages arise from the fault of the pilot alone. *The Lotus in re*, 11 L. C. R. 342 & 2 S. V. A. C. 58, V. A. C. 1861.

41. Review. — A party improvidently inscribing a case for hearing in Review which is not susceptible of being so inscribed, will be condemned in costs, although the case may have been heard on the merits. *Beckett* vs. *Bonnallie*, C. R. 1868, 14 L. C. J. 54.

42. —— However unjust a condemnation for costs in the Court below may seem to be, the Court of Review cannot afford relief to the party aggrieved. And although the judgment of the Court below be in all respects confirmed, the Court of Review may nevertheless refuse costs to the party succeeding. *MacDonald* vs. *Molleur*, C. R. 1868, 13 L. C. J. 189.

43. —— A defendant, who succeeds in Review in obtaining considerable part of the judgment complained of, may nevertheless be condemned to pay the costs in Review. *Lynch* vs. *Bertrand*, C. R. 1869, 13 L. C. J. 189.

44. —— Where a party in revision succeeds in obtaining a modification of the costs only, he will not have costs of revision, but each party will pay his own. *Intercolonial Coal Co.* vs. *Shaw*, C. R. 1873, 4 R. L. 539.

45. —— Costs will be given against a party who succeeds in Review and in the Superior Court on a technicality if fraud is proved against him. *Blouin* vs. *Langelier*, C. R. 1877, 3 Q. L. R 272.

46. —— The Court of Review will not give costs to parties coming to rectify a trifling error which has already been rectified by retraxit. *Soulière* vs. *Heron*, C. R. 1878, 1 L. N. 87.

47. —— Where a party inscribing in review discontinues after inscription and after factum filed by respondent, the latter is entitled to costs as of a case settled before hearing. *Milloy* vs. *O'Brien*, C. R. 1883, 6 L. N. 336, 27 L. C. J. 289.

48. —— On suit brought against an *aral* and dismissed purely and simply on the ground of non-liability, where a defence of delay has been further made out, the plaintiff has an interest and a right to inscribe in review to have the ruling of the Court below on the question of liability reversed, and his right to sue *de novo* reserved, and, in such case, though the judgment be maintained on the ground of delay granted, the plaintiff is entitled to his costs in review. *Norris* vs. *Condon*, S. C. 1888, 14 Q. L. R. 184.

XV. JOINT AND SEVERAL LIABILITY FOR.

1. Several defendants not bound jointly and severally may be sued together in one and the same action and condemned to pay divers sums of money individually and also condemned jointly and severally to pay costs. *Perkins* vs. *Leclaire*, C. Ct. 1862, 7 L. C. J. 78.

2. Joint and several liability for costs only exists in an action for personal damages. *Crevier* vs. *Crevier*, S. C. 1877, 9 R. L. 313.

XVI. JUDGMENT FOR.

A judgment setting aside the verdict of a jury, and condemning the respondent to pay the costs incurred in the court below, includes also the costs of the trial by jury, and not only

the costs upon the motion for setting aside such verdict. *Ouimet* vs. *Pepin*, Q. B. 1859, 9 L. C. R. 268.

XVII. SECURITY MUST BE FOR A FIXED SUM OF MONEY.

Lavallée vs. *Paul*, C. R. 1885, 30 L. C. J. 164.

XVIII. NON-PAYMENT OF PREVIOUS COSTS. (See "SECURITY FOR COSTS.")

1. An action by a foreign plaintiff was dismissed, security for costs not having been given during the delay fixed, and the plaintiff brought a second action on the same ground—*Held*, that the proceedings on the second action would be suspended until the costs of the first action were paid. *Dunlop* vs. *Jones*, S. C. 1867, 11 L. C. J. 316, 4 L. C. L. J. 42.

2. On a motion to amend a declaration on payment of costs, the court will, if demanded, grant a motion to suspend all proceedings until the costs are paid. *Miville* vs. *Caron*, 1817, 3 Rev. de Lég. 392.

3. Non-payment of costs in a former action is not the subject of a peremptory exception. The party may move to stay proceedings, or take out his execution, or sue by a new action in another court if necessary. *Robichaud* vs. *Fraser*, K. B. 1817, 3 Rev. de Lég. 392.

4. Where an action or proceeding has been discontinued or has been dismissed, the party proceeding may bring a new action before paying the costs of the first, but the defendant or adverse party may demand that the proceedings be suspended until the costs of the first are paid. *Gaudette* vs. *Laliberté*, S. C. 1869, 1 R. L. 747.

5. A defendant who has obtained *congé-défaut* of the plaintiff's demand, with costs, can, in a new action for the same causes, demand by petition that he be absolved from pleading until his costs on the *congé-défaut* are paid. *Moisan* vs. *Bourgeois*, C. Ct. 1871, 11 R. L. 120.

6. Costs due in respect of a former action will not entitle defendant to suspension of proceedings unless it appear that the causes of both are identical, and that the parties are also identical. *Lalonde* vs. *Lalonde*, S. C. 1857, 1 L. C. J. 290.

7. A plaintiff who takes a new action after his first is dismissed on a preliminary plea, and who is stopped in his proceedings by a motion on the part of the defendant, demanding that the costs of the first action be paid before he is allowed to proceed, is not bound to notify the defendant that he has paid the costs demanded, but the costs of the motion for costs must also be paid before he can proceed. *Laferrière* vs. *Provost*, C. Ct. 1879, 10 R. L. 26.

8. An opposition to a *rend. exp.* will be dismissed unless opposant pay the costs of his former opposition. *Dalton* vs. *Doran*, S. C. 1877, 8 R. L. 372, 1 L. N. 220, 22 L. C. J. 103.

9. The non-payment of costs on an incidental proceeding in a suit cannot entitle the party to whom the costs are due to a stay of proceedings until the costs are paid. *Cutting* vs. *Jordan*, Q. B. 1875, 19 L. C. J. 139.

10. On a motion for new security in appeal, it was shown that the party moving had been in default, and had had the default removed subject to payment of costs, and no notice had been given that these costs had been paid—*Held*, that the motion would be discharged *quant à présent*. *Goff* vs. *Grand Trunk Railway & Perkins*, Q. B. 1879, 2 L. N. 410.

11. Articles 450 and 453 C. P. C., which declare that a party may discontinue, on payment of costs, and cannot begin again without paying the costs incurred by the adverse party on the action abandoned, apply also to the case where an action has been dismissed. In such case, the defendant may, by dilatory exception, ask for the suspension of the second suit until the costs of the first be paid. *Sauriol* vs. *Lupien*, S. C. 1880, M. L. R., 2 S. C. 495.

12. While motion for leave to appeal from a judgment maintaining a demurrer was pending, the successful party applied for execution for his costs which after argument was refused by the prothonotary. *Payette & Hatton*, S. C. 1882, 5 L. N. 239.

13. On a demand or application for discharge from insolvency under the Insolvent Act—*Held*, that the costs of a former petition for the same purpose must be first paid where the parties and proceedings were identical. *Gohier* vs. *Perkins*, S. C. 1881, 4 L. N. 299.

14. The non-payment of costs on an incidental proceeding in a suit, even in appeal, does not entitle the party to whom the costs are due to a stay of proceedings until the costs are paid, where the judgment which condemned to costs did not make it a condition that such costs should be paid before further proceedings

be taken. *Robinson* vs. *Can. Pac. Ry.*, Q. B. 1888, M. L. R., 4 Q. B. 344.

15. Contra.—When an action has been dismissed on grounds of form, and a new action is instituted, the defendant cannot by motion ask that the new action be suspended until the costs of the first action be paid. *Vallée* vs. *Leroux*, S. C. 1886, 14 R. L. 597, M. L. R., 2 S. C. 359.

16. —— Where an action or proceeding has been dismissed by the Court, the party proceeding can recommence without paying the costs incurred in the former action or proceeding: article 453 only applies to discontinuance. *Leclerc* vs. *Compagnie du Gaz*, S. C. 1888, 11 Q. L. R. 367.

17. Where an intervention, or other proceeding, has been annulled or dismissed, *sauf recours*, the party cannot begin again unless he previously pays the costs incurred by the opposite party upon the proceeding dismissed. *Lusignan* vs. *Rielle*, S. C. 1888, M. L. R., 4 S. C. 467.

18. The plaintiff sued the defendant, and his action was dismissed with costs. The defendant, on affidavit that the plaintiff was secreting his effects, caused an execution to issue before the expiration of fifteen days from the date of judgment. The plaintiff opposed, contesting the truth of the facts alleged in the affidavit, and praying that the seizure be annulled and set aside. The opposition was made and sworn at Montreal, where the plaintiff resided, the 14th December, 1878, transmitted to Three Rivers, where an order suspending the execution was obtained and registered in the prothonotary's book there. It was then returned to Montreal to be served on the bailiff seizing, which was done at half-past eleven in the forenoon of the 17th December, 1878. But half an hour previous to the service of the opposition the defendant served on the plaintiff opposing notice of a *desistement* of his seizure. On the 24th December, the 15 days having expired, the defendant sued out a new execution. Judgment maintaining an opposition to the second seizure, on the ground that the costs of the first opposition had not been paid before issuing the second, confirmed with costs. *Bell* vs. *Riekaby*, C. R. 1879, 5 Q. L. R. 222.

19. Where plaintiff brought an action in the Superior Court in June, which action he discontinued in the following September, upon the usual condition of payment of costs, and renewed in October without previously paying the costs—*Held*, reversing the judgment of the Superior Court, that the defendant can demand the dismissal of the action for non-payment of the costs of the previous action. *Montreal Street Ry. Co.* vs. *Alley*, Q. B. April 23rd, 1896, judgment rendered by Hall J., reported in the *Gazette*, April 24, 1896.

XIX. OF. (See also "NON-PAYMENT OF COSTS.")

1. Action discontinued.—Where a party renounces his judgment after inscription in review, he is bound to pay costs. *Robinson* vs. *Bowen*, C. R. 1879, 2 L. N. 180.

2. —— Where, since the appeal was taken, respondent desisted from part of the judgment, and offered to pay the costs of appeal to date, and where the judgment was confirmed for that part from which he had not desisted, the Court condemned the appellant to pay all the costs incurred since the discontinuance. *Chaloner* vs. *Poitras*, Q. B. 1879, 10 R. L. 499.

3. ——Discontinuance of action by plaintiff does not give the defendant who has put in an exception to the form, which was dismissed, a right to the same costs as if the action had been dismissed upon exception to the form. *Dessaules* vs. *Stanley*, S. C. 1891, 21 R. L. 480.

4. Affidavit to obtain Judgment.—The affidavit to obtain judgment in a default case in vacation is equivalent to an *enquete*, and entitles the plaintiff's attorney to costs accordingly. *D'Amour* vs. *Bourdon*, C. Ct. 1873, 17 L. C. J. 85.

5. Amendment of Declaration.—A plaintiff on being allowed to amend his declaration must pay the full costs of action. *Boudreau* vs. *Richer*, S. C. 1856, 6 L. C. R. 474.

6. —— Where, after a verdict by a jury in his favor which had been set aside in appeal, and a new trial ordered, the plaintiff moved to amend the declaration—*Held*, that plaintiff should pay costs of contestation, including the jury trial. *Rolland* vs. *Citizens' Insurance Co.*, S. C. 1879, 2 L. N. 182.

7. Certiorari—On a motion to compel a magistrate to return the original papers in a case under *certiorari* the motion will be granted, but without costs against the magistrate. *Demers exp.*, S. C. 1857, 7 L. C. R. 428, 5 R. J. R. Q. 335, overruling *Terrien exp.*, 7 L. C. R. 429, 5 R. J. R. Q. 335.

8.——And, on a petition for *certiorari* from

a judgment of a justice of the peace homologating, on petition of the inspector of fences and ditches, a *procès-verbal* relating to a water course—*Held*, that the inspector would not be relieved from the costs of setting aside such judgment, notwithstanding that he had tendered to the appellant by notaries the costs of the proceeding previous to the return of the writ of *certiorari*, and promised in such tender that the applicant should not be troubled in future by reason of the *procès-verbal*. *Dagenais exp.*, S. C. 1856, 6 L. C. R. 112, 5 R. J. R. Q. 38.

9.——The costs on a *certiorari* are in the discretion of the Court. *Laviolette exp. & Trudel & Cazelais*, S. C. 1880, 3 L. N. 159.

10.——The prosecutor cannot, on a petition for *certiorari*, be condemned to pay costs unless he has been made a party to the proceedings. *McLaughlin exp.*, S. C. 1880, 3 L. N. 367.

11. Commission to take Evidence.—Where the plaintiff by her action claimed certain shares of stock as belonging to her first husband in the estate of the defendant, and the defendant pleaded that, at the time of the marriage of the plaintiff with her first husband, the latter was already married to a person in England then still living, and a *commission rogatoire* issued to establish the fact of such marriage—*Held* that the costs must be paid by the plaintiff, inasmuch as these facts were within their knowledge, and should have been admitted by them. *Cathcart* vs. *The Union Building Society*, S. C. 1864, 15 L. C. R. 467.

12.——Taxation of Counsel fee.—A fee paid to counsel for examining witnesses under an open commission issued from the Superior Court to a foreign country cannot be taxed against the losing party as costs in the cause. The only fee established by the tariff as regards the examination of witnesses on *commissions rogatoires* is fixed by No. 80, and allows $2 to the attorneys of record for the examination and cross-examination of each witness. *Young* vs. *Accident Insur. Co. of N. A.*, S. C. 1889, M. L. R., 5 S. C. 223.

13. —— Where the parties consent to the substitution of an open commission for the examination of witnesses at a distance, in lieu of a commission in the ordinary form, the fees of counsel conducting the *enquête* before the commissioner will be taxed as costs in the case. *Pictou Bank* vs. *Anderson*, S. C. 1889, M. L. R., 5 S. C. 260.

14. —— Where a *commission rogatoire* issues to a foreign country, a reasonable fee to the Commissioner appointed to execute the commission will be taxed as costs in the cause. *Blandy* vs. *Parker*, 1889, M. L. R., 6 S. C. 1.

15. Contestation of Collocation.—Where a report of collocation, made according to a registrar's certificate, was contested, and the contestation was maintained—*Held*, that the party over collocated would have to pay the costs of the contestation unless he has filed a *remittitur* for the amount over collocated. *Marois* vs. *Bernier & Lavicière*, S. C. 1861, 12 L. C. R. 174.

16.——A party erroneously collocated must pay the costs of the contestation of such collocation, although on receiving it he immediately gives notice of acquiescing in it, with a consent that judgment should be given as demanded in the contestation, but without costs. *Adams* vs. *Hunter*, S. C. 1861, 11 L. C. R. 172.

17. —— When the title of an opposant is contested in a contestation of report of distribution, the costs will be the same as if the opposition itself were contested, and will be regulated by the amount demanded by the opposition, and not by the amount of the collocation in dispute. *Doutre* vs. *Gosselin*, S. C. 1863, 7 L. C. J. 290.

18. —— Where two hypothecary creditors had been collocated in a report of distribution, in accordance with the registrar's certificate, and it was discovered that they had been paid their respective claims some time previously—*Held*, on the contestation by two interested parties of such collocations, where the creditors in question admitted the payment of their claims, that the costs should be divided between the two parties contesting in equal shares, but that the costs of one contestation should be allowed. *Cournoyer* vs. *Plante*, S. C. 1868, 1 R. L. 38.

19. Contestation of Intervention.—On contestation of an intervention, the contesting party is entitled to the same costs as on an original demand. *St Cyr* vs. *Mathon*, S. C. 1890, M. L. R., 6 S. C. 100.

20. Crown —(See also under title "CROWN.")—The Crown does not receive or pay costs. *Chandler* vs. *The Attorney-General*, K. B. 1835, 3 Rev. de Lég. 371.

21. Demand for Account of Tutor.—A tutor rendering account, after action brought, but without contestation of the plaintiff's action, is not liable for costs, and the question of costs in such a case is not

within the discretion of the Court. *Loiselle* vs. *Loiselle*, C. R. 1866, 10 L. C. J. 258.

22. Demurrer.—The costs, on dismissal of a *défense en droit*, reserved for hearing until the final hearing on the merits, will not be allowed to the plaintiff. *Roy et al.* vs. *Gauthier*, S. C. 1873, 17 L. C. J. 227.

23. —— Where demurrer is pleaded to a portion of the demand and maintained as pleaded, the action being good for the balance, a fee of $8.00 was allowed as on a demurrer dismissed. *Cheralier* vs. *Cavill'er*, S. C. 1881, 4 L. N. 306.

24. —— The attorney's fee, on an action dismissed on a demurrer, is the same as on an action dismissed on a preliminary plea. *Major* vs. *McClelland*, S. C. 1887, 10 L. N. 116.

25. Dilatory Exception. (See also "OF MOTION FOR SECURITY.")—When security for costs is claimed by dilatory exception the costs thereof will be reserved to abide the issue of the suit. *Akin* vs. *Hood*, S. C. 1877, 21 L. C. J. 47; *Symes* vs. *Voligny*, 1 L. N. 542; *Martin* vs. *Foley*, 2 L. N. 182; *American Rattan Co.* vs. *Charlebois*, S. C. 1891, 21 R. L. 324.

26. —— The plaintiff in this case resided in Glasgow, Scotland, and the defendant filed a dilatory exception to have the proceedings stayed until security for costs be put in, a power of attorney produced and a detailed account filed. The exception was maintained with costs. *Gray* vs. *Cleghorn*, S. C. 1884.

27. —— *Held*, that the costs of a dilatory exception for security did not depend on the result of the action, but were payable by the plaintiff. *McLennan* vs. *Grange*, S. C. 1881, 4 L. N. 170; *Galarneau* vs. *Guilbault*, S. C. 1885, 9 L. N. 62.

28. —— Where plaintiffs, instead of proceeding with a dilatory exception, require a plea to the merits, and compel the defendant to proceed to proof and hearing, at the same time, upon both issues, they will be condemned to pay the costs of both issues. *Trustees St. David* vs. *Lagueux*, C. Ct. 1886, 12 Q. L. R. 102.

29. Enquete.—A party who has failed upon all the facts which were the subject of the *enquête* will be condemned to pay the costs of *enquête* though succeeding in obtaining judgment. *Filiatrault* vs. *Etie*, C. R. 1884, M. L. R., 1 S. C. 66.

30. —— Costs of *enquête* will not be allowed when testimony is unnecessary. *Foleher* vs. *Auglie*, S. C. 1887, 10 L. N. 138.

31. Exception to the Form.—Where before the exception to the form has been disposed of, the parties by consent have proceeded to the merits, the Court, in dismissing the action upon the exception, will order each party to bear his own costs of the contestation on the merits. *Gadoua* vs. *Tassé*, S. C. 1885, 8 L. N. 385.

33. Expert.—The attorney demanding distraction of costs can include in his bill of costs and execute for costs of an expert without special taxation, even where it appears that he had not paid such expert nor incurred expenses in his behalf. *Gauthier* vs. *Gauthier*, S. C. 1886, 10 L. N. 30.

33. Factum.—[illegible]ocate and attorney-at-law has the right [illegible]m free his client the cost of a copy of the factum made for such client and submitted to the judge, such costs not being provided for in the tariff, but he is not entitled to be paid for preparing the factum. *Vandale* vs. *Gauthier*, C. Ct. 1873, 5 R. L. 132.

34. —— The rate of two dollars per page allowed by usage for the cost of printing factums in appeal will not be reduced, though it be shown that the actual disbursement was less than that sum. *Dorion* vs. *Dorion*, Q. B. 1884, 7 L. N. 90.

35. Fiat.—The plaintiff's attorney cannot claim costs from the defendant for any proceeding before the issue of the writ, and consequently no costs arise on the mere lodging of a fiat. *White* vs. *Foster*, C. Ct. 1872, 1 R. L. 565.

36. Garnishment.—Where the plaintiff sued the defendant for the amount of his taxation as garnishee in a case—*Held*, that the amount allowed by way of taxation of a garnishee is recoverable by suit at law, but only after being demanded. *Plante* vs. *Parker*, C. Ct. 15 L. C. R. 152, and *Brunelle* vs. *Sampson*, C. Ct. 1863, 14 L. C. R. 12.

37. —— The costs to be paid by a garnishee to be relieved from a judgment against him by default, are those attributable to his default and no more. *Corcney* vs. *Mullins*, C. Ct. 1880, 6 Q. L. R. 173; *Beaudoin* vs. *Ducharme*, C. Ct. 1876, 20 L. C. J. 223.

38. Intervention.—An intervening party tendering to an opposant the amount claimed by his opposition, must also tender the costs incurred in a distinct action in another district, instituted for the same object as that for which the opposition is filed. *Demers* vs. *St. Amour*, Q. B. 1865, 1 L. C. L. J. 59.

39. —— A party who intervenes in an

attachment in revendication to claim certain of the effects seized, must look to the defendant for his costs, if the plaintiff admits the intervention except as to the demand for costs. *Dupaul* vs. *Wheeler*, C. R. 1884, M. L. R., 1 S. C. 147. Confirmed in appeal 1887, 15 R. L. 564.

40. **Inventory.**—A universal donee of a usufruct by contract of marriage is held to advance the costs of an inventory of the goods subject to the usufruct. *Prévost* vs. *Forget*, C. Ct. 1868, 12 L. C. J. 54.

41. —— And the fees of the notary employed by the heirs in making the inventory form part of such costs. *Ib.*, & 1 L. C. L. J. 61.

42. **Jury Trial where Verdict set aside.**—Where the Court of Appeal, in setting aside verdict and ordering new trial, condemns defendant to pay the costs in the Superior Court, without specifying what costs, no other costs will be allowed than those attendant on the motion for the new trial. *Beaudry* vs. *Papin*, S. C. 1857, 3 L. C. J. 46, but reversed in appeal 6 June, 1859.

43. **Motion for Security for Costs.**—(See also "OF DILATORY EXCEPTION.")—A defendant who has demanded security for costs will be taxed with the costs incurred by the plaintiff on the motion, and in putting in such security where the plaintiff obtains judgment for the debt. *Goodall* vs. *McGinnis*, S. C. 1885, 31 L. C. J. 253.

44. ——A non-resident plaintiff will not be ordered to pay the costs of a motion for security for costs; such costs must abide the issue of the action. *Citizens' Ins. Co. of Pittsburg* vs. *Sincennes-McNaughton Line*, S. C. 1887, 15 R. L. 274.

45. —— The disbursement and fee for putting in security for costs form part of the costs of suit, and follow the issue of the cause; but the fee allowed by the tariff to the plaintiff's attorney on the motion for security for costs does not form part of such costs of suit. *Egan* vs. *Thompson*, S. C. 1887, 10 L. N. 210.

46. **Motion withdrawn.**—Motion for an order to the prothonotary to send up an exhibit filed and not produced before the motion was served. Before the hearing of the motion the exhibit was returned, and the party moving asked to be allowed to withdraw his motion without costs. The opposite party objected on the ground that he meant to move to reject the paper—*Held*, that he should be allowed to withdraw his motion and pay costs. *Latulippe* vs. *Bernard*, Q. B. 1880, 3 L. N. 298.

47. **Party brought into the Action.**—Where, in a petition in revocation of judgment, a person is made a party thereto who has no interest in contesting such petition, being merely made a party because he was a party to the original action, but who nevertheless does contest such petition, he will not obtain costs on his contestation even if it is maintained. *Bonnelle* vs. *Bergeron*, Q. B. 1885, 14 R. L. 591.

48. **Opposition.**—Where plaintiffs declare that they do not contest, and *main levée* of the seizure is in consequence granted, costs will be granted against the defendant but not against the plaintiffs. *Corse* vs. *Taylor*, S. C. 1859, 3 L. C. J. 167.

49. ——An opposition *à fin de conserver* to an application for a ratification of title, filed by a hypothecary creditor whose claim is protected by the title deed, will not carry costs. *Exparte Lenoir*, S. C. 1859, 3 L. C. J. 363, 10 L. C. R. 151.

50. —— Where a writ of execution is issued for principal, interest and costs, and the defendant files an opposition *afin d'annuler*, alleging and proving that the costs had been paid before the seizure, the defendant is entitled to his costs of opposition. *Berthelot* vs. *Lalonde*, C. Ct. 1869, 14 L. C. J. 28.

51. —— Costs will not be awarded against an opposant, claiming under a general mortgage, who restricts the conclusions of his opposition so soon as he discovers that part of the property upon which he claims is held in free and common soccage. *Quebec Building Society* vs. *Jones*, S. C. 1862, 12 L. C. R. 170.

52. —— The plaintiff contested an opposition filed by the assignee to the insolvent estate of the defendant. The contestation was entered upon because the assignee had admitted to plaintiff's attorney that he did not authorize the opposition. This was admitted by opposant, but it appeared that the opposition had been ordered by opposant's partner and approved of by opposant. Review from the judgment condemning the plaintiff in the costs of contestation, on the ground that plaintiff was justified by the statement of opposant in contesting the opposition—*Held*, to be no ground for revision. *Paquet* vs. *Poirier*, C. R. 1882, 5 L. N. 359.

53. —— Where a wife was trading in her husband's name, and her opposition to a seizure against the husband was, after contestation, maintained, she was nevertheless con-

demned to pay her own costs. *Van de Vliet* vs. *Fenion*, S. C. 1885, M. L. R., 1 S. C. 216.

54. —— An action having been dismissed with costs, one of the defendants, in order to recover his costs, caused an execution to issue, and seized the moveables in plaintiff's domicile. The plaintiff's wife filed an opposition claiming the effects as her property, and she asked costs against the defendant seizing.

Held, that the opposant was not entitled to ask costs against the creditor seizing (here the defendant), but only (C. C. P. 586) against the judgment debtor (here the plaintiff); and a mere notice in writing of her claim to the effects, transmitted to the seizing party, did not entitle her to costs against him. *Brown* vs *Ross*, S. C. 1886, M. L. R., 2 S. C. 372.

55. —— Where creditors seize, by virtue of a judgment against their debtor, an immoveable belonging to a third party who has a valid title thereto, duly registered, they are liable to the opposant for the costs of his opposition, even where the creditors declare that they do not intend to contest his opposition. *Allard* vs. *Marion*, S. C. 1890, 34 L. C. J. 314.

56. —— A creditor who imprudently seizes goods belonging to a third party will, even if acting in good faith, be charged with costs of opposition made by such third party. *M'Namara* vs. *Gauthier*, S. C. 1892, 2 Que. 107.

57. Petition to appeal to Supreme Court.—Where a petition before a judge in chambers to appeal to the Supreme Court is dismissed, no costs will be granted. *King* vs. *Kerr*, Q. B. 1886, 12 Q. L. R. 83.

58. Petition to quash Capias.—In the case of an *enquête*, on a petition to quash a *capias*, no allowance will be made for costs of *enquête*, if no articulation of facts be filed. *Ogilvie* vs. *Jones*, S. C., 17 L. C. J. 25.

59. Petition to set aside Adjudication.—No costs were allowed in a judgment setting aside an adjudication where the *adjudicataire* was the original vendor and plaintiff at whose suit it was sold. *Cie. de Prêt et Crédit Foncier* vs. *Baker*, Q. B. 1879, 21 L. C. J. 45.

60. —— The costs on a petition to set aside a sheriff's sale, on grounds of fraud, are the same as those allowed in ordinary suits. *Commercial Mutual Building Society* vs. *McIver*, S. C. 1880, 3 L. N. 358.

61. Postponement.—Upon granting an application to postpone a trial by jury, where absence of good faith is apparent—*Held*, that costs would be awarded against the party acting in bad faith, although the motion to postpone came from the other side. *Quebec Bank* vs. *Roland*, S. C. 1863, 15 L. C. R. 23.

62. Preliminary Exception - -ART. 132 C. C. P.--The words "if he succeeds," in Article 132 C. C. P., mean, if he succeeds in defeating the action, and when the preliminary plea is a dilatory exception which has been maintained after the defendant has been forced, under article 131, to plead to the merits, and the defendant has not availed himself of his right to amend his pleas to the merits or plead anew, and the plaintiff succeeds upon the merits of the action as contested, the defendant cannot claim to be paid the costs of his contestation, under article 132, but may on the contrary be condemned to pay them. *Banque Nationale* vs. *Ross*, C. R. 1885, 11 Q. L. R. 109.

63. Proceedings in Insolvency.—Where the imprisonment of the defendant was demanded under sec. 136 of the Insolvent Act, 1875, and judgment was obtained for the debt simply, costs as in an *exparte* case only were granted. *Brown* vs. *Mullen*, S. C. 1879, 2 L. N. 344.

64. Registration of Judgment.—Where a debtor brought action to recover the costs of registration of a judgment against him, which he had paid under protest—*Held*, that he was liable, and could not recover. *Beauchene* vs. *Pacaud*, C. Ct. 1869, 1 R. L. 740, 13 L. C. J. 135.

65. Rule for Coercive Imprisonment.—On a rule for coercive imprisonment against the sheriff, as guardian of things seized, where the latter had been allowed to make proof of the value of the things seized by the admission of the plaintiff himself—*Held*, that a tender to the attorneys *ad litem* of the plaintiff, where the latter resides beyond the limits of this province, of the value so proved and of the costs on the rule incurred in a case which has been dismissed, and an appeal sued out in consequence, but made before service of appeal, would entitle the sheriff to the costs of the appeal, where the judgment in appeal does not award a larger amount than that tendered. *Leverson* vs. *Boston*, Q. B. 1859, 3 L. C. J. 223, 9 L. C. R. 238.

66. —— The omission to state certain costs in a writ of coercive imprisonment does not absolve the defendant from paying them subsequently. *Beauchêne* vs. *Pacaud*, C. Ct. 1869, 13 L. C. J. 135.

67. Sheriff's Sale.—The costs of sheriff's sale of immoveables and the costs of distribu-

tion of the moneys arising from such sale ought to be divided or apportioned according to the prices at which the lots are adjudged, and not equally among such lots. *Pacaud* vs. *Imbe*, S. C. 1862, 7 L. C. J. 279.

68. ——*Held*, on appeal from the Circuit Court, that a sheriff conducting a judicial sale is liable for the cost of the registrar's certificate if he have ordered it before the day of sale, notwithstanding the provisions of C. S. L. C., cap. 36, sec. 28. *Lambly* vs. *Quesnel*, Q. B. 1867, 17 L. C. R. 264.

69. —— After the sale of an immoveable, the sheriff has a right to add to his bill of costs the tax of one per cent. imposed by C. S. L. C., cap. 109. *Armstrong* vs. *Hus*, S. C. 1874, 5 R. L. 396.

70. Substitution of Attorney. — The respondent moved for substitution of attorney. The appellant contested and, as to costs, contended that the costs of the motion should be against the party presenting it. The Court held that the costs must be costs in the cause, and follow the event of the suit. *Lapointe* vs *Brière*, Q. B. 1889, 12 L. N. 386.

XX. OPPOSITION TO SEIZURE FOR.

Where the plaintiffs who had opposed the seizure for distraction of costs on the ground that some of them had changed their status since the institution of the action—*Held*, that as the seizure had been made only on the effects of two of the plaintiffs, who had not in any way changed their status, that there was no ground of opposition whatever. *DeGaspé* vs. *Asselin*, S. C. 1874, 5 R. L. 240.

XXI. PAYMENT OF.

1. Payment of costs to an attorney *ad litem* who has not obtained distraction of costs, and who has no special authority to receive them, is nevertheless valid. *Young* vs. *Baldwin*, S. C. 1865, 16 L. C. R. 70.

2. Defendant cannot pay to plaintiff himself the costs for which plaintiff's attorney has had distraction. *Préseau* vs. *Campeau*, C. Ct. 1884, 13 R. L. 586.

3. And where plaintiff has personally received such costs, he cannot contest in his name the opposant's opposition ; such contestation should be made by the attorneys who were granted distraction. (*Ib*).

4. **Imputation.** — Payments made after judgment rendered, but before execution issued, where the costs have not been taxed, and where such payments are more than sufficient to pay the costs, they must as a rule be imputed on the capital and interest of the debt, under the rule that imputation does not take place upon unliquidated debts. *Leresque* vs. *Moussin*, C. Ct. 1882, 10 L. N. 239.

XXII. PLEADING RIGHT TO SECURITY AGAINST EVICTION.

1. In a case where the defendant had pleaded his right to security against trouble, etc., and the plaintiff with his answer filed discharges duly registered of the mortgages complained of, he was granted full costs of the contestation. *Tétreau* vs. *Bourier*, C. R. 1863, 15 L. C. R. 76.

2. And in a similar case where the defendant set up trouble by mortgages registered against the immoveable, some of which were discharged after the filing—*Held*, that the plaintiff would obtain judgment for the amount due with costs up to the filing of the plea, and that costs after the filing of the plea would be granted to defendant. *Collette* vs. *Dansereau*, S. C. 1864, 15 L. C. R. 83.

3. In an action for the purchase money of an immoveable, where the defendant pleaded that he was entitled to security against hypothec and defective title, etc.—*Held*, that the plaintiff was entitled to costs, notwithstanding that by the judgment he was ordered to give security against an alleged claim of title in the previous vendor. *Thompson* vs. *Thompson*, C. R. 1865, 15 L. C. R. 80.

4. Where the defendant pleads trouble to an action for instalments of purchase money, and offers to pay on security being given, the plaintiff should be condemned to pay the costs of contestation. *McDonald* vs. *Molleur*, C. R. 1865, 1 L. C. L. J. 108.

XXIII. PUBLIC OFFICER.

A revenue inspector suing in the Queen's name for penalties is not liable for costs. *Hogue exp. & Murray*, S. C. 1853, 3 L. C. R. 287, 4 R. J. R. Q. 14.

XXIV. SECURITY FOR.

1. Application for Affidavit.—An application for security for costs founded on an affidavit to the effect that the party in respect of whom security is asked has no domicile in Canada, having ceased to reside in Canada since he was a party in the cause, and being

(as deponent hath been informed and believes) a permanent resident in England, will be rejected for want of sufficiency of the affidavit. *McCulloch* vs. *Routh*, S. C. 1866, 11 L. C. J. 25.

2.——An application such as the above may be renewed on the production of further and sufficient affidavits. (*Ib.*)

3.——May be made by dilatory exception. *Calvin* vs. *Bertrand*, C. Ct. 1873, 17 L. C. J. 226; *Graham* vs. *Gervais*, S. C. 1873, 17 L. C. J. 295.

4. Delay and Default to put in.—ART. 129 C. C. P., 33 VICT., CAP. 17.—When a plaintiff neglects to put in security for costs within the delay fixed by the Court, his action will, on motion of defendant, be dismissed with costs. *Castongué* vs. *Masson*, S. C. 1862, 12 L. C. R. 404; *Adams* vs. *Sutherland*, S. C., 2 L. C. J. 109.

5.——Where an action by a foreign plaintiff has been dismissed for want of security of costs, a second action for the same cause of debt will be suspended until the costs of the first action are paid. *Dunlop* vs. *Jones*, S. C. 1867, 11 L. C. J. 316, 4 L. C. L. J. 42.

6. —— An action will be dismissed for failure to comply with an order to give security for costs, notwithstanding that the case was only returned into court for costs. *East Hampton Bell Co.* vs. *Grose*, S. C. 1882, 6 L. N. 22.

7. —— A delay of eight days to put in security for costs is insufficient in the case of an opposant who has only had a short time in which to produce his opposition. *Miller* vs. *Dechêne*, C. R. 1881, 8 Q. L. R. 18.

8. —— Default on the part of non-resident opposants to put in security for costs will not have the effect of dismissing the opposition as regards the other opposants. (*Ib.*)

10. Jurisdiction.—The Court in Montreal has no jurisdiction to order that the security for costs offered by the plaintiff, who appeals from a judgment of the Court for the district of Montreal, should be taken before the prothonotary or a judge in the District of Rimouski. *Fournier* vs. *Delisle*, S. C. 1877, 21 L. C. J. 165.

11. Motions for Delay.—Application for security for costs must be made within four days from return of the writ. *Cruikshank* vs. *Lavoie*, C. Ct. 1880, 24 L. C. J. 59; *Rousseau* vs. *Trudeau*, 13 L. C. J. 138; *Newark Patent Leather Co.* vs. *Wolff*, 14 L. C. J. 18; *Lynch* vs. *Guimond*, S. C. 1875, 6 R. L. 743; *Melles* vs. *Swales*, 22 L. C. J. 271; *Tiers* vs. *Trigg*, C. Ct. 1860, 5 L. C. J. 25.

12. —— The rule requiring application for security for costs to be made within four days from return of action is not complied with by making a motion for a rule *nisi causa* within the four days, but returnable afterwards. *Newark Patent Leather Co.* vs. *Wolff*, S. C. 1869, 14 L. C. J. 18.

13. —— **Vacation.** — Defendant summoned to appear in vacation can demand security for costs on the first day of the nearest term without giving notice within the four days from the return of the writ. *Comstock* vs. *Lesieur*, S. C. 1856, 2 L. C. J. 306.

14. —— A motion for security for costs may be presented after the expiration of four days from the return of the writ of summons, if notice thereof has been given within four days. *Bowker Fertilizing Co.* vs. *Cameron*, Q. B. 1884, 7 L. N. 214; *Marcotte* vs. *Desecham*, S. C. 1882, 5 L. N. 336, but see remarks 5 L. N. 343.

15. —— It no longer suffices to give notice within four days, and move on the first day of the ensuing term for security for costs. The application should be made within four days. *Batten* vs. *Stone*, S. C. 1871, 1 R. C. 217; *Giles* vs. *O'Hara*, S. C. 1882, 5 L. N. 336, and see remarks 5 L. N. 343; *Sproule* vs. *Corriveau*, 1878, 22 L. C. J. 55.

16. —— (Following *Bowker Fertilizing Co.* vs. *Cameron*, 7 Leg. News, 214.) That a motion for security for costs may be presented after the expiration of four days from the return of the writ, if notice of the motion has been given within the four days. *Connecticut & Passumpsic River RR. Co.* vs. *South Eastern RR. Co.* 1885, M. L. R., 2 Q. B. 105.

17. —— When a non resident plaintiff described himself as domiciled in the province, and an application for security for costs has not been made within the four days from the return of the action, security will not afterwards be ordered unless it appear that the application is made within four days of the knowledge acquired by the defendant of the plaintiff's absence, or with due diligence. *Scharf* vs. *Scharf*, S. C. 1887, 10 L. N. 137.

18. —— A motion for security for costs will be granted, if more than four days after the return of the action the plaintiff leaves his domicile in L. C. and resides in the United States, and although more then two months since the return may have elapsed before any

notice of motion was given, provided that the motion is made on the first day of the term next after the discovery by the defendant of this change of residence, and that these facts are established by affidavit. *Stalker* vs. *Hammond*, C. Ct. 1864, 8 L. C. J. 137.

19. —— Motion for security for costs will not be granted against a plaintiff who has left the province since the institution of the action, if it appear that the motion was not made within four days of the knowledge of the departure. *Oliver* vs. *Darling*, C. Ct. 1880, 3 L. N. 303; and *D'Extras* vs. *Perrault*, S. C. 1880, 3 L. N. 304; *Hunter* vs. *Rennie*, S. C. 1883, 28 L. C. J. 252.

20. —— Opposition produced on the 25th June. The 29th was Sunday. On the 30th plaintiff contesting gave notice that on the first day of term he would move security for costs, the opposant being resident in the United States. The Court below granted the motion, and ordered security to be given. Leave to appeal refused, because, by Art. 24 C. C. P., the party seeking security was within the delay if it applied to a case like this, and also because the four days' rule only applies to proceedings which are signified to the opposite party. *Wadleigh* vs. *Painchaud*, Q. B. 1880, 3 L. N. 298.

21. —— Where security for costs is asked for by motion, the motion must be made within four days after the return of the writ, or the production of grounds of intervention. *Canadian Bank of Commerce* vs. *McGaurran*, S. C. 1882, 5 L. N. 128.

22. —— **Contra.**—(By same judge.) Where the plaintiff leaves the province during the suit, the defendant is entitled to ask for security for costs, and the motion may be made even after the expiration of four days after the defendant had knowledge of the plaintiff's departure. *Cyr* vs. *Bryson*, S. C. 1885, M. L. R., 1 S. C. 495, 13 R. L. 681.

23. —— The delay of four days to demand security only applies where the demand is made by dilatory exception and not by motion. (*Ib.*)

24. —— It is not sufficient that motion for power of attorney and security for costs be served, stamped and filed within the four days from return of writ; it must also be presented within that delay, either before the Court if sitting or before a Judge in Chambers, or the prothonotary. *Potter* vs. *McDonald*, S. C. 1883, 10 Q. L. R. 101.

25. —— A notice of motion for security for costs irregularly made, but within the delay required by the law, and renewed by order of the Court to a future date beyond the legal delay, is sufficient. *Morrisson* vs. *Miller*, S. C. 1888, M. L. R., 4 S. C. 471.

26. —— Motion for security for costs is regular where the motion is served within the four days, although presented to the Court on the first day of the following term and after the expiration of the four days. *Croisetière* vs. *Tessier*, S. C. 1889, 18 R. L. 430.

27. —— Art. 120 C. C. P., allowing a delay of four days for making application for security for costs, only applies to ordinary cases and not to summary matters. Two days for notice of motion is sufficient in the latter case. *Atkinson* vs. *Forgetson*, S. C. 1890, 20 R. L. 353, 34 L. C. J. 256.

28. —— Where the notice of motion for security for costs is not given within four days after return of action, the motion must be rejected though made in the first term after the return. *Carson* vs. *Carlyle*, S. C. 1870, 15 L. C. J. 78. *Contra*, *Perry* vs. *St. Lawrence Grain Co*, S. C. 1861, 5 L. C. J. 252; *Monthe* vs. *Coghlan*, 1871, 3 R. L. 447.

29. Notice of Giving — The opposite party is entitled to notice of putting in security for costs, and security put in without notice may be rejected. *Bertrand* vs. *Labelle*, C. Ct. 1886, 9 L. N. 394.

30. —— The plaintiff is bound to notify the defendant that security for costs has been given, and a demand of plea and foreclosure without such notice are irregular, and will be set aside, as also a judgment of the prothonotary rendered in the cause, in favor of the plaintiff, treating such foreclosure as valid and irregular. *Jersey* vs. *Rowell*, Q. B. 1862, 13 L. C. R. 172.

31. —— And where judgment has been so taken, the defendant may obtain relief by opposition or *simple requête afin d'opposition*, or by an appeal to the Court of Queen's Bench, but, if he take his remedy by appeal, the Court will only grant the costs of the court below and the disbursements in appeal. (*Ib.*)

32. —— **Contra.**—It is not necessary for the plaintiff to notify the defendant that he has put in security for costs; notice that security will be put in on a day specified being sufficient, and the delays, therefore, run from the date of putting in such security. *Graves* vs. *Dennison et al.*, C. R. 1869, 13 L. C. J. 178;

Tuckett et al. vs. ***Forrester et al.***, S. C., 13 L. C. J. 179.

33. —— *Held*, a deposit made by the plaintiff as security for costs, without notice to the defendant as required by Art. 129 C. C. P., will be declared null and of no effect on motion of the adverse party. *DeGrandmaison* vs. *Drolet*, S. C. 1893, 4 Que. 1.

34. Review—Deposit.—Where plaintiff has made the deposit required for revision of a judgment, he is not bound to give security for costs upon leaving his domicile in the Province of Quebec, such deposit being sufficient to cover the costs in review. *Pelletier* vs. *Jetté*, C. R. 1893, 4 Que. 58.

35. —— In an hypothecary action, of which the amount does not exceed $400, the deposit required on an inscription in review is only $20. *Forsyth* vs. *Charlebois*, C. R. 1869, 13 L. C. J. 328.

36. Revision of Order of Judge in Chambers.—An order of a judge in chambers condemning the plaintiff to furnish security for costs, because he resides without the province, can be revised and the plaintiff discharged from the obligation. *DeAngelis* vs. *Masson*, S. C. 1892, 2 Que. 138.

37. The Security—Additional.—Under certain circumstances, the Court will compel non-resident plaintiffs to give further security for costs, without staying proceedings. *Hale* vs. *Price*, S. C. 1878, 4 Q. L. R. 207.

38. —— —— Defendant moved that plaintiff be held to give security for costs. The plaintiff answered that he had done so already — *Held*, that the security given only extended to judgment and not to proceedings subsequent to judgment. Motion granted. *Dalton* vs. *Doran*, S. C. 1879, 2 L. N. 181.

39. —— **Death of Surety.**—On a motion for renewal of security for costs—*Held*, that upon the death of a party giving security for costs, the defendant was entitled to another surety, and that no waiver of that right could be set up until the defendant has received notice of the death of the surety by denunciation in the usual manner. *Grainger* vs. *Parke*, S. C. 1865, 15 L. C. R. 134.

40. —— **Death of Plaintiff.**—When the plaintiff dies after having given security for costs, his heir, although residing abroad, can take up the suit without giving new security for costs. *Boxer* vs. *Judah*, Q. B. 1887, M. L. R., 3 Q. B. 320.

41. —— **Discretion of Court as to.**—Where the party entitled to security for costs has in his possession property belonging to the other party sufficient to secure his costs, a motion for security for costs may be rejected. The sufficiency of the security is a matter within the discretion of the Court, as in all other questions of costs. (*Ib.*)

42. —— **Liability of Sureties.**—However wide may be the terms of the surety bonds, the sureties are only liable for costs of first action, and not for costs of appeal. *Boulet* vs. *Levasseur*, C. R. 1887, 13 Q. L. R. 44.

43. —— **Sufficiency of.**—Householders resident within the province are good security for costs, and one is sufficient if he justify. *Colcer* vs. *Darreau*, 3 Rev. de Lég. 319, K. B. 1810.

44. —— —— The offer of the obligation of one person is insufficient. *Powers* vs. *Whitney*, S. C. 1861, 6 L. C. J. 40.

45. —— —— When two or more defendants severally move for security for costs, separate bonds must be given, but the same sureties in each bond will be sufficient. *Bell* vs. *Knowlton*, S. C. 1863, 13 L. C. R. 232.

46. —— —— For the purpose of ordinary security for costs it is not necessary that the surety be proprietor of immoveable property. *Utley* vs. *McLaren*, S. C. 1866, 17 L. C. R. 267.

47. —— —— On application for security for costs plaintiff can be compelled to furnish *two* sureties. *Donald* vs. *Becket*, S. C. 1859, 4 L. C. J. 127.

48. —— —— Security for costs may be given by depositing a sum of money with the prothonotary, the amount thereof to be determined by the judges. *Mann* vs. *Lambe*, S. C. 1860, 4 L. C. J. 300.

49. —— —— A deposit of $100, after notice, and without objection by defendant, is sufficient, without any special allowance of its sufficiency by the court or a judge or the prothonotary. *Canada Tanning Extract Co.* vs. *Foley*, Q. B. 1875, 20 L. C. J. 180.

50. —— —— But an application to give security for costs, by the granting of judicial bond by the plaintiff carrying hypothec on the plaintiff's real property in this province or by depositing money in court (without specifying how much) cannot be allowed. *Canadian Copper Pyrites Co.* vs. *Shaw*, S. C. 1874, 19 L. C. J. 99.

51. Leaving the Province after Suit brought.—Where the plaintiff leaves the Province to reside in the United States after

suit brought, he is bound to furnish security for costs already incurred as well as those to be incurred. *Gauthier* vs. *Dupras*, S. C. 1885, 20 R. L. 142; M. L. R., 1 S. C. 510.

52. Waiver of Right to.—Where a defendant, after giving notice of motion for security for costs, pleads without reserve of his right, he waives his right to security. *Connecticut & Passumpsic River Ry. Co.* vs. *South Eastern Ry.*, Q. B. 1885, M. L. R., 2 Q. B. 105.

53. —— Where a defendant, after a judgment by default has been entered against him, has been allowed to appear by opposition and plead to the action (Arts. 484, 485 C. C. P.), he cannot afterwards make a motion for security for costs, on the ground of the plaintiff being an absentee, unless in his opposition he has reserved his right to make such motion. *Booth* vs. *Lawton*, S. C. 1869, 13 L. C. J. 59.

54. Who must furnish — Absence for five years.—Where the evidence showed that the plaintiff had not resided in the country for five years, security for costs ordered. *Jones* vs. *Vanvliet & Jones* vs. *Pearson*, C. R. 1880, 3 L. N. 184.

55. —— **Army Officer.**—An officer stationed with his regiment in the province cannot be compelled to give security for costs. *Sutherland* vs. *Heatheote*, K. B. 1808, 3 Rev. de Lég. 347.

56. —— **Civil Imprisonment.**—Security for costs may be claimed by a guardian against whom a rule for coercive imprisonment is sued out by a party absent from the Province of Quebec. *Miller* vs. *Bourgeois*, S. C. 1872, 16 L. C. J. 196.

57. —— **Contestation of Collocation.**—A non-resident plaintiff, contesting the collocation of a third party in a report of distribution, is obliged to furnish a power of attorney and give security for costs. *Bornais* vs. *Arpin*, S. C. 1887, M. L. R., 3 S. C. 84, 15 R. L. 287.

58. —— **Contestation of Garnishee's Declaration.**—Security for costs may be exacted by a garnishee from the party (foreigner) contesting his declaration. *Mayer* vs. *Scott*, C. Ct. 1860, 4 L. C. J. 146.

59. —— **Contestation of Opposition.**—Where the plaintiff, who resides without the province, contests an opposition, the opposant is not entitled to security for costs, the plaintiff in such case not being the party prosecuting, but, on the contrary, the party occupying the position of defendant. *Brigham* vs. *McDonnell*, S. C. 1860, 10 L. C. R. 452; *Waugh* vs. *Porteous*, C. Ct. 1887, 10 L. N. 135; *Morrill* vs. *McDonald*, S. C. 1861, 6 L. C. J. 40; *Sandford Whip Co.* vs. *Stock*, S. C. 1889, 18 R. L. 283; *Park* vs. *Ricard*, C. R. 1885, M. L. R., 1 S. C. 291, 29 L. C. J. 236; *Webster* vs. *Philbrick*, S. C. 1871, 15 L. C. J. 242.

60. —— —— **Contra.**—*McAdams* vs. *Stuart & Fraser*, S. C. 1875, 1 Q. L. R. 354; *Baltzar* vs. *Grewing*, S. C. 1869, 13 L. C. J. 297; *Mahoney* vs. *Tomkins*, S. C. 1858, 9 L. C. R. 72; *Société Anonyme des Glaces et Produits Chimiques de St. Gobin & Co.* vs. *Giberton*, S. C., 26 L. C. J. 246.

61. —— **Corporations, etc.** — Corporations must give security for costs in cases where the law compels private individuals to do so. *The Columbian Insurance Co.* vs. *Henderson*, S. C. 1865, 1 L. C. L. J. 98.

62. —— —— And *held* thus in regard to an insurance company having an office in this province, and which has made a deposit with the government under the Insurance Act. *Niagara District Mutual* vs. *MacFarlane*, S. C. 1877, 21 L. C. J. 224; *Globe Mutual Ins. Co. of New York* vs. *Sun Mutual Ins. Co.*, S. C. 1877, 1 L. N. 139, but *held contra* in same case, 1 L. N. 53, 22 L. C. J. 38.

63. —— —— But *held* that a foreign company which has a place of business in the Province of Quebec is not bound to give security for costs in an action instituted in this province. *Victoria Mutual Fire Insurance Co.* vs. *Carpenter*, S. C. 1881, 4 L. N. 351; *Globe Mutual Ins. of New York* vs. *Sun Mutual Ins. Co.*, S. C. 1877, 1 L. N. 53, 22 L. C. J. 38.

64. —— —— **Contra.**—*Singer Manufacturing Co.* vs. *Beauceage*, S. C. 1882, 8 Q. L. R. 354; *Banque d'Ontario* vs. *Foster*, S. C. 1884, 19 R. L. 577, and see *Goldie* vs. *Fasconi*, S. C. 1887, 31 L. C. J. 166.

65. —— —— And a railway company, being a corporation, can have only one residence, and that its head office. Such company having its head office outside the Province of Quebec must give security for costs. *Can. Atlantic Ry. Co.* vs. *Stanton*, 1888, M. L. R., 4 S. C. 160.

66. —— **Co-heirs.**—Where, of two or more co-plaintiffs who are co-heirs, one is absent from the Province, security can be demanded from the absent one. *Howard* vs. *Yule*, S. C. 1880, 3 L. N. 373. *Henderson*

vs. *Henderson*, S. C. 1879, 2 L. N. 191, 23 L. C. J. 208.

67. —— Curator to Absentee. — A curator to an absentee who brings an action in his quality of curator, is not bound to furnish security for costs. *Parent* vs. *St. Jacques*, S. C. 1867, 2 R. L. 91.

68. —— Demand of Assignment.—A demand of assignment is not introductive of an action, and the petitioner is not bound to furnish security for costs to the debtor who contests the demand. *McCall* vs. *Simmons*, S. C. 1891, 20 R. L. 519.

69. —— Foreigner suing in Forma Pauperis.—Must give security for costs. *Gagnon* vs. *Wooley*, C. Ct. 1860, 10 L. C. R. 234.

70. —— In the Exchequer Court.—Where, by a letter addressed to the suppliant, the Secretary of the Public Works Department stated that he was desired by the Minister of Public Works to offer the sum of $3,950 in full settlement of the suppliant's claim against the Department, an application on behalf of the Crown for security for costs was refused on the ground that the power of ordering a party to give security for costs being a matter of discretion and not of absolute right, the Crown in this case could suffer no inconvenience from not getting security, as well as on the ground of delay in making the application. *Wood* vs. *The Queen*, Exchequer Court 1876, 3 Q. L. R. 17.

71. —— —— Application for security for costs in this Court must be made within the time allowed for filing statement in defence, except under special circumstances. (*Ib.*)

72. —— In Matters of Habeas Corpus.—On an application for a writ of *habeas corpus ad subjiciendum*, on behalf of Kate Frances Monjo, of the city of New York, to obtain possession of her three children, alleged to be in the custody of the respondent, in the district of Montreal, the father, Domingo M. Monjo, appeared and presented a motion that the petitioner, being a non-resident, be held to give security for costs. The Court said it was not the practice to allow costs in matters of *habeas corpus*, and the application for security of costs would not be granted. *Monjo* vs. *Monjo*, Q. B. 1885, 8 L. N. 102.

73. —— Incidental Plaintiff.—An incidental plaintiff must give security for costs if he be resident without the province. *McCallum* vs. *Delano*, & *è contra*, 3 Rev. de Lég. 199, K. B., & *Barry* vs. *Harris*, 3 Rev. de Lég. 348, K. B.; *Davidson* vs. *Cameron*, S. C. 1871, 15 L. C. J. 217.

74. —— Intervening Party.—An intervening party whose domicile is beyond the limits of the province is bound to give security for costs. *Scott* vs. *Austin*, S. C. 1860, 5 L. C. J. 53.

75. —— —— A foreign intervening party who has given security for costs may demand security for costs from a party (plaintiff *par reprise d'instance*) who had left the country permanently before such foreigner was himself a party to the cause. *McCulloch* vs. *Routh*, S. C. 1867, 11 L. C. J. 25.

76. —— —— The maker of a note, on which the defendant was sued as endorser, desired to intervene for the purpose of taking up the *faits et cause* of defendant, and showing that the note was given without consideration. Plaintiff moved that he be ordered to give security both as being domiciled in the United States and as being an undischarged insolvent—*Held*, that security could not be demanded from a person who simply sought to defend himself, neither under Art. 29 of the Code nor sec. 39 of the Insolvent Act. *Marais* vs. *Brodeur*, S. C. 1878, 1 L. N. 554, 22 L. C. J. 255.

77. —— Insolvent Husband—Authorization.—An insolvent husband who appears in a suit solely to authorize his wife to sue, cannot be called on to give security for costs. *Barthe* vs. *Moreau*, Q. B., Quebec, June, 1875.

78. —— Master of Foreign Vessel.—The master of a foreign vessel who has no domicile here must give security. *Grace* vs. *Crawford*, S. C. 1871, 3 R. L. 447.

79. —— Non-resident suing with Residents.—Where one or more of the plaintiffs have their domicile without the province, the defendant is entitled to have all the proceedings in the suit suspended until security has been furnished by the absentees. *Howard* vs. *Yule*, S. C. 1880, M. L. R., 1 S. C. 420; *Gibbard* vs. *Ricpert*, S. C. 1890, 20 R. L. 300.

80. —— —— And where one or more of several opposants to a seizure of things belonging to them in common, reside without the province, only the non-residents are bound to furnish the security for costs. *Miller* vs. *Déchène*, C. R. 1881, 8 Q. L. R. 18.

81. —— —— Where of two co-plaintiffs, not co-partners, and between whom no *soli-*

durité exists, one leaves the country after suit brought, security for costs can be demanded only from the absent plaintiff. *Humbert* vs. *Mignault*, Q. B. 1874, 18 L. C. J. 217.

82. —— —— But *held*, where one of two plaintiffs is resident abroad, and the other in the province, the absent plaintiff cannot be compelled to give security for costs. *Beaudry* vs. *Fleck*, S. C. 1876, 20 L. C. J. 304.

83. —— —— In an action by two co-heirs, one of whom is a resident and the other a non-resident, the non-resident will be held to give security for costs. *Henderson* vs. *Henderson*, S. C. 1879, 23 L. C. J. 208, 2 L. N. 191; *Howard* vs. *Yule*, S. C. 1880, 3 L. N. 373.

84. —— —— Security of costs may be exacted from one of joint and several creditors who is absent, provided the different creditors do not form a single ideal person. *Laframboise* vs. *D'Amour*, S. C. 1872, 28 L. C. J. 290.

85. —— **Non-Resident Defendant.**—A non-resident defendant is entitled to ask for security for costs from a non-resident plaintiff. *Connecticut & Passumpsic River Ry. Co.* vs. *The South Eastern Ry. Co.*, Q. B. 1885, M. L. R., 2 Q. B. 105.

86. —— —— The defendants, although residing in the United States, may ask that the plaintiff be ordered to give security, without the defendants being themselves liable to furnish security. *Can. Atl. Ry.* vs. *Stanton*, S. C. 1888, M. L. R., 4 S. C. 160.

87. —— **Opposant.**—An opposant *à fin de conserver* residing out of the province, who contests the collocation of another opposant, is bound to give security for costs. *Benning* vs. *Montreal Rubber Company*, S. C. 1858, 2 L. C. J. 287.

88. —— —— Security for costs may be exacted by an opposant *before* but not *after* filing a contestation of the claim of another opposant described as residing beyond the limits of the province. *Bonacina* vs. *Bonacina*, S. C. 1859, 4 L. C. J. 148.

89. —— —— Defendants, who have become insolvents under the Insolvent Act (1875) cannot call on the plaintiff to admit or contest an opposition filed by them to an execution of a judgment recovered against them by the plaintiff without giving security for costs. *Beausoleil* vs. *Bourgouin*, S. C. 1878, 22 L. C. J. 227.

90. —— —— An opposant residing beyond the limits of the province must give security for costs *Miller* vs. *Déchêne*, C. R. 1881, 8 Q. L. R. 18.

91. —— —— Overruling *Dupré* vs. *Cantara*, *Contra*, 1 R. L. 40, which was also combatted by the editor of the *Revue Légale* in a note to the case, 1 R. L. 40.

92. —— —— And *held* thus even where the opposant has his domicile in this province. *Gravel* vs. *Mallette*, S. C. 1877, 21 L. C. J. 162.

93. —— —— An opposant, *afin de conserver*, residing beyond the limits of the province, must give security for costs to a creditor contesting his opposition. *Kirby* vs. *Brunet*, S. C. 1890, 20 R. L. 259; *Park* vs. *Rivard*, C. R. 1885, M. L. R., 1 S. C. 291, 13 R. L. 479.

94. —— —— An opposant who is absent from the country, even if he is a defendant opposant *afin d'annuler*, is bound to give security for costs. *Beckett* vs. *Banque Nationale*, 1887, M. L. R., 3 Q. B. 274, 31 L. C. J. 249.

95. —— **Partners.**—A non-resident member of a commercial partnership doing business in the Province of Quebec is not bound to furnish security for costs in an action brought by the partnership. *Crane* vs. *McBean*, S. C. 1893, 4 Que. 331, revising judgment of Mathieu, J., 1 Que. 299; *Atkinson* vs. *Dade*, Mag. Ct. 1889, 13 L. N. 267; *Beaudoin* vs. *Desmarais*, S. C. 1890, M. L. R., 6 S. C. 278.

96. —— **Petition to quash Attachment before Judgment.**—The petitioner for the quashing of an attachment before judgment against him by virtue of Arts. 854, 819 C. C. P., is not bound to furnish to the plaintiff a non-resident security for the costs of contestation. *Hutchins* vs. *Ingram*, S. C. 1881, 12 R. L. 671.

97 —— **Prete-Nom.**—The fact that a person resident in the Province of Quebec, and who sues there, is only a *prête-nom* for a person resident outside of the province, is not sufficient to make the plaintiff liable to give security for costs. *Reed* vs. *Rascony*, S. C. 1885, M. L. R., 1 S. C. 431.

98. —— **Petition in Revocation of Judgment**—ART. 29 C. C.—The defendant filing a petition in revocation of judgment is in the position of a plaintiff, and, if a non-resident, is bound to satisfy the requirements of Art. 29 C. C. as to giving security for costs. *Mace* vs. *Cleveland*, S. C. 1893, 4 Que. 3.

99. —— **Representations of Plaintiff.** Where plaintiff has made representations that

he is an absentee, but proves that he was not, a dilatory exception asking for security for costs will be dismissed but without costs. *Wood* vs. *New Rockland Slate Co.*, S. C. 1887, 31 L. C. J. 125.

100. —— Receiver of Foreign Company.—The plaintiff alleging himself as of the city and district of Montreal sued in his quality of receiver duly appointed by judgment of the Court of Chancery for Ontario to the Niagara District Mutual Fire Insurance Co., carrying on business in the Provinces of Ontario and Quebec. Motion for security and judgment as follows: "Seeing that it appears by the declaration in this case that the 'Niagara District Mutual Fire Ins. Co.,' on behalf of which plaintiff is suing in his quality of receiver, has no office in this province; motion granted." *Giles* vs. *Chapleau*, 5 L. N. 372, S. C., and *Giles* vs. *Jacques*, *ib.*, and 27 L. C. J. 182, 1882.

101. —— Seaman.—A seaman of a foreign vessel suing for wages, and describing himself as "of Norway, now at Quebec," will be compelled to give security for costs. *Anderson* vs. *Brusgaard*, C. Ct. 1877, 3 Q. L. R. 287.

102. —— —— A seaman non-resident in the province must give security for costs. *Heardman* vs. *Harrowsmith*, K. B. 1809, 3 R. de L. 347.

103. —— Sheriff or other Officer of Court.—Security for costs cannot be claimed by the sheriff or other officer of the Court before obeying the order of the Court. *Leverson* vs. *Cunningham*, S. C. 1856, 1 L. C. J. 3, 5 R. J. R. Q. 359.

104. —— Temporary Absence of Plaintiff.—The temporary absence of the plaintiff from the province, while working on a timber limit in Ontario, but while his family continues to dwell in his home in the province, does not render him liable for security for costs. *Tremblay* vs. *Bastien*, C. Ct. 1887, 11 L. N. 5; *Mountain* vs. *Walker*, S. C. 1874, 5 R. L. 747; *Prentice* vs. *Graphic Co.*, S. C. 1878, 1 L. N. 555, 22 L. C. J. 268.

105. —— —— But *held*, *Contra*, that even a temporary residence abroad obliges the plaintiff to furnish security for costs. *Drolet* vs. *Lambe*, S. C. 1886, 33 L. C. J. 114.

106. —— —— Where the plaintiff has left the country subsequent to the institution of an action, security for costs may be demanded although it be shown, by affidavits, that he has a place of business, containing a valuable stock, and a domicile in this city, and that his absence was believed to be only temporary, namely, about three months. *Davis* vs. *Jacobs*, C. Ct. 1864, 9 L. C. J. 25; *Goldie* vs. *Rascovic*, S. C. 1887, 31 L. C. J. 166; and see *Globe Mutual Ins. Co.* vs. *Sun Mut. Ins. Co.*, 1 L. N. 53; *Niagara District Ins. Co.* vs. *McFarlane*, 21 L. C. J. 224.

107. —— Temporary Residence of Plaintiff in Province.—Security for costs cannot be exacted from a person residing in Lower Canada, even supposing that he is not a householder therein, and that he has another domicile out of Lower Canada. *Ryland* vs. *Ogilvie*, S. C. 1866, 10 L. C. J. 200.

108. —— —— Plaintiff residing, even temporarily, in the province is not bound to furnish security for costs. *Croisetière* vs. *Tessier*, S. C. 1889, 18 R. L. 430.

109. —— Under the Insolvent Act, 1875.—A demand for costs from an insolvent will not be granted unless the insolvent is such under the Insolvent Act. *Niagara District Mutual Fire Insurance Co.* vs. *Mullin*, S. C. 1877, 21 L. C. J. 221.

110. —— —— The demand, under sec. 39 of the Act of 1875, must be made within the four days after the return of the writ, and seems to cover every species of demand. *Cartier* vs. *Germain*, S. C. 1877, 21 L. C. J. 310.

111. —— —— It is not competent, under sec. 39 of the Insolvent Act of 1875, for the appellant, in a case pending between him and an insolvent under the Act, to demand security for costs from the respondent; he, the appellant, being the party proceeding and not the respondent. *McKinnon & Thompson*, Q. B. 1878, 23 L. C. J. 95.

112. —— —— Defendants, who have become insolvents under the Act, cannot call on the plaintiff to admit or contest an opposition filed by them to an execution of a judgment recovered against them by the plaintiff, without giving security for costs. *Beausoleil* vs. *Bourgouin*, S. C. 1878, 22 L. C. J. 227.

113. —— —— So long as a plaintiff does not move in a suit after his insolvency, he cannot be said to continue a suit so as to be bound to give security for costs under the Insolvent Act of 1875, sec. 39. *Perry* vs. *Fell*, S. C. 1879, 23 L. C. J. 55.

114. —— —— Application for security for costs under sec. 39 of the Insolvent Act, 1875. Application resisted, on the ground that the repeal of the Act prevented the demand—*Held*, that, under the terms of the repealing

Act, the application should be granted. *Gareau* vs. *Cinq Mars*, S. C. 1880, 3 L. N. 242.

115. —— —— The obligation of an insolvent plaintiff to give security for costs in accordance with section 39 of the Insolvent Act, 1875, was not limited to four days, and a motion to stay proceedings until he had given such security, made before plea filed, was not confined to the delay of four days mentioned in Art. 107 of the Code of Procedure. *Terreau* vs. *Lacoursière*, S. C. 1879, 5 Q. L. R. 354.

116. —— —— An undischarged insolvent under the Insolvent Act of 1875 cannot proceed in a suit until he has given security for costs, when it has been asked for, but the Court will not fix a delay within which sureties must be furnished under pain of non-suit. *Roy* vs. *Belcourt*, C. Ct. 1888, 11 L. N. 250.

117. —— —— Where an insolvent contested the collocation of a creditor under the Insolvent Act, 1875—*Held*, that he was bound to give security for costs. *Gervais* vs. *Heywood*, S. C. 1879, 2 L. N. 322, 23 L. C. J. 283.

118. —— —— On the contestation of a petition for discharge under the Insolvent Act, 1875—*Held*, that security could not be demanded of a foreign creditor contesting, as the insolvent was the party moving. *Hopper* vs. *Elliott*, S. C. 1881, 4 L. N. 298.

119. —— —— Under the Insolvent law of 1875 a creditor who has no domicile in the Province of Quebec is not bound to give security for costs, though he has sued out a writ of attachment. *Reed* vs. *Larochelle*, S. C. 1877, 3 Q. L. R. 93.

120. —— —— An insolvent, who made an assignment before the coming into force of the Insolvent Act of 1875, and who had not since obtained his discharge, is not bound to give security for costs of actions brought by him subsequent to the coming into force of the above Act. *Trudel* vs. *Langelier*, S. C. 1887, 14 Q. L. R. 35.

XXV. TARIFF.

1. Action of Damages—Court of Appeal.—Judgment as to Costs.—In an action for damages for £5,000, the Court of Appeal reversed the judgment of the Court below and granted plaintiff £2.10s. and costs. The prothonotary taxed the costs as of a first class action in the Superior Court. On motion by defendant to revise—*Held*, that the Court would look at the language of the judgment of the Court of Appeal to ascertain the class of costs awarded, and in this case the plaintiff was only entitled to costs as in an action for £2.10s. in the Circuit Court. *Kerr* vs. *Gugy*, S. C. 1860, 10 L. C. R. 478.

2. Action to set aside Municipal By-law—Appeal.—In a Circuit Court action under Art. 100 Municipal Code to annul a by-law of a local council, from which there was an appeal, costs should be taxed according to the tariff applicable to appeals from the Circuit Court. *Desroches* vs. *Corp. Par. St. Bazile-le-Grand*, S. C. 1889, 17 R. L. 618.

3. —— In a demand by way of petition to set aside a municipal by-law, the costs will be taxed as in a case of the first class of the C. Ct. *Exparte Bourbonnais*, C. Ct., 17 L. C. J. 69.

4. Action for Alimentary Allowance—Prothonotary's Tariff, Art. 16.—An action for alimentary allowance, wherein the plaintiff claims from the defendant $15.00 per month or $180.00 per annum during his lifetime, belongs to the class of $400.00 to $1,000.00 actions, thus rendering costs of defendant's plea $7.30 instead of $3.30. *Barry* vs. *Kelly*, S. C. 1893, 4 Que. 79.

5. —— A judgment allowing an alimentary provision will be reformed, but without costs, the point not being taken by the defendant. *Kingsborough* vs. *Pound*, Q. B. Quebec, 2 March, 1878.

6. Appointment of Sequestrator.—On the revision of a bill of costs arising out of the appointment of a sequestrator, for which the tariff makes no provision, it was taxed as in the class of appointments of tutor or curator. *McLean* vs. *Phillips*, S. C. 1884, 7 L. N. 246.

7. Articulation of Facts (and see *infra* "CAPIAS").—Where a preliminary plea raises issues of facts, and articulations have been filed, the attorney will be allowed the fees thereon. *George* vs. *The Can. Pac. Ry.*, S. C. 1884, 12 R. L. 632.

8. Capias.—In cases in the Superior Court between $100 and $200, instituted by writ of *capias ad respondendum*, the advocates' and bailiffs' fees on the action are to be taxed as in a case in the Circuit Court over $100, and the prothonotary's and sheriff's fees as in a case in the Superior Court under $100. *Gilmour* vs. *Monette*, S. C. 1887, 10 L. N. 385.

9. —— In such cases the costs on a petition to quash the writ of *capias* are to be taxed according to the tariffs for the Superior Court. (*Ib.*)

10. —— In such incidental proceedings, when the contestation is founded upon the falsity of the allegations of the affidavit, the advocates are entitled to fees on articulations of facts. (*Ib.*)

11. Contestation of Curator's Bill of Costs.—In a contestation of the bill of costs of a curator to an estate abandoned under articles 763 *et seq.* C. C. P., the costs of the contestant's attorneys should be taxed under Arts. 51 to 55 of the tariff of the Superior Court. *In re Bouthillier*, S. C. 1886, 16 R. L. 48.

12. Contestation of Collocation. — Costs of contestation of collocation, alleging that the creditor collocated has no valid hypothec, such hypothec having been granted to him when the debtor was notoriously insolvent, should be taxed under Art. 67 of Superior Court tariff. *Cheralier* vs. *Rivest*, S. C. 1889, 17 R. L. 528.

13. —— Where a sum less than $60, forming part of a claim exceeding $1,000, was collocated, and the collocation was contested on the ground that the deed upon which the whole claim was based was fraudulent, and the contestation was maintained, the costs were taxed as in a case exceeding $1,000. *Leblanc* vs. *Tellier*, S. C. 1882, 11 R. L. 352.

14. —— When a contestation of a statement of collocation necessitates a complete hearing and *enquête*, the costs will be taxed as in a contestation of an opposition *afin de conserver*. *Beaudet* vs. *Lefaivre*, S. C. 1888, 14 Q. L. R. 139.

15. Contestation of Opposition.— Action for $114.25. Judgment for $77.93. Defendant opposed the execution by an opposition *afin d'annuler*, which was subsequently dismissed with costs—*Held*, on contestation of the bill of costs incurred on the contestation of the opposition, that the costs should be taxed as in an appealable case over $100, and not as in a case of $77.93. *Francœur* vs. *Baron*, S. C. 1879, 5 Q. L. R. 145.

16. —— The plaintiff instituted an action for $47.50, and obtained judgment for $23.17. Execution issued in satisfaction of the judgment, and, the defendants' moveables being seized, an opposition was filed, which was subsequently maintained. On revision of the opposant's bill of costs, which had been taxed by the clerk according to the amount of the action, that is to say as in a case above $40.00, it was decided that the bill was incorrect, that it should be taxed not according to the amount of the original action but according to the amount of the judgment, that is to say, in an action under $25.00. *Rocheleau* vs. *Sinclair*, C. Ct. 1879, 5 Q. L. R. 308.

17. Dismissal of Inscription in Review.—Where an inscription in Review is dismissed for want of interest in the party inscribing in Review, the attorney obtaining the dismissal of the inscription is not entitled to the fee of $15 mentioned in Art. 76 of the Superior Court tariff. *Ross* vs. *Sweeney*, S. C. 1884, 13 R. L. 399.

18. Dismissal of Bailiff.—The stamp required to be paid for in the district of Montreal, upon the production of a plea to a petition demanding the dismissal of a bailiff, is $6.00 according to article 114 of the Tariff of the Superior Court prothonotaries, and the stamp to be paid for upon inscription for hearing and at merits of such petition, thus contested, is $3.00 by virtue of Arts. 8 and 9 of the same tariff. *Corporation des Huissiers du District de Montreal* vs. *Caisse*, S. C. 1890, 19 R. L. 619.

19. —— The item for $10.00 for counsel at the hearing is not allowable, but rather the sum of $8.00 according to Art. 83 of the advocates' tariff. (*Ib.*)

20. Intervention. — Where the intervening party sets up a defence against plaintiff's demand, and obtains nothing more from his intervention than the upholding of his defence to plaintiff's action against the defendant, the costs of intervention should be taxed as in an action of the same class as the principal demand, and not as in an action of the class of the claim in intervention. *Henderson* vs. *Pengelly*, S. C. 1892, 1 Que., 204.

21. Miscellaneous Cases.—Where judgment was rendered in the Superior Court for £50 interest and costs — *Held*, on motion to revise the taxation of the prothonotary, that the plaintiff was entitled to costs only as of the first class in the Circuit Court, and not of an action in the Superior Court. *Vallée* vs. *Latouche*, S. C. 1860, 10 L. C. R. 433.

22. —— A plaintiff may in some cases recover costs as of the Superior Court, though his judgment is for £5 only. *Godbout* vs. *Giroux*, K. B. 1816, 3 Rev. de Lég. 391.

23. —— On a judgment for $50 and costs of the lowest class of the S. C., the new tariff existing at the date of the judgment for cases under $200 must apply. *Fortier* vs. *Trudeau*, S. C. 1872, 16 L. C. J. 252.

24. —— Until the promulgation of a tariff for cases of the S. C. under $200, the tariff over $200 must apply. *Brennan* vs. *Molson*, S. C. 1872, 16 L. C. J. 253.

25. —— Where three separate parties put in three separate defences with identical pleas, but appeared and pleaded by the same attorney, the latter has a right to three separate fees. *Gauthier* vs. *Gauthier*, S. C. 1886, 10 L. N. 394. See *Lefebvre* vs. *Monette*, Q. B. 1888, 32 L. C. J. 201.

26. Opposition to Sale of Immoveable.—An opposant who opposes the sale of an immoveable at the instance of a plaintiff whose claim does not exceed $95.00 has a right to costs of an action of $200 to $400 in the Superior Court. *Kinloch* vs. *Robichon*, S. C. 1885, 8 L. N. 170.

27. Paulian Action.—The class of action and the amount of the costs in a Paulian action are determined by the value of the immoveable which it is sought to include in the defendant's patrimony, and not by the amount of the plaintiff's claim. *Labelle* vs. *Meunier*, S. C. 1893, 3 Que. 256.

In the same sense *Beaulieu* vs. *Levesque*, S. C. 1892, 2 Que. 194.

28.—Petition under Liquidation Act, 1882.—Nos. 41 and 42 of the Tariff of Fees are applicable to a petition praying that liquidators under the Liquidation Act of 1882 be ordered to deliver up property in their possession. *Adams Tobacco Co.* vs. *Plummer*, 1887, M. L. R., 3 S. C. 153.

29. Plea of Want of Jurisdiction ratione materiæ. — Where an action is dismissed upon a plea to the action which sets up want of jurisdiction *ratione materiæ*, costs will be taxed under Art. 7 of the tariff of Circuit Court fees. *Saxton* vs. *Paradis*, S. C. 1885, 13 R. L. 40.

30. Retroactive Effect of Tariff. (See under title "ADVOCATE AND ATTORNEY, FEES OF.")

31. Rule for Civil Imprisonment.—Where proceedings in a rule for coercive imprisonment necessitate an *enquête*, and that written admissions of facts are produced to sustain the rule, the fee of $8 mentioned in Art. 42 of the tariff of the Superior Court should be allowed. *Ex-parte Archambault*, S. C. 1870, 2 R. L. 105.

32. Where Judgment for $100. (See "ADVOCATE AND ATTORNEY, FEES.") *Held*, confirming judgment of prothonotary, that where judgment is for $100 precisely, the attorney's costs should be taxed as in an appealable case of $100 to $200. *Varieur* vs. *Rascony*, S. C. 1889, M. L. R., 5 S. C. 126, 17 R. L. 461.

33. Where Judgment for Principal and Costs.—Where the judgment is for principal and costs, and the principal is less than $100, the amount of the costs will be determined from the amount of the debt due in principal and interest, and not from the principal alone, although the said interest be not determined by the judgment. *Lemay* vs. *Boissenot*, S. C. 1883, 10 Q. L. R. 90.

34. Where Action joined. — Where several actions of the first class in the Superior Court, in which the same person is plaintiff, are joined after a plea to the merits has been put in one of the cases, and a declaration in each of the others that the defendant intends to put in the same defences as those of the defendant who has pleaded, and separate judgments are rendered in each case as if they had been contested, the plaintiff's attorney will be entitled in each case to the fee of $60.00 indicated by Art. 10 of the Superior Court tariff. *Lambe* vs. *Cie d'Assurance*, C. R. 1889, 15 R. L. 491.

XXVI. TAXATION.

1. Action to rescind Lease. — Costs of an action to rescind a lease on account of breach of its terms must be taxed according to the amount claimed. *McConville* vs. *Banque d'Hochelaga*, C. Ct. 1881, 11 R. L. 99.

2. Admission of indebtedness in Plea.—An admission of indebtedness in a plea, with an offer of confession of judgment, not accompanied by such confession, but accepted by plaintiff in his answer, is sufficient whereon to base a judgment for the amount of such admitted indebtedness. Upon such admission, in default of any absolute provision for such a case in the tariff, the costs will be taxed at the discretion of the Court. *Bertrand* vs. *Hinerth*, S. C. 1881, 25 L. C. J. 168, and see *Poulin* vs. *Prevost*, partly reported 25 L. C. J. at p. 170, Q. B. 1875.

3. Burden of Proof.—The burden is upon the party claiming that costs have been taxed to prove it, and such proof can be made by producing the bill or by the minute book; the fact the costs are said to have been taxed does not make proof. *Lévesque* vs. *Moussin*, C. Ct. 1882, 10 L. N. 239.

4. Discontinuance—One of three Defendants.—As to proportion of costs taxable against plaintiff on discontinuance of proceedings against one of three defendants, who has severed in his defence from the other two defendants who plead jointly. *Ives* vs. *Seegmiller*, S. C. 1883, 6 L. N. 84.

5. Error.—If, by an error of calculation in the addition of the items of a bill of costs, a total of $119 is arrived at instead of $159, and the bill is taxed at the former sum conformably with the notice of taxation given, execution can only issue for $119 unless the error is corrected by revision in the regular way, and if execution issues for $159 without such revision being made, the amount claimed will be reduced to $119 upon opposition to the seizure. *Gauthier* vs. *Gauthier*, S. C. 1886, 10 L. N. 394.

6. Exhibits.—A general conclusion for costs in the declaration or plea is sufficient to include costs of such exhibits as are necessary and cannot be presumed to be in possession of the party producing them. *Lainville* vs. *Legault*, S. C. 1885, M. L. R., 1 S. C. 452.

7. Execution before Taxation, etc.—(See also "In non-contentious cases.") The issue of an execution for the recovery of the amount of a judgment and costs in a contested case previous to the taxation of costs is null. *Audet* vs. *Asselin*, S. C. 1864, 15 L. C. R. 272; *Levesque* vs. *Moussin*, C. Ct. 1882, 10 L. N. 239; *Lewis* vs. *McKinley*, C. R. 1880, 6 Q. L. R. 61; *Theoret* vs. *Carrière*, C. Ct. 1887, 15 R. L. 511; *Theoret* vs. *Meloche*, C. Ct. 1887, 10 L. N. 171; *Laugevin* vs. *Martin*, S. C. 1871, 3 R. L. 447.

8. —— The practice under the ordinance of 1667, tit. 33, requiring notice to the adverse party of taxation of costs, was not affected by the passing of 20 Vict., ch. 44, s. 90 (C. S. L. C., ch. 83, s. 151), reproduced in Art. 479 C. C. P., and such notice is still required. *Scott* vs. *McCaffrey*, C. R. 1888, M. L. R., 5 S. C. 202.

9. —— Execution cannot issue for costs (nor even for the debt unless the costs are renounced) where they have not been taxed, or where notice of taxation has not been given to the adverse party. *Frères de Charité* vs. *Raymond*, C. R. 1890, M. L. R., 6 S. C. 142.

10.——But in regard to proceedings before the Magistrate's Court, it is not absolutely necessary that notice of taxation should be given to the adverse party before executing for costs. *Martineau* vs. *Brault*, Mag. Ct. 1889, 12 L. N. 251.

11.——And an opposition to such execution on the ground of omission of such notice and without allegating an overcharge will be dismissed. (*Ib.*)

12. Failure of "Mise en cause" to produce Pleadings.—On the 6th June the parties brought in to the action gave copies of a plea and articulation of facts to the plaintiff's attorney, but this plea and the articulation of facts had not been produced when, on the 30th June, the plaintiff desisted from his action against the above parties—*Held*, that the attorneys of the parties brought in to the action were only entitled to fees of an action discontinued after appearance put in. *Lancaster* vs. *Doran*, S. C. 1892, 2 Que. 304.

13. In Appeal.—Where the taxation of costs in appeal is regular on its face, and there is no proof of alleged want of notice to the adverse party, such taxation will be maintained. *Wells* vs. *Burroughs*, 1890, M. L. R., 7 Q. B. 451.

14. Notice. (See also "Taxation"—"Execution Before.") Under art. 479 of the Code of C. P., where the prothonotary or his deputy has taxed the costs without previous notice to the attorneys of the parties in the case, an opposition *afin d'annuler*, on the ground only of want of notice, will not be maintained unless the opposant shows that he has been prejudiced by the want of notice. *Samuel* vs. *Houliston*, 1885, M. L. R., 1 S. C. 505.

15. Prothonotary—479 C. C. P.—The prothonotary has power to tax a bill of costs in the absence of the judge. *Lynch* vs. *Tyre*, S. C. 1874, 5 R. L. 417.

16. Revision—Waiver.—Where a party moves to revise certain items of taxation in a bill of costs by the prothonotary, he thereby waives his right to object to the other items of taxation, and a second motion to revise these will be rejected although the party moving offers to pay the costs of his second motion. *Kerr* vs. *Gugy*, S. C. 1860, 10 L. C. R. 478.

XXVII. UNDER INSOLVENT ACT, 1875.

1. Liability of Creditors for.—Where an Insolvent Estate has no assets, the creditors cannot be called upon to pay, in proportion to the amount of their claims, a judgment obtained against the assignee of such estate. *Dupuy* vs. *Union Bank*, *Dupuy* vs. *Walters*, C. Ct. 1882, 5 L. N. 371.

2. The creditors are liable individually each for his share of costs made on behalf of an insolvent estate where there are no assets to pay them. *Poulin* vs. *Falardeau*, C. Ct. 1882, 4 L. N. 317.

XXVIII. WHAT ARE LAW COSTS?

1. The fees of a curator to an insolvent and the other expenses connected with the insolvency are not law costs (*frais de justice*) so as to take precedence of the landlord's privilege. *Re Menard & De Bellefeuille*, S. C. 1886, M. L. R., 2 S. C. 130. Reversed in Review, but restored in appeal. *Sub. nom. De Bellefeuille* vs. *Desmarteau*, M. L. R., 3 Q. B. 303.

2. The costs to be paid under a judgment, ordering the payment by plaintiff of the costs of a former action, as a condition precedent to proceeding with a new suit, are the taxed costs, and a guardian's fees not being by law claimable from defendant, cannot be included in such costs. *Dooly* vs. *Ryarson*, C. Ct. 1875, 1 Q. L. R. 219.

3. *Held*, reversing the judgment of Wurtele, J., M. L. R., 5 S. C. 374, Dorion, Ch. J., and Church, J., *diss.* In law costs (*frais de justice*) are included all costs incurred for the common interest of the creditors, whether it be in recovering property for the debtor or in preventing his property from being carried away, diminished or lost. *Barnard* vs. *Molson*, Q. B. 1890, M. L. R., 6 Q. B. 201, 19 R. L. 296; *Normandin* vs. *Normandin*, C. R. 1884, 29 L. C. J. 111.

XXIX. WHERE SUIT PENDING.

An attorney *ad litem* cannot recover from a client his costs in suits which are still pending and undecided. *Molony* vs. *Fitzgerald*, C. Ct. 1877, 3 Q. L. R. 381; *Atwell* vs. *Browne*, Q. B. 1865, 9 L. C. J. 155.

XXX. WHERE ACTION SETTLED BETWEEN PARTIES PENDING THE SUIT.

In an action against the defendant for the sum of $59.27, the latter pleaded by exception to the form. Thereafter, the defendant tendered the above sum without costs, through his notary, which was accepted by the plaintiff "in full receipt of claim against the said defendant." Thereafter, the plaintiff required the defendant to plead to the action, which he did by a plea of payment. The exception to the form was dismissed, as the payment by the defendant of the above sum without reserve was a waiver by him of all rights he might have under the said exception; but the plaintiff having wrongly required the defendant to plead to the action after having received payment of the debt without reserve, and the defendant to avoid judgment by default against him, being bound to plead to the action, the plaintiff is chargeable with the costs of such plea. *Fraser* vs. *Nicholson*, C. Ct. 1887, 10 L. N. 59.

XXXI. WHERE DEBT PAID BEFORE RETURN, BUT NO COSTS.

The defendant before the return of the writ of summons paid the plaintiff his debt, but no costs—*Held*, that he must pay costs to the day on which he paid the debt. *Gagnon* vs. *McLeish*, K. B. 1821, 3 Rev. de Lég. 393; *Darche* vs. *Debuc*, S. C. 1851, 1 L. C. R. 238.

XXXII. WHERE ACTION PEREMPTED.

ART. 460 C. C. P.

1. Where peremption is granted the action will be dismissed, each paying his own costs. *Fournier* vs. *Quebec Fire Insurance Co.*, S. C. 1856, 6 L. C. R. 97, 5 R. J. R. Q. 28.

2. In cases where peremption is granted, no costs will be awarded. *Turner* vs. *Lomas*, S. C. 1860, 10 L. C. R. 382.

3. *Held*, on a judgment of peremption, the court will, as a rule, award all costs of suit against the plaintiff, unless there be very special circumstances to prevent it. *Radford* vs. *Poitras* (Que.), S. C. 1892, 1 Que. 359.

4. In cases where peremption is granted, the court will award costs of suit against the plaintiff, unless there be very special circumstances to prevent it. *Cuvillier* vs. *Cie. du Ch. de Fer du Grand Tronc du Canada* (Montreal), S. C. 1886, 15 R. L. 7. And see *Chapman* vs. *Aylwin*, S. C. 1857, 1 L. C. J. 264; *Mongeon* vs. *Turenne*, S. C. 1857, 1 L. C. J. 264; *Gore* vs. *Gugy*, S. C. 1857, 1 L. C. J. 264; *Germain* vs. *Lacoursière*, S. C. 1877, 3 Q. L. R. 271; *Sinclair* vs. *McLean*, S. C. 1877, 22 L. C. J. 107, in the same sense.

5. So where the plaintiff shows sufficient cause by affidavit, the Court will not grant costs where action perempted. *De Bleury* vs. *Gauthier*, S. C. (Quebec) 1861, 11 L. C. R. 494, 5 L. C. J. 330.

XXXIII. WHERE DEFENDANT IS INSOLVENT.

Action against an insolvent who had not obtained his discharge for a debt incurred previously to the assignment. Judgment granted but without costs. *Laurent* vs. *Thériault*, S. C. 1881, 4 L. N. 373.

XXXIV. WHERE DEFENDANT DECLINES TO PLEAD TO AN AMENDED DECLARATION.

Plaintiff moved and was allowed to amend his declaration after plea filed. Defendant declined to plead *de novo*, and, after judgment against him for debt and costs, complained of being condemned to pay costs of contestation on the ground that he had not pleaded to the declaration as amended—*Held*, that this d'd not constitute an acquiescence sufficient to relieve him from the costs of contestation. *Archambault* vs. *Pangman*, C. R. 1879, 2 L. N. 246.

XXXV. WHERE ACTION VOID FROM ILLEGALITY.

A defendant cannot be condemned to pay costs of an illegal summons. *Valiquette* vs. *Nicholson*, C. Ct. 1886, 9 L. N. 106.

XXXVI. WHERE DEFENDANT APPEARS, BUT DOES NOT PLEAD.

Where a defendant merely appears and does not plead, but does not put himself in the position of a party *qui s'en rapporte à justice*, he is liable to costs as in an *ex-parte* proceeding. *Bissonnette* vs. *Town of Farnham*, S. C. 1892, 1 Que. 108.

XXXVII. WITNESS' FEES.

1. A miner summoned as a witness is entitled to take execution for his taxed fees. But where the amount of such fees has already been paid to the attorney of the party obtaining the judgment, as part of his taxed bill, a seizure by the witness for the same amount is illegal. *Deguire* vs. *Bastien*, C. Ct. 1886, 9 L. N. 94.

2. An attorney has a right to include in his bill of costs the taxation of the witnesses of his party if he has obtained distraction of costs, and to exact payment of costs from the party condemned to pay them, and in default to take execution in his own name for the amount of the taxation. *Beauchêne* vs. *Pacaud*, S. C. 1865, 15 L. C. R. 193.

COUPONS.

1. Interest on.—Interest runs on coupons of railway bonds without the necessity of putting the railway company in default. *Desrosiers* vs. *M. P. & B. Ry. Co.*, C. R. 1883, 28 L. C. J. 1.

2. Action on Bond.—Detachment of certain Coupons.—On motion of the owner of bonds with *coupons* attached, the Court will order such of the *coupons* as are not in litigation to be detached by the clerk of the Court and delivered over to the party moving. *Montreal Portland and Boston R. W. Co.* vs. *Banque d'Hochelaga*, Q. B. 1883, 27 L. C. J. 164.

COURS D'EAU.

(See Riparian Proprietors; Water Courses; Servitudes.)

COURT MARTIAL.

(See "Militia Law.")

Powers of, subordinate to Civil Courts.—The petitioner being tried for firing without orders towards a crowd of people in the streets of Montreal, such conduct being insubordinate, unsoldier-like and to the prejudice of good order and military discipline, and a writ of *habeas corpus* having issued, motion was made to discharge him from the custody of the military authorities—*Held*, that it appearing the written charge against the petitioner was one of felony, he must first be held to answer to the constituted tribunals of the province, proceeding under the common law of England, before a Military Court, under the Mutiny Act and the Articles of War, can legally take cognizance of the charge. *McCulloch exp.*, 1853, 4 L. C. R. 467.

COURTS.

I. Appointment of Judge. 1-2.
II. Opinion of Members of.
III. Of Record.
IV. Powers of.
Amendment of Award. 1.
Expertise. 2.
Order of Cases. 3.
Questions not submitted in Appeal. 4.

See also Jurisdiction
" Circuit Court
" Superior Court
" Review
" Queen's Bench, etc.

I. APPOINTMENT OF JUDGE.

1. The courts will, *ex-officio*, notice the appointment of one of its own officers to be a judge in another district. *Fay* vs. *Miville*, K. B. 1816, 2 Rév. de Lég. 333.

2. A barrister appointed to the bench cannot thereafter act as attorney or counsel, and the Court will notice his appointment *ex mere motu*. *Tremaine* vs. *Tonnancour*, K. B. 1818, 2 Rev. de Lég. 471.

II. OPINION OF MEMBERS OF.

The opinion of two members of the Court, in the degree of relationship of brothers in-law, cannot be reckoned as one under the Edict of 1681 and the declaration of the King of France of 1708. *Fleming* vs. *Seminary of Montreal*, K. B. 1825, S. R. 184.

III. OF RECORD—WHAT ARE.

The Magistrates' District Court is not a Court of Record. *Provost* vs. *Masson*, S. C. 1874, 5 R. L. 556.

IV. POWERS OF.

1. **Amendment of Award.**—The Superior Court has no power to amend an award of the Board of Revisors of the Montreal Corn Exchange Association. If irregular, it must be set aside *in toto*. *Glassford* vs. *Taylor*, S. C. 1865, 1 L. C. L. J. 94.

2. **Expertise.**—The Superior Court has no power to appoint experts to establish a boundary line in Ontario. *Skead* vs. *McDonnell*, Q. B. 1872, 3 R. C. 42.

3. **Order of Cases.**—The Court of Review has a discretionary power to give precedence to any particular case, notwithstanding 27 and 28 Vic., cap. 39., sec. 29, which says that the case shall be heard in its order on the first day in term of which it can be heard. *Attorney-General* vs. *The Grand Trunk Railway*, C. R. 1865, 1 L. C. L. J. 38.

4. **Questions not submitted in Appeal.**—*Held*, the Court will not consider a law issue raised by demurrer in the Court below and disposed of there by interlocutory judgment when no reference is made to it in appeal on the merits, and when it does not show absence of jurisdiction or of right of action. *Larue* vs. *Kinghorn*, Q. B. 1893, 2 Que. 263; appeal to Supreme Court quashed for want of jurisdiction, 22 Can. S. C. R. 347.

CRIMINAL LAW. (1)

I. Abduction. 1-3.
II. Assault.
Attempt to. 1.
Commitment—Security to keep the Peace. 2.
III. Bigamy. 1-2.
IV. Commitment—Copy—Amendment.
V. Conviction—Night-Walker.
VI. Conspiracy to Defraud. 1-2.
VII. False Pretences. 1-2.
VIII. Forgery.
IX. Grand Jury—Challenge to the Array.
X. Jury.
Mixed—Challenge. 1.
Jury—Challenge. 2
Discharge before Verdict. 3.
XI. Indictment—Objections to.
XII. Polygamy.
XIII. Receiving stolen Money.
XIV. Special Pleas — Autrefois Acquit.
XV. Summary Convictions—Evidence—Certiorari.
XVI. Theft by Misappropriation.
XVII. Vagrancy. 1-2.

I. ABDUCTION.

1. Art. 282 Criminal Code.—Verbal evidence that the abducted woman had an interest in property generally (without proof of the particular interest alleged in the indictment) is insufficient to sustain an indictment under 32-33 Vic., ch. 20, s. 54, which sets out the particular interest which the abducted person had in properties described in the count of the indictment. *Regina* vs. *Kaylor*, Q. B. 1881, 26 L. C. J. 36, 1 Dorion 364.

2. An indictment under s. 54 of said Act may be sustained without evidence of the prisoner's knowledge that the abducted person was an heiress. (*Ib.*)

3. Art. 283 Crim. Code.—On an indictment for abducting a girl under the age of 16, where it appeared the girl had left her guardian's house for a particular purpose with his sanction, it was held that the girl did not cease to be in possession of her guardian within the meaning of the statute 32 and 33 Vic., ch. 20, s. 56. *Regina* vs. *Mondelet*, Q. B. 1877, 21 L. C. J. 154.

(1) See now Criminal Code, 1892.

II. ASSAULT.

1. Attempt to. — See now ART. 711 CRIM. CODE.—A verdict of attempt to assault is not irregular. *Leblanc* vs. *Reginam*, Q. B. 1893, 2 Que. 255.

2. Commitment—Security to keep the Peace—CRIMINAL CODE, ART. 959. — The petitioner was convicted of assault by a justice of the peace, and was adjudged to pay a fine of $1 and costs, and in default of immediate payment to be imprisoned for eight days. It was, at the same time, adjudged that he should give security to keep the peace for the term of one year. The warrant of commitment directed the gaoler to keep the petitioner for the term of eight days, "and until the said John Doe do furnish good and sufficient securities as hereinbefore adjudged." The petitioner having undergone imprisonment for eight days, petitioned to be discharged—

Held, under Art. 959 of the Criminal Code of Canada, when a justice of the peace requires any one to give security to keep the peace, he must fix the amount of the bond to be given, and order him to be imprisoned for a term to be mentioned, not exceeding twelve months, in case he should refuse or neglect to give such security. The justice of the peace must afterwards establish and record the defendant's refusal or neglect to furnish the security, and he can only issue his warrant of commitment after such refusal or neglect. A commitment, therefore, which requires the defendant to furnish security to keep the peace, but does not fix the amount, is illegal. *In re Doe*, Q. B. 1893, 2 Que. 600.

III. BIGAMY. (See ART. 275 CRIM. CODE.)

1. On a trial for bigamy the Crown having proved the second marriage of the prisoner while his first wife was living, it is for the prisoner to prove the absence of the first wife during seven years preceding the second marriage, and where such absence is not established it is not incumbent on the prosecution to prove the prisoner's knowledge that the first wife was living at the time of the second marriage. *Regina* vs. *Dwyer*, Q. B. 1883, 27 L. C. J. 201.

2. —— It is incumbent upon the Crown, under 4th and 5th Vic., ch. 27, sec. 22 (ch. 91, secs. 29, 30, Cons. Stat. of C.), to prove that a person marrying a second time, whose husband or wife had been continually absent from such person for seven years then before, knew such prison to be living within that time. *Regina* vs. *Fontaine*, Q. B. 1871, 15 L. C. J. 141.

IV. COMMITMENT—COPY—AMENDMENT.

An error in a copy of a commitment may be amended by the production of a regular copy. (In this case an error of date.) *Ex-parte Gagnon*, Crim. Assizes, 1893, 2 Que. 287.

V. CONVICTION—NIGHT-WALKER.

The description of an offence as follows: "of being a loose, idle or disorderly person or "a vagrant within the meaning of the statute, "for that she, on the 23rd day of March "instant, at the said city, being then a night-"walker, did unlawfully wander by night, "between ten and eleven o'clock in the evening, "in a public street of the said city, St. Domi-"nique street, and did not then and there "render a satisfactory account of herself when "required to do so by the constable Paul Hill, "contrary to the statute in such case made "and provided," satisfies the provisions of the law. *Ex-parte Gagnon*, 2 Que. 287, Q. B. 1893.

VI. CONSPIRACY TO DEFRAUD. (See ART. 394 CRIM. CODE.)

1. And see definition in *Reg.* vs. *Roy*, Q. B. 1867, 11 L. C. J. at p. 93.

2. The conspiracy itself is the offence; that is to say the offence is completed by the combination and agreement. *Reg.* vs. *Thayer*, 5 L. N. 162.

VII. FALSE PRETENCES. (See ARTS. 358, 359 CRIM. CODE.)

1. Where the evidence established that the defendant sold two railway passes, good only to carry a particular person, and which the purchaser could not use except by committing a fraud on the Railway Company, and at the risk of being at any moment expelled from the train, there was evidence to go to the jury on an indictment against the defendant for obtaining money under false pretences. *Regina* vs. *Abrahams*, Q. B. 1880, 24 L. C. J. 325.

2. The prisoner, who had been discharged from the service of A., went to the store of D. & S., and represented herself as still in the employ of A., who was in the habit of dealing there, and asked for goods in A.'s name, which were put up accordingly, but, instead of being delivered to the prisoner, were sent to A.'s house. The prisoner, however, went directly from the store to A.'s house, and, remaining in the kitchen with the servant until the clerk delivered the parcel, snatched it

from the servant, saying, "that is for me, I am going in to see A.," but, instead of going into see A., went out of the house with the parcel —*Held*, on a reserved case before the judges in appeal, that the prisoner was rightly convicted as laid in the indictment under 4 & 5 Vict., cap. 25, sec. 45, of having obtained goods from D. & S. by false pretences. *Regina* vs. *Robinson*, 9 L. C. R. 278, Q. B. 1859.

VIII. FORGERY. (See ART. 422 CRIM. CODE.)

Where the prisoner was indicted for forging a note for $500, having changed a note of which he was the maker from $500 to $2,500—*Held*, that this was a forgery of a note for $500, and that not withstanding that the fraud was committed on the indorser. *Reg.* vs. *McNevin*, Q. B. 1867, 2 R. L. 711.

IX. GRAND JURY — CHALLENGE TO THE ARRAY. (1)

Any objection to the constitution of the Grand Jury may be taken by motion to the Court, and the indictment will be quashed if the court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise. Art. 656 Crim. Code.

X. JURY.

1. Mixed Jury—Challenge. (See now ART. 670 CRIM. CODE.) On a trial for misdemeanour, the defendant, who applies for a mixed jury, is not bound to divide his challenges. *Reg* vs. *Beauté*, Q. B. (Crown Side) 1892, 1 Que. (S. C.) 273.

2. Challenge.—Where the prosecutor or party aggrieved was the uncle of the sheriff of the district, it was held that the sheriff was incompetent to make the jury panel, and that this objection gave rise to a challenge to the array, the nullity of the panel under such circumstances being held to be absolute and not relative. *Reg.* vs. *Rouleau*, Q. B. 1890, 16 Q. L. R. 322.

3. Discharge before Verdict.—In the course of a trial for murder the jury was discharged, because it was discovered that one of them had come from a house where there was small-pox. On the case being resumed next day before another jury, it was contended on behalf of the prisoner that he had already been put in jeopardy, and could not be tried again; but the objection was overruled, and the trial proceeded with. *Reg.* vs. *Considine*, Q. B. 1885, 8 L. N. 307.

(1) See *Reg.* vs. *Mercier*, Q. B. 1892, 1 Que. 541.

XI. INDICTMENT — OBJECTIONS TO. (See ART. 629 C. C.)

If there is a total omission in the indictment, so that it charges no offence in law, the verdict is no cure. *Reg.* vs. *Lynch*, Q. B. 1876, 20 L. C. J. 187; *Reg.* vs. *Carr*, Q. B. 1872, 26 L. C. J. 61.

XII. POLYGAMY. (See ART. 278 C. C.)

The mere fact of co-habitation between two persons, each of whom is married to another person, will not sustain a conviction under R. S. C., ch. 161, as amended by 53 Vic., ch. 37, sec. 11. *Reg.* vs. *Labrie*, Q. B. 1891, M. L. R., 7 Q. B. 211.

XIII. RECEIVING STOLEN MONEY. (See ART. 314 C. C.)

Held, a conviction for feloniously receiving a sum of money knowing it to have been stolen is good, though the person from whom the prisoner received the money was the proper keeper of it in his capacity of bailee, if at the time when the bailee received the money he intended to misappropriate it, and the prisoner knew that it had been so misappropriated when he received it from the bailee. A conviction for unlawfully receiving stolen money is good, notwithstanding the fact that the prisoner was part owner of the money for an undivided and indefinite share, it being the undivided property of heirs of whom he was one as representing his wife. *McIntosh* vs. *Reginam*, Supreme Ct. 1891, 23 Can. S. C. R. 180, affirming Q. B., 2 Que. 357.

XIV. SPECIAL PLEAS. (See ART. 631 C.C.)

Where a coroner's jury returned a verdict of accidental death, a defendant who was afterwards indicted for the homicide was not entitled to plead *autrefois acquit* on the strength of the verdict of the coroner's jury. *Reg.* vs. *Labelle*, Q. B. 1892, 2 Que. 289.

XV. SUMMARY CONVICTIONS—EVIDENCE—CERTIORARI.

Under the Criminal Code of Canada, the evidence adduced by either party, in summary convictions, must be reduced to writing, and a *certiorari* will lie when this formality

has not been complied with, notwithstanding right of appeal. *Denault* vs. *Robida*, S. C. 1894, 1 Rev. de Jurisprudence 21.

XVI. THEFT BY MISAPPROPRIATION. (See now ART. 310 C. C.)

Larceny as a Bailee, 32-33 Vic., ch. 21, sec. 3—Deposit of Sum of Money—Evidence.—The prisoner was indicted for larceny, as a bailee, of a sum of money. The complainant produced a receipt, taken at the time of the deposit in the hands of the prisoner, by which it appeared that the deposit was made *en attendant le paiement qu'il pourrait faire d'une même somme à R. A. Benoit—Held*, that the receipt implied that the prisoner was to pay a similar sum, and not actually the same pieces of money, and that there was no larceny. That parol testimony could not be admitted to vary the nature of the transaction. *Reg.* vs. *Berthiaume*, 1886, M. L. R., 3 Q. B. 143.

XVII. VAGRANCY.

1. Being drunk is not an offence under clause of Art. 207 Crim. Code. The offence consists in causing a disturbance by being drunk. *Ex parte Despatie*, S. C. 1886, 9 L. N. 387.

2. A city carter who, contrary to a city ordinance, loiters on the street near the entrance of a hotel and solicits passengers to hire his cab, but who does not obstruct passengers, is not within clause (*e*) of Art. 207. *Smith* vs. *Reginam*, Q. B. 1888, M. L. R., 4 Q. B. 325.

CROWN.

I. ATTORNEY-GENERAL.
II. CLAIMS OF.
III. CLERK OF THE CROWN. 1-3.
IV. CONFISCATION. 1-2.
V. CONTRACTS OF. 1-4.
VI. ESCHEAT. 1-2.
VII. HYPOTHEC OF. 1-3. See under title "HYPOTHEC."
VIII. INTEREST.
IX. INJUNCTION AGAINST.
X. LAW STAMPS.
XI. LIABILITY OF—CUSTOMS.
XII. PRIVILEGE OF. See under title "PRIVILEGE."
XIII. PREROGATIVES OF. 1-2.
XIV. REGISTRATION.
XV. RIGHT OF REVIEW.
XVI. RIGHTS OF CREDITORS.
XVII. TAXES. See under title "TAXATION."
XVIII. TRANSFER OF CLAIM AGAINST.

I. ATTORNEY-GENERAL.

In all suits in this province, at the instance of the Crown, the Attorney-General of Quebec has a right to represent the Crown, although the money claimed may really belong to the Dominion Government. *Monk* vs. *Ouimet*, Q. B. 1874, 19 L. C. J. 71, reforming judgment of S. C., 17 L. C. J. 57.

II. CLAIMS OF. (See ART. 1203 C. C.)

Where the king claims possession of a piece of land in right of the Crown, the defendant must plead title and prove it. *Rex* vs. *Lelievre*, K. B. 1822, 2 Rev. de Lég. 336.

III. CLERK OF.

1. The provisions of sec. 72 of ch. 77 of the Cons. Stat. of L. C. do not debar a Clerk of the Crown, being a Queen's Counsel, from appearing in open court and conducting a case on behalf of the Crown, but must be construed to mean that the person holding the office of Clerk of the Crown cannot practice for individuals. *Regina* vs. *Lebœuf*, Q. B. 1865, 9 L. C. J. 197, 15 L. C. R. 291.

2. *Semble*, also that the above section has the same application to a Clerk of the Crown not *being* a Queen's Counsel. (*Ib*.)

3. The duties and powers of the Clerk of the Crown in cases of criminal information are analogous to those of the Master of the Crown Office in England. *Ex parte Gugy*, Q. B., 9 L. C. R. 51, 8 L. C. R. 353.

IV. CONFISCATION.

1. A person condemned to death in the Province of Quebec forfeits his property to the Crown as represented by the Provincial Legislature, and not the Dominion Parliament. Such property must first be applied to the payment of the debts of the condemned party. *Dumphy* vs. *Kehoe*, S. C. 1891, 21 R. L. 119, and *Gauthier* vs. *Joutras*, S. C. 1869, 1 R. L. 473, as to the latter part of the holding.

2. But where goods were confiscated for defrauding the revenue laws—*Held*, that the landlord on whose premises the goods were

seized had not a prior lien for his privilege as against the Crown. *Thompson* vs. *Rasconi*, Q. B. 2 Que. 483, reversing S. C. 1892, 1 Que. 307.

V. CONTRACT—INTERPRETATION OF STATUTES—DOMINION ELECTIONS' ACT, 1874.

1. This was an action at the suit of the Crown to recover $352.20 from the defendants, due upon a contract for the carriage of passengers between certain stations on the Intercolonial Railway, which is owned and operated by the Government of Canada. The defendants by their pleas admitted the contract and its performance by the Crown, but sought to avoid their liability by alleging the passengers were carried on *bons*, and the action should have been brought upon such *bons* and not upon the agreement set out in the information; the contract was for the carriage of voters to attend the nomination proceedings at an election then pending, with intent to corruptly influence such voters at such election, and was illegal and void under the provisions of secs. 100 and 122 of the Dominion Elections Act, 1874. A demurrer to these pleas was filed on behalf of the Crown—*Held*, that the defendants having admitted the breach of contract, their liability was not in any way affected by the fact the passengers were carried on *bons* signed by one, and not by all of the defendants; and the cause of action was properly averred in the information. Demurrer allowed. *Regina* vs. *Pouliot*, Exchequer Ct. 1888, 12 L. N. 31.

2. The Crown is not bound by section 100 of Dominion Elections Act, 1874 (37 Vict., c. 9), which avoids every executory contract, promise or undertaking in any way referring to, arising out of, or depending upon any election under the Act, even for the payment of lawful expenses or the doing of some lawful act; or by section 122 thereof, which enacts that all persons who have any bills, charges or claims upon any election shall send in such bills, charges or claims within one month after the day of the declaration of the election to the agent of the candidate, otherwise such persons shall be barred of their right to recover such claims. (*Ib.*)

3. The language of the 46th clause of the 7th section of the Interpretation Act (Rev. Stats. Can., ch. 1), which enacts: "that no "provision or enactment in any Act shall "affect in any manner or way whatsoever the "rights of Her Majesty, Her heirs or succes-"sors, unless it is expressly stated therein that "Her Majesty shall be bound thereby," is not to be construed by reading into the Act the exception to the common law rule, that the Crown is not bound by a Statute unless expressly mentioned, which exception is laid down by Lord Coke in the *Magdalen College case* (11 Rep. 74b), viz.: that the King "is "impliedly bound by Statutes passed for the "general good, the relief of the poor, the "general advancement of learning, religion "and justice, or to prevent fraud, injury or "wrong." (*Ib.*)

4. *Quære:* Does the clause in the Interpretation Act (Revd. Stats. Can., ch. 1, clause 46, s. 7) preclude the Crown from being bound by a Statute in which it is included by necessary implication only? (*Ib.*)

VI. ESCHEAT.

1. I. died in the Province of Quebec without heirs and without will. Under 637 of the Civil Code his estate devolved to the Crown. Shortly after his death a curator to the vacant estate was appointed, who took possession of the property. The Attorney-General of the Province then instituted action to recover the property from the curator. The Attorney-General of the Dominion, acting on behalf of the Crown, petitioned to be allowed to intervene and claim the estate. After contestation the claim was allowed by the Superior Court, and the case being appealed—*Held*, reversing the judgment of the Court below (1 Q. L. R. 177), that an escheat was one of the sources of revenue, which, as a minor prerogative of the Crown, was yielded up to the respective provinces now confederated into the Dominion of Canada, prior to the union of the provinces of Canada, Nova Scotia and New Brunswick. *Attorney-General of the Province of Quebec* vs. *Attorney-General of the Dominion of Canada*, Q. B. 1876, 2 Q. L. R. 236, and see *Attorney-General for Ontario* vs. *Mercer*, 8 App. Cas. 767, to same effect.

2. And *held*, also, that such escheat, prior to the union, formed part of the revenue of the respective provinces in which they arose, and that all territorial Crown rights and prerogatives possessed by the late provinces of Canada, Nova Scotia and New Brunswick, before the union thereof into the Dominion of Canada have been by the B. N. A. Act given to the provinces of Ontario, Quebec, Nova Scotia and New Brunswick. (*Ib.*)

VII. HYPOTHEC OF. (See under title "HYPOTHEC.")

1. The legal hypothec of the Crown in France was not created by the ordinance of 1669, that ordinance being merely declaratory of the jurisprudence existing prior to the creation of the *Conseil Supérieur de Québec*. *Monk* vs. *Ouimet*, Q. B. 1874, 19 L. C. J. 71, reforming S. C., 17 L. C. J. 57.

2. The legal hypothec of the Crown in respect of moneys collected by the prothonotary of the S. C. was sufficiently secured by the registration of a bond given by the prothonotary in 1841, when prothonotary of the Court of K. B., and registered in 1845, without any description of the immoveable affected. (*Ib.*)

3. The bond given as above covered all moneys collected by the prothonotary of the S. C., even fee funds created long after the making of the bond, but did not cover moneys collected by him as clerk of the Circuit Court. (*Ib.*)

VIII. INTEREST.

The Crown can recover interest where a private individual would be entitled to it, as in an action for money paid under a written contract, on account of a third person, in which it may be recovered from the date of service of process. *Attorney-General* vs. *Black*, K. B. 1828, Stuart's Rep., p. 324.

IX. INJUNCTION AGAINST.

There is no right of injunction against the Crown, or the executive acting through its duly appointed officers. *Joly* vs. *MacDonald*, Q. B. 1879, 10 R. L. 391.

X. LAW STAMPS.

Proceedings on behalf of the Crown are exempt from paying stamps. *Ostell* vs. *Blake*, Q. B. 1877.

XI. LIABILITY OF—CUSTOMS.

The Crown is not responsible for goods stolen from examining warehouse. *Corse* vs. *The Queen*, Exchequer Ct., 1892, 15 L. N. 131.

XII. PRIVILEGE OF—MINOR PREROGATIVE. (See under title "PRIVILEGE.")

The privilege of the Crown on property of its debtor in this province is a minor prerogative, and is governed by the law of Quebec and not by the law of England. *Monk* vs. *Ouimet*, Q. B. 1874, 19 L. C. J. 71, reforming S. C., 17 L. C. J. 57.

XIII. PREROGATIVES.

1. In the colonies, the Royal Prerogative can be restricted in all matters which do not relate to fundamental principles of sovereign rights, where laws exist in the colony formally limiting such prerogative. *Fraser* vs. *Abbott*, S. C. 1871, 3 R. L. 29.

2. Where the greater rights and prerogatives of the Crown are in question, recourse must be had to the public law of the empire, by which alone they can be determined, but where its minor prerogatives and interests are in question they must be regulated by the established law of the place where the demand was made. *Attorney-General* vs. *Black*, K. B. 1828, S. R. 324.

XIV. REGISTRATION—ART. 2084 C. C. (See under title "PRIVILEGE.")

The privilege granted to the Crown by 4 Vic., cap. 30, of preserving its hypothecary rights arising out of letters patent, without registering the same, applies only to the immoveable property granted by such letters patent and no other. *Morrin* vs. *Smith*, S. C. 1856, 6 L. C. R. 279.

XV. RIGHT OF REVIEW.

No right of revision exists in favour of the Crown when the right of appeal is denied by law. *Attorney-General* vs. *Corporation of Compton*, S. C. 1874, 15 L. C. J. 258.

XVI. RIGHTS OF CREDITORS.

The defendant in the case was curator to the vacant estate of an illegitimate person who had recently died, and the Attorney General on behalf of the Crown, by the opposant, prayed that the defendant be condemned to render an account of his administration as such curator, and that all the property moveable and immoveable belonging to the estate be delivered to the Crown *à titre de desherénee* or *de batardise*. The intervening party claimed to the extent of £50,000 against the estate, and prayed that the estate be not delivered to the Crown until they had had an opportunity of establishing their claims and obtaining satisfaction for them in so far as the estate sufficed for the purpose—*Held*, that they had a right to make good their claims as prayed, and to

have an account rendered by the defendant as curator to the estate. *Attorney-General* vs. *Price*, S. C. 1858, 9 L. C. R. 12.

XVII. TAXES. (See under title "TAXATION.")

The Crown is assessable for municipal taxes on property occupied by it as tenant. *Corp. of Quebec* v. *Leaycroft, & Attorney General*, intervening, S. C. 1880, 7 Q. L. R. 56.

XVIII. TRANSFER OF CLAIM AGAINST.

Consent of latter not necessary—C. C. P. 886a.—*Held*, claims against the Crown may be transferred without the express consent of the latter, and such transfers are legal and binding, the intent of Arts. 886*a et seq.* C. C. P. being to place the province generally on a similar footing with private individuals as to the recovery of claims against it. *Banque Jacques Cartier* vs. *Govt. of Quebec*, S. C. 1893, 3 Que. 360; and see *Pacaud* vs. *Bourdages*, S. C. 1854, Montreal Condensed Reports, p. 123.

CROWN LANDS AND TIMBER. (1)

I. HYPOTHEC ON. See title "HYPOTHEC."

II. LOCATION TICKET—CONDITIONS. 1-10.

III. SEIGNIORIAL LANDS ACQUIRED BY CROWN. 1-2.

IV. TIMBER CUTTING LICENSES. 1-2.

V. TIMBER DUES—PRIVILEGE FOR.

VI. TRANSFER OF RIGHTS UNDER LETTERS PATENT.

I. HYPOTHEC ON. (See under title "HYPOTHEC," and 58 Vic. Que., ch. 40.)

II. LOCATION TICKET.

1. Cancellation.—32 Vict. (Q.), c. 12, secs. 20 and 26.—Powers of Commissioner.—The powers given to a commissioner of Crown Lands to annul a location ticket under 23 Vic., cap. 2, sec. 20, are judicial, and before exercising such powers proceedings must be had to establish the default of the occupant under such ticket. *Lavigne* vs. *Dion*, C. R. 1872, 2 R. C. 237, Q. B. 1872, 4 R. L. 390.

2.—And *held*, also, that such power of cancelling tickets is vested in the commissioner only, and not in his deputy or substitute. (1) (*Ib.*)

3. —— The cancellation can only be made after one year's notice to the occupant. (2) (*Ib.*)

4. —— The clearing of an acre or more of land on a government lot, without residing thereon, is not an occupation in the meaning of the Act to encourage colonization, 31 Vic., ch. 20.

The fact of occupying and dwelling upon such lot, but without a government permit, is not an occupation within the meaning of the above Act, and does not therefore confer any of the privileges thereof.

A mere verbal authorization to occupy such lands, given by an agent of the Crown Lands Department, is not a permit under 33 Vic. *Vigneau* vs. *Pontbriand*, Mag. Ct. 1877, 7 R. L. 702.

5. Default to perform Settlement duties—Cancellation of License— 23 VICT. c. 2, ss. 18 and 20; 32 VICT. (Q), c. 11; 36 VICT. (Q.), c. 8.—A location ticket of certain lots was granted to G. C. H. in 1863. In 1874, the Commissioner of Crown Lands registered a transfer of the location ticket from G. C. H. to respondent. In 1878, the Commissioner cancelled the location ticket for default to perform settlement duties—*Held*, that the registration by the Commissioner, in 1874, of the transfer to respondent was a waiver of the right of the Crown to cancel the location ticket for default to perform settlement duties, and the cancellation was illegally effected. *Holland* vs. *Ross*, Supreme Ct. 1890, 19 Can. S. C. R. 566, reversing Q. B., M. L. R., 2 Q. B. 316.

6. Bona fide Settler. — Letters Patent.—C. C. P. 1034.—*Held*, that the facts proved in the present case, showing the defendants to have been *bona fide* settlers, were sufficient to support the intervention of the Attorney-General asking for the annulment of letters patent relied on by plaintiff as having been granted in error. *Sturton* vs. *Lessard*, C. R. 1892, 1 Que. 121.

7. (Per *Casault J.*, dissenting [and see *Holland* vs. *Ross*, Supreme Ct. *Supra* No. 5]. Where the Crown issues letters patent without therein exacting the fulfilment of certain con-

(1) Department of Crown Lands and matters connected therewith, secs 1236 *et seq.* R. S. Q., as amended by 52 Vict. (Que.), ch. 16; 55-56 Vict. (Que.), ch. 18; 58 Vic. (Que.), ch. 18 (Timber).
See "Twelve Children Act," 55-56 Vic., ch. 19, as amended by 58 Vic., ch. 17.

(1) But see now Art. 1244 R. S. Q.
(2) But see now Art. 1287, 1288, R. S. Q.

ditions of settlement as required by the law, such omission must be regarded as a waiver on the part of the Crown of such conditions. And in this case the legal adjudication of the land to the plaintiff could not be revoked; such sale between the government and the plaintiff as highest bidder gave rise to a contract which could not be voided except for error, fraud, violence or fear [C. C. 991], which did not exist in the present case. (*Ib.*)

8. Cancellation — Condition of License.—R. S. Q., Art. 1269, 1273, 1283 *et seq.* The right to cancel a location ticket is an absolute one, which can always be exercised by the commissioner of Crown Lands where the grounds exist. But such cancellation must be preceded by the notice and publication of the cancellation by the local agent sixty days before the cancellation takes effect.

But where a location of land made by a local agent is repudiated by the commissioner, this is not equivalent to the cancellation of a grant regularly made, but is merely the refusal of the commissioner to ratify the location ticket given by the agent; in such case notice is not necessary, and the refusal to ratify renders the location ticket void. *Rocheleau* vs. *Lacharité*, Q. B. 1892, 1 Que. 536.

9. —— If, before the time allowed for the performance of the conditions of settlement, the location ticket is cancelled by error, the commissioner can revoke such cancellation and put the party in his former position, and disallow a second location ticket granted in the interval by the local agent. (*Ib.*)

10. —— The holder of a location ticket thus dispossessed by error has an action of *complainte* and *réintégrande* — such ticket being *prima facie* evidence of title and possession under Art. 1270 R. S. Q. (*Ib.*)

III. SEIGNIORIAL LANDS ACQUIRED BY THE CROWN.

1. Lands acquired by the Crown in a fief in L. C. became reunited to the *Domaine* of the Crown as *seigneur suzerain*, and were absolutely freed from all future feudal rights in favor of the seignior of the *fief*, and the payment of the *droit d'indemnité* by the Crown extinguished all feudal rights whatsoever, and, therefore, a subsequent sale of these lands by the Crown did not give a right to *lods et ventes* from the purchaser by the seignior of the *fief*. *Sœurs Dames, &c., de l'Hotel Dieu de Montreal* vs. *Middlemis*, P. C. 1878, 22 L. C. J. 149.

2. Rights of Grantees.—Petitory action was brought against the transferee of a person to whom land was granted by the Crown in the district of Gaspé, by virtue of a statute passed in 1819, 59 Geo. III, cap. 3, for the purpose of granting land to settlers by means of commissioners, etc.—*Held*, confirming the judgment of the Court below, that the report of the commissioners so appointed was sufficient to vest in the party claimant the property mentioned therein without the necessity of the issue of letters patent, the title of the claimant being perfect without these. *Millar* vs. *Millar*, Q. B. 1864, 15 L. C. R. 229.

IV. TIMBER-CUTTING LICENSE.

1. The "location ticket" of the plaintiff in this case being virtually a sale conveying ownership, he has a right to recover the value of timber cut by others upon the land, notwithstanding the condition that he shall not cut the timber himself; even if the location ticket were a mere license of occupation and did not convey ownership, the plaintiff being allowed by law to "maintain suits in law or equity "against any wrong-doer or "trespasser as effectually as he could do un- "der a patent from the Crown," would still have a right to recover the value of the timber, notwithstanding the said condition. *Dinan* vs. *Breakey*, C. R. 1881, 7 Q. L. R. 120.

2. Where the plaintiffs had obtained a location ticket from the Crown of lands within the ambit of a forest reserve proclaimed by the Crown under the Forest Act of 1883, which prohibited any grant of them by the Crown—*Held*, that, under sec. 16 of the Public Lands' Act of 1869 (32 Vic., c. 11), the plaintiffs were in possession of land for valuable consideration given by them to the Crown, and (whatever the infirmities of the Crown's title) had a right under the injunction Act of 1878 to be protected against the defendants who held a timber-cutting license from which the plaintiff's land was excepted. *Gilmour* vs. *Mauroit*, P. C. 1889, 14 App. Cas. 645, confirming Q. B. 1887, M. L. R., 3 Q. B. 449, 31 L. C. J. 232. Reported *sub-nom.* *Gilmour* vs. *Paradis*.

V. TIMBER DUES—PRIVILEGE FOR.

A seizure made by the government through its agents, without any writing, of timber in the hands of possessors without legal title, is absolutely null.

Where the dues are not paid, the Crown has a right to sieze the timber in whatever hands it passes, and no transfer or alienation of such timber could deprive the Crown of its privilege for such dues. *Rivard* vs. *Belle*, S. C. 1866, 1 R. L. 571

VI. TRANSFER OF RIGHTS UNDER LETTERS PATENT.

An agreement to cede rights under letters patent will be enforced by judgment which will have the same force and effect as a cession of such rights. *Leblanc* vs. *Pellerin*, Q. B. 1857, 7 L. C. J. 113.

CURATE.

I. Baptism.
II. Liability of.
Marriage. 1-3.
Refusal of the Sacrament. 4.
III. Notice of Action. 1-3 (and see No. II.—3 *Supra*).
IV. Remuneration of. 1-2.
See also Burial.
" Church.
" Libel and Slander.
" Privilege.
" Tithes.

I. BAPTISM.

Curates, priests or ministers ministering to churches, congregations or religious societies, authorized to keep registers of civil status, are only bound to register baptisms, etc., performed by them, and are not bound to register the births of children which have not been baptized by them. *Davignon* vs. *Lesage*, S. C. 1893, 3 Que 1.

II. LIABILITY OF.

1. Marriage—Publication of Banns.—Consent of Parents.—A curate who celebrates the marriage of a girl during minority, without publication of banns and without the consent of her parents, in virtue of a dispensation from his bishop, is liable for damages for so doing. *Larocque* vs. *Michon*, Q. B. 1858, 2 L. C. J. 267, reversing S. C., 1 L. C. J. 187.

2. —— Without Dispensation—Interference of Curate—Action of Damages—Notice.—Art. 22 C. P. C.—Plaintiff's wife, having represented to the defendant, the vicar of St. Bridget's Roman Catholic church, at Montreal, that she had married her husband without a dispensation from the Church, although she was related to him, the defendant with the authorization of the curate of his parish made inquiries, and having ascertained that the spouses were related within the fourth degree of the collateral line, he obtained from the religious authorities without expense to the plaintiff the necessary dispensation. Thereupon the defendant called upon the plaintiff, and with his permission advised him, in the presence of his brothers-in-law, to rehabilitate his marriage; and, upon his refusal to do so, informed him that the marriage was null and void, that his children would be considered illegitimate, and that he should cease to live maritally with his wife until his marriage was rehabilitated—*Held*, that the defendant in seeking to bring about the rehabilitation of the plaintiff's marriage, was acting within his functions as priest of the parish inhabited by the spouses and acting under the authority of the curate of the parish, and was therefore not liable in damages to plaintiff for his action on the occasion complained of. But, as the defendant used unnecessarily severe language toward the plaintiff as a means of persuading him, he would not be awarded costs against him. *Pichette* vs. *Desjardins*, S. C. 1893, 3 Que. 436.

3. —— The defendant was not entitled to a month's notice of action under art. 22 C. C. P., as he was not acting in the quality of public officer. (*Ib.*)

4. Refusal of Sacrament.—Where a person attaches an importance to the sacraments, such that their refusal to him would affect his honor and reputation, he, in order to have a valid complaint, must have conformed to the requirements of the Church as to conditions precedent to receiving such sacraments, such as the payment of supplementary contributions imposed by an ordinance of the Church. The administration of the sacraments is a matter appertaining to the ecclesiastical authorities, but the participation in such sacrament is a right accruing to every member of the Catholic communion, and their administration is not subject to the arbitrary caprices of the clergy administering. But when there is a mere refusal of a sacrament without any accompanying legal damage to the plaintiff, the remedy of the plaintiff must be sought before the ecclesiastical authorities, the courts having no jurisdiction. *Davignon* vs. *Lesage*, S. C. 1893, 3 Que. 1.

III. NOTICE OF ACTION.

1. In an action against a curate for refusal to baptize, he is not entitled to a month's notice of action under Art. 22 C. C. P. *Davignon* vs. *Lesage*, S. C. 1893, 3 Que. 1.

2. Nor in an action of damages against a curate for urging a rehabilitation of a marriage against the express wish of the plaintiff and to his damage. *Pichette* vs. *Desjardins*, S. C. 1893, 3 Que. 436.

3. A curé cannot be sued in damages for marrying a minor without the consent of her parents unless notice of action be served on him at least one month before the issue of the writ of summons. *Robert* vs. *Bean*, Q. B. 1869, 13 L. C. J. 225, 1 R. L. 150.

IV. REMUNERATION OF. (See under title "Tithes.")

1. The remuneration of curates is fixed on a uniform basis in all the parishes of the Province by means of tithes and emoluments, and these two modes cover all the services rendered by them; a curate cannot, of his own authority, claim anything beyond these, and the administration of extreme unction is essentially gratuitous. *St. Aubin* vs. *Leclaire*, S. C. 1885, 13 R. L. 590, M. L. R., 2 S. C. 4.

2. Contra.—The services of a curate are of a mixed kind; they relate both to spiritual and the temporal, so that a curate can recover from his parishioners, who are not subject to pay tithes, properly so called, a certain sum for services rendered. *Courtemanche* vs. *Maillour*, Mag. Ct. 1879, 10 R. L. 195.

CURATOR.

I. Accounting. 1-2. (See also title "Account, Accounting.")

II. Actions against. 1-2. (See also title "Absence.")

III. Actions by. 1-4. (See also title "Absence.")

IV. Appointment. (See also title "Absence.")

Father—Interdicted person. 1.
Interdiction. 2.
Mother—Son. 3.
Non-resident. 4-5.
Registration of Curatorship.—Interdiction. 6.

V. Fiduciary Relations. 1-2.

VI. Liability for Trust Funds. 1-3.

VII. Powers of.

Removal of Interdicted Person.—1.
Substitution—Capital—Interest. 2.
Vacant Estate—Contestation of Opposition. 3.
Vacant Estate.—Discharge of Mortgage. 4.

VIII. Powers of Ward.

IX. Removal of. 1-2.

X. To Abandonment of an Immoveable.

See also Interdiction.
" Insolvency.
" Absence, etc.

I. ACCOUNTING—309, 343 C. C. (See also under title "Account, Accounting.")

1. A curator to a person interdicted for insanity is bound, upon demand of the relatives of the interdicted person, or of any other interested parties, to render from time to time a summary account of his management. *Francis* vs. *Clement*, S. C. 1884, 20 R. L. 5; *Robillard* vs. *Laramée*, S. C. 1885, 13 R. L. 668.

2. Where, after judgment had been obtained against the defendant in his capacity of curator to a vacant estate, action was brought against him personally to compel him to render an account—*Held*, reversing the judgment of the Court below, that such action would lie, notwithstanding that, in his quality of curator, he was not made a party to the cause. *Valleau* vs. *Oliver*, Q. B. 1852, 2 L. C. R. 462, 3 R. J. R. Q. 319.

II. ACTIONS AGAINST. (See under title "Absence.")

1. The curator to a vacant estate cannot be sued by a third party to whom he has assigned his claim against such vacant estate, inasmuch as the curator cannot sue himself or be sued by his own assignee. *Tessier* vs. *Tessier*, S. C. 1850, 2 L. C. R. 63, 3 R. J. R. Q. 92.

2. A plaintiff who has obtained judgment against a defendant in his quality of curator to a substitution, will not be allowed to take supplementary conclusions by petition, setting up a return of *nulla bona* against the defendant *es qual*, and praying for judgment against defendant personally. *Warner* vs. *Gerrard*, S. C. 1856, 6 L. C. R. 485, 5 R. J. R. Q. 150.

III. ACTIONS BY. (See also under title "ABSENCE.")

1. Art. 144 C. C. P.—In an action brought by a curator to the vacant estate of a party deceased—*Held*, that the filing of the deed of curatorship was sufficient evidence of the death of the party, more particularly as the defendant had not expressly denied the quality assumed by the plaintiff, or the fact of the death of the party deceased. *Pemberton et al.* vs. *Demers*, S. C. 1851, 1 L. C. R. 308, 3 R. J. R. Q. 16.

2. Action was brought by the curator to the vacant estate and succession of one E. B. for the benefit of the widow and children by a former marriage to recover $50,000 for loss and damage sustained by reason of the drowning of the said E. B. at the Champlain market wharf in the city of Quebec by the alleged fault and neglect of the defendant in not placing a light, fence or watchman on a certain slip undergoing repair there. Demurrer filed on the ground that the plaintiff in his said quality was not competent to bring such an action—*Held*, dismissing the demurrer, that the action would lie in the name of the curator, though by the statute the action is to be brought for the benefit of the wife, husband, parents and children of the deceased, and any damages recovered are to be divided among them. *Smyth* vs. *The Corporation of the City of Quebec*, S. C. 1867, 17 L. C. R. 347.

3. A curator to an emancipated minor cannot sue in his own name. If he does, the action will be dismissed upon exception to the form, but without costs. *Dufour* vs. *Tremblay*, S. C. 1889, 12 L. N. 105.

4. A curator to the estate of an absentee who contests and defends is *personally* liable for the costs of the plaintiff's action. *Whitney* vs. *Brewster*, S. C. 1855, 4 L. C. J. 298. And see *St. Jacques* vs. *Parent*, C. Ct. 1868, 2 R. L. 91, 95.

IV. APPOINTMENT. (See also under title "ABSENCE," and see "INTERDICTION.")

1. **Father—Interdicted Person.**—The father will be named curator to his interdicted son in preference to a stranger. *Dufaux* vs. *Robillard*, Q. B. 1876, 7 R. L. 470, 20 L. C. J. 288.

2. **Interdiction.**—A curator can be appointed to care for the person and property of an individual struck with paralysis and rendered incapable of managing his business, without it being necessary to have the individual interdicted. *Ex parte Bury*, S. C. 1885, 13 R. L. 477.

3. **Mother—Son.**—A mother may be appointed curatrix to her absent son and administer his estate. *Valiquette Exp.*, S. C. 1884, 7 L. N. 70.

4. **Non-Resident.**—The curator in the case of a judicial abandonment of property must be domiciled or resident within the Province. A non-resident is ineligible for such office. *Bate* vs. *Lang*, S. C. 1886, 9 L. N. 393.

5.—— And so, in the case of an interdicted person. *Legge* vs. *Legge*, S. C. 1879, 24 L. C. J. 83.

6. **Registration of Curatorship—Interdiction.**—A curator to an interdicted person is not bound to register his curatorship before bringing an action in his quality of curator. The law does not require such registration. *Symes* vs. *Farmer*, S. C. 1882, 16 R. L. 297.

V. FIDUCIARY RELATIONS.

1. A curator to a substitution cannot, through a third person, become the purchaser of immoveables of the substitution sold by judicial sale. *Benoit* vs. *Benoit*, Q. B. 1876, 8 R. L. 425; *Mackenzie* vs. *Taylor*, Q. B. 1868, 9 L. C. J. 113.

2. In any litigation between the party interested and the curator in connection with such illegal purchase, it is not necessary that all the parties to the transaction should be in the cause. *Mackenzie* vs. *Taylor*, Q. B. 1868, 9 L. C. J. 113.

VI. LIABILITY FOR TRUST FUNDS.

1. The law allows a curator six months to find an investment of trust funds, but the curator is liable to pay interest on all funds proved to have been applied to his own use, even within the six months. *Mackenzie* vs. *Taylor*, Q. B. 1868, 9 L. C. J. 113.

2. Where a curator deposits the trust funds to his own private credit in a bank, and afterwards checks out the funds, he will be presumed to have applied such funds to his own use in the absence of proof to the contrary. (*Ib.*)

VII. POWERS OF.

1. **Removal of Interdicted Person.**—A curator to an interdicted person cannot re-

move such person (although he be a lunatic or insane) from his domicile to a hospital or asylum without the authority of the Court acting on the advice of his relations or friends. *Exp. Cahill*, Q. B. 1874, 18 L. C. J. 270.

2. Substitution — Capital — Interest. — A curator to a substitution has no right of action to recover from a curator in whose stead he has been appointed any moneys due by the latter and belonging to institutes. *Dorion* vs. *Dorion*, Supreme Ct. 1885, 13 Can. S. C. R. 193; affirming Q. B. 1885, M. L. R., 1 Q. B. 483.

3. Vacant Estate — Contestation of Opposition. — A curator to a vacant succession has not legal quality to contest an opposition on the ground that the deed on which it is based was executed in fraud of creditors and when the debtor was notoriously insolvent, and to ask that the deed be declared inoperative, null and void, and be set aside. *Lamarche* vs. *Pauze*, Q. B. 1883, 27 L. C. J. 347, 3 Dorion's Rep. 265.

4. Vacant Estate — Discharge of Mortgage. — A curator to a vacant estate has *prima facie* the right to discharge mortgages. *Gray* vs. *Dubuc*, Q. B. 1876, 2 Q. L. R. 234.

VIII. POWERS OF WARD.

A party to whom a curator has been appointed cannot bind himself alone in a contract while the curatorship still subsists. *Emerick* vs. *Paterson*, S. C. 1857, 7 L. C. R. 239, 5 R. J. R. Q. 218.

IX. REMOVAL OF.

1. The curator to an interdicted person may be removed by his consent and the consent of his *parents*, or upon petition by the next of kin on sufficient cause shown, and on *avis de parents* without his consent. *Coté* vs. *Pageot*, K. B. 1812, 2 Rev. de Leg. 438.

2. The curatorship will not be set aside at the instance of the brother-in law of the interdicted party, who shows no interest in the matter, or that any fraud was practiced at the time of the appointment of the curator. *Marois* vs. *Bilodeau*, S. C. 1862, 16 L. C. R. 169.

X. TO ABANDONMENT OF AN IMMOVEABLE.

His functions cease *ipso facto* by the payment of the debt in the suit in which he was appointed. *Moncatel* vs. *Ross*, C. Ct. 1882, 27 L. C. J. 218; *Trudel* vs. *Bouchard*, S. C. 1883, 27 L. C. J. 218.

CUSTOM OF TRADE.

A custom of trade to be binding must be uniform, universal, known, and consecrated by long usage. *Forest* vs. *Berenstein*, C. R. 1882, 8 Q. L. R. 262, and *MacGillivray* and *Parker*, S. C. 1883, 6 L. N. 308.

A custom of trade has no force as against a formal provision of the law. *Smardon* vs. *Lefebvre*, S. C. 1884, M. L. R., 1 S. C. 387.

In action by a parish bedelle for three quarts of wheat, or three quarters of a dollar, which he had been accustomed to receive from each member of the parish annually, in accordance with a resolution passed at a meeting of the parishioners many years previous—*Held*, reversing the judgment of the Court below, that such a custom, legally followed from time immemorial, must be regarded as having the force of law, and as obligatory on the parties subject to it until another mode of remuneration shall have been legally substituted. *Martin* vs. *Brunelle*, Q. B. 1869, 1 R. L. 616.

CUSTOMS. (1)

I. Award of Arbitrators.
II. Collector.
Action against. 1-2.
Notice of Action against. 3.
Sale of Goods by. 4.
III. Duties.
Appraisement. 1.
Evidence. 2.
Estimating Value. 3-4.
Realization of. 5.
IV. Fines.
V. Forfeiture. 1-3
VI. Fraudulent Entry. 1-4.
VII. Liability for Seizure by.
VIII. Notice of Claim.
IX. Officers.
Liability of. 1.
Voting at Elections. 2.
X. Proof of Importation.
XI. Revendication. 1-3.

(1) Now governed by Customs Act R. S. C., ch. 32, as amended by 51 Vic., ch. 14 (amendments extensive).
51 Vic., ch. 14 (amendments extensive).
52 Vic., ch. 14 " "
54-55 Vic., ch. 44.
58-59 Vic., ch. 22.

I. AWARD OF ARBITRATORS.

Action was brought against the defendant, in his capacity of collector of customs, to recover four boxes of hardware detained by him for additional duty. The question that arose was as to whether the plaintiffs were entitled to deduct 10 per cent., which appeared on the face of the invoice. The matter was submitted to arbitrators, who decided that the actual cost and market value of the goods was the net amount stated in the invoice, no reference being made to the nature of the discount. The plea was that this ten per cent. was a cash discount, and not to be taken off, and that therefore the award was illegal, and not such as the law required—*Held*, dismissing the action with costs. *Darling* vs. *Lewis*, S. C. 1870, 3 L. C. L. J. 36.

II. COLLECTOR.

1. **Action against.**—An action of trespass on the case for mi-feasance can be maintained against a collector of customs for exacting a larger sum for duties than the law authorizes, unless some reasonable ground of excuse for his conduct is shown, or such facts be laid before the Court as will exclude every imputation of malice or wilful intent. *Perceval* vs. *Paterson*, K. B. 1828, Stuart's Rep. 270.

2. —— In cases of the violation of the customs laws by the officers of the port, that is, by overcharge, etc., the recourse of the importer is not by an action against the collector or his substitute, who are only officers of the Crown, but by petition of right. *Myers* vs. *Lewis*, Q. B. 1872, 2 R. C. 232.

3. **Notice of Action against.**—A collector of customs is entitled to the notice of action prescribed by ch. 17 of the Cons. Stat. of Canada, s. 91, in the case of an action to recover back from the collector moneys paid to him for duty, on condition that so much thereof as should not be legally exigible should be remitted. *Stephens* vs. *Bouthillier*, Q. B. 1864, 9 L. C. J. 309.

4. **Sale of Goods by.**—31 Vic., ch. 6.—A sale of goods by the collector of customs for non-entry is null, and confers no right on the purchaser unless the goods have been for a month previous to the sale in the customs warehouse. *Simpson* vs. *Yuile*, Q. B. 1877, 1 L. N. 31, & 22 L. C. J. 229.

III. DUTIES.

1. **Appraisement.**—31 Vic., ch. 6, sec. 45; 40 Vic., ch. 10, sec. 45.—The only recourse against the first appraisement of the collector (under ch. 17 of the Cons. Stat. of Can., sec. 33) is an appraisement by two merchants as therein prescribed, and, therefore, an importer who pays the duties exacted by the collector has no action to recover them back. *Rooney* vs. *Lewis*, C. R., 1870, 14 L. C. J. 155.

2. **Evidence.**—In an action to which the Customs Acts are applicable, it is incumbent on the importer of goods passed through the customs to prove that the duties have been duly paid, and that the requirements of the law have been fulfilled. *Lanctot* vs. *Ryan*, S. C. 1887, M. L. R. 3 S. C. 468.

3. **Estimating Value.**—31 Vic., ch. 6, secs. 30 and 31.—In estimating, for duty, the market value at the place of importation of goods imported from a foreign country, such value will be taken to be the value of such goods by a gold or other standard corresponding in value with the standard of the currency in which the duties are payable. *Atwater* vs. *Bouthillier*, C. Ct. 1863, 7 L. C. J. 285.

4. —— On principle above enunciated, goods imported from the United States should be estimated for duty by a gold standard, that being a standard corresponding in value with Canadian currency. (*Ib.*)

5. **Realization of.**—Where plaintiff, being indebted to the collector of customs for customs dues, transferred a quantity of goods as security for the payment of the debt, and the delay having expired, the collector proceeded to sell—*Held*, that he had a perfect right to do so, and that the plaintiff had nothing to complain of. *Ansell* vs. *Simpson*, S. C. 1877; 1 L. N. 64.

IV. FINES—46 VIC., CH. 12, SEC. 162.

Sec. 162 applies to the carriage of goods over land as well as to those carried by boat. *Wolff* vs. *Clarke* C. R. 1886, 30 L. C. J. 192.

V. FORFEITURE.

1. **Jurisdiction Superior Court.** 31 Vic., ch. 6.—The *onus probandi*, in cases of forfeiture of imported goods, by way of information, lies on the claimant. *Attorney-General Dorion* vs. *One box containing Jewelry* and *Rothstein*, claimant, S. C. 1864, 8 L. C. J. 130.

2. —— In cases of forfeiture such as above, the Superior Court has jurisdiction, irrespectively of the value of the goods. (*Ib.*)

3. On information filed for the condemnation of a parcel of jewelry, seized as imported into the Province in contravention of the customs laws and regulations—*Held*, that forfeiture for non-entry, or not reporting goods, would be incurred even where such goods had not been landed. *Leggett* vs. *Garrett*, Q. B. 1848, 3 Rev. de Leg. 252.

VI. FRAUDULENT ENTRY.

1. An entry at the customs by invoice, in which the goods are undervalued, is presumably a fraudulent entry. *Lyman* vs. *Bouthillier*, Q. B. 1863, 7 L. C. J. 169.

2. Where the owners in any way benefit by the entry, as by taking possession of part of the goods, they cannot question the validity of the entry. (*Ib.*)

3. When the invoice mentions, in effect, that the goods are consigned to the party making the entry, he will be held to be the consignee of such goods, within the meaning of the Customs Acts, even although the bills of lading of such goods affirm that the goods are to be delivered to other parties (the owners) or their assignees. (*Ib.*)

4. When goods have been undervalued in the invoice and entry, for the purpose of avoiding payment of part of the duties payable thereon, they are so completely forfeited that the owners are debarred from disputing the legality or proof of the seizure and sale of the goods. (*Ib.*)

VII. LIABILITY FOR SEIZURE BY.

Action under 1543 C. C. to rescind a sale of 473 chests of tea. Sale was made at Toronto on the 5th February, 1880, through a broker at Montreal, at 3¾ cents per pound duty paid, delivered in Toronto; terms cash. The declaration alleged the receipt of the goods by defendant at Montreal and non-payment of the price. The action began with an attachment of the goods in July, 1880. Plea that the goods were sold duty paid, and the duty was not paid, and the goods were seized on arrival in Montreal by the Customs authorities, and the seizure was only discharged on the 6th April, 1880; that meanwhile the defendants had resold the teas, and being unable to deliver them by the breach of contract of plaintiff they lost profits on their sale, and were liable in damages for non-delivery to the extent of $835 24, and asked that, in the event of the teas being delivered to plaintiff, they should be made subject to defendant's lien for that amount—*Held*, maintaining the seizure, that there was no proof of any default on the part of plaintiff, and he could not be held responsible. If the customs authorities were to blame in the seizure, defendants had their recourse against them. *Lambe* vs. *Hartlaub*, S. C. 1881, 4 L. N. 138.

VIII. NOTICE OF CLAIM.

40 Vic. Ch. 10.

Notice of claim for goods seized by the customs authorities must be given by the owners in writing within one month from the day of seizure. *Lawrence* vs. *Ryan*, S. C. 1883, 27 L. C. J. 289, 6 L. N. 346.

IX. OFFICERS.

1. Liability of.—Where the custom officer seized a quantity of jewellery in the store of the plaintiff as containing indecent pictures, and as having been imported contrary to the customs regulations, and it was proved that only a part of the things seized contained such indecent designs and pictures—*Held*, that the officer seizing was not liable in damages where he had acted on information duly obtained. *Saunders* vs. *Barry*, S. C. 1864, 14 L. C. R. 370.

2. Voting at Elections—*Held*, on demurrer, that section 81 of the British North American Act, which refers to the election laws of the former Province of Canada, not having made mention of the penalties imposed by C. S. C., ch. 6, against public officers voting at parliamentary elections, that these penalties no longer existed, according to the maxim *expressio unius exclusio est alterius*, and that in any case these penalties would not apply to officers of customs voting at provincial elections, as they were appointed by the federal government exclusively. *Lacroix* vs. *Delisle*, S. C. 1872, 2 R. C. 233.

X. PROOF OF IMPORTATION.

On the seizure by the customs authorities of a quantity of jewellery, containing indecent pictures, etc., seized in the store of the claimant, a demand in confiscation was made—*Held*, that it was unnecessary to prove the importation, as it would be presumed unless the contrary were proved. *Regina* vs. *Saunders*, S. C. 1864, 14 L. C. R. 367.

XI. EVENDICATION BY IMPORTER.

1. Where goods were retained by the collector of customs as forfeited under the Customs Act, 1883, and the importer seized them in the collector's hands by process of revendication, the plaintiff was entitled to an order for the delivery thereof only on making deposit with the collector of a sum of money at least equal to the full value of the goods. *Ryan* vs. *Sauche*, 1887, M. L. R., 4 Q. B. 312.

2. *Quære*, whether, pending a controversy between the importer and the Customs Department, an action of revendication will lie to revendicate goods retained by the collector as forfeited. (*Ib.*)

3. *Semble* (per Church, J.), that it is not competent for an importer to adopt this proceeding under the circumstances. (*Ib.*)

D.

DAMAGES.

I. Abatement of Nuisance.

II. Action for—Delay to Plead to.

III. Assault. 1-9.

IV. Bill of Particulars. 1-2.

V. Bite of a Dog—See also under title "Negligence."

VI. Breach of Contract. 1-2. See also *infra* "Measure of—Breach of Contract."

VII. Breach of Promise of Marriage—See also under title "Marriage."

VIII. Charivari—Burning in Effigy. 1-3.

IX. Civil Action not affected by Criminal.

X. Combinations in Restraint of Trade.

XI. Corporations acting within Scope of Statutory Powers.

XII. False Information as to Credit of Third Party.
By Mercantile Agency. 1-2.
By Friend. 3.

XIII. False Statements in Prospectus.

XIV. False Statement concerning Prevalence of Horse Disease in City by Health Officer.

XV. In Exparte Action.

XVI. Joint Action for. 1-2.

XVII. Joint and Several Liability. 1-4.

XVIII. Liability of Veterinary Surgeon.

XIX. Measure of.
Accidents. 1-2.
Action brought against Wrong Person. 3.
Assault. 4-6.
Breach of Contract.
Non inal Damages. 7-10.
Con ract for Prolongation and Opening of Streets. 11.
Non-delivery of Goods. 12-13.
Non-delivery of Carriage. 14
Non delivery of Trunk by Carrier. 15.
Non-delivery of Goods by Carrier. 16-17.
Non-delivery of Wood. 18.
Failure to return Debentures. 19.
Error in Measurement of Lot. 20.
Fee paid to Counsel. 21.
Stoppage of Grist Mill. 22.
Where Penalty provided. 23.
Contractor. 24.
Builders—Defective Plan. 25.
Builders—Defective Work. 26.
Damage to Wharf. 27.
Damage arising from bad Condition of Road. 28.
Damage to Vessel. 29.
Deterioration of Immoveable. 30-33.
Discretion of Judge. 34.
Exemplary or Vindictive. 35-44.
Illegal Attachment. 45-47.
Illegal Execution. 48.
Infringement of Copyright. 49.
Infringement of Trademark. 50.
Infringement of Patent. 51-52.

In Futuro. 53-55.
Inducing Minor to leave his Home. 56.
Interference of Appellate Courts. 57-70.
Libel and Slander. 71. And see under title "Libel and Slander."
Member of Parliament, 72.
Refusal to transfer Shares. 73.
Remoteness. 74-77.
Sale of Inferior Seed. 78.
Solatium. 79-83.
Where both Parties in Fault. 84.

XX. Neighbouring Proprietors.
Fire for Clearing Land. 1.
Blasting in Quarry. 2.

XXI. Omission to present Contribution Box in Church. 1-2.

XXII. Opening Private Letter.

XXIII. Proceedings to obtain Payment of a Debt. 1-16. See also under title "Capias."

XXIV. Public Nuisance. 1-2. See also under title "Nuisance."

XXV. Purchaser of Stolen Timber—Participation in Theft.

XXVI. Protest of a Bill or Note.

XXVII. Physical Examination of injured Person.

XXVIII. Race Course Proprietor.

XXIX. Reconciliation.

XXX. Rape.

XXXI. Riot.

XXXII. Refusal to transfer Shares.

XXXIII. Schoolmistress.

XXXIV. Shooting Dogs.

XXXV. Struck off Voters' List in Error.

XXXVI. Trade Name.

XXXVII. Unauthorized Sale of Shares.

XXXVIII. Who can recover.
Collateral Relatives, Art. 1056 C. C. 1.
Father for Injury to Son. 2.
Heirs. 3-4.

See also Railway Companies.
" Attachment.
" Contract.
" Negligence.
" Intoxicating Liquors.
" Libel and Slander.
See also Lessor and Lessee.
" Navigable Rivers.
" Riparian Proprietor.
" Water Courses.
" Prescription.
" Municipal Corporation.
" Ships and Shipping.
" Sale.

I. ABATEMENT OF PUBLIC NUISANCE.

Damages cannot be claimed from the proprietor of a lot in the city of Montreal who demolishes a wooden building erected thereon without his authority and contrary to the by-laws of the corporation after the party who erected the same has been notified by the proper officer to remove the same. *Bienvenue* vs. *Côté,* S. C. 1863, 8 L. C. J. 94.

II. ACTION FOR. (See under title "Prescription.")

Delay to plead to.—In action of damages defendant may appear and plead, even after a delay of five months and after service of interrogatories on articulated facts, and although his failure to appear was attributable to his own fault. *Hayden* vs. *Fitzsimmons,* S. C. 1856, 1 L. C. J. 9, 5 R. J. R. Q. 366.

III. ASSAULT.

1. In an action of damages for assault where justification was pleaded, and it was proved that the plaintiff had used insulting and exasperating language to the defendant, and attempted to pull him from his wagon—*Held,* that this did not justify the assault which had been committed, and damages to the extent of $100 were awarded the plaintiff. *Devaltamier* vs. *McCready,* S. C. 1865, 1 L. C. L. J. 30.

2. Where action was brought for assault committed on a commissioner holding court as a magistrate or justice of the peace, the assault consisting in abusive language, shaking the fist and daring the magistrate to go out with him and fight, $100 damages and costs were awarded. *Bélanger* vs. *Gravel,* S. C. 1865, 1 L. C. L. J. 98.

3. The plaintiff sued for damages suffered through the defendant having assaulted him. The sum of $500 was claimed. Plea, that plaintiff commenced the fight and, therefore, defendant was not guilty. Evidence was that plaintiff had commenced the fight, and his

finger was bitten in the struggle. The finger subsequently had to be amputated and, while the action was pending, the arm also, the gangrene having extended upwards—*Held*, that the plea of self-defence could not enable the defendant to go free where the violence used to repel the assault was greatly in excess of that committed by the other side. *Bocage* vs. *Larimée*, C. R. 1879, 2 L. N. 59.

4. Damages for assault will be allowed a plaintiff who has been assaulted, although he may have been to blame in using abusive and provocative words. The right of an hotelkeeper is to put a troublesome guest out of the house, but in so doing he must justify having used the least violence possible. *French* vs. *Marks*, Q. B. Montreal, 1876.

5. An hotel is a place of resort, and it is an assault for which an action of damages will lie for an hotelkeeper to eject a person, even one not resident in his hotel, by violence, when making use of the hotel in the ordinary manner. *Hogan* vs. *Dorion*, Q. B. Montreal 1882, 2 Dorion's Q. B. Rep. 238.

6. Action of damages for assault brought against the manager and an employee of the Chambly Cotton factory. The circumstances were as follows: The plaintiff and his wife were employed in the factory, and, at the time of the assault complained of, Mrs. B. (the wife) had been discharged and was ordered to leave the factory. She refused to go unless she was paid two weeks' wages, because employees were entitled to two weeks' notice of dismissal. The defendant G. refused to pay her, and proceeded to eject her by force. She was very angry and excited, and resisted. G. took her by the arm, and also used his knee to assist her movements towards the door and to put her out. She fell down on the outside, and it was pretended that a miscarriage was the result, but of this there was no proof. Now her husband brought an action of damages, alleging that she had been seriously injured by the violence used. The defendants pleaded that the ejection of the plaintiff was necessary for the maintenance of order in the factory, and that no greater force than was absolutely required had been used in putting her out. The Court was of opinion that the defence had been made out. The plaintiff's wife might be entitled to two weeks' notice—the Court did not pronounce any opinion on that point—but there would be a right to bring an action for her wages if she was entitled to any. But she was not justified in refusing to leave the building when ordered to do so. The defendants did not appear to have used any greater violence than was absolutely necessary, and under the circumstances the action must be dismissed with costs. *Blanchard* vs. *Greenwood*, S. C. 1882.

7. A trespass will not justify an assault of an aggravated character. So where two people pretend to be legally entitled to a wharf, and one puts wood upon it, which the other proceeds to remove with a great force of men, and a scuffle ensues, and the owner of the wood is seized and severely beaten, he will be entitled to recover damages from his assailant. *Methot* vs. *Burke*, Q. B. Que., 11th March, 1878.

8. *Held*:—An action does not lie against an insane person, or his heirs and representatives, for the recovery of damages caused by him while labouring under mental derangement. *Busby* vs. *Ford*, C. R. 1893, 3 Que. 254.

9. The defendant, on a Sunday immediately after divine service, of set purpose and inviting his friends to witness it, violently assaulted plaintiff and bit him on the shoulder—*Held*, that such assault could not be legally justified by plaintiff's former declaration of his willingness to fight defendant, nor by an alleged assault committed by plaintiff on defendant a week previously—and $25 damages awarded. *Piché* vs. *Guilmette*, C. R. 1893, 3 Que. 358.

IV. BILL OF PARTICULARS.

1. In an action of damages for personal injuries caused by a horse bite, the defendant before pleading is entitled to obtain particulars of the injuries complained of. *Lemieux* vs. *Phelps*, S. C. 1885, M. L. R., 1 S. C. 305.

2. In an action of damages against a lessee for deterioration of the leased premises, the defendant cannot by motion demand a detailed statement of the damages charged, but must do so by exception to the form. *Rhéaume* vs. *Panneton*, Q. B. 1879, 9 R. L. 594.

V. BITE OF A DOG. (See under title "Negligence.")

Action of damages lies for exciting a dog to bite the plaintiff's horse, whereby the horse was injured and the plaintiff's cart broken. *Davidson* vs. *Cole*, K. B. 1821, 1 Rev. de Lég. 503.

VI. BREACH OF CONTRACT. (See *infra* "Measure of—Breach of Contract.")

1. A party cannot claim for breach of contract, when the other party could not reason-

ably foresee that his neglect or default would cause such damage. To give rise to an action of damages in such a case it would be necessary to put the defendant *in morâ*, and notify him that damage would be the result of his neglect. *Renaud* vs. *Walker*, S. C. 1868, 13 L. C. J. 180.

2. Pleading.—The plaintiff alleged the sale of a beach lot to defendant, and that defendant after taking possession of the lot refused to sign the deed of sale or to pay the interest on the price as agreed, to the damage of plaintiff, who was thereby prevented from effecting a favourable sale to another, and plaintiff concluded, 1, for $525 damages, 2, for the return of the lot to him in default of defendant's executing the deed and paying the interest. Demurrer. That plaintiff, alleging a complete sale to defendant, could not claim damages for not having been able to sell to another; nor could he demand to get back the lot without first obtaining a rescission of the sale; nor could defendant therefore be condemned to the alternative.—*Held*, that the general allegation of damages resulting from defendant's refusal to sign the deed was sufficient to support the conclusion for damages, and such general allegation was not to be considered as restricted by the statement that defendant's said refusal had prevented a favourable sale to another. *Motz* vs. *Paradis*, S. C. 1878, 1 Q. L. R. 291.

VII. BREACH OF PROMISE OF MARRIAGE. (See also under title "Marriage.")

An action lies for damages for breach of promise of marriage. *Benning* vs. *Grange*, Q. B. 1870, 14 L. C. J. 284, C. R., 13 L. C. J. 126, 290. *Chapman* vs. *Scott*, C. R. 1887, 31 L. C. J. 327.

VIII. CHARIVARI—BURNING IN EFFIGY.

1. Where a person by his presence encourages a charivari, he will be held liable in damages toward the charivaried. *Duquette* vs. *Pesant*, S. C. 1892, 1 Que. 465.

2. And the same principle was laid down in a case where it was held that persons who took part, or aided or abetted in the hanging and burning of a person in effigy, with the object of bringing him into contempt, are jointly and severally liable in damages. *Lortie* vs. *Claude*, S. C. 1892, 2 Que. 369.

3. And, *held*, that the father of minor children, who, although aware that his children were planning and abetting a proceeding the above nature, did not interfere to restrain them, but actually encourages them, is responsible for their acts. (*Ib.*)

IX. CIVIL ACTION NOT AFFECTED BY CRIMINAL.

Art. 534 of the Criminal Code enacts that after the commencement of the act putting the same into force, "no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence."

X. COMBINATIONS IN RESTRAINT OF TRADE.

An action of damages will lie for an illegal combination to prevent a party carrying on business, as for instance for the builders and quarrymen to combine that a certain contractor shall not be allowed to purchase stone quarries. *Bertrand* vs. *Perrault*, Q. B., Montreal, June, 1875.

XI. CORPORATIONS ACTING WITHIN SCOPE OF STATUTORY POWERS.

Damages may be recovered against a corporation acting under and within the scope of statutory powers, where special damage is sustained. (1) *Grenier* vs. *City of Montreal*, Q. B. 1880, 3 L. N. 51.

XII. FALSE INFORMATION AS TO CREDIT OF THIRD PARTY.

1. By Mercantile Agency. — Persons carrying on a mercantile agency are responsible for the damages caused to a person in business when, by culpable negligence, imprudence or want of skill, false information is supplied concerning his standing, though the information be communicated confidentially to a subscriber to the agency on his application therefor. *Cossette* vs. *Dun*, Supreme Ct. 1890, 18 Can. S. C. R. 222, and see *Steel* vs. *Chaput*, S. C. 1888, 32 [illegible] 326.

2. — And in such case damages will be awarded although no serious pecuniary loss has resulted from such publication. *Bradstreet Company* vs. *Cars[illegible]*, Q. B. 1887, 15 R. L. 358, 31 L. C. J. 292 confirming S. C., 29 L. C. J. 330, M. C. R. 28 S. C. 33.

3. By Friend.—*Held*—That the defen-

(1) *Drummond* vs. *Corporation of Montreal*, Privy Council, 22 L. C. J. 1, not followed. And see cases relating to sparks from locomotive, under title "Railway."

fact was liable for the price of goods advanced to C. by plaintiff on the unqualified opinion given by the defendant as to the solvency of C., when in fact C. was not solvent and the defendant had not sufficient information to warrant his opinion. *Graves* vs. *Durand*, C. Ct. 1891, 14 L. N. 170.

XIII. FALSE STATEMENTS IN PROSPECTUS.

Where a party was induced to purchase stock upon the representations contained in a circular or prospectus, which representations proved to be false and intentionally misleading, the author of the prospectus will be held liable in damages to such party. *Dorion* vs. *Crowley*, Q. B. 1885, 30 L. C. J. 65.

XIV. FALSE STATEMENTS CONCERNING PREVALENCE OF HORSE DISEASE IN CITY.

A city will be held liable in damages to the injured party, a citizen, for a false report of one of its officers to the effect that glanders were prevalent in the city, and with the result that a foreign government prohibited the importation of Canadian horses. *Kimball* vs. *City of Montreal*, C. R. 1888, 18 R. L. 52, reversing M. L. R., 3 S. C. 131.

XV. IN EX-PARTE ACTION.

In an action for damages, where defendant defaults, the Court will assess the damages at what it considers reasonable below the sum proved by the plaintiff *ex parte*. *Vadeboncœur* vs. *Mason*, S. C. 1873, 5 R. L. 238.

XVI. JOINT ACTION FOR.

1. Two proprietors cannot legally join in an action for the recovery of their respective damages. *Bénard* vs. *Bourdon*, S. C. 1869, 13 L. C. J. 233, Q. B. 1870, 15 L. C. J. 60.

2. The insurers who have paid part of the loss, and are subrogated *pro tanto*, and the owner of the buildings destroyed, may sue jointly for damages for their respective claims. *North Shore Ry. Co.* vs. *McWillie*, Q. B., M. L. R., 5 Q. B. 122. Confirmed in Supreme Ct. 1890, 17 Can. S. C. R. 511.

XVII. JOINT AND SEVERAL LIABILITY FOR.

1. Two or more persons committing a delict are jointly and severally liable, but a settlement with one discharges the others. *Giroux* vs. *Blais*, C. Ct. 1881, 7 Q. L. R. 309.

2. An action for damages for a trespass on lands of plaintiff against one of the trespassers for his share of the damage, does not bar an action against a joint-trespasser unless it be proved the plaintiff has been fully indemnified. *Corporation of St. Gabriel West* vs. *Holton*, Q. B., Que., 6 March, 1877, 8 R. L. 293.

3. Persons who have wrongfully cut and carried away wood which did not belong to them are jointly and severally liable to the owner for the value thereof. *Lalonde* vs. *Bélanger*, Q. B., Montreal, 17 Dec., 1879, 24 L. C. J. 96, 3 L. N. 26.

4. *Held*, that an action *ex delicto* against several persons jointly and severally is not suspended as to the survivors by the suggestion of the death of one or more of the defendants. Such action may be brought against any one or more of the persons jointly and severally liable. *Allan* vs. *McLagan*, Q. B., Montreal, 1877, 1 L. N. 4.

XVIII. LIABILITY OF VETERINARY SURGEON.

Where a person exercises the art of a *maréchal* or veterinary surgeon without a sufficient knowledge of it, and without being licensed to do so, he will be held liable in damages by reason of his negligence or want of skill, resulting in injuring a horse submitted to his care. Judgment against him for the value of the horse and costs. *Levi* vs. *Gagnon*, C. Ct. 1879, 10 R. L. 68.

XIX. MEASURE OF.

1. **Accidents.**—Damages will be allowed for mental and physical suffering to a person who has received physical injuries. *Auclair* vs. *Bastien*, S. C. 1888, M. L. R., 4 S. C. 71; *Pelletier* vs. *Bernier*, Q. B. 1877, 3 Q. L. R. 94.

2. —— In an action for damages under Art. 1054, where the act causing the injury is not accompanied by malice, but is attributable to a mere accident, the Court will only condemn the defendant to damages actually suffered, in this case physical sufferings, which the Court assessed at $50. (1) *Shakel* vs. *Dameau*, S. C. 1889, 33 L. C. J. 55.

(1) As to measure of damages in Railway accident case, see English decision reported 3 L. N. 294, where the jury were instructed to take into consideration the income which the plaintiff was earning before he was injured, and give reasonable compensation. And it has been held that special fees earned by a professional man may be taken into consideration in calculating such income. *Phillips* vs. *London & Southwestern Ry. Co.*, Ct. of Appeal, 1879. And see cases collected 4 L. N. 177-187 on this subject.

3. Action brought against wrong Person.—Where a plaintiff brought action against the wrong person and was non-suited, and the plaintiff brought action of damages for loss of time, etc.—*Held*, that the only penalty upon a plaintiff failing in his suit was the costs of the suit, and where he had acted in good faith, the defendant could not recover for loss of time. *Cayer* vs. *Labrecque*, C. Ct. 1865, 15 L. C. R. 130. And see remarks of Lacoste, C. J., in *Scott* vs. *McCaffrey*, 1 Que. at p. 126 (Q. B.)

4. Assault.—Where there is a right of action for a trifling assault, and where no material damage is done, and the plaintiff refuses all settlement, and begins and then abandons a prosecution before a magistrate in order to bring an action of damages, the Court will reduce damages, which have no reasonable measure, to such a sum as would be imposed as a fine by a magistrate. *Papineau* vs. *Tuber*, 1885, M. L. R., 2 Q. B. 107.

5. —— **Costs**.—In an action of damages for assault and battery, where the evidence is conflicting, and there appears to have been fault on both sides, each party will be put on the same footing, each paying his costs in all the courts. *Turgeon* vs. *Sylvain*, Q. B. 1888, 17 R. L. 1; and see *Barthe* vs. *Boudreault*, Q. B. 1878, 8 R. L. 489.

6. —— Judgment allowing $20 damages and $20 costs in a small case for assault committed during a St. Jean-Baptiste celebration. *Poirier* vs. *Monette*, C. R. 1884, 7 L. N. 71.

7. Breach of Contract — Nominal Damages.—(See "Remoteness")—Arts. 1065, 1070, 1073, 1077, 1810 and 1811 Civil Code.—*Held*, that under the law in force in the Province of Quebec nominal damages, to the amount even of $100, may be awarded for breach of contract to issue debentures where there is no proof of actual damage. *Corporation du Cont'd. Ottawa* vs. *Cie. du Ch. de Fer M. O. & O.*, Supreme Ct., 1885, 14 Can. S. C. R. 193; confirming Q. B., 1883, 28 L. C. J. 29, M. L. R., 1 Q. B. 46, 6 L. N. 382; S. C. 1882, 26 L. C. J. 148, 5 L. N. 132.

8. —— The obligation of a municipality to issue debentures in payment of a subscription of shares in a railway is not to be regarded as equivalent to a mere obligation to pay money, in which case, under C. C. 1077, the damages resulting from delay would consist only of interest from the day of default. (*Ib.*)

9. —— Where damages are sought for the inexecution of a contract, and no real and certain damages are proved, the Court may condemn the defendant in default to pay exemplary damages. *Girard* vs. *Lepage*, Q. B., Montreal, Dec., 1874.

10. —— But the above doctrine would appear to have been modified by the following case decided by the Privy Council:—The respondent transferred one thousand shares railway stock to the appellant, the former to have the right to redeem the stock within two months from date by paying 50 per cent. of the nominal amount of the shares. The respondent made a sufficient tender within the delay, but the appellant had disposed of the shares, and refused to receive the amount. In an action of damages by respondent for breach of contract—*Held*, that the measure of damages was the sum which respondent could have obtained for the shares beyond the amount which he had to pay to get them back; and it not being clearly established that he could have sold the shares for more than this amount, or that appellant received any greater amount therefor, apart from other and subsequent transactions, the action of damages was dismissed. (1) *McDougall* vs. *McGreevy*, P. C. 1889, 12 L. N. 379, 15 Q. L. R. 198.

11.—Contract for Prolongation and Opening of Streets.—The municipality of H. (whose obligations were subsequently assumed by defendants), in consideration of the gratuitous cession of land by plaintiff, agreed to prolong a certain street through plaintiff's lots, at a width of 100 feet, and to open two other streets through his property. The street first referred to was afterwards homologated at a width of 60 feet only, and the defendants delayed to complete the other two streets—*Held*, that the measure of damages in respect of the street homologated at a width of 60 feet, was the value of the 40 feet taken by defendants and not retroceded, and the depreciation in value of the rest of plaintiff's property in consequence of the loss of frontage on the street as prolonged. And as to the breach of contract respecting the other two streets, the measure of damages was the interest (computed from the time when the streets could reasonably have been completed) on the capital represented by the increased value which the plaintiff could have got for his lots if the

(1) This decision of the Privy Council would appear to be in accord with the dissenting opinions of Dorion, C. J., and Cross, J., in the above case of *Corp. of Ottawa* vs. *M. O. & O. Ry.* in the Queen's Bench, and of Ritchie, C. J., and Gwynne, J., in the Supreme Court.

streets had been made as agreed. *Aylwin* vs. *City of Montreal*, 1889, M. L. R., 5 S. C. 402, 33 L. C. J. 117.

12.— Non-Delivery of Goods.—Action of damages was brought by the plaintiff on an agreement by the defendant to deliver a certain quantity of glass, to be imported from Germany the then next spring, in the port of Montreal. The glass was lost by *vis major*—*Held*, that the defendant was liable in damages to the purchaser to the extent of the profit which the latter could have derived, deducting the ordinary risk of re-sale. *Thompson* vs. *Beling*, S. C. 1875, 1 Q. L. R. 67.

13. —— —— In an action of damages by a vendor for breach of a contract of sale of hops, payable on delivery, the plaintiff alleging that delivery of the hops had been duly tendered, the proper measure of damage is the difference between the contract price and the market price at the time of the refusal to perform the contract; and in such an action the Court cannot legally condemn the defendant to pay the price of sale and order the plaintiff to make delivery of the hops after the payment of such price. *Boswell* vs. *Kilborn*, Privy Council, 1862, 6 L. C. J. 108, 12 L. C. R. 161, 15 Moore P. C. 309.

14.— Non-Delivery of Carriage.—The measure of damages in the case of breach of a notarial contract to manufacture and deliver a carriage within a specified period does not include loss of profit by reason of the non-delivery. *Marlow* vs. *Lajeunesse*, C. R. 1873, 18 L. C. J. 188.

15.— Non-Delivery of Trunk by Carrier.—In an action of damages for the loss of a trunk, in which action the value of the time lost by plaintiff in making enquiries therefor was also claimed—*Held*, that the value of the property lost was the only measure of damages. *Breton* vs. *The Grand Trunk Railway Company*, S. C. 1872, 2 R. C. 237.

16.— Non-Delivery of Goods by Carrier.—Where the circumstances justify the presumption that a carrier undertaking to convey goods was aware that they were intended for immediate sale, he may be held liable for the loss of profits on such sale, caused by his failure to deliver them. *Behan* vs. *Grand Trunk Ry. Co.*, S. C. 1885, 11 Q. L. R. 60.

17. —— —— Damages for loss of custom arising from such non-delivery are too remote to be held to have been in the contemplation of the parties, and cannot be recovered. (*Ib.*)

18.— Non-Delivery of Wood—Action of damages was brought for failure to deliver a quantity of wood according to contract. The plaintiff claimed large damages for non-delivery of the wood in the winter, when the price rose very high—*Held*, sustaining the plea that the damage was to be estimated by the price at the time the contract was broken. *Laflamme* vs. *Legault*, S. C. 1872, 3 R. C. 72.

19.— Failure to return Debentures.—Where the defendant was obliged to return the plaintiff certain railway bonds, but was unable to do so, owing to his having sold them, it was held that he should be condemned to pay the actual value thereof at the time the bonds were acquired by him and not their par or nominal value. *Senecal* vs. *Hatton*, P. C. 1886, 10 L. N. 59, affirming Q. B., 1881, M. L. R., 1 Q. B. 112.

20.— Error in Measurement of Lot.—L. purchased at auction from P. certain lots in the City of Montreal situated on projected streets, which the auctioneer announced were 60 feet wide, and which appeared to be the same width throughout on lithographed copies of the plan of the property, but on the official plan were only 51 feet wide through a portion of their length. After the sale, L., who decided to keep the lots, although aware of the difference in the width of the street on which they were situated, brought an action against P. in damages, claiming that the said lots were of less value on a street 51 feet in width than if situated on a street 60 feet wide; no actual amount of damage was proved—*Held*, that as plaintiff had made option to keep the said lots instead of refusing to carry out the sale, as he might have done on discovering the difference between the actual width of the street on which said lots were situated and that which said street was represented to have, and as he had not proved any actual loss to be suffered by him in consequence of said difference in the width of the street, he was not entitled to recover damages from defendants. *Inglis* vs. *Phillips*, S. C. 1887, 33 L. C. J. 82.

21.— Fee paid to Counsel.—A fee paid to Counsel for advice will not be allowed as part of the damages for breach of contract.—*Cox* vs. *Turner*, 1886, M. L. R., 2 Q. B. 278.

22.— Stoppage of Grist Mill.—Evidence of how much grain a grist mill could grind is not a satisfactory measure of damages for the stopping of a mill, unless it be shown that there was grain to be ground to employ the

mill continually. And where damages of this sort are complained of, it will be considered unfavourable to plaintiff, and expose the testimony he adduces to suspicion if he refuses an examination of his premises by a competent person of respectability, such as an engineer sent by defendant. *DeBeaujeu* vs. *Beaudel*, Q. B., Montreal, 15 June, 1877.

23.——Where Penalty provided, 1076, 1135 C. C.—In an action of damages for the non-performance of a special agreement in which a penalty was stipulated to be paid by the party failing to carry out the agreement—*Held*, that the penalty could not be considered as stipulated damages, and, therefore, whatever loss was proved to have been sustained, whether beyond, below or equal to the value of the penalty, the plaintiff would be entitled to judgment for such loss. *Muir* vs. *Wileys*, K. B. 1810, Pyke's Rep., p 61, 1 R. J. R. Q. 91.

24.——Contractor—Where a contract was not carried out to the letter, but in the failure to do so there was no fraud, the contractor will be entitled to receive the price of the work he has done less what it will cost the employer to finish the work. *Atkinson* vs. *Plamondon*, Q. B. Quebec, 8 Sept., 1881.

25. Builders—Defective Plan.—In an action of damages against a builder for want of skill in using a defective plan, the measure of damages is not what the plaintiff paid for altering the bad plan to a better, but what he had paid for the faulty construction and what he had lost by it. *Nordheimer* vs. *Reid*, Q. B., Sept., 1875.

26. —— Defective Work.—Where the floors of a building have sunk, in consequence of the insufficiency of the timber used to support the bridging joists and floors, the architects and superintendents and the carpenters and joiners employed in erecting the building are jointly and severally responsible for the damages incurred, and may be sued in one and the same action; and in estimating the damage allowance will be made in favor of the architects and contractors for what the work would originally have cost had timber been originally used of a size and quality sufficient to support the bridging joists and floors, and no allowance will be made to the proprietor for moneys paid by him to his tenants for actual expenditure by them in removing out of the building during the time that the necessary repairs are being made. *David* vs. *McDonald*, Q. B. 1863, 8 L. C. J. 44.

27. Damage to Wharf.—In an action against the master of a steamer for injury done to the wharf by the steamer striking against it in making her berth—*Held*, that the wharf, not being in good order, the rule of two thirds new for old might be urged as a guide to the discretion of the Court in awarding damages. *Harbor Commissioners of Montreal* vs. *Grange*, Q. B. 1860, 10 L. C. R. 259.

28. Damage arising from bad Condition of Road.—In fixing damages in such cases the Court will take into consideration the season of the year and the more or less of difficulty in keeping the road in repair. *Corporation of Township of Douglas* vs. *Mather*, Q. B. 1885, 11 Q. L. R. 294.

29. Damage to Vessel.—The loss of the use of a vessel damaged by an accident during the spring of the year, in the absence of any evidence of want of diligence in repairing it, is a good measure of damages. *Pierreville Steam Mill Co.* vs. *Martineau*, Q. B., Montreal, 21 Dec., 1875.

30. Deterioration of Immoveable.—In an action for the recovery of damages under Art. 2055 of our Civil Code, accompanied by *conclusions* under Art. 800 of the Code of Civil Procedure, alleged to have resulted from deterioration of the immoveable hypothecated, damages will be allowed not only for the value of wood cut and carried away, but also for the deterioration in value of the land itself caused by the cutting of the wood. *Désautels* vs. *Ethier*, C. R. 1871, 15 L. C. J. 301.

31. —— And *held* later that in an action of damage for wood cut on an immoveable, not only the value of the wood cut and carried away, but also the deterioration in value of the land itself caused by cutting the wood must be allowed. *Robillard* vs. *Tremblay*, S. C. 1882, 11 R. L. 465.

32. —— An action of damages for injury to the plaintiff's real property may be supported by evidence of constructive possession. *Hunter* vs. *Oviatt*, K. B. 1811, 1 Rev. de Lég. 380.

33. —— But where the value is claimed of certain wood alleged to have been cut on plaintiff's land, and the defendant contends by his plea that the land is his, no judgment can be rendered in the case without a *bornage*, and, if neither party demand it, the action will be dismissed. *Fournier* vs. *Lavoie*, C. R., 1871, 15 L. C. J. 270.

34. Discretion of Judge.—A difficulty in determining the exact extent of the injury

suffered, and the absence of means to fix the amount of damages, are not reasons for dismissing the demand, as it rests with the judge in such case to determine the amount. *Lepage* vs. *Girard*, S. C. 1872, 4 R. L. 554; *Mondor* vs. *Pesant*, C. Ct. 1872, 4 R. L. 382.

35. **Exemplary or Vindictive.**—Where damage results from the mere negligence of defendant, and there is no wilful neglect on his part, the judgment should allow only the actual damages suffered by the plaintiff, and not vindictive damages. *Stephens* vs. *Chaussé*, Q. B. 1887, M. L. R., 3 Q. B. 270.

36. —— In the above case the trial judge awarded $5,000, and in appeal to the Q. B. that amount was reduced to $3,000 for the reason, as above given, that the plaintiff was not entitled to vindictive damages. On appeal to the Supreme Court—*Held*, affirming the judgment of the Q. B., that, although in the opinion of the Court the sum of $5,000 awarded in a case like the present could not be said to include vindictive damages, the judgment of the Superior Court could not be restored, there being no cross appeal. (*Ib.*) 15 Can. S. C. R. 379.

37. —— When a person accuses another publicly of having committed perjury and of having defrauded minors of their property, he can, in an action of damages against him for injury to the reputation, be condemned to pay the plaintiff exemplary damages ($50 awarded). *Beauregard* vs. *Daigneault*, S. C. 1888, 11 L. N. 403.

38. —— Where there is clear proof of the counterfeiting of a copyright, the damages will not be measured merely by the price realized through the sale of the counterfeit, but vindictive damages will be allowed. *Bernard* vs. *Bertoni*, Q. B. 1889, 16 Q. L. R. 73, reversing S. C. 1888, 11 Q. L. R. 219.

39. —— Where an infringement of a right is proved, the party is entitled to nominal damages though no actual damage be established. *Canada Paint Co.* vs. *Johnston*, S. C. 1893, 1 Que. 255; also *Collette* vs. *Lasnier*, Supreme Court, 13 Can. S. C. R. 564.

40. —— Where it is evident that a party suing out a writ of attachment has acted maliciously, exemplary or vindictive damages will be awarded as well as real damages. *Perry* vs. *Pell*, S. C. 1879, 21 L. C. J. 129, 2 L. N. 401; *Brouillet* vs. *Clarke*, 1886, M. L. R., 2 S. C. 117; *Lamirand* vs. *Cartier*, C. R. 1892, 2 Que. 13.

41. —— And *held* so in the case of false and malicious arrest. (1) *Brigard* vs. *Sylvestre*, C. R. 1890, 20 R. L. 205.

42. —— In action for damages in consequence of plaintiff's child being severely bitten by defendant's dog, which was trained and kept as a fighting dog and suffered to run unmuzzled, exemplary damages will be awarded. *Falardeau* vs. *Couture*, S. C. 1857, 2 L. C. J. 96.

43. —— Damages arising from a breach of promise of marriage are not only real damages, but may be exemplary damages, according to circumstances. *Mathieu* vs. *Laflamme*, S. C. 1872, 4 R. L. 371.

44. —— Where a defendant is guilty of gross neglect, damages may be awarded as a punishment for his misconduct as well as a compensation to the plaintiff for the loss suffered by him. *Carsley* vs. *Bradstreet Co.*, M. L. R., 2 S. C. 33, 29 L. C. J. 330; confirmed in appeal 15 R. L. 358, 31 L. C. J. 292. (2)

45. **Illegal Attachment.**—Where a writ of attachment before judgment is improvidently sued out, the party whose effects are seized has a right to recover damages. In the absence of proof of malice on the part of the person suing out the writ, nominal damages and costs of the lowest class of the Superior Court will be awarded. But where it is evident that the party suing out the writ has acted maliciously, exemplary or vindictive damages will be awarded. *Perry* vs. *Pell*, S. C. 1879, 21 L. C. J. 129.

46. —— And as to the latter holding, see *Lamirande* vs. *Cartier*, C. R. 1892, 2 Que. 13 in same sense.

47. —— In action for damages for improvident issue of attachment before judgment, where justification or sufficient probable cause is not made out, but where the conduct of the parties was such as to create serious distrust, only nominal damages will be awarded. *Dalpé* vs. *Rochon*, S. C. 1858, 2 L. C. J. 120.

48. **Illegal Execution.**—In a case wherein it is shown that, in violation of article 595

(1) It appears from the judgment in this case that there was malice as well as want of probable cause, although this does not appear in the head-note.

(2) There is a recent and interesting Privy Council decision in an appeal from the Pacific Islands involving the question of exemplary or vindictive damages for trespass on land—*Held*, that the measure of damages was the produce which the lands were capable of yielding at the time they were taken possession of, after deducting the expenses of management. *However wilful and long continued the trespass may have been, there is no law which authorizes the disallowance of such expenses or the infliction of a penalty on the defendants beyond the loss sustained by the plaintiff.* *McArthur* vs. *Cornwall*, P. C. 1891 (1892), App. Cas. 75.

of the Code of Civil Procedure, and despite a remonstrance of the executing bailiff, the defendant in this suit has made such bailiff sell the plaintiff's moveables, to an amount about *double* the amount ordered to be levied by the writ of execution, the injured party has a right to vindictive damages, and this Court will not disturb, but will confirm, the judgment giving such vindictive damages. *Grandmont* vs. *McDougall*, C. R. 1886, 9 L. N. 266.

49. Infringement of Copyright.—Where there is clear proof of the counterfeiting of a copyright, the damages will not be measured merely by the price realized through the sale of the counterfeit, but vindictive damages will be allowed. *Bernard* vs. *Bertoni*, Q. B. 1887, 16 Q. L. R. 73; reversing S. C. 1888, 11 Q. L. R. 214.

50. Infringement of Trade Mark.—Where an infringement of a right is proved, the party is entitled to nominal damages though no actual damage be established. *Canada Paint Co.* vs. *Johnson*, S. C. 1893, 4 Que. 255.

51. Infringement of Patent.—*Held*—in this case the profits made by the defendants were not a proper measure of damages; that the evidence furnished no means of accurately measuring the damages, but substantial justice would be done by awarding $100. *Collette* vs. *Lesnier*, Supreme Court, 1885, 13 Can. S. C. R. 561, 32 L. C. J. 21; reversing Q. B. and S. C., latter reported, 5 L. N. 412.

52. —— And *held* in a later case, decided in the Queen's Bench, that the measure of damages for infringement of a patent of invention, by using a patented machine purchased of a manufacturer of the invention, and not the inventor, is not the profit which the purchaser derived from the use of the patent, but the loss suffered by the patentee. *Pinkerton* vs. *Cote*, Q. B. 1886, M. L. R., 3 Q. B. 133.

53. In Futuro.—Profits in futuro cannot enter into the computation of damages. *Desroches* vs. *Corporation du Comté d'Hochelaga*, S. C. 1889, 18 R. L. 108.

54. —— Where a mandate is revocable at pleasure, the agent has no right to be indemnified for profits not yet earned; he can claim merely such expenses as he incurred in order to carry on the business, and which, in the particular circumstances of the case, may be seen to have been contemplated at the time the appointment was made. *Cantlie* vs. *Canticook Cotton Co.*, Q. B. 1887, M. L. R., 4 Q. B. 111; confirming S. C., M. L. R., 3 S. C. 9, 30 L. C. J. 135.

55. ——1053 C. C.—In an action of damages for personal injury—*Held*, that the plaintiff must show how far his means of making a livelihood have been impaired in order to obtain indemnity for the future. *Marshall* vs. *Grand Trunk Railway Company of Canada*, S. C. 1855, 1 L. C. J. 6, 1 R. J. R. Q. 369.

56. Inducing Minor to leave his Home.—A person induced a minor, 16 years of age and earning a salary, to leave his home against the wishes of his parents. The father, in an action of damages against such person, was awarded $50 for loss of salary, trouble and expenses arising indirectly out of the departure of his son. *Martineau* vs. *Ladouceur*, S. C. 1891, 21 R. L. 273.

57. Interference of Appellate Courts.—In an action by a bank against its manager for damages for loss accrued through his misconduct—*Held*, that the judicial committee of the Privy Council would not alter the amount awarded unless there were clear proof that the Court below had proceeded upon an entirely erroneous basis. *Bank of Upper Canada* vs. *Bradshaw*, P. C. 1867, 17 L. C. R. 273.

58. —— Where the jury have found a verdict for plaintiff, and the defendant has not moved for a new trial, the Court cannot take into consideration the question whether the damages awarded by the jury were excessive. *Benning* vs. *Grange*, Q. B. 1870, 14 L. C. J. 281.

59. —— Where it is not a matter of contract, and no question of law or of principle is involved, and the case resolves itself into a mere question of appreciation of evidence, *e.g.*, as to the value of services, the Court of Appeal will not disturb the judgment of the Court below unless a serious injustice has been done to the appellant. *St. Lawrence Steam Nav. Co.* vs. *Lemay*, M. L. R., 3 Q. B. 214.

60. —— Where on a former trial the jury awarded the respondent $3,000 damages, but the verdict was set aside by the Supreme Court on the ground of misdirection, and on the second trial the jury awarded $6,500 damages, the amount was not so excessive that the Court should set aside the verdict and order a new trial. *Can. Pac. Ry. Co.* vs. *Robinson*, Q. B. 1890, 6 M. L. R. 118.

61. —— Where damages have been appraised by the Court of first instance, and the

Court of Review has reduced the amount, the Court of Appeal will not interfere with the award of the intermediate court unless it appear that gross injustice has been done. *Pratt* vs. *Charbonneau*, Q. B. 1890, 7 M. L. R. 21, 34 L. C. J. 124.

62. —— In an action of damages, if the amount awarded in the court of first instance is not such as to shock the sense of justice, and to make it apparent that there was error or partiality on the part of the judge, the exercise of a discretion on his part being in the nature of the case required, an Appellate Court will not interfere with the discretion such judge has exercised in determining the amount of damages. *Levi* vs. *Reed*, Supreme Ct. 6 Can. S. C. R. 482; *Cosselle* vs. *Dun*, Supreme Ct. 1890, 18 Can. S. C. R. 222.

63. —— In an action of damages against a railway company, for injury done by the negligence of their servants to the plaintiff, an architect, the jury found for plaintiff and awarded $7,000. A new trial was granted on the ground that the verdict was against the evidence and that the damages were excessive—*Held*, by the Privy Council, that inasmuch as the damages were not of such an excessive character as to show that the jury had been either influenced by improper motives or led into error, there ought not to be a new trial. *Lambkin* vs. *South Eastern Ry.*, P. C. 1881, L. R. 5 App. Cas. 352, 3 L. N. 162.

64. —— The Superior Court awarded $3,000 damages for injuries to plaintiff's hand, which necessitated the amputation of the middle finger and caused lockjaw to set in, entailing great suffering. The Queen's Bench (10 R. L. 275) reduced that sum to $600, and condemned plaintiff to all the costs of appeal. On appeal to the Supreme Court of Canada—*Held* (Taschereau, J., dissenting), that in view of the very serious injuries sustained by the plaintiff and of the misconduct of the defendant, who appears to have abused his position of a justice of the peace, the amount awarded by the judge of first instance was not so clearly excessive as to justify the pronouncing his judgment erroneous. (1) *Giugras* vs. *Desilets*, Supreme Ct., 11 February, 1881, Cassel's Dig., 2nd Edit., p. 213.

65. —— And in a later case where the Superior Court had awarded $2,000 to plaintiff for a false report given by a mercantile agency concerning him, the Court of Appeal reduced this sum to $500, but, on appeal to the Supreme Court, the judgment of the Superior Court was restored, the Court following the above case and *Levi* vs. *Reed*, 6 Can. S. C. R. 482. *Cosselle* vs. *Dun*, Supreme Ct. 1890, 18 Can. S. C. R. 223.

66. —— (*By the majority of the Court*) In actions for libel the assessment of damages is peculiarly the province of the jury, and a verdict of $6,000 for the newspaper libel complained of in this case, and $4,000 for the libellous allegations of the plea, was not so excessive as to lead to the inference that the jury were led into error or actuated by improper motives. *Mail Printing Co.* vs. *Lafiamme*, Q. B. 1888, M. L. R., 4 Q. B. 84.

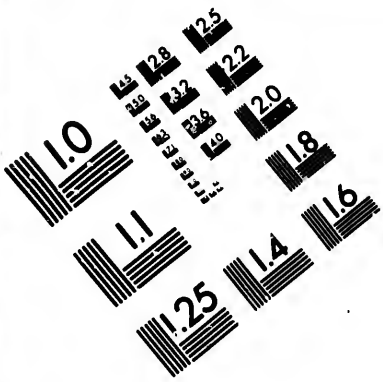
67. —— (Per Baby and Church, JJ., diss.) That the verdict of $6,000 for the libel in the newspaper was excessive, and justified the defendants in asking for a new trial—*Semble*, that if the Court reduced these damages to $1,000, leaving the damages for the libel in the plea undisturbed, so as to make the total condemnation $5,000, the judgment maintaining the verdict should be confirmed. (*Ib.*)

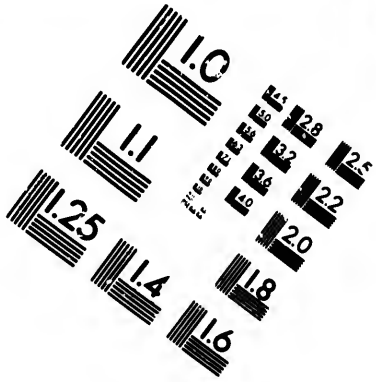
68. —— In the Supreme Court—*held*, a new trial would be granted unless the plaintiff would consent to accept a reduction of the verdict from $10,000 to $6,000, which he did, and judgment went accordingly. (*Ib.*) Supreme Ct., 5 February 1889, Cassel's Dig., 2nd Edit., p. 493, and see 12 L. N. 33.

69. —— Action of damages by the widow of a man killed on the wharf at Montreal against the master of the steamer "Harold," which was leaving the port, and in swinging around snapped her stern cawser, breaking both of deceased's legs and so seriously injuring him that he died in consequence at the general hospital within two or three days. The deceased was a young man of about thirty-three years, in excellent health, and left a widow and five children without support. He was at the time earning $14 per week, as a checker on the wharf, which gave him employment for about 7 months in the year. Judgment for $6,000. *Byrd* vs. *Corner*, S. C. 1883, 6 L. N. 364. But in appeal these damages were reduced to $2,500, M. L. R., 2 Q. B. 262. A motion to appeal to P. C. was granted, but case was settled out of court. See Article in 9 L. N. at p. 401 considering similar American and English cases.

70. —— The appellant was condemned by the Superior Court to pay $18,333.45 damages. The case being taken to review, the judgment

(1) As to remarks of Taschereau, J. (dissenting), see 14 L. N. 106, 107, and as to damages for physical injuries, see cases collected, 14 L. N. 185, 187.





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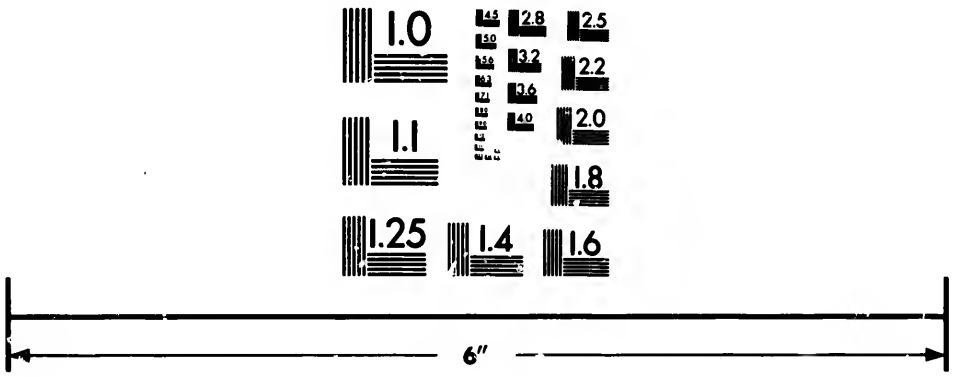

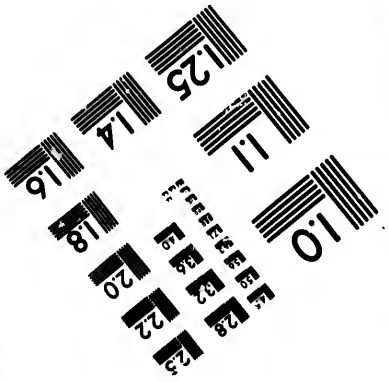

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was confirmed, save as to the amount of damages, which was reduced to $13,500. This amount was further reduced by the Queen's Bench to $10,000, and in the Privy Council the amount was still further reduced. *Osborne* vs. *Atkinson*, Q. B. (Quebec), 8 Sept., 1875.

71. Libel and Slander. (See under title "Libel and Slander.")—Where the evidence showed a gross case of slander against the defendant—*Held*, that $50 and costs awarded by the Court below was inadequate, and the amount was increased to $200 and costs. *Leger* vs. *Leger*, Q. B. 1867, 3 L. C. L. J. 60. And see *Beauregard* vs. *Daigneault*, S. C. 1888, 11 L. N. 403.

72. Member of Parliament.—The loss by a member of the Senate of Canada of his sessional allowance during the time he is disabled by his injuries, should not be included in the estimate of damages; but the total amount of damages allowed in this case being moderate and reasonable, and not complained of, the judgment was not disturbed. *Thibeaudeau* vs. *Compagnie du Ch. de Fer Urbain de Montréal*, C. R. 1888, M. L. R., 4 S. C. 400.

73. Refusal to Transfer Shares.—In an action for damages against a railway company for unduly refusing to register a transfer of shares during several months, the true measure of damage is the difference between the price of the stock at the time of such refusal and its price at the time of the subsequent registration of the transfer. *Grand Trunk Railway Co. of Canada* vs. *Webster*, Q. B. 1861, 6 L. C. J. 178.

74. Remoteness. (1) — The damages which a tenant can claim for a non-fulfilment of a condition of the lease must be the immediate and direct consequence of such inexecution, and will not include indirect losses, *e. g.*, damages alleged to have been suffered owing to the lessee's inability to fulfil contracts, or for the waste of wood prepared for his business. *Bell* vs. *Court*, Q. B. 1886, M. L. R., 2 Q. B. 80.

75. —— For refusal to deliver goods purchased, the measure of damages is the loss of profit which the buyer would have made upon the goods; but will not include pretended loss of custom. *Collette* vs. *Lewis*, S. C. 1889, M. L. R., 5 S. C. 107.

76. —— Damages, the result of fright or nervous shock, unaccompanied by impact or any actual physical injury, is too remote to be recovered. And so, where a miscarriage resulted from a fright caused to the plaintiff from the fall of a bundle of laths (which occurred through the defendant's negligence) near where the plaintiff was standing, it was held that she could not recover damages. *Roch* vs. *Denis*, C. R. 1888, 16 R. L. 569; confirming S. C., M. L. R., 4 S. C. 134.

77. —— In an action of damages for breach of contract in not constructing a railway station, the increased value which the adjoining lands would have gained had the station been constructed is too remote to be estimated in the damages to be awarded. *Compagnie du Ch. de Fer Grand Tronc* vs. *Black*, S. C. 1889, 17 R. L. 669.

78. Sale of Inferior Seed.—The seller of seed who delivers a different kind, which, being sown, does not come to maturity, is liable in damages for the value of the crop which the seed sold was intended to yield. *Cotè* vs. *Laroche*, C. Ct. 1889, 16 Q. L. R. 15.

79. Solatium.—Art. 1056 C. C.—In an action of damages brought for the death of a person by the consort and relations under Art. 1056 C. C., which is a re-enactment and reproduction of the Consol. Stats. L. C., ch. 78, damages by way of *solatium* for the bereavement suffered cannot be recovered. (1) *Can. Pac. Ry.* vs. *Robinson*, Supreme Ct. 1887, 14 Can. S. C. R. 105, and see *Provost* vs. *Jackson*, Q. B. 1869, 13 L. C. J. 170.

80. —— In an action of damages brought against the Corporation of the City of Montreal by Z. L. *et al.*, the descendant relations of L., who was killed while driving down St. Sulpice street (alleged to have been at the time of the accident in a bad state of repair), by being thrown from the sleigh on which he was seated, against the wall of a building, the learned judge, before whom the case was tried without a jury, granted Z. L., *et al.*, $1000 damages, on the ground that they were entitled to said sum by way of *solatium* for the bereavement suffered on account of the premature death of their father—*Held*, reversing the judgment appealed from (M. L. R., 2 S. C. 56, M. L. R., 7 Q. B. 468), that the judgment could not be affirmed on the ground of *solatium*, and as the respondents had not filed a cross-appeal to sustain the judgment on the ground that there was sufficient evidence of pecuniary loss for which compensation may be claimed,

(1) See English case reported 1 L. N. 439 as to prospective damages for physical injuries.

(1) Overruling *Ravary* vs. *G. T. Ry.*, 6 L. C. J. 49. As to mental suffering as an element of damages, see Article 4 L. N. 273.

Z. L. *et al.'s* action must be dismissed with costs. *C. P. R. Co.* vs. *Robinson*, 10 L. N. 324, 14 Can. S. C. R. 105, followed. *City of Montreal* vs. *Labelle*, Supreme Ct. 1888, 11 L. N. 90, 14 Can. S. C. R. 741.

81. —— Later, Mr. Justice Mathieu held that children whose mother had been killed by the negligent act of a third party can recover pecuniary compensation by way of *solatium doloris*. *Vanasse* vs. *City of Montreal*, S. C. 1888, 16 R. L. 387.

82. —— And Mr. Justice Wurtele held that in an action for assault damages would be awarded both for mental as well as physical suffering. *Auclair* vs. *Bastien*, S. C. 1888, M. L. R., 4 S. C. 74, and see *Pelletier* vs. *Bernier*, Q. B. 1877, 3 Q. L. R. 94.

83. —— But *held* still later by the Court of Appeal, following *C. P. R.* vs. *Robinson* (14 Can. S. C. R. 105), that, where no malice is shown, the Court will not allow any pecuniary compensation for grief or mental suffering resulting from the act complained of, but only the actual damage established. (*Bossé J.*, dissented, agreeing on this point with the judgment of *Jetté J.*, in the Superior, whose judgment was hereby reversed.) *Jeannotte* vs. *Couillard*, Q. B., 1894, 3 Que. 461.

84. **Where both Parties in Fault.**—No damages will be allowed either party, each paying his costs in all the Courts. *Turgeon* vs. *Sylvain*, Q. B. 1888, 17 R. L. 1; *Barthe* vs. *Bourdreault*, Q. B. 1878, 8 R. L. 489.

XX. NEIGHBOURING PROPRIETORS.

(See also under title "Railways.")

1. **Fire for clearing Land.**—Where a person makes a fire for the purpose of clearing his land, and the fire, in consequence of a high wind suddenly arising (*force majeure*), communicates with his neighbour's property, the person making the fire is liable for the damage thereby occasioned to his neighbour. (1) *Fordyce* vs. *Kearns*, C. R. 1870, 15 L. C. J. 80, 2 R. L. 623; *Guay* vs. *Labelle*, K. B. 1820, 1 Rev. de Leg. 503.

2. **Blasting in Quarry.**—Damages cannot be recovered against a proprietor of a farm by reason of explosions in quarrying carried on by his tenant. *Vannier* vs. *Larche*, S. C. 1858, 2 L. C. J. 220.

(1) As to fire started by sparks from locomotive, see under title "Railways," where the same doctrine is upheld, viz., that the starter of a fire is liable for the damage thereby caused whether by negligence or *force majeure*.

XXI. OMISSION TO PRESENT CONTRIBUTION BOX IN CHURCH.

1. A person performing a voluntary and gratuitous service, such as the collection of the offertory in a church, will not be permitted to make use of his office to offend and humiliate a member of the congregation, and an action of damages will lie for such offence. A wilful and marked omission to present the plate to a member of the congregation, was held to be an offence for which an action lay. *Lebeau* vs. *Turcotte*, S. C. 1884, 7 L. N. 259.

2. A person charged with the duty of taking up the collection during divine service, and who designedly omits to present the contribution box to a parishioner, so as to attract the attention of those present, is guilty of an insult, for which he is liable in damages to the parishioner, although the latter was not in the habit of contributing anything when the plate was presented to him. But the judgment of the Court below, which awarded the defendant $20 damages and $20 costs, but condemning the plaintiff to pay all other costs of both sides, was held to be erroneous in so far as it condemns the plaintiff to pay defendant's costs over and above the $20. *Primeau* vs. *Demers*, C. R. 1885, M. L. R., 3 S. C. 88.

XXII. OPENING PRIVATE LETTER.

The opening of a private letter by a person to whom it was not addressed and for whom it was not intended, and voluntarily perusing and copying such letter, renders the person who thus violates the sanctity of private correspondence answerable in damages. *Cordingly* vs. *Nield*, S. C. 1874, 18 L. C. J. 204.

XXIII. PROCEEDINGS TO OBTAIN PAYMENT OF A DEBT. (See also under title "Capias.")

1. *Held*:—If there be neither malice nor want of probable cause, a creditor is not liable in damages by reason of proceedings taken by him in the exercise of his right, to enforce the payment of his debt, whether by execution, *capias*, or otherwise, although such proceedings have been set aside by the Court *for informalities*. *Scott* vs. *McCaffrey*, Q. B. 1892, 1 Que. 123; *David* vs. *Thomas*, Q. B. 1857, 1 L. C. J. 69, and see *Beauchemin* vs. *Tradeau*, Q. B., Sept., 1876, Ram. Dig. 298; *Langlois* vs. *Normand*, Q. B. 1880, 6 Q. L. R. 162; *Montreal Street Ry. Co.* vs. *Ritchie*, Supreme Ct. 1889, 16 Can. S. C. R. 622, confirming M. L. R., 3 S. C. 232.

2. So, where an attachment for rent was dismissed on the ground that no demand of payment before suit was proved, an action of damages will not be maintained if the defendant in his defence to such action establishes that demand of payment was in fact made before the attachment issued. *Soulières* vs. *DeRepentigny*, S. C. 1888, M. L. R., 2 S. C. 414.

3. And where a party executed in good faith a judgment ordering coercive imprisonment, and such judgment was afterwards reversed, he was held not liable in damages. *Langlois* vs. *Normand*, Q. B. 1880, 6 Q. L. R. 162.

4. But in an early case where an attachment in revendication was dismissed, and an action of damages was taken by the party whose goods were attached, the Superior Court allowed the plaintiff 1 shilling damages and 1 shilling costs, and this was confirmed by the Court of Appeal, but no particulars are given in the report. *Poutré* vs. *Lagure*, Q. B. 1865, 12 R. L. 465.

5. And where the plaintiff attached goods in the hands of others than his judgment debtor, on the ground that they had been purchased fraudulently at a judicial sale of his debtor's goods, the fraud being indicated by the low price paid for the goods, the plaintiff attaching was liable in damages, which would be assessed at $100 although no special damages were proved, and costs of action as brought, fraud not being proved. *State* vs. *McNally*, C. R. 1889, 33 L. C. J. 136.

6. And in another case where an attachment before judgment had been taken on the ground that the debtor was fraudulently disposing of his goods, it was established that the plaintiff had sold a couple of cattle and had offered others for sale, but the Court found that there was no fraud, and dismissed the attachment. In an action of damages the defendant was condemned to pay the plaintiff $75 damages and all costs; but in review this judgment was reformed on the ground that the plaintiff had done things which, without being fraudulent, were such as to give the defendant some reason to believe the plaintiff was disposing of his property with a view to defraud. Damages reduced to $25 and costs of action of that class in Court below, but defendant to have his costs in review. *Emond* vs. *Gravel*, C. R. 1886, 12 Q. L. R. 69.

7. And *held* that in an action of damages for improvident issue of an attachment before judgment, the Court will only give nominal damages where there is serious ground for distrust, although not amounting to a complete justification of the process. *Dalpé* vs. *Rochon*, S. C. 1858, 2 L. C. J. 120.

8. Damages to the extent of $20 and costs allowed for an attachment before judgment issued on the ground that plaintiff was advertising his furniture for sale preparatory to removing to the country. *Perry* vs. *Pell*, S. C. 1879, 2 L. N. 404, and see *Powell* vs. *Patterson*, 4 Q. L. R. 192.

9. In an action for wrongfully suing out an attachment, it is incumbent on the party who resorts to such a remedy to show that he acted with reasonable and probable cause, and, in default of his so doing, malice will be implied, and he will be liable in damages for any injury sustained. *Deniss* vs. *Glass*, Q. B. 1867, 17 L. C. R. 473.

10. And *held* also that, where a person attaches the goods of another for a land tax which had been paid, the former will be liable in damages to the latter even where there was no malice but simply error on the part of the person attaching. *Brault* vs. *Marsolais*, S. C. 1879, 10 R. L. 111.

11. And a person whose effects are seized under an attachment before judgment without probable cause may, by incidental demand, claim damages for such seizure, and may plead such claim for damages in compensation of the plaintiff's demand. *Furness* vs. *Bleault*, S. C. 1886, M. L. R., 2 S. C. 419.

12. An action of damages lies for an illegal seizure of moveables under a writ of attachment for rent, not returned into court, and exemplary damages may be awarded. *Bronillet* vs. *Clarke*, S. C. 1886, M. L. R., 2 S. C. 417.

13. And in another action of damages for unfounded attachment, where the Court was of opinion that the allegations of the affidavit with respect to the secretion were not proved; but, on the contrary, that the attachment had issued on altogether insufficient grounds and information, and that damage had been occasioned thereby to the plaintiff—*Held*, reversing the judgment of the Superior Court, that malice would be presumed, and that the defendant would be condemned to pay damages and costs. *Deniss* vs. *Glass*, Q. B. 1867, 17 L. C. R. 473.

14. Where a merchant who is insolvent continues to carry on business after refusing to abandon his property to his creditors, this is a sufficient ground for the issue of an attach-

ment before judgment against him, outside of the fact that such merchant is charged with secreting his property with intent to defraud his creditors, and where such merchant takes an action of damages against the person attaching, for illegal attachment, in order to succeed he must disprove both of the above grounds alleged in the affidavit. So a judgment awarding him $800 damages where only one of the above grounds was disproved was manifestly unjust. New trial ordered. *Drolet* vs. *Garneau*, C. R. 1884, 10 Q. L. R. 139.

15. *Per Casault, J.*—As to whether there is probable cause or not for an attachment is a question of law for the judge; the jury have only to declare on the facts necessary for the judge to determine whether there is probable cause or not. (*Ib.*)

16. Where a creditor seizes the goods of his debtor which were exempt by law from seizure to the knowledge of the creditor, the latter will be held liable in damages. *Lemoine* vs. *Giroux*, C. Ct. 1886, 9 L. N. 147.

XXIV. PUBLIC NUISANCE. (See also under title "NUISANCE.")

1. No action of damages lies by an individual for a public nuisance unless such individual suffers special and particular damage. *Brown* vs. *Gugy*, P. C. 1864, 14 L. C. R. 213.

2. A person who moors a raft in front of the residence of a riparian proprietor on a navigable river such as the St. Lawrence, at a place under the control of Harbor Commissioners, and allows such raft to remain at that place over two months against the express wish of such riparian proprietor, will be condemned in nominal damages (in this case $50) and compelled to remove the raft. Plaintiff had an action in this case because the damage and inconvenience suffered were proved and were special to him, and apart from that suffered by the public. The right which the defendant had to tow his raft down the river St. Lawrence would not permit him to moor it at one spot for an unreasonable and unnecessary length of time, and merely for the purpose of holding back the timber until the market should be more favorable. (1) *Dunning* vs. *Girouard*, Q. B. 1877, 9 R. L. 177.

(1) And see *Johnson* vs. *Archambault*, 8 L. C. J. 317, where it was held that appellants had the right to have obstructions removed from the public street, which obstructions impeded their ingress and egress to and from the street. But no damages were granted.

XXV. PURCHASER OF STOLEN TIMBER—PARTICIPATION IN THEFT.

The purchaser of stolen timber who has participated in the theft, either before or after the committing of the offence, is liable in damages to the proprietor, although he may have paid for the wood he received. *DeBeaujeu* vs. *Perry*, Q. B. Montreal, Dec., 1875.

XXVI. PROTEST OF A BILL OR NOTE.

In an action of damages for allowing a bill of exchange to be protested—*Held*, on demurrer, that the allegation of having suffered damage by reason thereof was sufficient to sustain the plaintiff's declaration. *Henry* vs. *Mitchell*, S. C. 1855, 5 L. C. R. 489, 4 R. J. R. Q. 469.

XXVII. PHYSICAL EXAMINATION OF INJURED PERSON.

In action of damages for injuries caused by a horse-bite, the defendant can before pleading demand that physicians be appointed to examine the nature and extent of the injuries received by plaintiff. *Lemieux* vs. *Phelps*, S. C. 1885, M.L.R., 1 S. C. 305.

XXVIII. RACE-COURSE PROPRIETOR.

A race-course proprietor is obliged to carry out programme or will be responsible for damages. *Rouillard* vs. *Ricard*, C. Ct. 1884, 28 L. C. J. 280.

XXIX. RECONCILIATION.

The fact that the plaintiff and defendant have met and drank together will not be construed into a reconciliation on the part of the plaintiff, when the latter, at such interview, protests that he intends prosecuting his action. *Pepin* vs. *Rocand*, S. C. 1864, 8 L. C. J. 218.

XXX. RAPE.

An action of damages by the father of a minor girl for rape will not be sustained on the mere unsupported and uncorroborated evidence of the girl herself, and specially so in the face of evidence that her character was equivocal. *Bigonesse* vs. *Brunelle*, S. C. 1883, 27 L. C. J. 372.

XXXI. RIOT. (See also under title "MAGISTRATE," also "MUNICIPAL CORPORATION.")

Damages resulting from a riot may be claimed from a party proved to have been

amongst the body of rioters, although not taking an active part in their proceedings. *Niaentsiasa* vs. *Ackwirente*, Q. B. 1860, 4 L. C. J. 367, 10 L. C. R. 377.

XXXII. REFUSAL TO TRANSFER SHARES.

A shareholder in a railway company, who has transferred his shares as collateral security, may bring an action of damages against the company for refusing to register such transfer during a period of several months, and thereby causing him great pecuniary loss, although such transfer be prepared in the form of the company's charter. And the allegations that the transferees had offered to surrender such transfer to the company, and had demanded that the company should transfer the shares on their books, are sufficient to meet the requirements of the company's charter. *Webster* vs. *Grand Trunk Railway Company of Canada* Q. B. 1859, 3 L. C. J. 148, reversing S. C., 2 L. C. J. 291.

XXXIII. SCHOOLMISTRESS.

Damages will be awarded against a school mistress for excessive punishment of a pupil. *Brisson* vs. *Lafontaine*, S. C. 1864, 8 L. C. J. 173, 14 L. C. R. 377.

XXXIV. SHOOTING DOGS.

Action of damages by a farmer against his neighbor for shooting his dogs and firing shots into his building. Evidence that defendant killed the dogs—*Held*, that although they had been trespassing he had no right to take the law into his own hands, and $60 damages in all allowed. *Trenholm* vs. *Mills*, S. C. 1881, 4 L. N. 79.

XXXV. STRUCK OFF VOTER'S LIST IN ERROR.

The plaintiff complained that in the year 1880 or 1881, although he had paid his taxes, no credit was given to him in the books of the corporation, and a bailiff came down to his place of business and annoyed him a good deal; and further that his name was stricken from the list of voters. Action for a large amount of damages. *Per Curiam.*—The Court cannot commend the practice of suing for large amounts of damages in cases where there is often great difficulty in determining whether there is any right to recover even a dollar; it increases the costs enormously. The plaintiff here has made out a right of action. He has proved no special damage; but, for the deprivation of his right of citizenship and of his vote as such, he is entitled to recover something. Judgment for $30 and costs of the lowest class Superior Court action. *Martin* vs. *The City of Montreal*, S. C. 1882, 6 L. N. 23.

XXXVI. TRADE NAME.

Where a party abandons his business in favor of another party bearing the same name (his brother) and leaves for a foreign country, but returning shortly after issued circulars to the public to the effect that he is no longer carrying on business at the old stand but has taken a new one (naming the street), he is not liable in damages to the other party. *Racicot* vs. *Racicot*, S. C. 1890, 20 R. L. 228.

XXXVII. UNAUTHORIZED SALE OF SHARES.

An action of damages setting forth in effect that a bank, to which plaintiff had transferred certain shares as collateral security for an advance, had, without right, and against the will of plaintiff, sold the said shares at a third of their value, on purpose to injure plaintiff, is not demurrable because the plaintiff has not offered defendant the alternative to substitute other shares. *Gilman* vs. *Campbell*, 1885, M. L. R., 2 Q. B. 291, 30 L. C. J. 19.

XXXVIII. WHO CAN RECOVER.

1. Collateral Relatives—ART. 1056 C. C.—The claim for damages for the death of a person resulting from a *quasi* offence forms no part of his succession, and by article 1056 C. C., under which alone an action for such a claim will lie, the brothers and sisters of deceased have no right of action. *Ruest* vs. *G. T. R. Co.*, S. C. 1878, 4 Q. L. R. 181.

2. Father for Injury to Son.—Where a father is dependent upon his son's earnings for support (a support which the son is bound by law to afford), and he sues for damages for loss of support arising from his son's injuries, without alleging that the son is a minor or incapable of exercising his own rights, he will be allowed damages, such damages being suffered by him personally. *Larivée* vs. *Lapierre*, S. C. 1890, 20 R. L. 3.

3. Heirs.—In an action of damages by an ex-volunteer for imprisonment and hardship suffered by him at the hands

of the officers of the regiment after the expiration of his term of engagement—*Held*, that though the right to such actions was purely personal, and could not be instituted by his heirs, that, nevertheless, it could be continued by them where it had been instituted by the person himself previous to his death, and that they could succeed to the claim. *Thompson* vs. *Strange*, S. C. 1879, 5 Q. L. R. 205, and see *Salbert* vs. *Chouinard*, K. B. 1812, 1 Rev. de Leg. 389.

4. — But the heir or heirs have an action of damages for slander of the memory of his or their ancestors. *Roy* vs. *Turgeon*, S. C. 1886, 12 Q. L. R. 186.

DATION EN PAIEMENT.

See VENTE.

DEBENTURES. (1)

See BILLS AND NOTES.
" MUNICIPAL CORPORATIONS.
" COMPANY AND CORPORATION LAW.

1. A debenture is a negotiable instrument, and cannot bear a condition on the face of it, making its validity dependent upon obligations to be performed in future. *Parish of St. Césaire* vs. *McFarlane*, Supreme Ct. 1887, 11 Can. S.C. R. 738; confirming Q. B., M. L. R., 2 Q. B. 160.

2. A debenture of a municipal corporation in the hands of a *bona fide* holder, good on the face of it, and made within the limits of the powers of the corporation, cannot be questioned by the corporation for irregularities in its issue. *Corporation of Township of Roxton* vs *Eastern Townships Bank*, Q. B. Montreal, 28 Nov., 1882.

3. An error in the date of such debenture is a cause of nullity. (*Ib.*)

DEBTOR AND CREDITOR.

1. **Rights of Creditor.**—A creditor who, on the distribution of the price of sale of his debtor's property under process of execution, has not been collocated because the proceeds were insufficient, and were awarded in the report to a privileged creditor for a claim due by the debtor jointly with another, his warrantor to the extent of one half of the claim has under Art. 1031 C. C. the right to bring the action the debtor could have brought against such warrantor to recover from him the amount for which he is liable. *Gosselin* vs. *Brunean*, S. C., 16 Q. L. R. 23.

2. — The failure of the debtor to proceed in warranty against his co-debtor and warrantor, at the time of the distribution of the proceeds of his property, amounts to a refusal and neglect on his part to act sufficient to entitle the creditor to avail himself of Art. 1031. And, in the present case, the debtor was in default to so proceed, and no further putting in default by the plaintiff was required before bringing suit. (*Ib.*)

3. — It is not necessary, in such a case, that the creditor should join his debtor as co-defendant in the suit brought against the warrantor. (*Ib.*)

4. — An eventual or conditional creditor has a right to any conservatory recourse necessary to secure the payment of his debt. He can therefore refuse to pay, and may keep in his hands all sums which he owes to the person whose creditor he is about to become where such person is insolvent. *Rousselle* vs. *Primeau*, C. R. 1868, 1 R. L. 703.

5. **Release of Claim.**—Renunciation or release of a claim by a creditor against his debtor is valid even before acceptance. *Dalloz eo.* Obligations, No. 56.

DECRET.

See SALE BY SHERIFF.

DEED.

I. ABSENCE OF SEAL.
II. BY PRIVATE WRITING. 1-2.
III. INTERPRETATION. 1-6.
IV. NOTARIAL. 1-9.
V. NOVATION.
VI. NULLITY. 1-4.
VII. OF CONVEYANCE OF LAND. 1-2.
VIII. RESCISSION. 1-3.
IX. REVOCATION.
X. SIMULATED. 1-3.
XI. THIRD PARTIES. 1-2.
XII. WITNESSING. 1-2.

See also FRAUD, ETC.
" CONTRACTS.
" DONATION.
" SALE.

(1) See Debentures' Registration Act, Art. 4617 *et seq.*, R. S. Q. This Act applies to all corporate bodies in the Province of Quebec, except Railway Companies and Ecclesiastical Corporations.

I. ABSENCE OF SEAL.

The absence of a seal to a deed of sale of a property, when the purchaser has been put in possession, and paid the price of sale, is not a cause of nullity in a sale. *St. Patrick's Hall Association* vs. *Moore*, S. C. 1874, 5 R. L. 294.

II. BY PRIVATE WRITING.

1. A document *sous seing privé*, containing the stipulations of a sygnallagmatic contract is valid, and its production to prove the reciprocal engagement of the parties thereto is sufficient although it be neither executed *en double*, or pretends to have been so executed. *Lampson* vs. *McConnell*, C. Ct. 1864, 14 L. C. R. 44.

2. Depositing a deed by private writing with a notary is only for the purpose of security, and does not give to copies thereof made by the notary the effect of an authentic deed. Such a deed must be proved like any other private writing. *Guerin* vs. *Craig*, C. R. 1892, 2 Que. 168.

III. INTERPRETATION.

1. The plaintiff leased to the defendant a pair of three year old steers, to be returned at the end of two years. Defendant did not return them as stipulated, but in an action for the value, which was set down in the declaration at $91, pleaded that after the expiration of the lease plaintiff agreed to his keeping the oxen until the following spring, and that therefore the agreement of lease was extinct—*Held*, that plaintiff had never relinquished his claim under the lease, and was entitled to the amount sued for. *Woodard* vs. *Auringer*, S. C. 1865, 1 L. C. L. J. 113.

2. Property supposed to contain minerals was sold with a stipulation that the purchaser was to cause it to be explored, but without any time for such exploration being fixed—*Held*, that the purchaser might await the result of an exploration of the adjoining lot, it being proved by scientific testimony that the working of the latter would indicate what success was to be anticipated from that in question. *Johnston* vs. *Aylmer*, C. R. 1865, 1 L. C L. J. 67.

3. And where the defendant in an action of damages, which was dismissed with costs, seized a real property in possession of the plaintiff, in execution of two judgments for costs, and the plaintiff opposed on the ground that he was not the actual proprietor of the land seized, and filed in support of his allegation a deed which set forth "*que le défendeur "vendit, cela, delaissa et abandonna à l'op- "posant une petite maison située sur un certain "terrain (c'est-à-dire le terrai. saisi en la "cause), pour le prix et somme de cinq louis, "et que la dite vente fut faite en outre pour "le prix et somme de cinq louis par année "pour la rente du terrain tant que la dite "maison resterait dessus, et qu'il fut expres- "sement convenu que le dit opposant serait "libre de vendre échanger et enlever la dite "maison quand bon lui semblerait, et que la "rente serait de ce jour éteinte*"—*Held*, in review, reversing the original judgment, that the deed explained by the circumstances under which it was made, as well as by the position it gave to the parties, must be considered as conveying a right of property, and the opposition was dismissed. *Badeau* vs. *Guay*. C. R. 1866, 16 L. C. R. 390.

4. A license was granted to the plaintiff to cut timber on a location described as follows—"To commence at the mouth of Green's Creek on the Black River, and extending down six miles on the course, south twenty-one degrees west, and back four miles on the course, north sixty-nine degrees west." The question having arisen as to whether certain timber seized had been cut on this location—*Held*, confirming the judgment of the Court below, that the words "down on the course" meant down the Black River on the course, and that the word "back" meant back from the Black River. *Bryson* vs. *Stutt*, Q. B. 1866, 2 L. C. L. J. 81.

5. Where a clause in a deed is ambiguous and uncertain, the Court will give it such interpretation as appears to be most consistent with the intention of the parties and the equities of the case. So, where, by the terms of a *don mutuel*, by marriage contract, a farm alleged to be then in the occupancy of J. M. (one of the sons of the husband) was excluded from the *don mutuel*, and it appeared that this farm was then in possession of the son under a deed of donation from his father, which was subsequently resiliated, and the farm then became again the absolute property of the father, it was held that the reason for excluding the farm having ceased and disappeared by the interversion of title, it should not be excluded from the *don mutuel*. *Martindale* vs. *Powers*, Supreme Ct., 23 Can. S. C. R. 597, confirming Q. B. 1892, 1 Que. 145.

6. Where parties enter into a deed, the Courts should be guided by the terms of the deed in interpreting obligations stipulated

therein. *Langevin* vs. *Morrissette*, Q. B. 1888, 19 R. L. 476.

IV. NOTARIAL. (1)

1. A notary can pass an *acte* for his relations, especially if the *acte* he passes be contrary to their interest. But cases of this description depend altogether upon their merits, whether they indicate a presumption of fraud or otherwise, being the question to be decided. *Fournier* vs. *Kirouac*, K. B. 18, 1 Rev. de Lég. 509.

2. A copy of a notarial deed, not certified by the notary who executed the original, does not make proof of its contents, and an action based thereon will, therefore, be dismissed. *Ricker* vs. *Simon*, Q. B. 1877, 22 L. C. J. 270.

3. A deed made before a notary related to one of the parties is valid unless fraud be proved. *Lynch* vs. *McArdle*, C. R. 1871, 3 R. L. 372.

4. The Civil Code does not forbid notaries to draw up deeds to which their relatives are parties. (*Ib.*)

5. Petitory action was brought against the defendant in his capacity as curator to the vacant estate of the late "G" to recover possession of a certain property which defendant pleaded had been purchased by "G" by notarial deed of sale from the *auteur* of the plaintiff. This deed purported to be made in consideration of £800, of which £500 was alleged to have been paid at the time of passing the deed. The plaintiff replied that "G" had obtained the deed in question by false representations, etc., and that the £500, nor any sum whatever, was ever paid. Plaintiff also filed an inscription *en faux* on these and other grounds against the deed in question—*Held*, not necessary that an authentic deed be written in presence of the contracting parties, but it is sufficient if it be read to them at the completion of the deed, and that it mentions such reading. *McIvoy* vs. *Hunt*, C. R. 1868, 1 Q. L. R. 97. (2)

6. And *held*, also, that a false allegation in such deed of sale that the sum of £500 had been paid at the passing thereof is not sufficient to entail the nullity of the deed. (*Ib.*)

7. And *held*, also, that where a deed is written in English, and one of the parties is entirely ignorant of that language, although it be orally translated by the notary, it must be held to be null, such translation not being equivalent to the reading prescribed by law. (*Ib.*)

8. A notarial deed executed before the coming into force of the Notarial Code is not authentic unless dated, and a deed commencing with the words: "Before the notary, etc.," commencing with a capital B, without reference to any date following thereafter, is not dated nor is it authentic. *Dumas* vs. *Coté*, C. R. 1888, 14 Q. L. R. 308.

9. The real date of a notarial deed is that upon which the notary signed it, although some of the parties thereto had signed it previously to the notary. And where a notary altered the date of these previous signatures to the date of his own signature, this does not constitute a falsification. *Guevremont* vs. *Guevremont*, Q. B., 34 L. C. J. 317.

V. NOVATION OF.

A notarial deed of obligation for the payment of money may be novated by a writing *sous seing privé*, and the mortgage thereby created can, by the same means, be destroyed. *Nadeau* vs. *Robichaud*, K. B. 1818, 1 Rev. de Lég. 508.

VI. NULLITY.

1. The plaintiff brought petitory action asking to be subrogated in the rights of one of the defendants, his debtor, under certain judgments, as proprietor of an undivided half of certain real property situated in the City of Montreal. The declaration set up among other things a will, which it declared to be null. The defendant, on the other hand, invoked an inventory which purported to be made before two notaries, and the preamble of which was signed by the party whom the plaintiff claimed to represent. The plaintiff thereupon inscribed *en faux*, as well against the inventory as against the copy of the will, the *moyens de faux* being founded merely on the fact that the inventory was countersigned by the second notary some ten years after its date, and after the death of one of the persons mentioned in the inventory, and after protest and notice to the second notary not to sign it—*Held*, confirming the Court below, that a law may be abrogated by disuse, and that the provisions of the *Ordinance of* 1498 and of the *Ordonance de Blois of* 1579, in so far as they require the presence of a second notary to a notarial act, *have been so abrogated*, and that, consequently, a notarial *acte* is neither *faux* nor

(1) Commentary upon Art. 1203 C. C. by P. B. Lafrenaye, 3 R. L. 353.

(2) See reporters' note at end of this case.

null from the fact of the inventory having been countersigned several years after it was executed, the whole without fraud, and the inventory having been presented to the second notary by the executing notary himself, and notwithstanding a protest made by a third party, assignee of a creditor of a party to a deed. *Desforges* vs. *Dufaux*, Q. B. 1862, 13 L. C. R. 179.

2. And *held*, also, that the fact that the copy of the inventory was only produced as an exhibit on the 23rd March, after the countersigning of the second notary, which had taken place on the 16th of the same month, could not, by reason thereof, be considered as false. (*Ib.*)

3. Action to annul—Prescription.—Art. 2258 C. C. only applies to actions in rescission, and not to actions to annul. Therefore, an action to declare a deed void for simulation is only prescribed by thirty years. *Dorion* vs. *Dorion*, Q. B. 1883, 20 R. L. 176.

4. Of Part.—Where part of a deed is null, and the rest not, the part which is null, unless inseparably bound up with the rest of the deed, does not necessarily entail the nullity of the whole deed. *Lagorgendière* vs. *Thibodeau*, Q. B. 1871, 2 Q. L. R. 163, 1 R. C. 478.

VII. OF CONVEYANCE OF LAND.

1. A deed of conveyance of land which has not been signed by the purchaser will not make proof that he had power to create a hypothec on the property. *Union Bank* vs. *Nutbrown*, Q. B. 1885, 11 Q. L. R. 217.

2. Where two notaries, as witnesses, sign a conveyance of lands held in free and common soccage, their signatures must be proved like those of other witnesses. (*Ib.*)

VIII. RESCISSION.

1. Where the rescission of certain deeds set up in an opposition was demanded—*Held*, that such demand could not be granted unless all the parties to the deeds were joined in the proceeding; and in such case recourse should be had to revocatory action or action *en rescision*. *Mignier* vs. *Mignier*, S. C. 1852, 2 L. C. R. 251, 3 R. J. R. Q. 167.

2. Waiver.—In an action in which the rescission of a deed passed many years previously was demanded—*Held*, confirming the decision of the Court below, that as the plaintiff had acquiesced in the conveyance for years, until, by the lapse of time and the expenditure of money, the property had greatly increased in value and new interests had been created in it, the demand in rescission could not be granted. *Lemoine* vs. *Lionais*, S. C., 2 L. C. L. J. 163, & P. C. 1871, 6 R. L. 123.

3. —— In an action to nullify a deed for want of consent, the allegation of defendant that the plaintiff had benefited by the deed is not ground for voiding the deed. Such allegation will be dismissed on demurrer. *Hudon* vs. *Prevost*, S. C. 1892, 2 Que. 258.

IX. REVOCATION.

A deed stands unrevoked and good and valid in every respect until revoked in presence of all the parties thereto. *Sykes* vs. *Shaw*, Q. B. 1863, 9 L. C. J. 141 & 15 L. C. R. 304.

X. SIMULATED.

1. Simulation is a disguising of the truth; a deed is simulated which does not contain a sincere expression of the real intention of the parties. So, where a property worth about $1,260 was sold to a man of straw (who did not take possession) for a consideration stated in the deed to be $3,650, and two of the instalments amounting to $2,000 were afterwards transferred by the vendor to a creditor in payment of goods, the Court declared the deed to be a simulated one, and set it aside so far as concerned the creditor. *Walker* vs. *Black*, 5 L. N. 415, S. C. 1882, and 8 L. N. 67, Q. B. 1885. Confirmed in Supreme Court, but unreported.

2. *Held*,—Where opposant's title to immoveable property, acquired by her from a disinterested third party, was duly registered before the existence of the claim of a judgment creditor of opposant's husband, and no action to annul the wife's deed had ever been instituted, such creditor is not entitled to seize the property, and a contestation by him of the wife's opposition, on the ground that the deed to the wife was simulated and that the husband was the real owner, cannot be maintained. *Lefebvre* vs. *Lapierre*, Q. B. 1892, 1 Que. 364.

3. A party to a simulated deed can demand the nullity of the deed, and that he be put in the *status quo ante*. *Dorion* vs. *Dorion*, Q. B. 1883, 20 R. L. 176.

XI. THIRD PARTIES.

1. The date of the deed, which was *sous seing privé*, might be established against a third party by legal proof, and was so proved in the present case. *Eastern Townships Bank* vs. *Bishop*, 1889, M. L. R., 5 Q. B. 216.

2. The plaintiff, having judgment against the defendants, seized in the hands of the garnishee who declared to owe nothing. This the plaintiff contested on the ground that the garnishee leased from the defendant and paid him $15 per month rental. The garnishee replied that he had a lease from the defendant, but by private agreement the rent was to be paid to another who had accepted. Demurred to on the ground that, being a private writing, it had not the quality required to give effect to it as against third parties under Art. 1225 C. C. (1) The garnishee on the other hand pretended that under 1222 C. C. (2) the creditor was not a third party in the sense of Art. 1225. The Court maintained the contestation of plaintiff, and the declaration of the garnishee was set aside. *Evans* vs. *Lioncis*, S. C. 1879, 4 L. N. 110.

XII. WITNESSING.

1. The *Ordonnance* of 1731 is no part of the law of Canada. If there be but two witnesses, therefore, to a notarial deed who do not write, that does not vitiate it if it be executed in a country parish, for the 166th article of the *Ordonnance de Blois* requires written signatures by witnesses only *en gros bourg et ville*, and they are not required even there *à peine de nullité*. *Ruel* vs. *Dumas*, K. B. 1816, 2 Rev. de Lég. 333.

2. Notaries' clerks and assistants can witness authentic deeds entered into by parties who cannot sign their names. *Crébassa* vs. *Crépeau*, C. R. 1868, 1 R. L. 668.

DEFAULT.

I. In Matters of Capias.
II. Of Plaintiff (Congé Defaut).
Costs of entering the Action. 1.
Crown. 2.
Notice. 3.
Motion for—Delay. 4-6.
III. Putting in Default. 1-12.
See also Judgment.
" Lessor and Lessee.

I. IN MATTERS OF CAPIAS.

A default will be taken off on special cause shown and where the defendant has a good defence, on payment of fifty shillings costs. *Brisson* vs. *McQueen*, S. C. 1862, 7 L. C. J. 70.

II. OF PLAINTIFF (Congé Defaut).

1. Costs of entering the Action.—Where defendant moves for the dismissal of the action for plaintiff's default, he must, while filing his copy of the writ and action, pay for entering the action. *Coady* vs. *Fraser*, S. C., 6 Q. L. R. 384.

2. Crown.—There can be no *congé défaut* against the Crown. *Thompson* vs. *Sanderson*, Q. B. 1888, 19 R. L. 369.

3. Notice.—It is not necessary to give notice of motion for dismissal of action for plaintiff's default. *Gagnon* vs. *Senécal*, C. R. 1873, 4 R. L. 537.

4. Motion for—Delay.—Where the defendant demands dismissal of an action for default of plaintiff, he should, in order to obtain his costs, prove that he has deposited the copy of the action in the office of the clerk of the court on the day the action was returnable or on the following juridical day. *Lambe* vs. *Dyer*, S. C. 1893, 4 Que. 98; *Guerin* vs. *Bouchard*, C. Ct., 13 Q. L. R. 222; *Croisetiere* vs. *Tessier*, S. C. 1890, 20 R. L. 107.

5. —— Dismissal of the action for default of plaintiff can only be obtained upon the defendant filing his copy of the writ and action on the return day. *Cherrier* vs. *Torcapel*, C. Ct. 1880, 6 Q. L. R. 377.

6. —— Where a motion for dismissal of the action for plaintiff's default was not made until the fifth day after return, no costs were allowed. *Siegert* vs. *Hartland*, S. C. 1880, 3 L. N. 347; *Grant* vs. *Lavoie*, Q. B. 1880, 3 L. N. 392.

III. PUTTING IN DEFAULT.

1. Where an action in ejectment had been dismissed on the ground that no sufficient notice or *mise en demeure* had been made—*Held*, in review, that the judgment must be reversed, as there was proof of verbal notice, the lease being a verbal one. *Molleur* vs. *Farrean*, C. R. 1865, 1 L. C. L. J. 28.

2. The plaintiff, a lessee, sued his lessor to compel him to fulfil one of the conditions of the lease by which he was bound to provide materials for keeping the fences in

good order. The action was instituted four days after notice in writing had been served upon the lessor calling upon him to do the work. The judgment condemned the defendant to provide the materials within fifteen days from date of judgment, and, in default of his so doing, the plaintiff was authorized to provide the materials at defendant's expense—*Held*, that the notice, four days before suit, was sufficient. *Prevost* vs. *Brien*, Q. B. 1866. 2 L. C. L. J. 82.

3. The defendant had agreed to get a steamer off the rocks, which had run aground near Longueuil, in fifteen days, but failed to do so, and the day after the fifteen days had expired the boat took fire and was burnt to the water's edge and the plaintiff brought action of damages—*Held*, that where time was of the essence of the contract, as in this case, that a protest or default was unnecessary. *Beaudry* vs. *Tate*, S. C. 1867, 3 L. C. L. J. 143.

4. An action of resiliation for the non-performance of the conditions of an emphyteutic lease cannot be maintained if the defendant have not been put in default. *Ralston* vs. *Poser et al.*, 1 Rev. de Lég. 349, K. B., & 2 Rev. de Lég. 440, K. B. 1818.

5. The defendant undertook to return a certain number of shares in a railway before a day stated or to pay an amount in money: the shares were not returned—*Held*, that the contract being of a commercial nature, the debtor was put in default by the lapse of the time of performance. *Geoffrion* vs. *Senecal*, S. C. 1883, 6 L. N. 201.

6. A merchant suing on an account for goods sold and delivered must, prior to an action thereon, make a demand of payment at the debtor's domicile, either personally or through his attorney. A demand made by letter from the merchant by sending the account, or by lawyer's letter, is insufficient. *Smardon* vs. *Lefebvre*, 1884, M. L. R., 1 S. C. 387.

7. A demand of payment made through the medium of a lawyer's letter in the ordinary professional course is a sufficient putting in default. *Guimond* vs. *Leonard*, C. Ct. 1885, 8 L. N. 171.

8. The failure to make a written demand as required by Art. 1067 C. C., for putting a person in default where the contract is in writing, does not affect the existence of the plaintiff's rights, but only the manner of proving the default. Therefore a verbal putting in default is sufficient where it can be legally proved, although the contract be a written one. *Belanger* vs. *Paxton*, C. R. 1886, 14 R. L. 526.

9. Where the defendants, by the terms of the deed of sale of a strip of land to them by the plaintiffs, undertook to construct two crossings with gates and fastenings, to enable the vendors to cross the railway, but no time was stipulated within which such crossings were to be constructed, no damages could be claimed for inexecution of the obligation until the defendants had been put in default to make the crossings; and in the present case, no damages after the defendants had been put in default having been proved, the action was dismissed. *Crevier* vs. *Ontario & Quebec Ry. Co.*, 1888, M. L. R., 4 S. C. 428.

10. A putting in default can be validly made by a notary in the Police Court during the sitting of the court where the defendant could not be found elsewhere on the previous days. *Christin* vs. *Morin*, 1888, M. L. R., 4 S. C. 469.

11. The plaintiff agreed, in writing, to purchase a certain property for $11,000, of which $3,000 was an existing mortgage which he assumed; and of the balance, $6,000 to be paid on passing the deed, *which was to be done in ten days' time*, and $2,000 within two months from the date of the writing. This was accepted and ratified by the vendor, but the deed was not executed. The plaintiff, nearly five months afterwards, made a notarial tender of the $6,000, and also of the $2,000, less interest accrued on the mortgage, and called upon the vendor to execute a deed in accordance with the writing; and he afterwards brought an action to compel the vendor to execute a deed, but without making any deposit with the prothonotary—*Held*, that in order to put the vendor legally in default, the plaintiff should have tendered the $6,000 within ten days from the date of the writing, and that the tender subsequently was too late. Further, that the plaintiff should have renewed the tender by his action, and brought the money into court. *Foster* vs. *Fraser*, 1888, M. L. R., 4 S. C. 436. Confirmed in Appeal, M. L. R., 6 Q. B. 405.

12. A demand of payment made on the part of the creditor by a person unknown to the debtor, and not furnished with an authorization, is not a putting in default when the debtor does not deny the debt but only refuses to pay to the unknown person. *Gagnon* vs. *Robitaille*, C. Ct. 1878, 4 Q. L. R. 186.

DELIVERY.

1. What constitutes.—An assignment of the interest of the insolvent in his lease or leases of the premises containing the property sold, without any actual displacement or other species of actual delivery, is not a sufficient delivery in law as against creditors or other third parties. *Cumming* vs. *Smith*, Q. B. 1859, 5 L. C. J. 1.

2. The plaintiff seized a quantity of timber in the hands of a third party as belonging to the defendant, and a fourth, who was surety of defendant for the construction of a church for which the timber was intended, intervened, and claimed it as having been transferred by defendant to him; but the only proof of delivery was that he and defendant had stood on the top of a hill overlooking the place where the timber was piled, and the defendant said to the surety, pointing to the timber, "I give it to you"—*Held*, to be no delivery, and the judgment maintaining the attachment was confirmed. *Chartrand* vs. *Joly*, C. R. 1865, 1 L. C. L. J. 27.

3. Where a person, in security for an advance made to him of $10,000, gives a bill of sale of goods stored in his own warehouse, but under the control of the customs, who used it as a bonded warehouse—*Held*, that this constituted such delivery as to confer upon the creditor the right of pledge of the goods. *Ross* vs. *Thompson*, C. R. 1881, 10 Q. L. R. 308.

DEMURRAGE.

See AFFREIGHTMENT.—SHIPS.

DENTISTRY. (1)

License to practice.—Mandamus to compel defendants, the Dental Association of the Province of Quebec, to grant plaintiff a license to practice as a dentist. Petitioner alleged that during three years and upwards, previous to the 28th January, 1874, he had been constantly engaged in the practice of dentistry in the Province of Quebec, having an office, and that on the 10th July, 1877, he applied to defendants for a license as dentist, and was refused—*Held*, that as he had at various times admitted that he was not a practicing dentist during the years mentioned, and as, moreover, he had been absent from the city from two to six months during that time, and, therefore, could not be said to have been "constantly" in practice as a dentist during said three years, that he had not complied with the requirements of the statute, and the mandamus was discharged. *Young* vs. *Dental Association of the Province of Quebec*, C. R. 1879, 2 L. N. 292.

(1) Art. 4053 *et seq.* R. S. Q. amended, 52 Vic., ch. 40; 55-56 Vic., ch. 32; 57 Vic., ch. 37.

DEPENS.

See COSTS.

DEPOSIT.

I. DEPOSITARY.
II. FOR SECURITY—AT WHOSE RISK MADE.
III. LIABILITY OF DEPOSITARY. 1-6.
IV. NECESSARY DEPOSIT. 1-2.
V. RIGHTS OF DEPOSITARY.
See also LIEN.
" HOTEL KEEPER.

I. DEPOSITARY.

Where it is agreed that a railway company shall issue debentures, and shall deposit them with a depositary to be named by the contractor, as security for the latter, he cannot appoint himself to be the depositary. *Stanton* vs. *Chemin de Fer Atlantique Canadien*, Q. B. 1891, 21 R. L. 168.

II. FOR SECURITY—AT WHOSE RISK MADE.

Where a contractor deposits a sum of money in a bank in the name of the government as a security for a contract with the latter, such deposit is at the risk of the government, which is not relieved from responsibility by remitting the deposit receipt instead of the money after the failure of the bank. *Gilbert* vs. *Gilman*, Q. B. 1889, 17 R. L. 124, 17 R. L. 132.

III. LIABILITY OF DEPOSITARY.

1. Whenever goods are committed to any one for a specified purpose, any deviation from that purpose in the disposition of them is a conversion upon which an action *in factum* in the nature of trover may be maintained. *Adam* vs. *Henderson*, 1 Rev. de Leg. 504, K. B. 1819.

2. And in such action the material inquiries are touching possession and conversion by the defendant, and as to his possession, whether he got it by finding or otherwise matters not, *was he in possession* being the gist of the inquiry. *Fougère* vs. *Boucher*, K. B. 1821, 1 Rev. de Leg. 504.

3. In an action for the value of an organ deposited with the defendant, an auctioneer, for sale, the understanding was that the defendant was to have ten per cent. commission for selling it, but was meanwhile to have it insured, which he did, but his premises being destroyed by fire he only recovered a part of the value—*Held*, that the defendant was liable for the full value of the organ, less the commission which he would have derived from the sale. *Goodchild* vs. *Shaw*, S. C., 5 R. L. 259.

4. In answer to an attachment in garnishment, the garnishee declared that he had received certain goods from the defendant for sale on condition, which goods were destroyed by fire—*Held*, reversing judgment of Court below, maintaining the pretensions of the plaintiff, that they were bound to insure such goods, and not having done so they were liable to the plaintiffs for the value of them. *Elliott* vs. *Ryan*, Q. B. 1856, 6 L. C. R. 89, Montreal Condensed Reports (Ramsay and Morin) 69; 5 R. J. R. Q. 22.

5. And that more especially where there was an agreement between the consignor and the consignee that the goods were to be insured. (*Ib*)

6. Voluntary Deposit.—Where a servant leaves her employer's service, leaving her effects with the latter, this is a voluntary deposit, and the depositary is only liable for the loss of the effects where it has occurred through his fault or negligence. *Chevalier* vs. *Beausoleil*, Mag. Ct. 1889, 13 L. N. 90.

IV. NECESSARY DEPOSIT—KEEPER OF BOARDING-HOUSE.

1. Negligence—The keeper of a boarding-house who neglects to provide a lodger with a key to lock the room assigned to him, is responsible to the lodger for the value of his effects (in this case less than $200) stolen therefrom. *Falconer* vs. *Paterson*, S. C. 1892, 2 Que. 443.

2. See case of *Bunnell* vs. *Stern*, New York Court of Appeal. Reported 14 L. N. 17.

V. RIGHTS OF DEPOSITARY.

Deposit by Mother of Minor—Construction of Receipt—Right to Recover Deposit.—The depositary of a sum of money gave a written acknowledgment that the money had been placed in his hands by the plaintiff; but it was added: "it is understood that the money belongs to plaintiff's minor son, aged 7, and that I shall pay him the same when he comes of age, on his own demand; until that time, I shall pay interest at 7 pc. to the person who takes charge of him." The mother having sued the depositary (who had not made default to pay interest) to recover the deposit—*Held*, 1. That the son alone was entitled to claim the money. 2. That the plaintiff could not, by special answer, raise the pretension that the terms of the receipt implied a donation by the mother to her son, which was null for non-acceptance by the minor, and in any case that the receipt did not mark the existence of a donation. *McKercher* vs. *Mercier*, S. C. 1888, 4 M. L. R. 333.

DERNIER EQUIPEUR.

See PRIVILEGE.

DESAVEU.

See ADVOCATE AND ATTORNEY.

DETAINER.

Where a house is burnt down after an action to revendicate the property on which it was built, the detainer will be condemned to pay the value of the house, after judgment condemning him to deliver over the property, unless he can prove that the fire occurred through such *vis major* or *cas fortuit* as might have happened had the plaintiff been in possession. *Piton* vs. *Brunette*, S. C. 1881, 12 R. L. 74.

The Court could order that the price of such house be included in the account of fruits and interest to which the detainer may be condemned. (*Ib.*)

DETENTEUR.

See DETAINER.—HYPOTHEC.

DIFFAMATION.

See LIBEL AND SLANDER.

DIMES.

See TITHES.

DISAVOWAL.

See ADVOCATE AND ATTORNEY.

DISCHARGE.

See also INSOLVENCY.—SURETYSHIP.

1. Error as to number of Immoveable sold—Eviction—Warranty. *Murray* vs. *Burland*, Q. B., 32 L. C. J. 185.

2. A discharge which declares that consid-

eration has been given, is not *ipso facto* null because it is proved that none has been given. May create presumption of fraud. *Pinsonnault* vs. *Molleur*, Q. B. 29 L. C. J. 219.

3. Where a creditor releases his claim against a debtor, the discharge is valid, even before acceptance. *Dalloz* vs. *Obligation No.* 56.

DISCONTINUANCE.

I. Art. 453 C. P. C.
II. Attorney-General.
III. Appeal after.
IV. Before Return of Action.
V. Effect of. 1-4.
VI. In Cases of Interdiction.
VII. In Revisal. 1-2.
VIII. Made in an Inscription.
IX. Made in Open Court—Second Action—Signification.
X. What Constitutes—Congé défaut. 1-3.
XI. Where Case under Advisement. 1-2.
XII. Withdrawal of. 1-3.
XIII. Without tendering Costs. 1-6.
XIV. Without Consent of Attorney *ad litem*—Costs. 1-2.

I. ART. 453 C.P.C.

This article confers a privilege which must be strictly construed, and this privilege cannot be extended to the case where the first action was dismissed for default to proceed. *Landry* vs. *Beauchamp*, S. C. 1890, 13 L. N. 169.

II. ATTORNEY-GENERAL.

The Attorney-General of the Province of Quebec is the sole *dominus* of a suit instituted [illegible] in his official capacity, whether there be cause or not. Accordingly, a *mandamus* will not lie at the instance of a relator to compel him to continue proceedings under Art. 997 of the Code, nor need he obtain the leave of the Court before discontinuing such proceedings. A succeeding Attorney-General cannot retract a discontinuance by his predecessor. *Casgrain* vs. *Atlantic & North West Railway* [1895], App. Cas. 282, confirming Q. B. 23 Dec., 1892, which reversed judgment of S. C. *sub. nom. Turcotte* vs. *Cie du Ch. de Fer*, 21 R. L. 71.

III. APPEAL AFTER.

A party in whose favor an interlocutory judgment has been rendered may desist from such, even after a motion for leave to appeal has been granted, and without the consent of the opposite party, and in such case the appeal will be dismissed with costs against appellant from the filing of the discontinuance. *Nadeau* vs. *Pacaud*, Q. B. 1876, 9 R. L. 678.

IV. BEFORE RETURN OF ACTION.

Plaintiff before return of his action reduced his claim by an amount sufficient to deprive the Superior Court of its jurisdiction, and without mentioning in his discontinuance his reasons for so doing. This was considered an abuse, and action dismissed. *Santoire* vs. *Paradis*, S. C. 1884, 29 L. C. J. 55.

V. EFFECT OF.

1. As to one of two Defendants—Pleading de novo.—Where a plaintiff brings an action against two partners, and discontinues such action as regards one of the partners and continues it against the other, the defendant can, upon motion, obtain leave to plead *de novo*, and the action will be suspended until the plaintiff pays the taxed costs upon the discontinuance. *Chisholm* vs. *Langlois*, 1885, M. L. R., 1 S. C. 192.

2. Pleading de novo.—Where the plaintiff, by a writing, desisted from his action, the Court will not grant leave to the defendant to plead *de novo* for the purpose of invoking the discontinuance, but will permit the discontinuance to be filed, to have such effect as may be proper. *Brunet* vs. *Brunet*, 1887, M. L. R. 3 S. C. 216.

3. Discontinuance is not an abandonment of the right to bring a second action, and does not effect *res judicata*. *Sabas* vs. *Guevremont*, C. R. 1870, 4 R. L. 233.

4. Retraxit.—The filing by a plaintiff of a *retraxit* of his action, duly served on the defendant, operates discontinuance of the suit, and it is not necessary that a judgment should be rendered thereon. *Reg.* vs. *Atkinson*, S. C. 1889, 15 Q. L. R. 171.

VI. IN CASES OF INTERDICTION.

Plaintiff cannot discontinue an action for interdiction, which is a matter affecting public order. Such an act on must take its normal

course. Cour d'Appel de Douai, 12 May, 1887. Reported 10 L. N. 357.

VII. IN REVIEW.

1. A party may discontinue the inscription in Review so long as judgment has not been given, and a motion to withdraw the case from advisement and to discontinue the inscription in Review should be granted. *Baxter* vs. *Dorion*, C. R. 1884, 10 Q. L. R. 105.

2. But *held* in an earlier case that the plaintiff is not entitled to discontinue action after the case has been submitted to the Court on the merits, without express permission from the Court or Judge. *Williamson* vs. *Rhind*, Q. B. 1877, 22 L. C. J. 166.

VIII. MADE IN AN INSCRIPTION.

A discontinuance can be made in an inscription although it is more regular to make it by a separate declaration. *Bousquet* vs. *Duquette*, S. C. 1892, 2 Que. 522.

IX. MADE IN OPEN COURT—SECOND ACTION—SIGNIFICATION.

The Exchange Bank of Canada, in an action instituted by them against G., filed a withdrawal of part of their demand in open court, reserving their right to institute a subsequent action for the amount so withdrawn. The Court acted on this retraxit, and gave judgment for the balance. This judgment was not appealed from. In a subsequent action for the amount so reserved—*Held*, reversing the judgment of the Court below (Q. B. 1880, 16 R. L. 663), Fournier, J., dissenting, that the provisions of Art. 451 C. C. P. are applicable to a withdrawal made outside, and without the interference of the Court, and cannot affect the validity of a withdrawal made in open court and with its permission. That it was too late in the second action to question the validity of the retraxit upon which the Court had in the first action acted and rendered a judgment which was final and conclusive. *Exchange Bank of Canada* vs. *Gilman*, Supreme Court 1889, 17 Can. S. C. R. 108.

X. WHAT CONSTITUTES.

1. The abandonment of part of a claim sued on only effects a discontinuance. *Salvas* vs. *Guevremont*, C. R. 1870, 4 R. L. 233.

2. Congé défaut—Costs.—A plaintiff who has not returned his action is deemed to have discontinued the suit, and he cannot take it up again until he pays the costs incurred upon the *congé défaut*. *Chagnon* vs. *Jackson*, S. C. 1889, 18 R. L. 373.

3. —— —— Failure to return the writ of summons is not a discontinuance within the meaning of Article 453 of the Code of Civil Procedure. Non-payment of the costs of a previous suit not returned into court by the plaintiff, and in which the defendant obtained *congé défaut* with costs, cannot be pleaded by peremptory exception, but should be urged by motion to stay proceedings or by dilatory plea. A temporary exception is the proper proceeding where a suit has been discontinued on payment of costs under C. C. P. 453. Where a defendant obtains *congé défaut*, the suit is not "dismissed;" the defendant is merely "discharged" from it. *Hossack* vs. *Paradis*, C. R. 1881, 7 Q. L. R. 234.

XI. WHERE CASE UNDER ADVISEMENT.

1. Plaintiff not entitled to discontinue on payment of costs without express permission of Court or Judge. *Williamson* vs. *Rhind*, Q. B. 1877, 22 L. C. J. 166.

2. Contra.—*Baxter* vs. *Dorion*, C. R. 1884, 10 Q. L. R. 105.

XII. WITHDRAWAL OF.

1. A party who has filed a discontinuance cannot withdraw it without the permission of the opposite party. *Lesperance* vs. *Lesperance*, Q. B. 1885, 15 R. L. 413.

2. A party who has filed a petition demanding the appointment of a sequestrator, cannot discontinue such demand after judgment has been rendered granting his petition unless the opposite party consents. *Larkin* vs. *Kenny*, S. C. 1885, 13 R. L. 563.

3. Where a retraxit has been filed, the Court will not grant a motion for leave to withdraw, and the Court, notwithstanding such motion, will give effect to the retraxit upon motion by the opposite party. *Lesperance* vs. *Lesperance*, Q. B. 1885, 13 R. L. 370.

XIII. WITHOUT TENDERING COSTS.

1. A plaintiff can discontinue his action, as a general rule, only on payment of costs. *Greenshields* vs. *Leblanc*, S. C. 1868, 12 L. C. J. 343.

2. Upon a *désistement* of the judgment,

without a tender of costs, the Court of Appeals will condemn the respondent in the costs of both Courts. *Bellay* vs. *Guay*, Q. B. 1874, 4 Q. L. R. 91.

3. *Désistement*, without effect when it contains no offer to pay costs. *Molleur* vs. *Dougall*, Q. B., 33 L. C. J. 105.

4. A discontinuance of a contestation of an opposition which does not contain the declaration that the discontinuance is made with costs cannot be rejected by the opposite party, seeing that such discontinuance may be advantageous to such party, and he has no interest in demanding its rejection. *Haboux* vs. *Paquette*, S. C. 1891, 20 R. L. 506.

5. A discontinuance made without tender of costs constitutes nevertheless a renunciation on the part of the party making it to the claims set forth in the proceedings desisted from, and judgment can then be passed upon this discontinuance, condemning the party to costs if there are any. Consequently, such a discontinuance will not be struck from the record upon motion by the opposite party. *Bousquet* vs. *Duquette*, S. C. 1892, 2 Que. 522.

6. A discontinuance in which no offer is made to pay costs is of no effect; and where the plaintiff was ordered to return a writ of *capias* without delay, and, instead of doing so, filed a discontinuance or *désistement*, which contained no offer to pay costs, the defendant was granted *congé défaut* of the writ of *capias* with costs. *Lusignan* vs. *Sauvageau*, S. C. 1893, 3 Que. 448.

XIV. WITHOUT CONSENT OF ATTORNEY *AD LITEM*—COSTS.

1. The withdrawal of an action by a plaintiff personally, in the absence of and without the intervention of his attorney, is good and valid, although the attorney may have prayed for distraction of costs. *Ryan* vs. *Ward*, Q. B. 1856, 6 L. C. R. 201, 5 R. J. R. Q. 70.

2. A plaintiff is always, in his own interest, the master of his case, and has at all times, while acting in good faith and in his own interest, the right to effect a settlement on any terms which to him seem fit, and even to discontinue his suit without the consent of his attorney *ad litem*, even when the latter has demanded distraction of costs. *Farquhar* vs. *Johnson*, S. C. 1889, 34 L. C. J. 139.

DISCUSSION.

PLEA OF.

A plea of previous discussion of a pledge should be made by dilatory exception indicating the goods to be discussed and accompanied with a deposit sufficient for the costs of the discussion. *Banque d'Epargne* vs. *Geddes*, S. C. 1890, 6 M. L. R. 243.

DISTRIBUTION.

I. Collocation.

Attorney's Fee. 1.
Claim filed after Delay expired — Vouchers. 2-3.
Collateral Security. 4.
Costs of Action — Landlord's Rent. 5.
Bailleur de Fonds. 6-8.
Erroneous — Direct Recourse of Creditor. 9-15.
Hypothecary Creditor. 16-17.
Immoveable—Art. 735 C. C. P. 18.
Nullity of—Affecting Public Order. 19.
Upon reformed Judgment. 20.

II. Contestation.

Art. 761 C. C. P. 1-3.
After Judgment homologating Report. 4-5.
By Heirs—Appeal by one Heir. 6.
Before Judgment homologating Report. 7-8.
By Hypothecary Creditor—Registrar's Certificate. 9.
Costs of. 10. (*See under title "Costs."*)
Delay. 11-12.
Nature of. 13-14.
Of Judgment of Distribution. 15.
Partial—Effect upon Homologation. 16.
Rights of Creditors. 17.
Where only one Creditor. 18.

III. Homologation of Report. 1-3.

IV. Of Insolvent's Estate. (See under title "Insolvency.")

V. Question of Title.

VI. Rights of Parties.

VII. Rights of Tutor under Judgment of.

VIII. Report. 1-7.

I. COLLOCATION.

1. Attorney's Fee.—Upon the distribution of money levied in execution—*Held*, that the attorney of the seizing creditor was entitled to the fee allowed upon homologation of the report of distribution. *Kerry* vs. *Pelly*, S. C. 1862, 13 L. C. R. 163, and 6 L. C. J. 293.

2. Claim filed after Delay expired—Vouchers.—Where, in a report of distribution of the proceeds of the sale of the real estate of an insolvent sold by the sheriff and returned by him on the 28th August, 1875, the assignee of the estate of the insolvent was collocated in the amount of his claim for fees and disbursements, filed on the 20th January, 1876—*Held*, that having been filed after the delay had expired, and without leave of the Court, that it was improperly filed, and the appellants, who were hypothecary creditors, could appeal from the judgment homologating the report of distribution, although they had not contested in the Court below. *Shortis* vs. *Normand*, Q. B. 1877, 1 L. N. 86.

3. —— And *held*, also, that as no vouchers had been produced by the respondent to show that he was the assignee to the estate of the insolvent, or that the interim assignee, whose costs were included in the claim, had ever acted as such, or ever transferred his claim to respondent or been paid by him, there was no *prima facie* claim made out to entitle the respondent to be collocated. (*Ib.*)

4. Collateral Security.—Privileged creditor holding collateral security will only be collocated conditionally, and until it can be ascertained how much he will realise from such security, the general creditors or those next in rank will be allowed to receive the moneys subject to distribution on giving security to refund in case of necessity. *Doutre* vs. *Green*, S. C. 1861, 5 L. C. J. 152.

5. Cost of Action—Landlord's Rent.—A report of collocation and distribution, which collocates the plaintiff for his all costs of action, in preference and prejudice to the landlord's claim for rent, will be set aside. *Kerry* vs. *Pelly*, S. C. 1862. 6 L. C. J. 293, 13 L. C. R. 163, and see *Lalande* vs. *Rowley*, S. C. 1856, 6 L. C. R. 192.

6. Bailleur de Fonds.—In the case of an agreement (before our Civil Code) by A B to purchase from C D a lot of land for a specified sum, to be paid by instalments, followed by a bond from C D in a penal sum, to the effect that, on the purchase money being fully paid, C D would execute a deed of sale in due form, and followed also by actual and uninterrupted possession by A B, the right of property of C D in the lot of land was unaffected, so long as any portion of the purchase money remained unpaid, and, therefore, C D had a right to be collocated for such unpaid purchase money in the distribution of the proceeds of a sale of the lot by the sheriff, in preference to duly registered judgments obtained by creditors of A B against him while in possession of the lot, and this without any registration either of the agreement or the bond. *Thomas* vs. *Aylen*, Q. B. 1872, 16 L. C. J. 309; and see *Dionne* vs. *Soucy*, S. C. 1850, 1 L. C. R. 3; *Shaw* vs. *Lefurgy*, S. C. 1850, 1 L. C. R. 5; *Lemesurier* vs. *McCaw*, S. C. 1858, 2 L. C. J. 219.

7. —— Where a vendor of property already mortgaged to a third party is collocated for the balance of his price of sale next after such third person on the proceeds of the property sold at judicial sale, a subsequent creditor has a right to contest the collocation of the vendor and the first mortgagee, as the claim of the latter is a personal debt of the vendor. *Arpin* vs. *Lamoureux*, S. C. 1875, 7 R. L. 196.

8. —— And where the contestation does not allege certain payments, afterwards admitted by the person collocated, and not credited, the contestant will nevertheless have the benefit of them, and the report will be reformed accordingly. (*Ib.*)

9. Erroneous—Direct Recourse of Creditor.—The owner of an immoveable sold by judicial sale has a direct action to recover the amount paid out of the proceeds by virtue of a judgment of collation for a hypothecary claim which had already been paid and extinguished. And such owner can conclude that the reimbursement be made to the sheriff who conducted the sale, the moneys to be distributed among such owner's creditors. *Thibault* vs. *Beaubien*, S. C. 1886, 13 Q. L. R. 175.

10. —— The heirs collocated for such hypothecary claim which had been paid to their *de cujus* are not jointly and severally liable for the reimbursement. (*Ib.*)

11. —— A supplementary distribution will be ordered after homologation of a report upon proof that the registrar's certificate was erroneous and that no hypothec existed in favor of the party collocated. *Tardif* vs. *Gingris*, S. C. 1871, 3 R. L. 455.

12. —— A judgment creditor who has not appeared in a cause and who is not mentioned

in the registrar's certificate, is not a *party to the cause* within the meaning of Art. 761 C. C. P., and does not therefore come within the provisions of that article in regard to the contestation of the report of distribution. Such creditor can, however, by direct action, compel a party collocated to pay to the sheriff the amount of a collocation received by virtue of a judgment of distribution for a hypothecary claim already liquidated, such amount to be distributed among the creditors of the insolvent debtor. And it is not necessary that such creditor should prove that the sum claimed by his action, or part of it, will revert to him; his interest may even be merely eventual. *Martel* vs. *Dufort*, C. R. 1893, 3 Que. 376.

13. —— Art. 761 C. C. P. contains provisions which are apart from the ordinary rules of procedure, and must therefore be strictly interpreted. *Martel* vs. *Dufort*, C. R. 1893, 3 Que. 376; *Petit* vs. *Crevier*, S. C. 1885, 1 M. L. R. 313.

14. —— The following case is distinguished from the foregoing: A party, whose claim against an immoveable seized and sold by the sheriff appears in the registrar's certificate, but has not been collocated in the report of distribution, and who has failed either to contest the report of distribution or to appeal from the judgment homologating the same, or to present a *requête civile* or an opposition against such judgment, as required by Art. 761 of the Code of C. P., cannot, by direct action, recover the amount of his said claim from the party collocated in such report to his prejudice. *McDonell* vs. *Buntin*, Q. B. 1884, M. L. R., 1 Q. B. 1, 28 L. C. J. 11; confirming S. C., 27 L. C. J. 73.

15. —— Opposant complained that, by an error in the notice renewing a hypothec, he had not been collocated for the amount of his hypothecary claim. He asked that a new report of distribution be ordered. There was no doubt as to the facts, and the court considered that he was entitled to the relief prayed for under Art. 761 of the Code of Civil Procedure, which says that any party aggrieved by a judgment of distribution may seek redress by means of an appeal, or a petition in revocation, if there are grounds for it, whether he has appeared in the suit, or, his claim being mentioned in the certificate of hypothecs, he has not appeared. The *requête* of the opposant would be granted, and a new judgment of distribution ordered, and the parties who had been collocated would be ordered to pay back the sums of money received. *Bank of Toronto* vs. *Vigneau*, S. C. 1882.

16. Hypothecary Creditor. — Hypothecary creditors must be collocated merely on the net proceeds arising from the specific properties hypothecated in their favor. *In Re Larivière*, S. C. 1867, 11 L. C. J. 265.

17. —— Art. 730 C. C. P. — An hypothecary creditor, having a special hypothec in the property sold by the sheriff, has a right to be collocated in preference to a prior hypothecary creditor whose claim extends over other property not yet seized or sold, on giving security that he will refund the amount of his collocation in case such prior creditor be not paid in full out of such other property. *De Lagrave* vs. *Dessaulles*, S. C. 1865, 9 L. C. J. 89, and *Laframboise* vs. *Berthelot* (*Ib.*).

18. Immoveable.—Art. 735 C. C. P.—On the contestation of a report of collocation of the proceeds of the sale of an immoveable, against which judgment had been obtained by a hypothecary creditor, an evaluation was ordered by the court, in order to distribute the proceeds of the soil between the creditors of the vendor and the proceeds of the improvements between the creditors of the purchaser who made the improvements. *Bédard* vs. *Dugal*, S. C. 1851, 1 L. C. R. 173, 2 R. J. R. Q.

19. Nullity of—Affecting Public Order.—A creditor can attack a collocation which is based upon a title prior to his, but which is affected by an absolute nullity respecting public order. *Banque d'Union* vs. *Gagnon*, Q. B. 1888, 15 Q. L. R. 31.

20. Upon reformed Judgment. — A party contesting a report of distribution will be collocated for any money accruing from the reformation of the judgment by reason of his contestation, in preference to other parties of record who may otherwise have preferential claims, but who have not contested. *Mogé* vs. *Lapré*, S. C. 1857, 1 L. C. J. 255.

II. CONTESTATION.

1. Art. 761 C. C. P.—Art. 761 C. C. P. contains special provisions which are apart from the ordinary rules of procedure, and must therefore be strictly construed. *Martel* vs. *Dufort*, C. R. 1893, 3 Que. 376; *Petit* vs. *Crevier*, 1885, M. L. R., 1 S. C. 313.

2. —— It only applies to cases where the amount collocated is not d[illegible], and not to those cases where questions of privilege or preference

are concerned. *Petit* vs. *Crevier*, S. C. 1885, 1 M. L. R. 313; *Lamoureux* vs. *Péloquin*, S. C. 1871, 15 L. C. J. 216.

3. —— Report of distribution can only be attacked by contestation as required by Art. 761 C. P. C., or by appeal from the judgment homologating the same, or by *requête civile* and not by substantive action. *McDonell* vs. *Buntin*, Q. B. 1884, 28 L. C. J. 11.

4. After Judgment homologating Report—ARTS. 741-751 C. C. P.—Arts. 741 and 751 of the Code of C. P. do not apply where the creditor alleged to have been collocated for a sum not due has actually received the money after judgment homologating the report of distribution. *Leduc* vs. *McCarthy*, Q. B. 1874, 19 L. C. J. 107, 1 Q. L. R. 1.

5. —— A report of distribution cannot be contested after it has been duly homologated, even by authority of a judge. *Pangman* vs. *Pauzé*, S. C. 1883, 27 L. C. J. 181.

6. By Heirs—Appeal by one Heir.—A report of distribution was contested by certain heirs, and the contestation was dismissed. Four of the heirs appealed, but three of them subsequently desisted from the appeal. The respondent moved that as there were seven heirs and only one was persisting in the appeal that the other six be paid their share—*Held*, that as the report had not been homologated, and as the part of the record belonging to the contestation was missing, that the court could not give an order to the sheriff to pay the money. *Anger* vs. *O'Meara*, Q. B. 1879, 2 L. N. 104.

7. Before Judgment homologating Report.—Judgment of distribution may be contested, before its homologation, on cause being shown and on payment of costs. *Prévost* vs. *De Lesderniers*, S. C. 1859, 3 L. C. J. 165.

8. —— A report of collocation may be contested by permission of the court, and on special cause shown, after the delay of six days, if no proceeding to homologate the report has been adopted. *Deladurantaye* vs. *Pauzé*, S. C. 1877, 21 L. C. J. 100.

9. By Hypothecary Creditor—Registrar's Certificate.—Under the new law, which does not require opposition *afin de conserver*, a creditor is not bound to contest the registrar's certificate at the same time as the report of distribution. *Carrier* vs. *Boucher*, C. R. 1880, 6 Q. L. R. 282.

10. Cost of.—(See under title "COSTS.")—A hypothecary creditor who has been collocated for more than remains due him, the balance having been paid by a previous judgment of distribution, cannot be held for the costs of contestation of such collocation if he has filed with the prothonotary a declaration of the amount so remaining due. *Globensky* vs. *Daoust*, S. C. 1870, 2 R. L. 608. Article 2148 C. C. does not apply to this case. (*Ibid*).

11. Delay.—ART. 742 C. C. P.—Report of distribution cannot be contested after the delay fixed by Rules of Practice, even where special cause is shown supported by affidavit. *Forsyth* vs. *Morin*, S. C. 1857, 2 L. C. J. 59.

12. —— But *held* in another case that a report of collocation may be contested after the delays have expired upon cause shown by affidavit that the party contesting is interested, and that the party collocated to his prejudice appears on examination of his opposition not to be entitled to the amount of his collocation. *Clapin* vs. *Nagle*, S. C. 1860, 4 L. C. J. 286.

13. Nature of.—A party contesting is like a plaintiff, and therefore the party collocated must be put in default to answer the contestation by a regular demand of answer, and where the party collocated is represented by attorney, he is entitled to due notice of the inscription for hearing on the merits. *Trust and Loan Company of U. C.* vs. *Barlow*, S. C. 1868, 12 L. C. J. 278.

14. —— On a motion to dismiss the contestation of a report of distribution filed in the cause—*Held*, maintaining the motion, that the contestation of the report of distribution is in the nature of a demurrer, under which no matter of fact can be inquired into, and if the contestation rests upon matters of fact, the parties contesting ought to have pleaded to the opposition. *Dorion* vs. *Grant*, S. C. 1864, 14 L. C. R. 227.

15. Of Judgment of Distribution.—A creditor can contest the claim of another creditor where he pretends that the latter is not a creditor of the common debtor, but he should only contest the order of collocation and not the claim itself, where the contestant's claim relates to a right of preference over the collocated creditor. *Ward* vs. *Lunan*, C. R. 1893, 3 Que. 524.

16. Partial —"Contestation" under Art. 750 C. C. P.—Partial contestation does not deprive the prothonotary of jurisdiction to homologate the non-contested items of the report. *Belleau* vs. *Bender*, Q. B. 1793, 3 Que. 134.

16*a*. The word "contestation" in Art. 750 C.

C. P. only applies to the whole report when the latter is contested in its entirety. (*Ibid.*)

17. Rights of Creditors.—A claim of the contestants having been omitted from the registrar's certificate, in consequence of the registration division having been divided—*Held*, that they were not bound to come in by opposition *afin de conserver*, and were perfectly justified in contesting the report of distribution as they had done. *Banque Nationale* vs. *Société de Construction du Canada*, C. R. 1879, 2 L. N. 59.

18. Where only one Creditor—Appeal.—Where only one creditor is collocated in a judgment of distribution, he must establish that he has an interest in contesting the report of distribution before he can be granted leave to appeal from the judgment of distribution. *Morin* vs. *Young*, Q. B. 1888, 19 R. L. 274.

III. HOMOLOGATION OF REPORT.—ART. 749 C. C. P.

1. If it appear that the price of an adjudication have not been paid into the hands of the sheriff, the court will not homologate the report of distribution. *Lebois* vs. *Gagné*, K. B. 1818, 3 Rev. de Lég. 472.

2. A report of distribution cannot be homologated until the money to be distributed is in the hands of the sheriff. *Boucher* vs. *Beaudoin*, K. B. 1821, 3 Rev. de Lég. 475.

3. A report of collocation and distribution which has been homologated, without contestation, on motion made on the seventh day after its deposit and posting *nisi causa* five days after, will be set aside and annulled as having been irregularly and illegally homologated. *Villeneuve* vs. *Rolland*, Q. B. 1878, 23 L. C. J. 220.

IV. OF INSOLVENT'S ESTATE—(See "INSOLVENCY.")

In an action by a Canadian company against a company in New York, where moneys belonging to the latter, who were insolvent, had been seized in the hands of the Bank of Montreal—*Held*, that the distribution of such moneys by the court of the place wherein the writ of seizure had issued must be governed by the laws of this country and not according to the laws of the United States. *Canadian Inland Nav. Co.* vs. *Columbian Ins Co. of New York*, C. R. 1869, 1 R. L. 190.

V. QUESTION OF TITLE.

When money is before the court for distribution, the real question is as to the party entitled to it—and not the regularity of the proceedings by which it was procured. *Ste. Anne Mut. Bldg. Soc.* vs. *Watson*, Q. B. 1882, 4 M. L. R. 328.

VI. RIGHTS OF PARTIES.

If a plaintiff does not use due diligence in prosecuting a judgment of distribution, an opposant on motion may be substituted in his place, and may proceed to the distribution. *Langlois* vs. *Daigle*, K. B. 1818, 3 Rev. de Lég. 472.

VII. RIGHTS OF TUTOR UNDER JUDGMENT OF.

Judgment of distribution does not give tutor a right to claim against his pupil until he has rendered an account of his administration. *D'Orsennens* vs. *Christie*, Q. B. 1885, 30 L. C. J. 9.

VIII. REPORT.

ARTS. 1994 AND 2009 C. C.

1. Moneys levied under execution must be distributed by the ordinary report of distribution, although only one opposant file a claim, unless all the parties concerned consent to a distribution by motion. *Mead* vs. *Reipert*, S. C. 1857, 1 L. C. J. 177.

2. Any report of distribution homologated by the prothonotary under 23 Vic., cap. 57, sec. 32, may be reviewed before three judges under 27 & 28 Vic., cap. 39, sec. 20. *The Eastern Townships Bank* vs. *Pacaud*, C. R. 1864, 9 L. C. J. 156; Q. B. 1866, 17 L. C. R. 126 and 2 L. C. L. J. 270.

3. And *held*, that, after a report of collocation has been rejected by the court, a new one must be prepared in conformity with the judgment setting aside the first. (*Ib.*)

4. And *held*, also, that a report of distribution of moneys arising from the sale of different lots of land is irregular, which does not show the proportion of the costs each lot sold is to bear. (*Ib.*)

5. In preparing a report of distribution the prothonotary is bound to assume that the allegations of an uncontested opposition are true, and frame the report accordingly, which report must be contested in case the prothonotary makes an error in collocating the parties. *Doutney* vs. *Mullin*, Q. B. 1863, 13 L. C. R. 245.

6. And if the report be wrong in consequence of unfounded allegations in the opposition, then the opposition must be contested. (*Ib.*)

7. But where the report was contested instead of the opposition—*Held*, confirming the decision of the court below, that the court would overlook the error inasmuch as the parties had treated the contestation of the report as if it had been a contestation of the opposition, and adduced evidence accordingly, and inasmuch as the allegations of the contestation, as made, were not supported by sufficient evidence. (*Ib.*)

DIVORCE. (1)

I. Foreign—Effect of in this Province. 1-3.

II. Right of.

I. FOREIGN—EFFECT OF IN THIS PROVINCE.

1. The plaintiff and defendant were married in New York in 1871, without ante-nuptial contract, both being at the same time domiciled in that city. By the laws of the State of New York no community of property was created by such marriage, the wife retaining her private fortune free from marital control like a *feme sole*. Shortly after the marriage, the appellant entrusted the respondent with the whole of her private fortune consisting of personalty to the amount of over $200,000, and respondent administered this until 1876. The consorts lived in New York until 1872, when they removed to Montreal, where the respondent has ever since resided and carried on business, but appellant left him shortly after to take up her residence alternatively in Paris and New York. In 1880, when respondent was still in Montreal, the appellant, then in New York, instituted proceedings against him for divorce, before the Supreme Court of New York on the ground of adultery. The action was served on respondent personally at Montreal, and he appeared in the suit, but did not contest, and appellant obtained a decree of divorce absolutely in her favor in December, 1880. In 1881, appellant taking the quality of a divorced woman, and without obtaining judicial authorization, instituted an action against the respondent in the Superior Court in Montreal for an account of his administration of her property. The respondent pleaded that the alleged divorce was null and void for want of jurisdiction of the Supreme Court of New York, that the appellant in consequence was still his wife, and that she should have obtained the authorization of the Court to institute the present action—*Held*, reversing the decision of the Queen's Bench (6 L. N. 329 and 27 L. C. J. 228), restoring that of the Superior Court (5 L. N. 29), that the Supreme Court of New York had jurisdiction to pronounce the divorce, and the divorce was entitled to recognition in the Courts of the Province of Quebec. *Stevens* vs. *Fisk*, Supreme Ct. 1885, Cassel's Dig. 2nd Edit., p.235, 8 L. N. 42. (Compare *Lemesurier* vs. *Lemesurier* [1895], App. Cas. 517).

2. And that the Supreme Court of New York, having under the statute law of New York jurisdiction on the subject matter in the suit for divorce, the appearance of the defendant in the suit absolutely and without protesting against the jurisdiction stopped him from invoking the want of jurisdiction of the said Court in the present action. (*Ib.*)

3. And that the plaintiff had at the institution of the action for divorce a sufficient residence in New York to entitle her to sue there. (*Ib.*)

II. RIGHT OF.

A Christian marrying a native or Indian, whether according to their usages or not, cannot exercise in Canada the right of divorce or repudiation at will, though he might apparently have done so among the natives to which his wife belonged. *Connolly* vs. *Woolrich*, S. C. 1867, 11 L. C. J. 197 and 3 L. C. L. J. 14.

(1) Historical Review of, 1 L. N. 605, 622.
Bibliography. *Gemmill*—Proceedings for Divorce before the Senate, 1889.
Fremont—Divorce et Séparation de Corps (*Thèse*), 1886.

DOMICILE. (1)

I. Change of. 1-5.

II. Delay to Acquire.

III. Election of. 1-4.

IV. Matrimonial. 1-3.

V. What Constitutes.

I. CHANGE OF. (2)

1. In the case of a Scotchman who originally had his domicile in Scotland, but abandoned that domicile and established a new one in

(1) See article in 3 Themis 289, by P. E. Lafontaine, Ll.D.

(2) See *Fraser* vs. *Poulict*, 13 R. L. 2.

Jamaica, and finally gave up and left his Jamaica domicile with the intention of returning to Scotland, but died before his return, his domicile at the time of his death will be held to be Scotland. *Ferguson* vs. *Pow*, Scotch case, 3 L. C. J. 127.

2. In an action on a promissory note where the question of notice of protest arose--*Held*, confirming the judgment of the court below, that the effect of one of the parties having been appointed to a temporary office, in a place where he went alone, leaving his family in the usual domicile or place of residence, does not effect a change of domicile. *Ryan* vs. *Malo*, Q. B. 1861, 12 L. C. R. 8.

3. A person formerly residing in Lower Canada and leaving it for many years and then returning to it acquires a domicile there, although he may have only actually resided in Lower Canada a period of 17 days since his return. *Cressé* vs. *Baby*, Q. B. 1866, 10 L. C. J. 313.

4. A temporary change of residence does not effect a change of domicile. It must appear that the person has the intention of remaining permanently at his new place of residence, or of making it the seat of his principal establishment. *Waldron* vs. *Brennan*, S. C. 1879, 23 L. C. J. 268.

5. When a debtor suddenly leaves the province to go to the United States, leaving his wife and family at his former abode to which he intends to return, he does not thereby lose his former domicile, and can therefore be sued there. *Sylvestre* vs. *Grisé*, S. C., 20 R. L. 89.

II. DELAY TO ACQUIRE.

A residence of a year and a day is not required to acquire domicile. *Benning* vs. *The Canadian India Rubber Company*, S. C. 1865, 1 L. C. L. J. 97.

III. ELECTION OF.

1. If an opposition does not contain an election of domicile it will be dismissed. *Lizotte* vs. *Caron*, K. B. 1821, 3 Rev. de Lég. 472, and *Valliers* vs. *Robitaille*, 3 Rev. de Lég. 476.

2. But *held*, later, that an opposition made through the ministry of an attorney will not be dismissed on the ground that it does not contain an election of domicile, and the proper way to raise such an objection is by an exception to the form, and not by motion. *Murphy* vs. *Moffatt*, C. Ct. 1858, 8 L. C. R. 477.

3. An election of domicile by an opposant at the office of an attorney must state where the office is situated. *Leclaire* vs. *Daigle*, S. C. 1865, 1 L. C. L. J. 93.

4. **Summons**— Art. 85 C. C.—52 Vic. (Q.), c. 48.—*Held*—Affirming that the decision of Davidson, J., 1 C. S. (1892), p. 360, where a deed or writing, whether commercial or civil in its nature, is dated, or declared therein to be made and signed, at a place other than the real domicile of the party sought to be charged thereunder, he is considered to have made election of domicile at such place (if there be no indication of a place of payment), and an action based on the writing may be brought against him before the court of his elected domicile. *Beulac* vs. *Leclaire*, Q. B. 1892, 1 Que. 351.

IV. MATRIMONIAL. (See also under title "Divorce." *Fisk* vs. *Stevens*.)

1. *Held*, that a person whose domicile was not in the Province of Quebec was married in that Province, and declared in the presence of the priest who performed the ceremony that he was a *journalier de la Province de Québec*, and was so described in the certificate of marriage, did not lose his international domicile, and acquire a new domicile by election so as to affect his status and civil rights. *McMullen* vs. *Wadsworth*, P. C. 1889, 12 L. N. 314; Supreme Ct., 12 Can. S. C. R. 466; reversing Q. B., 11 Q. L. R. 232, M. L. R., 2 Q. B. 113.

2. The words "for the purposes of marriage" in Art. 63 C. C. mean for the purpose of the solemnization of the marriage and not that a person having his international domicile elsewhere should, by a residence in the Province of Quebec for six months for the purpose of having his marriage solemnized there, lose his international domicile, and acquire a new international domicile. (*Ib.*)

3. What law governs consorts where the husband residing at Abbitibbi, a post in the Hudson's Bay Company's Territories, comes to Lower Canada where he marries a woman domiciled there, and returns with her to Abbitibbi? *McTavish* vs. *Pyke*, Q. B. 1853, 3 L. C. R. 101, 3 R. J. R. Q. 447.

V. WHAT CONSTITUTES.

Domicile of husband is where he usually resides and carries on his business, notwithstanding his family may reside elsewhere. In Lower Canada the law only recognizes one domicile. *Kay* vs. *Simard*, S. C. 1857, 1 L. C. J. 167.

DONATIONS.

I. Acceptance. (See also No. III—1 *infra.*)

II. Action to Annul—Res Judicata.

III. By Marriage Contract.

Acceptance. 1.

Contestation by Creditor—Pleading and Proof. 2.

Effect of Husband's Insolvency upon Wife's Rights. 3-4.

Effect of Husband's Death before Money invested as per Contract. 5.

Effect of Disposal of particular Property donated. 6.

In Fraud of Creditors. 7-11. (See also *infra* No. XV.)

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Mortis Causa—Institute—Hypothecary Action. 15-16.

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To Daughter and Son-in-Law jointly. 26.

IV. Change of Nature of—Giving in Payment.

V. By onerous Title. 1-5.

VI. By particular Title.

VII. By Person Insane.

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XXIII. Nature of—How ascertained.

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XXIX. Registration. 1-8. (See No. V *supra.*)

XXX. Revocation and Resiliation. 1-13.

XXXI. Ratification. 1-2.

XXXII. Rights of Donor.

XXXIII. Rights of Parties under.

XXXIV. To Bastards.

XXXV. To Consorts.

I. ACCEPTANCE.

Action was brought to recover the amount of certain payments stipulated in a deed of retrocession of a donation, and the question of the validity of the acceptance of the donation arose, it having been accepted by a stranger on behalf of the donee, a minor—*Held*, confirming the judgment of the court below, that, taking both acts together, the act of retrocession must be considered to be a ratification of the acceptance of the donation, so as to make the whole good and valid. *Judd* vs *Esty*, Q. B. 1856, 6 L. C. R. 12, 4 R. J. R. Q. 472.

II. ACTION TO ANNUL—RES JUDICATA.

A deed of donation can be annulled at the suit of a single creditor, and the nullity pronounced is *res judicata* as regards the other creditors. *Prowse* vs. *Simpson*, S. C. 1885, 13 R. L. 302.

III. BY MARRIAGE CONTRACT.

1. Acceptance.—The acceptance of a donation in a contract of marriage may be legally made by simply registering the contract during the lifetime of the donor. *Charlebois* vs. *Cahil*, S. C. 1875, 20 L. C. J. 27, 7 R. L. 243.

2. Contestation by Creditor—Pleading and Proof.—A creditor contesting the opposition of the wife must allege and prove the loss suffered by him through the contract. *Morin* vs. *Langlois*, C. R. 1886, 30 L. C. J. 272.

3. Effect of Husband's Insolvency upon Wife's Rights.—A right given to an intended wife by a contract of marriage, in case she *survive* her intended husband, to the legal interest of one third of the property and assets belonging to his "*succession* and estates," cannot be exercised during the lifetime of the husband against the property and

estates assigned by him under the Insolvent Act of 1875. *Workman* vs. *Renny*, Q. B. 1879, 23 L. C. J. 324, 10 R. L. 412, 2 L. N. 82.

4. —— But a donation in a marriage contract by a husband to his wife separate as to property "of the sum of two thousand dollars, to be taken by her upon the goods most easily available, either at his death or as ordered by the court," is not merely a *gain de survie* but a matrimonial advantage which, by the terms of the contract, can be claimed during the lifetime of the husband if the latter's financial affairs justify the court in allowing it. *Lecavalier* vs. *Trudel*, S. C. 1888, 16 R. L. 565.

5. Effect of Husband's Death before Money invested as per Contract.—Where a donation was made by marriage contract from the husband to the wife of a sum of money to be applied to the purchase of household furniture for their joint use, the death of the husband before the donation was so applied did not exempt the husband's estate from liability for the amount thereof. *Symons* vs. *Kell*, S. C. 1877, 21 L. C. J. 251.

6. Effect of Disposal of particular Property donated.—Where it was stipulated by the contract of marriage that the wife at his death should have the furniture contained in the house therein described, and during the marriage the consorts sold the house and furniture and bought a new one and put new furniture in it, and the wife upon the death of her husband claimed the new furniture in place of that given to her by the contract of marriage—*Held*, that she had no title to it without a new contract to that effect. *Cahill* vs. *Hachette*, Q. B. 1876, 7 R. L. 513, confirming S. C., 6 R. L. 532.

7. In Fraud of Creditors.—The defendant by contract of marriage transferred all his property to his wife, nine days after action brought, but there was no assignment in insolvency and no allegation of insolvency in the pleadings; the contract of marriage was nevertheless held to be made in fraud of plaintiff's rights, and the opposition of the wife based thereon was dismissed. *Holliday* vs. *Consedine*, S. C. 1884; Loranger, J. (unreported).

8. —— A donation by marriage contract, by an insolvent person to his wife, in fraud of his creditors, will be set aside, even though his wife had no share in the fraud. *Behan* vs. *Erickson*, S. C. 1881, 7 Q. L. R. 295.

9. —— A gift of household furniture, in and by a marriage contract, by the intended husband to the intended wife, is not an onerous contract within the meaning of Article 1038 C. C., and is liable to be set aside, if the donor, at the time it was made, was, and knew himself to be, insolvent, and this without proof of bad faith on the part of the donee. (*Ib.*)

10. —— A gift by marriage contract is deemed to be gratuitous; and where the husband, donor, is insolvent at the time of the marriage, the gift is voidable without proof of bad faith on the part of the donee. *McIntosh* vs. *Reiplinger*, S. C. 1890, M. L. R., 7 S. C. 456, 20 R. L. 130.

11. —— On the 28th June, 1876, the plaintiffs sold to T a property for $12,250, of which price $3,789 were paid in cash. On the 16th June, 1879, T's daughter married one K, and in the contract of marriage T made a donation to his daughter of real estate of considerable value, the only property remaining to him being that sold to him by the plaintiffs. In July, 1881, the plaintiffs brought an action to set aside the gift in question, claiming that the property sold had become so depreciated in value as to be insufficient to cover their claim for the balance remaining due to them and secured only by the property so sold; that the gift in the marriage contract had reduced T to a state of insolvency, and had been made in fraud of the plaintiffs, and that at the time the gift was made T was notoriously insolvent. T pleaded, *inter alia*, denying averments of insolvency, fraud or wrong-doing. The only evidence of the value of the property still held by T at the date of the donation was the evidence of an auctioneer, who merely spoke of the value of the property, in November, 1881, and that of a real estate agent who did not know in what condition the property was two years before, but stated that it was not worth more than $6,000 in November, 1881, adding that he considered property a little better then than it was two years before, although very little changed in price—*Held*, reversing the judgment of the Court of Queen's Bench (3 Dorion's Q. B. Rep. 247), that in order to obtain the revocation of the gift in question it was incumbent on the plaintiffs to prove the insolvency or *déconfiture* of the donor at the time of the donation, and that there was no proof in this case sufficient to show that the property remaining to the donor at the date of his donation was inadequate to pay the hypothecary claims with which it was charged. *Treacey* vs. *Ligget*, Supreme Ct.

1884, 9 Can. S. C. R. 441, 8 L. N. 5, 28 L. C. J. 181.

12. Interpretation.—Where a person intervened in the marriage contract of his niece, and made her a donation of $200,000 payable at his death, the intended husband to have "the administration and enjoyment of the "said sum of $200,000 from the time of the "same becoming due," and the only condition of the husband's administration and enjoyment was the birth of children, which was a fact admitted—*Held*, that the husband was usufructuary, and the wife had the *nue propriété*. *Kimber* vs. *Judah*, C. R. 1885, M. L. R., 2 S. C. 86, 14 R. L. 320.

13. —— In such case the action against the donor's universal legatee, for the recovery of the amount of the donation, can be brought by the usufructuary only. An action by the wife, even with her husband's authorization, will be dismissed.

14. —— Usufruct—Child's Share according to the Edict "*des Secondes Noces*"—Community—Inventory—Partition Surety for Usufructuary. *Lajeunesse* vs. *David*, C. R. 1887, 31 L. C. J. 182.

15. Mortis Causa—Institute — Hypothecary Action.—The institute to a gift in contemplation of death made by consorts in the institute's marriage contract, cannot be sued hypothecarily in relation to an immoveable belonging to the donor where it is stipulated in the gift that the surviving donor shall remain in possession of the property donated until his or her death. The institute is not considered as being in possession in the above case until the decease of the surviving donor, whether the immoveable on which the hypothecary action is based be a joint *acquet* of the community or part property of the deceased donor. *Beauchemin* vs. *Désilets*, S. C. 1880, 10 R. L. 323.

16. —— A donation by universal title in usufruct, made in a marriage contract, is a donation in contemplation of death. *Hudon* vs. *Rivard*, Q. B. 1879, 24 L. C. J. 268, 3 L. N. 414.

17. Payment by anticipation.—A sum of money paid by a mother to her daughter at the time of her marriage, in addition to the *dot* stipulated by her in the contract of marriage to be paid to her daughter at her decease, will not be considered as a payment by anticipation of a debt payable to the daughter at the time of her mother's death, in the absence of clear proof to that effect, but will be regarded as a gift. *De Montenach* vs. *De Montenach*, Q. B. 1874, 19 L. C. J. 94.

18. Registration — Moveables —Delivery—Possession.—A gift contained in a marriage contract must be registered, unless in the case of moveables there is actual delivery to and public possession by the donee, which is not shown where the husband, by marriage contract, makes a gift of furniture in his house, and the wife, donee, comes and lives with him in the house where the furniture was at the time of the marriage. *McIntosh* vs. *Replinger*, S. C. 1890, M. L. R., 7 S. C. 456, 20 R. L. 130.

19. —— Art. 806 C. C.—Third Parties.—A gift of moveable property, in a marriage contract, made by a husband to his wife, is valid between the parties thereto without registration. *Morin* vs. *Langlois*, C. R. 1886, 30 L. C. J. 272.

20. —— Such a donation could only be affected by the rights of third parties acquired at the date of the gift and its registration. (*Ib.*)

21. —— And, in the present case, the fact that the registration of the contract was delayed until after the plaintiff's claim had accrued could not give the latter a valid ground of complaint if at the time of contracting the debt the husband was solvent and had sufficient property apart from that disposed of in the marriage contract to satisfy his debts. (*Ib.*)

22. —— Mutual Gift of Usufruct.—A mutual gift of usufruct between future consorts is not a donation, properly so called, but constitutes a marriage covenant containing reciprocal advantages, and which as such does not require to be registered. *Marchessault* vs. *Durand*, C. R. 1888, 16 R. L. 193. Confirmed by Q. B., 34 L. C. J. 205, but on other grounds.

23. —— 14-15 Vict., ch. 93—Registration substituted for insinuation—Marriage contract containing appointment of heirs—Necessity of registration after death of person making appointment—Minors.—*Held*:—1. Under 14-15 Vict., ch. 93, s. 4, the registration of a donation has the same effect as the insinuation thereof under the law previously in force, even as to donations registered before the passing of the Act and not insinuated; consequently the want of insinuation cannot be invoked against a donation contained in a marriage contract passed in 1842, which was duly registered during the lifetime of the donor, but

not insinuated. 2. Children of the age of majority, who have either accepted their father's succession as universal legatees, or have concurred in the testamentary dispositions made by him of his estate by accepting the particular legacies made to them, are estopped from making any claim under his marriage contract at variance with the dispositions of the will. 3. Gifts made in a marriage contract, to take effect only after the death of the donor, such as an appointment of heirs, partake of the nature of wills; and consequently in order to give effect to the appointment of heirs against third parties acquiring immoveables in good faith from the legal heirs or legatees of the donor, it is necessary that the marriage contract containing the appointment of heirs be registered in the same manner as a will, within six months from the death of the person making the appointment, with a declaration of the date of his death, the names of the heirs, and a designation of the immoveables affected and transmitted thereby. 4. The want of such registration can be invoked even against minors. *Paré* vs. *Allan*, S. C. 1890, M. L. R., 7 S. C. 107.

24. —— Life Rent—Renunciation of Community.—A stipulation in a contract of marriage, whereby the future husband gives a life rent to the future wife, in consideration of the renunciation by her to all right of community of property and dower and to all other matrimonial rights is not a donation requiring to be registered during the lifetime of the donor. *Chisholm* vs. *Panzé*, S. C. 1882, 26 L. C. J. 162.

25. Rights of Wife—Hypothec.—A wife has no legal hypothec on her husband's property for a life rent donated to her by her husband in the contract of marriage. *Davignon* vs. *Roy*, Q. B. 1889, 31 L. C. J. 233.

26. To Daughter and Son-in-Law jointly.—The gift of immoveable property by a father to his daughter and his son-in-law jointly is deemed to be a gift to the daughter alone. (Art. 1276 C.C.) And so where a judgment against the son-in-law is registered against the property so given there is no hypothec, the title not being in the son. *St. Ann Mutual Bldg. Soc.* vs. *Watson*, Q. B., 28 Nov., 1882.

IV. CHANGE OF NATURE OF—GIVING IN PAYMENT.

The parties to a deed of gift *inter vivos* may, by a later deed, change its nature from an apparently gratuitous donation to a deed of giving in payment. *Wilson* vs. *Lacoste*, Supreme Ct., 1892, 20 Can. S. C. R. 218, confirming M. L. R., 6 Q. B. 316, 20 R. L. 284.

V. BY ONEROUS TITLE.

1. Lods et Ventes.—An *onereuse* donation gives rise to payment of *lods et ventes*. *Lamothe* vs. *Talon*, Q. B. 1857, 1 L. C. J. 101.

2. Registration.—An *onereuse* donation, the charges whereof exceed the value of the goods given, is not null for want of insinuation. *Rochon* vs. *Duchene*, S. C. 1859, 3 L. C. J. 183; *Lafleur* vs. *Girard*, 2 L. C. J. 90; *Lacoste* vs. *Wilson*, Supreme Ct. 1892, 20 Can. S. C. R. 218, confirming M. L. R., 6 Q. B. 316.

3. An onerous donation is in the nature of a sale, and therefore such a deed made notarially in November, 1866, but not countersigned and followed by possession, was not *ipso jure* null and void, and was good under any circumstances, so far as the moveables were concerned. *Doutney* vs. *Richard*, Q. B. 1879, 24 L. C. J. 30.

4. A natural obligation and a mere moral obligation suffice to render a donation an onerous one, and therefore not subject to the same formalities as a donation by gratuitous title. *Drouin* vs. *Provencher*, C. R. 1883, 9 Q. L. R. 179.

5. Forfeiture under Art. 806 C.C, resulting from neglect to register, applies only to gratuitous donations, and not donations by onerous title. *Wilson* vs. *Lacoste*, Supreme Ct., 1892, 20 Can. S. C. R. 218.

VI. BY PARTICULAR TITLE—780 C. CODE.

In order that a donation be considered universal, the donor must give all his goods as a universality, and the donation of things specially designated constitutes only a special donation, though in effect the donor has given all he possessed. *Brunet* vs. *Saumure*, S. C. 1879, 2 L. N. 189; and see *McMartin* vs. *Gareau*, S. C. 1857, 1 L. C. J. 286; and see *Paquin* vs. *Bradley*, S. C. 1870, 14 L. C. J. 208.

VII BY PERSON INSANE.

The court could find nothing in this case to establish insanity at the date of the donation, and the subsequent interdiction of the donor for insanity had no retroactive effect. *Bouvier* vs. *Collette*, Q. B. 1886, 31 L. C. J. 14.

VIII. BY PERSON OF WEAK MIND.

A donation made by a person, who, by reason of weakness of mind, is unable to give a valid consent, will be annulled. *Collette* vs. *Bouvier*, S. C. 1885, 14 R. L. 97.

IX. BY UNIVERSAL TITLE.

In this case the donation from father to son partook of the character of a donation by universal title. *Clouthier* vs. *St. Jacques*, Q. B. 1884, 10 Q. L. R. 44.

X. CHARGES.

1. Removal of Residence.—A donation which provides for the board and lodging of the donor in the house of the donee and at his table, does not confine the donee to a residence in the house given by the donation. The donor, if it be not otherwise provided, must accompany the donee to the house which he chooses for his dwelling, or forego the advantage of board and lodging at the donee's expense. *Gagnon* vs. *Tremblay*, K. B. 1818, 2 Rev. de Lég. 209.

2. —— Where a donor gives, *inter alia*, a house to his son subject to the right in favour of his wife, the donee's step-mother, to occupy an apartment in it, and the donee sells the property, the step-mother is not bound, under the circumstances in this case, to accept an apartment from the donee in another house, nor to continue to occupy that in the house given, after it has passed into the hands of a stranger, and she is entitled to recover from the donee the money rental of the apartment she would have occupied had the sale not taken place. *Goupil* vs. *Letellier*, C. R. 1888, 15 Q. L. R. 120.

3. —— **Bad Treatment.**—If A, in consideration of a gift *inter vivos*, made to him by B, of all the moveable and immoveable property of the latter, binds and obliges himself to maintain and support B in his own house till B's death, and to pay for all necessary medical attendance which might be rendered to B, and to pay B's funeral expenses, he will be bound, on B's leaving his house, to provide for her support and maintenance elsewhere, if B's departure from his house was justified by the treatment she had received there; and if C, in such circumstances, gives B board and lodging, and provides for B nursing and attendance, rendered necessary by her illness; and further, pays for necessary medical services rendered B, and for B's funeral expenses; he may recover from A the fair value of such board, lodging and attendance, as well as the amount paid out by him for the medical services rendered B, and for B's funeral expenses, although no contract has been previously entered into between A and C with regard to such board, lodging, etc. *Lord* vs. *Oliver*, S. C. 1887, 10 L. N. 356.

4. If A, on being called upon by C to pay him for the board and lodging so provided B, and the expenses so incurred on B's behalf, say that he is ready to do "what is right" with regard to the support of B by C, this will constitute an admission on the part of A that he is indebted to C in such amount as is justly due the latter for his support of B, and for the expenses he has incurred on her behalf. (*Ib.*)

5. A and C having made a submission to arbitrators of the matters in dispute between them, such submission, though informal, should, nevertheless, under the circumstances, be taken as a further admission of A's indebtedness to C. (*Ib.*)

6. By reason of these various admissions, all that remained to be done was to establish the amount of A's indebtedness to C. (*Ib.*)

7. Augmentation — Life Rent.— The donor of an immoveable who reside thereon with the donee, cannot require the latter to furnish the stipulated life rent at any other place than that in which the immoveable donated is situated, where to do so would render the condition much more onerous. *Roy* vs. *Sabourin*, S. C. 1892, 1 Que. 135.

8. Assumed by Transferee of Donee.—Plaintiff gave all her property to her son on the condition, *inter alia*, that he was to furnish a cow. He supplied his mother with a cow, as he had agreed to do, but some time afterward sold the property to the defendant, who assumed the same obligations to the plaintiff. On his failure to furnish a cow—*Held*, that defendant was bound by the obligations of the donee. *Lalonde* vs. *St. Denis*, C. R. 1880, 3 L. N. 415.

9. —— A right of habitation stipulated by donation in favor of donor, on another property to be acquired subsequently by the donee, cannot be invoked by such donor against the purchaser of such other property from the donee. *Verdon* vs. *Groulx*, S. C. 1857, 1 L. C. J. 184.

10. —— Where a donation of an immoveable was made subject to a life rent, prior to

the coming into force of the code, but not registered, and the donee subsequently transferred the immoveable to another, subject to a charge of paying the rent stipulated in the previous donation —*Held*, on contestation of a report of distribution, that the first donor had no hypothec for his life rent, as it was not distinctly specified in the second deed, and that the donor could not consequently rank for the amount of the life rent until he had obtained a judgment setting aside the second donation. *Arpin* vs. *Lamoureux*, S. C. 1875, 7 R. L. 203.

11. Keeping Horse.—Where a donor reserves to himself the use of a horse, he is not bound for the horse's keep. This is at the charge of the donee, even in the absence of a stipulation to that effect. *Langevin* vs. *Morisset*, Q. B. 1888, 17 Q. L. R. 263.

12. Quality of Wheat to be supplied.—Where the donee is charged with the furnishing of "the best wheat grown on the property donated," he is obliged to furnish good wheat, and, if that grown on the land donated is not good, the donee must purchase it. *Lalond* vs. *Cholette*, Q. B. 1868, 1 R. L. 700.

13. Conversion into Money.—A right reserved by donation *inter vivos* to be furnished "*avec des vetemens suffisants et convenables pour chaque saison de l'annee*," if left in abeyance, cannot afterwards be converted into a demand for money. *McGinn* vs. *Brawders*, S. C. 1857, 1 L. C. J. 176.

14. Who can Sue for.—Action was brought against the donee of a certain immoveable and her husband for arrears of *cens et rentes*, due on the property which she had received from her father, subject to the charge of paying all the debts of the donor, her father, among which was an acknowledgment of said arrears and obligation to pay the same—*Held*, that although neither the plaintiff nor the person represented by him was a party to the donation containing the covenant declared on, the plaintiff had a right of action to enforce such covenant. *Fortier* vs. *Cantin*, S. C. 1867, 17 L. C. R. 337. (See *Aylwin* v. *Allsop*, S. C. 1855, 5 L. C. R. 367.)

XI. CONDITIONAL.

1. Resolutive Condition.—The conditional reversion of the property provided by the donation in this case was perfectly legal. *Herse* vs. *Dufaux*, Privy Council 1873, 17 L. C. J. 147.

2. Resolutive Clause.— Action to Account.—When the donation of an immoveable becomes null under a resolutive clause, the donor is entitled to demand from the donees an authentic title and an account of their administration from the happening of the event by which the donation became void This liability to account is joint and several. *Thivierge* vs. *Thivierge*, S. C. 1886, M. L. R., 2 S. C. 198.

3. Life Rent — Prohibition to alienate.—Art. 782 C. C.—The father and mother of the defendant by deed of gift transferred to him in his contract of marriage all their moveable property on condition that he should support them during their lifetime, and when they died bury them, etc., and should also pay them a life rent of $80 per annum, and subject to the additional condition that he should by no means alienate the said property under a penalty, that the moment it passed into the hands of strangers *la rente et pension viagère devrait doubler de la juste moitié*, and, judgment being had against the defendant by the plaintiff, the donor opposed the sale of the property until he should be collocated for a sum equal to double the amount of the life rent stipulated in accordance with the above clause—*Held*, that the donor could not recover, and the opposition was dismissed. *Griguere* vs. *Griguere*, S. C 1874, 6 R. L. 32.

4. Lapse of Conditions in—*Per Curiam*. Action to recover possession of the Jacques Cartier square, Montreal, on the ground that the conditions of original donation in 1803 had not been fulfilled, in particular that the ground had not been used as a public market square, and that the right had been reserved to the donors to re-enter into possession if the land were converted into any other use—*Held*, from the evidence that *auteurs* of the plaintiffs, more than fifty years ago, had ceded the lots which they possessed along the line of the square, and that they had not been troubled by their *ayants cause*, and, therefore, were without right to complain of the failure to use the ground as a public market. Further, the defendants were always in time, up to the judgment, to establish a public market, and it was proved that the square was now used as a market square. Action dismissed. *Chevrogny* vs. *City of Montreal*, S. C. 1877.

XII. CO-DONEES.

Subrogation.— Art. 1156, Sec. 3, C. Code.—One of two co-donees who has paid the whole of an annuity to which the donation

is subject can maintain an action against the other for his share of the annuity. *Patris* vs. *Begin*, K. B. 1813, 1 Rev. de Lég. 346.

XIII. DELIVERY. (See *infra* "OF MOVEABLES.")

A donation made before the coming into force of the Civil Code is null if the donor, without reserve of usufruct, remains in possession of the property given up to the day of his death, and a clause reserving a right of habitation jointly with the donee was not equivalent to a delivery of the property. *Lesage* vs. *Prudhomme*, C. R. 1882, 26 L. C. J. 213, 11 R. L. 475.

XIV. DISGUISED UNDER FORM OF RECEIPT.

See *De Tonnancourt* vs. *Salvas*, Q. B. 1870, 15 L. C. J. 113.

XV. FRAUDULENT.

1. The plaintiff, a widow, brought action to set aside a deed of donation from her late husband to the defendant, his legal attorney, made, as she alleged, in fraud of her rights. She alleged also having been married to the donor with stipulation of community in their marriage contract; that the property in question had been acquired by and during the community; that her late husband had given the property in question to the defendant, while he, the husband, was suffering from a serious malady from which he shortly afterwards died. Conclusions to set aside the donation, and to have one-half the property in question declared to belong to her in full right, and the other half in usufruct, according to another stipulation in her marriage contract, providing for mutual donation in usufruct to the survivor—*Held*, reversing the judgment of the court of original jurisdiction, that the donor had a right to make such donation, and that there was no evidence of fraud. *Desbarats* vs. *Lavertere*, Q. B. 1843, 1 Rev. de Lég. 417.

2. Where judgment has been rendered against the defendant for damages for seduction, etc., and the defendant afterwards, and before the amount of the judgment was satisfied, gave all his property to his wife by contract of marriage, with a stipulation of separation of property—*Held*, that the donation was fraudulent and void, and an opposition by the wife to a seizure of the effects so given was dismissed with costs. *Chaput* vs. *Berry*, S. C. 1861, 12 L. C. R. 172.

3. An opposition was filed to the sale of certain immoveables seized in the cause, the opposant claiming to be proprietor under a deed of donation from the defendant to his wife, subject to the support and maintenance of the donors; but, on contestation the donation was, notwithstanding, held to be made in fraud of the creditors, and the opposition was dismissed. *Lavallée* vs. *Laplante*, S. C. 1860, 10 L. C. R. 224.

4. And where to a seizure under a judgment against the defendant, the son of the latter filed opposition, alleging that the property had been given to him by his father by deed of donation, subject to the charge of supporting the donor and his family, the right of usufruct, however, being reserved by the donor—*Held*, that the donation was fraudulent, there being nothing to show that the son had ever paid anything for the property, or that the transfer was anything more than an artifice to protect the defendant's property from the grasp of his creditors. *Ward* vs. *Brown*, C. R. 1865, 1 L. C. L. J. 95.

5. A deed of donation of real estate will not be considered fraudulent because a chirographic creditor of the donor obtained judgment against him eighteen months subsequent to the date of the donation, which was made for good consideration. *Tessier* vs. *Bienjonetti*, C. R. 1865, 1 L. C. L. J. 68.

6. A donation made by a weak and aged person for a small annual rental, not exceeding half of the annual revenue of the property given, may be set aside for fraud, if the inference of fraud be not rebutted by evidence of circumstances which plainly show that such inference is unfounded. *Bernier* vs. *Boiceau*, K. B. 1813, 2 Rev. de Lég. 209.

7. A deed of donation of the donor, made in fraud of the creditors, may be set aside on contestation of the opposition filed by the donee invoking such deed. *Marin* vs. *Bissonnette*, C. R. 1878, 1 L. N. 242.

8. Where a donation is made by a father to his daughter, while solvent, but with a view to entering business and withdrawing the property donated from liability for possible debts contracted in that business, such donation can be annulled upon action by the assignee of the donor's estate although all the claims of the creditors of the estate be subsequent to the donation. *Murphy* vs. *Stewart*, Q. B. 1868,

12 R. L. 501; *Ivers* vs. *Lemieux*, C. R. 1878, 5 Q. L. R. 128.

9. A donation of an immoveable from a sister to her brother, after judgment rendered against her and not registered, was held to be made in fraud of her creditors. *McGillivray* vs. *Cullen*, C. R. 1874, 5 R. L. 456.

10. A donation by a father, who is insolvent, to his son, for work performed by the latter when he had his domicile with the former, and there was no agreement as to remuneration, is a donation by gratuitous title and made in fraud of the father's creditors. *Leblanc* vs. *Tellier*, S. C. 1882, 11 R. L. 341.

11. A donation made between near relations at a moment when the donor has just been served with an action for a debt, and in the absence of proof of good faith, will be presumed fraudulent. *Lortie* vs. *Dionne*, S. C. 1878, 4 Q. L. R. 299.

12. Partial Donation.—A partial donation, followed by a series of others, having the effect of rendering the donor insolvent, to the prejudice of his creditors, is annuliable at the demand of the latter under Arts. 1032 and 1034 C. Code. *Houtiston* vs. *Hart*, C. R. 1891, 17 Q. L. R. 249.

13. —— It did not appear in this case that at the date of making the donation the donor was indebted to the contestant. The fact that the donor had given the contestant a surety bond for the performance of a contract was not sufficient proof of indebtedness without it being proved that the debt existed at the date of making the donation. *Marion* vs *Postmaster-General*, Q. B. 1890, 34 L. C. J. 32.

XVI. GRATUITOUS.

In an action in declaration of an hypothec against the defendants, donees of the property in question, under a donation subject to a life rent in favor of the donors—*Held*, that such donation was *à titre gratuit*. *Holmes* vs. *Cartier*, S. C. 1855, 5 L. C. R. 296.

XVII. HYPOTHEC CREATED BY.

1. A donor who causes his deed of donation to be registered preserves his right of hypothec and *bailleur de fonds* for all the charges appreciable in money which are stipulated in his favor, without the necessity of establishing the value of such charges in the deed. *Dufresne* vs. *Dubord*, Q. B. 1878, 4 Q. L. R. 59.

2. And the registration of such a donation will preserve to a third holder in whose favor such charges are stipulated the same right of hypothec. (*Ib.*) And see *Fortier* vs. *Cantin*, 17 L. C. R. 337.

3. Also, the children of the donor have a hypothec of *bailleur de fonds* for the charges stipulated in their favor in a deed of donation, even where the deed had been subsequently revoked as between the donor and donee. *Demers* vs. *Martin*, cited in the above judgment at p. 61.

XVIII. IMPROVEMENTS.

1. Resiliation of Donation—Art. 816 C. C.—The donee of an immoveable, against whom action was brought for the resiliation of the donation on the ground of the non-fulfilment of the conditions imposed thereby, should in the same action claim the value of improvements made by him, and in default of doing so the presumption is that there are no such improvements, or that he has abandoned his right to claim the value of them. *Pearce* vs. *Gibbon*, S. C. 1875, 6 R. L. 649.

2. Rights of Donee.—Donees of immoveables, in an action by the creditors of the donor to set aside the donation as being in fraud of their rights, cannot retain the possession of the immoveables until paid for their improvements thereon, but will be ordered to abandon the property subject to their privilege for the improvements. *Prowse* vs. *Simpson*, S. C. 1885, 13 R. L. 302.

3. Verbal Promise—Art. 776 C. C.—*Held* (affirming the judgment of Brooks, J.), that a promise of a gift of real property without legal consideration, made verbally, is null; but where the promisee entered into possession of the land in pursuance of the promise, it was sufficient to make him possessor in good faith, and therefore entitled to the value of his improvements if proceedings were taken to evict him. *Montgomery* vs. *McKenzie*, C. R. 1890, M. L. R., 6 S. C. 469.

XIX. INTERPRETATION.

1. Art. 1013 C. Code—Life Rent.—The plaintiff made a donation of real and personal property in favor of his son, subject to a life rent, and afterwards made a donation of other real property to the donee for life, subject to a life rent, with a clause that the donation should avail to the donee's wife after the decease of the donee, so long as she remained a widow, but no longer, and in the latter donation gave a discharge for the rent due and

about to become due under the first donation. The donee having died, and his widow having re-married—*Held*, on action by the donor, that the two donations must be read together, and that the second having become void the discharge contained in it did not take away the plaintiff's recourse for the rent stipulated by the first donation. *Dalpé* vs. *Brodeur*, S. C. 1858, 9 L. C. R. 56, 7 R. J. R. Q. 102.

2. Substitution — Authorization to Sell.—Where by a clause in a deed of donation with substitution to the children of the donee it was permitted to alienate the property *à constitution de rente* in case it were found by experts to be advantageous to the children of the donee to do so—*Held*, confirming the judgment of the court below, that such provision would be carried into effect by the court on a report of experts in an action by the donee praying to be authorized to sell, although the donee had no children and was not likely to have any. *Castonguay* vs. *Castonguay*, Q. B. 1857, 14 L. C. R. 308.

3. —— The words "*jouissance*" and "*usufruit*" in a donation do not necessarily imply a mere usufruct, where the whole context of the deed evidently points at a substitution, and, where the enjoyment passes to several persons collectively "*leur vie durante*," it accrues to the survivors. *Joseph* vs. *Castonguay*, Q. B. 1861, 8 L. C. J. 62, reversing S. C., 3 L. C. J. 141; and see *Castonguay* vs. *Castonguay* 14 L. C. R. 308.

4. —— **Reversion.**—A, by donation *inter vivos*, gave his property to his son B, to be enjoyed by him *à titre de constitut et précaire sa vie durante*, and to his said son's children in property after his death. And the donation declared that, in default of such issue, the property should belong to the other heirs of the donor, who should enjoy and dispose of it in such a manner as the donor should direct by his will.

The donor made his will before making the donation, by which he gave all his property in usufruct to his said son B, and the property thereof to B's children, and gave B power by his own will to dispose of and to apportion said property as he pleased among the testator's grandchildren. And, by a codicil executed after the donation, confirmed the will.

B survived A and died without issue, leaving a will by which he bequeathed the particular property in question in this cause to the respondents, two of A's grandchildren.

Held—1. That the donation did not create a substitution, in default of lawful issue of B, in favor of "the other heirs of the donor."

2. That the conditional reversion of the property provided by the donation was perfectly legal.

3. That, under the circumstances, B had a legal right to bequeath the property as he did. *Herse* vs. *Dufaux*, P. C. 1873, 17 L. C. J. 147.

XX. LIABILITY OF DONEE.

1. Where, subsequent to a donation by particular title to the *auteur* of the defendant, since deceased, the brother of the donor obtained judgment for a certain sum of money against the vacant estate of the latter in an action *en reddition de compte*, the said donor having had the management of the property of his brother during his absence from the country—*Held*, upon the mere production of such judgment, and without it being necessary to prove that the debt existed prior to the passing of the donation otherwise than by what was stated in such judgment, that the donee was liable. *Aylwin* vs. *Alsopp*, S. C. 1855, 5 L. C. R. 367, 4 R. J. R. Q. 374.

2. The universal legatee or donee in usufruct is personally liable to the creditors for the debts of the succession, even capital sums, and the contribution to such debts by the *nu-propriétaires* does not prevent the recourse of the creditors. *Boileau* vs. *Seers*, S. C. 1885, M. L. R., 1 S. C. 239.

3. A donee charged with the payment of certain sums to the creditors of the donor, cannot avoid his liability to such creditors, after paying them various amounts on account, by executing a resiliation of the deed of donation with the donor, but continuing nevertheless in possession of the property given. *Poirier* vs. *Lacroix*, S. C. 1862, 6 L. C. J. 302.

4. Art. 712 C. C.—Gifts *inter vivos* are subject to *rapport*, but with interest only from the date of the death of the donor. *De Tonancour* vs. *Salvas*, Q. B. 1870, 15 L. C. J. 113.

5. Universal Donee—Debts of Donor.—A universal donee is liable for debts incurred by the donor before the gift, but contingent upon an event to happen subsequently to it. *Goupil* vs. *Letellier*, C. R. 1888, 15 Q. L. R. 120.

XXI. MADE DURING ILLNESS.

Where a person had expressed an intention to make a particular donation, and subsequently, while afflicted with softening of the brain and of feeble intelligence, he made the donation with the assistance of a judicial counsel—*Held*, valid. *Brault* vs. *Brault*, Q. B. 1878, 1 L. N. 495.

XXII. MORTIS CAUSA.

1. In an action by a widow to set aside a deed of donation to her son, which was made by her conjointly with her husband a few days before the death of the latter—*Held*, that as it appeared by the deed that the father did not at the time of its execution contemplate that his death was so near at hand, but, on the contrary, he had made the donation subject to a life rent, which showed that he anticipated living for some time thereafter, that the donation could not be held to have been made *mortis causâ*, but was a valid donation *inter vivos*, and could not, on the grounds alleged, be disturbed. *Raiche* vs. *Alie*, S. C. 1868, 1 R. L. 77.

2. A donation *inter vivos* of a sum of money for valuable consideration secured by hypothec, though payable only after the death of the donor, is not invalid as made *causâ mortis*. *Newton* vs. *Cruse*, S. C. 1882, 6 L. N. 107.

XXIII. NATURE OF—HOW ASCERTAINED.

In estimating the value of yearly charges imposed on the donee in a deed of gift of all the donor's property, to determine whether it is a universal gift or an onerous transfer equivalent to sale, account must be taken of the yearly revenue yielded by the property given. *Goupil* vs. *Letellier*, C. R. 1888, 15 Q. L. R. 120.

XXIV. OF COMMUNITY PROPERTY.

One Bedard, after the death of his first wife, with whom he was common as to property, made a donation of a *conquêt* of the community with onerous conditions attached. But several children survived from the marriage so that Bedard, the father, had only the right to one half of such *conquêt*, whereas he gave it as having a right to the whole. The donation was made in consideration of 3,000 *livres* and certain alimentary charges to be paid during his lifetime and that of his second wife. 1,200 *livres* were paid at the time of passing the deed. The action was brought for the recovery of the balance. The defendant pleaded that plaintiff was never proprietor of the whole lot, and that, being entitled to only half, he could only claim half the money. The defendant also alleged a subsequent payment of 300 *livres*, making half the purchase money, and that the other half belonged to the children whose rights he had purchased, with the exception of two of them. Judgment dismissing the action was confirmed. *Fletcher* vs. *Perillard*, C. R. 1865, 1 L. C. L. J. 26.

XXV. OF FUTURE PROPERTY.

A donation of a sum of money payable at the death of the donor "*à prendre sur tous les biens meubles et immeubles les plus clairs et apparents qui se trouveront lui appartenir au jour de son décès*" is invalid. *Bourget* vs. *Guay*, S.C. 1882, 8 Q. L. R. 173.

XXVI. OF MOVEABLES—ART. 776 C. CODE.

1. In an action to revendicate a piano claimed by the plaintiff—*Held*, confirming the judgment of the court below, that the gift of moveable effects by parents to their children, followed by tradition and possession, is complete without the necessity of any written contract to establish the same. *Mahoney* vs. *McCready*, Q. B. 1864, 15 L. C. R. 275.

2. What constitutes Delivery.—To a seizure of a piano at the house of the defendant the son of the defendant opposed, alleging that the piano had been given to him by his father, the defendant, over five years previously, by verbal donation. The plaintiff contested this statement, and the question which arose was as to the delivery necessary to the validity of a verbal donation. The proof was that the son, some five years previously, had commenced to teach the piano for a living, and his father had given him the piano for that purpose; that thereupon it had been removed somewhere else, and remained away for several days; that the defendant and the rest of his family did not play and did not use the piano at all, that in short it was exclusively used by the opposant and his pupils—*Held*, that the proof of delivery was sufficient, and the opposition was maintained. *McMaster* vs. *Moreau*, S. C. 1880, 3 L. N. 91.

3. Delivery through Agent.—The acceptance of a moveable, in the lifetime of the donor, the acceptance being notified to the

donor's agent who was entrusted with the delivery of the moveable, renders the agent's possession the possession of the donee, and completes the delivery. *Drouin* vs. *Provencher*, C. R. 1883, 9 Q. L. R. 179.

4. —— After such acceptance an action by the donee will lie against the agent to recover the gift. *Ib.*

5. Delivery — Proof — Principal and Agent.—Prior possession of the property donated is equivalent to delivery at the time of the gift, although the former possession was for another purpose. *Richer* vs. *Voyer*, Privy Council 1876, 5 R. L. 591; L. R. 5 P. C. 461.

5*a*. *Dons Manuels* must be clearly proved, especially when there is a relation between the donor and the donee, such as that of principal and agent. *Ib.*

6. Enregistered Deed—Creditors—808 C. C.—An unregistered deed of donation of moveables without delivery cannot avail as a title to such moveables against creditors of the donor. *Crossen* vs. *O'Hara*, S. C. 1877, 21 L. C. J. 103.

7. Divesting of Ownership—Law Prior to Code, Art. 777.—A gratuitous donation in May, 1863, of moveables without displacement, although there was registration in the registry office of the donor and donee, is inoperative as against posterior creditors. *Demers* vs. *Lefebvre*, C. Ct. 1870, 14 L. C. J. 241. See *Bonacina* v. *Seed*, Q. B. 1853, 3 L. C. R. 446.

8. Proof—Testimony.— A donation of moveables exceeding in value $50 can be proved by oral testimony. *Richer* vs. *Voyer*, Privy Council, 1874, 5 R. L. 591, reversing Q. B., 15 L. C. J. 122.

XXVII.—OF ANOTHER'S PROPERTY.

A donation inter-vivos of moveables belonging to others, although null as respects the owner, is valid as against the donor, if he should afterwards become proprietor of the moveables, and in such case the donor cannot have the donation set aside for error. *Boucher* vs. *Bousquet*, S. C. 1889, M. L. R., 5 S. C. 11.

XXVIII.—PROHIBITION TO ALIENATE.

1. Where a contract of marriage contained a donation to the husband from his father and mother (the plaintiffs herein) of "*un lot de terre à la charge de ne pouvoir vendre, ceder, echanger ni autrement aliener ledit immeuble sans exprès consentement et par écrit des dits demandeurs*"—*Held*, that the donee by this clause was deprived of the right of disposing of it even by will, and that his legatee, who had taken possession, was bound to restore it to the plaintiff. *Pepin* vs. *Couchêne*, Q. B. 1879, 10 R. L. 77, 2 L. N. 397.

2. The donor in a deed of donation prohibited the usufructuary from selling or alienating in any way the property thus given, and afterwards brought action to set aside the deed, on account of lease of the property for nine years, made by the usufructuary in favor of the defendant, the said lease being made, as pretended by the usufructuary, for the great advantage of the property in improvements and repairs, which the lessee bound himself to make.—*Held*, that the prohibition in such case could not be invoked, especially as a lease for nine years did not amount to an alienation of the property. *Valois* vs. *Gareau*, S. C. 1870, 2 R. L. 131.

3. A donation made before the Code, with prohibition to the donee and to his heirs to alienate during the life of the donor on pain of nullity, does not prevent the donee from bequeathing the property donated to one or more of his heirs, and such a bequest is not an alienation; in this respect it differs from a legacy of property made to a stranger. *Pénisson* vs. *Pénisson*, S. C. 1880, 6 Q. L. R. 239.

4. And if it were an alienation, the violation of the condition could only be invoked by the donor, and a co-donee would have no right to avail himself of it. *Ib.*

5. A clause prohibiting alienation *during the donor's life*, on pain of nullity, is valid, and may be invoked against an alienation by last will and testament.* *Bourassa* vs. *Bedard*, Q. B. 1863, 7 L. C. J. 158, 13 L. C. R. 251; reversing S. C. 1858, 3 L. C. J. 48.

6. Expertise to ascertain by what Title Property held.—The prohibition to alienate contained in a deed of donation subject to a life rent is valid only with respect to those whom it shall be shown by experts to hold by gratuitous title, and an expertise will be ordered to establish who are the holders by gratuitous, and who the holders by onerous, title. *Peltier* vs. *Debusat*, S. C. 1873, 5 R. L. 57.

* NOTE.—This case is distinguishable from *Pénisson* vs. *Pénisson* supra. (See remarks of Casault J., 6 Q. L. R. at p. 240.)

7. —— A prohibition to alienate property given by onerous gift is void. *Grenier* vs. *Kerr*, C. R. 1893, 3 Que. 409. (Following *Vigneault* vs. *Bone*, 19 R. L. 185; *Lachapelle* vs. *Brunette*, 19 R. L. 523.)

8. —— The nullity resulting from the sale of an immoveable declared inalienable by the donor, is merely relative. (*Ib.*)

9. —— A prohibition to alienate does not prevent the party who makes the stipulation from seizing the land donated in satisfaction of a charge therein in his favor. *Kiernan* vs. *Kiernan*, Q. B. 1865, 1 L. C. L. J. 57.

10. **Municipal Taxes.**—Municipal taxes and other public dues are payable by the usufructuary, and a donor cannot, by a clause of exemption from seizure, free the immoveables given from such charges. *Cité de Montreal* vs. *Bronsden*, S. C. 1887, M. L. R., 3 S. C. 146.

11. **Penal Clause.**—Where a sum was stipulated by a donor payable in his favor in the event of the property donated being sold contrary to a clause in the deed prohibiting alienation, such a clause was held to be not comminatory, but was a charge on the donation exigible so soon as the property should be sold or exchanged by the donee. *Cheval* vs. *Morrin*, S. C. 1862, 6 L. C. J. 229.

XXIX. REGISTRATION, ART. 806 C. CODE.

1. A donation may be registered at any time during the life of the donor. *Gaulin* vs. *Carrier*, K. B. 1809, 2 Rev. de Lég. 209.

2. Donations to minors have no effect until registered, and an acceptance and registration by such minor after he reaches majority will not avail against creditors who have registered subsequently to the gift, but prior to its registration. *Roy* vs. *Vacher*, C. R. 1871, 16 L. C. J. 45, 3 R. L. 440.

3. The omission to register a donation containing a prohibition to alienate, could not deprive the donor of the right of return resulting from Art. 630 C. Code, as under Art. 2098 the donee could not transfer any rights in the property to the prejudice of the donor without having himself registered his title. *Pepin* vs. *Courchêne*, Q. B. 1879, 10 R. L. 77.

4. Forfeiture under Art. 806 C. Code, resulting from neglect to register, applies only to gratuitous and not to onerous donations. *Lacoste* vs. *Wilson*, Supreme Ct. 1892, 20 Can. S. C. R. 218, confirming M. L. R., 6 Q. B. 316; and see *Poirier* vs. *Lacroix*, S. C. 1862, 6 L. C. J. 302.

5. The giving of a thing in payment being equivalent to a sale of it (Art. 1592 C. C.), and the necessity of registering a deed of sale existing only as to third parties acquiring the thing and to hypothecary creditors, absence of registration of the original deed could not be invoked by the testamentary executors of the person giving, against the deed which converted it into a giving in payment, which moreover was duly registered. (*Ib.*) And see *Poirier* vs. *Lacroix*, S. C. 1862, 6 L. C. J. 302.

6. All donations *inter viros* should be registered saving those excepted by Arts. 807 and 808 C. C., and onerous donations amounting to sale. *Leclaire* vs. *Landry*, S. C. 1890, 19 R. L. 342.

7. A chirographic creditor can invoke want of registration of donation fraudulently made by the donor his debtor. *Leclaire* vs. *Landry*, S. C. 1890, 19 R. L. 342.

8. **Seigniorial Rights under.**—A donation in a contract of marriage is not a transfer upon which *lods et rentes* can be claimed. *Baby* vs. *Letellier*, K. B. 1821, 2 Rev. de Leg. 206.

XXX. REVOCATION AND RESILIATION.

1. A donation can legally and rightfully be revoked before acceptance. *Lalonde* vs. *Martin*, S. C. 1856, 6 L. C. R. 51, 5 R. J. R. Q. 3.

2. **Resiliation of, procured by Fraud.**—Resiliation of a deed of donation by onerous title obtained from the donee without legal consideration and by fraud and *dol* will be set aside. *Doutney* vs. *Richard*, Q. B. 1873, 24 L. C. J. 30.

3. **Third Party.**—The stipulation in a deed of donation in favor of a third party may be revoked by the donor so long as such third party has not accepted the stipulation in his favor. *Grenier* vs. *Leroux*, C. R. 1878, 22 L. C. J. 68, 1 L. N. 231.

4. **Grounds for—Art. 816 C. C.—** Where the donee by his own act had rendered it impossible for him to perform a material condition of the donation—*Held*, that this was good and sufficient cause for resiliation. *Legacé* vs. *Courberon*, K. B. 1817, 2 Rev. de Leg. 209 and 1 Rev. de Leg. 506.

5. —— The donation may be resiliated for non-payment of an annual rent for which the

donor and donee had stipulated. *Migné* vs. *Migné*, K. B. 1811, 2 Rev. de Leg. 209.

6. —— In the case of a donation by a parent to his child, the tranquillity, the careful aid, and the minute filial attention which the parent requires and naturally seeks to obtain in the decline of life, must necessarily be destroyed by the constant intoxication of the donee, and being voluntarily in that condition, is a good cause of resiliation of the contract. *Couture* vs. *Bégin*, K. B. 1819, 2 Rev. de Leg. 60, 2 R. J. R. Q. 150.

7. Where a donation *inter vivos* is made in consideration of and subject to the charge that the donee shall contribute to the support of the donor according to the terms of the deed of donation, and the donee violates such terms, and specially where the donee illtreats and shows ingratitude towards such donor, the court will revoke such donation. *Dean* vs. *Drew*, Q. B. 1888, 32 L. C. J. 316.

8. Revocation—By Birth of Children.—According to the old French Law in force in the Province of Quebec, before the Civil Code, the gift *inter vivos* is not revocable by the birth of children to the donor, *par survenance d'enfants*, when the gift is not excessive in relation to the property of the donor, and if it may be presumed that the donor would have made it if she had contemplated children. The ordinance of 1731 *si unquam*, establishing in France the revocation of gifts *inter vivos* by *survenance d'enfants*, is not law in the Province of Quebec, not having been therein registered. *Symes* vs. *Cuvillier*, Privy Council 1879, 5 App. Cases 138.

9. —— Effect of — Onerous Gift — Hypothecs.—Revocation of an onerous gift does not affect the hypothecs created by the donee during the existence of the donation. *Lafleur* vs. *Girard*, S. C. 1854, 2 L. C. J. 90.

10. —— Third Party.—The resolution of a donation for ingratitude cannot be demanded as against a third party, notwithstanding he may have assumed the payment of the charges of the donation. *Martin* vs. *Martin*, S. C. 1859, 3 L. C. J. 307.

11. —— The resolution thereof cannot be prosecuted without bringing all the parties to the act into the case. (*Ib.*)

12. —— Conservatory Attachment—A donor demanding the revocation of a donation for cause of ingratitude may cause the issue of a conservatory attachment, pending the action, to attach in the hands of the donee the effects donated, and also any moveables replacing those donated. *Cryan* vs. *Cryan*, S. C. 1887, 13 Q. L. R. 271.

13. Resiliation — Intention of Parties.—If it appear by the evidence that the intention of the parties to a deed of donation was that it should not be gratuitous, but rather that the donee should assume the payment to the donor of his, the donor's share, in the succession of their late father, but the donation, being made by the donor's agent, was stated to be by gratuitous title, it will be cancelled as being contrary to the intention of the parties. *McCord* vs. *McCord*, C. R. 1882, 11 R. L. 510, 5 L. N. 342.

XXXI. RATIFICATION.

1. A covenant, in a deed of donation, to ratify the same at a certain time is obligatory, and cannot be avoided on the ground of there being no consideration for such promise. *Easton* vs. *Easton*, S. C. 1863, 7 L. C. J. 138.

2. A will which ratifies a donation can only do so as to the dispositions which are legal and will be good, therefore, only as regards gifts of present property. *Morency* vs. *Morency*, Q. B. 1876, 8 R. L. 634.

XXXII. RIGHTS OF DONOR—NOVATION.

The intervention of the donor (creditor of a life-rent affecting an immoveable) in a deed of sale of the immoveable, whereby he accepts the interest from the purchaser instead of the life-rent, does not operate as a novation of his claim; he consequently has a right to bring an hypothecary action in virtue of his donation, as well as a personal action in virtue of the deed of sale. *Bernier* vs. *Carrier*, Q. B. 1878, 4 Q. L. R. 45; *Leclaire* vs. *Filion*, S. C. 1875, 7 R. L. 428.

XXXIII. RIGHTS OF PARTIES UNDER.

A third party, in favor of whom a sum of money is stipulated, payable by a deed of donation, can sue the recovery thereof by direct action and even hypothecarily, and his hypothec is equivalent to that of an unpaid vendor. *Dupuis* vs. *Cédillot*, C. Ct. 1866, 10 L. C. J. 338.

XXXIV. TO BASTARDS—Art. 768 C. C.

An adulterine bastard, to whom a gift was made by substitution before the passing of the Canada Act removing his disability to receive, will, as substitute, be entitled to re-

ceive the substitution opened in his favor after the passing of the Act. *King* vs. *Tunstall*, S. C. 1870, 14 L. C. J. 197, P. C. 1874, 6 R. L. 358 and 20 L. C. J. 49.

XXXV. TO CONSORTS.

A donation by a father to a daughter and her husband is a *propre*, and does not fall into the community. *Pollico* vs. *Elvidge*, S. C. 1869, 13 L. C. J. 333.

DOWER.

I. Acceptance of Succession. 1-2.
II. Action for. 1-3. (See also other headings.)
III. Conflict of Laws. 1-2.
IV. Conventional.
Hypothec for. 1-5.
Judicial Separation. 6.
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VII. Property affected by.
Claim of Wife on Insolvent Estate of Husband. 1.
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Judicial Sale—Dower not open. 3-5.
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VIII. Registration. 1-4. (See also under title "Registration.")
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As against Creditors—1370 *C.C.* 1.
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XI. Rights of Children. 1-7.
XII. Unchastity of Dowager.

I. ACCEPTANCE OF SUCCESSION.

1. A widow who is universal legatee cannot claim her dower on an immoveable which forms the subject of the particular legacy. *Kirby* vs. *Ross*, S. C. 1873, 5 R. L. 453.

2. Heirs joined in a deed of sale of an immoveable pertaining to the succession of their father. They afterwards claimed customary dower on an immoveable which had been disposed of by their father during his lifetime, without the wife having renounced her dower thereon—*Held*, that this immoveable would have been subject to dower if the heirs had renounced the succession, but the fact that the heirs joined in the deed of sale first mentioned was equivalent to a declaration of their acceptance of the succession, and excluded their right to customary dower. *Bétournay* vs. *Moquin*, Q. B. 1882, 5 L. N. 327 and 2 Dorion's Q. B. R. 187.

II. ACTION FOR. (See other headings.)

1. 1454 C. C. An action for dower may be maintained by a widow after her second marriage, but she is bound to give security as required by the the 264th article of the Custom. *Elot* vs. *Touchette*, K. B. 1821, 2 Rev. de Lég. 277.

2. 1452 C. C.—An action *en délivrance de douaire coutumier* is an action of partition, and all the co-heirs must therefore be parties to the suit. *Turcot* vs. *Drouin*, K. B. 1817, 2 Rev. de Lég. 278.

3. Arrears of Fruits and Revenues.—Where a dowager sues a third party in possession in good faith of an immoveable affected by her dower, for her customary dower, without putting such party in default, she can only claim the fruits and revenues of such immoveable from the date of the action, and not the arrears. *Lamirande* vs. *Lalonde*, 1888, M. L. R., 4 S. C. 55, 18 R. L. 671.

III. CONFLICT OF LAWS.

1. A stipulation in a Lower Canada marriage contract that there shall be no "*douaire coutumier ou préfix*" cannot apply to dower on lands in Upper Canada. *Fisher* vs. *Jameson*, C. P. of U. C. 1861, 7 L. C. J. 154.

2. The claim to customary dower is a real right, and is governed by the law of the place where the real property of the husband is situate, and not by the law of his domicile at the time of his marriage or of the place where the marriage was celebrated. In the present instance, however, the dower was held to have been renounced. *Erichsen* vs. *Curillier*, Q. B. 1880, 25 L. C. J. 80.

IV. CONVENTIONAL.

1. Hypothec for.—In hypothecary action for recovery of conventional dower defendant cannot demand that the latest purchasers be sued first, such an exception applying only to the case of the customary dower. *Benoit* vs. *Tanguay*, S. C. 1857, 1 L. C. J. 168.

2. —— A wife has no legal and general hypothec for her conventional dower, and the special hypothec created by the marriage contract for securing the conventional dower, which is extinguished by the judicial sale of the hypothecated immoveable, cannot be renewed by the second registration of the marriage contract upon the immoveable again becoming the property of the husband. *Prevost* vs. *Bourque*, S. C. 1884, 13 R. L. 57.

3. —— Conventional dower consisting of money is in all respects moveable, and the wife has no legal hypothec to secure the payment of conventional dower. *Perrault* vs. *Caron*, S. C. 1891, 14 L. N. 129.

4. —— The conventional hypothec stipulated in a marriage contract without designating the husband's property is absolutely null. (*Ib.*)

5. —— The subsequent registration of a notice to the registrar wherein are particularized certain immoveables as being affected by the hypothec stipulated in the marriage contract, does not validate the said hypothec, nor does it create a new one on the said immoveables. (*Ib.*)

6. Judicial Separation. — Conventional dower may be claimed by the wife upon the dissolution of the community by a judicial separation when it is stipulated by the contract of marriage that the wife should be entitled to her dower at the dissolution of the community by death or otherwise. *Parent* vs. *Tonnancour*, S. C. 1868, 1 R. L. 50.

7. Stipulated not revertible to Children.—A wife, after the decease of her husband, and where there have been children to the marriage, is owner, to the exclusion of the latter, of the conventional dower stipulated in her marriage contract as being *une fois payé et sans retour*. *Lacerte* vs. *Boisvert*, C. R. 1891, 17 Q. L. R. 110.

V. ENGLISH LAW OF.

English law of dower as well as English law of descent and alienation, as respects lands held in free and common soccage, was introduced into Lower Canada for the first time by the Imperial Statute 6 Geo. 4, ch. 59, commonly called "The Canada Tenures' Act." *Wilcox* vs. *Wilcox*, Q. B. 1857, 2 L. C. J. 1.

VI. OPENING OF.—1438 C. C.

The death of the husband gives right to the opening of the dower unless there be an express agreement to the contrary, and an express renunciation of the provisions of the Custom of Paris. *Mercier* vs. *Blanchette & Bignell* vs. *Henderson*, Q. B. 1845, 1 Rev. de Lég. 122.

VII. PROPERTY AFFECTED BY.

1. Claim of Wife on Insolvent Estate of Husband.—The wife of an insolvent filed a claim on his estate under a clause in her marriage contract which provided that on the death of her husband, should she survive him, she should receive £250, or, at option, the legal interest of one-third of the property and assets belonging to his "succession and estate" —*Held*, that her right could not be exercised during the life of her husband. *Workman & Renny*, Q. B. 1879, 2 L. N. 82, 23 L. C. J. 324, 10 R. L. 412.

2. Greve de Substitution.—Where by her contract of marriage the appellant was given £1,000 as conventional dower, to be levied on all the property of the husband, and the latter died intestate and without issue—*Held*, that she could before the promulgation of the Civil Code take her dower subsidiarily on property in the possession of her husband *grevé de substitution* in default of other available property in the husband's estates, and that preferably to the heirs substituted. *Morasse* vs. *Baby*, Q. B. 1874, 7 Q. L. R. 162.

3. Judicial Sale—Dower not open.—An *adjudicataire* may, in some cases, be permitted to retain the capital of a dower not yet open. *Roberts* vs. *Lavaux*, K. B. 1816, 2 Rev. de Lég. 278.

4. —— Sheriff's sale does not extinguish customary dower not then open. *Blondin* vs. *Lizotte*, Q. B. 1887, 31 L. C. J. 80.

5. —— A sale of property affected by dower under the bankruptcy laws in force in 1845 did not purge the property from the dower not then open. *Massue* vs. *Morley*, Q. B. 1869, 14 L. C. J. 308, confirming C. R. 1868, 13 L. J. C. 85.

6. Lands held in Free and Common Soccage.—Customary dower as regulated by the Custom of Paris was at all times claimable on lands in Lower Canada held under the

tenure of free and common soccage before the passing of the Imperial Statute, 6 Geo. 4, ch. 59, commonly called "The Canada Tenures' Act." *Wilcox* vs. *Wilcox*, Q. B. 1857, 2 L. C. J. 1, 8. L. C. R. 34.

7. Licitation.—Customary dower does not affect a mere undivided interest or share in real property where such property is sold by forced licitation, the effect of the licitation being to convert the right of dower on the land to a claim on the moneys resulting from the sale of the property; and this even in the case of a third party. *Denis* vs. *Crawford*, S. C. 1863, 7 L. C. J. 251.

8. Mobilization—Customary Dower.—Immoveables converted into moveables by the marriage contract are not subject to customary dower. *Antaya* vs. *Dorge*, S. C. 1873, 6 R. L. 728.

9. Partition.—Customary dower affects lands coming to the husband as the result of a partition, subsequent to his marriage, of property belonging to his father, who died *ab intestate* prior to the son's marriage. *Bernard* vs. *Charretier*, C. Ct. 1886, 9 L. N. 100.

10. Property paid for by Community.—In action for dower—*Held*, that a property, the price of which was paid by the community, was no less subject to dower, nor was the dowager held to the costs of the improvements made upon such property by the community. *Martigny* vs. *Archambault*, Q. B. 1846, 2 Rev. de Lég. 211.

11. Reunion to the "Domaine."—The reunion to the *domaine* by voluntary retrocession made in consequence of the non-fulfilment of the conditions of the original deed of concession has not the effect of purging the property thus retroceded from the customary dower with which it is affected. *Filion* vs. *de Beaujeu*, S. C. 1860, 5 L. C. J. 128.

VIII. REGISTRATION. (See under title "Registration.")

1. Dower stipulated in a marriage contract to be "such as is established by the laws of Lower Canada" is legal and customary dower and not conventional dower, and the registration of such marriage contract is not necessary to preserve the hypothecary rights of the widow and children upon real estate subject to such dower. *Sims* vs. *Evans*, S. C. 1860, 4 L. C. J. 311. Confirmed Q. B. 1860, 10 L. C. R. 301.

2. A customary dower created by contract of marriage, executed before the coming into force of the registry ordinance, did not require to be registered. *Leroux* vs. *Leroux*, Q. B. 1875, 20 L. C. J. 224; and see *Nadeau* vs. *Dumon*, 2 L. C. R. 196.

3. Only purchasers and hypothecary creditors subsequent to the passing of the Act 44-45 Vic. (Q.), ch. 16, can avail themselves of want of registration of customary dowers arising before the Civil Code. *Bernard* vs. *Charretier*, C. Ct. 1886, 9 L. N. 100.

4. And the transferee—in virtue of a transfer subsequent to the Act 44-45 Vic. (Q.), ch. 16,—of the price of a sale made prior to this Act, is not a subsequent creditor within the meaning of 44-45 Vic., ch. 16, and 47 Vic., ch. 15. (*Ib.*)

IX. RENUNCIATION.

1. The share of the children renouncing does not accrue to the other *douairiers*, but falls into the succession of the father. *Lepage* vs. *Chartier*, S. C. 1866, 11 L. C. J. 29.

2. A general renunciation for consideration by a wife separate as to property, in 1828, of all rights she might have in a property sold by her husband, and which at the time was hypothecated for the payment to her of a conventional dower, did not operate as a bar to her children's claim to be paid such dower when the same became open. *Massue* vs. *Morley*, Q. B. 1869, 14 L. C. J. 308, confirming C. R. 1868, 13 L. C. J. 85.

3. A married woman may legally renounce to dower, under authority of a judge, when her husband is interdicted for insanity. *Dufresnay* vs. *Armstrong*, Q. B. 1869, 14 L. C. J. 253.

4. A wife separated as to property may legally renounce to the customary dower of herself and children, after the property affected with the dower has been sold by sheriff. *Dufresnay* vs. *Armstrong*, Q. B. 1869, 14 L. C. J. 253.

X. RIGHT OF.

1. As against Creditors—1370 C. C.—The plaintiff sued the defendant, in her quality of common as to property with her late husband, for a debt due by him, and, having obtained judgment, seized and sold an immoveable property belonging to the community. The defendant opposed, claiming a stipulated dower both for herself and her children in virtue of her marriage contract, which had been duly registered. The plaintiff contested on the ground that the defendant had not renounced the community—*Held*, that a widow who has been condemned as common as to pro-

perty to pay a debt of the community may claim her dower in preference to the creditors, although she has not renounced the community, on the principle that she is only bound to pay the debts out of what she has received from the community. *Delisle* vs. *Richard*, S. C. 1856, 6 L. C. R. 37, 4 R. J. R. Q. 482.

2. As against Creditor for Life Rent.—The creditor prior to the dower can seize and sell the property affected by the dower. And the dowager who has instituted an action of licitation and partition of the usufruct of the immoveable upon which her right of dower attaches, cannot by opposition have the sale of such property by the creditor for life rent suspended until adjudication upon her action; she can only secure her rights by an opposition to secure the charges. *Laberge* vs. *Laberge*, C. R. 1886, 10 L. N. 153.

XI. RIGHTS OF CHILDREN.

1. Tiers-Detenteur.—The children who are proprietors of an estate on which the dower of their mother is charged, cannot maintain an action to recover possession of the estate from a third party, who holds by title derived from their mother so long as she lives. *Lemieux* vs. *Dionne*, K. B. 1817, 2 Rev. de Lég. 277.

2. The children who have committed *acte d'héritiers* cannot claim dower, although they may have renounced. *Filion* vs. *DeBeaujeu*, S. C. 1860, 5 L. C. J. 128.

3. The insolvency of the husband, at the time of the marriage, cannot prevent the children from claiming their customary dower. (*Ib.*)

4. Dower of the children of a second marriage can only consist of the fourth of the immoveables acquired during the first community, although by the effect of the partition of the first community, made after the second marriage, the husband became the proprietor of the *whole of the immoveable* property affected by the dower. (*Ib.*)

5. The 279th article of the Custom of Paris does not apply to the customary dower of a second wife and of the children of such second marriage. (*Ib.*)

6. Art. 1446 C.C.—On an opposition filed by a defendant in his capacity as tutor to his minor children for the customary dower to which they were entitled—*Held*, that, under 4 Vic., cap. 30, sec. 37, the dower to which children are entitled attaches to land and tenements in the possession of their father at the time of his decease, and to lands and tenements which have been in possession of their father and in relation to which the mother has not barred or released her dower under the provisions of the 35th section of such statute. *Adams* vs. *O'Connell*, S. C. 1860, 11 L. C. R. 365.

7. —— Action for Dower.—In action for customary dower by the children, it is unnecessary to prove that there were not other properties in the succession subject to the dower sufficient in value to meet it; the *onus probandi* of the fact being on the party prosecuted. *Lepage* vs. *Chartier*, S. C. 1866, 11 L. C. J. 29.

XII. UNCHASTITY OF DOWAGER.

In an action by a widow for her dower—*Held*, sustaining the plea of the defendant, that the unchastity of the widow during the first year of her widowhood would deprive her of her dower, and that even if she married the person with whom she committed adultery, but only as to the future rents and profits from the time of the demand, and not with respect to those accrued before the acts charged were committed. *J*—— vs. *R*——, S. C. 1857, 7 L. C. R. 391, 5 R. J. R. Q. 321.

DOWERY.

See Married Women.

DRAIN.

See Servitude.

DROIT CRIMINEL.

See Criminal Law.

DROIT DE RETENTION.

See Lien—Hotelkeeper—Improvements.

DROIT INTERNATIONAL.

See International Law.

DRUGGIST. (1)

(See also "Negligence.")

1. Liability for Practicing as a Physician.—A druggist who recommends a tonic or a lotion for a particular ailment, and who sells the customer such tonic or lotion, charging him merely the ordinary price of the preparation, is not guilty of practicing medicine without being a registered licensee in accord-

(1) Art. 4019 *et seq.* R. S. Q.; amended 53 Vic. ch 46.

ance with 42 and 43 Vic., c. 37 (Q.). *Collège des Médecins et Chirurgiens de la Province de Québec* vs. *Chivé*, C. Ct. 1885, 8 L. N. 342.

2. —— And a druggist who was formerly a doctor of Rouen, and who sells bottles of medicine with the label *Dr. Chivé, ex interne des hôpitaux de Rouen*, thereon, is not liable for assuming the title of physician. (*Ib.*)

3. Quebec Pharmacy Act, 48 Vict. (Q.), ch. 36, s. 8—Construction of—Partnership contrary to law.—*Held* (reversing the judgment in Review, M. L. R., 1 S. C. 485), that the appellant, who had, during more than five years before the coming into force of the Act 48 Vict. (Q.), ch. 36, practiced as chemist and druggist in partnership with his brother, and in his brother's name, was entitled, under section 8 of the Act, to be registered as a licentiate of pharmacy. The section in question must be construed as applying to those who have *illegally* practiced as chemists and druggists, and it was immaterial whether the appellant had practiced in his own name or in a partnership contrary to law,—the illegality in either case being covered by the Act. *Brunet* vs. *Ass. Pharm. de Québec*, 1886, M. L. R., 2 Q. B. 362; confirmed in Supreme Ct. 1887, 14 Can. S. C. R. 738.

DRUNKENNESS.

See "INTERDICTION."

E.

ECOLES.

See SCHOOLS.

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See CHURCH.

ELECTION LAW. (1)

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(1) See new Quebec Election Act, 1895, 59 Vic., ch. 9; Dominion Act "Electoral Franchise," ch. 5 R. S. C.; amended, 1887, ch. 5; 1889, ch. 9; 1890, ch. 8; 1891, ch. 18; 1894, ch. 12.
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I. ASSESSMENT ROLL. (See "VOTERS' LISTS.")

Parliamentary electors have a right to demand the annual correction of the assessment roll, as the voters' lists are made from that roll. *Boileau* vs. *Corp. de St. Geneviève*, C. Ct. 1889, 18 R. L. 74.

II. BALLOT.

1. Initialing.—Ballots not initiated by the deputy returning officer will only be voided where circumstances give rise to a presumption of fraud. *Bernatchez* vs. *Fortin*, S. C. 1875, 9 Q. L. R. 81; *Dionne* vs. *Gagnon*, C. R. 1883, 9 Q. L. R. 20; *Exparte Tremblay*, S. C. 1887, 13 Q. L. R. 64; *White* vs. *Mackenzie*, S. C. 1875, 20 L. C. J. 22.

2. Marking—By Voter.— The ballots should not be too rigidly examined, and where the irregularity of the cross indicating the vote appears to be due to awkwardness or clumsiness or a desire to improve its appearance rather than to make it appear who signed it, and where it is impossible to single it out frem other votes by reason of any special marking, such ballot should be accepted. But ballots marked by horizontal or vertical bars should be discarded. *Dionne* vs. *Gagnon*, C. R. 1883, 9 Q. L. R. 20.

3. —— —— Ballot papers under the Dominion Election Act of 1874, marked with the **x** to the left of or below the name of the candidate, or with two distinct crosses, or with an asterisk or other peculiar mark which might serve as a private signal between a voter and his briber, are null. But papers with the **x** immediately after the name, though not in the square allotted to it, are good. *White* vs. *Mackenzie*, S. C. 1875, 20 L. C. J. 22.

4. —— —— The absence of the initials of the deputy returning officer to the ballot paper is not a fatal defect. (*Ib.*)

5. —— **By unknown Person.**—Where ballots were marked by some unknown person between the date of the voting and the recount, they were ordered to be restored to the candidate in whose favor they were given. *Bernatchez* vs. *Fortin*, S. C. 1875, 9 Q. L. R. 81.

6. —— **By Officer.**—The mark made by the returning officer on a ballot for the purpose of identifying it for further objection does not spoil the ballot. *Bernard* vs. *Brillon*, S. C. 1881, 1 M. L. R. 121.

7. —— —— Where the deputy returning officer marks certain ballots with numbers corresponding with those on the poll book, they will be declared void, and, if this affects the result of election, the latter will be voided. *Dansereau* vs. *Bernard*, C. R. 1886, 16 R. L. 129.

8. Minor.—A vote given by a minor should be cancelled where legal proof allows of his being interrogated as to the candidate for whom he voted. *Dionne* vs. *Gagnon*, C. R. 1883, 9 Q. L. R. 20.

9. Recount.—An election having been held for Montreal, and an application having been made under section 55 for a count of the ballots by a judge, it appeared that the returning officer had removed the ballots from the envelopes in which they had been transmitted to him by the deputy returning officers, and had made them into packages—*Held*, that the judge, under such circumstances, could not recount the ballots. *Montreal Centre Election in re*, S. C. 1878, 1 L. N. 496.

10. —— A recount of votes need not necessarily be asked for by a candidate, but it may be asked for either by a candidate or by any elector of the electoral district. *Chartier ex*

parte Electoral District of Ottawa, 1887, 10 L.N. 410.

11. —— In a contested election case under the Quebec Elections Act—*Held*, that where the deputy returning officer has omitted to make a statement of the votes given to each candidate under 38 Vic., cap. 7, sec. 193, it is the duty of the returning officer to ascertain by reference to the documents the total number of votes for each candidate at the poll in question, and if the returning officer has failed to do so a recount may be ordered by the judge. *Mousseau Exp.*, S. C. 1883, 6 L. N. 354.

12. —— **Delay.**—In computing the delay of 4 days after the returning officer has made his final addition of the votes, during which a recount can be demanded, Sunday should be included therein where it is not the last day of the delay. *Ex parte Stephens*, S. C. 1886, 14 R. L. 568.

13. —— **Disappearance of Ballot.**—Notwithstanding the disappearance of ballots given in favor of one or several candidates in a polling station, the judge should recount the votes given in all the other stations. *Ex parte Tremblay*, S. C. 1887, 13 Q. L. R. 64.

14. —— —— Where 130 votes have disappeared from a polling station, the judge cannot recount the votes polled at such station, but should instruct the returning officer to proceed in accordance with Sec. 63 of the Dominion Elections Act of 1874. (*Ib.*)

15. —— **Notice—Delay.**—On the fourth day after the returning officer had made his final addition of the votes, the petitioner obtained a judge's order for a recount, under the Quebec Election Act, 42-43 Vict., ch. 15, but did not thereof notify the returning officer until three days afterwards. In this interval the returning officer transmitted to the clerk of the Crown in Chancery the election writ with his return indicating the respondent as the person elected.—*Held*, that under these circumstances the judge had no power to proceed with the recount. *The Bellechasse Election Case*, S. C. 1886, 17 Q. L. R. 294, and see *Stafford* vs. *Tessier*, S. C. 1892, 1 Que. 268.

16. —— **Procedure.**—In a contested election case in which the recount is disputed, the court will order an examination of all the ballot tickets, and will compare the election lists with the returning officer in order to establish that it is in conformity with the copies of the registry office. *Rocheleau* vs. *Martel*, S. C. 1878, 9 R. L. 511.

17. Secrecy.—The secrecy of votes is established in favor of the voter, and he can, when asking for his ballot, declare *viva voce* for whom he intends to vote, without thereby losing his right to vote. *Bernard* vs. *Brillon*, S. C. 1881, 1 M. L. R. 121.

18. —— And his admissions in this respect make proof. *Dionne* vs. *Gagnon*, C. R. 1875, 9 Q. L. R. 20.

19. Scrutiny.—The striking out from the votes given for a candidate of one vote for each person found guilty of corrupt pratices, can take place even where the seat is not claimed by the petitioner; but in such case notice of the particular votes which are objected to must be given in accordance with the sixth Rule of Practice. *Dansereau* vs. *Bernard*, C. R. 1886, 16 R. L. 129.

III. CONTRACTS.

1. Delay to send in Claim—R. S. Q. 439.—*Held*, the failure of a person who does work for a candidate in connection with an election, to send in his claim therefor to the candidate's agent within one month from the declaration of the election, as required by R. S. Q. 439, is an absolute bar to his right to recover the same, and the court is bound to apply the law though the limitation was not specially pleaded. *Tansey* vs. *Kennedy*, S. C. 1893, 4 Que. 466.

2. —— **R. S. C., ch. 8, ss. 120-121—Delay to send in Account.**—An action lies for the value of work done for a candidate in connection with an election contest for the House of Commons, provided the account for the work was reported to the candidate's election agent within the delay stipulated by the Election Act. *Guerin* vs. *Taylor*, Q. B. 1893, 3 Que. 86.

3. Evidence—Parol.—A claim by lawyer for services rendered to a candidate, such as the drawing up of circulars, notices in newspapers, etc., etc., cannot be proved by parol evidence where the amount exceeds $50. *Ethier* vs. *Hurteau*, S. C. 1888, 4 M. L. R. 36.

4. Goods supplied — R. S. Q. 425 — Delays.—Respondent sued by appellant on a promissory note, offered in compensation an account for goods supplied to appellant upon his special requisition and demand. Evidence showed that the account related to an election held under the Quebec Election Act, and was not sent to the candidate's agent within the delay of one month of the announcement of the election; and that the debt was not in-

curred by appellant personally, neither for the legitimate expenses of the election, and that respondent knew the reason for which the goods were sold by him—*Held*, that, under Art. 425 R. S. Q., the said contract for goods supplied was null and void and the account not recoverable at law. *Brunelle* vs. *Béyin*, Q. B. 1892, 1 Que. 570.

5. —— Under the circumstances of this case, and in the absence of objection from either side, verbal and secondary proof of the holding of the election was sufficient. (*Ib.*)

6. **Personal Expenses.**—An action will lie for a candidate's personal expenses at an election. *Bernard* vs. *Vallée*, C. Ct. 1892, 2 Que. 127.

7. **Quantum Meruit.** — Election agent cannot sue for the value of his services without proof of a special undertaking by the principal to pay for the same. *Girouard* vs. *Beaudry*, C. Ct. 1858, 3 L. C. J. 1.

8. —— **R. S. Q. 425.**—No suit or action can be maintained on *quantum meruit* for the value of services alleged to have been rendered to or for a candidate at an election of a member to the Provincial Legislature. *Turcotte* vs. *Martineau*, S. C. 1892, 1 Que. 363.

9. **Promissory Note—Act of 1860.**—"The Corrupt Practices' Prevention Act of 1860," of the late Province of Canada, is in force, and applies to elections of members for the House of Commons of the Dominion, and, therefore, a note given for the payment of even lawful expenses connected with any such election is void in law. *Willett* vs. *Grosbois*, S. C. 1873, 17 L. C. J. 293.

10. —— **38 Vict. (Q.), s. 266 R. S. Q., § 425.**—The respondent made his promissory note payable to his own order, and endorsed and delivered the same to appellants, who got it discounted; and the proceeds were applied to an election fund of which the respondent was treasurer, the fund being used in promoting the election of members of the Provincial Legislative Assembly. There was an understanding that the appellants would take up the note at maturity as their contribution to the election fund. The appellants, having failed to take up the note, it was paid by respondent. In an action by the latter against appellants—*Held*, that the respondent had no right to recover the amount of the note from the appellants, a promise or undertaking in any way referring to an election fund being void under 38 Vict. (Q.), s. 266, now R. S. Q., § 425. *St. Louis* vs. *Sénécal*, Q. B. 1889, 5 M. L. R. 332. Confirmed in Supreme Ct. 1890, 18 Can. S. C. R. 587, *sub nom Dansereau* vs. *St. Louis*.

11. —— **For Money lent Candidate—R. S. Q. 425.**—A promissory note given by a candidate, for money loaned him during an election of a member of the legislature, the lender knowing that the money was obtained and destined for use by the borrower in such election, is not recoverable at law, in virtue of the provisions of Art. 425 R. S. Q., as being a promise and contract arising out of an election. *Ritchie* vs. *Vallée*, C. R., 1893, 3 Que. 70.

12. **Hiring Cabmen.**—The hiring by a person, not an agent of any candidate, of cabmen to stand at poll houses and drive when required, is an illegal contract within the meaning of section 100 of the Election Act 1874, upon which no action at law will lie, even though the cabmen were not voters, and it does not appear that they drove voters to or from the polls. *Bradford* vs. *Driscoll*, C. Ct. 1878, 5 Q. L. R. 70.

13. **Feast.**—The cost of an election feast, after an election (in 1867) had been closed, are not recoverable. *Guevremont* vs. *Tuntstall*, Q. B. 1876, 21 L. C. J. 293.

14. **Refreshments — Act of 1860.**—The value of refreshments supplied to a gang of men collected during an election of a representative to the Commons of Canada, to be used in case of an emergency, cannot be recovered in an action at law, the Election Act of 1860 being still in force *quoad* such election. *Johnson* vs. *Drummond*, C. Ct. 1873, 17 L. C. J. 176.

15. —— But where liquor was bought for the purpose of treating voters, but the vendor was unware of the purpose for which the liquor was to be used—*Held*, that he could recover in an action for the value of liquor sold by him to the candidate. *Couture* vs. *Delery*, Q. B. 1876, 7 R. L. 577.

16. **Sec. 100 Election Act 1874 (D).**—To an action for an account for printing and advertising done for the purposes of an election, the defendant, who was the successful candidate, pleaded that the expenses were unauthorized by him or by his agent, that they were extravagant and unnecessary, and that under the Dominion Election Act no action lay for their recovery—*Held*, that Sec. 100 of the Act of 1874 does not preclude the recovery of lawful accounts connected with an election, unless the expenses were incurred with a corrupt or

illegal motive. *Workman* vs. *Herald Ptg. Co.*, Q. B. 1877, 9 R. L. 305, 21 L. C. J. 268.

17. —— Section 100 of the Dominion Elections Act 1874 must be interpreted as annulling all contracts, even those formed for the payment of legitimate expenses, when they have for their object to illegally influence the election, and constitute a corrupt act such as is prohibited by the Statute. *Jalbert* vs. *De Lery*, C. R. 1878, 5 Q. L. R. 297.

18. —— But an action may be brought to recover legitimate expenses, when these expenses are not incurred in pursuance of a corrupt bargain. (*Ib.*)

IV. CORRUPT PRACTICES.

1. Appeal from Conviction for.—The only appeal contemplated by the Act 52 Vict., c. 10, is an appeal by a party convicted of corrupt practices at an election. No cross-appeal is allowable under the Act, and therefore the only charges upon which the Court of Appeal is called upon to adjudicate are those upon which the appellant has been convicted by the court below. In the present case no corrupt practices have been proved against the appellant. *Whyte* vs. *Johnson*, Q. B. 1890, 34 L. C. J. 145, 16 Q. L. R. 54.

2. Judgment.—Conviction should contain a clear statement of the charges on which the defendant has been convicted, or a distinct reference thereto. *Whyte* vs. *Johnson*, Q. B. 1890, 34 L. C. J. 145, 16 Q. L. R. 54.

3. Electoral Agency. — Where the agency of a person is limited to a particular act, e. *g.*, making a speech for a candidate, and subsequently that person is guilty of an act of a doubtful character, he will not be deemed an agent of the candidate merely because he has been employed for a special purpose. *Généreux* vs. *Cuthbert*, S. C. 1883, 6 L. N. 74. Confirmed in Supreme Court, 1884, 9 Can. S. C. R. 102.

4. —— Agency must result from an authorization, expressed or implied, and proof of an implied authorization must relate to the particular fact which forms the subject of the accusation. *Mercier* vs. *Amyot*, S. C. 1881, 8 Q. L. R. 33.

5. —— And, moreover, presumptions of implied authorization are fully rebutted by direct proof that the candidate openly had in good faith forbid the person charged as agent to meddle in the election. (*Ib.*)

6. —— On the trial of an election petition —*Held*, that a candidate at an election is responsible for the acts of agents who are not and would not necessarily be agents under the common law of agency. *Massé* vs. *Robillard*, C. R. 1880, 4 L. N. 3, and see *Hamilton* vs. *Beauchesne*, E. C., 1876, 3 Q. L. R. 75.

7. —— A person had been furnished with a list of voters resident in Montreal, which he had given to one Boswell, with instructions to see them. The respondent telegraphed him two names to be added to the list, and asked him to procure certain canvassers at Montreal, and to send them to the county. This person sent Boswell to obtain the canvassers, and gave him nine railway tickets without specifying distinctly to whom they were to be given, but, as he stated in evidence, intended to be furnished to them. Boswell, seeing two persons on the platform whom he knew to be voters going up to vote, gave to each of them one of the tickets. He returned two, but it was not proved what he did with the remainder —*Held*, that under the circumstances Boswell was an agent of the respondent, and that the delivery of the tickets to the voters was a corrupt act sufficient to avoid the election. *Hickson* vs. *Abbott*, S. C. 1881, 25 L. C. J. 290.

8. —— An act of bribery committed by an agent of the sitting member who has been cautioned by him to comply strictly with the law will void the election. *Joliette Election Case*, Supreme Ct. 1888, 12 L. N. 13.

9. —— An election will be voided for a corrupt practice by an authorized agent though the act be in violation of the directions and instructions of the candidate. *Electoral Division of Chambly*, S. C. 1875, 19 L. C. J. 185, 332.

10. —— If the candidate participate in or sanction the corrupt act of his agent he will be deemed personally guilty. Therefore the payment by respondent through his election agent of an innkeeper's account for "the expenses of *orateurs* during the election," in the absence of any proof as to the name and occupation of or the services rendered by the persons styled "*orateurs*," and the payments, moreover, not being included in the statement of expenses required by law, are corrupt practices within the meaning of said Act. (*Ib.*)

11. —— The payment of money by an agent to a canvasser will not be held ground for personal disqualification, unless it be shown that the candidate was aware of such

payment. *Lavoie* vs. *Gaboury*, C. R. 1884, 7 L. N. 186.

12. —— What constitutes evidence of. *Deslauriers* vs. *Larue*, S. C. 1880, 6 Q. L. R. 100.

13. —— In an election case it was proved that one T. was the respondent's general agent for that part of the country, and that A. was specially requested and given money by T., and induced by him to advance money to employ a certain number of men without specifying any particular persons to be so employed for the alleged purpose of preserving the public peace on polling day. It was not in evidence that T. had applied to the proper authorities or otherwise complied with the law in order to secure the peaceful conduct of the election. To the persons in question, who were all electors, A gave the sum of two dollars as pretended remuneration for the object in question—*Held*, that the respondent was responsible for the act of bribery committed by A, a sub-agent appointed by his general agent. *Cimon* vs. *Perrault*, Supreme Ct. 1881, 4 L. N. 91, reversing S. C., 10 R. L. 651.

14. —— In order to constitute electoral agency the partisan must act with the express or implied authorization of the candidate, so that, where there is no express authorization, the candidate must have knowledge of his partisan's services and accept them, or there must be some other mode of acquiescing. *Bernatchez* vs. *Fortin*, S. C. 1883, 9 Q. L. R. 81.

15. —— A candidate is not liable for the acts of a committee or association formed in the interest of a political party to which he belongs, even where he is the candidate selected by this committee, attends their meetings and accepts their nomination. *Whyte* vs. *Johnson*, S. C. 1881, 14 Q. L. R. 200; *Guerin* vs. *Taylor*, Q. B. 1893, 3 Que. 86.

16. —— A person who accompanies the candidate on his tour through the country, and presents him to those electors who are not acquainted with him, is not *ipso facto* the candidate's agent. (*Ib.*)

17. —— Handing the voters' lists by the candidate to his partisan for use in the elections constitutes the latter his agent. (*Ib.*)

18. —— A written authorization given by the candidate to a person to represent him at a poll constitutes him his agent during the voting. (*Ib.*)

19. —— In order to constitute a person an agent of a candidate, it is not sufficient to work at the election and desire the election of a candidate, but it is necessary to show that the candidate or his authorized agent accepted such assistance, and an act of corruption committed by a person before he was agent cannot be imputed to the candidate, as the appointment of an agent has no retractive effect. *Magnan* vs. *Dugas*, S. C. 1882, 12 R. L. 226. Confirmed in Supreme Ct. 1884, 9 Can. S. C. R. 93.

20. —— And, when the powers of the agent are limited, acts done in excess of such power cannot be imputed to the candidate. (*Ib.*)

21. —— A person who takes part in committee work and assists in checking voters' lists, with the knowledge and sanction of the candidate, is an agent within the meaning of the election law. *Magnan* vs. *Forest*, 1888, M. L. R., 4 S. C. 265.

22. —— The fact that large sums were being illegally spent by the agents of a candidate, and that this circumstance must have been known to those who were engaged in promoting his election in that part of the country, is not of itself sufficient to prove knowledge by the candidate of corrupt practice, where it appears that he was not present at the place where the money was being disbursed, but was engaged in a remote part of the country. Knowledge of corrupt practice must be clearly established, and, where the evidence is so contradictory as to raise a doubt, the defendant is entitled to the benefit of the doubt. *Sequin* vs. *Rochon*, S. C. 1889, M. L. R., 5 S. C. 465.

23. —— Corrupt acts by agents were proved in the present case. *McQuillen* vs. *Spencer*, S. C. 1887, M. L. R., 3 S. C. 247.

24. Evidence—Admission — Revocation.— An admission of corrupt practice made by the defendant after the adduction of evidence cannot be revoked. *Brisson* vs. *Goyette*, C. R. 1889, M. L. R., 6 S. C. 102. Reversed in appeal as to jurisdiction, M. L. R., 6 Q. B. 1

24*a*. —— **Contra.**—*Faille* vs. *Lussier*, C. R. 1888, 16 R. L. 136.

24*b*. —— The allegations of the election petition may be admitted by the respondent so as to cause him to lose his seat. *Langlois* vs. *Valin*, S. C. 1880, 6 Q. L. R. 18.

24*c*. —— **Application to reject.**—The respondent cannot apply to prevent the petitioner from giving evidence in support of certain specified particulars, on the ground that they were too vague, too general, and wholly insufficient in law, after the trial has begun and evidence has been adduced regarding

these particulars, under objection taken and reserved till the final hearing. *Clayes* vs. *Baker*, S. C. 1879, 23 L. C. J. 194.

25. —— Bill of Particulars.—On the trial of a controverted election petition and of the recriminatory charges against a candidate, no evidence can be received of charges not specifically detailed in particulars furnished, as ordered by the court. *Whyte* vs. *Johnson*, Q. B. 1890, 34 L. C. J. 145, 16 Q. L. R. 54.

26. —— —— In an election case—*Held*, that evidence of corrupt acts and bribery is not admissible under a bill of particulars in which the names and descriptions of the alleged bribers are not given. *Généreux* vs. *Cuthbert*, S.C. 1883, 6 L. N. 74. Confirmed in Supreme Court, 9 Can. S. C. R. 102.

26*a*. —— —— The petitioner must give such particulars as to time, place and circumstance, as shall afford the respondent fair information in reference thereto; and no evidence will be received at the trial except as to matters within the particulars and tending to support the same, without the leave of the court or a judge, and upon such conditions as to postponement of the trial, payment of costs, or otherwise, as may be ordered. *Langlois* vs. *Valin*, S.C. 1880, 6 Q. L. R. 18.

27. —— Burden of Proof.—The burden is upon the person accused of corrupt practices to clear away the presumption of corrupt practice caused by treating a voter on polling day. *Whyte* vs. *Johnson*, S. C. 1888, 14 Q. L. R. 200.

27*a*. —— Candidate not party to the Cause.—No evidence of corrupt practices is admissible concerning a candidate not made a party to the cause. *Rocheleau* vs. *Martel*, S. C. 1878, 8 R. L. 592.

28. —— In Candidate's own behalf —Multiplicity of Charges.—On a petition in the usual form charging bribery and corruption by respondent and his agents, and treating by respondent's agents on the nomination and polling days, the respondent was examined on his own behalf—*Held*, on appeal to the Supreme Court, that the evidence of a candidate on his own behalf in the Province of Quebec is admissible. *Somerville* vs. *Laflamme*, Supreme Court 1878, 2 Can. S.C.R. 216.

29. —— And that when a multiplicity of charges of corrupt practices are brought against a candidate or his agents, each charge should be treated as a separate charge, and if proved by one witness only and rebutted by another, the united weight of their testimony, without accompanying or collateral circumstances to aid the court in its appreciation of the contradictory statements, cannot overcome the effect of the evidence in rebuttal, and that in such case the candidate is entitled to the presumption of innocence to turn the scale in his favor. (*Ib.*)

30. —— Evidence—Former Election.—A charge of bribery and other corrupt practices against the respondent alleged to have been committed by him at the voided election which necessitated the present one, may be proved, on the principle that the two elections form part of one and the same election. *White* vs. *MacKenzie*, S. C. 1875, 19 L. C. J. 113.

30*a*. —— Of Intimidation. — Various charges were made, alleging the intimidation of persons employed upon the Government works, and the exercise of undue influence upon them, by threats of dismissal to induce them to vote for the respondent—*Held*, that the evidence in support of these charges was wholly insufficient. *Hickson* vs. *Abbott*, S. C. 1881, 25 L. C. J. 289.

30*b*. —— Illegal inducement—Penalty.—And where the action is for a penalty, the corrupt inducement to vote or refrain from voting must be clearly proved. *Hébert* vs. *Choquette*, Q. B. 1883, 6 L. N. 414.

30*c*. —— Holding the Election.—In an action under the Quebec Elections Act, the holding of the election must be proved by the certificate of the returning officer. *Hébert* vs. *Choquette*, Q. B. 1883, 6 L. N. 414, 19 R. L. 665.

31. —— Personal Disqualification.—In an action under the Quebec Elections Act, in which it was attempted to show grounds for personal disqualification of the candidate—*Held*, that, where the evidence of a corrupt promise by the candidate is contradicted in important particulars, and the candidate wholly denies it on oath, the court will not base thereon a judgment of personal disqualification. *Lavoie* vs. *Gaboury*, C. R. 1884, 7 L. N. 186.

31*a*. —— Of Qualification of Elector.—In the contestation of an election the qualification as electors of those who are charged with corrupt acts must be proved by producing a copy or extract of the electoral list; such proof cannot be made by parol testimony. *Magnan* vs. *Dugas*, S. C. 1888, 12 R. L. 226.

32. —— Recriminatory Charges.—(See Counter Petition.) By the 55th clause of the Statute of 1875, the defendant may make recriminatory proof of fraudulent practices against any candidate, although the seat may not be claimed by such candidate, and, therefore, he is justified in referring to such proof in his answer. *Adam* vs. *Mercer*, S. C. 1879, 23 L. C. J. 256.

32*a*. —— In an election petition claiming the seat for the defeated candidate, recriminatory charges were brought against him, and the trial judge, after having found that the election of the sitting member should be set aside for corrupt practices, fixed a day for the evidence upon the recriminatory charges. Thereupon the petitioners withdrew the claim to the seat, and the judge gave judgment avoiding the election—*Held*, that section 42 of chap. 9 R. S. C. no longer applied, and the judge was right in refusing to proceed upon the recriminatory charges. *Guilbault* vs. *Dessert*, Supreme Ct. 1888, 15 Can. S. C. R. 458.

32*b*. —— Where the defendant in answering an election petition brings accusations against the defeated candidate, who is not a party to the cause, the latter must intervene in the regular way in order that he may appear in the cause and demand the dismissal of the allegations against him. *Tremblay* vs. *Guilbeault*, S. C. 1882, 11 R. L. 523.

33. —— Weight of.—Where the uncorroborated statement of a person who alleged that he had been bribed, was positively denied by the person charged with the corrupt act—the evidence of the latter being the more credible and trustworthy—the charge should be rejected; and especially as this was the sole case by which the allegation of corrupt practices in the election was supported. *Prevost* vs. *Boyer*, 1888, M. L. R., 4 S. C. 350.

34. —— —— The evidence of persons who were friends of the defendant during the election, and afterwards changed their political party and became his enemies, should be accepted with great caution. *Cimon* vs. *Perrault*, S. C. 1888, 10 R. L. 651.

35. —— —— And when an act is testified to by one witness only, his evidence, in order to constitute proof, must be irreproachable, and must not be contradicted in any important particular, or if contradicted must be corroborated by circumstantial evidence. (*Ib.*)

36. —— —— And in order to prove attempts at corruption simply it must be still stronger. (*Ib.*)

37. —— —— And a single witness, when he is contradicted by another witness, even if it be the defendant himself, is insufficient. (*Ib.*)

38. —— —— And it is not evidence of a corrupt intention that the defendant has, since the election, in order to avoid difficulty and enmity, settled with persons to whom he did not previously acknowledge himself indebted. (*Ib.*)

38*a*. —— —— **Credibility of Witnesses — Circumstantial Evidence.** — Evidence to disqualify a candidate should be such as would justify a conviction on an indictment. *Ryan* vs. *Devlin*, C. R. 1875, 20 L. C. J. 77.

38*b*. The decision of the trial judge as to the credibility of a witness will not be disturbed, unless a manifest error has occurred. (*Ib.*)

38*c*. In the application of circumstantial evidence as to the candidate's knowledge of corrupt acts, the circumstances proved should be susceptible of no explanation inconsistent with guilt. (*Ib.*)

39. Procedure.—To enable the defendant to prove that the contesting candidate was guilty of corrupt practices and to demand his disqualification, it is not necessary that the contesting candidate should have demanded the contested seat. *Whyte* vs. *Johnson*, S. C. 1888, 14 Q. L. R. 200.

40. —— Notice given to a person who is not a candidate, of the accusation that he has been guilty of corrupt practices at an election, does not fix his guilt unless he has been summoned by a judge or the court to be heard on the accusation. (*Ib.*)

41. Status of Candidate—How affected by proof of.—The *status* of a candidate petitioning is not liable to be defeated by proof of corrupt practices on his part during the election, and therefore a charge of such corrupt practices cannot be tried by preliminary objection. *Electoral Divisions of Megantic, St. Maurice & Gaspé, E. C.*, 1874, 19 L. C. J. 1.

42. What Constitutes—Bribery.—The giving of money by a canvasser to an adverse elector, as payment of certain lists of voters of the opposite party, and in the hope of obtaining information, is not an act of bribery within the meaning of the statute, though very grave suspicion must attach to the making of such payments. *Glagras* vs. *Shehyn*, E. C. 1875, 1 Q. L. R. 295.

43. —— —— The defendant was charged

with having incurred the penalty imposed by the Quebec Elections' Act for bribery, and it appeared in evidence that the defendant paid one H. $6 to go from Lavaltrie to Montreal for a load of a thousand pounds, but the load turned out to be a package of cotton of about ten pounds weight— *Held*, that the engagement of H. was a sham and done to seenre his absence from the polls, and penalty of $200, or six months imprisonment imposed. *Lapierre* vs. *Laviolette*, Q. B. 1882, 6 L. N. 415.

44. —— —— Appeal from a judgment holding appellant guilty of bribery within the meaning of ss. 3, sec. 92, of the Dominion Elections Act, 1874, "for having agreed and promised to pay the expenses of one H., a voter and a professional speaker." It was admitted that H. addressed meetings in the interest of appellant, and during the time of election made no demand for expenses, except on one occasion, when, being unexpectedly without money, he asked for and received the sum of one dollar and a half for the purpose of paying the livery bill of his horse—*Held*, that the weight of evidence showed that the appellant only promised to pay H.'s travelling expenses, *if it were legal to do so*, and such a promise was not a breach of the section cited. *Wheeler* vs. *Gibbs*, Supreme Ct. 1880, 3 L. N. 334, 4 Can. S. C. R. 430.

45. —— —— Defendant called on a person who was very poor and lived to some extent on charity, and asked the man if he would vote, to which the man replied he would, but would not say for whom, upon which defendant gave the man's wife $5. Judgment imposing a penalty reversed in appeal, but partly on the ground that there was no legal proof of the election having been held. *Hébert* vs. *Choquette*, Q. B. 1883, 6 L. N. 414.

46 ——Canvassers—Canvassing.—The employment and payment *bona fide* of canvassers, whether electors or not, is not a corrupt practice so as to void the election, although an elector so employed ought not to vote, and may be prevented from voting under sec. 167 of the Quebec Elections Act. *Gingras* vs. *Shehyn*, E. C. 1875, 1 Q. L. R. 295.

47. —— —— Accompanying a candidate through a portion of the county, introducing him to the electors, organizing meetings and committees, speaking at such meetings, corresponding and telegraphing about the election generally, is not canvassing within the meaning of the Quebec Election Act of 1875 and its amendments,—"*cabaler*," to canvass, consisting in the act of privately soliciting votes for a particular candidate, or in soliciting electors to abstain from voting for an adverse candidate. *Whyte* vs. *Johnson*, Q. B. 1890, 34 L. C. J. 145, reversing S. C. 1888, 14 Q. L. R. 200.

48. —— —— Although the employment of paid canvassers (*cabaleurs*), which is expressly prohibited by the Quebec Election Act of 1875 and its amendments, is a corrupt practice, the payment of persons employed for other purposes, not expressly prohibited, only becomes a corrupt practice under subsection 3 of sec. 249 of said Act, when done with a corrupt intent to unduly influence the election, such as when the employment is unnecessary, or otherwise colorable, or the payment in excess of the services rendered. (*Ib.*)

49. —— **Colorable Employment.**— On the trial of an election petition it was proved that the agents of respondent had employed a number of persons to act as policemen at one of the polling places in the parish of Baie St. Paul, on the polling day, for the ostensible purpose of keeping the peace. It was not in evidence that they had applied to the proper authorities or otherwise complied with the law in order to secure the peaceful conduct of the election, but the reason assigned by him for ordering the employment of policemen was that he had received intimation by telegrams and letters that roughs were coming down from Quebec to Baie St. Paul to interfere with the polling of the electors. No person came, and the polling took place without any interference. The four persons employed were known to be supporters of the appellant, and swore that they had voted for the respondent because they had received from him the sum of two dollars each—*Held*, a colorable employment and a corrupt practice. *Cimon* vs. *Perrault*, Supreme Ct. 1880, 5 Can. S. C. R. 133.

50. —— **Contractor abstaining from charging for time—Dominion Election Act of 1874.**—One Goodwin, contractor, and G. Goodwin and Sutton, his manager, employed about 100 men on the canal; and Geo. Goodwin and Sutton were active supporters of the respondent. These two canvassed the men, and found that a large majority of them intended to vote for the respondent. On the evening before the polling day, with the approbation of Goodwin, the contractor, they told the foreman to tell the men to come to their work as usual, and they would all be taken to the polls by the teams without distinction, whether they

voted for the petitioner or the respondent, and be brought straight back again. And the men were given to understand that, if they went and came straight back, nothing would be deducted from their pay, without distinction as to the mode in which they might vote. This had been the custom in all former elections as well municipal as parliamentary—*Held*, that abstaining from charging the men for their time was, under the circumstances, an act of corruption sufficient to avoid the election. *Hickson* vs. *Abbott*, S. C. 1881, 25 L. C. J. 289.

51. —— Conveyance to Polls. — The term "six next preceding sections" in the 98th section of the Dominion Controverted Elections Act, 1874, means the six sections preceding the 98th, and the hiring of a team to convey voters to the polls prohibited by the 96th section is a corrupt practice, and will void an election if an agent is proved to have intentionally hired a team for that purpose. *Young* vs. *Smith*, Supreme Ct. 1880, 3 L. N. 335; *Somerville* vs. *Laflamme*, Supreme Ct. 1878, 2 Can. S. C. R. 216.

52. —— —— The hiring and paying of carters by an agent to convey voters who are known to be supporters of the agent's candidate is a corrupt practice. *Belleau* vs. *Dussault*, Supreme Ct. 1885, 11 Can. S. C. R. 133, confirming S. C., 10 Q. L. R. 247.

53. —— —— The taking unconstitutionally and gratuitously of a voter to the poll by a railway company or an individual, whatever his occupation may be, or giving a voter a free pass over a railway or by boat, or other conveyance, if accompanied by any conditions or stipulations that shall affect the voter's action in reference to the vote to be given, is not prohibited by 39 Vic., ch. 9 (D.). *Genereux* vs. *Cuthbert*, Supreme Ct. 1884, 9 Can. S. C. R. 102, confirming S. C. 1883, 6 L. N. 74.

54. —— —— If a ticket, although given unconditionally to a voter by an agent of the candidate, has been paid for, then such a practice would be unlawful under section 96, and by virtue of section 98 a corrupt practice, and would void the election. (*Ib.*)

55. —— —— And telling a carter who was asked to bring a voter to the poll, "*tu feras ton compte et tu iras te faire payer*," even if the words were used by an agent of the candidate, is insufficient to avoid an election. *Genereux* vs. *Cuthbert*, S. C. 1883. Confirmed in Sup. Ct., 9 Can. S. C. R. 102.

56. —— Corrupt Promises.—The respondent, having a perfectly legitimate motive in promising R. to try and get an office for his brother-in-law, viz., his desire to please a political friend and supporter, was not guilty of a corrupt act in making such promise, and that the act of R. in relation to the votes of the Paré family, even if a corrupt one, was not committed with the knowledge and consent of the respondent. *Somerville* vs. *Laflamme*, Supreme Ct. 1878, 2 Can. S. C. R. 216.

57. —— —— The words "if you are not awkward to me I will not be so for you" used by a candidate towards a voter do not constitute a corrupt promise. *Robillard* vs. *Lecavallier*, C. R. 1877, 7 R. L. 662.

58. —— —— A promise by a candidate that if elected he would lay sidewalks at his own expense in the municipality is a corrupt promise, and will void an election. *Robert* vs. *Bertrand*, C. R. 1879, 2 L. N. 198.

59. —— —— A promise in order to constitute a corrupt practice must be clearly established and form an obligation on the part of him who makes it. *Magnan* vs. *Dugas*, S. C. 1882, 12 R. L. 226. Confirmed in Supreme Court, 9 Can. S. C. R. 93.

59*a*. —— Expenses—Defendant, the elected candidate, omitted in the publication of his expenses the sum of $29 paid to different parties for election purposes—*Held*, that such an omission gives rise to a presumption that this sum was devoted to corrupt purposes. *Dorais* vs. *Houde*, S. C. 1882, 9 Q. L. R. 15.

59*b*. —— —— In this case the election was voided for corrupt practices. (*Ib.*)

60. —— —— In another case the charge was as to the bribery of one A. During the election canvass the respondent gave A., at whose house he stopped two or three times, $5 for the trouble he gave him. A. swore it was not worth more than a dollar. This amount, together with other amounts paid out by the appellant during his canvass, was not furnished to his agent as part of his personal expenses and did not appear in the official statement of legal expenses furnished to the returning officer—*Held*, that the candidate is bound to include in the published statement of his election expenses his personal expenses, and, as appellant had not included in the said return the said amount of $5, and A. had not earned more than a dollar, the payment of $4 more than was due was an act of personal bribery. *Larue* vs. *Deslauriers*, Supreme Ct.

1880, 5 Can. S. C. R. 91, confirming S. C. 1880, 6 Q. L. R. 100.

61. —— —— Payment of $3 for use of elector's house for meeting purposes is not a corrupt act. *Mercier* vs. *Amyot*, S. C. 1881, 8 Q. L. R. 33.

62. —— —— Payment of five dollars by a candidate to his carter for a trip was held a lawful expense in view of the circumstances, a very heavy snow-storm having occurred. *Mercier* vs. *Amyot*, S. C. 1881, 8 Q. L. R. 33.

63. —— **Expenditure.**—When an agent of a candidate receives and spends for election purposes large sums of money, and does not render an account of such expenditure, it will create a presumption that corrupt practice has been resorted to. *Belleau* vs. *Dussault*, Supreme Ct. 1885, 11 Can. S. C. R. 133, confirming S. C., 10 Q. L. R. 247.

64. —— —— During the respondent's absence in England, in September, 1878, and a few days before the nomination in that year, respondent's son gave a cheque for $150 to one Williamson, a prominent supporter of the respondent in the county, for the expenses of the election, Williamson promising to use it in a strictly legal manner. The respondent did not discover the expenditure till two months after the election was over, when he disapproved of it, and ordered the amount to be charged to his son. Williamson rendered a rough account to the son, by which it appeared that the disbursements made were legitimate; but he afterwards destroyed the rough draft, and never rendered any formal account. In the course of the next year, upon a settlement of accounts between the respondent and his son, he remitted the charge against his son—*Held*, that these circumstances created no presumption that the disbursements of Williamson were illegal, and that they did not constitute an act of corruption by the respondent. *Hickson* vs. *Abbott*, S. C. 1881, 25 L. C. J. 289.

65. —— **Gifts, etc., for Charitable Purposes.**—On appeal from a judgment dismissing an election petition—*Held*, that if gifts and subscriptions for charitable purposes made by a candidate who is in the habit of subscribing liberally to charitable purposes, are not proved to have been offered or made as an inducement to or on any condition that any body of men or any individual should vote or act in any way at an election, or on any express or implied promise or undertaking that such body of men or individuals would, in consequence of such gift or subscription, vote or act in respect to any future election, then such gifts or subscriptions are not a corrupt practice within the meaning of that expression as defined by the Election and Controverted Elections Act, 1874. *Mackay* vs. *Glen*, Supreme Ct. 1879, 3 Can. S. C. R. 641.

66. —— **Gifts or Loan of Money.**—A gift or loan of money by the respondent to a voter pending the contestation of the first election was a corrupt practice, within the meaning of the Dominion Election Act of 1874. *Benoit* vs. *Jodoin*, S. C. 1875, 19 L. C. J. 185. Confirmed in Review 1875, 19 L. C. J. 332.

67. —— **Gift to Local Improvements**—Before setting out on a canvassing tour the appellant, the sitting member, placed in the hands of one B., who was not his financial agent, $100 to be used for the purposes of the election. While visiting a part of the county with which the appellant was not much acquainted, but with which B. was well acquainted, they paid an electioneering visit to one K., a leading man in that locality, who indicated to B. dissatisfaction with the candidate of his party, and stated that, although he would vote for the Liberal party, he would not exert himself as much as in the former elections. The appellant then went outside and B. asked his host: Do you want any money for your church? and having received a negative reply, added: Do you want money for anything? K then answered: If you have any money to spare there is plenty of things we want it for; we are building a town hall, and we are scarce of money. B. then said: Will $25 do? K. then answered: Whatever you like, it is nothing to me. The money was left on the table. Then when wishing the appellant B. good-bye, K. said: "Gentlemen, remember that this money has no influence as far as I am concerned with regard to the election." The appellant did not at the time repudiate the act of B. This amount of $25 was not included in any account rendered by the appellant or his financial agent, and large sums were admittedly corruptly expended in the election by the agent or the appellant—*Held*, affirming the judgment of the Court below, that the giving of the $25 by B. to K. was not an act of liberality or charity, but a gift out of the appellant's money with a view to influence a voter favorably to the appellant's candidature, and that, although the money was not given in the appellant's presence, yet it was given with his knowledge, and, therefore, that the appellant had been personally guilty of a corrupt

practice. *Coté & Goulet*, Supreme Ct. 1884, 9 Can. S. C. R. 279.

68. —— Hospitality.—Where ordinary hospitality is shown during an election by an agent of the candidate to a friend, it will not be presumed because the person receiving it was a voter that the entertainment was offered with a corrupt motive. *Magnan* vs. *Forrest*, S. C. 1888, 4 M. L. R. 265.

69. —— Illegal Inducement.—One Conway, an agent of the respondent, represented to a large number of persons that it would be better for the country and for them if the work on the Grenville Canal were let by tender, according to law, and not given to the existing contractors without tenders. That in that case they would have a better chance for obtaining work for themselves and their teams, and that the respondent would have more influence to cause the work to be done by tender than Dr. Christie, and would undoubtedly do so. And Conway declared that this argument exercised a considerable influence over a number of voters in respect of their votes—*Held*, that these statements of Conway did not constitute an illegal inducement to vote for respondent. *Hickson* vs. *Abbott*, S. C. 1881, 25 L. C. J. 289.

70. —— Interpretation.—The words used by a candidate must be interpreted according to what he intended, and not according to how they were understood by the voter. *Robillard* vs. *Lecavalier*, C. R. 1877, 7 R. L. 662; and see *Mercier* vs. *Amyot*, S. C. 1881, 8 Q. L. R. 33; *Magnan* vs. *Dugas*, S. C. 1882, 12 R. L. 226. Confirmed in Supreme Ct. 1883, 9 Can. S. C. R. 93-97.

71. —— —— And where an act charged as being corrupt is susceptible of two interpretations, the judge should give to it that which is most favorable. *Magnan* vs. *Dugas*, S. C. 1882, 12 R. L. 226. Confirmed in Supreme Ct., 9 Can. S. C. R. 93.

72. —— Intimidation—Dismissal of Employee for voting against wishes of Employer—One Robinson, a voter, who worked under Goodwin, was asked by Goodwin if he would go up with him to vote, to which he replied that he would prefer not to do so, as he was a poor man and had friends on the other side who would be offended by his doing so, and he would therefore stay at work. Goodwin assented, and left him at work. After his time had been taken for the afternoon, one of Dr. Christie's agents coming up, Robinson accompanied him to the poll, and voted, stating that he voted for Dr. Christie. Goodwin, meeting him on his return with the petitioner's canvasser, ordered him to be dismissed, and he was accordingly dismissed from the works. But the evidence was conflicting whether he was dismissed because he voted for the petitioner or because he had deceived his employer—*Held*, that the weight of evidence went to show that he was dismissed because he voted against the respondent, and that his dismissal was therefore an act of intimidation avoiding the election. *Hickson* vs. *Abbott*, S. C. 1881, 25 L. C. J. 290.

73. —— —— In order to constitute intimidation, it is not necessary that the threat should have had its effect upon the voter; it is sufficient that it was made to him. *Mercier* vs. *Amyot*, S. C. 1881, 8 Q. L. R. 33.

74. —— —— In a contestation under the Dominion Elections Act—*Held*, that the serving of a notice upon persons, warning them that they are not entitled to vote, and threatening them with the legal consequences if they vote, is an interference with the exercise of the franchise. *Cholette* vs. *Bain*, Supreme Ct. 1884, 10 Can. S. C. R. 652, reversing S. C., 7 L. N. 220.

75. —— —— A father and son were notified by an agent of the candidate that if they voted, the wife of the first mentioned would be prosecuted for illegal practice of midwifery—*Held*, a case of intimidation sufficient to annul the election. *Magnan* vs. *Forrest*, S. C. 1888, 4 M. L. R. 265.

76. —— Payment.—A payment to a voter by the elected candidate after the elections, such payment having no connection with any promise made prior to or during the elections, is not a corrupt practice. *Dumas* vs. *Bazinet*, C. R. 1889, 18 R. L. 334.

77. —— —— The payment by a candidate and his friends of the costs due by a corporation upon an appeal from the decision of the local council concerning the voters' lists, such payment being made to quiet public feeling in the matter, is not a corrupt payment. *Dumas* vs. *Bazinet*, C. R. 1889, 18 R. L. 334.

78. —— —— The payment by the candidate himself of a sum of money for election purposes to a person concerned in his election is a matter to be judged by the circumstances attending such payment, and where the payment in question was made to a person strongly in favor of the candidate, and who required no inducement to support him, it was

held no ground for personal disqualification. *Lavoie* vs. *Gaboury*, C. R. 1884, 7 L. N. 186.

79. —— —— It will not be assumed, as against the candidate, from the fact that money placed by him in the hands of an official agent for disbursements has not been fully or accurately accounted for by the agent (who expended only one-third thereof), that it was advanced by the candidate, or expended by the agent, for corrupt purposes. Proof must be made of the corrupt payments, and that the candidate sanctioned them. Such advance of money, however, is objectionable. *Magnan* vs. *Forrest*, S. C. 1888, 4 M. L. R. 265.

80. —— —— **Of just Debt.**—The settlement by payment of a just debt by a candidate to an elector, without any reference to the election, is not a corrupt act of bribery, and especially so when the candidate distinctly swears he never asked the elector's support, and the elector says he never promised and never gave it. *Mackay* vs. *Glen*, Supreme Ct. 1879, 3 Can. S. C. R. 641.

81. —— —— Payment of just debt not a corrupt act, even when it influenced the election. *Mercier* vs. *Amyot*, S. C. 1881, 8 Q. L. R. 33; and see *Robillard* vs. *Lecavallier*, C. R. 1877, 7 R. L. 662.

82. —— —— **Of Debts of previous Election.**—The payment by an agent of a sum of $147 to a voter claiming the same to be due for expenses at a previous election, and who refuses to vote until the amount is paid, is a corrupt practice. *Belleau* vs. *Dussault*, Supreme Ct. 1885, 11 Can. S. C. R. 133, confirming S. C. 10 Q. L. R. 217.

83. —— —— Certain accounts having remained unpaid from a previous election, notwithstanding that efforts were made to have them settled, friends of the respondent informed him during the canvass that their non-payment would injure him, and that they ought to be paid. The respondent replied that he would do nothing about the accounts during the election, and requested his friends not to say anything about them of any kind; but he stated to his friends his intention to have all legitimate accounts paid after the election—*Held*, that this was not an act of corruption within the meaning of the Act. *Hickson* vs. *Abbott*, S. C. 1881, 25 L. C. J. 289.

84. —— —— **Of illegal account.**—The payment of illegal accounts with the knowledge and consent of a candidate, after the avoidance of the first election, and with a view to influence votes in his favour in the election rendered necessary by such avoidance, is a corrupt practice within the meaning of the Election Act. *Owens* vs. *Cushing*, C. R. 1875, 20 L. C. J. 86.

85. —— —— **To Voter to suspend Work.**—In the absence of a general system of corruption, an isolated case of payment to a voter of a moderate sum to suspend work in order to attend a meeting does not constitute bribery. *Mercier* vs. *Amyot*, S. C. 1881, 8 Q. L. R. 33.

86. —— **Speaker.**—A candidate may lawfully employ and pay a speaker to advocate his cause by public speeches during the election contest. *Wheeler* vs. *Gibbs*, Supreme Ct. 1880, 4 Can. S. C. R. 430; *Magnan* vs. *Forrest*, S. C. 1888, 4 M. L. R. 2

87. —— **Treating** treating of certain of the electors by a person working for one of the candidates, it being an isolated act, will not invalidate the election without clear proof of agency. *Gingras* vs. *Shehyn*, S. C. 1875, 1 Q. L. R. 295.

88. —— —— Where a candidate offers a glass of liquor to each of the representatives of the two candidates and to the deputy returning officer in the polling booth, with the remark, "gentlemen, if you wish to take a glass of brandy, there is some in the room; go and help yourselves, but, before you go, go and vote for whom you like," this constitutes treating. *Hamilton* vs. *Beauchesne*, Election Ct. 1876, 3 Q. L. R. 75.

89. —— —— In another case the following facts were proved: 1st. The giving of a glass of beer to each of a number of electors on a Sunday during the election, by an active partisan of the defendant, in the defendant's house and with his knowledge and consent. 2nd. The giving of meat and drink to certain electors on the day of voting by an active supporter of the defendant. 3rd. The giving of a bottle of whiskey by the defendant during the election to certain electors, who, although opposed to him in politics, had come to meet him at his request—*Held*, that under the circumstances the acts of treating, although doubtless imprudent and dangerous, would not be held to be corrupt practices so as to void the election. *Morrisette* vs. *Larue*, C. R. 1876, 2 Q. L. R. 262.

90. —— —— On a petition under the Dominion Controverted Elections Act charging bribery and corruption in the usual form —*Held*, that drinking on the nomination or

polling day is not a corrupt practice sufficient to void an election, unless the drink is given by an agent on account of the voter having voted or being about to vote. *Somerville* vs. *Laflamme*, Supreme Ct. 1878, 2 Can. S. C. R. 216.

91. —— —— Where the charge in the petition and in the particulars is merely "treating," either corrupt treating or unlawful treating on polling day may be proved. *Desbarres* vs. *Larue*, S. C. 1880, 6 Q. L. R. 100.

92. —— —— In order that treating may constitute a corrupt act, it must be done with a view to corrupting the voter treated, and, if the treating occur after the election, it must be shewn that it resulted from a promise made prior thereto, or from an attempt to influence the voter. *Mercier* vs. *Amyot*, S. C. 1881, 8 Q. L. R. 33.

93. —— —— Treating, while innocent in itself, merits censure when it takes place at the polling booth, on account of the pernicious example thereby set. (*Ib.*)

94. —— —— Where the corrupt motive is clearly established, the quantity of refreshment or liquor furnished is immaterial and can only be taken into account where there is doubt as to the intent of the parties. *Magnan* vs. *Pagas*, S. C. 1882, 12 R. L. 226. Confirmed in Supreme Ct., 9 Can. S. C. R. 93.

95. —— —— Treating is not to be entirely prohibited during election time, but the law prohibits only such treating as is done for the purpose of corrupting the electors. (*Ib.*)

96. —— —— Forty or fifty persons, including several voters, assembled on the eve of the election at the house of an agent, where liquor was served to them indiscriminately, and there was heavy and general drinking—*Held* (Taschereau, J., differing), that it was a case of general treating sufficient to annul the election. *Magnan* vs. *Forrest*, S. C. 1888, 4 M. L. R. 265.

97. —— **Undue Influence.**—A candidate charged by his opponent with having no influence, is not guilty of a corrupt practice if, in a public speech in reply to the attack, he states that he had influence to procure more appointments for the electors of the county than any member. *Somerville* vs. *Laflamme*, Supreme Ct. 1878, 2 Can. S. C. R. 216.

98. —— —— Whether R. was respondent's agent or not, the conversations which took place between him and the P. family did not sufficiently show a corrupt intent on his part to influence their vote, and that he was not guilty of bribery or undue influence within the meaning of the statute. (*Ib.*)

99. —— —— For some time before and during the canvass, the respondent advocated a change in the mail service between Lachute and Shrewsbury, in which the postmaster at Shrewsbury was active, and correspondence took place between them, showing that he had done so. In consequence, the mail service between Lachute and Shrewsbury was improved, and the postmaster at Shrewsbury got the contract from the Government for carrying the mails; but nothing occurred in the correspondence or discussions on the subject tending to show that the movement was intended to influence the election, and the postmaster was an old and firm supporter of the respondent—*Held*, that a candidate cannot be precluded from performing during an election any duty incidental to his position, in the interest of any part of his constituency, provided he does not attempt by such means unduly to influence votes; and that the circumstances did not constitute a corrupt act by the respondent. *Hickson* vs. *Abbott*, S. C. 1881, 25 L. C. J. 289.

V. COSTS.

1. Where imprudent, though not corrupt, acts of treating (which it has been attempted to disguise) are proved against the defendant, such acts must be regarded as inviting inquiry, and defendant will not have a judgment for costs arising out of such inquiry. *Morrisette* vs. *Larue*, S. C. 1876, 2 Q. L. R. 262.

2. The petitioners examined a large number of witnesses, from many of whom nothing was elicited in support of their charges. They also examined many of such witnesses at very great length, thereby causing great expense—*Held*, that the respondent pay the costs of the proceedings, but that the petitioners pay one-half the costs of the *enquête*. *Hickson* vs. *Abbott*, S. C. 1881, 25 L. C. J. 290.

3. Even where the petitioner succeeds, each party must pay his costs if the defendant succeeds in his recriminatory charge under sec. 55 of the Quebec Election Act, 38 Vic. *Hamilton* vs. *Beauchesne*, E. C. 1876, 3 Q. L. R. 75.

VI. DEPOSIT BY MEMBER.

1. The deposit to be made by a candidate with the returning officer need not be in gold

or legal tender notes, and an alleged irregularity in such deposit cannot be urged after the election. *Morrissette* vs. *Larue*, C.R. 1876, 2 Q. L. R. 262.

2. The deposit required by Art. 272 R. S.Q. for the election of members to the legislative assembly, is a pledge furnished by the member, but it need not necessarily be his own property. It can be made by a third party, and in that case the candidate's creditors could not seize it in the hands of the returning officer. *Desjardins* vs. *Côté*, Q. B. 1891, 17 Q. L. R. 332. Overruling *Cité de Québec* vs. *Baker*, C. R., 17 Q.L. R. 116.

VII. ILLEGAL VOTING.

At one of the polls in Chatham, a certain number of persons had their ballots marked by the deputy returning officer, without having been made to take the oath that they could not themselves mark their ballots, some of them voting openly by causing their ballots to be marked in the room where several persons were, besides the returning officer and clerk and the representatives of the two candidates. But all these took place in good faith, and without the voters having been induced to act in that way by any fraudulent or corrupt practice on the part of the respondent's agents or of the deputy returning officer. The voters appeared to act in this way of their own will, and without having been asked or urged to do so by any one, and the returning officer also appeared to have acted in good faith—*Held*, 1. The votes so taken were irregular and illegal. 2. That inasmuch as the number of illegal votes thus taken was not great enough to change the result of the election, even if they had all voted for the respondent, the illegality thus committed was not enough to annul the election. *Hickson* vs. *Abbott*, S. C. 1881, 25 L. C. J. 290.

VIII. INTERPRETATION OF ELECTION ACTS.

The court sitting by virtue of a law creating a special tribunal, such as is created by the Election Acts, must interpret the terms employed in these acts according to their special meaning attributed by the Statute and not according to their general meaning. *Hearn* vs. *McGreevy*, S. C. 1887, 13 Q. L. R. 322.

IX. NULLITY OF.

1. The faults or omissions of officers who have not the right to vote does not import the nullity of the election, except where the law has expressly declared it, and no omission or irregularity which does not interfere with the free exercise of the franchise will invalidate the election. *Bureau* vs. *Normand* S. C. 1873, 5 R. L. 40.

2. Where, upon contestation of an election, it is found that each candidate has received an equal number of votes, the election should be annulled. *Dionne* vs. *Gagnon*, C. R. 1883, 9 Q. L. R. 20.

X: PENALTIES.

1. Affidavit in Action for.—In a penal action under the Federal Election Act, the plaintiff must file an affidavit, as in a *qui tam* action, indicating clearly the grounds of his complaint and the penalty claimed. *Legris* vs. *Corneillier*, S. C. 1885, 1 M. L. R. 490; *Rondeau* vs. *Lalonde*, S. C. 1885, 1 M. L. R. 108; *Filiatrault* vs. *Elie*, S. C. 1884, 1 M. L. R. 127; *Lavoie* vs. *Racine*, S. C. 1879, 5 Q. L. R. 319.

2. Against Mayor or Secretary-Treasurer.—The mayor of a municipality cannot be sued for the penalty imposed by the Quebec Election Act, for not having transmitted a duplicate of the voter's list to the registrar when the secretary-treasurer has not entirely completed the list. *Berthiaume* vs. *Sicotte*, S. C. 1885, 1 M. L. R. 200.

3. —— Action to recover from the mayor and secretary-treasurer of the Municipality of the Parish of St. Joseph de Chambly the sum of $200 each for alleged violation of the Quebec Election Act. The electoral list was to be in duplicate under sec. 12, one of which was to be kept in the archives of the municipality and the other to be transmitted to the registrar of the registration division in which was situated the municipality, within eight days following the day upon which such list should have come into force by the secretary treasurer or by the mayor, under a penalty of $200, or of imprisonment of six months in default of payment, against each of them, in case of contravention of this provision. It was charged against the mayor and the secretary-treasurer, that in 1880 they had omitted to transmit to the registrar within the eight days required, the duplicate in question, whereby the penalty of two hundred dollars against each was incurred. Demurrer on the ground that it did not follow that the defendants were liable to the penalty by non-transmission of the duplicate list, because they had the right of transmitting with the same effect the copy mention

ed in section 39, and it was not alleged that they had not transmitted such copy—*Held*, incumbent on the plaintiff to aver not only that the duplicate referred to in section 38 had not been transmitted, but that the copy mentioned in section 39 had not been transmitted. *Tavernier* vs. *Robert*, S. C. 1881, 4 L. N. 131.

4. —— (Reversing the decision of Taschereau, J., S. C., 1 M. L. R. 323.) The fact that the electoral list was still under the consideration of the Council is not a valid ground of defence, where a secretary-treasurer is sued for a penalty for not transmitting a duplicate of the list to the registrar of the registration division, within eight days after it came into force, as required by 38 Vict. (Q.), ch. 7, and the penalty may be recovered even where the secretary-treasurer does not appear to be in bad faith. (1) *Jodoin* vs. *Archambault*, Q. B. 1886, 3 M. L. R. 1, 31 L. C. J. 7.

5. **Ballot stuffing.**—In a prosecution against six persons for what is called ballot stuffing—*Held*, that section 114 applies to an accusation for an offence under sec. 68 of the Elections Act, Canada. *Queen* vs. *Forget*, Q. B. 1878, 1 L. N. 542, 544.

6. —— And the failure of the returning officer to take the oath prescribed in such cases will not defeat a prosecution under the Act, the failure of the officer to be sworn not having the effect of annulling the election. (*Ib.*)

7. —— And a return signed by the election clerk as returning officer is good, where it appears that the returning officer had declared himself unable to act, and had been represented throughout the election by the clerk. (*Ib.*)

8. —— And the admission of a substantial averment in the indictment for an offence under the Elections Act that an election was held, though a defect, is such as must be objected to by demurrer or motion to quash. (*Ib.*)

8*a*. —— But a count alleging that each of several defendants put illegal ballots in the box, which "the said deputy returning officer (one of them) had not a right to put in," is bad as lacking precision. (*Ib.*)

9. **Bribery—Dominion Election Act 1874—Cumulation of Penalties.**—Suits brought thereunder to recover penalties for bribery are civil suits for the recovery of debt controlled by the procedure governing actions in the Province in which they are instituted, and, in consequence, in this Province seven distinct and separate penalties for contravention of the Act may be cumulated as to amount in one and the same action. *Joyal* vs. *Safford*, S. C. 1881, 25 L. C. J. 166.

10. **Deposit in Action for.**—In an election case under the Quebec Controverted Elections Act—*Held*, that a person put into the cause for alleged corrupt practices is not entitled to a deposit. *Laroie* vs *Gaboury*, C. R. 1883, 6 L. N. 276.

11. —— Where in a penal action under the Federal Act, as amended by 46 Vic., ch. 4, sec. 1, a plaintiff in one and the same action seeks for the recovery of several penalties or fines, he should make with his *præcipe* a deposit of $50 for each penalty sought to be recovered. *Choquette* vs. *Hébert*, Q. B. 1884, 7 L. N. 178, 10 Q. L. R. 192.

12. **Election Expenses — Statement of.**—Effect of failure to appoint an agent for all election expenses and to publish a statement of such expenses. *Deshaviers* vs. *Larue*, S. C. 1880, 6 Q. L. R. 100.

13. —— The detailed statement required by sec. 123 of the Act must include the personal expenses of the candidates as defined by sec. 125 of the Act. *Terriault* vs. *Ducharme*, C. R. 1880, 24 L. C. J. 320.

14. —— The court may, in its discretion, reduce the amount of penalty imposed on a candidate, for not delivering a detailed statement in conformity to the law. (*Ib.*)

15. —— Where a candidate has not incurred any expense, he is not bound to furnish the returning officer with the statement of expenses required by sec. 284 of the Quebec Election Act, and is consequently not amenable to any penalty for failure to furnish such certificate. *Gauthier* vs. *Bergevin*, C. R 1877, 22 L. C. J. 51.

16. —— The candidate or his agent being bound to furnish the returning officer with a detailed statement of expenses only when expenses have been incurred, therefore in an action for the penalty imposed for not furnishing such a statement, the plaintiff must specify in his allegations the particular expenses which he claims the candidate or his agent has made. In the absence of such allegation the action will be dismissed on exception to the form. *Fortin vs. Chalout*, S. C. 1888, 11 L. N. 257.

17. **False Declaration as to Property Qualification.**—In an action for penalty for making a false declaration as to property qualification, the proof should be governed by

(1) For full opinion of Mr. Justice Ramsay in this case, see 12 L. N. 78.

the strict rules of law. *Néault* vs *St. Cyr*, Q. B. 1877, 3 Q. L. R. 147.

18. Illegal Voting (See "ILLEGAL VOTING," *Supra* No. 7).—*Held*, on demurrer, that section 84 of the British North America Act, which refers to the election laws of the former Province of Canada not having made mention of the penalties imposed by C. S. C. cap. 6, against public officers voting at parliamentary elections, these penalties no longer exist, according to the maxim *expressio unius exclusio alterius*, and that in any case these penalties would not apply to officers of customs voting at Provincial elections, as they were appointed by the Federal Government exclusively. *Lacroix* vs. *Delisle*, S. C. 1872, 2 R. C. 233.

19. —— A person wilfully voting at an election for a member of parliament, without possessing all the qualifications required by law, will be condemned to pay the sum of forty dollars and costs to any one who may sue therefor as in an action for debt, and will be subject to coercive imprisonment in default of payment within the period to be fixed by the co[illegible], under the Cons. Stat. of Canada, chap. *Perry* vs. *Adams*, C. Ct. 1864, 8 L. C. J. 165.

20. —— The fact of the defendant, in such an action as the above, having obtained a legal opinion of qualification to vote, will not of itself absolve him from the penalty imposed on one who wilfully votes without having all the qualifications required by law for entitling him so to vote. (*Ib.*)

21. —— The certified copies of poll-books deposited, as required by the above statute, with the registrar of the county, are valid and sufficient evidence, in courts of law, of the votes mentioned in them having been polled. (*Ib.*)

22. —— An action brought as above against a person for willful voting without qualifications, is an action of debt, and subject to the rules governing such actions, and consequently a defendant is bound to answer upon *faits et articles* (*Ib.*

23. Inducing non-voters to vote.—Action under 37 Vict., ch. 9, sec. 74 (D), by respondent against appellant, accusing him of having induced one J. D. *alias* J. C. D. to vote at an election for a member to serve in Parliament, he the said J. D. not being a voter. Appellant was condemned to pay the sum of $200 or to be imprisoned for six months. On the evidence judgment reversed. *Pouliot* vs. *Cadorette*, Q. B. 1882, 5 L. N. 417.

24. Intimidation. In an action for the penalty for intimidation under the Parliamentary Elections Act of 1874, it appeared that the language relied on was as follows:—F., cette année il faut que tu votes pour M. A., si tu ne votes pas pour M. A., je le saurai, et après l'élection tu auras affaire à moi," or "qu'ils joueraient ensemble." The person who used this language was proved to have been drunk at the time, and the person to whom it was uttered was proved to have thought nothing of it. Action dismissed. *Mackenzie* vs. *Tourgeon*, Q. B. 1882, 5 L. N. 335.

25. Jurisdiction.—The fine of $200 imposed by C. S. C. cap. 6, sec. 60, for falsely assuming to vote in the name of a person whose name appears on the list of voters, cannot be recovered in a court of civil jurisdiction, inasmuch as the offence is a misdemeanor, and can be tried only in a criminal court, and the fine imposed only on conviction before such court. *Barrette* vs. *Barnard*, C. Ct. 1864, 14 L. C. R. 435.

26. Proof of Quality of Voter.—Proof of quality of voter must be made by producing the voter's lists, when an action is brought to recover a penalty under the Election Act; in such a case the testimony of witnesses is insufficient. *Filiatrault* vs. *Pricur*, Q. B. 1886, 30 L. C. J. 246, 18 R. L. 666.

27. To whom belong.—The fines imposed by chapter 6 of the Consolidated Statutes of Canada are recoverable by, and belong wholly to, the person suing therefor, and such person is consequently not bound to proceed by *qui tam* action. *Mathieu* vs. *Belanger*, C. Ct. 1874, 6 R. L. 642.

28. Treating.—In an action for the recovery of a fine under the sections 245 and 246 of the Quebec Election Act, it is sufficient to allege and prove the giving of drink or other refreshment by a candidate to an elector during the election, without alleging or proving the existence of any wrong motive whatever. *Philibert* vs. *Lacerte*, C. R. 1877, 3 Q. L. R. 152.

29. Where several Offences charged.—In an action for a penalty under section 94 of the Election Act of 1874, several offences, or several modes of the same offence, may be charged, although the conclusion be but for one penalty. *Raymond* vs. *Valin*, Q. B. 1880, 6 Q. L. R. 146.

XI. PETITION.

1. **Appeal to Privy Council.** — Where a special tribunal was created for the trial of election petitions, subject to a special procedure and with limitations of its own, the intention of the Legislature was to make the decision of such tribunal final, and an appeal from such tribunal to Her Majesty's Privy Council will be dismissed. *Kennedy* vs. *Purcell*, P. C. 1888, 32 L. C. J. 250.

2. —— The Provincial Legislature, in enacting the Quebec Controverted Elections Act, having created the Superior Court a tribunal for the purpose of trying election petitions in a manner which should make its decisions final, the prerogative right to admit an appeal from such decisions to Her Majesty in Her Privy Council does not exist. *Landry* vs. *Théberge*, P. C. 1876, 3 Q. L. R. 202.

3. **Appeal to Queen's Bench.**—On a petition under the Quebec Controverted Elections Act, 38 Vic, ch. 8, McShane was brought into the cause (under sec. 272 of 38 Vic., ch. 7), for corrupt practices under the election. The evidence against him was taken before the judge trying the election petition, and when judgment was given on the election petition by the Superior Court sitting in Review, that court also pronounced upon the issue between the petitioner and the *mis en cause*, finding the latter guilty of corrupt practices. McShane applied for a writ of appeal, which was refused by the clerk of the court, and application that he be ordered to issue a writ was then made to the court. The court, under all reserves, ordered that the writ issue, in order that the parties interested might be heard upon the question whether the Court of Review had jurisdiction as respects the *mis en cause*. *Brisson* vs. *Goyette*, Q. B. 1889, 12 L. N. 42.

4. **Appeal to Supreme Court.**—The decision of a judge at the trial of an election petition, overruling an objection taken by respondent as to the jurisdiction of the judge to go on with the trial on the ground that more than six months had elapsed since the date of the presentation of the petition, is appealable to the Supreme Court of Canada under sec. 50 (*b*), ch. 9 R. S. C. *Glengarry Controverted Election Case. Purcell* vs. *Kennedy*, Supreme Court, 1888, 14 Can. S. C. R. 453, 11 L. N. 130.

5.—— On the 23rd April, 1887, an election petition was duly presented to set aside the election of the respondent as a member of the House of Commons for the Electrical District of Montmorency. The trial of the petition was fixed by order of a judge for the 22nd of October, but was not proceeded with. On the 16th December application was made by respondent to the court to have the petition declared abandoned on the ground that six months had elapsed after the petition had been presented without the trial having been commenced, as provided in sec. 32, ch. 9, R. S. C. This application was granted by the court, and the election petition was dismissed. On appeal to the Supreme Court of Canada, it was *Held*—Fournier and Henry, J. J. dissenting—that there was no provision in the Dominion Controverted Elections Act authorizing an appeal from such an order or judgment (R. S. C., ch. 9, sec. 50), and therefore the present appeal should be quashed with costs for want of jurisdiction. *Cauchon* vs. *Langelier*, Supreme Court, 1888, 11 L. N. 83.

6. —— In the L'Assomption Election Appeal, where the appeal was only from the decision of the judge refusing to set aside the election petition on the ground that the trial had not been proceeded with within six months since the date of its presentation, and there was a subsequent judgment of the court setting aside the election on the admitted acts of corruption by agents, it was also held that the Supreme Court of Canada had no jurisdiction to entertain the appeal. (*Ib.*)

7. —— In the l'Islet Election Appeal the appeal was quashed for the same reason as that given in the Montmorency case. (*Ib.*)

8. **Attorney's Fees.**—Where a petitioner discontinues his petition after the dismissal of defendant's preliminary objection and before the production of a defense to the merits, the defendant's attorney has a right to a fee of $100 as given in the 2nd item of fees in contested election cases. *Lambert* vs. *Villeneuve*, S. C. 1887, 15 R. L. 521.

9. **Bill of Particulars.** (See also "Corrupt Practices"—"Evidence.")—When the petitioner in a controverted election case claims the seat for himself, a bill of particulars or list of the electors to whom the petitioner wishes to object, as also the heads of the objections which he intends to raise against their votes, must be filed and regularly served upon the adverse party, at least ten days before the day fixed for trial, in conformity with the rules and practice followed in England in such cases. *Goyer* vs. *Coupal*, S. C. 1875, 8 R. L. 80.

10. —— But the non-production or the

irregular production of a bill of particulars will not involve the dismissal of the petition, nor be equivalent to an abandonment on the part of the petitioner, but has the effect solely of preventing the petitioner from making proof of the illegality of the votes which he contests. (*Ib.*)

11. —— And a bill of particulars which declares that the petitioner objects to all the votes taken in such parish at such an election by reason of the illegality of the assessment roll and the electoral list of the parish is sufficient. (*Ib.*)

12. —— Bill of particulars ordered to be filed in court, and served on the defendant on all the heads of allegations of the petition, so as to put the defendant himself in a position to defend himself in respect of each and every charge in the petition, and so to be as explicit and complete as they would be in an ordinary civil action before the same court, and to be served on the defendant at least eight days before that fixed for the trial. *Bruneau* vs. *Massue*, S. C. 1879, 9 R. L. 561.

13. —— **Motion to amend.**—A motion at the hearing of an election petition to amend the particulars by substituting one baptismal name for another was refused, as sufficient time had been allowed to prepare the particulars. *Robillard* vs. *Lecavalier*, S. C. 1877, 7 R. L. 662.

14. —— But amendments will be allowed at any time during trial on sufficient cause shown to the satisfaction of the judge. *Clayes* vs. *Baker*, S. C. 1879, 23 L. C. J. 194.

15. Certification of Copies.—A copy of an election petition certified by the attorney of the petitioner is sufficient. *Gouin* vs. *Malhiot*, C. R. 1875, 1 Q. L. R. 123; *Goyer* vs. *Coupal*, S. C. 1874, 6 R. L. 229.

16. Communication of Depositions.—The defendant is entitled to take communication of the depositions of petitioner's witnesses at the office of the clerk of the court as soon as the stenographer's notes have been transcribed. *Benoit* vs. *Rocheleau*, S. C. 1888, 16 R. L. 567.

17. Counter Petition. (See "Corrupt Practice"—"Recriminatory Charges.")—Where the respondent to an election petition makes counter charges against the unsuccessful candidate, who is not a party to the cause, and in whose behalf the seat is not claimed, and prays that he be disqualified, such petition is an election petition, and must be accompanied by security and all other formalities prescribed by the Dominion Controverted Elections Act, 1874, 37 Vic., cap. 10, secs. 8, 9 and 40. *Somerville* vs. *Laflamme*, S. C. 1877, 21 L. C. J. 240.

18. —— Any counter petition by a respondent must be served within the 30 days mentioned at the beginning of sub-section 2 of section 8 of the said Act. The extra delay of 15 days mentioned towards the end of the said sub-section is exceptional, and is confined to the particular case mentioned in section 8. A counter petition served after the 30 days, though within the extra 15 days, will therefore be rejected with costs. *Langlois* vs. *Valin*, S. C. 1879, 5 Q. L. R. 1. Confirmed in Supreme Ct. 1879, 3 Can. S. C. R. 1, 2 L. N. 364. (See remarks 2 L. N. 361.)

19. —— The defendant under the Quebec Contested Elections Act, sec. 55, will be allowed to issue a counter petition without giving security or making a deposit. *Lacoi* vs. *Gaboury*, S. C. 1882, 1 M. L. R. 75.

20. Delays—If the trial of an election petition has not been commenced within six months of the date of its being filed, it will be perempted with costs upon motion of the defendant. In computing this delay the sitting of Parliament should be included where the court or the judge has not decided, or it is not made to appear, that the defendant's presence was necessary at the trial. *Gazaille* vs. *Audet*, S. C. 1887, 15 R. L. 604, 10 L. N. 403; *Hearn* vs. *McGreevy*, S. C. 1887, 15 R. L. 609, 13 Q. L. R. 322; *O'Brien* vs. *Caron*, S. C. 1887, 15 R. L. 697; *Gibault* vs. *Pelletier*, Supreme Ct. 1892, 20 Can. S. C. R. 185, reversing S. C. 1891, 21 R. L. 278; *Purcell* vs. *Kennedy*, Supreme Ct. 1888, 14 Can. S. C. R. 453, 11 L. N. 130. *Contra*, *Caron* vs. *Coulombe*, S. C. 1887, 15 R. L. 615, 13 Q. L. R. 243.

21. —— The court has not jurisdiction to extend the delay of six months enacted by the statute after it has expired; it can only do so where application has been made within six months. *O'Brien* vs. *Caron*, S. C. 1887, 15 R. L. 697. *Contra Caron* vs. *Coulombe*, S. C. 1887, 15 R. L. 615; *Purcell* vs. *Kennedy*, Supreme Ct. 1888, 14 Can. S. C. R. 453.

22. —— After the trial has been commenced the judge may adjourn the case from time to time as to him seems convenient. So where the proceedings for the commencement of the trial have been stayed during a session of Parliament by an order of a judge, and a day

has been fixed for the trial within the statutory period of six months as so extended, on which day the petitioners proceeded with their *enquête* and examined two witnesses, after which the hearing was adjourned to a day beyond the statutory period as so extended, to allow the petitioners to file another bill of particulars, those already filed being declared insufficient—*Held*, that there was a sufficient commencement of the trial within the proper time, and the future proceedings were valid under section 32 of the Controverted Elections Act, R. S. C. ch. 9. *Guilbault* vs. *Dessert*, Supreme Ct. 1888, 15 Can. S. C. R. 458.

23. —— It being enacted by the Q. 39 Vict., ch. 14, sect. 2, that all proceedings respecting the trial of an election petition shall be suspended during the sessions of the Legislature of this province, and during the eight days which precede and the three days which follow such sessions, on the mere application of the sitting member—*Held*, that the hearing of an election petition, not only as being "a proceeding respecting the trial" of such petition, but as being part of the trial itself, must be suspended during a session of the legislature, if an application to that effect be made by the sitting member. *Perrault* vs. *Langelier*, C. R. 1879, 5 Q. L. R. 242, and see *Clayes* vs. *Baker*, S. C. 1879, 23 L. C. J. 194.

24. —— Petition presented on the 7th November and served on the following day—the notice of election having been published on the 8th October—is within the delay prescribed by R. S. Q. 482. *Séguin* vs. *Rochon*, 1889, M. L. R., 5 S. C. 465.

25. —— Where the law allows a certain proceeding to be made within a stated number of days, these days are clear, and the delay is reckoned to expire on the day succeeding the expiration of the time. *Laroie* vs. *Gaboury*, 1882, M. L. R., 1 S. C. 75, 6 L. N. 276.

26. —— Thus, under the Quebec Controverted Elections Act, the filing of an answer on the sixth day after service of the petition is within the delays. (*Ib.*)

27. Deposit — Certificate — Government Percentage.—The certificate of the prothonotary, to the effect that the required deposit of $1,000 has been made within office hours, viz.: between 3 p. m. and 4 p. m., cannot be contradicted. *Barras* vs. *Guay*, S. C. 1885, 12 Q. L. R. 133.

28. —— —— It is not necessary that, over and above the deposit of $1,000, any amount should be deposited to meet the poundage or percentage of the government on such deposit. (*Ib.*)

29. —— Certificate— Bills.— It is not necessary to state in the certificate of the deposit that it was filed in the office of the prothonotary during office hours, and a certificate in the terms set out in this case is sufficient. *Brissette* vs, *Sylvestre*, S. C. 1875, 8 R. L. 334.

30. —— —— It is not necessary to enumerate therein the bills filed as security, nor to mention the value, amount, number or date of the bills. (*Ib.*)

31. —— —— A certificate of the prothonotary, to the effect that the security was made in Dominion bills, is sufficient. *Goyer* vs. *Coupal*, S. C. 1874, 6 R. L. 229; *Brissette* vs. *Sylvestre*, S. C. 1875, 8 R. L. 331; *Christie* vs. *Morrison*, Supreme Ct. 1892, 20 Can. S. C. R. 194.

32. —— Where party charged with offence, not made party to the suit.— Quebec Controverted Elections Act, 1875.—Where an election petition under the Act, against the candidate elected, charges illegal acts against a deputy returning officer by name, who, however, is not made a party, and who does not appear in the suit, the respondent is not entitled to ask for security other than that which is required by the Act to be given on a single petition. *Dansereau* vs. *Bernard*, S. C. 1882, 26 L. C. J. 233.

33. —— —— A deputy returning officer against whom nothing is asked by the petition, and who does not appear in case, is not a respondent within the meaning of the said Act. (*Ib.*)

34. —— Where more than one Defendant.—Where an election petition is against two defendants, it will be considered, with respect to the security, as two separate petitions, and as many deposits of $1,000 must be made as there are defendants. *Bernatchez* vs. *Fortin*, S. C. 1882, 8 Q. L. R. 49.

35. —— —— But the obligation to give security is divisible, in this sense, that where one deposit only is made and there are two defendants, it will be considered sufficient with regard to one and null as to the other, and in such case the court will look to see who is the principal defendant, that is, he against whom the petition is principally directed, as, for instance, the candidate whose return is petitioned against, and holding the deposit good and sufficient with regard to him, will discharge the other. (*Ib.*) And see *Hearn*

vs. *Murphy*, C. R. 1890, 16 Q. L. R. 311, 315, commenting on *Bernatchez* vs. *Fortin*.

36. —— —— Where, in an election petition, the petitioner complains of the conduct of the returning officer, and demands the voiding of the election by reason of illegal acts committed by him, and subsidiarily by reason of corrupt practices committed by the candidate elected, these parties being constituted defendants, the petition will be regarded as a separate petition against each defendant. (Arts 485 and 486 R. S. Q.) A deposit of $1,000 on such petition is therefore insufficient, and will be dismissed upon prelimary objections. *Hearn* vs. *Murphy*, C. R. 1890, 16 Q. L. R. 31.

37. —— **Withdrawal.—Elections Act.**—The petitioner, and not his attorney, is given by the statute the right to withdraw the deposit. *Dionne* vs. *Gagnon*, S. C. 1883, 9 Q. L. R. 210.

38. Enquete.—Motion to re-open.—On the hearing of an election petition motion was made to re-open the *enquête*, in order to produce new particulars—*Held*, that considering that sixty-tive accusations had been brought and eighty witnesses heard, the motion would be rejected. *Robillard* vs. *Lecavalier*, S. C. 1877, 7 R. L. 662.

39. —— **Bill of Particulars.**—The *enquête* in a contested election case will not be allowed to go beyond the bill of particulars. *Rocheleau* vs. *Martel*, S. C. 1878, 9 R. L. 511.

40. Evidence — (See "CORRUPT PRACTICES"—"EVIDENCE.")—The rules of evidence applicable to election petitions are not those of the Civil Code, but of the laws of England, and the evidence of a party must be received as well in his own favor as against him. *Morissette* vs. *Larue*, C. R. 1876, 2 Q. L. R. 262.

41. Exhibits.—During the *enquête* on a contested election petition it is the duty of the judge to order the exhibits to be placed in the care of the clerk of the court. *Rocheleau* vs. *Martel*, S. C. 1878, 9 R. L. 511.

42. Form.—The description of the electoral district, in the petition, as "the electoral "district of *the County of* Ottawa," instead of "the electoral district of Ottawa," is not a sufficient ground for rejecting the petition, the electoral district being in fact composed of the county of Ottawa alone. *Séguin* v. *Rochon*, S. C. 1889, M. L. R., 5 S. C. 465.

43. —— The petitioner properly describes himself by giving the name and surname which he usually bears, by those which he is given on the voters' lists, and under which he presented himself as a candidate. *Bernatchez* vs. *Fortin*, S. C. 1882, 8 Q. L. R. 49.

44. —— **Petition to the House.**—Although election petitions should be sent to the committee of privileges and elections, yet where such a petition was submitted to the House complaining of the election of a member described by his wrong name, such petition should be thrown not. *Robillard* vs. *Le Cavalier*, Legislative Assembly 1871, 3 R. L. 281.

45. Intervention.—A petition to intervene in a contested election should, like the petition for the contestation, be signed by the party intervening, and it is insufficient if signed by his attorney *ad litem*. *Faille* vs. *Lussier*, C. R. 1888, 16 R L. 436.

46. —— Where the trial of an election petition is concluded and an inscription for hearing before the Court of Review has been made and filed, an intervention by an elector demanding to be made a party to the cause in the petitioner's place, cannot be received by a single judge of the Superior Court, nor before that court presided over by a single judge, for the cause is no longer before that court, but in the Court of Review. *Decary* vs. *Mousseau*, 1884, M. L. R., 1 S. C. 25.

47. Jurisdiction in Matters of (1)—*Held*, that by the Dominion Controverted Elections Act of 1874, the Parliament of Canada has not created a Dominion Court, as it was empowered to do by section 101 of the British North America Act, and has merely sought, in so far as regards the Province of Quebec, to extend the jurisdiction of the Superior Court of that Province. *Deslauriers* vs. *Larue*, S. C. 1879, 5 Q. L. R. 191.

48. —— And that the Parliament of Canada has no power to extend the jurisdiction of the Superior Court of this Province. (*Ib.*)

48*a*. —— And that the said Superior Court, independently of the Dominion Controverted Elections Act, 1874, has no power to try controverted elections of members of the House of Commons of Canada. (*Ib.*)

49. —— The Contested Elections Act of 1873 is constitutional. *Duval* vs. *Casgrain*, E. C. 1874, 19 L. C. J. 16, 5 R. L. 712.

49*a*. —— The Dominion Controverted Elections' Act of 1874 in giving to the Superior

(1) See opinions upon this question, 5 R. L. 497.

Court, which is a civil provincial court, and to its judges, the trial of Dominion contested election cases, has conferred upon it a jurisdiction which it did not before possess, and has also, in deciding upon and regulating the procedure to be followed in such cases, encroached upon the rights of the Provincial Legislature, which possesses with regard to the creation, organization and maintenance of civil and criminal courts, and as to the procedure in civil matters in such court's an unlimited authority, and in illegally pretending to and exercising such power and authority the Dominion Legislature has acted unconstitutionally and illegally. *Guay* vs. *Blanchet*, S. C. 1879, 5 Q. L. R. 43.

49*b*. —— The Imperial Parliament has given to the Parliament of Canada the power to establish additional courts for the better administration of the laws of Canada, and in passing the Dominion Contested Elections' Act of 1874 the Parliament of Canada has, at the same time, established a court for the administration of that law in the Dominion. *Dubuc* vs. *Vallée*, S. C. 1879, 5 Q. L. R. 31.

49*c*. —— Section 3 of the Act does not add to or extend the jurisdiction of the Provincial courts, but merely designates those courts or one of the judges thereof as being the court established for applying that law or trying the merits of contested election cases, and in doing so the Parliament of Canada has not encroached on the rights conferred on the Provincial Legislatures by the British North America Act; but has made the Superior Court a distinct tribunal or Federal Court for the purposes of the Act. (*Ib.*)

49*d*. —— Nor does the said Controverted Elections Act in any way affect the rights mentioned in par. 13 of sec. 92 of the British North America Act, but regulates merely the manner in which controverted election trials are to be held, that is to say, the procedure to be followed. (*Ib.*)

49*e*. —— A citizen of a Province may be deprived of his political rights in that Province while continuing to enjoy his rights of citizenship in the Dominion. (*Ib.*)

50. —— The Superior Court of Lower Canada in the exercise of its ordinary powers, as the highest court having original civil jurisdiction throughout this province, can legally discharge the duties assigned to it by the Dominion Controverted Elections Act of 1874. *Langlois* vs. *Valin*, S. C. 1879, 5 Q. L. R. 1. Confirmed in Supreme Ct. 1879, 2 L. N. 364, 3 Can. S. C. R. 1.

51. —— The *trial* of an election petition under the statute must take place not before any provincial court, but before a Dominion Court of Record, as appears more particularly by section 18. (*Ib.*)

52. —— The reports to be made to the speaker, as to the right to the seat, and as to corrupt practices, etc., are to be made, not by any provincial court, but by the judge who held the Dominion Court of Record for the trial. (*Ib.*)

53. —— Although it may be true that the Dominion Parliament cannot extend the jurisdiction of any provincial court, it does not follow, and is not true, that the Dominion Parliament cannot assign to judges, named by the Dominion Government, any judicial duties that can be discharged by such judges elsewhere than in the provincial court, of which they are members, and consistently with their other duties. (*Ib.*)

54. —— In principle, a judge *trying* an election petition, or discharging any duty out of court, under the Act of 1874, is in the same position, as to his powers, as were the judges who discharged like duties under the Act of 1873. (*Ib.*)

55. —— The exclusive power of the provincial legislatures as to procedure seems to be limited to matters, in other respects, within their control; and the objection as to procedure, whatever may be its importance as to proceedings in a provincial court, cannot apply to *the trial* before a Dominion court, nor to the proceedings before a judge out of court; and under the express words of the Statute every duty that can be performed by a provincial court may also be performed by a judge out of court, except that of fixing the time and place of trial; as to which no special procedure is ordered. (*Ib.*)

56. —— The Superior Court is a Court of Original Civil Jurisdiction of and for this province, with all the powers, jurisdiction and authority of the Courts of Prévoté, Justice Royale, Intendant and Conseil Supérieur, prior to the year 1759, and such others as have been conferred upon it by the laws or ordinances of Lower Canada since 1759, and at the Union there had not been conferred upon it, from any source, any jurisdiction to try and determine a controverted election petition. *Bélanger* vs. *Caron*, S. C. 1879, 5 Q. L. R. 19.

57. —— The legislative powers conferred by the British North America Act, 1867, exclusively upon the legislatures of the provinces, comprise the administration of justice and the constitution and organization of provincial courts, both of civil and criminal jurisdiction for the provinces, and the legislature of this province has not legislated on the subject of this court, and the administration of justice by it—so as to confer any authority upon it to try and determine an election petition of a member of the House of Commons, and no other legislature has the power to confer that or any other jurisdiction or duty on this court. (*Ib.*)

58. —— The Parliament of Canada, under the power conferred exclusively upon it to provide for the constitution, maintenance and organization of a general court of appeal, and for the establishment of any additional courts for the administration of the laws of the Dominion, has in fact constituted a Supreme Court and a Court of Exchequer with jurisdiction throughout the Dominion, and the Dominion Controverted Elections Act of 1874 is a law common to the whole Dominion, to be administered of right by the judicial department of the Dominion, and not by the Provincial Courts. (1) (*Ib.*)

59. —— The Dominion Parliament had a legal right to impose on the Superior Court and the judges thereof the duty of trying controverted elections of members elected to the House of Commons of Canada. *Bruneau* vs. *Massue*, Q. B. 1878, 23 L. C. J. 60.

60. —— On the trial of an election petition it was found that the court had no jurisdiction.

In the Supreme Court the appeal being limited to the question of jurisdiction, the judgment was reversed and the record ordered to be sent back to the proper officer of the lower court to have the cause proceeded with according to law.—*Held*, that the court could not, even if the appeal had not been limited to the question of jurisdiction, have given a decision on the merits, and that the order of this court remitting the record to the proper officer of the court *a quo* to be proceeded with according to law, gave jurisdiction to proceed with the case on the merits and to pronounce a judgment on such merits, which latter judgment was properly appealable under sec. 48 Supreme Court Act. *Larue* vs. *Deslauriers*, Supreme Ct. 1881, 5 Can. S. C. R. 91, 4 L. N. 95.

61. —— **Court of Review—Mise en cause.**—Where a person has been brought into an election case, under the provisions of 38 Vict. (Q.), ch. 7, s. 272, and the evidence on the charge against the *mise en cause* has been taken before the trial judge, the determination of such matter is within the competence of the court sitting in review upon the merits of the petition. *Brisson* vs. *Goyette*, S. C. 1888, 4 M. L. R. 323.

62. —— **Preliminary objections — Review.**—The *mise en cause* (whether by the answer to the petition or subsequently) of any other candidate not petitioner in the cause, is in the nature of an election petition, and is subject to the rules prescribed for such petitions; and an appeal lies to the Superior Court sitting in Review, under sec. 41 of the Quebec Controverted Elections Act (R. S. Q. 500), from a judgment maintaining preliminary objections of the *mise en cause*. *Séguin* vs. *Rochon*, C. R. 1889, 5 M. L. R. 458.

63. —— —— **Quebec Election Act, 38 Vict, ch. 7, s. 272—Mis-en-Cause—Quebec Controverted Elections Act, 38 Vict., ch. 8.**—At the trial of the election petition against the return of a member to represent the county of Laprairie in the Quebec Legislative Assembly, evidence was given that the appellant had committed acts of bribery and corruption at the election, whereupon he was summoned, under sect. 272 of the Quebec Election Act of 1875, to appear and answer the charges made against him. He appeared, denied the charges, went to evidence, and the case being heard before the Superior Court in Review, as a court of first instance, under the Controverted Elections Act of 1875, he was found guilty of two cases of corrupt practices at the election, and condemned to pay a fine of $200 for each offence, with costs and imprisonment in default of payment—*Held* (reversing the decision of the Court of Review, M. L. R., 6 S. C. 102), 1. That the Quebec Election Act of 1875 confers no authority upon the Superior Court sitting in Review to enquire into and determine any charge of corrupt practices against the provisions of the Act; the only authority conferred by the Act to try and determine such charges being conferred on the Superior Court held by one judge thereof, as provided for by sects. 272, 273, 274 and 292 of the Act. 2. That the jurisdiction of the Superior Court sitting in Review is limited by

(1) See remarks on this case, 2 L. N. 361.

the Controverted Elections Act of 1875 to the hearing of the parties to an election petition and the determination of the issues raised thereon between the parties to such petition, including charges of corrupt practices against any of the candidates, at the election, who are made parties to the controverted election petition. 3. That as the appellant was neither an elector, nor a candidate, nor a returning officer, nor a deputy returning officer, at the election, he could not be, and in fact was not, a party to the election petition, and was not amenable to the jurisdiction of the Court of Review, as a court of original jurisdiction. 4. That the power conferred by sub-section 4 of section 89 of the Controverted Elections Act, to determine all matters arising out of the election petition, refers to such matters only as are in issue on the election petition between the parties thereto, and does not extend to collateral and independent issues with parties unconnected with the election petition, such as charges of corrupt practices against persons who were not candidates at the election and are not parties to the election petition. 5. That the Superior Court sitting in Review had no jurisdiction to hear and determine, as a court of first instance and without appeal, the charges of corrupt practices against the appellant; the Superior Court held by one judge, or a judge thereof, having sole jurisdiction in the matter, subject to a review before three judges and to an appeal to this court, as provided for with regard to judgments rendered by the Superior Court. 6. That an appeal lies to this court from every judgment rendered by the Superior Court sitting in Review for excess of jurisdiction, and that that part of the judgment of said court by which the appellant was found guilty of corrupt practices and condemned to pay two fines of $200 each, with costs and imprisonment in default of payment, is *ultra vires* and must be set aside, and the record returned to the Superior Court, in order that the proceedings may be continued, as if the case had not been heard, nor adjudicated upon by the Court sitting in Review. *McShane* vs. *Brisson*, 1898, M. L. R., 6 Q. B. 1, 31 L. C. J. 59.

64. **Pleading.**—Motion for leave to appeal from a judgment dismissing an exception to the form of an action under the Elections Act 37 Vic., cap. 9, sec. 92. The point of the exception was that the declaration set up numerous infractions of the law which are set forth in the statute in the disjunctive. Motion rejected on the ground that they were varieties of the same offence. *Tarte* vs. *Cimon*, Q. B. 1880, 3 L. N. 195.

64*a*. **Preliminary Objections — Appeal.**—Under the Dominion Contested Elections Act, sec. 50, the right to adjudicate upon the merits of a judgment rendered by one judge upon preliminary objections is reserved to the Supreme Court; consequently the Superior Court sitting as an election court, and consisting of two judges, cannot reform such judgment of one judge on account of error. *Robin* vs. *Choquette*, S. C. 1892, 1 Que. 459.

64*b*. —— —— A court constituted under the amendment to the Contested Elections Act made by sec. 17, 54-55 Vic., ch. 20, cannot alter what was done before the trial, and cannot therefore reform the decision given by one judge at the hearing; the duty of the trial court is to consider the petition on its merits just as if there had been no preliminary objections. (*Ib.*)

65. —— **Qualification of Petitioner.**—The qualification of the petitioner, that is his right to the seat contested, which defendant denies on grounds of corrupt practices, cannot be tried by preliminary objection. *Forest* vs. *Hurteau*, S. C. 1874, 19 L. C. J. 6; *Lacerte* vs. *Lajoie*, S. C. 1874, 7 R. L. 70.

66. —— —— But the qualification of the petitioner by virtue of his qualification as voter can be so tried. *Duval* vs *Casgrain*, C. Ct. 1874, 19 L. C. J. 16, 5 R. L. 654.

67. —— —— **Burden of Proof.**—Upon preliminary objections alleging that the petitioner is not qualified, the burden of proving the objection is upon the defendant making it. *Duval* vs. *Casgrain*, C. Ct. 1874, 19 L. C. J. 16, 5 R. L. 654; *Fréchette* vs. *Goulet*, Supreme Ct. 1885, 8 Can. S. C. R. 169.

68. —— —— But held *contra* that the burden of proving his qualification was upon the petitioner in such a case. *Rider* vs. *Snow*, Supreme Ct. 1891, 15 L. N. 8, 20 Can. S. C. R. 12; *Amyot* vs. *Labreeque*, Supreme Ct. 1892, 20 Can. S. C. R. 181.

68*a*. —— —— Where the petitioner's status is objected to in an election petition, such status must be established by the production of the voters' lists actually used at the election, or a copy thereof certified by the clerk of the crown in chancery. *Paradis* vs. *Bruneau*, Supreme Ct. 1892, 21 Can. S. C. R. 168.

69. —— —— Evidence in support of a preliminary objection charging generally that the petitioners who claim to have been voters

had not any of the legal qualifications of voters and were not entitled to vote, impugning the validity of the assessment rolls from which the voters' list were made, will be disregarded by the court when it has been proved that the names of the petitioners were on the voters' list furnished to the returning officer, and that such voters' lists were to all appearances legally made and duly sworn to. *White* vs. *Mackenzie*, S. C. 1875, 19 L. C. J. 117.

70. —— —— A plea of *fin de non recevoir*, founded on default of qualification in the elector, pleaded specially against the petitioner, is not a preliminary objection within the meaning of the Statute of 1875. *Adam* vs. *Mercier*, S. C. 1879, 23 L. C. J. 256.

71. —— —— A simple negation of the petitioner's allegation that he was a qualified voter is equivalent to a *défense en fait*. (*Ib.*)

72. —— **Hearing on.**—The hearing on preliminary objections, under sec. 10 of The Dominion Controverted Elections Act of 1874, should take place at the *chef-lieu* of the district, and an order fixing the hearing at the *chef-lieu* of the county affected is irregular. *Hills* vs. *Christie*, S. C. 1879, 23 L. C. J. 266.

73. —— **Defective Service — (C) 37 Vic., ch. 10, sec. 9; (Q) 38 Vic., ch. 8, sec. 36.**—The fact that the respondent in an election case has been served with one copy of the petition at his domicile, and another at the prothonotary's office, does not furnish ground of preliminary objection or of delay until the petitioner declares on which service he intends to proceed. *Goyer* vs. *Coupal*, S. C. 1874, 6 R. L. 229.

74. —— **Proof of Corrupt Practices.**—Proof of corrupt practices alleged to have been committed by the petitioner will not be allowed on preliminary objections, as it does not affect the right of the petitioner to petition, which in this case was sufficiently attested by the fact that his name appeared on the list on which the election had been or by the fact that he was a candidate. *Bernatchez* vs. *Fortin*, S. C. 1882, 8 Q. L. R. 49.

75. —— **What are Preliminary Objections.**—It is not a preliminary objection to a petition praying for the voidance of a federal election, on the ground of corrupt practices, to state that there exist no legal means of ascertaining whether voters alleged to have been treated or otherwise corruptly reached, have voted for the defendant. *Barras* vs. *Guay*, S. C. 1885, 12 Q. L. R. 133.

76. Procedure under.—The hearing of the preliminary objections, and the trial of the merits of the election petition, are distinct acts of procedure. *Brassard* vs. *Langevin*, Supreme Ct. 1878, 2 Can. S. C. R. 310.

77. —— In contested election cases the principles of procedure in ordinary actions before the Superior Court must be followed, as to the parties to be joined in the cause, as to the nature of the pleadings by which the relations of the parties are determined and defined, and as to the issues joined, in every case where the Statute makes no other special provision. *Rocheleau* vs. *Martel*, S. C. 1875, 8 R. L. 592.

78. ——The judge should so regulate the procedure as to ensure celerity in the proceedings and permit the court to decide on all the incidents, at one hearing, so long as the same can be done without prejudice to the rights of either of the parties. *Adam* vs. *Mercier*, S. C. 1879, 23 L. C. J. 253.

78*a*. —— Where there are two or more petitions, it is a matter of judicial discretion whether the petitions shall be ordered to be tried together or not. *McMillan* vs. *Fabie*, Supreme Ct. 1893, 22 Can. S. C. R. 1.

79. Publication of—37 Vic., ch. 10, sec. 8, sub-sec. 8.—The fact that the returning officer has not published the petition in conformity with (C.) 36 Vic., cap. 28, sec. 11, ss. 6, will not prevent the court from fixing the day of trial. *Beaupré* vs. *Baby*, E. C. 1875, 6 R. L. 745.

80. Qualification of Petitioner.—A candidate is not disqualified as a petitioner, if it should be proved that he had been guilty of bribery and other corrupt practices at a previous election in an electoral division other than the one in controversy in the case. *White* vs. *Mackenzie*, S. C. 1875, 19 L. C. J. 113.

81. —— At the trial of the petition, the returning officer, who was also the registrar of the County of Megantic, and secretary of the Municipality of Inverness, was called as a witness, and produced in court in his official capacity the original list of electors for the Township of Inverness, and proved that the name of L. McM., one of the petitioners whom he personally knew, was on the list. The original document was retained by the witness, and as neither of the parties requested that the list should be filed, the judge made no order to that effect. The status of the other petitioners was proved in the same way—*Held*, that there was sufficient evidence that the petitioners were persons who had a right

to vote at the election to which the petition related under 37 Vic., cap. 10, sec. 7 (D). *Coté* vs. *Goulet*, Supreme Ct. 1884, 9 Can. S.C.R. 279.

82. Service. (C) 37 Vic., ch. 10, sec. 9; (Q) 38 Vic., ch. 8, sec. 36, et seq.—The service of two copies of the election petition on the respondent, one at his domicile and one at the prothonotary's office, does not found a preliminary objection or a reason for delay until the petitioner declares on which service he intends to proceed. *Goyer* vs. *Coupal*, S. C. 1874, 6 R. L. 229.

83. —— Where the petitioners have presented their petition and served a notice and copy thereof upon the respondent, it is not competent to them to serve another notice and copy even within five days from such presentation, and before the expiry of the five days allowed for answering, and before the respondent has in fact produced his answers. And such second copy of petition and notice will, on motion, be struck from the record. *Rousel* vs. *Rinfret*, S. C. 1875, 8 Q. L. R. 278.

84. —— The service of an election petition made in the Province of Quebec, at the defendant's law office, situated on the ground floor of his residence, and having a separate entrance, by delivering a copy thereof to the defendant's law partner, who was not a member of, and did not belong to the defendant's family, is not a service within sec. 11, ch. 9, Revised Statutes of Canada, and Art. 57 C. C. P., and a preliminary objection setting up such defective service was maintained, and the election petition was dismissed. *Choquette* vs. *Laberge*, Supreme Court, 1888, 15 Can. S. C. R. 1. 11 L. N. 91.

85. Signature.—A petition, praying for the voidance of a Federal election, on the ground of corrupt practices, need not be signed by the petitioners themselves; it is sufficient that it be signed by the petitioners' attorneys, although such attorneys appear, for the first time, on such petition, as being partners. *Barras* vs. *Guay*, S. C. 1885, 12 Q. L. R. 133.

86. Stamps.—A district where the fee on filing petition is payable in money to the clerk of the court, and has been duly paid, the absence of stamps on the petition is not an irregularity. *Seguin* vs. *Roehon*, C. R. 1889, M. L. R., 5 S. C. 465.

87. Substitution of new Petitioner—Jurisdiction — Quebec Controverted Elections Act, 38 Vic., ch. 8, sec. 104.—*Held* (Buchanan J., differing partly as to this point), where a petitioner abandons the personal charges, but inscribes the case before three judges sitting in Review in order to have the defendant's election annulled for admitted acts of corruption by agents, such petitioner is proceeding within the meaning of sec. 104 of the Quebec Controverted Elections Act, 1875, and therefore the right to substitute another petitioner does not arise under the circumstances stated. *Decary* vs. *Mousseau*, C. R. 1884, M. L. R., 2 S. C. 228.

88. —— That when the case has been inscribed for hearing before three judges sitting in Review as an election tribunal, the court has no jurisdiction to send the case back to the trial judge in order that another petitioner may be substituted, and that the trial may proceed upon the personal charges. (*Ib.*)

89 —— Substitution of petitioner will be allowed when the first petitioner refuses or neglects to proceed, but it must be shown to the satisfaction of the court that there was collusion between the first petitioner and the defendant, and the petition for substitution must be signed by the petitioner himself and not by his attorney *ad litem*. *Faille* vs. *Lussier*, 1884, M. L. R., 4 S. C. 139.

90. Summons.—Application on behalf of a witness in the Verchères election case, praying that he be paid the amount for which he had been taxed for attendance as a witness out of the deposit made with the prothonotary as security for the costs in the case. The case was still pending before the court. Application rejected on the ground that the witness had no right to be paid out of the deposit pending the suit. *Lalonde* v. *Archambault*, S. C. 1883, 6 L. N. 300.

91. —— In a contestation under the Quebec Elections Act—*Held*, that under sections 272, 273 and 274 of the Quebec Elections Act of 1875, a regular summons to a person charged with a corrupt practice to appear at a place, day and hour fixed, must be issued. If the party fails to appear, he may be condemned on evidence already adduced on the trial of the election petition, but if he does appear, the case is to go on as an ordinary case, and the judgment is to be given on evidence then to be adduced. *Lavoie* v. *Gaboury*, C. R. 1884, 7 L. N. 186.

92. Trial — Enquete closed — Proof after—R. S. Q. 514.—After the *enquête* on the trial of an election petition has been closed, the respondent is no longer entitled, under R.

S. Q. 514, to adduce evidence to show that any other candidate has been guilty of corrupt practice. *Séguin* v. *Rochon*, C.R. 1884, M. L. R., 5 S. C. 461, 18 R. L. 395.

93. —— In Vacation.—Cases under the Controverted Election Act, 1874, may be tried in vacation. *Ryan* v. *Devlin*, S. C. 1875, 19 L. C. J. 193; *Owen* v. *Cushing*, C. R. 1875, 20 L. C. J. 86.

94. —— Place of.—Where the order of the judge fixing a trial under the Dominion Act omitted to specify the place of trial, no trial could be had, though notice of time and place had been given to respondent, and he was present in court. *Ryan* v. *Devlin*, S. C. 1875, 19 L. C. J. 194.

95. —— What constitutes — Suspension.—The hearing of an election petition is not only "a proceeding respecting the trial" of such petition, but is a part of the trial itself, and must be suspended during a session of the Legislature, if an application to that effect be made by the sitting member. *Perrault* v. *Langelier*, C. R. 1879, 5 Q. L. R. 242.

96. —— —— The word "trial" in section 32 of the Dominion Controverted Election Act means a separate and distinct part of the general process, and only begins at the time fixed by the notice given under section 31. *Re Shefford Election, Gazaille* v. *Audet*, S. C. 1887, 10 L. N. 403.

97. —— —— The word "trial" in the Dominion Controverted Election Act (R. S. C., ch. 9, sec. 32) means the hearing of witnesses upon the merits of the petition. *Hearn* v. *McGreevy*, S. C. 1887, 13 Q. L. R. 322.

98. —— —— But hearing witnesses upon the merits of preliminary objections does not constitute part of the "trial."

99. —— When concluded—R. S. Q. 514.—The trial of an election petition is concluded when the *enquête* of petitioner and respondent has been closed; and it is not competent thereafter for the respondent to give notice, under R. S. Q. 514, that he intends to prove that another candidate not in the cause has been guilty of corrupt practices. *Séguin* v. *Rochon*, C. R. 1889, M. L. R., 5 S. C. 463.

100. What constitutes a Petition.—Where the respondent, in answer to a petition contesting his election as member of the House of Commons, makes counter charges against the unsuccessful candidate, who is not a party to the cause, and in whose behalf the seat is not claimed, and prays that he be disqualified, such petition is an election petition, and must be accompanied by security and all other formalities prescribed by the Dominion Controverted Election Act, 1874. *Somerville* v. *Laflamme*, S. C. 1877, 21 L. C. J. 240.

XII. PRESENCE OF CANDIDATE AT ELECTION.

(C) 37 Vic., ch. 9, sec. 21 & Que., 38 Vic., ch. 7, sec. 111.—The law does not require, on pain of disqualification, that candidates should be present at an election in order to be examined as to their qualifications. *Bureau* v. *Normand*, S. C. 1873, 5 R. L.

XIII. QUALIFICATION.

1. Candidate — Assignment of Property.—A member who has made an assignment of his effects under the Insolvent Act of 1875, and entered into a deed of composition by which his stock has been placed in the hands of trustees until a composition is paid, is not proprietor of the property in the sense of sec. 124 of the Quebec Elections Act, and is subject to a penalty of $2000 for every day which he sits as a member without having the qualification required by law. *Legris* v. *Duckett*, S. C. 1881, 11 R. L. 121.

2. —— Property of Wife.—Property possessed by the wife separated as to property of a member of the Legislative Assembly of Quebec cannot be taken into account in an inquiry into the qualification of such member. *Legris* v. *Duckett*, S. C. 1882, 5 L. N. 91.

3. —— Simulated Deed. — A deed given to transfer property to a candidate merely to qualify him, and with the intention that the property shall for all other purposes remain in the possession of the transferee, is insufficient under sec. 124 of the Quebec Elections Act, even although it be clothed with all the formalities required for the valid transfer of the property. *Hamilton* v. *Beauchene*, S. C. 1876, 3 Q. L. R. 75; Election List of Kamouraska, S. C. 1877, 3 Q. L. R. 308.

3a. —— —— And when there is only a simulated payment of the price, and no delivery or putting in possession, that will be sufficient evidence of the intention. (*Ib.*)

4. —— Value of Usufruct.—Where one person buys for another person, the candidate, property for the express purposes of qualifying the latter, but attaches such conditions to the deed of transfer as to reduce the candidate's title to a title of usufruct and nothing more, such title will not qualify the candidate

where the full and unrestricted right of property with all its attributes is worth at the very outside $2,000. *Beaudry* vs. *Brosseau*, C. R. 1879, 2 L. N. 218.

5. **Of Returning Officer.**—A returning officer, after he has accepted the office and acted as such, may resign, but his resignation must be formal and must be accepted, otherwise he is ineligible as a candidate. *Le Boutillier* vs. *Harper*, E. C. 1874, 1 Q. L. R. 4.

5*a*. **Of Voter—Joint Owners.**—A. and B. possessed conjointly, and by equal parts, a property valued on the roll at from $200 to $300. Neither the one nor the other could be put on the list. Neither could they if they had been, conjointly and by equal parts, tenants of a property, for which they had paid annually, according to the roll, $20 to $30. In the first case, that they both might vote, the property would need to be valued at least $400. In the second case, that they both might vote, the rent would need to be at least $40. But if A. and B. possessed together property of the value of $300, A. for a third and B. for two thirds, B. could vote, but not A., and the same as to rent. *Election List of Kamouraska*, S. C. 1877, 3 Q. L. R. 308.

6. —— **Curate of Parish.**—A *curé* of a parish who occupies real property given to the *fabrique* for the use of the church, is only the administrator, and occupies the property merely as *curé*, and such official occupation does not entitle him to be put on the voters' list. *Brunet* vs. *Corporation de Ste. Anne de Bellevue*, S. C. 1890, M. L. R., 6 S. C. 223, and see *Election Lists of Kamouraska*, S. C. 1877, 3 Q. L. R. 308.

6*a*. —— **Date of.**—The date of the qualification of an elector is that of the election list, and it is at the time of the making of the list by the secretary-treasurer that the qualification should exist and appear. *Election List of Kamouraska*, S. C. 1877, 3 Q. L. R. 308.

7. —— **Employees of Dominion Government.**—Employees of the Dominion Government who work during the season of navigation at so much per day, and who are continued in their employment from year to year, without a new engagement, fall under § 4 of Section 176 of the Quebec Election Act, and are not entitled to be put on the voters' list. *Brunet* vs. *Corp. de Ste. Anne de Bellevue*, S. C. 1890, M. L. R., 6 S. C. 223.

7*a*. —— —— The prohibition of Custom House officers to vote at elections by the Act 20 Vic., ch. 22, sec. 3 (1857), continued by B. N. A. Act, secs. 41 and 84, does not prevent them from voting at elections for local members. *Hamilton* vs. *Beauchêne*, Q. B. Que. 1875, 8 March.

8. —— **Employees of Intercolonial Railway.**—Persons employed on the Intercolonial Railway by the Dominion Government, who can be dismissed at the end of each day without excuse or reason, do not fall within the meaning of Art. 176 R. S. Q., amended by 52 Vic., ch. 6, sec. 2, depriving of the right to vote all those who occupy a "permanent and salaried position" under the Government of the Dominion or of this province. *Beaumont* vs. *Corp. de Lévis*, S. C. 1890, 16 Q. L. R. 187.

9. —— **Evidence of—Parol—Lease.**—Parol testimony is admissible to prove that a person whose name is on the voters' list is qualified as a tenant, although the lease of the property rented by him was made in his father's name, but simply as an extra guarantee to the landlord. *Coupal* vs. *Corp. St. Jacques Le Mineur*, S. C. 1888, 16 R. L. 447.

10. —— **Evidence of Proprietorship, Tenancy or Occupancy.**—The person who, at the time the voters' lists are being made, is actually and in good faith owner, occupant or lessee of the property which, according to the assessment roll, is of sufficient value to qualify him to vote; such person is entitled to have his name entered on the list, although his name does not appear on the assessment roll, the latter serving only as proof of the value of the property; the other contents of the roll being subject to contradiction by the usual legal rules of evidence. *Coupal* vs. *Corp. St. Jacques Le Mineur*, S. C. 1888, 16 R. L. 447; *Jeannotte* vs. *Corp. de Bélœil*, S. C. 1890, M. L. R., 6 S. C. 261; *Filiatrault* vs. *Corp. de Quebec*, 1885, M. L. R., 1 S. C. 308, 14 R. L. 405; and see *Mongeau* vs. *Corp. de St. Bruno*, 1887, M. L. R., 3 S. C. 278.

11. —— **Occupant as Servant of Owner.**—Has not quality requisite for a voter. *Jeannotte* vs. *Corp. de Bélœil*, 1890, M. L. R., 6 S. C. 261.

12. —— **Occupant or Tenant, etc., etc., of part of Building not separately assessed.**—The owner, tenant or occupant of a separate and distinct portion of an immoveable assessed in the valuation roll as a whole, no assessment being made of the separate portion, has not the right to be placed on the voters' list, as sec. 9 of 38 Vic. (Q.), ch. 7 (Art. 173 and 174 R. S. Q.), only applies to

owners, tenants or occupants of an undivided property. *Coupal* vs. *Corp. de St. Jacques Le Mineur*, S. C. 1888, 16 R. L. 447; *Mongeau* vs. *Corp. de St. Bruno*, 1887, M. L. R., 3 S. C. 278; *Beaulieu* vs. *Corp. de Ste. Mélanie*, C. Ct. 1889, 17 R. L. 429.

13. —— "Rentiers."—The qualification of *rentiers* under the Quebec Election law is personal, and *rentiers* must be entered in the voters' list of the municipality where they reside, and not on that of the municipality where the immoveables are situated for which their rents have been constituted. *Jeannotte* vs. *Corp. de Bélœil*, 1890, M. L. R., 6 S. C. 261.

14. —— Sale of Immoveable for Taxes.—The sale of an immoveable for municipal taxes disqualifies the owner as a parliamentary voter from the time of the sale, though the sale be revocable during two years, the effect of the sale, by Articles 1004 and 1013 of the Municipal Code, being to transfer immediately the ownership of the lot sold to the buyer. *Brunet* vs. *Corp. de Ste. Anne de Bellevue*, 1890, M. L. R., 6 S. C. 223.

15. —— Son of Proprietor.—The son of a proprietor, to be qualified as a voter, must have resided for a year with his father or other ascendant possessing a property sufficient in value, according to the valuation roll, for the qualification of both; but it is not necessary that they should reside on the property, which may even be situate in a municipality other than that in which they live. *Jeannotte* vs. *Corp. de Bélœil*, 1890, M. L. R., 6 S. C. 261.

16. —— —— The time during which the son of a proprietor must have resided with his father, etc., is one year before the date of completion of the voters' lists. *Brunet* vs. *Corp. de Ste. Anne de Bellevue*, S. C. 1890, M. L. R., 6 S. C. 223.

17. —— —— The son of a proprietor who works constantly outside of the municipality, but whose periods of absence are less than six months, and who has no residence except that of his father, and who contributes to the support of his father's establishment, is entitled to be put on the voters' list. (*Ib.*)

18. —— —— The son of a proprietor will not be permitted to prove, in order to establish his qualification, that since the completion of the valuation roll his father's property, on which he seeks to qualify, has increased in value. (*Ib.*)

19. —— "Tenant Feu et Lieu."—Where a married son dwells in a house with his father, and contributes with the father to the expenses of the establishment, including the heating, he must be considered as *tenant feu et lieu* in the sense of paragraph 5, sec. 2, ch. 7, 38 Vic. (Q.), 1875. *Coupal* vs. *Corp. St. Jacques le Mineur*, S. C. 1888, 16 R. L. 447; and see Election list of Kamouraska, S. C. 1877, 3 Q. L. R. 308.

20. —— Tenants—Valuation Roll.—In the case of tenants it is not necessary that the amount of their rent be stated on the roll, it being sufficient that the tenant is in fact qualified according to law. *Mongeau* vs. *Corp. de St. Bruno*, M. L. R., 3 S. C. 278.

21. —— —— Valuation Roll—Lease by the Year.—To be qualified as parliamentary voters under the Quebec Election Act, 52 Vic., ch. 4, tenants must occupy immoveables valued separately, by the valuation roll in force, at $200 at least, in municipalities other than cities. *Galipeau* vs. *Corp. de Pointe aux Trembles*, 1890, M. L. R., 6 S. C. 211.

22. —— —— Tenants to be so qualified must have leased by the year and not by the month. (*Ib.*)

23. —— —— Reserves in favor of Proprietor.—The fact that a tenant occupying the whole of a lot sufficient to qualify him has agreed to certain reserves in favor of the owner does not disentitle him to be entered in the voters' lists. *Jeannotte* vs. *Corp. de Bélœil*, 1890, M. L. R., 6 S. C. 261.

24. —— —— Who is.—A person paying the rent of a house in which he resides one day in the week is a tenant within the meaning of the Quebec Elections Act, 1875. *Beaudet* vs. *The Corp. of the Parish of St. Ignace*, S. C. 1883, 6 L. N. 183.

25. —— Valuation Roll.—Only the real value of the immoveable leased need be shown by the valuation roll; the other facts as to a tenant which constitute the quality of voter may be established by other evidence. *Jeannotte* vs. *Corp. de Bélœil*, 1890, M. L. R., 6 S. C. 261.

26. —— Voters' List—Error.—When a voter's name is entered erroneously on the voters' list, the municipal council should not on that account strike the name from the list, but should rectify the error and enter the name correctly. *Jeannotte* vs. *Corp. de Bélœil*, 1890, M. L. R., 6 S. C. 261.

27. —— —— When a voter whose name appears on the voters' list is not qualified as indicated on the list, but is really qualified in a different way, his name should not be struck

from the list. *Mongeau* vs. *Corp. de St. Bruno*, M. L. R., 3 S. C. 278.

28. —— —— Under the Quebec Election Act, the voters' lists do not finally determine either the majority or British nationality of the voter. *Dionne* vs. *Gagnon*, C. R. 1883, 9 Q. L. R. 20.

XIV. RETURNING OFFICER. (See QUALIFICATION OF.)

1. Candidate cannot act as a returning officer, and where he does so he will be disqualified. Legislative Assembly, 1856, 4 R. L. 703.

2. Where the returning officer has made his return to the clerk of the Crown in Chancery on the evening of the day on which the writ was returnable, such officer is *functus officio*, and, having dispossessed himself of his writ, the court or a judge had no jurisdiction to order a recount. *Stafford* vs. *Tessier*, S. C. 1892, 1 Que. 268.

3. Where a returning officer demands from the registrar copies of the voters' lists, he is personally responsible for the payment of such list if the Government refuses to pay. *Rocher* vs. *Leprohon*, C. R. 1876, 12 R. L. 373.

XV. RIGHTS OF CANDIDATE.

Where one of the candidates was declared disqualified after an election, the other candidate, unless he have a majority of votes, is not entitled to the seat, and a new election must be had. *Bureau* vs. *Normand*, S. C. 1873, 5 R. L. 40.

XVI. UNDUE INFLUENCE.

(See also "CORRUPT PRACTICES.")

1. By Priest.—A Roman Catholic priest, or minister of any religious denomination, who takes part in an election under The Quebec Election Act, to promote the election of one of the candidates, will be held an agent of such candidate within the meaning of the Act. *Massé* vs. *Robillard*, C. R. 1880, 26 L. C. J. 288, 4 L. N. 3, and *Hamilton* vs. *Beauchesne*, E. C. 1876, 3 Q. L. R. 75.

2. —— Counsel and advice by such priest or minister to the members of his congregation, for the purpose of influencing their votes in favor of a particular candidate, is not an act of undue influence. (*Ib.*)

3. —— But the refusal or threat of refusal of the sacraments to those who are unwilling to vote as the priest directs them, or any other act by a priest which tends to restrain the liberty of the elector, is an act of undue influence, and has the effect of avoiding the election. (*Ib.*) And *Hamilton* vs. *Beauchesne*, E. C. 1876, 3 Q. L. R. 75.

4. —— On appeal from a judgment of the Superior Court of the Province of Quebec, dismissing the petition of the appellant against the return of the Hon. H. L. Langevin, as member of the House of Commons—*Held*, that the election of a member of the House of Commons, guilty of clerical undue influence by his agents, is void, and that sermons and threats by certain parish priests amounted in the case in question to undue influence, and were in contravention of the 95th sec. of the Dominion Election Act, 1874. *Brossard* vs. *Langevin*, Supreme Court 1877, 1 Can. S. C. R. 145, reversing S. C. 1876, 2 Q. L. R. 323.

XVII. VOIDED ELECTION.

Continuation of same Election.—Until the exigency of the original writ of election is satisfied there is no election, and the several elections are considered one and the same election, even though the seat is not claimed for any one. *Lavoie* vs. *Gaboury*, C. R. 1883, 7 L. N. 186, and see *Owens* vs. *Cushing*, C. R. 1875, 20 L. C. J. 86.

XVIII. VOTERS' LISTS.

1. Alterations after 30 Days.—By the Quebec Elections Act, sec. 27, the electoral list of a corporation must remain for thirty days only, and any alterations made in it after the thirty days have expired are illegal, and must be set aside. *Jodoin* vs. *The Corp. of the Village of Varennes*, S. C. 1879, 2 L. N. 262.

2. Filing Complaint with Secretary-Treasurer.—The council of a municipal corporation has no right to add or strike off names from the list of parliamentary voters, without any complaint in writing having been made within the delay required by law, and without notice to the persons whose names are so struck off. Any elector of the electoral division may complain of such illegality, and appeal to a judge. *Robertson* vs. *Corp. de St. Vincent de Paul*, 1887, M. L. R., 3 S. C. 178; and see *Viger* vs. *Corp. de Longueuil*, S. C. 1879, 2 L. N. 267.

3. —— Appeal under Art. 206 R. S. Q. to a judge of the Superior Court from a decision of a municipal council upon the voters' lists, will only lie where such decision was rendered

upon a complaint duly filed in the office of the secretary-treasurer within the necessary delay. *Beaumont* vs. *Corp. de Lévis*, S. C. 1890, 16 Q. L. R. 187.

4. Illegal—Effect upon Election.—An election held on illegal voters' list will be set aside, notwithstanding that the petitioners themselves fail to prove that they were legally entitled to petition. *Caverhill* vs. *Ryan*, C. R. 1874, 18 L. C. J. 323.

5. Petition to Appeal from Revision of.—It was charged that the voters' list of the parish of St. Andrews was rendered illegal by the following facts: the valuation roll from which it was made had a number of names added to it by the council upon the revision of it, and on an appeal to the Circuit Court these names so added were all struck off for some irregularity in the mode in which they had been so added; but, pending the discussion of the matter in the court, the time fixed by the law for the making of the voters' list arrived, and the secretary-treasurer made his list from the valuation roll as amended, the judgment striking off the added names not having been rendered. Some of the voters appealed to the court against the voters' list, but their appeal was rejected as being too late—*Held*, 1. That the judge sitting for the trial of an election case cannot determine the validity or invalidity of a voters' list, inasmuch as the law furnishes a mode of contesting a voters' list, and, if such mode be not followed, the judge holding an election trial cannot interfere with the list. 2. That in making the list, pending the appeal, the secretary-treasurer acted properly, and if any one objected to the list he should have appealed against it in the manner provided by the law. *Hickson* vs. *Abbott*, S. C. 1881, 25 L. C. J. 290.

6. —— The petition in appeal from the revision of an electoral list is, according to the Elections Act of Quebec, 38 Vic., ch. 7, a non-contentious proceeding, and does not require that the corporation who revised the list in question should be made parties to the cause or should have notice of the petition. *Center* vs. *Corp. of Chatham*, Mag. Ct. 1875, 7 R. L. 366.

7. —— But the petition should be served upon the secretary-treasurer, who should cause notice of it to be given to the mayor and to the parties interested. (*Ib.*)

8. —— And the corporation and others interested can only become parties to the case by intervention. (*Ib.*)

9. —— So that the illegal designation of the corporation in such petition does not involve its nullity, and the petitioner, notwithstanding this informality, may have the benefit of the 46th section of the statute. (*Ib.*)

10. —— The petition to appeal from the decision of a municipal council by virtue of Art. 206 *et seq.* of the Quebec Elections Act, R. S. Q., should be presented to the judge within the fifteen days following the decision appealed from, and it should further be served upon the secretary-treasurer of the municipality in question within the same delay. The judge can issue an order fixing the return of the petition at a date outside the sixteen days. *Forest* vs. *Corp. de l'Epiphanie*, S. C. 1890, 19 R. L. 208.

11. Revision.—Where a voter has been put upon the voters' list by virtue of an erroneous qualification, whereas at the time the lists were being made he was qualified in another way, his name should not be struck from the list. *Filiatrault* vs. *Corp. de St. Zotique*, 1885, M. L. R., 1 S. C. 308, 14 R. L. 405, 409.

12. —— In revision of the voters' lists of the County of Kamouraska, the following holdings were found—that the valuation roll of the municipality is conclusive as to the value of the property. *Electoral Lists of Kamouraska*, S. C. 1877, 3 Q. L. R. 308.

13. —— That no one can be on the electoral list who is not on the valuation roll. (*Ib.*)

14. —— That all those who appear by the roll to be qualified should be on the electoral list, unless some disqualification of a personal nature prevents them from being so. (*Ib.*)

15. —— The Municipal Code points out the manner in which a valuation roll should be attacked, and in a collateral procedure as in a contestation of the electoral lists the correctness of the roll cannot be called in question. (*Ib.*)

16. —— Neither has the secretary-treasurer any right to correct the valuation roll. (*Ib.*)

17. —— The valuation roll is an authentic document which makes complete proof of the real and annual value of taxable property of a municipality for election purposes. *Gratton* vs. *Corp. of St. Scholastique*, Mag. Ct. 1875, 7 R. L. 356.

18. —— And at the time of the revision of the list no other value can be admitted but that mentioned in the roll. (*Ib.*)

19. —— But the roll does not make proof of the quality of the person occupying the property at the time of the completion of the list.

And the council may, at the time of the revision of the list, replace the names of those who were not before then proprietors, occupants or lessees, by the names of those who have such quality. (*Ib.*)

20. —— In virtue of ss. 3, sec. 8, of the Electoral Act of Quebec, the annual value of a property is sufficient to give the franchise to the proprietor or occupant, even when the actual value does not give that qualification, but the rent required by law does not unless the property has the actual value required. (*Ib.*)

21. —— Any parliamentary elector can demand the annual correction of the assessment roll, because the voters' lists are made from such roll. *Boileau* vs. *Corp. de Ste. Geneviève*, C. Ct. 1889, 18 R. L. 74.

22. —— Where a voter's name is incorrectly entered upon the voters' list, the municipal council should not for that reason strike it from the list, but should correct it and enter it as corrected. *Jeannotte* vs. *Corp. de Bélœil*. 1890, M. L. R., 6 S. C. 261.

23. —— A municipal council, sitting for the revision of the voters' list, can enter upon the assessment roll then in force the names of persons who they think are duly qualified by reason of the valuation upon such roll. *Forest* vs. *Corp. de St. Paul l'Ermite*, S. C. 1890, 19 R. L. 411.

24. —— Where, at the moment of making the list, a person is qualified to be entered thereon by reason of his property qualification, as issued on the assessment roll, he may, within fifteen days from the notice that the list has been deposited, demand that the council enter his name upon the list, although his name does not appear on the assessment roll. (*Ib.*)

25. **Transmission of List to Registrar —Penalty.**—The Election Act, sec. 38, provides that a duplicate list of electors must be transmitted to the registrar within eight days following the day upon which such list shall have come into force, under a penalty of $200. The defendant transmitted the list four days before it came into force—*Held*, that this was not a compliance with the law, and he had subjected himself to the penalty. *Marcotte* vs. *Paquin*, S. C. 1879, 5 Q. L. R. 168.

26. —— The electoral list is a paper of the highest importance, for upon its validity may depend the legality of the election. No element of uncertainty should be allowed to find its way into the proceedings, and it is the duty of the courts to insist upon a strict adherence to the directions of the Legislature on this subject. (*Ib.*)

ELECTION OF DOMICILE.

See DOMICILE.

EMPHYTEUSIS.

See LESSOR AND LESSEE.

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See AUCTIONEER.

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I. ADMISSIBILITY.

1. Action for Slander.—In an action of damages for verbal slander arising out of a claim of the defendant against the plaintiff for money—*Held*, that a receipt signed by the party for notes received as collateral security for the plaintiff's debt, and dated five months before the injury complained of, and produced by the defendant at *enquête*, as evidence of the debt, as well as a receipt of the defendant in full, given subsequently to the action, should have been rejected from the record. *Lenoir* v. *Jodoin*, 16 L. C. R. 387, Q. B. 1866.

2. Admissions made in another Suit—An authentic copy of a party's answers on interrogatories in one suit and filed as evidence in another suit will be deemed sufficient evidence of the facts admitted by such answers. *Clairmont* vs. *Dickson*, C. Ct. 1859, 4 L. C. J. 6. Confirmed in appeal, Dec., 1859.

3. After Proof made—Art. 1233 C. C., Sec. 6.—Where a writing, material as proof in a case, is missing at the time of proof and is afterwards found, it may still be produced as evidence. *Marchildon* vs. *Charlebois*, S. C. 1873, 5 R. L. 530.

4. Change of Procedure.—The plaintiff declared upon a donation of a certain date, and at the *enquête* proved another donation of a different date. Before the case was heard he moved to amend his declaration by inserting the true date of donation. The defendant consented to this amendment, and the plaintiff then set down the cause for final hearing, without any other ulterior proceedings, and when the cause came on pretended that the law would permit him to use an *enquête* taken in a prior suit upon the same cause of action, and this was a similar case. *Sed per curiam.*—When a cause has been out of court by a *péremption d'instance*, if an *enquête* has been taken it is allowed to subsist, and may be used in a second suit founded upon the same ground of action, and this appears to be reasonable, but we are not aware of any authorities that would justify the reception of an *enquête* in a subsequent cause under other circumstances. *Leclere* vs. *Roy*, K. B. 1818, 3 Rev. de Lég. 352.

5. Contradiction by another Witness.—The evidence of a witness may be contradicted, by proving by another witness certain statements made by him in a conversation with respect to which conversation he himself had not been interrogated. *Méthot* vs. *Lalonde*, S. C. 1866, 11 L. C. J. 301.

6. Contract—Engineer's Certificate.—A stipulation in a contract, to the effect that the contractor shall be paid any such indemnity as shall accrue, only on the certificate of the employer's superintendent, does not exclude other lawful evidence that such indemnity is due; but it is the duty of the party so obliging himself to conform to such stipulation, or explain why he failed to procure such certificate—or, failing therein, to produce evidence as conclusive as the said certificate would have been. *McGreevy* vs. *McCarron*, Q. B. 1886, 12 Q. L. R. 373, 14 R. L. 422. Confirmed in Supreme Court, 1886, 13 Can. S. C. R. 378.

7. Deed.—A witness may be examined concerning a deed of obligation made in his favor, and produced on his behalf, although the deed states that the obligation was consented to for value received, in the shape of money lent, and the party who examines the witness relies on such deed. *Johnson* vs. *Martin*, S. C. 1874, 5 R. L. 336.

8. —— Where a married woman describes herself in a deed as being separate as to property, yet evidence is admissible to prove that she is really common as to property. *O'Connor* vs. *Inglis*, Q. B. 1891, 21 R. L. 315.

9. Extrinsic Evidence.—Where a deed of sale sets out in detail the various properties

and goods thereby transferred, the court cannot take into consideration any other documents between the parties or any extrinsic evidence, but must look at the deed alone to decide what property has passed thereunder. *In Re Mullarky*, 1887, M. L. R., 4 S. C. 89.

10. Evidence of Daughter in Assault upon her.—Where an action was brought by a father to recover damages from the defendant for debauching his daughter, a minor child, and thereby wounding him in his sensibilities, and depriving him of her services and society, and the plaintiff called the daughter to prove the assault upon her, and the defendant objected to her evidence—*Held*, that the evidence of the daughter might be received, and the plaintiff was ordered to confine himself to proof of the acts of violence complained of. *Neill* vs. *Taylor*, S. C. 1865, 15 L. C. R. 102.

11. Facts other than those alleged.—In cross-examination of the petitioner's witnesses the plaintiff went into proof of other facts tending to show the fraudulent intent of defendant—*Held*, that said proof may be made, and that the plaintiff is not to be restricted to the precise matters set up in his affidavit. *Blanckensee* vs. *Sharpley*, Q. B. 1860, 10 L. C. R. 240.

12. General Issue—Patent.—A defendant who has pleaded the general issue to an action for infringement of patent, cannot prove that the invention was not new. *Baril* vs. *Dionne*, S. C. 1879, 3 L. N. 86.

13. Indictment in Criminal Prosecution.—An indictment in a criminal prosecution is not admissible as evidence in a civil suit against the party indicted. *Winning* vs. *Fraser*, S. C. 1868, 12 L. C. J. 291.

14. Notary—Award of Arbitrator.—It is not competent, either for the notary who receives an award of arbitrators, or for one of the arbitrators, to give evidence explanatory of certain expressions in such award. *Colson* vs. *Ash*, S. C. 1873, 18 L. C. J. 191.

15. Previous Conduct.—Evidence tendered by the defendant in an action for libel as to the previous conduct and character of the plaintiff was properly rejected as illegal, especially when such matters were not referred to in the pleadings. *Mail Ptg. Co.* vs. *Laflamme*, 1888, M. L. R., 4 Q. B. 81. Confirmed in Supreme Ct., 5th Feb., 1889.

16. —— The court will allow, in the cross-examination of a witness called in to prove the good reputation of the plaintiff's wife, that such witness be asked whether he has paid his debts, and refusal to answer said question will entail contempt of court. *Dussault* vs. *Bacon*, S. C. 1886, 13 Q. L. R. 40.

17. —— In cross-examining a witness, a married woman, called in to prove the bad reputation of plaintiff's wife, she cannot be asked, for the purpose of discrediting her, if she has had sexual intercourse with a person other than her husband. (*Ib.*)

18. Production of Letters.—Where a party is asked on interrogatories upon articulated facts, whether he has not received the originals of certain letters addressed to him by the adverse party in the suit, it is irregular to produce other letters not inquired of. *Hearle* vs. *Date*, Q. B. 1861, 11 L. C. R. 290.

19. Proof of feeble Intelligence, etc.—Where a defendant is examined by the plaintiff, as his own witness, evidence may be adduced by the defendant's attorney to establish that he, the defendant, is a person of very feeble intelligence and limited memory. *Delisle* vs. *Décary*, S. C. 1864, 9 L. C. J. 107.

20. Religious Belief.—Art. 259 C. C. P.—The testimony of a witness who declares that he does not know whether there is a state of rewards and punishments after death is inadmissible.—Art. 259 C. C. P. *Schwersenski* vs. *Vineberg*, 1888, M. L. R., 5 S. C. 372.

II. ANSWERS UPON INTERROGATORIES.

1. The answers of a party summoned on a rule for interrogatories upon articulated facts can only make proof against himself. *Gregory* vs. *Kershaw & Fowler*, 3 Rev. de Lég 98, K. B. 1818.

2. *Held*, that the sale of greenbacks, to be delivered in future, can be proved by admissions on articulated facts, and without any proof in writing. *Nichols* vs. *Hias*, C. R. 1872, 2 R. C. 475.

III. APPRECIATION OF.

The concurrence of the two courts below on a matter of fact, as on a matter of foreign law, has great weight on the opinion of their Lordships, who would require a very strong case of mischief to reverse them. *Bellingham* vs. *Freer*, P. C. 1837, 1 Moore at p. 342.

IV. AUTHENTIC.

1. Writings made outside the Province.—In a petitory action brought before

the Superior Court in the province of Quebec, to recover land, the plaintiff filed in the record as evidence a deed of sale made before a notary public in the province of Ontario. The courts in the province of Quebec refused to give effect to the signature of the notary in the absence of proof of identity of parties named in the deed, and dismissed the plaintiff's action.

Held, although by the French law the deed signed by a notary public, in the province of Quebec, is sufficient evidence before the courts of that province of its contents, the certificate of a public notary in the province of Ontario, where the English law prevails, will not be received *per se* as proof of the due execution of an instrument or of the identity of the parties; such fact must be proved by evidence as required in England. *Nye* vs. *MacDonald*, P. C. 1870, 7 Moore (N. S.) 134; S. C. 1867, 2 L. C. J. 109.

2. The Quebec Gazette makes authentic evidence of the publication of the proceedings in the courts of the Province, such as orders to call in creditors, sales by sheriff, etc. *Huppé* vs. *Dionne*, K. B. 1818, 2 Rev. de Lég. 333.

3. A copy of a notarial instrument is evidence in Canada, under the law of England, in cases in which the rule of that law obtains in evidence. *Moses* vs. *Henderson*, K. B. 1809, 2 Rev. de Lég. 278.

4. A copy of a paper, signed before one notary only, cannot be received in evidence as an authentic deed. (Obsolete, see C. C. Art. 1208.) *Miville* vs. *Roy*, K. B. 1809, 2 Rev. de Lég. 278.

V. BURDEN OF PROOF.

1. Action against Executrix. — Where the plaintiff claimed the sum of £1,500 from the defendant in her quality of executrix of the testator, by virtue of a letter purporting to have been written by the testator some fourteen years previously, in which he promised to pay plaintiff the said sum of £1,500, on condition, among other things, that she should marry his adopted son, of whom he appeared to be very fond—*Held*, reversing the judgment of the Queen's Bench, that it was incumbent upon the plaintiff to prove all the facts alleged by her, namely, the signing of the letter, the delivery of the same to her, either by the party signing or with his consent, and the accomplishment of the condition precedent, namely, the marriage, which fact she had not established. *McCarthy* vs. *Judah*, P. C. 1858, 8 L. C. R. 369, 12 Moore 47, 6 R. J. R. Q. 276

2. Affixing Stamps.—The plaintiff having obtained judgment in vacation before the prothonotary on a promissory note for the sum of $300, the defendant filed opposition to the judgment, alleging among other things that the note in question had not been legally stamped; that a stamp to the amount of nine cents only had been placed upon it after it was made, but that no stamps had been placed on it by either of the parties at the time it was made. At enquête plaintiff declared that he had no evidence to make, and the defendant pretended that the affidavit filed with plea threw the burden of proof on the plaintiff to show when the stamps were affixed—*Held*, that the burden of proof was on the defendant, *National Insurance Co.* vs. *St. Cyr*, S. C. 1879, 5 Q. L. R. 258.

3. Answer to plea—Special matters.—Where a party alleges special matters in his answer to a plea, the burden of proof in support of his affirmation rests on the party making such allegation. *Bury* vs. *Forsyth*, C. R. 1887, 32 L. C. J. 267.

4. Attachment before Judgment—Secretion.—In an action commenced by attachment before judgment the *onus* of proving the falsity of the statements contained in the declaration and affidavit as regards secretion of property is on the defendant, notwithstanding that by his plea he specially denies the truth of the plaintiff's allegation in this respect. *Richot* vs. *McGill*, S. C. 1875, 20 L. C. J. 139.

5. Carrier—Fraud and Concealment.—(See "CARRIERS.")—Where in action against a carrier for damage to the goods intrusted to his care he contends that there has been fraud or concealment, the burden of proof is on him. *Hart* vs. *Jones*, K. B. 1834, 1 S. R. 589.

6 —— Loss and Damage.—Where the defendant in an action for freight claimed by incidental demand for loss and damage of the cargo during the voyage—*Held*, confirming the judgment of the court below, that the burden of proof was upon the carrier to show that the loss or damage had been occasioned by the perils of navigation, in order to claim exemption from liability therefor. *Gaherty* vs. *Torrance*, S. C. 1860, 4 L. C. J. 371 and Q. B. 1862, 6 L. C. J. 313, 13 L. C. R. 401.

7. Denial of Jurisdiction.—Where the defendant is sued in a jurisdiction within which he comes solely by virtue of a particular fact alleged in the declaration (*e. g.*, that goods were sold and delivered to him in the district

wherein the action is brought), and the defendant by declinatory exception denies such fact, the proof of the fact rests upon the plaintiff. *Shaw* vs. *Cartier*, C. R. 1886, M. L. R., 2 S. C. 282.

8. **Bank Deposit.— Signature of Cheque.**—Action by a depositor against the bank for a balance of deposit. Plea, that the balance sued for had been withdrawn by cheque of plaintiff. Plaintiff denied the cheque which was filed—*Held*, reversing court below (2 L. N. 124), that the burden of proof was on the bank to show that he had signed it. *Clarke* vs. *Exchange Bank*, Q. B. 1880, 3 L. N. 45.

9. **Declinatory Exception —Sale.**— In this case, the action being inscribed upon a declinatory exception, the burden of proof is upon the plaintiff, because the contract of sale alleged in the action is denied by the exception. *Shaw* vs. *Cartier*, C. R. 1886, 31 L. C. J. 12, M. L. R., 2 S. C. 282.

10. **False Arrest.**—In an action of damages for false arrest, the plaintiff is only bound to prove the information laid against him, his arrest and release from custody. The burden is upon the defendant to produce evidence which will clear himself of responsibility for the arrest. *Brissette* vs. *Boucher*, C. Ct. 1887, 31 L. C. J. 104. See remarks of Taschereau, J., in *Larocque* vs. *Willet*, Q. B. 1874, 23 L. C. J. at p. 187. And see No. 20 *infra*.

11. —— **Contra.**—*Peloquin* vs. *Workman*, 2 L. N. 268; *Labelle* vs. *Martin*, C. R. 1885, 30 L. C. J. 292; *Lajeunesse* vs. *O'Brien*, 5 R. L. 242; *Poulin* vs. *Ansell*, S. C. 1874, 5 R. L. 251; *Lefebvre* vs. *Beauharnois Steam Nav. Co.*, 2 L. N. 269.

12. **Fraud in obtaining Consent.**—Where an action to set aside an inventory and partition is brought by a member of the family who formally consented thereto, the burden of proof is on the plaintiff to show that his or her consent was improperly obtained; and parol evidence is admissible on the part of the defendant to repel the verbal proof of fraud adduced by the plaintiff. *Charlebois* vs. *Charlebois*, Q. B. 1882, 26 L. C. J. 364.

13. **Guardian —Value of Goods Missing.**—When a guardian, in answer to a rule for coercive imprisonment, pleads that the property is only worth a particular amount, the *onus probandi* falls on him. *Leverson* vs. *Boston*, Q. B. 1858, 2 L. C. J. 297.

14. —— —— Where a guardian was allowed, under a rule for coercive imprisonment, to pay the value of the things which he had failed to produce rather than the amount of the debt—*Held*, that the burden of proving such value rested with him. *Higgins* vs. *Robillard*, Q. B. 1861, 12 L. C. R. 3.

15. **Insolvent —Transfer.**—In an action by an assignee to set aside the transfer by the insolvent—*Held*, that the burden of proof was on the insolvent to show his good faith, and that the transaction complained of was in the usual course of dealing. *Webster* vs. *Footner*, Q. B. 1845, 1 Rev. de Lég. 40.

16. **Negligence.**—On review of a judgment dismissing an action of damages for injury to a horse by collision on a railway—*Held*, that the burden of proof both to show neglect on the part of the defendants, and proper care on the part of the plaintiff himself, was on the plaintiff. *Moffette* vs. *The Grand Trunk Railway Co. of Canada*, C. R. 1866, 16 L. C. R. 231.

17. **Opposition.** — Where an opposant claimed by opposition out of the proceeds of a farm sold by the sheriff the amount of a legacy left him by the testator, who had owned the property, and the opposition was contested on the ground that the opposant had never lived in this country, and that she was dead before the death of the testator—*Held*, reversing the judgment of the court below (10 L. C. R. 79), that the *onus probandi* of the death of the opposant lay on the contesting party who had alleged it. *Bonacina* vs. *McIntosh*, Q. B. 1861, 11 L. C. R. 327.

18. —— The general rule by which the burden of proof is on the opposant, as plaintiff, suffers no exception, even when the opposition simply negatives the allegations of the affidavit on which an execution issued (under C. C. P. 551) before the expiration of fifteen days after judgment. *Boudrean* vs. *Lanctot*, C. R. 1868, 12 L. C. J. 345.

19. **Powers of Corporate Officers to Sign Note.**—As the promissory note sued upon purported to have been signed by the manager and the president of the company defendant, it was incumbent upon the plaintiff, under the general issue, to prove that these persons were duly authorized to make the note, especially in view of the provisions of the act of incorporation of the company with respect to such notes. *Delany* vs. *St. Lawrence S. N. Company*, C. R. 1882, 8 Q. L. R. 92.

20. **Probable Cause.**—In an action of damages for the issuing of a search warrant

without probable cause—*Held*, that the allegation of the absence of any probable cause would entitle the plaintiff to a judgment, unless the defendant proved that probable cause existed. *Mimandre* vs. *Allard*, C. Ct. 1863, 14 L. C. R. 154.

21. —— Insolvent Act 1875, Sec. 5.—Where the demand of assignment has been wrongfully made on a debtor, the burden of proof is upon him to show want of probable cause. *Senecal* vs. *Beauchemin*, S. C. 1874, 6 R. L. 71.

22. Promissory Note — Consideration.—Where a note was obtained by fraud, and handed to a third party who discounted it at a bank, the latter having knowledge of the fraud which was a matter of public notoriety, it was incumbent on the bank to prove that their transferer gave consideration for the note. *Exchange Bank* vs. *Carle*, Q. B. 1887, 31 L. C. J. 90, M. L. R., 3 Q. B. 61.

23. Robbery.—Where goods had been deposited with a regular warehouseman, and some of them were found to be missing when demanded, and, to an action brought, he pleaded that the missing goods must have been stolen, as his store had been broken into during the time that the goods were in his possession—*Held*, confirming the judgment of the court below, that, in order to free himself from liability, he was bound to establish the robbery. *Frazer* vs. *Roche*, S. C. 7 L. C. R. 472, Q. B. 1858, 8 L. C. R. 288, 5 R. J. R. Q. 342.

24. Slander—Prescription.—In an action for slander where plaintiff, in answer to plea of prescription of a year, pleads that the slanderous expressions did not come to her knowledge until within a year and a day before the commencement of such action, the burden of proof is on the plaintiff. *Ferguson* vs. *Gilmour*, Q. B. 1857, 1 L. C. J. 131.

25. Special Answer to Plea of Compensation.—Where to a demand for money lent, the defendant pleaded compensation by a *bon* given to him by the plaintiff, which *bon* was in these terms:—"Good to W. L. "Forsyth (defendant) for $500, balance of the "payment of $1,000 purchase price of 2-12ths "of Anticosti, not transferable," and the plaintiff answered specially that the *bon* was not given to the defendant personally, but in his capacity of manager of the Anticosti Company, that the burden of proof was on the plaintiff to prove the truth of the special answer. *Bury* vs. *Forsyth*, C. R. 1887, M. L. R., 3 S. C. 359.

26. Tenant —Fire.—The *onus probandi* is on the tenant to prove that the fire was not the result of negligence on the part of himself or his servants when the premises are burnt whilst in his occupation. *Alis* vs. *Foster*, C. R. 1869, 15 L. C. J. 13. Reversed in appeal (*Foster* vs. *Alis*, Q. B., 16 L. C. J. 113) because defendant was only part occupier. Remainder of premises occupied by proprietor.

VI. BY.

1. Almanac.—See 4 L. N. 317.

2. Affidavit taken in Foreign Country.—An affidavit sworn to before the chief magistrate of a town in Scotland is lawful evidence in this province, under the statute 5 Geo. II, cap. 7, if it be, in other respects, according to that statute. *Dennistoun* vs. *Wilson*, K. B. 1821, 2 Rev. de Lég. 335.

3. Commission.—Evidence taken before the Lord Mayor of London by commission is admissible in proof of goods sold in London, under the statute 5 Geo. III, cap. 7. *Sawyer* vs. *Newton*, 2 Rev. de Lég. 75, K. B. 1820.

4. Copy of Deed.—A copy taken from the registered copy of a deed of donation is not evidence. *Beaudet* vs. *Beaudet*, 2 Rev. de Lég. 279, K. B. 1810.

5. Copy of Registration.—Nor does a certified copy by a registrar of an authent. deed, registered at length, make proof. *Dessein* vs. *Ross*, 2 Rev. de Lég. 58, K. B. 1844.

6. Certificate of Prothonotary.—Not sufficient proof of execution of deed of composition between the insolvent and his creditors. *Osborne* vs. *Paquette*, C. R. 1881, 4 L. N. 50.

7. Entries in Merchant's Books.—The entries in a merchant's books make complete proof against him. *Darling* vs. *Brown*, Supreme Ct. 1877, 1 Can. S. C. R. 360, 21 L. C. J. 169.

8. Interrogatories pro confessis.—The plaintiff claimed $5,000 damages for verbal slander. The defendant was a foreigner, and during the pendency of the case left the province. The only proof the plaintiff had then of this case was by serving interrogatories, and having them taken *pro confessis*. Case proved but not entitled to so much favor as if proved otherwise. Damages $11 and costs. *Fortin* vs. *Say*, S. C. 1880, 3 L. N. 331.

9. Pass-Book.—*Held*—That on assumpsit for the price of goods sold and delivered where the plaintiff produces a pass-book containing the items of the account, and proves that a duplicate pass-book was furnished to defendant, which, however, the defendant fails to produce, and the defendant admits the fact of supplies having been furnished to him by plaintiff, the court will generally hold the pass-book produced exact, notwithstanding verbal evidence attacking it. It will be otherwise if the defendant denies the existence of the transactions. Under the circumstances of the case the judge exercised a wise discretion in tendering the *serment supplétoire* to the plaintiff. *Gaudry* vs. *Judah*, C. R. 1885, 29 L. C. J. 282; M. L. R., 1 S. C. 473.

10. Proceedings in Criminal Prosecution.—The clerk of the Police Court being called as a witness in a civil suit was asked to state the contents of a criminal information. Objected to on the ground that the prosecution in question was not terminated, and cited 32-33 Vic., cap. 30, sec. 58. Objection overruled. *Kennedy* vs. *O'Meara*, S. C. 1884, 7 L. N. 407; M. L. R., 1 S. C. 143.

11. Protest against Contractors.—In an action against the corporation of Montreal for damages caused by negligence in the performance of works which they are authorized by law to make, declarations made by them in protests against their contractors will be taken as evidence against them. *Harold* vs. *The Mayor, etc., of Montreal*, Q. B. 1867, 11 L. C. J. 169.

12. Receipt.—A receipt in full given by a clerk, duly empowered to give receipts for money which he receives, is not conclusive evidence. *Munroe* vs. *Higgins*, 2 Rev. de Lég. 279, K. B. 1810.

13. —— In an action for money paid, receipts dated after the service of the summons are not evidence of the demand. *Robichaud* vs. *Fraser*, 2 Rev. de Lég. 279, K. B. 1817.

14. Registrar's Certificate.—A certificate of registration, with an indorsement which refers to a bill of sale, is not evidence of property in the indorsee. *Provost* vs. *Faribault*, 2 Rev. de Lég. 333, K. B. 1818.

15. Will.—Probate of a will is evidence to prove a debt, admitted in the will to be due. *Hupé* vs. *Dionne*, 2 Rev. de Leg. 332, K. B. 1817.

VII. COMMENCEMENT OF PROOF IN WRITING.

1. Commencement of proof in writing is, in its widest meaning, a writing which, without making complete proof of the fact to be established, renders its existence probable. It is a presumption which, while not legal, is left to the discretion of the court or judge. (C. C. 1242.) *Auclil* vs. *Dechêne*, C. R. 1872, 6 Q. L. R. 317, 318.

2. A document, to avail as a commencement of proof in writing, must be the best evidence obtainable of its kind, and will not give rise to the necessary presumption, where the existence, in the hands of the party, of other more direct and better written evidence is made to appear, no cause being shown for its non-production. *Gilchrist* vs. *Lachaud*, S. C. 1888, 14 Q. L. R. 278; confirmed in Review 1888, 14 Q. L. R. 366.

3. The testimony of the plaintiff's *auteur*, admitting that he had sold a portion of a lot of land to the defendant, will not be taken as a commencement of written proof, entitling the defendant to produce verbal evidence of ownership. *Lecompte* vs. *Laflamme*, C. R. 1883, 9 Q. L. R. 140.

4. The evidence of a person who has ceased to be agent is inadmissible to serve as a commencement of proof against his principal, to contradict the terms of a contract of loan made during the existence of the agency. *Knox* vs. *Boivin*, S. C. 1893, 4 Que. 311.

5. But the production of a cheque signed by the agent, payable to the order of a third party, showing that the amount of the loan, after deducting charges, was paid to said third party, is evidence in writing that the lender placed the money in the hands of such third party, and that it was not paid direct to the borrower as represented in the deed of loan. (*Ib.*)

6. In the present case there was not a sufficient commencement of proof in writing of a loan even by dividing the admission, and, even were the evidence produced admissible, it does not establish the loan. *Fournier* vs. *Morin*, Q. B. 1885, 11 Q. L. R. 98.

7. In an action upon an obligation—*Held*, that a receipt was a sufficient commencement of proof in writing to let in parol evidence. *Lavoie* vs. *Gagnon*, Q. B. 1865, 1 L. C. L. J. 35.

8. In an action of damages for inexecution of a promise of sale by the real owner of cer-

tain property, the apparent title being in another person; the admission of the defendant (the real proprietor) that he had accepted plaintiff's proposition to buy on condition that the apparent owner consented, does not constitute a commencement of proof in writing of the contract of promise of sale. *Coulombe* vs. *Boulanger*, S. C. 1888, 15 Q. L. R. 268. Unanimously confirmed in Review, 30 May, 1888; and see *Anctil* vs. *Déchêne*, C. R. 1872, 6 Q. L. R. 317.

9. It is entirely in the discretion of the court to appreciate whether the deposition of a witness in a case is sufficient to be invoked as a commencement of proof in writing, and the Court of Review will not interfere with such discretion. *Kay* vs. *Gibeau*, S. C. 1888, 16 R. L. 411.

10. Where a writing evidencing a sale is dated elsewhere than where the writing was drawn up and signed, it is a sufficient commencement of proof in writing to allow of parol testimony showing where the sale evidenced by the writing took place. *Riopelle* vs. *Fleury*, S. C. 1883, 12 R. L. 85.

11. Where a writing signed by a creditor states that it is the intention of such creditor to release the debtor of his debt for reasons known to him, parol testimony of the release of the debt is admissible, such a writing constituting a commencement of proof in writing. *Voligny* vs. *Palardy*, 1888, M. L. R., 4 S. C. 108.

12. A memorandum of a sale made at the request of the defendant, though not signed by him, will be a sufficient commencement of proof in writing to admit parol evidence on an action to execute a deed. *Bernard* vs. *Boutin*, Q. B. Que., 1874, 7 Sept.

13. Where a party by a letter refuses to receive delivery of goods, giving as pretext the failure to conform to the conditions of the contract, such letter furnishes a commencement of proof in writing, and enables plaintiff to establish his case by parol. *Lamont* vs. *Ronayne*, Q. B. Montreal, 15 Sept., 1874.

14. A writing issuing from the representative of the party—in this case of the notary who received interest due on an obligation on behalf of such party—can serve as a commencement of proof in writing against the said party, where the writing was made in execution of the mandate entrusted to the mandatory. *Watters* vs. *Cassidy*, Q. B. 1894, 3 Que. 270.

15. Such a commencement of proof in writing will serve not only against the party himself, but against his successor even by particular title, for instance against the person to whom such party has transferred the rights which his successor invokes. (*Ib.*)

16. In this particular case, a sale with right of redemption within a certain time, the court accepted as a commencement of proof in writing of the extension of the time for redemption, receipts for interest paid to sustain the right of redemption given by the agent of the creditor who purchased the immoveable, such receipts being given after the delay stipulated for the exercise of the right of redemption. (*Ib.*)

17. Must be some written evidence which lends probability to that which is sought to be proved by oral evidence. *Price* vs. *Neault*, P. C. 1885, 12 App. Cas. 110.

18. In an action upon an obligation—*Held*, that a receipt was a sufficient commencement of proof in writing to let in parol evidence. *Lavoie* vs. *Gagnon*, Q. B. 1865, 1 L. C. L. J. 35.

19. An admission on interrogatories that the defendant was indebted to the plaintiff, not for money lent, as demanded, but for a balance due for land sold by a notarial act or deed, was *held* to be a commencement of proof in writing so as to admit the plaintiff to prove that the act or deed had been settled and receipted, and the amount claimed had been loaned to defendant. *Blais* vs. *Moreau*, K. B. 1818, 3 Rev. de Lég. 355.

20. The only point in this case was whether there was sufficient evidence in the defendant's admissions and letters to let in parol testimony. *Per Curiam*:— I have already intimated my opinion that the relation of vendor and vendee being once established, the evidence of C. and the other witnesses is to be looked at to see the terms of this contract, and whether it has been fulfilled or not, and whether the plaintiff has proved damages. *Baron* vs. *Coultry*, S. C. 1877.

21. The answer of a party examined on articulated facts cannot be divided so as to obtain a commencement of proof sufficient to let in parole evidence. *Christin* vs. *Valois*, Q. B. 1880, 3 L. N. 59, and *Sauré & Veronneau*, 3 L. N. 75, and 24 L. C. J. 308.

22. The possession of a moveable is a sufficient commencement of proof in writing to allow the possessor to explain the character of his possession by oral testimony. *Lefebvre* vs. *Bruneau*, S. C. 1870, 14 L. C. J. 268.

23. Where a party employing a notary to perform certain services writes to the notary (in doing so) that he understands another party has arranged with him as to his remuneration, and the notary, in reply, does not contradict this statement, the correspondence is a sufficient commencement of proof in writing to enable the party so employing the notary to prove that the latter agreed to look to the other party for his fees. *Thomas* vs. *Archambault*, Q. B. 1863, 9 L. C. J. 203.

24. Where an action is brought to recover the price of a horse sold and delivered, and the defendant, being examined, states that the horse was received by him on trial, even if the transaction be treated as a non-commercial case, this answer makes a commencement of proof in writing, and oral evidence is admissible on the part of the plaintiff to prove the sale. *Cox* vs. *Patton*, Q. B. 1874, 18 L. C. J. 316.

25. The admission or declaration of an agent binds his principal only when it is made during the continuance of the agency, in regard to a transaction then depending. The evidence of a person who has ceased to be agent is inadmissible to serve as a commencement of proof against his principal to contradict the terms of a contract of loan made during the existence of the agency. *Knox* vs. *Boivin*, S. C. 1893, 4 Que. 311.

26. Interrogatories on articulated facts taken *pro confessis* imply an admission, and, when sufficient, may supply the want of a memorandum in writing required by 1235 C. C. *Douglas* vs. *Ritchie*, Q. B. 1874, 18 L. C. J. 274; Contra *Charest* vs. *Murphy*, Q. B. 1894, 3 Que. 376.

27. In an action against the defendant for the value of carpets ordered by the defendant to be made according to directions then given, and which were made accordingly, but of which the defendant refused to take delivery or to pay for, and on action brought relied entirely upon the Statute of Frauds for want of evidence of any contract — *Held*, reversing the judgment of the Superior Court, that the admission of the defendant, either in his pleading or as a witness, or in answer to the interrogatories upon articulated facts, was equivalent to the note or memorandum in writing required by the Statute of Frauds, but that the judgment dismissing the action must be maintained on other grounds. *Baylis* vs. *Ryland*, C. R. 1864, 15 L. C. R. 94.

28. In an action for money lent, admissions by a defendant in his answers to interrogatories upon articulated facts that he received the amount for a debt due him, without, however, having specially pleaded such debt, are sufficient commencement of proof in writing to justify the introduction of parol evidence. *Ford* vs. *Butler*, S. C. 1862, 6 L. C. J. 132.

29. When defendant is sued in execution of an agreement claimed to be made with him, and makes admissions which render probable such agreement, which he denies, parol evidence of such agreement will be allowed. *Rocheleau* vs. *Grisé*, S. C. 1890, 21 R. L. 177.

VIII. CORRECTION OF, AFTER JUDGMENT.

A mistake made by a witness in his deposition taken by a stenographer, cannot be corrected after judgment has been rendered in the case, although the stenographer's notes had not been transcribed before the judgment was rendered. *Collins* vs. *Atlantic & N. W. Ry. Co.*, S. C. 1890, 34 L. C. J. 202.

IX. DEPOSITION.

1. By Stenography.—Where depositions are taken by a short-hand writer without a written consent, but both parties have participated without objection, they will be bound by them. *Ross* v. *McGillivray*, S. C. 1877, 1 L. N. 76.

2. Of Witness in former Suit—Copies of the depositions of witnesses examined in another cause may be filed in a cause pending at *enquête*, for the purpose of discrediting a witness examined therein. *O'Connor* vs. *Brown*, S. C. 1866, 12 L. C. J. 28.

3. Omissions in.—The omission of the usual words "*y persiste*" at the end of a deposition is not fatal. *Carden* vs. *Finley*, S. C. 1859, 3 L. C. J. 232.

4. —— The omission of the age of the witness is not a cause of nullity in his deposition. *Barsalo* vs. *Massicotte*, C. R. 1873, 5 R. L. 526.

5. Marginal Notes.—Marginal notes in a deposition which are initialed but not noted in the jurat are not null, but a deposition which omits to state that the witness is not related, allied or of kin to any of the parties in the cause, or to state the degree of his relationship, is a nullity. *Lauzon* vs. *Stuart*, S. C. 1860, 4 L. C. J. 126.

X. DIVISIBILITY.

1. Account Books.—Where the sole evidence offered against the heirs of a merchant consists in the production of the latter's books, those who invoke them cannot divide their contents by producing what is favorable to them and rejecting what is unfavorable. *Bilodeau* vs. *Lemieux*, C. R. 1887, 13 Q. L. R. 181. Confirmed in appeal 4 Feb., 1888.

2. —— And this doctrine of the indivisibility of an account produced was laid down in *Paré* vs. *Paré*, Q. B. 1893, 2 Que. 489, reversing the decision of the Court of Review.

3. —— The Supreme Court reversed the decision of the Court of Queen's Bench, 1894, 23 Can. S. C. R. 243, on other grounds

4. Commencement of Proof—Oath.—The evidence of a witness cannot be divided so as to obtain a commencement of proof, which would authorize the putting of the oath to the adverse party. *Richard* vs. *Brossit*, C. Ct. 1871, 2 R. L. 605.

XI. DOUBTFUL.

The evidence of the vendor of a thing revendicated, tending to establish his right of property, and in consequence the legality of the sale, should always be received with caution. *Leblanc* vs. *Rasconi*, Mag. Ct. 1873, 4 R. L. 596.

XII. ENGLISH RULES OF.

1. The English rule of evidence, requiring notice to produce an original document, in the hands of the adverse party, does not obtain in a case instituted to rescind a deed of assignment of hereditary rights, and a copy of such document can be proved, when the articulation of facts indicates that it is the intention of the party producing the same to prove it to be a true copy. *Herriman* vs. *Taylor*, Q. B. 1865, 9 L. C. J. 253.

2. Even if the English rule, as above, did prevail, the failure to object to the evidence on that ground at *enquete* would be fatal. (*Ib.*)

3. English rules of evidence are applicable in an action on a contract for building a house and furnishing materials. *McGrath* vs. *Lloyd*, S. C. 1856, 1 L. C. J. 17.

XIII. EXAMINATION OF WITNESSES.

When the plaintiff has closed his *enquête*, he cannot cross-examine the defendant's witnesses in such a way as to endeavor to make proof of facts which he has an interest in establishing, unless such cross-examination arise fairly from the examination in chief. *Morrison* vs. *Delorimier*, S. C. 1870, 16 L. C. J. 137.

XIV. EXCLUSION.

The exclusion of the testimony of a witness, on the ground that he violated an order of the court made at the commencement of the *enquête*, ordering all the witnesses out of court during such *enquête*, is illegal. *Irvin* vs. *Maloney*, Q. B. 1862, 6 L. C. J. 285.

XV. EXPERT.

Valuation—Phosphate Mine—Partnership Account.—In order to determine, for the winding up of a partnership, the fair cash value of an asset of indefinite value, such as a phosphate mine, the court will have regard to the estimate set upon it by persons experienced in the purchase and sale of mines, rather than to the opinion of witnesses who assign a speculative value to the property; and the fact that the mine could not be worked at a profit may also be properly taken into consideration. *Jones* vs. *Powell*, 1885, M. L. R., 1 Q. B. 499.

XVI. HEARSAY.

1. On a trial for murder by poisoning—*Held*, that the statements made by the deceased concerning her sufferings, while labouring under disease and in pain, were not necessarily hearsay evidence, and might be admitted as original. *Regina* vs. *Bernhe*, Q. B. 1852, 3 L. C. R. 212, 4 R. J. R. Q. 10.

2. An apprentice having died since the institution of the action, and there being no other living witness of the fact, the statement made by him to his master, the defendant, in explanation of what had happened, is admissible as evidence, when coming from the lips of the defendant himself. *Lyons* vs. *Lasley*, 1889, M. L. R., 5 Q. B. 5.

XVII. IN.

1. Actions exparte.—In an action founded upon a detailed account, the court cannot give judgment in favor of the plaintiff without any other evidence than that of the plaintiff himself. *Plante* vs. *Carrier*, S. C. 1879, 5 Q. L. R. 351.

2. Action en complainte.—Possession for a year and a day, antecedent to the day on which the action was commenced, must be

proved in an action *en complainte*. *Jourdain* vs. *Vigoreux*, K. B. 1809, 2 Rev. de Lég. 278, and *Morin, fils*, vs. *Palsgrave*, C. R. 1865, 1 L. C. L. J. 95, Q. B., 2 L. C. L. J. 111.

3. —— In an action *en complainte* for trespass on a fishery on the bank of the St. Lawrence, possession by title arising from the Crown must be proved. *Morin* vs. *Lefebvre*, K. B. 1816, 1 Rev. de Lég. 351.

4. Action for Breach of Promise of Marriage.—An action for breach of promise of marriage requires a commencement of proof in writing. *Asselin* vs. *Belleau*, Q. B. 1845, 1 Rev. de Lég. 46.

5. Action of Damages.—In an action for damages done to the plaintiff's property, it is sufficient to prove a constructive possession in the plaintiff. *Hunter* vs. *Ovitt*, K. B. 1811, 2 Rev. de Lég. 280.

6. Action of Slander.—In an action for slander every fact that rebuts the inference of malice may be proved by the defendant on the *défense en fait*. *Dupont* vs. *St. Pierre*, K. B. 1819, 1 Rev. de Lég. 503.

7. —— Proof of rumors current in the plaintiff's neighbourhood, before the uttering of slanderous words imputed to plaintiff, may be made in mitigation under the general issue. *Fournier* vs. *Noreau alias Noro*, S. C. 1868, 12 L. C. J. 342.

8. Action to account.—In an action to account, if the defendant does not render an account, the plaintiff must proceed to give evidence of the sum for which the defendant was responsible, or move for an attachment against the defendant for contempt. *Wilson* vs. *McClure*, K. B. 1809, 2 Rev. de Lég. 278.

9. Appeal.—Where evidence is conflicting, the Court of Appeals will not disturb the judgment appealed from unless it be clearly wrong. *Foley* vs. *Crusy*, Q. B. Montreal, 19 Nov., 1884; *Shortis* vs. *Martel*, Q. B. Que., 7 Dec., 1880; *Battis* vs. *Beatty*, Q. B. 1880, 3 March, 1880.

10. Criminal Cases.—The evidence required by C. S. C., cap. 94, sec. 26, to corroborate the evidence of an interested witness, cannot be based upon something stated by such witness. *Regina* vs. *Perry*, Q. B. 1865, 1 L. C. L. J. 60.

11. Commercial Matters. (See "Parol.")—Dealings which were cognizable in the consular jurisdiction of France are facts concerning commercial matters within the meaning of the ordinance, 25 Geo. III., cap. 2, sec. 10. *Pozer* vs. *Meiklejohn*, K. B. 1809, 2 Rev. de Lég. 77.

12. —— Hiring river craft is also a fact of a commercial nature within the meaning of the same ordinance. *Bréhaut* vs. *Méran*, K. B. 1811, 2 Rev. de Lég. 78.

13. Hypothecary Action.—In the hypothecary action the plaintiff must prove his mortgage debt, and prove the identity of the land possessed by defendant with the land mortgaged. *Beaubien* vs. *Sirois*, K. B. 1817, 2 Rev. de Lég. 279.

14. Improbation.—On an inscription *en faux* the witnesses to a forged deed, and also witnesses who were related to the parties, may be examined. *Paquet* vs. *Demers*, K. B. 1810, 2 Rev. de Lég. 279, 3 Rev. de Lég. 198.

15. —— *Held*, confirming the judgment of the court below, that the testimony of the notaries before whom a deed has been executed, to the effect that essential formalities which on the face of the deed appeared to have been observed were not really observed, if alone and uncorroborated, is insufficient to establish that the deed was *faux*. *Larochelle* vs. *Proulx*, Q. B. '75, 1 Q. R. L. 142.

16. —— Improbation is merely a special and more formal mode of taking evidence in a case. The proceedings in improbation therefore are merely part of the principal action, and likewise the evidence taken in such proceedings, which is the same as if it were taken in the course of the regular hearing of the case. *Cedar Shingle Co.* vs. *Cie. d'Assurance*, Q. B. 1893, 2 Que. 379, 381.

17. Maritime Cases.—Where damage occasioned by the misconduct of a pilot was set up against the demand of the latter for his services—*Held*, that the master could be admitted as a witness. *The Sophia in re*, S. V. A. C. 96, V. A. C., & *The Lord John Russell in re*, S. V. A. C. 190, V. A. C. 1838.

18. —— In a case for wages the supplementary oath was ordered to be administered to the promoters. *The Josepha in re*, S. V. A. C. 212, V. A. C. 1838.

19. —— In cases of collision, more credit is to be attached to the evidence of the crew of the ship which is on the alert than that of the crew of the ship which is at rest. *The Dalhia in re*, S. V. A. C. 212, V. A. C. 1841.

20. —— And in cases of collision arising from neglect or unskilfulness in the management of the ship causing the injury, the

pilot is a competent witness for such ship. *The Courier in re*, 2 S. V. A. C. 91.

21. In Rebuttal.—The testimony of the attending physician touching the incapacity of a person to contract marriage, corroborated by the consulting physician called in the day after the marriage and the day preceding the decease of such person, may be rebutted by the testimony of the notary, the priest and a witness present at the celebration of the marriage and the execution of the marriage contract. *Scott* vs. *Paquet*, Q. B. 1857, 4 L. C. J. 149.

22. —— Evidence adduced by plaintiff in rebuttal, tending merely to confirm and strengthen their original case, is inadmissible, and will be rejected. *Morland* vs. *Torrance*, S. C. 1869, 13 L. C. J. 197.

23. —— When the plaintiff in his case in chief has adduced evidence to repel the case of the defendant as disclosed in his plea, he cannot adduce evidence of the same kind in rebuttal. *Matthews* vs. *Northern Assurance Co.*, S. C., 16 L. C. J. 82.

24. —— The evidence of witnesses about to leave the Province, taken *de bene esse* in the form of deposition, may be read to the jury as evidence in rebuttal, although on the face of the depositions it is not stated whether the evidence was taken in chief or in rebuttal. *Butters* vs. *Allan*, C. R. 1875, 20 L. C. J. 137.

25. Sur Rebuttal.—The testimony of a witness in sur-rebuttal may be attacked by counter evidence to show that such witness was inimical to plaintiff, and was not to be believed on oath. *Payette* vs. *Cousineau*, S. C. 1873, 17 L. C. J. 287.

26. —— Evidence tending to show that the defendants were not guilty of negligence as pleaded by them cannot legally be offered in sur-rebuttal. *Butters* vs. *Allan*, C. R. 1875, 20 L. C. J. 137.

XVIII. IRRELEVANT.

In an action of damages for illegal arrest—*Held*, that the plaintiff could not adduce evidence of the pecuniary circumstances of the defendant, in order to enable the court to judge of the defendant's ability to pay damages. *Jordeson* vs. *McAdam*, S. C. 1863, 13 L. C. R. 229.

XIX. JUDICIAL NOTICE.

1. The court is bound *ex officio* to notice the appointment of one of its own officers to be a judge in another district. *Fay* vs. *Miville*, K. B. 1816, 2 Rev. de Lég. 333.

2. And where a barrister is appointed to the bench, the court will notice his appointment *ex mero motu*. *Tremaine* vs. *Tonnancour*, K. B. 1818, 2 Rev. de Lég. 471.

3. The courts of the Province of Quebec are not bound to acknowledge judicially the statutes of the other Provinces. *Giles* vs. *Gariepy*, S. C. 1885, 29 L. C. J. 207.

4. The court will take notice of the removal of the Attorney-General *pro Regina*, as published in the Quebec *Official Gazette*. *Simms* vs. *Quebec, &c., R. W. Co.*, S. C. 1878, 22 L. C. J. 20.

5. Superior Court judges are bound to take judicial notice of the locations of Commissioners' courts, these being published in an official paper, the Quebec *Official Gazette*. *Ex parte Dubois*, S. C. 1875, 7 R. L. 430.

6. The court will take judicial notice of the putting into force of registration cadastres by proclamation of the Lieutenant Governor in Council. *Theberge* vs. *Danjou*, S. R. 1886, 12 Q. L. R. 1.

XX. MEMORANDUM IN WRITING.

Interrogatories taken *pro confessis*, when they furnish sufficient commencement of proof in writing, may supply the want of the memorandum in writing required by Article 1235 of our Civil Code. *Douglas* vs. *Ritchie*, Q. B., Montreal, 20 June, 1874, 18 L. C. J. 274. Contra *Charest* vs. *Murphy*, Q. B. 1894, 3 Que. 376.

XXI. OATH.

1. Decisory.—Where the defendant after demand of plea moved to dismiss the action for want of particulars, and the plaintiff immediately afterwards moved to defer his claim to the decisory oath of the defendant—*Held*, reversing the judgment of the court below and granting the plaintiff's motion. *Lenfesty* vs. *Metivier*, Q. B. 1860, 10 L. C. R 199.

2. —— A decisory oath cannot be withdrawn when the party to whom it is referred accepts the reference, and declares himself ready to answer. *O'Farrell* vs. *O'Neil*, S. C. 1867, 17 L. C. R. 80.

3. —— Where the decisory oath is put to a party who cannot take it by reason of his being paralyzed, the judge will refuse its delation. *MacDougall* vs. *Roy*, S. C. 1887, 15 R. L. 406.

4. —— Where a merchant proves that a person has been in the habit of buying from

him regularly, and proves also that he has furnished a large number of articles set forth in an account rendered, and that his principal clerk at the time the things were sold had since left the country, and that some of the articles mentioned in the account were used by the customer referred to or his family, he has established a sufficient presumption in his favor to admit him to the decisory oath, where the defendant's principal plea is that he had forbidden the plaintiff to give credit to any member of his family. *Bonner* vs. *Bonner*, C. Ct. 1871, 3 R. L. 35.

5. Of Agent.—Where the defendant had given authority to another to buy for him a quantity of brandy, and he admitted the authority so given, and proof had been made of the delivery of the goods to a carrier—*Held*, that the vendor should be permitted to prove by the oath of the agent the quantity of brandy so sold and delivered. *Boyer* vs. *Beaupre*, C. Ct., 1871, 3 R. L. 31.

6. Of Employer.—Action for wages by a servant. The defendant proved by his own oath the terms of the agreement; and the payment of wages due to the plaintiff—*Held*, that the oath of the defendant was equivalent in such case to the decisory oath, and could not be contradicted by witnesses. *Dorval* vs. *Boucher*, S. C. 1879, 6 Q. L. R. 196.

7. Supplementary.—In an action against a husband separate as to property from his wife, defendant pleaded that he should have been credited with a payment of $90 which he had made, but which had been credited to an account of his wife's previous to her marriage. There being no evidence but that of the defendant himself as to the particulars of this payment, the supplementary oath was deferred to the plaintiff. *Oakes* vs. *Clements*, S. C. 1879, 2 L. N. 271.

8. —— Action for $243.31, goods sold and delivered. Plea, confession of judgment for $225, and judgment according to plea. Plaintiff inscribed in Review, and the Court of Review tendered the *serment suppletoire* to him upon his declaration that the whole amount was due, and rendered judgment for the amount asked for with full costs—*Held*, that the supplementary oath was wrongly deferred, and the judgment of first court restored with costs against plaintiff. *Daly* vs. *Cherrier*, Q. B. 1882, 4 L. N. 82, and 1 Dorion's Q. B. R. 293.

9. —— On the contestation of an opposition to the seizure and sale of household furniture, bought by the wife of the defendant, the opposant brought evidence of her ownership of all the things seized, with the exception of three or four articles. Concerning these the official oath (*serment judiciaire*) was submitted by the court, and the contestants appealed on the ground that as there was no proof concerning these things on which to base the official oath, that it was improperly taken—*Held*, that the oath was properly submitted, and judgment confirmed. *May* vs. *L'Heureux*, Q. B. 1880, 3 L. N. 110.

10. —— Where there is absolute proof of injuries resulting from a chemical explosion upon defendant's premises, and the only witness is dead, the supplementary oath may properly be administered to the plaintiff. *Lyons* vs. *Laskey*, 1889, M. L. R., 5 Q. B. 5; M. L. R., 4 S. C. 4.

11. —— The court cannot put the oath officially where no proof has been made of the demand or exception. *Begin* vs. *City of Montreal*, S. C. 1890, 20 R. L. 306.

XXII. OF.

1. Account.—In an action to recover the balance unpaid of an amount inserted in an agreement of composition as the amount of the creditor's claim, on failure of the debtor to pay such composition, the fact of such insertion with parol evidence to the effect that such amount had been admitted by the debtor to be due after examination of the items of account between him and his creditor, are sufficient, without furnishing the details of indebtedness. *Brown* vs. *Hartigan*, S. C. 1860, 5 L. C. J. 11.

2. —— In the case of a notarial obligation for £53 6s, for goods sold, if it appears by the books of the creditor that only £34 18s 9d were really due, the creditor will be condemned to grant a discharge of the obligation on satisfactory proof being made that the smaller amount was paid. *Lalonde* vs. *Rolland*, S. C. 1864, 10 L. C. J. 321.

3. —— In an action by a provincial land surveyor to recover an amount due him for fees as an expert, and for travelling expenses—*Held*, that, though a written promise to pay the amount sued on, acknowledged by the defendant, was the only evidence adduced, such written promise might be taken as part of the account, not of the whole. *Brady* vs. *Aitchison*, S. C. 1865, 1 L. C. L. J. 112.

4. Additional Claim by Builder.—In an action for an additional sum by a contractor on his contract, for extra work, proof of such extras is admissible under the ordinary rules

of evidence, and the exception contained in Art. 1690 C. C. is only applicable where the contract is at a fixed price and according to plans and specifications. *Corriveau* vs. *Roy*, C. R. 1888, 15 Q. L. R. 90.

5. Agent.—In an action on a note signed and discounted by an agent—*Held*, that statements made by the agent to an indorser for accommodation, in order to obtain his indorsation, were not evidence in a suit against the principal by the party who discounted the note. *Castle* vs. *Baby*, S. C. 1851, 4 R. J. R. Q. 459, 5 L. C. R. 411.

6. Attorneys and Solicitors.—In commercial cases, under the English rules of evidence, a solicitor in law may be a witness for a party for whom he has acted, and with regard to the matter in which he represents him. *Melançon* vs. *Beaupré*, S. C. 1874, 6 R. L. 509.

7. —— The evidence of the attorneys *ad litem* to be rejected whenever possible. *Molson* vs. *Carter*, Q. B. 1880, 3 L. N. 258.

8. —— The attorney of record, even in a non-commercial case, may be heard as a witness on behalf of his client, if parole evidence be admissible. *Dames Ursulines* vs. *Egan*, C. Ct. 1879, 6 Q. L. R. 38.

9. —— The evidence of an attorney *ad litem* in behalf of his client is admissible, but such testimony is repugnant to the discipline of the profession. *Waldron* vs. *White*, 1886, M. L. R., 3 Q. B. 375; *Larkin* vs. *Inglis*, Mag. Ct. 1887, 12 L. N. 211.

10. —— The attorney of record is only allowed to offer his testimony in favour of his client under exceptional circumstances; and the introduction of the evidence of the defendant's attorney as to a private conversation between himself and the plaintiff was under the circumstances improper, and such testimony would be rejected by the court. *Benning* vs. *Rielle*, 1890, M. L. R., 6 Q. B. 365, affirming M. L. R., 4 S. C. 219.

11. Bail having been entered.—Where the certificate of the prothonotary was admitted as evidence of special bail having been put in—*Held*, to have been no evidence at all, as the bail bond itself should have been produced. *Miller* vs. *Ferrier*, S. C. 1867, 3 L. C. L. J. 17.

12. Bailiff.—A bailiff who has acted in a case may be examined as a witness, provided that it is not to prove conversations or admissions made at the time of the service. *Garneau* vs. *Courchène*, C. Ct. 1879, 6 Q. L. R. 34.

13. —— In an action to recover the penalty for illegal sale of intoxicating liquors, the bailiff who served defendant's attorney with the inscription of the action is not incompetent as a witness relative to the sale of drinks by the defendant. *Rivard* vs. *Courtemanche*, C. Ct. 1881, 11 R. L. 103.

14. Bills and Notes.—An imperfect note of hand in an action by the payee against the maker may be evidence on the money counts, or on an *in simul computassent*. *Arnold* vs. *Farran*, K. B. 1871, 2 Rev. de Lég. 27.

15. —— A promissory note expressed "for value received" may with other testimony be received as evidence on an *in simul computassent* *Bellet* vs. *Dageny*, K. B. 1813, 2 Rev. de Lég. 28.

16. —— But a promissory note is not evidence on an *indebitatus assumpsit* for goods sold, and a *quantum meruit* thereon, if there are no other counts in the declaration. *Patterson* vs. *Stors*, K. B. 1813, 2 Rev. de Lég. 28.

17. —— In an action of *assumpsit* the plaintiff has a right to examine the defendant on the fact he signed a promissory note in his favour for money lent, although the note was prescribed before the action brought. *Bagg* vs. *Wurtele*, S. C. 1861, 6 L. C. J. 30.

18. —— A prescribed note cannot be admitted as proof of a loan. *Gibeau* vs. *Chef*, C. R. 1858, 14 L. C. J. 53.

19. Birth.—Where the date of a birth is in issue, parol proof may by adduced without first establishing the non-existence of a registered record of such birth. *Lane* vs. *Campbell*, Q. B. 1863, 8 L. C. J. 68.

20 —— An entry of a baptism in a non-authentic register, where mention is made of the date of the birth of the person baptized, signed by both parents, is only *primâ facie* proof of the birth at that date, and such date may be contradicted and disproved by oral testimony. *Sykes* vs. *Shaw*, Q. B. 1864, 9 L. C. J. 141.

21. —— An entry of baptism may be explained by parol testimony. *Poulin* vs. *Thibault*, K. B. 1871, 2 Rev. de Lég. 332.

22. —— Where an action was brought against a woman who pleaded that she was a minor —*Held*, that the production of the certificate of baptism, purporting to be signed by a parish priest in Ireland, was sufficient evidence of the baptism, and that insertion of the quality, occupation and place of abode of the father, required by the C. S. L. C., cap. 20,

sec. 5, was not required in such certificate *Feron* vs. *Donnelly*, C. Ct. 1883, 11 L. C. R. 50.

23. **Children.**—On a trial for murder by poisoning—*Held*, that a child, whatever may be his age, may be examined as a witness, if he can distinguish between good and evil. *Regina* vs. *Bernbé*, Q. B. 1852, 3 L. C. R. 212, 4 R. J. R. Q 10.

24. **Contract in Foreign Country.**—Evidence as to a contract executed in a foreign country will be regulated by the law of that country. *Wilson* vs. *Perry*, S. C. 1859, 4 L. C. J. 17.

25. **Co defendants.**—The evidences of co-defendants who have pleaded separately may be taken separately, the one for the other. *Borthwick* vs. *Bryant*, C. R. 1874, 5 R. L. 449; *Close* vs. *Dickson*, S. C. 1875, 4 R. L. 141 and 17 L. C. J. 59.

26. **Consorts.**—In an action of separation from bed and board the court or judge has discretionary power to admit the testimony of one or other of the parties, and such testimony should be admitted when the interests of justice require it. *Moore* vs. *Duclos*, 1886, M. L. R., 2 S. C. 254.

27. —— In an action of separation from bed and board, the consort defendant can examine as a witness the consort plaintiff with a view to extracting testimony contradicting the allegations of the action. *Hebert* vs. *Callaerts*, S. C. 1885, 14 R. L. 182.

28. —— **Separation from Bed and Board.**—The admission of the consort defendant, in an action of separation from bed and board, whether the admission be judicial or extra-judicial, is inadmissible in evidence. The prohibition contained in articles 186, 193 and 1231 of the Civil Code is absolute, and leaves the judge no discretion in the matter. *Smith* vs. *Wheeler*, 1884, M. L. R., 1 S. C. 80.

29. —— In such a case, an allegation of the declaration in these words "the whole as confessed and admitted by the defendant" may be rejected on motion. (*Ib.*)

30. —— The provision of Q. 35 Vict., c. 6, s. 9, cannot be interpreted to mean that a party may examine his own wife as a witness when she has had the administration of his property, but that he may examine the wife of the adverse party in such case. *Foisy* vs. *Lefebvre*, S. C. 1872, 4 R. L. 564; *Fourquin* vs. *McGreevy*, S. C. 1877, 9 R. L. 383; *Brush* vs. *Stephens*, S. C. 1873, 17 L. C. J. 110; *Lareau* vs. *Beaudry*, S. C. 1878, 22 L. C. J. 336.

31. —— Under 35 Vict. (Q.), ch. 6, sect. 9, the right to examine a consort as a witness is conferred upon the adverse party only, and the evidence of the husband of the transferor of a claim is inadmissible in an action by the transferee, on the part of the plaintiff. *Lajeunesse* vs. *Price*, 1886, M. L. R., 2 S. C. 241; *Thomson* vs. *Wescott*, S. C. 1873, Montreal (Beaudry J.).

32. —— The testimony of consorts for or against each other is inadmissible only in two cases: 1, where the status of the consorts might be affected or modified by the result of proceedings taken by one against the other, as in an action of separation from bed and board; 2, where the testimony is offered or sought in a case where the other consort is contending against a third party. But where one consort sues the other in a matter bearing the relations simply of debtor and creditor, no objections can arise as to the admissibility of the testimony of one against the other, provided there is no collusion between them. *Beaudry* vs. *Starnes*, C. R. 1892, 4 Que. 55.

33. —— A husband who is brought into a case merely for the purpose of authorizing his wife, is not a party in the case, so as to be examined under Art. 251 of the Code of Civil Procedure. *Ireland* vs. *Duchesnay*, Q. B. 1867, 11 L. C. J. 51, 2 L. C. L. J. 229; *Ontario Bank* vs. *Duchesnay*, S. C. 1860, 15 L. C. R. 463.

34. —— A wife cannot be examined on interrogatories, or as a witness against her husband, unless she be a party in the cause, and her rights are concerned. *Le Fort* vs. *Marie*, S. C. 1866, 16 L. C. R. 400.

35. Under the C. S. L. C., cap. 82, secs. 12 and 15, a defendant sued personally and as authorizing his wife, who is also a defendant, may be examined as a witness on behalf of the plaintiff. *Dillon* vs. *Harrison*, S. C. 1863, 14 L. C. R. 96.

36. —— The husband may be examined in a case in which the wife is plaintiff, where she declares in her deposition that it is he who manages her property. *Johnson* vs. *Martin*, S. C. 1874, 5 R. L. 336.

37. —— A consort separate as to property who is defendant in a case cannot act as witness for plaintiff upon a contestation of an opposition to withdraw made by the defendant's wife. *Brunelle* vs. *Bergeron*, Q. B. 1885, 14 R. L. 501.

38. —— Where a wife separated as to property from her husband carries on trade and

commerce through her husband, authorized as her agent to that effect, under power of attorney, the said husband may be examined as a witness against his wife. *Ireland* vs. *Maume*, S. C. 1864, 10 L. C. J. 28.

39. —— The wife of an insolvent cannot be legally examined touching his estate, although sub-sec. 4 of sec. 10 of the Insolvent Act of 1864 authorizes the examination of any person upon oath respecting the estate of the insolvent. *In Re John Feron*, S. C. 1865, 10 L. C. J. 111.

40. Death.—An affidavit of the death of a person out of L. C., purporting to be sworn before a foreign notary public, does not make proof of its contents. *Quin* vs. *Dumas*, Q. B. 1874, 23 L. C. J. 182.

41. Verdict of Coroner's Jury.—The verdict of a coroner's jury produced in a civil suit makes proof, as against the party producing it, of the death of the person on whose remains the inquest was held, but not of the circumstances attending it. *Busby* vs. *Ford*, C. R. 1893, 3 Que. 270.

42. Date of Private Writing — Art. 1226 C. C.—A private writing setting forth a sale of merchandise and promise to pay therefor, is a writing of a commercial nature, and is presumed to have been made on the day the instrument was dated. *Desautels* vs. *Desautels*, C. R. 1892, 1 Que. 261.

43. Date of posting Letter.—Evidence of the working of a system of stamps will not be sufficient to counter-balance positive and consistent evidence as to a particular fact, so where a notary in the regular course of business ought to post a notice of protest on the 10th, and the post office stamp indicates that it was only posted on the 11th, and the notary swears positively that he actually posted it on the 10th, general evidence of the post office officials that the stamp is invariably correctly applied will not be sufficient to establish that the notice was not filed on the 10th. *Doutre* vs. *Banque Jacques-Cartier*, Q. B. 1878, 28 Jan.

44. Deeds.—The allegations of a declaration founded upon notarial deeds of sale, seeking to fasten a personal liability upon defendant towards plaintiff, will not be proved by a declaration made by defendant in another deed to a third party, no privity of contract being thereby created between plaintiff and defendant. *Pelletier* vs. *Ratelle*, S. C. 1874, 18 L. C. J. 75.

45. —— In a suit by the assignees of a creditor to recover the amount of a notarial obligation in his favor, the defendant may successfully oppose thereto a release in his favor executed by such creditor *sous seing privé*, without proof that the same was really executed at the time it purports to have been signed. *Prévost* vs. *Melançon*, Q. B. 1878, 23 L. C. J. 167.

46. Delivery of Newspapers. — The delivery in the Post Office, at Montreal, of a newspaper published there, addressed to a subscriber residing in the country, is sufficient proof of delivery. *Penny* vs. *Berthelot*, C. Ct. 1865, 9 L. C. J. 101.

47. Executors and Persons suing in their Quality.—In an action on a promissory note made in the States by the husband and administrator of the deceased—*Held*, that letters of administration from a Court of Probate in the State of Michigan, produced in the cause, as well from the terms thereof as from the principles of international law, did not extend beyond the limits of the State in which they were granted, and formed, therefore, no evidence of the capacity of the plaintiffs as assumed. *Coté* vs. *Morrison*, Q. B. 1859, 9 L. C. R. 424.

48. —— When a fact cannot be proved by oral testimony, a person who has ceased to be a testamentory executor, and is therefore not a party to the cause, cannot legally prove admissions made by himself when executor. *Pinsonnault* vs. *Desjardins*, Q. B. 1879, 24 L. C. J. 100.

49. —— In an action against executors of a will, one of the executors who is a legatee under such will, and also individually sued, is a party to the suit, and cannot be examined on behalf of the estate of which he is executor in a separate defence by it. *Ontario Bank* vs. *Mitchell*, S. C. 1882, 5 L. N. 154.

50. —— And though he may have renounced as such legatee, being a defendant individually and liable *solidairement* as having endorsed the note sued upon, he is still incompetent as a witness for the estate although he has pleaded separately. (*Ib.*)

51. —— Following *Battersby & City of Montreal.* Where an assignee to the estate of an insolvent brings an action in his quality as such assignee—*Held*, reversing the judgment of Superior Court (4 L. N. 170), that he can be examined on behalf of the parties he represents. *Fair* vs. *Cassils*, Q. B. 1881 2 Dorion's Q. B. R. 1.

53. —— A tutor suing *es-qualité* may be a witness in the suit for his pupil. See opinion

of Casault, J., 7 Q. L. R. 59. It was not necessary to decide the point, the proceeding by the tutor not being established with his evidence; but the court did not question the ruling of the Superior Court on the point. *Pelletier* vs. *Thompson*, Q. B., Que., 3 Dec. 1881.

54. **Gift.** *Molleur* vs. *Roy*, C. R., 1889, 31 L. C. J. 99.

55. **Handwriting**—Evidence of the handwriting of a subscribing witness who is proved to be outside the jurisdiction of the court is sufficient, if there be also evidence of the handwriting of the parties. *Curillier* vs. *Fraser*, K. B. 1810, 2 Rev. de Lég. 279.

56. —— A verification of handwriting by witnesses cannot be allowed until all other mode of proof has been tried and failed. *Fournel* vs. *Durert*, K. B. 1801, 2 Rev. de Lég. 279.

57. —— The signature of the drawer of any note of hand, or of an indorser, or of both, is well proved by one witness to either signature. *Hoogs* vs. *Blackstone*, K. B. 1818, 2 Rev. de Lég. 333.

58. —— The signature to a writing which is denied cannot be proved solely by comparison of the disputed signature with other signatures, which are admitted or proved to be genuine. *Paige* vs. *Ponton*, Q. B., 1877, 26 L. C. J. 155.

59. **Identity of an Immoveable.**— To prove the identity of an immoveable, parol evidence is not necessary where the description thereof contained in various instruments sufficiently resemble each other. *Morrow* vs. *Richer*, S. C. 1859, 1 L. C. R. 106, 2 R. J. R. Q. 419.

60. **Illegal Practices.**—In a *qui tam* action for a penalty, for practicing physic without a license, two witnesses to different acts of such practice are sufficient evidence to support the action. *Painé* vs. *Fay*, K. B. 1812, 2 Rev. de Lég. 280.

61. **Insolvent**—An insolvent may be a witness in a case in which his assignee is a party, and that, even where the insolvent himself was a party before the assignee took up the proceedings. *Barthe* vs. *Millet*, C. Ct. 1872, 3 R. L. 525.

62. **Joint Interest.**—The joint interest of plaintiffs is matter of proof. *Crawford* vs. *Protestant Hospital for the Insane*, 1888, M. L. R., 4 S. C. 215.

63. **Lost Documents.**— There being no proof, as required by article 1218 of the Civil Code, of the destruction by fire or other accident, or otherwise, of the loss of the original of a notarial deed, duly registered, proof of the contents of such original notarial deed cannot be made by a copy of such original certified to be true by the registrar of the registration division wherein it may have been registered. *Noonan* vs. *Niel*, C. R. 1886, 9 L. N. 195.

64. **Marriage.**—The marriage of plaintiffs, if admitted, need not be proved in an action for a debt due the community. *Bertrand* vs. *Pouliot*, S. C. 1878, 4 Q. L. R. 8.

65. **Medical Services.**—The fact of medical services having been rendered, as well as their nature and duration, may be proved by the oath of the physician who rendered such services. *Baynes* vs. *Brice*, C. R. 1888, 32 L. C. J. 327.

66. **Member of Parliament.** — On a motion for *habeas corpus* —*Held*, that papers produced by petitioner, purporting to be indentures of election, were not sufficient evidence of his being such member of parliament so as to entitle him to the benefit of the writ. *Bedard exparte*, K. B. 1810, Stuart's Reports, p. 1.

67. **Minor in Actions for him.**—The question was as to whether the minor, in an action in declaration of paternity on her behalf, could be examined. *Per curiam.*—Jousse, Com. Ord., 1667, p. 90, says the minor (*pubère*) may be interrogated on matters in his cognizance in causes instituted for him. 1 Pigeau 228 says that as the minor cannot alienate, his admission cannot harm him, but at p. 230 he says: "*Mais on peut faire interroger celui de ces enfants de qui il s'agit pour corroborer ou compléter la preuve qui résultera de l'interrogatoire subi par le tuteur ou l'administrateur,*" and then he lays down the rule as Jousse has done at page 90. The minor may therefore be interrogated "*pour avoir tel égard que de raison.*" *Forget* vs. *Sénécal*, S. C. 1881, 4 L. N. 85.

68. **Notary.**—In an action against the maker and indorser of a promissory note, the evidence of the notary who made the protest was held to be inadmissible to contradict the notice filed by the plaintiff. *Dorwin* vs. *Evans*, S. C. 1850, 1 L. C. R. 100, 2 R. J. R. Q. 415.

69. —— A notary who has made a lease cannot be examined to prove what passed at the time the lease was executed, and which

does not appear in the act itself. *Lemoulet* vs. *DeBellefeuille*, S. C. 1882, 5 L. N. 426.

70. Notarial Copies.—The production of a copy of an authentic deed establishing that defendant signed the deed will not make proof of the signature of the defendant without proof also of his identity. *Coté* vs. *Labelle*, S. C. 1881, 12 R. L. 33.

71. Nuns.—The sisters of St. Joseph de l'Hotel Dieu may be witnesses, and the court can, in certain cases, order their examination by an examining commissioner. *Religieuses Hospitalières* vs. *Banque Ville Marie*, S.C. 1889, 18 R. L. 249.

72. Ownership.—In an action in revendication of a quantity of timber taken off wild lands by the defendant—*Held*, that the plaintiffs had sufficiently established their proprietorship by acts of possession of the land at different times without producing title deeds. *British American Land Co.* vs. *Stimpson*, S. C. 1852, 3 L. C. R. 90, 3 R. J. R. Q. 440.

73. Paternity.—Action in declaration of paternity to which defendant pleaded amongst other things a *defense en fait*. The only proof of the paternity was an admission made by the defendant in a question put in cross-examination of one of plaintiff's witnesses—*Held*, that under Arts. 232, 233 and 241 of the Civil Code, proof by testimony could not be admitted without a commencement of proof in writing, or where there is a legal presumption by facts admitted or established prior to the *enquête*, and that an admission such as that referred to did not constitute a commencement of proof sufficient to let in verbal evidence. *Turcotte* vs. *Nackè*, C. R. 1881, 7 Q. L. R. 196.

74. Parties interested.—The maker of a note who is implicated with the indorser in an action on the note, may be a witness for such indorser. *Woodbury* vs. *Garth*, Q. B. 1858, 9 L. C. R. 438.

75. —— In an action on a promissory note where defendant pleads *usury*, a party also liable to plaintiff on same note is a competent witness to prove such usury. *Malo* vs. *Nye*, S. C. 1856, 1 L. C. J. 11.

76. —— A defendant may be witness for his co-defendants, if he be not interested, or if his interest be removed by a discharge. *Bank of British North America* vs. *Curillier*, Q. B. 1859, 4 L. C. J. 241, confirming S. C., 2 L. C. J. 154.

77. —— A corporator may be a witness for the corporation, if it appear that he has no interest in the result of the suit. *Moss* vs. *Carmichael*, S. C. 1856, 3 L. C. J. 166.

78. —— In an action by an indorsee of a promissory note against the maker, the payee and indorser, who has received the amount of the note from the maker before its maturity, and undertakes to pay it, is not a competent witness for the defendant to prove that fact. *Fraser* vs. *Bradford*, S. C. 1857, 2 L. C. J. 110.

79. —— Where by a simulated deed a claim is transferred to a nominal plaintiff, the real plaintiff cannot be a witness to establish the claim. *Bernier* vs. *McGreevy*, Q. B., Que., 6 Feb., 1882.

80. Parties to the Suit.—In a hypothecary action, upon an obligation for one hundred and fifty pounds, brought by a widow, both for herself and as executrix to her minor children, in which want of consideration was set up—*Held*, confirming the judgment of the court below, that the admission of the plaintiff, who was the only witness examined in the cause, could not destroy the obligation to the prejudice of the minors. *Mahoney* vs. *Howley* Q. B. 1865, 1 L. C. L. J. 32.

81. —— Where a party in a cause had examined another party in a cause as a witness, and had not at the close of his *enquête*, or at any other time, declared his intention of availing himself of such evidence—*Held*, that such evidence could not avail him in the contestation. *Owens* vs. *Dubuc*, S. C. 1862, 6 L. C. J. 121 and 12 L. C. R. 399.

82. —— The evidence of one of several defendants, though insolvent, is inadmissible to prove that he gave the plaintiff a note in payment of the one sued upon. *Brown* vs. *Mailloux*, S. C. 1859, 9 L. C. R. 252.

83 —— A party to the record, although not interested, *cannot* be examined in the cause as a witness. *Ouimet* vs. *Sénécal*, S. C. 1859, 3 L. C. J. 179.

84. —— But decided in a contrary sense by another judge in the following month, 3 L. C. J. 182. (*Ib.*)

85. —— A party may be examined by his adversary as an ordinary witness, in addition to being examined on interrogatories upon articulated facts *viva voce* in open court. *Bailey* vs. *McKenzie*, S. C. 1861, 5 L. C. J. 223.

86. —— A declaration, that the plaintiff intends to make use of the defendant's evidence, filed after the defendant's *enquête* is closed, is filed too late according to law, and will be struck from the files on the defend-

ant's motion to that effect. *Beaudry* vs. *Ouimette*, S. C. 1863, 8 L. C. J. 126, 14 L. C. R. 107.

87. —— But on special motion to that effect, at any time before judgment the plaintiff may file a declaration that he intends to make use of the evidence of the defendant, 8 L. C. J. 127. (*Ib.*)

88. —— One of two sets of defendants who are sued as jointly and severally liable to plaintiff, can examine each other as witnesses, in support of the separate issues raised by each. *David* vs. *McDonald*, S. C. 1861, 5 L. C. J. 164.

89. — Defendants, joint makers of a promissory note, may legally give evidence for each other, in a suit for the recovery of the note, when they sever in their defence. *Batchelder* vs. *Smith*, C. R. 1870, 15 L. C. J. 12.

90. —— A party to a suit may be subpœnaed as a witness *duces tecum*, or otherwise, under Art. 221 C. C. P., as replaced by 48 Vict., c. 20, sec. 8, as soon as the pleas are filed, and examined as such witness, without it being necessary to serve articulated facts upon such party. *Cridliford* vs. *Clarkson*, S. C. 1888, 32 L. C. J. 202.

91. —— *Held*, a party to a suit cannot be heard as a witness on his own behalf, in a commercial case, to prove a contract alleged to have been made at a date prior to the coming into force of the Act 51 Vic. (Q), ch. 45. *Platt* vs. *Drysdale*, S. C. 1892, 2 Que. 282.

92. —— *Contra* as to 54 Vic., c. 32, s. 2, relating to advocate's oath as to services rendered. *Chagnon* vs. *St. Jean*, S. C., 1893, 3 Que. 459; *Beaubien* vs. *Allaire*, C. R. 1892, 1 Que. 275.

93. —— Where two partners are sued together for penalties for non-registration of partnership, with conclusions against each separately for the amount of the penalty, one defendant may be examined as a witness by his co-defendant, although they united their defences in one plea. *Bélanger* vs. *Denis*, S. C. 1893, 3 Que. 490.

94. Partners.— Defendants, sued as copartners carrying on trade under the name of "The Montreal Railroad Car Company," may prove, under the general issue, that the company was incorporated and that the debt sued on was a debt of the corporation. *Edmondstone* vs. *Childs*, S. C. 1858, 2 L. C. J. 192.

95. —— One partner being a defendant in a cause, examined as a witness under the Judicature Amendment Act of 1860, may be a good witness for his co-partners, any objection going only to his credibility. *Higginson* vs. *Lyman*, S. C. 1860, 4 L. C. J. 329.

96. —— Where two members of a dissolved partnership, being sued jointly for a debt of the partnership, separate in their defences, one can examine the other. *McCone* vs. *Poulin*, S. C. 1888, 14 Q. L. R. 182.

97. —— Action was brought against the defendant as having been a secret partner in a firm to which the goods were sold—*Held*, confirming the judgment of the court below, that the evidence of one of the other partners was inadmissible on behalf of the defendant, and was accordingly rejected. *Chapman* vs. *Masson*, S. C. 1858, 2 L. C. J. 216 and 8 L. C. R. 225; Q. B. 1858, 9 L. C. R. 422, 3 L. C. J. 285. *Rowan* vs. *Massé*, M. L. R., 1 S. C. 177.

98. —— Proof of partnership as between the partners themselves must be in writing and not by parol. *Beaudry* vs. *Laflamme*, S. C. 1861, 6 L. C. J. 134.

99. —— A third party can establish by parol testimony the existence of a partnership. *Graham* vs. *Bennett*, S. C. 1883, 12 R. L. 448; *Lemire* vs. *Bourdeau*, S. C. 1888, 12 R. L. 362; *Beaudry* vs. *Laflamme*, 6 L. C. J. 134; *Massé* vs. *Rowan*, M. L. R., 1 S. C. 177. *Contra*: *Prefontaine* vs. *Barrie*, Q. B. 1887, 13 Q. L. R. 312.

100. —— But such evidence is not admissible between partners. *Rowan* vs. *Massé*, M. L. R., 1 S. C. 177.

101. Payment.—The books of a bank are not evidence in its favor to prove payments made by the bank. *Brooke* vs. *The City Bank*, S. C. 1849, 1 L. C. R. 112, 2 R. J. R. Q. 423.

102. —— In an action for the value of work and labor done, proof that the plaintiff and other workmen employed by the defendant were paid weekly, and that the plaintiff had not been heard to complain of non-payment, is a sufficient presumptive proof of payment against a stale demand. *Bonneau* vs. *Goudie*, K. B. 1819, 2 Rev. de Lég. 333.

103. —— The payment of a sum of money may be proved by the attesting witness to a receipt signed with a mark made by the party receiving the money. *Néren* vs. *DeBleury*, Q. B. 1861, 6 L. C. J. 151, 12 L. C. R. 117.

104. —— The *prima fâcie* proof of payment afforded by a receipt in writing can be destroyed only by the clearest and most positive

evidence of error. *Bell* vs. *Aruton*, Q. B. 1875, 20 L. C. J. 281.

105. —— Proof of payment of a promissory note may be made by parol evidence. *Carden* vs. *Finley*, Q. B. 1860, 8 L. C. J. 139, reversing S. C., 3 L. C. J. 232.

106. Persons deceased.—Where in an action it was necessary to examine the witnesses *de novo*, and one of them was found to have died in the interval, and the judge's notes were mislaid and could not be used—*Held*, admissible to prove by any persons present at the time, and who were willing to swear from memory as to what the deceased witness said, but that the judge who took the notes could not be examined to prove what was said by the witness. *Savard* vs. *Vallée*, C. Ct. 1851, 4 L. C. R. 85, 4 R. J. R. Q. 92.

107. Personal Injuries—Medical Examination.—In an action by a father, in his quality of tutor, for personal injuries suffered by his minor child, the defendant, before pleading, may obtain an order for an examination of the child by a physician. *McCombe* vs. *Phillips*, 1891, M. L. R., 7 S. C. 381.

108. Public Documents.—Proof of public documents should be made by certified copies or extracts, and not by filing the document itself. *Schiller* vs. *Compagnie du C. P. Pacifique Canadien*, 1891, M. L. R., 7 S. C. 174.

109. Relations.—In an action between parties who are not traders, the plaintiff's nephew is incompetent to prove the sale and delivery of firewood, *Desbarats* vs. *Murray*, S. C. 1857, 3 L. C. J. 27.

110. —— A cousin-german may be examined to prove *actes d'héritiers*, on the ground that he is a necessary witness. *Filion* vs. *Binette*, S. C. 1859, 4 L. C. J. 36.

111. —— A party who closed his *enquete* before the passing of the 22nd Vic., ch. 57, sec. 51, has a right to reopen it for the purpose of examining his relations when his adversary has in the interim availed himself of that law and examined his relations as witnesses. *Vanier* vs. *Faulkner*, S. C. 1861, 6 L. C. J. 251.

112. —— In an action in revendication—*Held*, that the son of the plaintiff was not a competent witness for his father. *Hearle* vs. *Date*, Q. B. 1861, 11 L. C. R. 290.

113. Record.—If the record states that the parties were heard, it is proof that they were present. *Filieau* vs. *Goulet*, K. B. 1817, 2 Rev. de Lég. 279.

114. —— Records of the court as to a judicial sale constitute a higher class of evidence than the sheriff's deed of sale. *L'Hotel Dieu* vs. *Roxburgh*, K. B. 1811, 3 Rev. de Lég. 476.

115. Transferor of Debt.—A party who cedes a debt due to him by another may be a witness on an action by the party to whom it is ceded against the alleged debtor, and his testimony will be received with caution. *Cooke* vs. *Senécal*, Q. B. Montreal, 19 May, 1881.

116. Unchaste Woman.—See 8 L. N. 127, 9 L. N. 113.

117. Witness in former Suit.—The deposition of a witness made in a former case may be used or read by him upon a subsequent examination, though in a different proceeding, to refresh his memory. *City Bank* vs. *Coles*, S. C. 1851, 2 L. C. R. 16, 3 R. J. R. Q. 84.

118. —— The deposition of an absent witness who is beyond the jurisdiction of the court, taken in a former suit, where the matters in issue are the same, may be filed as the evidence of such witness. *Roe* vs. *Jones*, S. C. 1852, 3 L. C. R. 58, 3 R. J. R. Q. 424.

XXIII. PAROL.

1. Acceptance of Goods sold and delivered.—Proof by parol may be made of the acceptance of goods sold and delivered, though the amount claimed is over $50, and where the purchaser offers to resell the whole or part of the goods it is sufficient proof of such acceptance. *Lemonier* vs. *Charlebois*, S. C. 1882, 5 L. N. 196.

2. —— Where the plaintiffs set up a sale of oil in barrels to arrive, and that in accordance with the contract appellants shipped 778 casks of oil which arrived in Montreal, 1st July, 1880; that notice was given to respondents of its arrival, and that L. & M., agents of appellants, were instructed by respondents through their agent to store the same as it was not then required; that, shortly after arrival and storage of the oil, respondents by their manager ordered appellants' agents to sell the oil at 60 cents per gallon; that five barrels were sold at this rate, and that respondents then advanced the price; that they finally refused to take the oil altogether, and, upon such refusal, the oil was sold at the current market price, and a loss of $3,094.71 made, for which action was brought. All these transactions were verbal, and no

writing could be produced as a commencement of proof—*Held*, in Supreme Court, overruling all the decisions in the courts below, 6 L. N. 363, 27 L. C. J. 349, that parol evidence of such acceptance was admissible under Art. 1235 C. C. *Munn* vs. *Berger*, Supreme Ct. 1884, 10 Can. S. C. R. 512.

3. **Action for School Rates.**—In a suit between rate payers and school commissioners, the fact that rate payers are dissentients, and the organization of a corporation of dissentient school trustees, may be proved by verbal testimony, where it is evident by receipts for school taxes granted by such dissentient corporation in favor of said rate payers, during a series of years, and by other circumstances, that such a corporation has existed *de facto* and claimed payment of school taxes in that capacity during many years. *School Commissioners of Roxton* vs. *Boston*, Q. B. 1879, 24 L. C. J. 122.

4. **Action for Tithes.**—In an action for tithes—*Held*, that parol evidence was inadmissible to prove a verbal notice to a priest that the defendant had ceased to be a Roman Catholic. *Proulx* vs. *Dupuis*, S. C. 1865, 10 L. C. J. 114 and 16 L. C. R. 172.

5. **Agreement in Writing.**—Testimony cannot be received to vary the terms of a written instrument, and where the defendant undertook by an agreement in writing to grind the green furnished by plaintiff in pure linseed oil, the defendant was not allowed to prove by witnesses that the plaintiff verbally requested him to use other materials. *Dominion Oil Cloth Co.* vs. *Martin*, C. R. 1883, 6 L. N. 344.

6. **Agreement to release Maker of Note.**—An agreement to release the maker of a negotiable promissory note made after the signing and before the maturing of the note, may be proved by parol evidence. *Gole* vs. *Cockburn*, S. C. 1864, 8 L. C. J. 311.

7. **All Contracts for the Sale of Goods**—Art. 1235 C. C.—The words of Article 1235 C. C., "all contracts for the sale of goods," comprise the sale of promissory notes also, and such sale for an amount exceeding $50 cannot be proved, except where there is a writing signed by the party to be bound. *Truteau* vs. *Leblanc*, Q. B. 1870, 4 R. L. 560.

8. **Architect's Services.**—Parol evidence may be admitted to prove the value of an architect's services. *Roy* vs. *Huot*, S. C. 1879, 2 L. N. 347.

9. **Board and Lodging.**—Board and lodging may be proved by parol evidence. *Spatz* vs. *Myers*, K. B. 1816, 2 Rev. de Lég. 332.

10. **Certificate of Baptism.**—An *extrait de baptême* may be explained by verbal testimony. *Poulin* vs. *Thibault*, K. B. 1816, 2 Rev. de Lég. 332.

11. **Charter Party.**—Parol evidence will be allowed to prove the usual interpretation to be given to certain words in a charter-party, when, without such evidence, these words would not have a proper meaning. *Caird* vs. *Webster*, S. C. 1883, 9 Q. L. R. 158.

11a. **Commercial Matter — Explanation.**—Witnesses may be called to show that a particular expression in a commercial contract is understood in the mercantile world in a sense different from its ordinary import. *Schollfield* vs. *Leblond*, K. B. 1821, 2 Rev. de Lég. 77.

12. —— The sale of a safe by a hotel-keeper to a trader to whom the former was indebted for groceries furnished, is a commercial matter under the Consolidated Statutes of L. C., chap. 82, s. 18. *Archibald* vs. *Shaw*, C. Ct. 1869, 14 L. C. J. 277; confirmed in Review, 28 June, 1870.

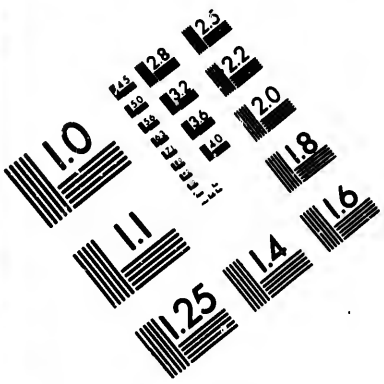
13. —— In a commercial case, verbal testimony may be adduced in explanation of the contents of a written document, the meaning of which may not be perfectly clear. *Garth* vs. *Woodbury*, S. C. 1856, 1 L. C. J. 43; confirmed in Appeal, 9 L. C. R. 438.

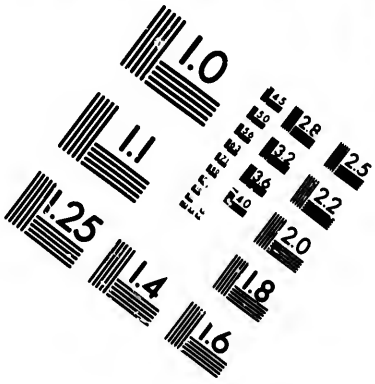
14. —— In a commercial case, an agreement as to the special imputation of certain payments may be proved by parol evidence, although part of the debt be represented by a notarial obligation. *Lalonde* vs. *Rolland*, S. C. 1864, 10 L. C. J. 321.

15. —— Verbal evidence is inadmissible to prove payment of a debt due under a judgment, although the debt were originally of a commercial nature. *Miller* vs. *Kemp*, C. R. 1869, 14 L. C. J. 74.

16. —— The engagement by a railway company of a civil engineer, for carrying out the construction of the railway, is a commercial matter, and may, therefore, be proved by verbal testimony; and any modification of the agreement may be proved in the same way. *Legge* vs. *The Laurentian Railway Company*, Q. B. 1879, 24 L. C. J. 98.

17. —— **Error.**—In commercial cases, parol evidence may be adduced to establish an





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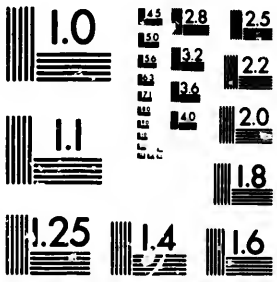

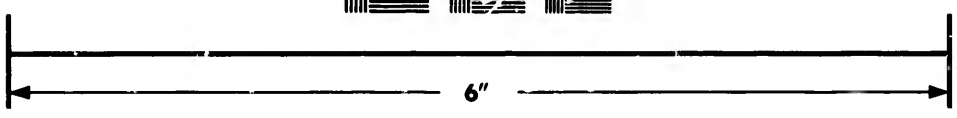

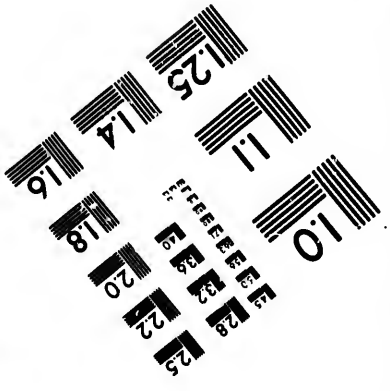

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alleged error in a written contract. *Ætna Life Insurance Co. & Brodie*, Q. B. 1876, 20 L. C. J. 286.

18. —— Sale.—In order to prove by parol testimony a sale for a sum over $50, the sale must not only be made by a trader, but the trader must be a dealer in the goods which form the subject of contestation. *Guernon* vs. *Lacombe*, C. Ct. 1872, 4 R. L. 385.

19. —— Photographer's Employee.—In an action against a photographer by an employee for wages under an alleged contract —*Held*, that, though the following of the art of photography was carrying on trade, nevertheless the engagement of a party to whom the photographer pays a salary, at the same time that he instructs him in the art, cannot be considered as a commercial contract, and, therefore, to be admitted to prove such contract by parol evidence a commencement of proof in writing is necessary. *Jones* vs. *Jones*, C. Ct. 1866, 16 L. C. R. 296.

20. Consent of opposite Party.—When a party consents to parol testimony being received concerning a matter upon which parol testimony is not admissible, the other party will be allowed to invoke such proof against the former; but the party who allowed its admission will not be permitted to invoke it. *Cie. de Pêche aux Marsouins* vs. *Gagnon*, Q. B. 1888, 16 R. L. 269.

21. Contract of Insurance.—In an action against an insurance company for the amount of an insurance, for the premium of which the insured had given a promissory note, which had been dishonored at maturity, but for which no policy or interim receipt had been issued by the company—*Held*, confirming the judgment of the court below, that parol evidence of such contract of insurance was admissible. *Montreal Assurance Company* vs. *McGillivray*, Q. B. 1857, 2 L. C. J. 221 and 8 L. C. R. 401, 4 R. J. R. Q. 406. Reversed in Privy Council, but on other grounds, 13 Moore 87, 8 L. C. R. 488.

22. Deed of Sale.—Parol evidence will be admitted to show that a deed of sale passed before a notary was written and read in a language which one of the parties thereunto did not understand, and that it contained stipulations different from those to which he agreed. *Noble* vs. *Lahaye*, C. R. 1869, 1 R. L. 197.

23. Deed—Authentic.—In an action in which the defendant had occasion to set up a certain lease, and the plaintiff wished to disparage it, the defendant himself was called as a witness, and was asked if he had not executed the lease in question in order to give the lessee (the plaintiff) the right to vote at an election then imminent—*Held*, that the question would be allowed, seeing that it was the party himself who was interrogated. *Bouin* vs. *Bouin*, S. C. 1877, 9 R. L. 372.

24. Deed—Error in.—Where a person is led by error into signing a contract or deed, proof of the error may be made by verbal testimony. *Cie. de Pret et de Crédit Foncier* vs. *Santerre*, S. C. 1886, 14 R. L. 453.

25. Deposit.—Parol evidence in an action of deposit is admissible, but not without a commencement of proof in writing. *Smith* vs. *Gateskill*, K. B. 1812, 2 Rev. de Lég. 278.

26. —— With Express Co.—Receipt—A person who deposits a sum exceeding $50 in the office of an express company, can prove by oral testimony that the company's agent counted the money, even where the receipt given therefor only declares that it was represented that the package contained a certain sum. *Can Express Co.* vs. *Létourneau*, Q. B. 1884, 13 R. L. 693.

27. —— Parol testimony is admissible to prove the deposit of a promissory note for more than $50, where the circumstances under which it was made give rise to a presumption that there was a deposit. *Sébastien* vs. *Durocher*, C. R. 1891, 21 R. L. 240.

28. Engagement of Hotel Employee.—The engagement of an employee for a hotel is a commercial matter, and can therefore be proved by verbal evidence. *Cousineau* vs. *Beauvais*, S. C. 1890, 20 R. L. 319.

29. Entry of Baptism.—Oral testimony may be adduced to disprove an entry of baptism in a non-authentic register, even where mention is made of the date of the birth of the person baptised, and is signed by both persons. *Sykes* vs. *Shaw*, Q. B. 1864, 9 L. C. J. 141 and 15 L. C. R. 304.

30. Executory Contract.—Cannot be proved by parol. *Trudeau et al.* vs. *Ménard*, S. C. 1858, 3 L. C. J. 52.

31. Extension of Time to pay Debt— ART. 1233 1235 C. C.—The fact that an extension of time was given by a grocer to a customer for the payment of the grocer's account for goods sold and delivered may be proved by testimony, where no writing exists which would be contradicted by such testimony. *McGarry* vs. *Bruce*, 1888, M. L. R. 4 S. C. 363.

32. —— Contract of Suretyship.—Parol evidence of the extension of a contract of suretyship is inadmissible where the amount involved exceeds $50. *Mansfield* vs. *Charette*, C. R. 1883, 6 L. N. 106.

33. Gift with Delivery.—May be proved by parol testimony even where its value exceeds $50. *Richer* vs. *Voyer*, P. C. 1874, 5 R. L. 591.

34. Finding lost Property.—In an action for the recovery of property lost by the plaintiff and found by the defendant, the only proof of the finding was the admission of the defendant—*Held*, that verbal evidence thereof could be adduced without a commencement of proof in writing. *Talbot & Blanchet*, Q. B. 1872, 2 R. C. 238.

35. Giving in Payment.—Verbal evidence admissible to prove a giving in payment of a commercial debt. *Labrecque* vs. *Dubois*, Q. B. 1887, 14 Q. L. R. 72.

36. Hypothec.—Parol evidence is not admissible to prove the existence of a hypothec upon an immoveable. *Leclaire* vs. *Côté*, C. R. 1893, 3 Que. 331.

37. Hypothecary Action. — Plaintiff sued hypothecarily for $37, balance due upon a notarial obligation for $72—*Held*, that payment could be proved by parol evidence. *Massé* vs. *Côté*, S. C. 1879, 5 Q. L. R. 145.

38. Interruption of Prescription — Writing—ART. 1235 C. C.—In commercial matters where the amount in question exceeds fifty dollars, parol evidence of partial payments to establish interruption of prescription is inadmissible. *Charest* vs. *Murphy*, Q. B. 1894, 3 Que. 376.

39. —— A commencement of proof in writing completed by parol evidence is not equivalent to a writing signed by the party as required by Art. 1235 C. C., so as to take a commercial debt out of the operation of the law respecting the limitation of actions. *Ib*.)

40. —— Parol testimony is admissible to prove acknowledgment of a prescribed debt and a promise to pay it, where the debt is for a sum under fifty dollars. *Girouard* vs. *Gagné*, Mag. Ct. 1889, 12 L. N. 186.

41. —— Article 1235 C. C. does not apply to such a case, that article relating only to debts exceeding fifty dollars. (*Ib.*)

42 Lease.—Action was brought for rent, and the defendant pleaded that he had not obtained possession of the premises leased until ten days after the time mentioned in the deed of lease, and that he was entitled to damages therefor, and to apply such damages in deduction of the rent *pro tanto*—*Held*, reversing the judgment of the court below, that parol evidence would be received of such allegations. *Belleau* vs. *Regina*, Q. B. 1861, 12 L. C. R. 40.

43 —— Notice of Continuation.—Oral evidence of a verbal notice of a continuation of a lease is sufficient, under certain circumstances. *Saunders* vs. *Déom*, C. R. 1871, 15 L. C. J. 265.

44. —— In an action to rescind a lease under the Lessor and Lessee Act, for contravention of one of the stipulations of the lease, to the effect that the lessee should not sublet without the consent of the lessor, and the defendant wished to examine plaintiff as to whether there was not an understanding that he should be allowed to sublet the premises—*Held*, that evidence could not be admitted to contradict the lease, unless a commencement of proof were first obtained by examining such party by interrogatories on articulated facts. *Foley* vs *Charles*, Q. B. 1865, 15 L. C. R. 248.

45. Lost Document.—The contents of a lost document can be proved by verbal testimony, after the loss is established by the affidavit of the party invoking the lost document. *Russel* vs. *Guertin*, S. C. 1866, 10 L. C. J. 135.

46. —— In a case of separation from bed and board, the contents of a letter alleged to have been written by the defendant, and the destruction of which has been sworn to, may be established by parol evidence. *Starke* vs. *Massey*, S. C. 1871, 17 L. C. J. 56.

47. —— Where a defendant had been condemned in 1859 in a sum exceeding $25 for an election offence, and had established by witnesses that the plaintiff had given the defendant a writing by which he loaned him a sufficient amount to pay the judgment, and a note of the writing had been made by witness in his account book—*Held*, that he would be admitted to prove the writing and the circumstances of the loss of it, and that proof by testimony might in such case be admitted. *Guérremont* vs. *Girouard*, C. Ct. 1871, 3 R. L. 36.

48 Misdescription in Insurance Policy—ART. 993 and 1234 C. C.—Where the plaintiff brought action on a policy of fire insurance, and the defendants pleaded that there had been misdescription and misrepresentation in the policy, and the plaintiff examined the agent and clerk of the defendants to show

that the errors, if any, were the faults of the defendants themselves and their agents, to all of which defendants objected as inadmissible —*Held*, that no better evidence of the cause and nature of the errors contained in the policy could be found than the testimony of the persons by whose instrumentality the policy was drawn and executed. *Somers* vs. *Athenæum Insurance Society*, S. C. 1858, 3 L. C. J. 67 and 9 L. C. R. 619.

49. Mitoyenneté.—A right of *mitoyenneté* cannot be established by mere verbal evidence where there is no title, and the marks on the wall do not indicate any such right. *Rodier* vs. *Tait*, C. Ct. 1865, 1 L. C. L. J. 70.

50. —— Parol evidence is inadmissible to prove consent of a neighbouring proprietor to the erection and placing of a mitoyen wall. *Leduc* vs. *McShane* S. C. 1884, 29 L. C. J. 56.

51. Obligations of Wife.—In an action on two notarial obligations, signed by a wife separate as to property, in which she acknowledged herself personally indebted to the plaintiff—*Held*, confirming the judgment of the court below, that parol evidence was admissible to prove that it was the husband who was really indebted, and that she was merely a *prête-nom* for him. *Mercille* vs. *Fournier*, S. C 1858, 2 L. C. J. 205, and Q. B. 1859, 4 L. C. J. 51 and 9 L. C. R. 300.

52. —— In an action on an obligation entered into by a wife as surety for her husband —*Held*, that in order to disprove the contents of such document, there must be a commencement of proof in writing. *Fuchs* vs. *Talbot*, C. Ct. 1863, 13 L. C. R. 494.

53. Payment of Note—ART. 1233 C. C. —*Held*, overruling the judgment of the court below (3 L. C. J. 232), that proof of payment of a promissory note may be made by parol evidence. *Carden* vs. *Finley*, Q. B. 1860, 8 L. C. J. 139 and 10 L. C. R. 255.

54. —— **Several Payments under $50** —Verbal proof is admissible of the payment, at different times, of sums less than $50 each, though the total exceeds $50. *Mayer* vs. *Léveillé*, 1887, M. L. R., 3 S. C. 190.

55. —— **Of Judgment for Commercial Debt.**—The payment of a judgment for a commercial debt cannot be proved by parol evidence where the debt exceeds $50. *Dominion Type Foundry Co.* vs. *Pacaud*, C. R. 1884, 10 Q. L. R. 354; *Miller* vs. *Kemp*, C. R. 1869, 14 L. C. J. 74.

56. —— **Arrears of Interest.**—The payment of a sum exceeding $50, and an acknowledgment that all previous arrears of interest were paid, cannot be proved by verbal evidence, although each instalment of interest was less than $50 in amount. *Montchamps* vs. *Perras*, S. C. 1880, 24 L. C. J. 231, 3 L. N. 339.

57. Placing Horse in charge of person to be pastured.—The placing a horse in charge of a person to be pastured is not a deposit which can be proved by witnesses (where the sum or value exceeds $50), and the admission of the defendant in such a case, that he had received the horse but had subsequently delivered it back to the plaintiff, cannot be divided. *Johnson* vs. *Longtin*, C. Ct. 1880, 24 L. C. J. 292.

58. Pledge.—Evidence of pledge can be made by parol testimony where the debt is less than $50, although the object pledged be worth more than that sum. *David* vs. *Perreault*, S. C. 1887, 15 R. L. 74.

59. Policy of Insurance.—Where an assurance company sued on a policy payable at death, and the defendant contended that what he had agreed with the company's agents to take was a policy payable in twenty years —*Held*, that parol evidence of this was admissible. *Sun Mutual Insurance Co.* vs. *Béland*, C. R. 1881, 5 L. N. 42; and see *Ætna Life Ins. Co.* vs. *Brodie*, Supreme Ct. 1880, 5 Can. S. C. R. 1.

60. Promissory Note — Indorsers — Agreement between the Parties.—In an action between parties to a promissory note, that the true intention and agreement of the parties should be carried into effect, the facts and circumstances at the time of the transaction may be established by parol evidence, and it may be shown that an indorser, whose name appears below that of the payee, really indorsed before the latter, as surety for the maker to the payee, although the name of the payee appears on the note as the first indorser. *Deschamps* vs. *Léger*, 1886, M. L. R., 3 S. C. 1. (See also *Scott* vs. *Turnbull*, 6 L. N. 397.)

61. —— Parol evidence is inadmissible, under Art. 1234 C. C., on the part of the indorser of a promissory note, to establish an agreement, pleaded by him, that he would not be required to pay the note. *Decelles* vs. *Samoisette*, C. R. 1888, M. L. R., 4 S. C. 361, 32 L. C. J. 236.

62. —— Where to an action on a promissory note against the indorser the defendant pleaded, among other things, that the time the

indorsement was made by him the indorser agreed verbally to accept the note on the credit of the maker alone, without recourse to him, the defendant—*Held*, reversing the judgment of the court below, that parol evidence of such an agreement was inadmissible, as tending to vary the terms of a valid written agreement. *Chamberlain* vs. *Ball*, Q. B. 1860, 5 L. C. J. 88 and 11 L. C. R. 50.

63. —— Oral evidence of the indorsement of a promissory note, by a cross, is admissible. *Blackburn* vs. *Decelles*, S. C. 1871, 15 L. C. J. 260.

64. —— Per Johnson, C. J.:—Parol evidence is admissible to establish the real relationship of the parties to a bill or note, and the circumstances under which it was indorsed. *Northfield* vs. *Lawrence*, C. R. 1891, 15 L. N. 324, *ibid*, per Davidson J. in S. C., 21 R. L. 359.

65. —— Parol evidence is admissible to vary the order of indorsements to a negotiable instrument, or to show that the intention of the parties was that their liability would not follow that order *Scott* vs. *Turnbull*, S. C. 1883, 6 L. N. 397: *Léveillé* vs. *Daigle*, Q. B. 1880, 2 Dorion's Q. B. R. 129.

66. —— Where an indorser of a note was released from liability thereon by the fact that the note was not protested, but afterwards went to the plaintiffs and promised not to take advantage of the circumstances, but would pay the note, and afterwards sent a letter to the same effect, which was destroyed, and finally refused to pay it—*Held*, that his promise could be proved by parol evidence. *Johnson* vs. *Geoffrion*, C. Ct. 1863, 7 L. C. J. 125, 13 L. C. R. 161.

67. **Promise of Sale—Commencement of Proof in Writing.**—A promise of sale may be proved by verbal evidence where there is a commencement of proof in writing. *Montreal Loan & Mortgage Co.* vs. *Leclair*, 1890, M. L. R., 6 Q. B. 374.

68. —— In the present case, a memorandum of figures in the handwriting of appellant's manager, with his statements when examined as a witness, constituted a sufficient commencement of proof. (*Ib.*)

69. **Promise of Marriage.**— A commencement of proof in writing is necessary to prove a promise of marriage. *Cameron* vs. *Steele*, S. C. 1887, 11 L. N. 234.

70. **Property of Community.**—Under the *régime* of exclusion of community, parol evidence is admissible in regard to movables acquired by the wife since her marriage. *Hopital Général* vs. *Gingras*, S. C. 1884, 10 Q. L. R. 230.

71. **Purchase of Farm.**—The plaintiff, as representing his deceased wife and defendant's daughter, brought action to recover the value of the use and occupation of a farm purchased by his (the plaintiff's) wife. The defendant pleaded compensation, alleging that the purchase money of the farm in question was paid by him in discharge of his daughter, and at her request—*Held*, that verbal evidence could not be received to prove that the bargain for the property was made by the defendant, that he bought and paid for it, taking the deed in the name of his daughter. *Lefebvre* vs. *De Montigny*, S. C. 1858, 9 L. C. R. 233.

72. **Receipt.**—Circumstances under which parol evidence may be received to explain a receipt and the circumstances under which it was given. *Woodbury* vs. *Garth*, Q. B. 1858, 9 L. C. R. 438.

73. —— A clerk is competent to prove that a receipt given by him for his employer to a customer for a sum of money was given by error, and that he did not actually receive the money acknowledged by the receipt; and in such a case the weight to be given to testimony of the clerk is a question as to credibility, which depends upon the circumstances of the case. *Whitney* vs. *Clark*, Q. B. 1859, 3 L. C. J. 318; reversing S. C., 3 L. C. J. 89.

74. —— On the 23rd of October, 1855, R. acknowledged a transfer as made to him by N of his rights in a certain lot of land, and agreed to take N.'s interest in the lot and allow him upon debts due to R. whatever two persons named should appraise it as worth. On the 19th June, 1856, the persons so named appraised the value of N.'s interest in the lot, and awarded that R. should allow N. $306 upon the debts he then held against N, or pay him the money. On the 29th March, 1859, N. instituted an action against R. for the $300, setting up the submission and appraisal, and alleging that R. had refused to allow or deduct the $300 from the debts due, and had compelled him to pay the debts in full. The defendant pleaded payment, set up a claim on notes filed, and that a settlement had been made and deduction allowed of the $300 on the 8th September, 1856. The plaintiff produced with his answer R.'s receipt for $650 of the 8th September, 1856, in full of all obligations, etc., and alleged that this amount was more than

was due on the notes referred to, and that the whole of the notes were paid in cash—*Held*, confirming the judgment of the court below, that the parties present on the 8th September, 1856, were inadmissible to prove by parol testimony conversations between the plaintiff and defendant as to the settlement and deduction of the $300, or that N. had admitted such deduction and settlement at the date of the receipt. *Rowell* vs. *Newton*, Q. B. 1860, 10 L. C. R. 437.

75. —— In an action on a note, in which a receipt was filed by defendant explaining to some extent the term in which the note was given—*Held*, that parol evidence could not be received to alter, vary or control the receipt, which must be assimilated to a written contract. *West et al.* vs. *Fleck*, C. Ct. 1864, 15 L. C. R. 422.

76. —— Parol testimony will be received to prove error in a receipt. *Ste. Marie* vs. *Ste. Marie*, Q. B. Montreal, 15th June, 1877.

77. —— **Evidence.**— In non-commercial matters, verbal testimony is inadmissible to extend or alter the purport of a written receipt. *Gilchrist* vs. *Lachaud*, S. C. 1888, 14 Q. L. R. 278. Confirmed in Review, 1888, 14 Q. L. R. 366.

78. —— **Receipts given through Error.**—S. brought suit to compel V. to render an account of the sum of $2,500, which S. alleged he paid V. on the 6th October, 1885, to be applied to S.'s first notes maturing, and in acknowledgment of which V.'s bookkeeper gave the following receipt:—"Montreal, October 6, 1885. Recd. from Mr. D. S. the sum of $2,500 to be applied to his first notes maturing. M. V. (Fred)." V. pleaded that he never got the $2,500, and that the receipt was given by his clerk by error, and that it should be for a case of sealskins, and not for $2,500. The clerk and other witnesses were examined without objection to prove error—*Held*, that parol evidence is admissible in commercial matters to prove error in a written receipt given by a clerk, and that the evidence in this case proved error. *Schwersenski* vs. *Vineberg*, 1890, M. L. R. 7 Q. B. 137. Confirmed in Supreme Ct., 14 L. N. 289, 19 Can. S. C. R. 243.

79. —— ART. 1234 C. CODE.—The prohibition of Art. 1234 C. Code against the admission of parol evidence to contradict or vary a written instrument is not a matter of public order, and if such evidence is admitted without objection at the trial, it cannot subsequently be set aside in a Court of Appeal. (*Ib.*)

80. —— Parol evidence is inadmissible on the part of a person pretending to be the real vendor and owner of the goods sold, to contradict a receipt signed by him, in which another person is declared to be the owner of such goods. *Hall* vs. *McBean*, S. C. 1893, 3 Que. 242.

81. Refusal to deliver up Goods.— Refusal on the part of the party detaining goods, to deliver them to their owner, can be proved by parol evidence, even though the value of the goods exceeds fifty dollars. *Bourinot* vs. *Robert*, S. C. 1892, 1 Que. 301.

82. Release of Debt or Novation.— Can be proved by parol evidence. *Labelle* vs. *Pesant*, C. Ct. 1886, 14 R. L. 306.

83. Repairs by Tenant.—Parol testimony is not admissible to prove authorization by a landlord to his tenant to make repairs, where their value exceeds $50. *Larochelle* vs. *Baxter*, C. Ct. 1894, 21 R. L. 87.

84. Report of Arbitrators.—In an action brought upon a report of arbitrators and *amiables compositeurs*, the defendant may contest the validity of the report which does not set forth that the witnesses were heard, by alleging that the arbitrators refused to hear his witnesses, and such defendant will be allowed to prove such refusal. *Ostell* vs. *Joseph*, Q. B. 1857, 9 L. C. R. 440; reversing S. C. 1856, 1 L. C. J. 265.

85. Revendication of Moveables.—In the case of the attachment in revendication of a moveable, the parties may prove their respective pretensions by oral evidence, whatever may be the value of the moveable attached. *Sanche* vs. *Sabourin*, C. Ct. 1888, 11 L. N. 218; *Boardman* vs. *Heskin*, C. R. 1889, 18 R. L. 257.

86. Register of Fabrique.—Parol evidence is not admissible to prove the falsity of the register of proceedings of a *fabrique* unless it be attacked by improbation. *Champoux* vs. *Paradis*, C. R. 1890, 2 Que. 419.

87. Sale of Moveables.—A sale of moveables, by a trader, being a commercial transaction under article 2260, sec. 5 C. C., may be proved by parol testimony. *Gagnon* vs. *Carle*, Q. B. 1885, 12 Q. L. R. 66.

88. Sale of Goods—Packing Cases—Writing.—ART. 1254.— Parol testimony is inadmissible to vary the terms of a written agreement relating to sale of goods by proving that there was an understanding that the cases

should be paid for. *Ulster ning Co* vs. *Foster*, 1887, M. L. R. 3 Q. B. 396.

89. Sale by Trader.—A sale of moveables by a trader, being by virtue of Art. 2260, sec. 5 C. C., a commercial sale, can be proved by parol testimony. *Gagnier* vs. *Bissette*, Q. B. 1885, 14 R. L. 164.

90. Sale of Goods through Broker.—In an action of damages for refusing to take delivery of and pay for goods, bargained and sold through a broker, proof of the contract cannot legally be made without the production of the bought as well as the sold note, or without due notice to the defendants to produce the bought note. *Gould* vs. *Binmore*, S. C. 1861, 6 L. C. J. 296.

91. Sale—Conditional—Writing.—Action of damages for non-delivery of four cases of phosphorus sold by defendant to plaintiffs on the 10th November, 1883. The price, $232, was paid on the 11th November. The defendant pleaded that the sale was conditional upon the arrival of the phosphorus in Montreal, and it did not arrive. The plaintiff proved a rise in value of $60, and the defendant proved by witnesses the allegations of his plea. The sale is proved by witnesses, and the bill of sale receipted by the defendant. The bill says nothing of the condition attached by defendant to the sale, that it should only be binding if the phosphorus arrived, and the question is submitted by plaintiffs that the evidence by witnesses of defendant that the sale was only conditional should be ruled out and rejected as inadmissible, as contradicting a written agreement. The court is with the plaintiffs, and, holding this view, the plaintiffs should have judgment for these damages and costs of protest. *Rousseau* vs. *Evans*, S. C. 1883, 6 L.N. 204.

92. Servitude.—The existence of a *héritage dominant*, not mentioned in the deed under which a right of servitude is claimed, cannot be established by parol evidence. *Mondelet* vs. *Roy*, 1882, M. L. R., 1 Q. B. 9.

93. Signature by Cross.—Signature by cross is not valid, and a receipt so signed in the presence of a witness is not a writing in the sense of Art. 1233 C. C. (1) *Ouimet* vs. *Migneron*, S. C. 1890, 20 R. L. 357.

94. Status.—Verbal testimony is admissible to prove error as to status of a person. *Charette* vs. *Robert*, Q. B. Montreal, 27 Sept., 1883.

(1) See "Bills and Notes, Signature," for cases on this point.

95. Storage of Goods.—In an action by a merchant against a brewer for a quantity of beer stored in his cellar, it was held to be a commercial matter, so as to be within the statute of frauds. *Pozer* vs. *Meiklejohn*, K. B. 1809. Pyke's Rep. p. 11.

93. Subscription to Shares — Guarantee.—A guarantee by the agents of a joint stock company, to take payment of a subscription of shares in merchandise, cannot be proved by parol. *Compagnie de Navigation Union* vs. *Christin*, S. C. 1878, 2 L. N. 27. Confirmed in appeal, Mont., 20 Novb., 1882.

97. —— Misrepresentation.—On an action for calls on stock to which misrepresentation was pleaded—*Held*, that verbal evidence could not be received to contradict the written consent of the party. *National Insurance Co.* vs. *Chevrier*, S. C. 1878, 1 L. N. 591.

98. —— Parol evidence is not admissible to prove that a subscription of stock in a company was conditional when the writing contains on the face of it an absolute promise. *Wilson* vs. *Société de Construction de Soulanges & divers garnishees*, S. C. 1880, 3 L. N. 79.

99. Suretyship.—In an action for $33.25, parol evidence is inadmissible to prove a contract of suretyship. *Reeves* vs. *Malhiot*, C. Ct. 1863, 8 L. C. J. 84.

100. Tender of Rent—C. C. 1233.—A tender of rent, not being a commercial matter, cannot be proved by parol evidence. *MacFarlane* vs. *McIntosh*, 1885, M. L. R., 1 S. C. 451.

101. Tender for Construction.—In an action by a contractor for the construction of a chapel, etc.—*Held*, that tenders on the part of the contractor, where the amount exceeded $50, could not be proved by witnesses. *Chèvrefils* vs. *Les Syndics*, S. C. 1869, 2 R. L. 161.

102. Third Party—Writing.—Evidence of a third person who is not a party to the suit may be received to vary or even contradict a valid written instrument. *Girard* vs. *Bradstreet*, S. C. 1872, 4 R. L. 376.

103. Transfer of Effects at Judicial Sale.—Where goods had been purchased at judicial sale and allowed to remain in the possession of the debtor—*Held*, on opposition to another seizure that the verbal testimony of the purchaser is admissible, as against such other seizing creditor, to prove the transfer of the effects from the first purchaser to the transferee, opposant. *Senécal* vs. *Crawford*,

Q.B. 1831, 5 L. N. 256, and 2 Dorion's Q. B. R. 120.

104. Transfer of Shares.— In railway companies cannot be proved by verbal testimony. *Cockburn* vs. *Beaudry*, S. C. 1858, 2 L. C. J. 283.

105. Place where Work to be performed.—Cannot be proved by parol testimony where there is a written contract. *O'Keefe* vs. *Desjardins*, Q. B. 1886, 30 L. C. J. 280.

106. Value of Goods seized.—On a rule for civil imprisonment—*Held*, in appeal, that the value of the goods seized, for which the rule was demanded against the guardian, may be established by the verbal admission of the plaintiff, as to the value at the time the seizure was made. *Leverson* vs. *Boston*, Q. B. 1859, 3 L. C. J. 223 and 9 L. C. R. 238.

107. Value and Occupation.— In an action for the use and occupation of a farm, the *quantum valebat* of such use and occupation, and the defendant's possession, may be proved by witnesses. *Langlois* vs. *Darbyson*, K. B. 1820, 2 Rev. de Lég. 333.

108. Verbal Agreement to terminate Written Contract.—Oral evidence is admissible to establish a verbal agreement to terminate a written contract, where the object of the agreement or contract does not exceed in value $50. *Leblanc* vs. *Rasconi*, Mag. Ct. 1873, 4 R. L. 595.

109. Warranty in Sale.—Verbal evidence is inadmissible to prove a warranty of a horse sold where the value is over $50. *Tassé* vs. *Ouimet*, 1887, M. L. R., 3 Q. B. 312.

110. Warranty—Verbal.—On a sale of a cargo of coals by written memorandum, with verbal warranty of the best quality, where an inferior quality was delivered, and action brought—*Held*, that parol testimony could not be admitted to prove the verbal warranty, as it would tend to control the written memorandum, and the purchaser must pay the full contract price for the coals, as if they were of the best quality. *Fry* vs. *The Richelieu Co.*, Q. B. 1859, 9 L. C. R. 406.

111. Writing.—Art. 1232 C. C.—Parol evidence was received to prove a verbal agreement, extending the terms of a written contract filed in the cause affecting a sum of money amounting to over fifty dollars. *Eastman* vs. *Rolland*, C. Ct. 1866, 2 L. C. L. J. 216.

112. —— Although the ambiguous terms of a written instrument may be explained by parol evidence of a usage, they cannot be explained by parol evidence of a conversation which took place when the contract was made. *Connolly* vs. *Provincial Insurance Co.*, S. C. 1876, 3 Q. L. R. 6.

113. —— **Error.** — In commercial cases parol evidence may be adduced to establish error in a written contract, in this case an insurance policy. *Ætna Life Ins. Co.* vs. *Brodie*, Q. B. 1877, 8 R.L. 91, 20 L. C. J. 286.

114. —— Where an employee sued on a written contract with his employer—*Held*, that the defendant could not produce verbal evidence to prove other agreements than those in the writing. *Lemontais* vs. *Amos*, C. R. 1874, 5 R.L. 353; and see *Anderson* vs. *Battis*, Q. B. 1888, 17 R. L. 99, 15 Q. L.R. 196.

115. —— Verbal testimony is inadmissible to impugn a written document for fraud, except where such fraud is charged in the making of the document or immediately connected therewith, in such a manner that the party against whom it was practised could not protect himself in the drawing of the document or otherwise in writing. *Gilchrist* vs. *Lachaud*, S. C. 1888, 14 Q. L. R. 278; confirmed in Review, 14 Q. L. R. 366.

116. —— The admission of a party examined as a witness may be received to contradict the terms of a written instrument. *Mc Connell* vs. *Millar*, 1886, M. L. R. 2 S. C. 270, 14 R. L. 587; same case, 20 R. L. 354.

117. —— Not even a commencement of proof in writing (provided it does not amount to a full admission) will serve to contradict or vary the terms of a valid written instrument. *Bury* vs. *Murray*, Supreme Ct. 1894, 24 Can. S. C. R. 77.

118. —— But *held* apparently *contra* in *Lamoureux* vs. *Molleur*, Supreme Ct. 1886. Reported Cassil's Digest, 2nd Edit., pp. 71-75.

119. Written Contract—Commercial Law.—*Held*, even in commercial cases, and under the English law of evidence, parol evidence cannot be admitted to vary the terms of a valid written instrument, unless such variance result from a subsequent oral agreement based on a new consideration, and which subsequent agreement would itself be susceptible of proof by parol evidence. *Fortier* vs. *Bédard*, S. C. 1893, 4 Que. 78, and see *Dominion Oil Cloth Co.* vs. *Martin*, C. R. 1883, 6 L. N. 344.

120. Writ of Prohibition.—Verbal evidence is admissible on a writ of prohibition

issued before conviction by the recorder. *McKeown* vs. *City of Montreal*, M. L. R., 3 S. C. 54.

121. Will.—In the absence of an improbation, oral evidence cannot be admitted to contradict the enunciations which are contained in the authentic will. *Leriger* dit *Laplante* vs. *Daignault*, 1887, M. L. R., 3 S. C. 444.

XXIV. PRESUMPTION.

In a case where all the essential facts date back to a remote period, the law permits conclusive presumptions to be drawn from circumstances, probabilities, documents of apparent genuineness, acquiescence, silence and the total absence of even a pretension of claim. For example, a discharge *sous seing privé*, produced in this case, given by the heirs of an interdict to his curator thirty-four years before the institution of an action to account, and never questioned during all that time, was held to be sufficiently proved, notwithstanding it was not absolutely established that one of the five signatures, made by a cross, was authorized. *Vinet* vs. *Paré*, S. C. 1893, 3 Que. 235.

XXV. PRIVILEGED COMMUNICATIONS.

1. The private account of a party in a cause at his bankers may be shown, where it is established that money at issue in the cause has been lodged by the party at the bankers' to the credit of his private account. *Mackenzie* vs. *Taylor*, S. C. 1862, 6 L. C. J. 83.

2. A judge at *nisi prius* has no power to compel the provincial secretary to produce documents connected with affairs of state if their production would be injurious to the public service, of which he was the sole judge; and the power of the secretary of state to withhold such documents was not waived by the fact that a copy of the paper in question had already been delivered to the appellant by the assistant secretary of state. *Gugy* vs. *Maguire*, Q. B. 1863, 13 L. C. R. 33.

3. A physician is not exempt from disclosing information acquired by him confidentially in his professional character. *Brown* vs. *Carter*, S. C. 1865, 9 L. C. J. 163.

4. Communications between principal and agent will be protected, if they form part of the preparation or preliminary investigation prior to suit. *Pacific Mutual Ins. Co. of N. Y.* vs. *Butters*, S. C. 1873, 17 L. C. J. 309.

5. *Held*, where a Catholic is examined as a witness, what passed at the confessional between the witness and his *curé* was privileged. (1) *Massé* vs. *Robillard*, S. C. 1880, 10 R. L. 527.

6. Upon motion to reject certain items of the particulars of an election petition, as containing charges against clergymen which could only be proved by revealing the secrets of the confessional. Motion dismissed, on the ground that the kind of proof required could not be indicated by a motion of that kind, and that the proof could only be controlled at the time it was offered. (*Ib.*)

7. On the examination of an advocate—*Held*, that the right of privilege as to what had been communicated to him by his friend did not extend to a conversation in the presence of another party which had nothing of the character of secrecy about it, and could not be considered confidential. *Bulman* vs. *Andrews*, S. C. 1883, 12 R. L. 332.

8. On a charge of perjury alleged to have been committed in an affidavit made by the defendant in order to obtain a writ of *capias*, the counsel for the accused, plaintiff in the *capias* suit, was asked to prove the identity of the accused as the person who signed and swore to the affidavit—*Held*, that this was not a private or confidential matter, and further that the fact that the witness was also retained for the accused in the perjury case did not excuse him from answering. *Kavanagh Exp.*, Q. B. 1884, 7 L. N. 316.

9. Communications between solicitor and client are privileged, and accordingly it was *held* that the managing director of a company could not be forced to produce letters written to him by the solicitor of the company, touching the suit in which said company was defendant. *Abbott Exp.*, S. C. 1884, 7 L. N. 318.

XXVI. SECONDARY EVIDENCE.

1. If secondary evidence be adduced, without objection, it is presumed that the party, who might have objected to such evidence, but failed to do so, has waived his right to urge such objection. *Thwaites* vs. *Coulthurst*, C. R. 1874, 3 Q. L. R. 104.

2. No secondary proof of the contents of an insurance policy will be allowed, when the original policy itself, though deposited in an-

(1) "Are admissions made in the confessional privileged communications?" 3 Themis 117, 173, 244, 257, 381, 4 Themis 65.

other district, could have been obtained. *Reg.* vs. *Bourassa*, Q. B. 1877 (Crown Side), 3 Q. L. R 359.

XXVII. STATUTE OF FRAUDS.

1. In an action brought to recover $245 for furnishing and making certain carpets, which it was alleged the defendant had ordered to be made according to directions then and there given, and promised to take delivery thereof, and to pay for the same in cash on delivery, but which he subsequently, and on tender, refused to take delivery of, or to pay for, and the defendant, on action brought, pleaded that there was no proof of any contract, relying on the Statute of Frauds—*Held*, that the Statute of Frauds has been recognized by the jurisprudence of Lower Canada previous to and since the Provincial Act 10 and 11 Vic., cap. 11, and is in force as a rule of evidence in commercial matters. *Baylis* vs. *Ryland*, S.C. 1864, 15 L. C. R. 94.

2. In an action by a blacksmith against the defendants, merchants, for the non-delivery of coal purchased from them by the plaintiff, a jury being granted, the plaintiff was about to make proof of the purchase by parol evidence when the defendant objected—*Held* (confirming *Pozer* vs. *Meiklejohn*, P. R. 11), that, by 25 Geo. III, cap. 2, the 17th section of the Statute of Frauds was in force in Canada in commercial cases, and therefore a sale of goods to any greater value than £10 sterling could not be proved, where no part of the goods have been delivered, no earnest given, and no memorandum in writing made of the contract. *Hunt* vs. *Bruce*, Pyke's Reports 8, K. B.

XXVIII. STENOGRAPHER'S NOTES.

1. The shorthand notes of the shorthand writer employed by the court to take down the evidence were not extended in his handwriting, but were signed by him—*Held*, that the notes of evidence could not be objected to. *Coté* vs. *Goulet*, Supreme Ct. 1884, 9 Can. S. C. R. 279.

2. **Correction of Errors**—47 Vict. (Q.), c. 8, s. 4 (R. S. Q. 5888).—The transcribed notes of evidence taken by a stenographer under the direction of the judge, in the manner provided by 47 Vict. (Q.) c. 8, s. 4, are like notes taken by the judge himself, and it is not necessary that they should be read to the witnesses. Where errors are found to exist in such notes, the judge who heard the evidence, upon application by the party interested, may order the errors to be corrected in the manner he may deem proper. *Guimond* vs. *Leblanc*, 1888, M. L. R. 4 S. C. 426.

XXIX. SUFFICIENCY OF.

1. **Proof of Claim—Account Sales.**—Where appellants, by a claim filed upon an estate in liquidation, claimed indemnity for an alleged loss made by them upon shipments of cattle from Boston to Liverpool—*Held*, that the account sales received by claimants from their Liverpool agents were insufficient, *per se*, to make proof of the loss. *Hathaway* vs. *Chaplin*, Q. B. 1891, 7 M. L. R. 317. Confirmed in Supreme Ct. 1892, 21 Can. S. C. R. 23.

2. **Receipt—Forgery.**—Where there was strong evidence that the signature to a receipt was a forgery, but no actual proof was made, and no affidavit produced denying the signature, the receipt was maintained and the action dismissed. *Brunet* vs. *Brunet*, S. C. 1873, 5 R. L. 466.

3. **Sale.**—In an hypothecary action against the purchaser of an immoveable—*Held*, that a copy of the deed of sale delivered or produced by the registrar or deposited in his office for registration, is not evidence of sale. *Ross* vs. *Colvill*, Q. B. 1852, 3 L. C. R. 97, 3 L. R. Q. 414.

4. **Waiver.**—Where defendants claimed neither in the Superior Court nor in Review that the evidence of notice of registration and of separation as to property were insufficient, this constitutes a waiver of his right to object thereto. *Pacaud* vs. *Brisson*, C. R. 1886, 12 Q. L. R. 281.

XXX. TAKEN IN CASE BY DEFAULT.

A deposition filed in a case in order to obtain judgment by default will not avail to prove the plaintiff's case on his contestation of the opposition to judgment made by defendant. *McLachlan* vs. *Baxter*, 1886, M. L. R. 2 S. C. 434.

XXXI. TO CONTRADICT WITNESS.

Evidence of a statement or declaration made by a witness subsequently to his examination, for the purpose of contradicting or invalidating his testimony, is inadmissible, until such witness has been recalled and examined upon the point, and an opportunity has thus been furnished to him of giving such reasons, ex-

planation or exculpation as he may have. *Séguin* vs. *Rochon*, S. C. 1888, 11 L. N. 386.

XXXII. UNDER AGRICULTURAL ACT.

In cases before the Justice of the Peace, under the Agricultural Act, the evidence must be taken in writing, and that notwithstanding the proceeding is a summary one. *Houle* vs. *Martin*, C. Ct. 1874, 6 R. L. 70 and 641.

XXXIII. VARIANCE.

In matters of simple contract, in which there is no written agreement, a variance between the allegations and proof is not fatal, and it is sufficient that the real substance of the matter at issue be considered. *Guérin* vs. *Mathe*, C. R. 1871, 15 L. C. J. 253.

ESTOPPEL.

See also PLEADING.

The island of Anticosti, held in joint ownership by a number of people, was sold by licitation for $101,000. The report of distribution allotted to respondent (plaintiff) $16,578.66 for his share as owner of $\frac{1}{6}$ of the island acquired from the Island of Anticosti Company, who had previously acquired $\frac{1}{6}$ from Dame C. Langan, widow of H. G. Forsyth. The respondent's claim was disputed by the appellant, the daughter and legal representative of Dame C. Langan, alleging that the sale by Mrs. C. Langan through her attorney W. L. F., of said $\frac{1}{6}$th to the Anticosti Company, was a nullity, because the Act incorporating the Island of Anticosti was *ultra vires* of the Dominion Government, and that the sale by W. F. L. as attorney for his mother, to himself, as representing the Anticosti Company, was not valid. The Anticosti Company was one of the defendants in the action for licitation, and the appellant an intervening party; no proceedings were taken by respondent prior to judgment attacking either the constitutionality of the Island of Anticosti Company's charter or the status of the plaintiff, now respondent—*Held*, affirming the judgment of the court below (Sir W. J. Ritchie, C.J., and Gwynne, J., dissenting), that as the said Dame C. Langan had herself recognized the existence of the company, and as the appellant, the legal representative of Dame C. Langan, was a party to the suit ordering the licitation of the property, she, the appellant, could not now, on a report of distribution, raise the constitutional question as to the validity of the Act of the Dominion Parliament constituting the company, and was estopped from claiming the right of setting aside a deed of sale for which her mother had received good and valuable consideration. Appeal dismissed with costs. *Forsyth* vs. *Bury*, Supreme Ct. 1887, 15 Can. S. C. R. 543, 11 L. N. 323.

ETAT CIVIL.

See CIVIL STATUS—INTERDICTION.

EVOCATION.

1. The words "fee of office" as ground of evocation do not extend to costs of action alleged to have been taxed too high. *Dérome* vs. *Lafond*, S. C. 1856, 6 L. C. R. 474.

2. Evocation will be allowed in an action for a life rent brought in the Commissioners court. *Dalpé* vs. *Brodeur*, S. C., 9 L. C. R. 56.

3. An intervention, claiming that the property leased belongs to the intervening party and that the rent thereof should be paid to him, renders the whole case evocable. *Kingsley* vs. *Nixon*, S. C. 1869, 15 L. C. J. 271.

4. In a non-appealable case returnable out of term, a defendant may evoke at any time before plaintiff has obtained an *acte* of foreclosure. *DeBeaujeu* vs. *McNamee*, S. C. 1872, 17 L. C. J. 50.

5. Where a case has been evoked from the Circuit Court to the Superior Court, and the evocation has been declared valid by the latter court in virtue of Art. 1058 C.P.C., the judgment which declares the evocation valid cannot be revoked by the same court. *St. Aubin* vs. *Leclaire*, C. R. 1884, 13 R. L. 609.

6. Where a railway company was sued for ninety dollars, being the amount of penalties for nine days, under a by-law of a town enacting a penalty of ten dollars per day in the event of the company's making default to erect gates at the intersection of the railway with certain streets—*Held*, that rights in future within the meaning of Art. 1058 C. C. P. were affected, and the defendant might evoke the action to the Superior Court. *Cie. de Chemin de Fer Grand Tronc* vs. *Corp. de St. Jean*, Q. B. 1888, M. L. R., 4 Q. B. 271, 16 R. L. 691.

EXCEPTIONS.

See PROCEDURE.—PLEAS AND PLEADING.

EXCHANGE.

An action in restitution and in rescission may be maintained in the case of an exchange of real property. *Laperrière* vs. *Thibaudeau*, K. B. 1821, 1 Rev. de Leg. 506.

In the case of an exchange of horses, it is not competent for a party sued on a note given as boot on such exchange to plead non-liability on the ground of a redhibitory vice in the horse received by him, and without bringing any action to set aside the exchange; especially where such plea is filed several months after the defendant knew of the vice and had tendered back the animal. *Veronneau* vs. *Poupart*, S. C. 1877, 21 L. C. J. 326; *Lemoine* vs. *Béique*, Q. B., 29th Jan., 1878.

An exchange is void where one of the parties to the transaction is not proprietor of the thing which he has obliged himself to give in exchange. But where the plaintiff takes action to recover the thing promised in exchange, and for damages for non-delivery, not knowing that the defendant was not proprietor thereof, the defendant will be held liable to the plaintiff for the damages claimed, and whole costs of action. *Cadieux* vs. *Rawlinson*, S. C. 1892, 2 Que. 296.

Where a horse has the tic or rot, and his teeth have been fixed so as to make him appear younger, these constitute hidden defects voiding an exchange of horses. The plaintiff in such a case will not be deprived of his remedy because the horse offered by him in exchange had also redhibitory defects, where such defects could easily be detected by the defendant who was a horse dealer. *Chaussé* vs. *Malette*, S. C. 1893, 3 Que. 402.

EXCISE.

The seizure of a distillery for violation of the excise laws does not extend to the building. *Regina* vs. *Spelman*, Q. B. 1867, 2 R. L. 709.

And *held* also, that during such seizure the proprietor is entitled to retain the enjoyment and possession of the building, with the right of entry, and consequently to force his way into the building is not an offence against the government. (*Ib.*)

EXEMPTION FROM EXECUTION.

See EXECUTION.

EXECUTION. (1)

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Curator to Substitution. 1.
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IV. BY BAILIFF OUT OF HIS DISTRICT.
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VI. CUSTODY OF MONEY SEIZED.
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XXXII. VENDITIONI EXPONAS. 1-7. (See under title "WRITS," "SHERIFF'S SALE.")

I. AGAINST.

1. Curator to Substitution.— An execution against a curator to a substitution, presented to the sheriff whilst the lands are under seizure, under a writ against the *grevé*, should be noted as an opposition *afin de conserver*, and, after being so noted, a *rend. ex.* may lawfully issue at the suit of the plaintiff to sell another immoveable of the substitution

in the same case. *Wilson* vs. *Leblanc*, C. R. 1872, 16 L. C. J. 209.

2. **Goods in Plaintiff's Possession.**—Where the goods seized in execution were already in possession of the plaintiff—*Held*, that the seizure was bad, i such as the proceedings should have been by *saisie arret*. *Morris* vs. *Antrobus*, S. C. 1850, 1 L. C. R. 114, 2 R. J. R. Q. 425.

3. ——**Quære**—As to the right to oppose other claims in compensation of the damages, a party has been condemned to pay for a *délit* or *quasi délit*, or to seize in his own hands the sums so awarded to his debtor. *Archambault* vs. *Lalonde*, 1887, M. L. R., 3 Q. B. 486.

4. **Immoveables—Creditor who has filed an Opposition becoming Purchaser.**—When a mere chirographary creditor who has filed an opposition in the hands of the sheriff, becomes purchaser of the immoveable sold, he is not entitled to retain the purchase money to the extent of his claim—Article 688 C. C. P. referring only to the seizing creditor and to hypothecary creditors. *Fairbanks* vs. *Barlow*, 1886, M. L. R., 4 S. C. 180.

5. —— **Division of Lots.**—Notwithstanding the subdivision of an immoveable into official lots for cadastral purposes only, if the immoveable constitute but one seizure it can be seized as a single lot. *Turcotte* vs. *Lionais*, S. C. 1890, 18 R. L. 660.

6. —— **Fieri Facias.**—An order to the sheriff to suspend all proceedings on a writ of *fieri facias de terris* causes the writ to lapse. *Ranger* vs. *Seymour*, Q. B. 1870, 16 L. C. J. 42.

7. —— —— If, during the pendency of an appeal, the return day of a writ of *fieri facias* arrives, the plaintiff can subsequently, upon the rejection of the appeal, take a *conditioni exponas* in pursuance of such (seemingly) exhausted *fieri facias*, and need not proceed by *alias fieri facias*. *Union Bank of Lower Canada* vs. *Dawson*, C. R., 11 Q. L. R. 329.

8. —— **Jurisdiction.**—Upon the issue of a writ of *fi fa de terris* returnable to the Superior Court, the jurisdiction of the Circuit Court is exhausted, and all subsequent proceedings relating to the execution of the writ are within the jurisdiction of the Superior Court. *Potvin* vs. *Fruchon*, S. C. 1887, 10 L. N. 305.

9. —— —— Consequently an opposition to annul such execution should be addressed to the Superior Court, and the affidavit accompanying it cannot be sworn to before the Clerk of the Circuit Court. (*Ib.*)

10 —— **Necessary Amount.**—The costs of suit cannot be added to the principal in order to form the sum of $40 required to seize real estate, the costs belonging to the attorney of the successful party and being determined only by taxation subsequently to the judgment. *Jenckes Machine Co.* vs. *Hood*, C. R. 1891, M. L. R., 7 S. C. 203, 21 R. L. 201.

11. —— —— In a suit for $45, dismissed with costs, a writ of *fieri facias de terris* may issue from the non-appealable side of the Circuit Court against the plaintiff's lands, to satisfy the defendant's costs, taxed at a sum exceeding $40. *Moore* vs. *Keane*, C. R. 1880, 6 Q. L. R. 378; *Charbonneau* vs. *Charbonneau*, S. C., Montreal, 8th April, 1880.

12. —— —— A writ of *fieri facias de terris*, issued *generally*, in satisfaction of an hypothecary judgment for an amount less than £10 cy. is illegal, such writ being only allowed *specially* against the land *declared to be hypothecated*. *Gorrie* vs. *Herbert*, S. C. 1857, 1 L. C. J. 173.

13. —— **Second Seizure.**— The provisions contained in Art. 642 Code of C. P. are applicable only to cases where the second or subsequent writ of execution against the lands of a debtor is placed in the sheriff's hands, while he is still in possession of the writ on which the said lands have been seized, and while he is still in a position to proceed to the sale of such lands on the day fixed for the sale. Accordingly, where an opposition has been filed to a seizure of lands, and the seizure has been suspended, and the sheriff has returned the writ and *procès verbal* of seizure into the prothonotary's office, a second seizure of the same lands may validly be made for another debt, and consequently the sheriff cannot treat such subsequent writ as coming within the provisions of said Art. 642 C. C. P. *Fuller* vs. *Fletcher*, Q. B. 1881, 25 L. C. J. 93.

14. —— **Supra non Domino.**—Where, under a judgment for the amount of a commercial debt, an execution was placed on an immoveable, transfer of which had been made to the brother of the debtor about the time of the judgment being rendered and duly registered, and the transferee opposed the seizure —*Held*, that the seizure must be considered to

be made *supra non domino*, and could not be maintained under the pretext that the title was null. *McGowan* vs. *Masson*, Q. B. 1870, 4 R. L. 461.

15. —— —— And *held*, also, that, in such case, the proper course was to attack the title by a revocatory action. (*Ib.*)

16. —— **Writ of Possession**—ART. 712 C. P. C.— A writ of possession will be allowed against the widow of a defendant who has died since the adjudication of the land by the sheriff. *Lewis* vs. *O'Neill*, S. C. 1856, 1 L. C. J. 15.

17. —— —— Where an immoveable has been sold, under an execution issued out of the Circuit Court, but returned as of course into the Superior Court, a writ of possession can only be asked for in the Superior Court. *Evans* vs. *Hurtubise*, C. Ct. 1883, 27 L. C. J. 291.

18. **License.**—A license to sell intoxicating liquors cannot be seized under an execution. *Van de Vliel* vs. *Fenion*, 1885, M. L. R., 1 S. C. 216.

19. **Moveables and Immoveables.**—ART. 554 C. P. C.—Moveables and immoveables can be seized simultaneously under one and the same writ. *Kierzkowski* vs. *Lespérance*, S. C. 1857, 1 L. C. J. 193.

20. —— In Circuit Court cases the defendant's moveables and immoveables cannot be seized at the same time; such seizure would be a ground for an opposition to annul. *Bouchard* vs. *Audet*, S. C. 1882, 10 L. N. 230.

21. —— Where defendant's movenbles have been seized, and his wife puts in an opposition, claiming the goods seized as her own, the sheriff can seize and proceed to sell the defendant's immoveables notwithstanding Art. 554 C. P. C. *Parsons* vs. *Berthelet*, 1890, M. L. R., 6 S. C. 340.

22. **Railways.**—Following *Corporation of Drummond & South Eastern Railway Co.* (24 L. C. J. 276, 3 L. N. 2)—*Held*, that railways may be seized and sold like other property in execution of a judgment. *Hochelaga Bank* vs. *Montreal, Portland and Boston Ry. Co.*, S. C. 1881, 4 L. N. 333; *Banque d'Union de Bas Canada* vs. *Corp. of Wickham*, Q. B. 1885, 21 R. L. 212.

23. —— Railways which have received subsidies from the province may be seized and sold like other property in execution of a judgment. *Wason Manufacturing Co.* vs. *Levis & Kennebec Railway Co.*, C. R. 1880, 7 Q. L. R. 330; reversing S. C., 5 Q. L. R. 99.

24. **Partnership Property.**—Where an immoveable property was purchased by a commercial firm, and a building erected thereon, which was occupied by one of the partners, who had only a one-fourth interest in the profits of the firm for some time subsequent to the dissolution of the partnership, and a seizure was made of the property by the creditors of the other partner—*Held*, on the contestation of an opposition by the partner in occupation, that the seizure must be maintained, notwithstanding such opposition, and it was accordingly maintained. *Lepage* vs. *Stevenson*, Q. B. 1866, 17 L. C. R. 209.

25. —— And *held*, also, that the contestation by the seizing creditors of an opposition of this nature, by means of a *défense en fait* merely, not setting forth any title showing the property to be the defendant's, is maintainable if the title be produced at the *enquête*, although not registered, and subsequent in date to the opposant's possession, and to a declaration by the defendant in an authentic deed that the property belonged to a commercial partnership in which the opposant had a fourth share. (*Ib.*)

26. **Representatives.**—A demand to make a judgment executory against the representative of a deceased defendant, and others against whom it was rendered, does not necessitate the calling in of the others who are not affected by it. *Destimauville* vs. *Tousignant*, S. C. 1874, 1 Q. L. R. 52.

27. **Shares.**—ART. 566 C. P. C.—The plaintiff, having obtained judgment, took in execution certain shares belonging to the defendant in an unincorporated joint stock company, in the manner provided by the statute 12 Vic., cap. 23, being an act for the seizure and sale of shares in the capital stock of unincorporated companies—*Held*, that they were not subject to be taken in execution in that manner. *Bruneau* vs. *Foolcooke*, S. C. 1851, 1 L. C. R. 92, 2 R. J. R. Q. 414.

28. —— Bank shares can only be seized conformally to Art. 566 C. P. C., and in no other way. *Hudon* vs. *Banque du Peuple*, Q. B. 1875, 7 R. L. 229.

29. —— Where bank stock or shares is seized under a writ of execution, notice should be given by the bailiff charged with the execution that the shares held by him in such and such a company or bank have been taken in

execution, and, if the notice is not made and signed by the bailiff, the seizure will be null. *Francis* vs. *Clement*, S. C. 1884, 12 R. L. 642.

30. Ship.—Execution for an ordinary civil debt due by a person other than the registered proprietor of a vessel is null, and even proof of fraudulent sale prior to the registration is not sufficient to give legitimacy to the seizure made on behalf of a creditor of the vendor. *Darveau* vs. *Cyprien*, S. C. 1884, 10 Q. L. R. 348.

II. ALIAS WRIT.

Where a judgment creditor has caused the seizure and sale of a portion of the defendant's effects, sufficient to cover his claim as stated in the writ of execution, he cannot subsequently, upon a mere allegation that the defendant is insolvent, and that oppositions *afin de conserver* have been filed by other creditors, obtain an order for an *alias* writ of execution for the purpose of seizing and selling the remainder of the defendant's effects. *Bury* vs. *Samuels*, 1885, M. L. R., 1 Q. B. 436, 29 L. C. J. 187.

III. ATTACHMENT FOR RENT.

1. The landlord cannot oppose the seizure and sale of the moveables subject to his claim; he can only exercise his privilege upon the proceeds of the sale. *Damien* vs. *Demers*, C. Ct. 1887, 10 L. N. 179; *Caron* vs. *Can. Investment Co.*, S. C. 1891, 21 R. L. 151; *Voyer* vs. *Pichet*, Prev. de Quebec, 1728, Perrault's Prevosté, p. 10.

2. Defendant sued by way of attachment for rent cannot oppose execution of his immoveables when he has signed the bailiff's return of *nulla bona* after judgment has been rendered maintaining the attachment. *Graham* vs. *Hurlburt*, C. R. 1880, 10 R. L. 228.

IV. BY BAILIFF OUT OF HIS DISTRICT.

Under Art. 461 C. P. C., a bailiff of the Superior Court for the District of Montreal can execute in a neighboring district a writ of execution issuing from that court. *Duhaut* vs. *Lacombe*, S. C. 1869, 1 R. L. 440, 13 L. C. J. 308.

V. COSTS OF.

Money paid to a bailiff for crying a property taken in execution is a disbursement to be charged by the sheriff, but the latter cannot charge for his own warrant, or for the draft which he makes of the advertisement of sale. *Hoyt* vs. *Taillon*, K. B. 1811, 3 Rev. de Lég. 471.

VI. CUSTODY OF MONEY SEIZED.

A voluntary guardian petitioned to have a sum of current money, which was among the articles seized, placed under his guardianship by the bailiff, who was retaining it. The latter refused, citing 564 C. C. P.: "If current money is seized, mention of its kind and quantity must be made in the inventory, and the sheriff must return it with the moneys levied." The petitioner submitted that this was a command to seizing officers to retain in their own possession, till return of the warrant of execution, any current moneys seized. —*Contra*, the word "must" in Art. 564 is "imperative," not "facultative," therefore the bailiff is obliged to hold the currency until he returns the other moneys levied. The court held the latter view, and thus interpreting articles 564 and 601 dismissed the petition. *Leclerc* vs. *Sauvé*, S. C. 1888, 11 L. N. 361.

VII. DEMAND OF PAYMENT.

1. Art. 560 C. P. C.—Upon the seizure of moveables under a writ of *fi. fa.* no demand of payment is necessary. *Lee* vs. *Lampson & divers*, S. C. 1851, 2 L. C. R. 148, 3 R. J. R. Q. 120; *Massue* vs. *Crébassa*, S. C. 1863, 7 L. C. J. 225.

2. Demand of payment is unnecessary in the case of a seizure of immoveables made the same day that a *procès verbal* of *nulla bona* (containing such demand) has been made. *Hurteau* vs. *Owens*, S. C. 1869, 14 L. C. J. 55.

VIII. DEMAND OF NULLITY—DELAY FOR, EXPIRED.

A demand of nullity of execution, on the ground of alleged irregularities in the seizure and sale, cannot be brought after the delay prescribed by law. *Boyer* vs. *Slowan*, S. C. 1852, 2 L. C. R. 53, 3 R. J. R. Q. 87.

IX. DISCONTINUANCE. (See "SUSPENSION.")

1. Where, with the consent of the attorneys of an opposant to an execution against moveables and immoveables, the opposition is not returned, and the opposant's attorneys receive their costs on the opposition on condition that

the plaintiff shall discontinue his execution, the latter can issue a new writ of execution without obtaining judgment on his discontinuance. *Charby* vs. *Charby*, C. R. 1889, 17 R. L. 374.

2. A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the plaintiff's solicitor, were left by the sheriff in charge of S., who undertook that the same should be held intact. The sheriff made a return to the writ that he had seized the goods. The sheriff subsequently sold the goods under executions of the creditors. In an action against the sheriff—*Held*, reversing the judgment of the court below, that the act of leaving the goods in the possession of S. was not an abandonment by the plaintiff's solicitor of the seizure, and if it was, the sheriff was estopped by his return to the writ from raising the question. *Duffus* vs. *Creighton*, Supreme Ct. 1888, 10 L. N. 362.

3. *Held*, also, that the fact of plaintiff's solicitor acting as attorney for S., in a suit connected with the same goods, was not evidence of an intention to discontinue proceedings under the attachment. (*Ib.*)

X. DISCUSSION OF PROPERTY.

1. Execution having issued against the goods of the defendant, the bailiff made a return of *nulla bona*, and a writ issued in virtue of which his immoveables were seized. The defendant filed an opposition *afin d'annuler*, alleging that he had moveable property, which he specified in his opposition, and asked that the seizure of the immoveables be set aside—*Held*, that the moveable and immoveable property of the defendant could be seized at the same time, but the moveables must be first sold, and that, where the return of the bailiff sets forth that the defendant has no moveables, proceedings must be taken to set aside the return before an opposition can be filed to set aside the seizure of immoveables. *Paige* vs. *Savard*, S. C. 1860, 11 L. C. R. 3.

2. And in another case where the defendant himself told the officer charged with the execution that he had no moveables, and afterwards brought opposition on the ground stated above, exactly the same decision was rendered. *Arnold* vs. *Campbell*, Q. B. 1858, 9 L. C. R. 33.

XI. DUTIES OF BAILIFF. (See "BAILIFFS.")

1. A writ of execution should be made returnable on a fixed date. *Kennedy* vs. *Danford*, Mag. Ct. 1889, 12 L. N. 244.

2. A bailiff cannot execute a writ addressed to another bailiff. (*Ib.*)

3. After the dismissal of a first opposition, the bailiff to whom the writ is addressed cannot *de plano* give notice to the defendant and guardian that he is going to sell the goods seized. (*Ib.*)

4. The bailiff to whom the writ of execution is addressed has no right to sell the effects seized by another bailiff, and cannot order the guardian to deliver over to him the said effects. (*Ib.*)

XII. ERROR.

1. Description of Immoveable.—In a demand to annul a seizure of an immoveable held under emphyteutic lease—*Held*, that where a plaintiff has by his fault or neglect caused an immoveable to be seized, under an inaccurate description, the party seized, having an interest that such description be accurate and correct, may demand the nullity of such seizure with costs. *Dupuis* vs. *Bourdages*, S. C. 1853, 4 L. C. R. 227, 4 R. J. R. Q. 172.

2. Fiat.—A clerical error in the *fiat* for a writ of execution does not entail nullity of the execution. *Latour* vs. *Champagne*, S. C. 1889, 19 R. L. 283.

3. Liability for Error of Bailiff.—The seizing creditor is responsible for the error of the bailiff in seizing effects which belong to another party; and in such case the owner of the effects so illegally seized is entitled to exemplary damages. *Lalonde* vs. *Bessette*, S. C. 1888, M. L. R., 4 S. C. 39.

4. Notice of Sale.—An error by a bailiff in the notice of sale at the foot of the *procès-verbal* of seizure will give rise to an opposition by the defendant, but does not necessarily involve the nullity of the seizure. *Manseau* vs. *Bernard*, S. C. 1870, 2 R. L. 212.

5. Overcharge.—An overcharge of ten cents made by error in a writ of execution is not sufficient to annul the writ on opposition. *Côté* vs. *Sampson*, Q. B. 1882, 12 R. L. 112, reversing C. R., 8 Q. L. R. 357, and restoring S. C., 5 L. N. 421. See remarks of Andrews, J., on this case, 17 Q. L. R. at p. 360.

XIII. EXEMPTION FROM.

1. Alimentary Allowance.—An alimentary allowance granted in settlement of a claim which the beneficiary had against the grantor, and which assumes the form of an obligation to "board, lodge, clothe and maintain," cannot be garnisheed. *Sœurs du Précieux Sang* vs. *Dorion*, C. R. 1887, 31 L. C. J. 153.

1a. Art. 556 C. P. C.—Ball Dresses.—Ball dresses are not exempt from seizure under Art. 556 C. P. C. *Doutre* vs. *Sharpley*, Q. B. 1883, 27 L. C. J. 25.

2. —— Contra.—*O'Dowd* vs. *Brunelle*, C. Ct. 1881, 4 L. N. 79.

3. —— Choice of Goods seized—Description of Goods seized.—The bailiff should offer the party executed against, his choice of those goods which are exempt from seizure. *Lanthier* vs. *Thouin*, C. Ct. 1892, 2 Que. 157.

4. —— —— The bailiff should describe the goods seized in such a manner that he will be able to identify them. Thus a description in the *procès-verbal* as follows, "four beds out of seven," is insufficient. (*Ib.*)

5. —— —— But *held* in an earlier case, that where the debtor does not make choice, under C. C. P. 556, of the tools for which he claims exemption, the bailiff may seize all of them, and if the debtor wishes to claim his right of exemption afterwards, he must pay his own costs on the opposition. *Ross* vs. *Lemieux*, 1886, M. L. R., 2 S. C. 272.

6. —— —— The debtor who wishes to avail himself of the exemption provided by Art. 556 C. P. C. must allege in his opposition that the effects seized are the only ones of the same kind which he possesses. It is not sufficient to allege that they are exempt by their nature. *Perrault* vs. *Caron*, S. C. 1891, 14 L. N. 130.

7. —— Farmer.—Where a person executed against is not sufficiently engaged in agriculture to justify his qualification as farmer, he is not entitled to the exemption accorded by Art. 556, § 5, C. P. C. *Gendron* vs. *Morriset*, C. Ct. 1886, 14 R. L. 632.

8. —— —— A farmer does not change his status by the fact of his farm being judicially sold, and even after such a sale he is entitled to claim exemption from seizure of two plough horses, etc., under Art. 556 C. P. C., especially where he continues to farm the premises for the purchaser. *Bilodeau* vs. *Jalbert*, C. R. 1891, 17 L. R. 297.

9. —— Landlord's Claim.—A subtenant who has rented premises from a tenant who is prohibited from sub-letting, cannot claim the exemptions established by Art. 556 C. P. C., this exemption being in favor of the debtor only. *Bartel* vs. *Desroches*, S. C. 1893, 4 Que. 60.

10. —— —— *Held* thus in regard to goods exempt from seizure, which their owner had lent or leased to a tenant, in whose possesssion they were seized by the landlord. *Bélanger* vs. *Roy*, C. Ct. 1879, 10 R. L. 19.

11. —— —— Contra.—*Herron* vs. *Brunette*, S. C. 1894, 6 Que. 318; *Brophy* vs. *Fitch*, C. R. 1895, 7 Que. 173; *Jones* vs. *Albert*, S. C. 1877, 7 L. N. 277.

12. —— Making up the Value of $50.—Where the bailiff has left the defendant certain effects mentioned in § 4 of Art. 556 C.P.C., of a value less than $50, the defendant can take from the seized effects further goods to complete the value of $50. *Liggett* vs. *Storer*, S. C. 1890, 20 R. L. 318.

13. —— Occasional Trade.—Where a person has another occupation, and only occasionally follows a certain trade, he cannot claim exemption of the tools used in that occasional trade. *Noel* vs. *Laverdière*, C. R. 1881, 7 Q. L. R. 367.

14. —— Retroactive effect of the Law.—Where a debt was contracted before a certain law came into effect declaring certain effects to be exempt from seizure, which law was declared to be non-retroactive, the judgment and the seizure upon such debt having taken place after the new law came into force, must be governed by such law. *Surprenant* vs. *Spooner*, C. Ct. 1884, 13 R. L. 421.

15. —— —— There was an execution against the plaintiff for costs. He opposed the sale of a sewing machine, alleging that it had been brought into the *menage* by his wife, and served *à gagner la vie commune*. The proof showed that it belonged to the wife before marriage, she being *commune en biens*, and that, when she got work to do for manufacturers, she worked on it for hire, and also used it for domestic purposes; and the plaintiff was a working stonecutter. Defendant's counsel contended that the sewing machine was not a "tool, implement or other chattel ordinarily used by defendant in his trade," that of a stonecutter, within the meaning of Art. 556 C. C. P., and that the amendment to this article exempting a sewing machine was

not passed until after the machine in question had been seized—*Held*, that though the amendment of 1886 did not apply, yet that a broad view must be taken of the Article 556, and that, therefore, the opposition would be maintained without costs. *Léonard* vs. *Canadian Pacific Ry. Co.*, C. Ct. 1886, 9 L. N. 387.

15*a*. Damages for Personal Wrongs.—Damages awarded for personal wrongs are exempt from execution. *Maurice* vs. *Desrosiers*, 7 L. N. 264, 12 R. L. 654; *Chef* vs. *Leonard*, S. C. 1862, 6 L. C. J. 305, 13 L.C. R. 74.

15*b*. —— Contra.—*Archambault* vs. *Lalonde*, 1887, M. L. R., 3 Q. B. 486, 31 L. C. J. 213, 18 R. L. 191, affirming S. C., M. L. R., 2 S. C. 410, 31 L. C. J. 195. *Desrosiers* vs. *Wurtele*, S. C. 1892, 2 Que. 411, and see *Williams* vs. *Rousseau*, S. C. 1886, 12 Q. L. R. 116.

15*c*. —— Damages awarded for bodily injuries and medical care are exempt from execution. *Cresse* vs. *Young*, C. Ct. 1890, 18 R. L. 186.

15*d*. —— Also damages awarded to plaintiff on behalf of his minor daughter, whose face was slapped by the defendant. *Laberge* vs. *Bouchard*, C. Ct. 1885, 10 L. N. 187.

15*e*. —— A sum of money awarded by the court as indemnity for personal injuries of a permanent nature partakes of the nature of an alimentary provision, and is exempt from seizure. *Beauvais* vs. *Leroux*, 1881, M. L. R., 2 S. C. 491.

16. Family Portraits.—Are exempt from execution. *Blais* vs. *Julien*, C. Ct. 1887, 10 L. N. 331.

17. Goods of High Constable.—Where a seizure of things belonging to a high constable, of Quebec, was made under a writ of execution against him, and the defendant opposed on the ground, among other things, that the things seized were under the value of thirty dollars—*Held*, that C. S. L. C. cap. 85, sec. 3, ss. 6, does not apply, except to tools of tradesmen necessary to the exercise of their calling. *Bussière* vs. *Faucher*, C. Ct. 1864, 14 L. C. R. 87.

18. Government Contract.—The plaintiff having a judgment against the defendant, seized a balance due him on a contract with the Government in the hands of the Minister of Public Works. The defendant opposed, on the ground, among others, of exemption from seizure, and the opposition was maintained. *Gingras* vs. *Vézina*, C. Ct 1879, 5 Q. L. R. 237.

19. Insurance on lives of Husbands.—The provisions contained in the Act 29 Vic., ch. 17, whereby insurances upon the lives of husbands may be effected or indorsed in favor of their wives and children, are in the nature of an alimentary allowance, and the insurance moneys due under policies made under said Act are free from the claims of the creditors of both the husband and wife. *Vilbon* vs. *Marsouin*, Q. B. 1874, 18 L. C. J. 249.

20. Indians.—Moveable effects belonging to Indians are exempt from seizure. *Hannis* vs. *Turcotte*, S. C. 1878, 8 R. L. 708; *Lepage* vs. *Watzo*, C. Ct. 1878, 8 R. L. 596.

21. Military Property.—Moneys payable under a contract for the erection of fortifications in this Province are not liable to attachment. *Fitts* vs. *Piton*, S.C. 1868, 12 L. C. J. 289.

22. —— The sword of a military man is exempt from seizure, as being part of his necessary military equipment. *Wade* vs. *Hussy*, C. Ct., 8 L. C. R. 511, 6 R. J. R. Q. 327.

23. Of Money in hands of Revenue Inspector.—In an attachment by garnishment of moneys in the hands of the revenue inspector belonging to the defendant as an informer under the revenue laws—*Held*, that they were not attachable, and the attachment was dismissed. *Leclerc* vs. *Caron*, C. Ct. 1858, 8 L. C. R. 287, 6 R. J. R. Q. 248.

24. Of Money in hands of Officers of the Admiralty.—Such money cannot be attached. *Perrault* vs. *McCarthy*, K. B. 1816, 3 Rev. de Leg. 306.

25. Pension.—Under a judgment against the defendant, it was sought to attach a pension granted to her as widow of a pilot from what is known as the "Decayed Pilots' Fund" (1) —*Held*, to be exempt. *Lelièvre* vs. *Baillargeon*, C. Ct. 1853, 3 L. C. R. 420, 4 R. J. R. Q. 25.

26. Salary and Wages.—An employee of the Government at so much a day is not an employee whose salary is seizable under Q. 38 V., c. 12. *Lepine* vs. *Gauthier*, C. Ct. 1877, 5 Q. L. R. 217.

27. —— The salary of an officer of the Inland Revenue cannot be seized in the hands of the collector in Montreal of Inland Revenue, he not being the head or deputy

(1) See R. S. C., ch. 80, sec. 91.

head of the department, but only an employee himself. *Evans* vs. *Hudon*, S. C. 1887, 22 L. C. J. 268.

28. —— The exemption of the salaries of public employees from seizure is a matter of public order, and the Parliament of the Province of Quebec has not the power to declare seizable the salaries of employees of the Federal Government. (*Ib.*)

29. —— Contestation by defendant of the declaration of *tiers saisi*, who stated that, in his quality of executor of the will of the late M., he had engaged the defendant as travelling tutor to young M., a minor, and the tutor (the defendant) and the pupil were then in Europe for the purpose of the latter's education. For this the tutor was receiving a salary of $1,000 a year, payable half yearly in advance. That on the 15th July, 1879, there was due to defendant under this engagement $500, which he had paid to defendant's sister, under an arrangement made to that effect before the departure, and on the 15th January, 1880, there would be due $500 more. Defendant contested on the ground that the money was exempt under Art. 628 of the Code of Procedure, by which the salaries of school teachers are exempt from seizure—*Held*, that the remuneration in question did not come under the terms of the Art., as defendant was not a school teacher within the meaning of that provision. *Lafricain* vs. *Villeneuve*, S. C. 1881, 4 L. N. 54.

30. —— The provisions of 38 Vict. (Q)., ch. 12, subjecting a portion of the salaries of public employees to seizure, do not apply to the salaries of teachers under the control of the School Commissioners, which are exempt from seizure. *Lorejoy* vs. *Campbell*, S. C. 1884, M. L. R., 1 S. C. 77.

31. —— A domestic servant is not entitled to the exemption claimed under Art. 628 C. P. C. *Haefner* vs. *Ruess*, C. Ct. 1890, 13 L. N. 84.

32. —— The Act 51-52 Vict., ch. 24 1888), which provides that three-fourths of the wages of a workman are exempt from seizure, does not include a journeyman barber, nor a clerk. *Leprohon* vs. *St. Germain*, Mag. Ct. 1890, 13 L. N. 346, and *Germain* vs. *Ducharme*, 11 Dec., 1889, cited in foot-note to this case.

33. Sale of Property for Taxes.—The usufruct can be seized and sold in payment of municipal taxes assessed upon an immoveable which is held under title containing a clause of exemption from seizure. *Gareau* vs. *Cité de Montreal*, Q. B. 1888, 32 L. C. J. 306.

34. Under Terms of Will.—On an opposition based on a clause in a will by which the property seized was declared to be exempt from seizure—*Held*, that as the judgment was for money advanced to pay the debts of the testatrix herself, and as she had no power to prevent the property of her succession from being liable for her debts, that the opposition must be dismissed. *Ontario Bank* vs. *Lionais & Papineau*, S. C. 1878, 1 L. N. 279.

35. —— For an interesting case of an attempt to avoid the clause of *insaisissabilité* in a will, see the case of *Carter* vs. *Molson*, P. C. 1885, 8 L. N. 281.

36. —— Clause of exemption from execution does not apply to expenses incurred in the administration of the property given subject to such clause. *Saunders* vs. *Voisard*, S. C. 1878, 28 L. C. J. 266, and see *Quintal* vs. *Roberge*, S. C. 1892, 2 Que. 462.

37. —— Nor to improvements to property donated exempt, where the improvements or additions are made from savings of the donee. *Catelli* vs. *Gareau*, S. C. 1878, 4 Thémis 57.

38. —— Where an executor, without authorization to do so, indorses accommodation notes signed by one of the heirs, execution will not be allowed to issue against the estate by the holder of the notes, the will containing a clause exempting the property of testatrix from execution. *Lionais* vs. *Molson*, Supreme Ct. 1883, 10 Can. S. C. R. 526.

39. Waiver.—A clause in a lease whereby the tenant waives his right to the exemptions from execution which the law allows him is illegal. *Marois* vs. *Deslauriers*, C. Ct. 1876, 7 L. N. 278; *Brodeur* vs. *Rogers*, C. Ct. 1885, 30 L. C. J. 2. *Contra*, *Robitaille* vs. *Bolduc*, C. Ct. 1878, 4 Q. L. R. 179.

XIV. FORMALITIES. (See under Title "Sheriff's Sale.")

1. Alteration of Writ.—If a writ of execution after having been received by the sheriff to whom it is addressed, and partially executed by him, be brought back to the prothonotary to have the return day altered, and such return day be accordingly altered on the face of the writ, such alteration is reprehensible, but does not give rise to an improbation. *Duchesnay* vs. *Vienne*, S. C. 1871, 16 L. C. J. 138.

2. Announcement at Church Door.—In an action to set aside a sale made by the sheriff on the ground that the formalities required by law precedent to the sale of immovables had not been observed, that the announcement had not been made at the church doors, but that the sale having been first stayed by an opposition *afin de charge*, which was maintained, the property was subsequently sold by the sheriff with the ordinary formalities, under a writ of *renditioni exponas*—*Held*, confirming the judgment of the Court of Review, that the plaintiff having known all along that the announcements had not been made, and having taken no proceedings to stop the sale, had waived any objection that he might have had thereto, and had no right of action afterwards to set it aside. *Bourier* vs. *Brush*, Q. B. 1870, 1 R. L. 641, C. R., 1 L. C. L. J 110.

3. —— And, *Held*, also, that the failure or neglect to make the announcements at the church doors after oppositions filed is not a ground of absolute nullity of an execution in every case. (*Ib.*)

4. Designation of Parties.—The designation of a party in the writ of execution as universal usufructuary legatee, instead of donee, as stated in the judgment, is no cause of nullity of the seizure made of the defendant's personal effects. *Trudelle* vs. *Hadon*, Q. B. 1875, 24 L. C. J. 171.

5. Indorsement of Title of Writ.—The indorsement of its title or description upon the back of a writ is not an essential part thereof and any difference in the title as endorsed upon the several copies served is not a ground of nullity. *Beaulieu* vs. *Phillips*, S. C. 1892, 2 Que. 537. Confirmed in Review, 31 Oct. 1892.

6. Notice.—A sheriff or bailiff executing a writ of *fi. fa.* is bound to give immediate written notice of the time and place of the sale to defendant. *Scott* vs. *Alain*, S. C. 1868, 4 L. C. L. J. 60.

7. —— A notice of sale of moveables under execution, in which a wrong number is given as the defendant's domicile, is irregular; but in such case the court will permit the notice to be renewed without setting aside the seizure. *Dorion* vs. *Diette*, S. C. 1884, M. L. R., 1 S. C. 31, 29 L. C. J. 28.

8. Omission of Attorney's Signature on Writ. — The omission of the signature of the attorney *ad litem* of the party executing or of such party himself, on the writ, does not entail a nullity of the seizure; the 78th Rule of Practice being abrogated by 140th section of ch. 83 of the Con. Stat. of L. C. *Levesque* vs. *Beaupré*, C. R. 1868, 10 L. C. J. 257.

9. Omitting Date of Judgment in Writ against Immoveables.—Annuls the writ of execution and the seizure made thereunder. *Bertrand* vs. *Devouin*, C. R., 1891, 21 R. L. 226.

10. Omission to state Return Day.—A defendant cannot claim as a cause of nullity the failure to state the return day in a *fiat* for execution and in the register of executions. *DeBellefeuille* vs. *Polloek*, S. C. 1881, 25 L. C. J. 104.

11. Proces-Verbal.—The declaration in a *procès verbal* of seizure that the guardian has signed, when he has only made his mark, is not a cause of nullity in the seizure, and the guardian only can avail himself of it. *Perrault* vs. *Chartrand*, C. Ct. 1874, 6 R. L. 276.

12 —— Where the bailiff in his *procès-verbal* declares that he elects his domicile in a particular parish, without specifying in what part of it, the seizure will be declared null, and a notice of sale at the foot of the *procès verbal* for a specified day of the month, without mention of the year, is null, although such *procès-verbal* be fully and correctly dated. *Beaupré* vs. *Martel*, S. C. 1858, 2 L. C. J. 276.

13. —— Art. 1081 C. P. C., relating to election of domicile by the bailiff executing, only applies to cases susceptible of appeal. *Légaré* vs. *Desroches*, S. C. 1868, 1 R. L. 51.

14. —— It is not necessary that the *procès-verbal* of seizure of an immoveable should be drawn up and signed where the immoveable is situated; it can be done at the defendant's domicile. *Senécal* vs. *Vienne*, C. R. 1871, 3 R. L. 523.

15. —— The omission to mention in a *procès-verbal* of seizure that the person seized had refused to sign the *procès-verbal*, or that he was absent from his domicile at the time of the seizure, is not a cause of nullity. *Duquette* vs. *Ouimette & Ouimette*, C. Ct. 1874, 6 R. L. 167.

16. —— Officers of justice are presumed to have complied with the law, and it cannot be inferred, from the silence of a *procès-verbal* of seizure of a stove, that another was not left to the debtor. The omission to call upon the debtor to sign the *procès-verbal* is not a cause of absolute nullity of seizure. *Sexton* vs. *Beaugrand*, 1886, M. L. R., 2 S. C. 413.

17. —— It is not necessary that the *procès-verbal* of seizure of an immoveable at the instance of plaintiff and the attorneys distraining should state their Christian names; it is sufficient if it state the legal names of the firm if the plaintiff's name is stated in the *procès-verbal* and advertisements. *Godin* vs. *Lortie*, C. R. 1891, 21 R. L. 330.

18. —— The law does not require that the *procès-verbal* for execution against immoveables and the advertisements thereof should give the actual domicile of the creditor. (*Ib.*)

19. —— In a *procès-verbal* which states that the defendant had no seizable effects, it is sufficient that it contain in the body of it the date on which the bailiff went to the defendant's house and ascertained that he had no goods to seize. *Godin* vs. *Lortie*, C. R. 1891, 21 R. L. 330.

20. Service of Writ before seizing.—The bailiff charged with a writ authorizing him to seize, is not bound to serve the copy of such writ upon defendant before effecting the seizure. The seizure may be effected in the absence of defendant and the writ subsequently served upon him. *Beaulieu* vs. *Phillips*, S. C. 1892, 2 Que. 537; confirmed in Review, 31 Oct., 1892.

21. Taxing Bill of Costs.—Where execution issues for the costs of the day only against defendant, the inscription having been struck out, such execution will be annulled if it issued without the bill of costs being taxed as provided by Arts. 479 and 1059 C. P. C. *Théoret* vs. *Carrière*, C. Ct. 1887, 15 R. L. 511.

XV. FOR MORE THAN IS DUE.

(See "Sale for more than is due," *infra* No. XXVIII.).

1. Where a defendant has paid sums of money on account of a judgment, the seizure of his land afterwards, under a writ of execution for the whole amount of the judgment, is illegal, and the defendant has the right to have the writ stayed until the exact amount due upon the judgment is determined. *Banque du Peuple* vs. *Donagani*, S. C. 1853, 3 L. C. R. 478, 4 R. J. R. Q. 36.

2. Where the plaintiff omitted to give credit for moneys received on account—*Held*, that the defendant was entitled to file an opposition to the sale for more than the amount due. *Martin* vs. *Labelle*, S. C. 1884, 7 L. N. 174.

3. And he is not bound to deposit or tender the balance due under the judgment. *Lafleur* vs. *Verville*, S. C. 1868, 1 R. L. 45.

4. When an execution is issued for more than is due under the judgment, the defendant has a right to oppose the sale and demand that the plaintiff be restrained from seizing and selling for more than is due to him, without tendering the amount really due, and to recover costs of his opposition from plaintiff. *Patenaude* vs. *Guertin*, C. Ct. 1878, 22 L. C. J. 57.

5. A defendant, whose effects are seized for a sum greater than that actually due (*e. g.* $76.03 instead of $74.83), cannot by opposition demand the nullity of the seizure. But the court will, by its judgment, declare the amount for which defendant's effects can be sold to be the lesser instead of the greater amount. *Bernard* vs. *Lemieux*, C. Ct. 1891, 17 Q. L. R. 358, and see *Coté* vs. *Samson*, Q. B. 1882, 12 R. L. 112.

XVI. FOR PART.

Where in an opposition the defendant admits that he owes a part of the debt, or even the costs, the plaintiff may obtain an order to execute for the part admitted without waiting a decision on the opposition. *Blanchard* vs. *Canadian Fire Ins. Co.*, Q. B. 1886, 30 L. C. J. 165.

XVII. ILLEGAL.

(See "Formalities.")

1. Execution issued on a judgment against several defendants jointly, directed against one of them for the whole debt, is illegal, and will be set aside on opposition, without even a tender of the amount really payable by such defendant. *McBean* vs. *DeBartzch*, S. C. 1858, 3 L. C. J. 118.

2. If the sheriff seize property in the hands of one party, under a writ which authorizes him to seize property in the hands of another only, the seizure is null. *Lee* vs. *Taylor*, K. B. 1811, 3 Rev. de Lég. 171.

3. An execution must be issued for the whole debt due under the judgment, and when it is illegally issued for part it is bad for the whole; and so where an execution issued for debt, interest and costs, and it appeared that the costs had not been legally taxed, the execution was annulled on opposition *afin d'annuler*. *Scott* vs. *McCaffrey*, C. R. 1888, M. L. R., 5 S. C. 202.

4. By the artifice of a debtor, the sheriff's officer was induced to take in execution and sell property not belonging to the debtor, and part of which was the property of the seizing credit-

or. In an action *en nullité de décret*, it was held that the seizing creditor had an interest to set aside the sale of her own property, but that she had no interest to set aside what had been illegally and fraudulently sold in her suit. *Clark* vs. *Ralph*, Q. B. Que., 6 May, 1886.

XVIII. IN HANDS OF THIRD PARTY.

(See "ATTACHMENT BY GARNISHMENT.")

1. A seizure effected in the hands of a third party, *who does not object*, is valid, and the actual *consent* of such third party to the seizure is unnecessary, his failure to object being of itself sufficient. *Brossard* vs. *Tison*, Q. B. 1873, 18 L. C. J. 54, and see *Perrault* vs. *Caron*, S. C. 1891, 14 L. N. 130.

2. A judge in Chambers may lawfully order a bailiff in charge of a writ of execution to remove from the possession of a third party goods which have been seized, and which the defendant and guardian have failed to represent, and this without notice to such third party, and such third party may be ruled to show cause why he should not be condemned to pay the costs of the procedure. *Cantwell* vs. *Maldon*, S. C. 187 , 23 L. C. J. 77.

3. A party who pays the defendant the amount of his indebtedness, after he has been duly served with a writ of *saisie-arrêt*, even if such payment be made to protect his effects from seizure, may be condemned to pay the amount a second time. *Lalonde* vs. *Archambault*, 1888, M. L. R., 4 S. C. 62.

XIX. LAPSE OF.

1. An execution will become null by the lapse of the delay, notwithstanding the consent of the defendant that it should be suspended, and an opposition founded on such nullity is good. *Denault* vs. *Pratt*, C. Ct. 1884, 7 L. N. 415.

2. But under the same circumstances, *held, contra*, that in the Circuit Court of Montreal district the practice is not to fix a delay for the return of the writ of execution. *Bonin* vs. *Côté*, C. Ct. 1885, 8 L. N. 70; *Dionne* vs. *Bonami*, C. Ct. 1884, 8 L. N. 69.

3. A writ of execution issued on the 16th April, returnable on the 31st May. On the 18th April, the seizure was made and oppositions were filed, which on the 13th May were dismissed on motion for informality. On the 17th July the plaintiff issued a *venditioni exponas*. The return day of the first writ had expired, and more than two months had elapsed between the return day and the date of the *venditioni exponas—Held*, that if the seizing party does not proceed before the return day, the writ lapses unless prolonged by a judge's order, which not having been done the *venditioni exponas* must be quashed. *Fletcher* vs. *Smith*, C. R. 1879, 2 L. N. 117.

4. But in a subsequent case between the same parties, in which the same point arose, but in which the plaintiff appeared to have made all due diligence, and to have been prevented only from taking his *venditioni exponas* by oppositions which the defendant had interposed to the execution of the writ—*Held*, that *venditioni* was properly issued although the return day of the first writ had passed. (*Ib.*), C. R. 1880, 3 L. N. 117.

5. *Held*, where the sale of moveables under writ of execution has been retarded by an opposition filed by the defendant, and the day fixed for the return of the writ has passed without an order having been obtained from the court or judge extending the return day, the seizure lapses, and the court has no authority to order the issue of a writ of *venditioni exponas*. (*Fletcher* vs. *Smith* [in Review], 2 Leg. News 117, followed.)

Quære: When the sale of moveables under execution has been delayed, is a writ of *venditioni exponas* necessary? *Lavoie* vs. *Lacroix*, S. C. 1892, 1 Que. 57.

6. But *held* in a later case (overruling *Lavoie* vs. *Lacroix supra*) that the extension by the judge of a writ of *fieri facias* is only required where the execution is not suspended by an opposition; where it is so suspended it subsists, even after the delay for the return of the writ, if the obstacle is not previously removed.

As the Code of Procedure has not provided any delay for the peremption of execution where the obstacle has been removed subsequently to the day fixed for the return of the writ, recourse must be had to Art. 172 of the Custom of Paris, which accords a delay of two months after the obstacle has disappeared.

The words "subsequently removed" in Art 589 C. P. C. mean "removed subsequently to the seizure, but prior to the return of the writ." *Martineau* vs. *Fournier*, C. R. 1893, 3 Que. 130, and see *Stanton* vs. *Reid*, C. R. 1894, 6 Que. 232.

XX. LIABILITY OF PLAINTIFF.

1. Disregarding Opposition.—No damages will be allowed for disregarding an opposition where the opposition was false and friv-

olous. *Guertin* vs. *Nolan*, S.C. 1880, 3 L. N. 182.

2. Seizing Property of another.—A plaintiff seizing *bonâ fide* the property of another in the possession of his debtor is not liable in damages to the proprietor. *McDonald* vs. *Lalonde*, S. C. 1869, 13 L. C. J. 331.

3. —— But where plaintiff seizes property of another not in the possession of his debtor, he will be held liable in damages, and these comprise the depreciation of the things seized and the injury done to their owner's credit. *Leclair* vs. *Dessaint*, Q. B. 1889, 21 R. L. 32.

XXI. OF.

1. Interlocutory Judgment.—Art. 551 C. C. P., relating to the execution of judgments, applies equally to interlocutory judgments and to final judgments; and such execution of an interlocutory judgment may issue fifteen days from the date of such judgment, and even before the rendering of the final judgment, and by motion for a rule *nisi* the prothonotary may be compelled to issue such execution. *Trudel* vs. *Desautels*, C. Ct. 1871, 4 R. L. 701.

2. Judgment ordering an Accounting.—The plaintiff obtained judgment ordering an account to be rendered within thirty days, and condemning the defendant in default of doing so to pay a certain sum. The defendant rendered an account which was rejected on motion as irregular. Some time after he filed another, which was also rejected. That was in July. In November plaintiff issued execution, and subsequently the defendant obtained leave to file another account—*Held*, on opposition, that execution did not lie *de plano* in such case, and the seizure was set aside. *Curé*, etc., de St. Clément de Beauharnois vs. *Robillard*, Q. B. 1879, 2 L. N. 236.

3. Judgment for Libel with Option to apologize.—Where defendant is condemned to pay damages for defamation with option of apologizing to the plaintiff, and he does apologize before the delay for execution of the judgment, he can oppose execution on such judgment and have it annulled. *Vézina* vs. *Saucier*, Q. B. 1888, 19 R. L. 456.

4. Judgment in Separation of Property.—Execution of a judgment in separation of property is sufficiently effected by a renunciation by the wife to the community, duly insinuated. *Senécal* vs. *Labelle*, S. C. 1857, 1 L. C. J. 273.

5. Judgment rendered in another District.—A judgment rendered in a district other than that in which the defendant resides may be executed *de plano* in the district where he lives; unless that he can show that he is possessed of property in the district where the judgment was rendered. *Terroux* vs. *Hart*, S. C. 1866, 10 L. C. J. 199.

6. Judgment in Appeal.—The execution of a judgment in appeal, reducing in amount the judgment of the S. C., cannot legally issue until after the expiration of 15 days from the date of such judgment in appeal. *Duhaut* vs. *Lacombe*, S. C. 1869, 13 L. C. J. 230.

7. Provisional Judgment.—A *fi. fa.*, for a sum ordered by a provisional judgment to be paid in default of rendering an account, may be superseded if it appear that an account has been filed, and that delay beyond the time has not been occasioned by the accountant. *Sergeric* vs. *Rouleau*, K. B. 1818, 3 Rev. de Lég. 472.

XXII. QUALIFICATION OF OFFICER.

1. A sheriff before his appointment acted as attorney in a case, but his appointment as sheriff was made before final judgment in the case. Before such judgment he transferred to his partner all his fees in this case as well as others—*Held*, that he could himself execute such judgment against the moveables and immoveables of defendant, he not having such interest in the case as would disqualify him from so acting. *Charby* vs. *Charby*, C. R. 1889, 17 R. L. 374.

2. An opposition cannot be maintained on the ground that the bailiff making the seizure was not a sheriff's bailiff, the writ of execution having been delivered to him by the sheriff. *Freligh* vs. *Seymour*, S. C. 1858, 8 L. C. R. 256, 6 R. J. R. Q. 237.

XXIII. RESISTING PROCESS.

(See under title "Coercive Imprisonment.")

1. Where a writ of execution apparently irregular in every respect had been issued and addressed to a certain bailiff—*Held*, that it was his duty to proceed under it, notwithstanding it may have really contained causes of nullity. *Regina* vs. *Morrison*, Q. B. 1872, 3 R. L. 525.

2. Where a lawyer advises resistance to execution on such a writ, in the belief that the writ is null and void, he cannot be incriminated for such illegal advice. (*Ib.*)

3. The defendant assaulting the bailiff executing such a writ is guilty of assaulting a bailiff in the performance of his duties. (*Ib.*)

XXIV. RECORS.

The presence or co-operation of a *recors* is not necessary to render an execution valid. *Guilfoyl* vs. *Tate*, S. C. 1857, 1 L.C. J. 188; *Banque du Peuple* vs. *Daoust*, S. C. 1864, 15 L. C. R. 464.

XXV. RECOURSE OF THIRD PARTY AGAINST THING SEIZED.

In the case of the seizure of moveables, the proper recourse of a third party claiming a right of ownership therein is by opposition, and not by an action and attachment in revendication. *Major* vs. *McClelland*, S. C. 1887, 10 L. N. 147.

XXVI. RIGHTS OF CREDITORS SEIZING.

1. **Against Third Parties.**—Where a third party takes away a thing which is under seizure, with the effect of preventing its sale by justice, the plaintiff executing has an action against him to have him return the thing to the guardian, or pay its value. *Savage* vs. *Singer Manufacturing Co.*, C. Ct. 1886, 9 L. N. 203.

2. **Attachment in Hands of Debtor.**—A garnishment in the hands of a debtor does not prevent his creditor from executing against him, and to raise such execution he must tender the money due his creditor and pay it into court. *Francis* vs. *Clement*, S. C. 1889, 17 R. L. 386, 31 L. C. J. 26; and see *Lalonde* vs. *Archambault*, 1888, M. L. R., 4 S. C. 62; *Duvernay* vs. *Dessaules*, Q. B. 1851, 4 L. C. R. 142, 4 R. J. R. Q. 114.

3. **Cumulation of Remedies.**—A creditor can cumulate against his debtor the various modes of execution afforded him by law in satisfaction of his judgment. *Gaudette* vs. *Laliberté*, S. C. 1869, 1 R. L. 747.

4. —— The plaintiff caused a writ of execution to issue against the immoveables of the defendant, who filed an opposition on the ground that, previous to the issue of such writ, the plaintiff had attached property belonging to him in the hands of third parties who had made default, and asked that the seizure *de terris* be annulled until the plaintiff had exhausted the other means which he had adopted—*Held*, dismissing the opposition, that the creditor could simultaneously exercise every mode of seizure and execution which the law permits to enforce payment of what is due him. *Lalonde* vs. *Lalonde*, C. R. 1866, 16 L. C. R. 395.

5. **Sale suspended by Opposition—Rights of next Seizing Creditor.**—*Held*, where the seizure of moveables by the first seizing creditor is suspended by reason of an opposition to his proceedings, the next seizing creditor is not thereby prevented from proceeding to the sale of the effects, the preference given to the first seizing creditor only subsisting so long as he is in a position to proceed to the sale of the effects seized and is not retarded by oppositions not affecting other creditors in a position to proceed. *Joseph* vs. *Leblanc*, S. C. 1892, 2 Que. 453.

6. **Transferee of Judgment**—ART. 547 C. P. C.—The transferee of a judgment cannot execute thereon in his own name; he can only do so in the name of his transferor, even after the latter's decease. *Wilson* vs. *Joly*, S. C. 1887, 32 L. C. J. 75.

XXVII. RETURN. (See "LAPSE.")

1. A sheriff cannot be ruled to return a writ of execution before the return day. *Dorval* vs. *Lespérance*, K. B. 1811, 3 Rev. de Lég. 471.

2. A return of a sheriff to a writ of execution cannot be contested except by an improbation. *Lespérance* vs. *Allard*, Q. B. 1851, 1 L. C. R. 154, 2 R. J. R. Q. 444.

3. In an action in revendication of two lots of land sold by the sheriff, on account of alleged informalities in the seizure and sale—*Held*, that the return of the sheriff, that the advertisements and publications of the sale have been made, is conclusive until such return is declared false, and that a party against whom execution has issued, and who has failed to make opposition within the delay prescribed by law, was forever precluded from the right of availing himself of any irregularities in the seizure or in the proceedings thereon. *Boyer* vs. *Sloan*, S. C. 1852, 2 L. C. R. 53, 3 R. J. R. Q. 86.

XXVIII. SALE.

1. **After Return Day.**—Judicial sale of goods seized cannot be made after the day fixed for the return of the writ; an opposition based on a sale so made will be upheld. *Brodeur* vs. *Leblanc*, 1889, M. L. R., 6 S. C. 236.

2. **On Return Day.**—A sale of goods

may be validly made under an execution *de bonis* on the day fixed for the return of the writ into court. *Elliott* vs. *St. Julien*, S. C. 1874, 18 L. C. J. 11.

3. For more than is due—Shares.—Sale cannot proceed for a greater amount than is necessary to satisfy the writ. *Bury* vs. *Samuels*, Q. B. 1885, 29 L. C. J. 187.

4. —— Where a number of shares of railway stock were seized and advertised to be sold in one lot, and neither the defendant nor any one interested in the sale requested the sheriff to sell the shares separately, and it did not appear that there was any intention to defraud, or that any loss had been sustained in consequence of the shares being sold in one lot, but, on the contrary, that such mode of sale was advantageous to the creditors, the sale was held good and valid, although the amount realized thereby was far in excess of the judgment debt for which the property was taken in execution. *Morris* vs. *Connecticut & Passumpsic River R. R. Co.*, Q. B. 1886, M. L. R., 2 Q. B. 303. Confirmed in Supreme Ct. 1887, 14 Can. S. C. R. 318.

5. Where made.—Where a sale under a writ of execution was made of things belonging to the high constable of the district, in his office in the court house, and the defendant opposed on the ground that the seizure was null as being made within the limits of the court house—*Held*, that having been made outside the hall of the court, that it would not be set aside. *Bussière* vs. *Faucher*, C. Ct. 1864, 14 L. C. R. 87.

XXIX. SECOND SEIZURE.

1. The seizing bailiff in a first seizure has a right to intervene in a subsequent seizure to protect the rights of the first seizure. *Graham* vs. *Lepailleur*, Q. B., Montreal, 14 Dec., 1878.

2. The guardian of a seizure of moveables can oppose a second seizure of the same effects, so long as the first seizure has not been disposed of. *Langlois* vs. *Gaurreau*, S. C. 1862, 12 L. C. R. 158; and see *Shelton* vs. *Kerns*, S. C. 1863, 7 L. C. J. 139; *Warren* vs. *Douglas*, C. Ct. 1863, 7 L. C. J. 140; *Smith* vs. *O'Farrell*, S. C. 1859, 9 L. C. R. 495; but see *Donnelly* vs. *Nagle*, S. C. 1858, 3 L. C. J. 135.

3. Arts. 642 and 642 C. P. C. do not apply where the sheriff has no longer the writ in his hands, it having been returned into court accompanied by an opposition. *McLaren* vs. *Drew*, S. C. 1879, 2 L. N. 388; *Fuller* vs. *Fletcher*, Q. B. 1880, 1 Dorion's Q. B. R. 102, 25 L. C. J. 93 (see 2 L. N. 408 and 3 L. N. 18).

4. A second seizure may be legally made under a warrant of distress for a penalty, when the things seized in the first instance prove to be insufficient to satisfy the debt and costs. *Prime* vs. *Perkins*, C. R. 1879, 23 L. C. J. 250, 2 L. N. 256. (See notes 2 L. N. pp. 297 and 298.)

5. With a view to supplanting a creditor who has a prior execution, it is not permissible for a party under a second execution to advertise the sale of the goods seized under the second execution for 8 a.m., where the sale under the former execution was fixed for 10 a.m. *Lorin* vs. *Gareau*, C. Ct. 1886, 9 L. N. 211.

6. Under such circumstances the party first seizing who is not guilty of laches can have the second seizure annulled by opposition as being in fraud of his rights. (*Ib.*)

XXX. SUSPENSION OF.

1. Agreement to suspend.—Plaintiff having seized the moveables of defendant under a judgment, agreed to release the things seized on receipt of notes indorsed by a person mentioned in the agreement, at twelve, eighteen and twenty-four months. The notes were furnished and the seizure withdrawn, but before the maturity of the notes, plaintiff seized money belonging to the defendant in the hands of *tiers-saisis*. Defendant pleaded the agreement, which was in writing—*Held* to suspend the execution of the judgment till the notes fell due, notwithstanding verbal evidence that it was only to apply to the moveables then under seizure. *Mackay* vs. *Fletcher*, S. C. 1831, 4 L. N. 374, and see *Gingras* vs. *Vezina*, C. Ct. 1879, 5 Q. L. R. 237 to same effect.

2. Effect of.—An order to the sheriff to suspend all proceedings on a writ of *fieri facias de terris* causes the writ to lapse. *Ranger* vs. *Seymour*, Q. B. 1870, 16 L. C. J. 42, 2 R. L. 623.

3. Garnishment.—Where a creditor of the plaintiff, before execution had issued against the defendant, caused a writ of attachment in garnishment to be served on the defendant—*Held*, that this did not suspend proceedings under an execution, and to produce that effect the defendant must have deposited the amount of the judgment with interest and costs. *Duvernay* vs. *Dessaulles*, Q. B. 1851, 4 L. C. R. 142, 4 R. J. R. Q. 114.

4. Opposition by Third Party.—The execution of a judgment is not delayed by an opposition by a third party, unless an order to suspend proceedings is obtained thereby. *Molleur* vs. *Marchand*, S. C. 1874, 5 R. L. 379.

5. Pending Appeal to Privy Council. A judge in the exercise of a sound discretion may grant a suspension of proceedings under execution to allow of an appeal to Her Majesty in Her Privy Council. *DeGaspé* vs. *Asselin*, S. C., 18 L. C. J. 112.

6. —— *Held*, where leave to appeal to the judicial committee of the Privy Council, from a judgment of the Court of Queen's Bench sitting in appeal, has been refused by the latter court, a judge of the Superior Court has no power to suspend the execution of the judgment. *Piché* vs. *Letang*, S. C. 1893, 3 Que. 488.

7. Where another Suit pending.—In certain cases, as when the same parties have another suit pending, which may alter the balance of indebtedness, the court may suspend execution in a case decided, and the suspension of the execution may be extended to the costs of the attorneys. *Dorion* vs. *Dorion*, Q. B. Montreal, 31 Oct., 1883.

XXXI. UNION OF.

1. Where two executions issue, at the suit of different parties, against the same defendant, the sheriff cannot unite both seizures in one *procès-verbal*. *Sanderson* vs. *Roy*, S. C. 1858, 3 L. C. J. 119. Confirmed in Appeal 1st December, 1859. *Palliser* vs. *Roy*, Q. B. 1859, 4 L. C. J. 208, 9 L. C. R. 456.

2. Where the sheriff receives at the same time several writs of execution against the immoveables of the same defendant, he can make but one seizure in virtue of these writs. *Banque Nationale* vs. *Aubertin*, C. R. 1892, 1 Que. 340.

XXXII. VENDITIONI EXPONAS. (See under title "WRITS," "SHERIFF'S SALE.")

1. On a writ of *venditioni exponas* against moveables it is not necessary to have a *procès-verbal de recolement*, and no opposition can be maintained grounded upon the nullity of such proceeding. *Lespérance* vs. *Langevin*, S. C. 1851, 1 L. C. R. 279, 3 R. J. R. Q. 12.

2. An alteration of the return day of a writ of *vend. exp. de terris*, made after the sheriff has commenced the execution of the writ, by publishing his proceedings in a newspaper, is fatal, and all proceedings on such writ will be set aside, without the necessity of an inscription *en faux*. *Duchesnay* vs. *Vienne*, S. C. 1872, 17 L. C. J. 82.

3. An opposition was filed to proceedings under a writ styled a *venditioni exponas*, but requiring notices of sale to be given for the same periods required for proceedings under a writ of *fieri facias*. On a motion to dismiss the said opposition—*Held*, that the writ was not one of *venditioni exponas* within the meaning of Article 664 of the Code of Procedure. *Vidal* vs. *Demers*, S. C. 1881, 7 Q. L. R. 313.

4. A copy of a judgment or order attached to a writ of execution *fi. fa.*, issued from the Circuit Court for the district of Montreal, and designated a writ of *venditioni exponas*, is not such a writ within the meaning of the Code of Civil Procedure. *Petit* vs. *Thompson*, C. Ct. 1890, 13 L. N. 379.

5. Writ of *venditioni exponas* cannot be issued without an order of the court or judge, and if so issued may be set aside. *Trust & Loan Co.* vs. *Meubleau*, Q. B. 1888, 32 L. C. J. 73, M. L. R., 3 S. C. 135, 16 R. L. 14; *Bissonnette* vs. *Laurent*, Q. B. 1886, 15 R. L. 41; *Lefeuntun* vs. *Veronneau*, Supreme Ct. 1893, 22 Can. S. C. R. 203.

6. Where the plaintiff declares that he will not contest an opposition to annul on grounds of irregularities in notices of sale, and ultimately takes out a writ of *venditioni exponas*, he cannot avail himself of Art. 664 C. P. C. to demand the dismissal of a new opposition taken without permission of the judge and for causes arising prior to the first seizure. *Goodall* vs. *Laberge*, C. R. 1893, 4 Que. 134.

7. The writ of *venditioni exponas* cannot order the seizing officer to proceed to the sale of the effect seized for a larger amount than originally executed for. To add to the original amount the amount of costs taxed on oppositions which interrupted the seizure, renders the writ absolutely void on the face of it, and the defendant can have the writ quashed without previous notice to the plaintiff and without an order to suspend. *Marchildon* vs. *Tousignant*, C. R. 1893, 4 Que. 376.

EXECUTIVE COUNCIL. (1)

The members of the executive council who concur in an order of council sanctioning the

(1) An Act respecting the Executive Council, Que. 53 Vict., ch. 14.

sale by the Crown of certain real property, and the execution of a deed of sale in accordance with such order, cannot be sued in warranty by the purchaser, to guarantee and indemnify him against an action brought by the attorney-general for and on behalf of Her Majesty to set aside the deed of sale on the ground (*inter alia*) that the sale itself was *ultra vires*, and that the deed was executed without lawful authority. *Church, Attorney-General*, vs. *Middlemiss*, S. C. 1877, 21 L. C. J. 319.

EXECUTORS.

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I. ACCOUNT.

1. The testator by his will, after making several particular legacies, disseized himself of all his property in favor of his executors, directing that they should act as such until his will was carried into effect, and died on the same day as the will was made, and the executors became at once seized of all the moveable property left by the testator. At the expiration of a year and a day, the executors were called upon by the respondent, heir-at-law, to render their account. They pleaded that they, after they had paid the particular legacies, had transferred the whole estate to the universal legatee in usufruct, to the delivery of which the plaintiff was a party—*Held*, reversing the judgment of the court below, that the executors could not be compelled to render any account to the heir-at-law under the peculiar circumstances of the case. *Bossé* vs. *Hamel*, Q. B. 1872, 3 R. C. 43.

2. Although a testamentary executor is not obliged to account to the heirs or legatees until the end of his administration, nevertheless when he gets placed in possession of all the property of the testator, and his appointment is for a considerable time, he should furnish them on their demand, and at their cost, statements of account, and allow them to examine the accounts, receipts, etc., but when he is sued for that purpose, without previous notice, he will not be liable for the costs. *Quinn* vs. *Fraser*, C. R. 1884, 10 Q. L. R. 320.

3. Nor is the executor who has been appointed to replace another obliged to account for the administration of his predecessor. From the latter only, or his heirs and successors, an account of his administration can be demanded. (*Ib*)

4. After a testamentary executor has been discharged by a deed signed by all the legatees, an action against him praying for an account, brought by one of the legatees who joined in the discharge, and without asking that the discharge be set aside, will be dismissed. *Newton* vs. *Seale*, 1887, M. L. R., 4 Q. B. 158.

5. Testamentary executors only, and not the universal legatees, are bound and have the right to account to the legatees by universal title. *Taché* vs. *Taché*, Q. B. 1886, 14 R. L. 257.

6. A testamentary executor who is charged by a will to distribute testator's property among those of his relatives who in the opinion of such executor shall be most in need of it, is bound to account to those relatives whom he has selected as beneficiaries. *Contant* vs. *Mercier*, S. C. 1890, 20 R. L. 379.

II. ACTION AGAINST.

1. All joint executors who have acted must, in an action to account against them, be made parties to the suit. *Dame* vs. *Gray*, 1 Rev. de Lég. 352, K. B. 1812.

2. If a testator direct an executor to pay his debts, an action may be maintained against him by a creditor of the estate. *Bernier* vs. *Bossé*, 1 Rev. de Lég. 349, K. B. 1819, & *Iffland* vs. *Wilson*, 1 Rev. de Lég. 350, K. B. 1820.

3. An executor after the expiration of his executorship and account rendered, cannot be

sue l *en délivrance de legs*. *Gotron* vs. *Corrieaux*, K. B. 1820, 1 Rev. de Lég. 379.

4. The plaintiff instituted an action for the amount of a judgment rendered in Upper Canada against the defendant in his quality of executor to the person against whom the judgment was rendered, to which the defendant pleaded that the deceased had left a will by which he made his wife his universal legatee, and that he, the defendant, as executor, had made an inventory, and by advertisement had called in all the creditors, and had since disposed of all the estate of the deceased which was in his hands—*Held*, that, under the circumstances, an action for the amount of the debt *mobilière* would not lie against the executor alone, but the heirs and other personal representatives of debtor must be joined in the suit, and that, although the executor was directed by the will to pay the debts, and although the action was commenced within a year and a day from the death of the testator. *Caspar* vs. *Hunter*, S. C. 1863, 14 L. C. R. 198.

5. Where action was brought against one of three executors to an estate for a specific sum of money—*Held*, confirming S. C., that the proper course was by an action to account against all the executors, and the action was consequently dismissed. *McPhee* vs. *Woodbridge*, Q. B. 1865, 11 L. C. J. 160 and 1 L. C. L. J. 86.

6. The testamentary executor may be sued alone for the recovery of the debts *mobilières* of the testator. And it is the duty of the executor so sued to notify the heir of the demand, if there be any doubt, so that he may admit or contest it. *Delery* vs. *Campbell*, Q. B. 1865, 16 L. C. R. 54.

III. ACTIONS BY.

1. In an action by two executors under a will, one of them filed disavowal of the proceedings in his name—*Held*, not competent for one of the joint executors to bring an action without the consent of the other, and, should he do so, he must do so in his own name alone. *Clement* vs. *Geer*, *Pettis* vs. *Drummond*, S. C. 1854, 4 L. C. R. 103, 4 R. J. R. Q. 100.

2. In an action arising out of the sale of a lot of land to the defendant—*Held*, that the executors only, and not the usufructuary under a will, can take proceedings to support the rights of the estate. *Johnson* vs. *Aylmer*, C. R. 1865, 1 L. C. L. J. 67.

3. Where the powers of the executors of a will are extended beyond the year and a day, they may sue instead of the heirs while their powers last. *Lapointe* vs. *Gibb*, Q. B. Que., 5 Sept., 1876.

4. Action by a testamentary executor for the dividend on shares, the usufruct of which was bequeathed to himself and his sister. The defendants tendered the part due the sister, but as to the part due the plaintiff set up in compensation a debt due by him to defendants —*Held*, that, although the action was brought in his quality as executor, the defence was well founded, notwithstanding there was no partition of his share from his sister's. *Gray* vs. *Quebec Bank*, C. R. 1879, 5 Q. L. R. 92.

IV. APPOINTMENT.

1. In an oppo-ition filed by the respondent, a testamentary executor—*Held*, that the appointment of a testamentary executor was a mandate of a private character, which could only be delegated by the testator, and was not a public trust such as could be imposed by a judge in court. *Gugy* vs. *Gilmore*, Q. B. 1845, 1 Rev. de Lég. 169. But see Art. 924 C. Code.

2. An executor cannot be appointed by the court in the place of one who has ceased to act in the case of a will made previous to the Code. *Exparte Chalut*, S. C. 1872, 17 L. C. J. 44.

3. But where, in the case of a will receiving its execution by the death of the testator before the Code, the testator directed that the execution of the will should be continued until the happening of a certain event, and the executors had died without naming their successors as charged by the will, the court can by virtue of Art. 924 C. C. appoint an executor to continue the execution of the will. (1) *Chouinard* vs. *Chouinard*, S. C. 1886, 13 Q. L. R. 275.

V. LIABILITY.

1. Executors are not liable jointly and severally, for the payment of the balance of moneys collected by them, but are only liable each for the share of which he had possession. *Darling* vs. *Brown*, Supreme Court 1877, 21 L. C. J. 125, 2 Can. S. C. R. 26.

2. Are not liable to pay more than 6 per cent. interest on the moneys collected by them after their account has been demanded,

(1) See remarks by Casault, J., at p. 283, 13 Q. L. R., *re Yule* vs. *Braithwaite*, 12 L. C. J. 267, and notes thereto under Art. 2613 DeBellefeuille's C. Code.

in the absence of proof that they realized a greater rate of interest by the use of the money. (*Ib.*)

3. Action for account of administration prescribed by 30 years. (*Ib.*)

4. But joint executors who have taken *undivided* possession of the estate must render a joint account, and are jointly and severally liable for the balance due. *Hoffman* vs. *Pfeiffer*, S. C. 1881, 7 Q. L. R. 125.

5. Executors are only responsible for what they actually receive or ought to receive, and are not jointly and severally responsible for each other's administration. *Miller* vs. *Coleman*, Q. B. 1881, 25 L. C. J. 196. In the Supreme Ct., that court while agreeing with the Court of Queen's Bench as to the law respecting the liability of executors, yet allowed the appeal and varied the judgments of the courts below. (See full report of this case in Cassel's Digest, 2nd edition, at pp. 301-306.) But see 6 L. N. 410.

6. Where a person, besides being an executor, acts as if he were the tutor (though not really so) of a minor to whom the estate he administers belongs, he cannot charge interest on moneys expended by him in excess of his receipts. (*Ib.*)

7. In an action against an executor on a judgment obtained against deceased in Upper Canada, in which the defendant pleaded that, in his quality of executor, he had made an inventory, called in the creditors, and disposed of all the estate of the deceased in his hands —*Held*, that the plea must be maintained, although the action was commenced within three months from the death of the testator. *Caspar* vs. *Hunter*, S. C. 1863, 14 L. C. R. 198.

8. Where the creditor of the deceased, having obtained judgment for his claim against his universal legatee, and afterwards, and while such judgment was still in force, brought action against the testamentary executors, of whom the said universal legatee was one, jointly and severally—*Held*, confirming the decision of the court below, that, where he had obtained judgment against the universal legatee, he could not proceed later against the other executor, though not paid, unless the insolvency of the legatee be alleged. *Hossack* vs. *Young*, C. R. 1865, 15 L. C. R. 500.

9. When a testamentary executrix employs an agent as attorney, she is bound to supervise his management of the matters entrusted to him, and to take all due precaution and securities. *Low* vs. *Gemley*, Supreme Ct. 1890, 18 Can. S. C. R. 685, affirming Q. B., M. L. R., 5 Q. B. 186, 21 R. L. 44, and S. C., M. L. R., 4 S. C. 92.

10. An executrix cannot escape liability for the misappropriations committed by her agent, by simply establishing that such agent was a notary of excellent standing in the community; and the immunity granted to the mandatary empowered to substitute (under Art. 1711 C. C.) does not apply to a testamentary executrix.

11. In the present case the executrix had acted carelessly and without due precaution in making cheques payable to her agent instead of to the borrowers on the proposed mortgages, and in signing deeds without sufficiently examining their contents.

12. *Held*, confirming the decision of the court below, that executors empowered to act beyond the year and a day, and until the provisions of the will are fully executed, cannot claim to have the legatees, usufructuary or in property, impleaded with them. *Gray* vs. *Dubuc*, Q. B. 1876, 2 Q. L. R. 231.

13. Executors, sued as such, and not denying the executorship, cannot urge the non-proof of their having made an inventory as a want of proof of their having accepted the charge. (*Ib.*)

14. A testamentary executor is not liable for an over-payment made on account of the estate in good faith. *Bourret* vs. *Hurtubise*, Q. B., 18 Sept., 1877.

VI. PLEADING BY WHEN SUMMONED *EN REPRISE D'INSTANCE.*

1. Where a party summons executors *en reprise d'instance*, and files the will appointing them as such, he is not obliged to prove that they have accepted the position, if they have only pleaded a *défense en fait*, without specially denying that they have accepted. *Price* vs. *Hall*, Q. B. 1881, 1 Dorion's Q. B. R. 233.

2. And where such executors have pleaded a *défense en fait* without complaining that there is already a judgment on a previous *demande en reprise d'instance* uncontested, they cannot avail themselves of such irregularity in appeal. (*Ib.*)

VII. POWERS OF.

1. In General—Engagement of Clerk.—The general powers of an executor include the engagement of clerks to keep the books of the estate, and to carry on its affairs, and such general powers are not restricted by the fact that the executor has received a legacy under the will; unless it be apparent from the terms of the testament that the legacy was intended as compensation for special services. *Young* vs. *Rattray*, Q. B., 12 Q. L. R. 168. This judgment was reversed in the Supreme Ct. on other grounds, 16 Nov., 1885, Cassel's Digest, 2nd edition, p. 150.

2. Immoveables.—In an action to set aside a legacy, where the plaintiff died during the pendency of the action, and the executors took up the *instance—Held*, that they had no quality to do so where the action related to real property. *Hamilton* vs. *Plenderleath*, Q. B. 1845, 2 Rev. de Lég. 1.

3. —— *Held* (affirming the decision of Taschereau, J., M. L. R., 4 S. C. 447), that the testamentary executor has no right to hypothecate the immoveables of a substitution without the consent of the institute; and the order of a judge or of the prothonotary, authorizing such hypothecation on the advice of a family council, will be set aside. *Arbee* vs. *Lamarre*, C. R. 1889, M. L. R., 5 S. C. 7.

4. Sale by two Executors to one of themselves.—Where power is given by a will to two of the executors to sell immoveable property belonging to the estate, a sale by two of the executors to one of themselves is void. *Carter* vs. *Molson*, P. C. 1885, 8 L. N. 281. Confirming Q. B., 6 L. N. 372.

5. To indorse notes.—By the third clause of her will, H. M., the testatrix, disposed of all her property, moveables and immoveables, in favor of her children as universal legatees. The legacy was subject to the extended powers of administration conferred by the fifth clause of the will (referred to in the statement of the case), and also to the power to alter the disposition in favor of the testatrix's children, given by the same clause, to her husband, H. L., the executor, and also by the will the executors were exonerated from the obligation of making an inventory, and rendering an account. H. L., in his quality of testamentary executor and administrator to the estate of the said H. M., endorsed accommodation promissory notes, signed by C. L., one of his children, and the "Molsons Bank" (respondent) as holder thereof for value, obtained judgment against both the maker and endorser. An execution was subsequently issued against H. L., *es-qualité*, and certain real estate of the late H. M., which he detained in his said capacity, was seized and advertised for sale. J. D. L., *et al.* (the appellants), who were the only children of the defendant, H. L. and his wife, opposed the sale of the property seized, on the ground that the said property was *insaisissable—Held*, reversing the judgment of the court below, 26 L. C. J. 271, 12 R. L. 61, 4 L. N. 86, and 5 L. N. 364, that the endorsements were not authorized by the will, and that the clause in the will, exempting the property of the testatrix from execution, was valid, and must be given effect to. Art. 972 C. C. *Lionais* vs. *Molsons Bank*, Supreme Court 1885, 10 Can. S. C. R. 526.

6. To revendicate.—A testamentary executor is the legal depositary of the moveables of the succession, for the purposes of carrying out the provisions of the will, and as such may revendicate the same from the heirs or legatees subject to the obligation of rendering an account when his functions cease. *Kerry* vs. *Merchants' Bank*, S. C. 1888, 32 L. C. J. 121; *Normandeau* vs. *McDonnell*, Q. B. 1886, 30 L. C. J. 120.

7 —— A testamentary executor, who has fulfilled the requirements of the will, and has left the moveables of a substitution, created thereby, in the possession of the tutor to the institute (a minor), has no action against the tutor, upon the death of the institute within a year and a day from the death of the testator, to revendicate these effects for distribution among the substitutes,—the tutor being bound to account only to the substitutes or to the curator to the substitution. *Marchessault* vs. *Durand*, 1889, M. L. R., 5 Q. B. 361.

8. To substitute.—Where the testator has given his testamentary executors power to appoint substitutes, such power may be exercised even after the testamentary executors have commenced to act. *Kennedy* vs. *Stebbins*, 1890, M. L. R., 6 S. C. 456.

8*a*. —— It is not necessary that the replacement should be made judicially, unless the testator has so directed. A notarial declaration naming substitutes is legal and regular. (*Ib.*)

9. —— *Held*, affirming the decision of Johnson, J. (M. L. R., 4 S. C. 92), that while an executrix, who is also appointed administrator of the estate for a long term of years, has power to substitute another person for the management of the affairs of the estate,

the executrix is bound to exercise supervision over the acts of the person so appointed, and cannot divest herself of her personal responsibility, if she fails to take all due precautions. *Low* vs. *Gemley*, 1889, M. L. R., 5 Q. B. 186, 21 R. L. 44; affirmed in Supreme Court, 18 Can. S. C. R. 685.

VIII. REMOVAL FROM OFFICE.

1. Action was brought by a minor, assisted by his tutor, to oust an executor from office, and to compel him to account—*Held*, that, where an executor, whose powers have been extended by the testator beyond a year and a day, has become insolvent, and is making away with the estate, the court will interfere to deprive him of the control of the property and oust him from the office, but that the court has no power to appoint a sequestrator. *McIntosh* vs. *Dease*, S. C. 1852, 2 L. C. R. 71, 3 R. J. R. Q. 97. (But as to appointment of sequestrator, see No. 7 *infra*.)

2. Action to deprive of their office four executors appointed by a testator for the administration of his succession. Reasons alleged were incapacity of some of the defendants, refusal to act on the part of two of them, negligence and bad administration—*Held*, dismissing action, that the evidence would require to be very plain to justify the destitution of the executors from their office a few months after they had entered upon their administration. *Gingras* vs. *Brillon*, S. C. 1880, 3 L. N. 183.

3. The defendant was sued as sole surviving executrix of the will of the late J. R., in an action to have her turned out of the executorship and compelled to render an account of her executorship. The declaration charged that she had since her marriage been managing the executorship by attorney—namely, by her husband—to whom in violation of law and of the will she had given a power of attorney. The declaration accused the defendant of waste, improper charges against the plaintiff, for alleged expenditure and percentages; also it charged that the defendants had contrived bonuses to themselves on leases granted to people, not stating them to the plaintiffs in any way, so that plaintiffs only became aware of it within the six months next before the suit; that the defendants had made an improper lease of some of the real estate for a mere nominal rent when a large beneficial rent was procurable, and even offered for it, etc. On the evidence the demand was granted and defendant ordered to account. *Ross* vs. *Ross*, S. C. 1881, 5 L. N. 197, Q. B. 1883, 7 L. N. 65. Confirmed in Supreme Court, June 23, 1884, Cassil's Digest, 2nd edit., p. 307.

4. Where a testamentary executor has been removed from office by a final judgment, he will not subsequently to such judgment be permitted to inscribe in Review from a judgment dismissing an action brought by him in his quality of executor. *Ross* vs. *Sweeney*, C. R. 1884, 7 L. N. 346.

5. Where testamentary executors transferred the control of the estate to another person, who paid the moneys belonging to it into a bank in his own name, and afterwards drew them out—*Held*, that the court below exercised a proper discretion in removing the executors from office, even without evidence of fraudulent intention or actual dissipation of the property. *French* vs. *McGee*, 1886, M. L. R., 2 Q. B. 59.

6. The refusal of an executor to allow his co-executor to take an equal share in the management of the estate, his applying the proceeds of a cheque to other purposes than that for which his co-executor had signed it, his payment to himself of his own charges against the estate without the sanction of the co-executor, and his enmity to the universal legatee, are sufficient grounds of removal, under Articles 917 and 285 C. C. *Seed* vs. *Tait*, C. R. 1883, 9 Q. L. R. 145.

7. An executor and trustee under a will made before the passing of the Civil Code may be removed from office for any of the causes stated in Art. 917 of the said Code, and a sequestrator appointed to administer the estate of the testator until another executor and trustee be appointed. *Howard* vs. *Yule*, S. C. 1881, 25 L. C. J. 229, 4 L. N. 126.

8. The heirs or legatees are not entitled to complain, after the lapse of forty years, that the testamentary executor did not make a legal inventory, but contented himself with a statement made by the testator before his death, and such omission on the part of the executor is not a valid ground for his removal from office. *Howard* vs. *Yule*, 1881, M. L. R., 4 S. C. 454.

9. The court will not remove an executor from office, under Art. 917 of the Civil Code, for an isolated act of maladministration, when it is proved that the executor acted in good faith, and that no loss is likely to accrue to the estate from what he did, and that the administration of the executor was in all other respects

most satisfactory. *Devine* vs. *Griffin*, S. C. 1881, 25 L. C. J. 249.

10. In an action for removal of an executor from office, the following grounds are not incompatible, and can be joined in the same action: nullity of the executor's appointment by the court, expiration of the period fixed for his executorship and his bad management of the estate. *Chouinard* vs. *Chouinard*, S. C. 1886, 13 Q. L. R. 275.

11. Loans fully guaranteed made by the executor to one of the usufructuary legatees to enable him to make a journey prescribed by his physicians for his health, and to the mother of the legatees to enable her to repair property belonging to her and all the legatees but one, do not constitute grounds for removing such executor from office, in the absence of proof that the funds so used could have been advantageously placed in the manner desired by the testator. (*Ib.*)

12. *Held*, that Art. 232 C. C. does not apply to executors chosen by the testator, and that in an action for the removal of one executor, when there are several executors, the existence of a lawsuit between such executor and the estate he represents, and the evidence of irregularities in his administration, but not exhibiting any incapacity or dishonesty, are not a sufficient cause for his removal. Arts. 917, 285 C. C. (Strong J., dissenting). *Mitchell* vs. *Mitchell*, Supreme Ct. 1889, 16 Can. S. C. R. 722, 12 L. N. 180; confirming Q. B., M. L. R., 4 Q. B. 191, 17 R. L. 703, which reversed C. R., M. L. R., 3 S. C. 31, 15 R. L. 167, 31 L. C. J. 178.

13. Art. 919 C. C. prescribes the duties to be performed by the executor, failure to execute which enables the heir or universal legatee to demand the executor's removal. *Cook* vs. *Banque de Québec*, Q. B. 1893, 2 Que. 172.

IX. RENUNCIATION OF OFFICE.

A testamentary executor who has accepted office can renounce it on the authorization of a judge in chambers, for sufficient cause, the heirs and legatees and other executors being present or duly called. *Ex parte Yule and Braithwaite*, S. C. 1868, 12 L. C. J. 207. (See remarks of Casault J. re this case, 13 Q. L. R., at p. 283, and Judge McCord's note cited under Art. 2613, DeBellefeuille's C. C.)

X. RIGHTS OF.

1. An executor has a right to claim payment of money payable under a life policy in preference to the special legatee to whom the same is bequeathed. *Archambault* vs. *Citizens Ins. Co.*, S. C. 1880, 24 L. C. J. 293.

2. A testamentary executor sued by an heir for removal from office, who has the action dismissed with costs, can charge the heir with the costs thus incurred although the revenues were bequeathed to such heir under title of exemption from execution. *Quintal* vs. *Roberge*, S. C. 1892, 2 Que. 462.

XI. SEIZIN.

1. Moveables — Art. 918 C. C. — The father of minors, legatees under a will, cannot exclude the testamentary executor from the possession of the moveable property of the succession, even for the use of the minors. *Normandeau* vs. *McDonnell*, 1886, M. L. R., 4 Q. B. 319, 30 L. C. J. 120.

2. —— Testamentary executors are seized of the testator's moveables from the date of his death, and this independently of the making of an inventory. *Cook* vs. *La Banque de Québec*, Q. B. 1893, 2 Que. 172; reversing S. C., 1 Que. 501; *Henderson* vs. *Campbell*, S. C. 1893, 4. Que. 4.

3. —— Consequently a bank in which the funds of the estate have been deposited must honor the executor's cheques even before he has made an inventory. *Cook* vs. *Quebec Bank*, *supra*.

4. —— And even supposing that an executor were obliged to make an inventory before becoming seized of the property, this would only amount to a prejudicial obligation, and his default to perform it could only be pleaded by dilatory exception (Art. 120 C. P. C.). *Henderson* vs. *Campbell*, S. C. 1893, 4 Que. 4.

5. Immoveables. — Executors are not seized of the immoveables, neither have they the administration thereof. *Arbec* v. *Lamarre*, C. R. 1889, M. L. R., 5 S. C. 7; affirming M. L. R., 4 S. C. 447.

XII. WARRANTY BY.

An executor if he sell an estate of the testator, may warrant the title in his own name. *Baley* vs. *Measam*, K. B. 1821, 2 Rev. de Lég. 337.

EXPERTS.

I. Appointment. 1-3.
II. Costs of Expertise. (See also "Fees" *infra.*)
III. Duties of. (See also "Notice" *infra.*)
IV. Evidence of—Handwriting.
V. Expertise in Foreign Country.
VI. Fees of. 1-9.
VII. Improbation.
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Amendment. 1-2.
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I. APPOINTMENT.

1. A person named as *expert* cannot be re-named in the case of a second *expertise* in consequence of the setting aside of the first, if objection to his nomination be made. *Auclair* vs. *Low*, S. C. 1861, 5 L. C. J. 223; *Doutre* vs. *Green*, No. 1617, Montreal, June, 1861.

2. Under Art. 323 C. P. C., a rule appointing two experts only is irregular, and a report made by two such experts, though unanimous, cannot be maintained. *Ouimette* vs. *Picotte*, C. Ct. 1872, 4 R. L. 702.

3. Where the court has appointed one expert only, and the expert has proceeded to act without protest or objection by the parties, they will be presumed to have acquiesced, and the report will not be set aside on the ground urged subsequently that the court should have appointed three experts. *Malbœuf* vs. *Larendeau*, 1885, M. L. R., 2 Q. B. 56.

II. COSTS OF EXPERTISE.

(See "Fees" *infra.*)

Costs of *expertise* are in the discretion of the court, and in the exercise of such discretion the court will at least divide them between the parties, where the report has the effect of materially reducing the plaintiff's demand. *Gardner* vs. *McDonald*, S. C. 1858, 2 L. C. J. 208.

III. DUTIES OF.

(See "Notice" *infra.*)

In appeal from a judgment rendered by the Superior Court, homologating the report of one expert, appointed to ascertain whether a certain property held by joint proprietors, and of which the partition was asked, was divisible or no, and rejecting the report of the other, there being but two appointed—*Held*, reversing the decision of the court below, that the experts appointed to establish the divisibility or otherwise of a property must confine themselves to reporting whether the property can or cannot be divided into two portions, the question of further division between the defendants not having been raised. *Lloyd* vs. *Boswell*, Q. B. 1863, 14 L. C. R. 274.

IV. EVIDENCE OF—HANDWRITING.

In an action against a bank for a balance of deposit, where the signature of the plaintiff to a cheque set up by the bank was denied, the evidence of experts was said to be of little value, and to be entirely rebutted by evidence that no such transaction as that represented by the cheque had occurred in the course of plaintiff's business. *Clark* vs. *Exchange Bank*, Q. B. 1880, 3 L. N. 45, reversing S. C., 2 L. N. 124.

V. EXPERTISE IN FOREIGN COUNTRY.

The plaintiffs moved that an *expertise*, ordered by an interlocutory judgment, be referred to experts in England, on the ground that competent experts could not be obtained in Canada or the United States—*Held*, that, apart from the inconvenience and expense of such a reference, the requirements of articles 325, 333 and 334 C. C. P. appear to place insuperable difficulties in the way of execut-

ing an *expertise* abroad. *Muir* vs. *Providence Ins. Co.*, S. C. 1889, 5 M. L. R. 158.

VI. FEES OF.

1. Experts cannot detain their report until their fees are paid. *Hoyt* vs. *Todd*, K. B. 1809, 3 Rev. de Lég. 357; *Duchesnay* vs. *Giard*, S. C. 1859, 4 L. C. J. 9; *Décary* vs. *Poirier*, S. C. 1876, 21 L. C. J. 27.

2. But they may move that a sum shall be paid into court to secure their fees and expenses before they begin to report. *Hoyt* vs. *Todd*, K. B. 1809, 3 Rev. de Lég. 357; *Muir* vs. *Provid. Washington Ins. Co.*, S. C. 1890, 18 R. L. 703.

3. And in such case the plaintiff and defendant will be required to deposit each one-half of such costs. *Muir* vs. *Provid. Washington Ins. Co.*, S. C. 1890, 18 R. L. 703.

4. Experts can only recover their fees or emoluments from the party or parties naming them, or in whose interest they are named by the court, the other parties to the litigation being in no way responsible therefor. *Brown* vs. *Wallace*, Q. B. 1860, 5 L. C. J. 60.

5. A surveyor is entitled to his fees and disbursements from the party who named him expert, although the report has been set aside by the court on the ground that the experts were not sworn. *Brady* vs. *Aitchison*, C. Ct. 1865, 1 L. C. L. J. 112.

6. And *held*, also, that the tariff established by C. S. C. cap. 77, sec. 108, by which the time of a provincial land surveyor attending a court in his professional capacity is valued and taxed at four dollars a day, may be disregarded by the court, and the sum reduced in the discretion of the judge. (*Ib.*)

7. An expert cannot recover the amount of his fees, when his report has been set aside, in consequence of his failure to give the requisite notice to the parties before proceeding. *Beaudry* vs. *Tomalty*, C. Ct. 1873, 17 L. C. J. 175.

8. Experts appointed by the court are not bound to wait for their fees and expenses until the end of the suit, these can be recovered from the parties once the amount is judicially established, where they have not already been deposited in court. *Quirk* vs. *New Rockland Slate Co.*, S. C. 1892, 2 Que. 312.

9. A party can only avoid such payment by proving the nullity and uselessness of the report. (*Ib.*)

VII. IMPROBATION.

Where a party objects before experts to the genuineness of a receipt, contending that it is forged, he may, in case they overrule his objection, contest the genuineness of such receipt after wards before the court. *Brunet* vs. *Brunet*, S. C. 1871, 17 L. C. J. 51.

VIII. LIABILITY FOR CONTEMPT.

Attachment may be issued against experts for contemptuous language. *Morin* vs. *St. Pierre*, K. B. 1817, 3 Rev. de Lég. 358.

IX. NOTICE.

1. Experts must, in all cases, notify the parties of the time and place of the intended operation, *à peine de nullité*. *Lamarche* vs. *Johnson*, S. C. 1861, 5 L. C. J. 336; *Wardle* vs. *Bethune*, Q. B. 1866, 2 L. C. L. J. 18.

2. A return of service of notice given by a surveyor to the parties to a suit, which states that the notice was served between one and four p. m., is sufficient, and sufficiently indicates the time of service. *Forest* vs. *Heathers*, S. C. 1881, 11 R. L. 7.

3. It is not necessary for an expert, when appointed under Art. 2013 C. C., to secure a builder's privilege on an immoveable, to give notices of his proceedings to the proprietor's creditors, such proceedings not being regulated by Art. 333 *et seq.* C. P. C. *Dufresne* vs. *Préfontaine*, *Vallée* vs. *Préfontaine*, Supreme Ct. 1892, 21 Can. S. C. R. 607.

X. POWERS OF.

1. Experts have no right to name a third expert before proceeding to the execution of their duties as such, and before any disagreement has taken place. *Brodie* vs. *Cowan*, S. C. 1852, 7 L. C. J. 96.

2. Where three persons have been named to examine into certain accounts, without any special powers being given to the majority, the court may legally adopt the report of one of such experts, and base its judgment on such report. *Taplin* vs. *Beckett*, C. R. 1869, 15 L. C. J. 26.

3. When the report of experts has once been made, they are *functi officio*, and cannot of their own motion make a new report on the ground that the first is imperfect or defective. *Beckham* vs. *Farmer*, S. C. 1877, 21 L. C. J. 38.

4. Experts appointed to establish the amount of damage caused by an estray have no power to bind the parties to submit to their decision, except under the conditions required by Article 428 *et seq.* of the Municipal Code, that is to say when the animals are in pound. *Lacasse* vs. *Délorme*, Mag. Ct. 1874, 6 R. L. 210.

XI. REPORT OF.

1. Amendment. — A report of experts cannot be amended by motion of either party, but either may move for a new visit by the same experts or for new experts and a new report. *Dumontier* vs. *Couture*, K. B. 1812, 3 Rev. de Lég. 358.

2. —— Where the *jurat*, declaring that the expert was sworn, has been lost, and is not annexed to his report, the report may be amended, with the permission of the court, so as to enable the expert to put in an affidavit to the effect that he was duly sworn before acting. *Silcot* vs. *Papineau*, 1885, M. L. R., 1 S. C. 297, 13 R. L. 414.

3. Containing irrelevant Matter.— Where the report of experts contains observations not called for by the judgment ordering the *expertise*, also injurious remarks concerning one of the parties to the suit, and does not contain a direct answer to the question put, the court can return the report to the experts in order that they may alter it. *Tousignant*, vs. *Boitcaux*, Q. B. 1883, 20 R. L. 280.

4. Builder's Privilege.—There was evidence in this case to support the finding of fact of the courts below, that the second *procès-verbal* or official statement, required to be made by the expert under Art. 2013, had been made within six months of the completion of the builder's works. *Dufresne* vs. *Préfontaine*, *Vallé* vs. *Préfontaine*, Supreme Ct. 1892, 21 Can. S. C. R. 607, confirming Q. B., 1 Que. 330.

5. —— It was sufficient for the expert to state in his second *procès-verbal*, made within the six months, that the works described had been executed, and that such works had given to the immoveable the additional value fixed by him. The words "*executé suivant les règles de l'art*" are not *strictissimi juris*. (*Ib.*)

6. —— If an expert includes in his valuation works for which the builder had by law no privilege, such error will not be a cause of nullity, but will only entitle the interested parties to ask for a reduction of the expert's valuation. (*Ib.*)

7. Delay to file.—The delay for filing a report of experts is not governed by Art. 337 C. C. P., as report of experts and a report of arbitrators are not the same thing; hence the delay may be extended on application, even when the application is not made until the original delay has actually expired. *Chanteloup* vs. *Dominion Oil Cloth Co.*, S. C. 1879, 2 L. N. 314.

8. Does not exclude other Evidence. —A report of experts, unlike an award of arbitrators, does not, by including the whole question in dispute, exclude other evidence. *Scott* vs. *Payette*, Q. B. 1879, 2 L. N. 335, 24 L. C. J. 141.

9. Irregularities of Proceedings.—If experts are by a judgment ordered to visit works in the presence of the parties, and yet make their visit without the parties, their report must be set aside. *L'Abbé* vs. *Ritchie*, K. B. 1818, 3 Rév. de Lég. 358.

10. —— A report of provincial land surveyors, acting as experts, will be set aside on motion, if the surveyors have not been sworn, though the rule appointing such experts does not order that they shall be sworn. *Aitchison* vs. *Morrison*, S. C. 1865, 1 L. C. L. J. 112.

11. —— In an appeal from the Circuit Court—*Held*, confirming the judgment appealed from, which homologated a report of experts, that where justice has been done to the parties the court would not set aside the report, notwithstanding irregularities in form, and the fact that the adoption of the report had never been demanded. *Fabrique de Ste. Julie de Somerset* vs. *Paquet*, Q. B. 1869, 1 R. L. 430.

12. —— The court will not be disposed to reject a report of experts for irregularities where the parties are not prejudiced thereby. *Cameron* vs. *Bryson*, 1884, M. L. R., 1 S. C. 221.

13. Motion to reject—Laches.—Upon the homologation of a surveyor's report of boundary, the party who moves to reject the report cannot allege that the surveyor was wrongfully appointed because he had already acted in the case, and had formed an opinion; and in fact had already made a report which had been rejected by the court for informalities; such objection to prevail should have been made upon the expert's second appointment. *Forest* vs. *Heathers*, S. C. 1831, 11 R. L. 7.

14. Surveyors.— Surveyor's report, referring to a plan not of record in the cause is bad, and will be set aside on motion. *Adams* vs. *Gravel*, S. C. 1858, 2 L. C. J. 203.

15. Where Homologation not demanded.—The court can adopt a report of experts without its homologation being demanded. *Fabrique de Ste. Julie de Somerset* vs. *Paquet*, Q. B. 1869, 1 R. L. 430.

16. Where two Reports conflict.— Where two experts have been appointed to report on the divisibility or otherwise of a property, and the one reporting the property divisible and the other that it is not—*Held*, setting aside the decision of the court below, which adopted the one and rejected the other, that a third expert should have been appointed by the court to decide between them. *Lloyd* vs. *Boswell*, Q. B. 1863, 14 L. C. R. 271.

XII. SUSPENSION OF PROCEEDINGS.

1. If one of the parties die, pending an inquiry by experts, their proceedings must be stayed until there is a *reprise d'instance*. *Taché* vs. *Levasseur*, K. B. 1810, 3 Rev. de Lég. 358.

XIII. SWEARING OF.

1. A sworn land surveyor appointed an expert, by rule of court, in a petitory action to establish certain land boundaries, must be sworn before acting as such, and, in default of his so being sworn, his report will be set aside even without any special motion on that ground. *Knowlton* vs. *Clarke*, Q. B., 1864, 9 L. C. J. 243.

2. Surveyors must be sworn before they can act under an order of the court. *Melançon* vs. *Venne*, C. R. 1873, 5 R. L. 185.

3. A surveyor proceeding to fix boundaries under the terms of a judgment, and to carry out the instructions of the judgment, need not be sworn anew, but can proceed under his oath of office. *Forest* vs. *Heathers*, S. C. 1881, 11 R. L. 7; *Brown* vs. *Perkins*, Q. B. 1880, 6 Q. L. R. 143. (See Remarks of Tessier, J., on this point.)

XIV. UNREASONABLE EXPERTISE.

1. In this case the Privy Council criticized the course of the court below in directing a reference to experts. *Brown* vs. *Gugy*, P. C. 1864, 14 L. C. R. 221.

2. An order for an expertise will be set aside if it be unreasonable. So, where the curate of a parish described a parishioner's child as being of the Parish of Lachine, when in fact the place of the father's domicile had always been considered as in the Parish of St. Laurent, on the ground that the line of the parish had been wrongly drawn more than a hundred years ago, and the parishioner brought suit to rectify the register, an interlocutory judgment ordering *preuve avant faire droit* to establish by a reference to experts the limits of the parish will be set aside. *Laframboise* vs. *Veinard*, Q. B. Montreal, September, 1875.

XV. WHEN EXPERTISE ORDERED.

1. Accountant.—In an action for board and lodging, where the matter after hearing was referred to an accountant, and on his report the court condemned the defendant to pay the amount demanded with costs, on appeal the amount was reformed without costs of appeal, and—*Held*, also, that the reference to an accountant was not sanctioned by the Judicature Act of 1857 in a case not involving the settlement of accounts, and that, under the Act referred to, the report should have been acted upon and homologated in the same way as reports of experts. *Elliott* vs. *Howard*, Q. B. 1860, 10 L. C. R. 317.

2. —— Order of reference to take accounts made pursuant to the powers contained in 3rd and 4th Wm. IV., ch. 41, s. 17, notwithstanding dissent of respondent's counsel, to the court referring the same, with order to report to the committee finally, or from time to time at the request of the parties. The object of the reference was to ascertain the amount due to the estate of Wm. Hutchinson. *Hutchinson* vs. *Gillespie*, P. C. 1838, 2 Moore P. C. 243.

3. Before Enquete.—The court will not, before *enquête*, make an order for examination by experts, where the parties are in dispute as to the limits of their respective properties, and one is claiming damages from the other for encroachment. *Desere* vs. *Desere*, M. L. R. 1891, 7 S. C. 157; *Symons* vs. *Bougie*, S. C. 1874, 5 R. L. 472.

4. Breach of Contract.—The court below had condemned the defendant in damages for an alleged breach of contract, in failing to re-transfer to plaintiff certain railway stock and selling the same at a profit to himself, which profit the court had adopted as the measure of damages—*Held*, that, as the proofs appeared defective as to values, and the nature of the contest seemed to require it, the court here would set aside such judgment and order

an expertise to be proceeded with according to law and the practice of the Superior Court. *McDougall* vs. *McGreevy*, Q. B. 1887, 14 Q. L. R. 30. Reversed in P. C., 12 L. N. 379, on question of measure of damages.

5. Handwriting.—Where a signature to a note is denied, experts may be appointed on motion by one of the parties, and their report homologated as conclusive. *Lord* v. *Laurin*, S. C. 1865, 9 L. C. J. 171 and 15 L. C. R. 452.

6. —— Where, in consequence of a deed improbated having been drawn up, and the different parts of it put together, in an unusual and slovenly way, there is room for doubt as to the genuineness of a part of it, an expertise may be ordered as to the genuineness of that part of the deed to which such doubt relates. *Hamel* vs. *Panet*, P. C. 1876, 3 Q. L. R. 173.

7. Physicians.—In an action of damages for injuries received from a horse, the defendant can, before pleading, have one or several physicians appointed to examine the nature and extent of plaintiff's injuries. *Lemieux* vs. *Phelps*, S. C. 1885, M. L. R., 1 S. C. 305.

8. —— On a petition for the discharge of a person confined as a lunatic, the court found that the testimony of physicians who had examined the patient was conflicting, and in particular the opinion of the physician resident in the asylum was in conflict with that of the visiting physician—*Held*, that under the circumstances the court would order an examination of the patient by a disinterested expert before pronouncing upon the petition for discharge. *Exparte Perry*, S. C. 1884, 29 L. C. J. 7.

9. Servitude.—Where in an action such as the present, in which it is sought to recover damages for injury to a wall through the flow of water from a higher to a lower property, the evidence adduced by the parties does not make the facts of the case clear, it is the duty of the court to refer the case to experts. *Hampson* vs. *Vineberg*, Q. B. 1888, 33 L. C. J. 185.

10. Without Consent of Parties.—In an action to recover back moneys alleged to have been paid to respondent as his share of certain supposed profits which appellant alleges afterwards proved to be losses, the court may, without the consent of the parties, refer the matters in dispute to an accountant, when the court is of opinion that the evidence adduced is contradictary and unsatisfactory. *Canada Paper Co.* vs. *Bannatyne*, Q. B. 1891, 26 L. C. J. 124.

11. —— In an action for work and labor done, in which the defendant pleaded that the work was done under a verbal contract and for a fixed sum, and an order was made in the court below to send the case to experts or arbitrators to decide the existence or non-existence of such contract—*Held*, that such order was illegal, and would be set aside, as the court had no power to refer the case to arbitrators without the consent of the parties. *Dunn* vs. *Bissonnette*, Q. B. 1864, 14 L. C. R. 403.

12. —— And *held*, also, that a judgment homologating a report of arbitrators appointed with such consent, and condemning the defendant to pay the amount mentioned in the award, would be set aside with costs. (*Ib.*)

EXPROPRIATION. (1)

I. By City of Montreal.
Assessment Roll. 1-2. (See also under title "Municipal Corporation.")
Commissioners.
Duties of. 3-6.
Removal. 7.
When third Commissioner absent. 8-9.
Deposit of Funds.
Certificate of Prothonotary. 10.
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Costs. 11-12.
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Homologation of Commissioners' Report. 15.
Proceedings irregular. 16.
II. By Railway Companies.
Arbitrators—Powers of. 1. (See also under title "Arbitration.")
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(1) See Article in 2 Rev. Crit., pp. 70, 206, by N. W. Trenholme.
An Act respecting Expropriations, 54 Vict. (Que.), ch. 38.
Expropriations for cemeteries, 51 Vict. (Que.), ch 31.

When governed by Federal Law. 35.
Withdrawal of Bank Deposit. 36.

III. Municipal.
Indemnity. 1-15.
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Reservation of Right of, in Crown Grant. 19-20.
Rights of Lessee. 21.

See also Arbitration.
" Municipal Corporations.
" Railway Companies.

I. BY CITY OF MONTREAL.

1. Assessment Roll.—Action was brought to set aside a roll on which plaintiff was assessed for his share of the cost of an improvement in the widening of a street, on the ground of irregularities in the expropriation. The commissioners had fixed the amount of indemnity to be paid for the land, and plaintiff had received his share. They had also made an assessment roll which was not based on the last assessment roll of the city, as required by 37 Vic., cap. 51. When the corporation discovered the error, it abandoned the collection of the amounts assessed, and applied to the Legislature to have another roll made. This was granted, and by Q. 39 Vic., cap. 52, sec. 6, commissioners were empowered to make a new roll in accordance with sec. 187 of 37 Vic., cap. 51. It was this new roll plaintiff sought to have set aside—*Held*, that as notice had not been posted in accordance with the new Act passed after the expropriation had taken place, the new roll must be set aside. *Demers* vs. *The City of Montreal*, Q. B. 1879, 2 L. N. 226.

2. And *held*, also, that the fact of plaintiff having received his share of the indemnity was not an acquiescence in the assessment roll. (*Ib.*)

3. Commissioners—Duties of.— Commissioners of expropriation, appointed under 27-28 Vic., cap. 60, must, under 29-30 Vic., cap. 56, sec. 12, at the same time that they determine the amount of indemnity for expropriated land, assess and appropriate that indemnity upon the different persons benefited by the improvements. Such assessment and apportionment cannot be made after the report of the commissioners has been homologated, and they have become *functi officio*. *Mayor, etc., of Montreal* vs. *Stephens*, P. C. 1878, 3 App. Cas. 605.

4. —— —— Commissioners appointed for expropriation have two duties: (1) to appraise and determine the indemnity for each property required, and to make and deposit a report of their appraisements; and (2) to apportion the cost among those who are to bear it.

Held, that when the commissioners have made and deposited the report of their appraisements, or when the delay for the completion of their work of appraisement and for the deposit of their report has expired without such deposit being made, all their powers as experts for the purposes of valuation cease, and a writ of mandamus will not then lie to compel them to proceed (as they were by law bound to do) to value the residue, not exceeding fifty feet in depth, of a property taken for the improvement. *Guérin* vs. *Proctor*, 1889, M. L. R., 5 S. C. 166.

5. —— —— Under the Montreal Charter the commissioners of expropriation are to be regarded as fulfilling the duties of sworn experts, and they can award a lesser sum than that fixed in the city's statement. *Cité de Montréal* vs. *Dumaine*, C. R. 1892, 2 Que. 56.

6. —— —— Such a statement does not constitute an acknowledgment of the value by the city, but is only an expression of their witnesses' opinions. (*Ib.*)

7. —— **Removal.**—Neither the S. C. nor any judge thereof had power to remove commissioners appointed for purposes of expropriation under the Statute 27th and 28th Vic., chap. 10, and appoint others in their stead, on the ground that they were pursuing a vicious and illegal mode of expropriation. *Brown* vs. *Mayor, etc., of Montreal*, Q. B. 1873, 18 L. C. J. 146; reversing S. C., reported *sub. nom.*, *Mayor of Montreal* vs. *Beany*, 16 L. C. J. 1.

8. —— **When third Commissioner absent.**—The two commissioners cannot proceed where the third is absent through sickness. *Carsdake* vs. *Cité de Montréal*, S. C. 1893, 4 Que. 61.

9. —— —— The city cannot be compelled to proceed under a report made by two commissioners, especially where the delay has expired. (*Ib.*)

10. Deposit of Funds—Certificate of Prothonotary.—In the case of an expropriation, the certificate of the prothonotary that the Corporation of Montreal have deposited the necessary funds, cannot be attacked by an improbation, on the ground that the required funds were not really so deposited. *Beaudry* vs. *Le Maire, etc., de Montréal*, S. C. 1866, 10 L. C. J. 278.

11. Indemnity—Costs.—The party expropriated by the city cannot claim the costs paid to his attorneys to plead his case before the commissioners. *Gauthier* vs. *Cité de Montréal*, S.C. 1891, 21 R. L. 150; *Ouimet* vs. *Cité de Montréal*, 1891, M. L. R., 7 S. C. 193.

12. —— —— Contra, *Sentenne* vs. *Cité de Montréal*, Q. B. 1893, 2 Que. 297.

13. —— Increase.—Where a Statute has given the parties expropriated the right to sue for increase of indemnity over that fixed by the commissioners' award, the court is bound to weigh the evidence presented in support of the action, and to increase the indemnity if the evidence is sufficient to sustain the increased indemnity. *Bagg* vs. *Mayor et al. of Montreal*, Q. B. 1875, 19 L.C. J. 136; reversing S. C., 18 L. C. J. 211.

14. —— Widening St. Lawrence Street 52 Vict., Ch. 79, Sec. 243.—Under 51-52 Vict. (Q.), ch. 79, s. 14, as revised and consolidated by 52 Vict.(Q.), ch. 79, s. 243, the portion of the indemnity payable by the city, for the expropriation of the property required for the widening of St. Lawrence street, may properly be paid out of the capital funds of the city, and not out of the annual revenue. *Ex parte Foster*, S. C. 1887, 5 M. L. R. 161.

15. —— Homologation of Commissioners' Report.—Can only be opposed on grounds of informality. *City of Montreal* vs. *Childs*, S. C. 1889, 18 R. L. 268.

16. —— Proceedings irregular.— The proceedings in expropriation, if irregular, will be set aside, at the instance of any of the parties aggrieved; but with respect to such parties only as have complained. *Mayor, etc., of Montreal* vs. *Healey*, S. C. 1806, 10 L. C. J. 275.

II. BY RAILWAY COMPANIES. (See also under title "Arbitration.")

1. Arbitrators—Powers of.—Arbitrators under the Consolidated Railway Act of 1880 do not exceed their jurisdiction in awarding indemnity for "three feet outside the fences on either side rendered useless for purposes of cultivation." *Mathieu* vs. *Cie. du Ch. de Fer Q. M. & O.*, Q. B., 15 Q. L. R. 360. Confirmed by Supreme Ct. 1891, 19 Can. S. C. R. 426, *sub. nom Quebec, Montmorency & Charlevoix Ry. Co.* vs. *Mathieu*.

2. Formalities for acquiring Land.—Under the Quebec Railway Act companies acquire the ownership of lands necessary for their lines by marking them on the plans prescribed by the Act and paying the indemnity settled by the arbitrators, and owners cannot refuse to cede their property. *Banque d'Hochelaga* vs. *M. P. & B. Ry. Co.*, C. R. 1882, M. L. R., 1 S. C. 150. Confirmed in appeal, 19 Jan., 1884.

3. —— Petitions for expropriation under the Railway Act of 1869 must contain the description required by Art. 2167 C. C. The Commissioners of the Quebec, Montreal, Ottawa and Occidental Railway Company cannot in their own name exercise the right of action. The railway being a public work, this right is vested in Her Majesty. *Comrs. Q. M. O. & O. Ry. Co.* vs. *O'Neil*, S. C. 1876, 4 Q. L. R. 216.

4. —— A petition by a railway company to obtain a writ of possession of property required for the construction for their right of way, will be granted upon security being given to the satisfaction of the judge, when by affidavit to the judge's satisfaction the railway company establishes that the possession of the property is immediately required for the purposes of the railway. *The Atlantic and North Western R. R. Co. Exparte*, S. C. 1886, 10 L. N. 26.

5. —— Where the railway company has allowed the delays required by the Railway Act to expire before making the application, no further delay can be demanded by the proprietors. (*Ib.*)

6. —— The railway company in serving a notice of expropriation is merely bound to give the name of their arbitrator, without any indication as to his residence or occupation. (*Ib.*)

7. —— A clerical error in the description of the property to be expropriated in the petition cannot be urged as a ground of nullity when the property is correctly described in the expropriation notice; and the clerical error does not form an essential part of the description and is not misleading as to the identification of the property. (*Ib.*)

8. Indemnity.—A proprietor, whose land extends to the beach of the River St. Lawrence, within the limits of the Harbour of Montreal, has not such a distinct and independent right of easement or servitude in the river frontage as is susceptible of being valued separately and apart from the compensation awarded for the property itself when the latter is expropriated for public purposes. The inconvenience of being excluded from

easy access to the river is merely an element to be considered by the arbitrators when estimating the indemnity to be awarded for the property expropriated. *Starnes* vs. *Molson*, 1885, M. L. R., 1 Q. B. 425.

9. —— Even if the riparian proprietor expropriated possessed such easement or servitude, the functions of the arbitrators would not extend to the valuation of such right, unless it were included in the notice or demand of expropriation. (*Ib.*)

10. —— *Held*, reversing the judgment of the Exchequer Court (Gwynne, J., dissenting), that the words "compensation to be paid for any damages sustained by reason of anything done and by authority of R. S. C., ch. 39, sec. 3, sub-sec. (*e*) or any other Act respecting public works or government railways," include damages resulting to the land from the operation as well as from the building of the railway; that the right to have a farm crossing over Government railways is not a statutory right, and that in awarding damages the learned judge should have granted full compensation for the future as well as for the past for the want of a farm crossing. (R. S. C., ch. 38, sec. 16.) *Vézina* vs. *The Queen*, Supreme Ct. 1889, 17 Can. S. C. R. 1, 12 L. N. 221.

11. —— The party expropriated by a railway company has a right to be indemnified for depreciation in value of the rest of the land, increased difficulty of communication to and working of the lands separated by the railway. *Cie. du Ch. de Fer Atlan. N. O.* vs. *Prud'homme*, S. C. 1889, 18 R. L. 143.

12. —— Where the land, expropriated for Government railway purposes, severs a farm, although the owner is not entitled to a farm crossing apart from contract, he is entitled to full compensation covering the future as well as the past for the depreciation of his land by the want of such a crossing, and as it does not appear by the judgment appealed from that full compensation has been awarded, the damages awarded by the judge of the Exchequer Court should be increased by $100. Gwynne, J., dissenting. *Guay* vs. *Regina*, Supreme Ct. 1889, 12 L. N. 222; 17 Can. S. C. R. 30.

13. —— The amount awarded for the right of way for a railway is compensation, under sections 146, 147 and 152 of the Railway Act, 51 Vict. (D.), ch. 29, not only for the land taken by the railway, but also for the damage likely to be occasioned to the proprietor during the construction of the railway. *Evans* vs. *Atlantic & N. W. Ry. Co.*, 1890, M. L. R., 6 S. C. 193.

14. —— Railway companies have the right, under paragraph (*c*) of section 90 of the Railway Act, to fell and remove trees which stand within six rods of the railway, and the damage which may result from the exercise of this right forms part of the damages to be covered by the compensation awarded to the person whose land is expropriated; and he has no action to recover any additional amount for the value of trees within this limit which may be cut down and removed by the railway company. (*Ib.*)

15. —— Where the party expropriated makes an offer to the railway company of a certain sum for his land, this does not bind him in the case of an arbitration, and the arbitrators can award a greater sum. *Cardinal* vs. *Cie. du Ch. de Fer Beauharnois*, C. R. 1891, 20 R. L. 648.

16. —— The party expropriated by a railway company cannot claim an indemnity for the increased facilities of access which the passage of the railway through his property would give to thieves who might pilfer on the rest of his lands, neither can he claim damages for increased liability of accidents to his live-stock and his family, as distinct from the damages allowed for the inconvenience caused by the passage of the railway through his lands. *Cie. du Ch. de Fer Atlan. Nord Ouest* vs. *Descaries*, Q. B. 1891, 21 R. L. 194.

17. —— *Held*, where a part of a property occupied as a country residence is expropriated for railway purposes and its value as a country residence is thereby greatly diminished, the true test in estimating the indemnity to which the owner is entitled is, what was the commercial value of the property as an attractive country residence at the time of the expropriation, and what was the depreciation in that marketable value by reason of the expropriation of the strip of land by the railway company, and the intended working of its train service across it. *Can. Atlantic Ry. Co.* vs. *Norris*, Q. B. 1892, 2 Que. 222.

18. —— *Held* (Rever-ing S. C., 21 R. L. 246), the expropriation of an overhead passage by a railway company gives the right to the enforcement of all the statutory rights which would follow from expropriation of subterranean or surface rights. *Wood* vs. *Atl. & N. W. Ry. Co.*, Q. B. 1893, 2 Que. 335.

Confirmed by Privy Council [1895], A. C. 257, 11 R. L. 407.

19. —— Where the railway company's expropriation notice covers a piece of land belonging to the party expropriated, even if the company did not intend that it should do so, the company has thereby sufficiently exexercised expropriation powers over land belonging to the party to bring the company within the terms of the Railway Act in respect to compensation for damages to the remainder of the property. (*Ib.*)

20. —— Under the Canadian Railway Act of 1888, as well as under the English Acts, a railway company is responsible, where land or real rights are or have been actually expropriated, to compensate the proprietor, not only for the land actually taken, but for the direct damage to his remaining land, resulting either from construction and severance, or from the use of the railway line and the operation of the traffic service. (*Ib.*)

21. —— Where at the time the right of way map and plans are deposited by the railway company, the property to be taken for the railway is held by another person for and in the interest of the real owner (the transfer to the latter not having been executed through inadvertence), the real owner may be considered for expropriation purposes the proprietor at the time. (*Ib.*)

22. —— A riparian proprietor on a navigable river is entitled to damages against a railway company for any obstruction to his rights of ingress and egress, and such obstruction without parliamentary authority is an actionable wrong. *Bigaouette* vs. *North Shore Ry. Co.*, Supreme Ct. 1888, 17 Can. S. C. R. 363. *Pion* vs. *North Shore Ry. Co.*, 14 App. Cas. 612.

23. Injunction.—During the pendency of an action, in the nature of an *action négatoire*, by lessees against the R. W. Co., in consequence of the company and the arbitrators appointed under the Act to determine the compensation to be paid in consequence of the expropriation of the leased property, refusing to admit the right of said lessees to be indemnified under the Act, the plaintiffs are entitled to a writ of injunction against the R. W. Co., in consequence of the company persisting in exercising their right of expropriation, without paying or offering to pay indemnity to the lessees. *Bourgoin* vs. *Montreal N. C. Ry. Co.*, Q. B. 1874, 19 L. C. J. 57.

24. Interest on Award.—The party expropriated is entitled to interest on the sum awarded him, from the date the company has taken possession of the property expropriated. The arbitrators cannot include such interest in the award, as the question of interest is one of law, and therefore not within their jurisdiction. *Compagnie du Chemin de Fer Atlantique & Nord-Ouest* vs. *Gouvernement P. Q.*, S. C. 1889, 17 R. L. 317.

25. —— A railway company, which takes possession of land during expropriation proceedings, owes interest on the price awarded from the time the proprietor was dispossessed. *Atlantic & Northwest Ry. Co.* vs. *Prud'homme*, S. C. 1885, M. L. R., 2 S. C. 21.

26. —— But *held* later, affirming the judgment of Tait, J. (M. L. R., 5 S. C. 211), that where a railway company obtains possession of land on making a deposit, and the arbitrators subsequently make an award of a sum of money for the value of the land, and "in full payment and satisfaction of all damages resulting from the taking and using of the said piece of land for the purposes of the said railway," the company is liable for interest on the amount of the award only from the date thereof—and not from the date when the company obtained possession of the land. It will be presumed that the arbitrators included in their award compensation for the company's occupation of the land prior to the date of the award. *Reburn* vs. *Ontario & Quebec Ry. Co.*, Q. B. 1896, M. L. R., 6 Q. B. 381.

27. —— But *held* still later, that where the railway company takes possession of the land required by it, after the institution of expropriation proceedings, but prior to the date of the award by the arbitrators, the latter are competent witnesses to prove that the matter of interest between the date of possession and the date of the award was not taken into consideration by them, and in that case the party expropriated is entitled to such interest in addition to the amount of the award. *Atlantic & Northwest Ry Co.* vs. *Leeming*, Q. B. 1894, 3 Que. 165.

27*a*. —— The party expropriated has a direct action for the recovery of such interest. (*Ib.*)

28. Lessees — Occupiers. — Under the provisions of the Quebec Railway Act, the lessees for five years of a stone quarry, with right of quarry and right to renew lease for another five years, are occupiers of such land and parties interested therein, entitled to com-

pensation for damages caused by expropriation of the property for railway purposes, within the meaning of the Act. *Bourgoin* vs. *Montreal N. C. R. W. Co.*, Q. B. 1874, 19 L. C. J. 57.

29. Rights of Proprietors.—Where land has been taken by a railway company, without observing the formalities prescribed by the Railway Acts for the expropriation of lands for the use of the railway, the owner is entitled to oppose the sale of such land under an execution against the railway company, and to claim its withdrawal from seizure by an opposition *afin de distraire*. *Brewster* vs. *Mongeon*, 1887, M. L. R., 3 Q. B. 20, 15 R. L. 67; *Cie. du Chemin de Fer de Temiscouata vs. Dubé*, Q. B. 1888, 16 R. L. 285.

30. —— A person who has allowed a railway company to take possession of his land for the purposes of their road cannot subsequently oppose the judicial sale of the land by a creditor of the company, on the ground that the company had not complied with the formalities required by law before taking possession of the property. His recourse, after allowing the company to have possession, is against the company to get paid the value of his land. *Mongeon* vs. *Cie. du Ch. de Fer Montreal & Sorel*, S. C. 1885, M. L. R., 2 S. C. 7.

31. —— When a contractor for a railway company agrees to build a road and to buy the necessary lands in the name of the company, the possession he obtains is not his own, but that of the company. *Banque d'Hochelaga* vs. *M. P. & B. Ry. Co.*, C. R. 1882, M. L. R., 1 S. C. 150, 12 R. L. 575. Confirmed in appeal 19 Jan., 1884.

32. —— The owner of land who is deprived of his property by a railway company without his consent, and without offering to pay its value before taking possession of it, has a petitory action against the railway company, and is not bound to have recourse to arbitration under the railway act; and this, even where the company had deposited its plans of lands to be expropriated by it. *Cie. du Ch. de Fer Central* vs. *Legendre*, Q. B. 1885, 11 Q. L. R. 106.

33. Rights of Hypothecary Creditors. — Where, after the expropriation notices have been served, the company acquires the land by voluntary sale from the proprietor, this gives the company a perfect title to the property free from all incumbrances, therefore a hypothecary creditor cannot sue the company in declaration of hypothec; his sole recourse is upon the sum paid by it. *Brunet* vs. *Cie. du Ch. de Fer*, S. C. 1893, 3 Que. 445.

34. —— The hypothecary creditor in such a case would have a personal recourse against the company when the latter omitted to deposit the price of the property in court. (*Ib.*)

35. When governed by Federal Law. —Expropriations by the Montreal, Ottawa & Occidental Railway Co. are governed by the Federal Parliament. *Cie. du Ch. de Fer M. O. & O.* vs. *Bourgoin*, S. C. 1877, 7 R. L. 715.

36. Withdrawal of Bank Deposit.—The railway company has the right to withdraw from the bank the money which has been deposited by order of the judge, as security to the proprietor when a warrant of possession is granted under sec. 9, sub.-sec. 34 of the Railway Act, when it is shown that an award has been rendered by the arbitrators, and the amount of the award with interest has been deposited in court under the provisions of sec. 9, sub.-sec. 28 of the Railway Act,—notwithstanding the fact that the proprietor has taken an action to set aside the award. *Atlantic & Northwestern R. R. Co.* vs. *Whitfield*, S. C. 1887, 10 L. N. 67.

III. MUNICIPAL.

1. Indemnity.—The best mode of ascertaining the value of a property for purposes of expropriation is to establish its market value, and such value should be based upon the annual revenue of the property. *In re St. John's Bridge*, S. C. 1885, 1 M. L. R. 438.

2. —— A person whose property is expropriated by the city for public purposes has an action for increase of indemnity where the commissioners for expropriation have erroneously fixed the amount of the indemnity (37 Vict. [Que.], ch. 51, sec. 176, ss. 21.) *Ouimet* vs. *Cité de Montreal*, 1891, M. L. R., 7 S. C. 193.

3. —— Such indemnity, in the case of a tenant, should include use of improvements made by him, up to the end of his lease; cost of removal, repairs made by him which have become useless, damages to business caused by removal, and difference of rent up to termination of lease. (*Ib.*)

4. —— No indemnity is due for the expropriation of a street which the proprietor has dedicated to public use. *Cité de Montreal* vs. *Thompson*, C. R. 1892, 2 Que. 273.

5. —— *Held*, where the construction of a retaining wall was rendered necessary, by the

expropriation of a portion of a college property, in order to retain the soil adjoining the street, which it was desired to raise to the same level as the rest of the college play ground, the proprietor expropriated is entitled to the cost of such wall as part of the indemnity. *Cité de Montreal* vs. *College Ste. Marie*, C. R. 1893, 4 Que. 410.

6. —— The prospective capabilities of the land and its adaptability to particular uses may be taken into account, and the proprietor expropriated is entitled to more than the current market value of the property taken if the expropriation renders it impossible for him to extend his educational establishment as intended, and thereby make larger profits out of the additional number of boarders accommodated. (*Ib.*) And see *Morrison* vs. *Mayor of Montreal*, 3 App. Cas. at p. 156; *Mayor of Montreal* vs. *Brown*, 2 App. Cas. at p. 185.

7. —— The fact that a church is left projecting to some extent on the street as widened by the expropriation of a strip along the front, and that the architectural appearance is marred, cannot be taken into account in estimating the indemnity. (*Ib.*)

8. —— Although a report of commissioners appointed under Colonial Act 27 and 28 Vict., c. 60, to fix the compensation payable for expropriated lands is no longer final, having regard to 35 Vict., c. 32, s. 7, it must nevertheless be considered correct until it is proved to be erroneous. *Morrison* vs. *Mayor of Montreal*, P. C. 1877, 3 App. Cas. 148, 1 L. N. 44.

9. —— In an action under that section to augment the amount of the indemnity for expropriated lands—*Held*, that the *onus* lay on the plaintiffs to prove that the report was erroneous in itself and not merely with reference to the evidence adduced before the commissioners. (*Ib.*)

10. —— Where a statute has given parties expropriated the right to sue for increase of indemnity over that fixed by the commissioners' award, the court is bound to weigh the evidence presented in support of the action and to increase the indemnity if the evidence is such as to sustain the claim for increased indemnity. *Bagg* vs. *Mayor of Montreal*, Q. B. 1875, 19 L. C. J. 136.

11. —— The prospective capabilities of land may form and very often are a very important element in the calculation of its value. *Mayor of Montreal* vs. *Brown*, P. C. 1876, 2 App. Cas. 168, 185; and see *Morrison* vs. *Mayor of Montreal*, 3 App. Cas. at p. 156.

12. —— *Held*, that in expropriation proceedings, under the charter of the City of Montreal, the production of witnesses and the retaining of counsel before the commissioners being a necessary proceeding by the expropriated party, the expenses of such witnesses and counsel form part of the just indemnity to which he is entitled under Art. 407 C. C., and should be added by the commissioners to the price of the property taken. *Sentenne* vs. *Cité de Montreal*, Q. B. 1893, 2 Que. 297.

13. —— **Contra.**— *Ouimet* vs. *Cité de Montreal*, 1891, M. L. R., 7 S. C. 193; *Gauthier* vs. *Cité de Montreal*, C. R. 1892, 1 Que. 309.

14. —— In ascertaining the indemnity due for lands expropriated, allowance must be made for the actual value of the land at the date of expropriation, and not the prospective value it might derive from the erection of public works, the object of the expropriation. Neither can account be taken of the increased value the lands might receive from proposed improvements of a speculative character and difficult to undertake. *Mayor, etc.*, vs. *Lemoine*, Q. B. 1893, 3 Que. 181, and see *Kearney* vs. *The Queen*, Supreme Ct., 30 April, 1889, Cassel's Digest, 2nd Edit., p. 313.

15. —— The court should only annul the commissioners' award where it is clear they have proceeded on an erroneous principle. (*Ib.*) And see *Corporation of Town of Levis* vs. *The Queen*, Supreme Ct., 1892, [illegible] S. C. R. 31.

16. Proceedings in.—In the exercise of the powers conferred on a corporation by statute, affecting the property of individuals, such as the powers conferred on the city of Quebec of acquiring the right of way necessary for the construction of the Quebec Water Works, the course sanctioned and pointed out by the Legislature must be strictly adhered to, and any departure from such course will vitiate the proceedings, and the taking of land for such purposes must be under the conditions mentioned in the statute, and not under any other conditions can such taking be compulsory. *MacPherson* vs. *Mayor, etc., of Quebec*, S. C. 1854, 4 L. C. R. 429, 4 R. J. R. Q. 223.

17. —— The plaintiff complained that the defendants, a municipal corporation, had caused his fence to be taken down, and expropriated a part of his land for the purpose of changing the direction of a certain road, without having caused the land to be valued by valuators—*Held*, that the proceedings were irregular, and must be set aside. *Deal* vs.

The Corporation of Phillipsburg, C. R. 1866, 2 L. C. L. J. 40.

18. —— Action was brought by the plaintiff against the City of Montreal for trespass in the expropriation of his property for public uses, protesting that the defendants ought to have endeavored to have arrived at a voluntary or amicable agreement before presenting a petition in expropriation. The proceedings in expropriation were taken under 14 and 15 Vic., cap. 128, secs. 66, 68, 69—*Held*, reversing the judgment of the Queen's Bench, 6 L. C. R. 328, that the judge could not refuse to swear nor the jury to hear, the witnesses produced before them, but the appearance and attendance at such proceedings, had subsequently to the refusal, could not be taken as a waiver of his right to complain of the illegal decision, there being no act of express acquiescence therein. *Beaudry* vs. *Mayor of Montreal*, P. C. 1858, 8 L. C. R. 104, 11 Moore P. C. 399, 6 R. J. R. Q. 137.

19. Reservation of Right of in Crown Grant.—*Held*, that a municipal corporation has not, in virtue of the reserve of making any number of public roads through any part of a land, in a concession of Crown lands, made in letters patent, the right to expropriate any portion of land of a tenant for the purpose of opening a road, without having first appointed persons to value it. *Corporation de Dorchester* vs. *Collet*, Q. B. 1884, 10 Q. L. R. 63, 8 L. N. 156. And see *King* vs. *Corp. d'Irlande*, Q. B. 1893, 2 Que. 266.

20. —— Notwithstanding such reservation and Art. 906 M. Code, the tenant has a right to be indemnified for the land so expropriated. (*Ib.*)

21. Rights of Lessee.—Where the street in front of the property leased by the defendant had been lowered by the corporation, thereby diminishing the value of the premises—*Held*, that such change of level constituted a partial expropriation, and gave to the lessee a right to demand a diminution of the rent or the resiliation of the lease, and also a demand against the corporation for damages. *Motz* vs. *Hollinwell*, C. R. 1875, 1 Q. L. R. 64; and see *Corp. of Dorchester* vs. *Collet*, Q. B., 10 Q. L. R. 63, *supra*.

EXTRADITION.

I. Bail.
II. Commitment. 1-9.
III. Evidence. 1-12.
IV. Forgery. 1-8.
V. Proceedings. (See also *supra* "Commitment," "Evidence," and *infra* "Warrant of Arrest.")
Jurat. 1.
Irregularities. 2-4.
VI. Jurisdiction. 1-2.
VII. Law of. 1-3.
VIII. Warrant of Arrest. 1-3.
IX. With France.
X. With the United States.

I. BAIL.

Petitioner was committed for extradition under the treaty with the United States. As the court would not sit at Montreal before the lapse of seven days from the commitment, his counsel applied to the court at Quebec by *habeas corpus* for bail—*Held*, on argument, granting the application. (1) *Foster Exp.*, Q. B. 1872, 3 R. C. 46.

II. COMMITMENT.

1. A warrant of commitment under the Extradition Treaty, which omits to state that the accused was brought before the magistrate or that the witnesses against him were examined in his presence, is bad upon the face of it, and must be set aside. *Brown Exp.*, Q. B. 1866, 2 L. C. L. J. 23.

2. A warrant of commitment for extradition should in its terms conform to the requirements of section 1 of the Dominion Statute, 31 Vic., cap. 94, in directing the person accused to be committed until surrendered on the requisition of the proper authority or duly discharged according to law. *Exparte Zink*, Q. B. 1880, 6 Q. L. R. 260.

3. The judge is required to decide whether he deems the evidence adduced before him sufficient to justify the apprehension and commitment for trial of the person accused if the crime had been committed in Canada. If he finds in the affirmative, he should so state it in his commitment, and certify the fact to the proper executive authority; his functions do not extend to determining whether the accused should be extradited, that rests with the Gov-

(1) This decision was contrary to the judgment of the court rendered about two years previous in the case of Caldwell, where an application made under precisely similar circumstances, and for the same object, was refused. From this latter decision, Badgley & Monk, J. J., dissented, and consequently concurred in granting the application in Foster's case. (Reporter's Note.)

ernor General after the evidence has been reported to him. If the judge fails to state in the commitment that he deems the evidence sufficient, the commitment will be defective and insufficient. (*Ib.*)

4. Where a person charged with a crime is committed in pursuance of a special authority, the commitment must be special, and must exactly pursue that authority. (*Ib.*)

5. If the commitment does not on its face show that the case of the accused falls within the terms of the extradition treaty and the statutes authorizing the proceedings in extradition, or fails to contain the proper statutory conclusions, no sufficient cause of detention will have been shown, and he will be liberated on *habeas corpus*. (*Ib.*)

6. Where a commissioner has been appointed under the Great Seal of Canada (Sect. 5 of the Extradition Act, R. S., ch. 142), and his appointment as such commissioner has appeared in the official *Gazette*, and he is thereby "authorized to act judicially in extradition matters under the Extradition Act, within the Province," and he describes himself in a warrant of commitment, as "a Judge under the Extradition Act,"—his jurisdiction is sufficiently disclosed. *In re Debaum*, Q. B. 1888, M. L. R., 4 Q. B. 145; Mag. Ct. 16 R. L. 612.

7. In examining, upon a petition for *habeas corpus*, whether the detention of the prisoner is lawful, the court or judge will set aside the commitment only if there be manifest error in the adjudication. If the commissioner had jurisdiction, and there was legal evidence before him which might justify a committal, the court is not called upon to examine the sufficiency of the evidence. (*Ib.*)

8. If the first commitment be irregular, but be replaced, before the return of the *habeas corpus*, by a valid commitment, the prisoner will not be discharged. (*Ib.*)

9. A commitment for extradition for "forgery" is sufficient, without any further particulars. *In re Hoke*, Q. B. 1877, 15 R. L. 92.

III. EVIDENCE.

1. The evidence of criminality to support the demand for extradition must be sufficient to commit for trial, according to the laws of the place where the fugitive is arrested and not according to the laws of the place where the offence is alleged to have been committed. *Exparte Lamirande*, Q. B. 1866, 10 L. C. J. 280.

2. It is not necessary that the depositions be taken before the magistrate who issued the original warrant. *Worms Exp.*, Q. B. 1876, 22 L. C. J. 109.

3. In a proceeding for extradition, the judge or magistrate has no authority to hear the prisoner's defence, though in the exercise of his discretion he may hear any evidence which may be tendered to show that the offence is of a political character, or one not comprised in the Treaty, or that the accuser is not to be believed on oath, or that the demand for the prisoner's extradition is the result of a conspiracy. *Re Rosenbaum*, Q. B. 1874, 20 L. C. J. 165.

4. An affidavit sworn to before a commissioner of the United States, proved to be a magistrate having authority in the matter according to the law where taken, may be received, if properly proved, as evidence against the prisoner on proceedings for extradition, and provided there has been adduced legal evidence applicable to the case, and prisoner has thereon been committed for extradition, a judge on an application for *habeas corpus* will not be disposed to weigh or appreciate that evidence with a view of giving the prisoner the benefit of a doubt as to its preponderance. *Phelan Exp.*, Q. B. 1883, 6 L. N. 261.

5. Copies of indictments and true bills found by the Grand Jury of New York State cannot be admitted as a *primâ facié* evidence in Canada against the accused on a demand for extradition. *In re Eno*, S. C. 1884, 10 Q. L. R. 194. *In re Rosenbaum*, Q. B. 1874, 18 L. C. J. 200.

6. Depositions taken in a foreign country are, under s. 9 of the Extradition Act of 1877, receivable in evidence in Canada, although taken in the absence of the accused, and not for the purpose of issuing or sustaining a warrant of arrest for the commission of the crimes charged in them. *In re Hoke*, before Judge Dugas, 1886, 14 R. L. 705.

7. Such depositions, purporting to have been received and sworn before a judge of a County Court of a foreign State, and certified by him to be original depositions, are sufficiently authenticated and make legal proof; more particularly so when such signature is certified by the clerk of the court, and by the testimony of witnesses.

8. Such depositions, when taken according to the law of the foreign State, are sufficient, and when received before and signed by a

judge, are to be presumed to be in the form in use in such State.

9. Statements on oath, sworn before a judge of a County Court of the State of Illinois, whose signature is certified by the clerk of the court under the seal of the court, are admissible as evidence in extradition proceedings, and it is immaterial whether the witness has been sworn prior to his evidence being reduced to writing, as in a deposition, or whether he has been sworn thereto after it has been written down, as in an affidavit. *In re Hoke*, Q. B. 1887, 15 R. L. 92.

10. Upon *habeas corpus*, the court should see that the facts alleged by the prosecution constitute an extraditable offence, and that the court should examine the evidence so far as to see that there is such proof as would warrant a Grand Jury in finding a true bill, or a Justice of the Peace in committing for trial. *In re Hoke*, Q. B. 1887, 15 R. L. 93.

11. A *primâ facie* case is sufficient to warrant extradition, and this may be established by circumstantial evidence; also, that a statement by the accused, made under such circumstances as to be admissible in evidence, may be contradicted in part by the other evidence for the prosecution, and it is for the jury to decide what weight shall be attached to the various parts of such statement. *In re Hoke*, Q. B. 1887, 15 R. L. 99.

12. In proceedings for the extradition of a fugitive, evidence to contradict that of the prosecution is not admissible. The accused is only entitled to show that the offence charged is not a crime mentioned in the treaty. *In re Debaum*, Q. B. 1888, M. L. R., 4 Q. B. 145.

IV. FORGERY.

1. The making of false entries in the books of a bank does not constitute the crime of forgery, according to the laws of England or of Canada. *Exparte Lamirande*, Q. B. 1866, 10 L. C. J. 280.

2. The expressions "forgery" and "utterance of forged paper," in the extradition treaty, include every crime falling under that description, whether it amounts to a felony or is only a misdemeanor. *Exp. Worms*, Q. B. 1876, 22 L. C. J. 109, 7 R. L. 319.

3. In extradition for forgery, this offence should be the one recognized as forgery under the Extradition Act of 1842 (Ashburton Treaty). *In re Eno*, S. C. 1884, 10 Q. L. R. 194.

4. Approving the decision of Mr. Rioux (11 Leg. News, 323, 16 R. L. 612), a statement of account, such as is received by a bank from other banks having business connections with it, and containing an acknowledgment of the receipt of money to be accounted for, is an "accountable receipt" within the meaning of R. S., ch. 165, s. 29, and the fraudulent alteration thereof is a forgery. *In re Debaum*, Q. B. 1888, M. L. R., 1 Q. B. 145, 32 L. C. J. 281.

5. A confession as to alteration of such "accountable receipt," made by an officer of a bank, after his connection therewith has terminated, to a fellow employee, no director of the bank being present, is not made to a person in authority; and when such confession is made without any inducement being held out, and after the accused was warned not to state anything that he did not wish repeated to the directors, it is admissible in evidence. (*Ib.*)

6. In a case of forgery it is not necessary to prove the legal existence of the bank intended to be defrauded; it is sufficient to prove generally an intent to fraud; but in this case the legal existence of the bank was sufficiently proved. (*Ib.*)

7. The fact that an indictment for embezzlement has been found against the accused, in the state from which he fled, does not prevent a demand being made for his surrender for forgery. (*Ib.*)

8. An alteration of a writing or "accountable receipt," made to cover a fraud previously committed, is a forgery, though no money was taken at that time. (*Ib.*)

V. PROCEEDINGS.

(See *supra* "COMMITMENT" — "EVIDENCE," and *infra* "WARRANT OF ARREST.")

1. **Jurat.**—The omission, in the jurat, of the place where the depositions were taken is not material, where the place is mentioned in the heading or margin, and is otherwise certified to. *In re Debaum*, 1888, M. L. R., 4 Q. B. 145.

2. **Irregularities.**—And an alleged irregularity in the proceedings for his arrest cannot, on an application for *habeas corpus*, avail a

prisoner committed for extradition. It is sufficient that, being under arrest before proper authority, a case has been made out against him to justify his commitment. *Phelan Exp.*, Q. B. 1883, 6 L. N. 261.

3. —— It is not necessary in proceedings for a committal for extradition to prove a demand for the fugitive from the foreign government. *Re Hoke*, Q. B. 1887, 15 R. L. 99.

4. —— It is sufficient if the affidavits or depositions filed by the prosecution are read to the accused upon his voluntary examination, the same having been taken in communication by his counsel during the previous hearing. The procedure will be presumed to be regular, unless the contrary appears on the face of the record. (*Ib.*)

VI. JURISDICTION.

1. The judge of sessions has, under the Imperial Act, 33-34 Vic., cap. 52, power to take the preliminary *enquête* in matters of extradition, and to order the arrest of the accused. *Kolligs in re*, Q. B. 1874, 18 R. L. 213.

2. The Imp. Stat., 6th and 7th Vic., ch 76, which was suspended in this colony by the Queen's Proclamation of the 28th day of March, 1850, was not revived by the passing of either of the Provincial Acts, 22 Vic., ch. 29, and 24th Vic., ch. 6, and, consequently, a judge of the Superior Court for Lower Canada has jurisdiction over the several classes of offences enumerated in the Treaty between Great Britain and the United States, commonly known as the "Ashburton Treaty." *Regina* vs. *Young*, S. C. 1865, 9 L. C. J. 29.

VII. LAW OF.

1. The Imperial Extradition Act of 1870 applies to Canada, and is not inconsistent with section 132 of the B. N. A. Act. *Exp. Worms*, Q. B. 1876, 22 L. C. J. 109, 7 R. L. 319.

2. The Extradition Act merely requires that the fugitive be charged with having committed, within the foreign jurisdiction, one of the crimes enumerated in the treaty, and that the evidence of criminality be such as, according to the laws of this country, would justify his apprehension and trial, if the crime had been committed here; and when the authorities in the country where the offence was committed have declared, by the issue of a warrant for the apprehension of the offender, that the acts complained of constitute an extradition offence according to their law, it only remains for the authorities here to examine whether the same acts, if committed here, would, under our law, justify the arrest and trial of the accused for the same offence. (*Ib.*)

3. On a demand for *habeas corpus* by a person committed for extradition on a charge of passing counterfeit money—*Held* that since the Imperial order in council of 28th December, 1882, published in the *Canada Gazette* of 3rd March, 1883, the operation of the Imperial Extradition Act of 1870 has been suspended in Canada, *quoad* the extradition of fugitive offenders from the United States, and the Dominion Act, 40 Vic., cap. 25, is applicable in such case to the extent at least of the extradition arrangements in force with that country. *Phelan Exp.*, Q. B. 1883, 6 L. N. 261.

VIII. WARRANT OF ARREST.

1. An informal translation of the *acte de renvoi* or warrant of arrest will not supply the place of the original. *Exparte Lamirande*, Q. B. 1866, 10 L. C. J. 280.

2. An error in the warrant of arrest in an extradition case does not affect the warrant of commitment, if the latter be in accordance with the charge and the evidence adduced. *Worms Exparte*, Q. B. 1876, 22 L. C. J. 109, 7 R. L. 320.

3. It is not necessary to obtain a warrant of arrest prior to arrest in cases under the Extradition Act. *In re Hoke*, Q. B. 1887, 15 R. L. 93.

IX. WITH FRANCE.

The French Consul General, not being an accredited diplomatic agent of his government, is not competent to demand the extradition of a fugitive criminal. *Exparte Lamirande*, Q. B. 1866, 10 L. C. J. 280.

X. WITH THE UNITED STATES.

Sub section 2 of section 3 of the Imp. Extradition Act of 1870 is inconsistent with the subsisting extradition treaty between Great Britain and the United States, and is therefore not in force *quoad* any application under such treaty. *In re Rosenbaum*, Q. B. 1874, 18 L. C. J. 200.

F.

FABRIQUE.

See CHURCHES.

FACTUM.

On special application, on ground of poverty, respondent was permitted to send in factums in appeal in writing. *Kingsborough* vs. *Pound*, Q. B., Que., Dec., 1877.

FAILLITE.

See INSOLVENCY.

FALSE ARREST.

I. DAMAGES—WHAT GIVES RISE TO.

General Principles. 1-3.
Abuse of Process. 4.
Arrest by private Person. 5.
Asserting Right to Property. 6.
Capias on disputed Claim. 7-8. (See also under title "CAPIAS.)"
Children—Breaking House Windows. 9.
Committal without Hearing. 10.
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Exemplary Damages—Malice. 13.
Illegal Arrest by Justice of Peace. 14.
Illegal Conviction. 15-16.
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Joint and several Liability. 19.
Justification by alleging new Grounds of Complaint. 20.
Lunatic. 21.
Mistaken Identity. 22.
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Municipal Corporation. 24-26. (See under title "MUNICIPAL CORPORATION.")
Partnership. 27.
Perjury. 28.
Women of doubtful Repute. 29.

II. PRESCRIPTION OF ACTION AGAINST MAGISTRATE. 1-2.

III. PROBABLE CAUSE. 1-15.

IV. SET OFF.

See also CAPIAS.
" MALICIOUS PROSECUTION.
" MUNICIPAL CORPORATION.

I. DAMAGES— WHAT GIVES RISE TO.

1. General Principles.—Damages claimed for false arrest will be allowed, although no malice be proved. *Wilson* vs. *Morris*, S. C. 1857, 1 L. C. J. 237.

2. —— An action for damages will not lie against a party for having caused another to be arrested, if probable cause and no malice be proved, even although the Grand Jury have found no bill against the party accused. *Bélanger* vs. *Collin*, S. C. 1873, 18 L. C. J. 78.

3. —— The doctrine laid down by Ramsay, J., in his judgment in this case, which was assented to by two other judges (Mount and Baby), and dissented from by Dorion, C. J., and Cross, J., viz.: "that an action of damage for false imprisonment will not lie, unless there be want of probable cause and malice combined," was overruled by the Supreme Court. *Shaw* vs. *MacKenzie*, Q. B. 1880, 25 L. C. J. 40. Reversed in Supreme Court, 6 Can. S. C. R. 181.

4. Abuse of Process.— The defendants bought up some debts, and caused the arrest of the plaintiff under a capias for the purpose of detaining his person and getting possession of certain papers—*Held*, an abuse of the process of the court, and that exemplary damages should be awarded. *Gerbie* vs. *Bessette*, S. C. 1884, 7 L. N. 156.

5. Arrest by private Person.—A private person, although armed with a warrant, cannot legally make an arrest, and is liable for doing so to damages. *Leroux* vs. *Archambault*, S. C. 1871, 16 L. C. J. 83.

6. Asserting Right to Property.— Where a person who pretends that he has rights to real property, attempts to assert them by force, and is repulsed, and then causes the person in possession to be arrested for assault, he will be held liable in damages for false arrest. *Filiatrault* vs. *Prieur*, 1889, M. L. R., 5 S. C. 67.

7. Capias on disputed Claim — (See also under title "CAPIAS.")— The plaintiff had been arrested on a capias issued by defendants against him on a disputed claim concerning some partnership matter. The plaintiff resided in New Jersey, and was in Montreal attending the progress of the suit, which had arisen out of this disputed claim when arrested. The capias was quashed, and the plaintiff sued for damages. Judgment for $500

confirmed in review. *Bannatyne* vs. *Canada Paper Co.*, C. R. 1880, 3 L. N. 207.

8. —— Where a writ of capias issued for the arrest of one Thomas Maheu, and the plaintiff, who was the son of the said Thomas Maheu, and bore the same name, represented to the bailiff entrusted with the writ that he was the Thomas Maheu against whom the writ was directed, and on such representations was arrested. On discovering the mistake, the capias was discontinued, and plaintiff afterwards brought present action to recover damages for false arrest—*Held*, that as the plaintiff had by such representations brought about the arrest of which he complained, he could not recover damages for the same. *Maheu* vs. *Oliver*, S. C. 1885, 34 L. C. J. 53.

9. Children—Breaking House Windows.—The occupant of a house is justified in having a child arrested for breaking a window-pane in his house, even where such breaking was not done maliciously, but whilst playing with other children. *David* vs. *Lepage*, C. Ct. 1887, 15 R. L. 554.

10. Committal without hearing.—Where a mayor, presiding at an election of municipal councillors, committed a person to prison, for ten days, without a hearing—*Held*, that, under the circumstances of the case, there was malice, and the defendant was liable in damages. *Cloutier* vs. *Trépanier*, Q. B. 1886, 12 Q. R. L. 289, confirming S. C., 11 Q. L. R. 321.

11. Dismissal for want of Jurisdiction.—The warrant of arrest was issued at Sorel, in the district of Richelieu, and was executed by the plaintiff being seized at Contrecœur, and carried to Sorel on a Sunday, the 31st of January, 1881. The hearing at Sorel was put off till February, when the complaint was dismissed for want of jurisdiction, the offence having been committed in Montreal district, if anywhere. $100 damages allowed. *Leclaire* vs. *Copeland*, C. R. 1882, 5 L. N. 340.

12. Evading the Tolls.—The plaintiff complained of the defendants that they had illegally arrested him and caused his detention while they had a warrant prepared against him, and then compelled him to give security to appear on a subsequent day. It appeared in evidence that on the 15th January, 1881, the plaintiff removed a barrier which had been placed by the corporation on a piece of land donated to the city, called the Quinn Avenue. There was a constable present to prevent people passing through, and he arrested plaintiff and conducted him to the police office, where a warrant was prepared, and he was bound over to appear at a future day. The proceedings then begun by the city were afterwards quashed. Plaintiff averred that he had a perfect right to remove the barrier and pass on to land which he had leased from the Quinn family. He alleged a previous verbal lease, and a written lease signed the afternoon of the arrest. The barrier had been erected to prevent plaintiff and others from evading the toll—*Held*, that as the lease had been obtained evidently to give plaintiff a color of right he had suffered no damages, and action properly dismissed. *Brais* vs. *Corporation of Longueuil*, C. R. 1882, 5 L. N. 212.

13. Exemplary Damages—Malice.—Where there was probable cause for laying an information, damages will not be granted on that account; but where the complainant unnecessarily asked for the arrest and detention of the party, exemplary damages may be awarded for such arrest. *Labelle* vs. *Versailles*, 1890, M. L. R., 7 S. C. 112.

14. Illegal arrest by Justice of Peace.—Where a person lays an information before a justice of the peace, that a crime has been committed for which such justice has general jurisdiction, and the justice grants a warrant upon which the accused is arrested, but he is afterwards discharged upon the ground that the justice had no authority in that special case, the complainant, if he had probable cause, is not liable in damages for illegal arrest and imprisonment. *Copeland* vs. *Leclerc*, 1886, M. L. R., 2 Q. B. 365.

15. Illegal conviction.—Action of damages will not lie against a person who, in good faith, executes a judgment ordering coercive imprisonment, even where such judgment is bad. *Gagnon* vs. *Julien*, S. C. 1888, 11 Q. L. R. 5, and see *Langlois* vs. *Normand*, Q. B. 1880, 6 Q. L. R. 162; *Lafleur* vs. *Cherrier*, S. C. 1882, 5 L. N. 411.

16. —— Where action of damages for malicious arrest and imprisonment was brought against two magistrates, and also against the complainant and the bailiff who conveyed the plaintiff to gaol—*Held*, that the complainant had good ground for making the affidavit before the magistrate, and, as he had not participated in any of the subsequent proceedings, and as the bailiff had executed the magistrate's warrant in good faith, that the action must be dismissed as regarded them,

but that the magistrates having issued an illegal warrant were liable to the plaintiff in damages, but that the sum awarded by the court below, viz., $100 and costs, was under all the circumstances of the case excessive. *Bissonnette* vs. *Bornais*, Q. B. 1866, 16 L. C. R. 377, and 2 L. C. L. J. 18.

17. Innocence.—The mere fact that the party imprisoned was innocent would not entitle him to damages; he must further prove that the person causing his imprisonment had not probable cause. *Lefebvre* vs. *Cie. de Navigation à Vapeur de Beauharnois*, S. C. 1879, 9 R. L. 547.

18. Inveigling across boundary line.—Defendant held liable in damages for having induced the plaintiff to go across the international line, and for causing him to be arrested in Vermont for an alleged debt which it appeared did not exist, and $250 and costs allowed. *Woodard* vs. *Butterfield*, S. C. 1883, 6 L. N. 228.

19. Joint and several Liability.—If two persons arrest a third, without grounds, both are answerable in an action of damages jointly and severally. *Pouliot* vs. *Stanley*, 1 Rev. de Leg. 380, K. B. 1813.

20. Justification by alleging new grounds of Complaint.—The defendant in an action of damages for false arrest cannot justify himself by alleging acts of the plaintiff subsequent to those which served as the basis of the criminal proceeding. *Bogue* vs. *Brouillet*, 1885, M. L. R., 1 S. C. 470.

21. Lunatic.—Arrest and privation of liberty on the charge of being a dangerous lunatic, although such charge does not involve any moral turpitude, entitles the person so arrested to damages, if the proceedings be taken without reasonable or probable cause. *Genereux* vs. *Murphy*, M. L. R., 7 S. C. 403.

22. Mistaken Identity — Nominal Damages.—Where, in an action of damages for false arrest, the arrest was proved to have been due to a mistake in the person, and not to malice, nominal damages only were awarded. *Chartrand* vs. *Pudney*, C. R. 1880, 3 L. N. 237.

23. Magistrate.—A magistrate is not liable in damages for issuing a warrant of arrest without jurisdiction, in the absence of bad faith and malice. *Kingston* vs. *Corbeil*, C. R. 1879, 7 L. N. 325.

24. Municipal Corporation.—Where a corporation is sued for an alleged illegal arrest by its officer, it is sufficient for the defendant to show that the officer had probable cause. *Corporation of Quebec* vs. *Piché*, Q. B. 1881, 11 Q. L. R. 249.

25 —— A warrant of arrest can be issued and executed to assure the attendance of a witness in court in a suit for contravening the License Act; but if such arrest be carried out at an unusual hour, and with unnecessary severity, such as putting handcuffs on the witness without any necessity therefor, the corporation will be liable for the acts of the policeman so making the arrest. *Gagnon* vs. *City of Montreal*, S. C. 1890, 34 L. C. J. 212.

26 —— Where the police officers arrested by mistake the brother of the accused, who had a certain resemblance to him, but without taking necessary precautions to ascertain the residence and identity of the accused—*Held*, that the corporation was liable for damages, the plaintiff having passed the night in the cells, but that the damages could not include the publicity given to the affair by the newspapers, the defendants being in no sense participants in such publication. *Bigras* vs. *Cité de Montreal*, S. C. 1892, 2 Que. 227.

27. Partnership.—Damages can be recovered from a partnership for false arrest at the instance of one of its members. *Cowan* vs. *Osborn*, S. C. 1881, 12 R. L. 29.

28. Perjury.—The appellants were appointed respectively joint tutors and subrogate tutors to a minor child, and respondent, together with one A., presented a petition for their removal, to which they appended an affidavit of the facts contained in the petition. Appellants contending that the facts contained in the petition were false, charged them with perjury and procured their arrest. They were, however, almost immediately discharged by the magistrate before whom they were brought —*Held*, that the appellants had acted thoughtlessly, and without reasonable cause, and were properly condemned in $100 damages. *Beaudrone* vs. *Lalonde*, Q. B. 1881, 1 Dorion's Q. B. R. 208.

29. Women of doubtful Repute.—The respondents were two sisters keeping a house of doubtful repute in which appellant lost a sum of money, on account of which he had the sisters arrested, charged with having stolen it while he was under the influence of liquor. They were both discharged, the one by the magistrate, the other by the grand jury. On action for false arrest $20 and $10 respectively was awarded with costs of the lowest

class of the Superior Court. On appeal judgment confirmed. *Serrurier* vs. *Mercier*, Q. B 1880, 1 Dorion's Q. B. R. 65.

II. PRESCRIPTION OF ACTION.

1. An action against a justice of the peace for false imprisonment must, under 14 and 15 Vic., cap. 54, be commenced within six months after the act complained of, and notice of such action as required by the second section of the statute is not a commencement of the action. *Lavoie* vs. *Greyoire*, S. C. 1859, 9 L. C. R. 255.

2. An action of damages against a magistrate for illegal arrest is prescribed in six months from the arrest complained of. *Kingston* vs. *Corbeil*, C. R. 1879, 7 L. N. 325.

III. PROBABLE CAUSE.

1. The defendants, members of the Montreal police force, were sued in damages for false arrest. A murder had been committed by a mob of persons on the 12th of July, and the Chief of Police had received an anonymous letter, stating that plaintiff was implicated in it. The information turned out to be without foundation—*Held*, that notwithstanding the defendants were in good faith in making the arrest, the plaintiff was entitled to compensation, which was fixed at $75. *Coyle* vs. *Richardson*, S. C. 1879, 2 L. N. 60.

2. Action against the mayor of Montreal for causing the arrest of the plaintiff during the Orange Riots of 1878. Plaintiff was one of the leaders of the Orange body which had announced its determination to march on the 12th July. The lodges which had met for that purpose claimed protection during their march to and from church. Instead the mayor ordered them not to walk, and to prevent their doing so caused the arrest of plaintiff, who was subsequently tried and acquitted on a charge of being a member of an illegal association—*Held* that there was probable cause for the arrest and no malice. *Grant* vs. *Beaudry*, Q. B. 1881, 4 L. N. 393, 2 Dorion's Q. B. R. 197. Confirmed in Supreme Ct., 11 Jan. 1883, but merely on the question of want of notice of action. (Cassel's Digest, 2nd Edit., p. 581.)

3. A trading firm, by making false statements to a mercantile agency as to their capital, obtained a high and incorrect rating, on the strength of which they got credit for goods which they handed over to a relative in payment of an antecedent debt, and within a month afterwards a writ in insolvency issued against them. The vendor of the goods on discovering the facts, and being so advised by counsel, prosecuted the firm on a charge of obtaining goods by false pretences, but after a preliminary examination the prisoner was discharged—*Held*, that there was reasonable and probable cause for the prosecution, and an action of damages would not lie. *Bowes* vs. *Ramsay*, S. C. 1881, 4 L. N. 227.

4. A sum of $1200 in bills of $20 and $50 of the Jacques Cartier Bank had been stolen from a lawyer's office in Montreal. Notice had been given to the police, and amongst others to defendants to be on the watch. On the morning of the arrest, the plaintiff accompanied by others in the garb of workmen entered the Jacques Cartier Bank in Montreal and asked for change of bills of $20 and $50 of that bank. Shortly afterwards they were arrested, and having given a perfectly satisfactory account of themselves were liberated—*Held*, there was probable cause for their arrest and no damage. *Lebel* vs. *Paradis*, S. C. 1881, 4 L. N. 403.

5. The plaintiff, who was a grocer, sent out two men to deliver goods in the village of St. Gabriel. A constable in the village thought these men were intruders, doing business without a license. He accordingly arrested them, and they were taken away and detained for some time. Finally they were released—*Held*, (following *Doolan & The Corporation*), that the plaintiff was entitled to damages, and $50 and costs allowed. *Bruchesi* vs. *Corporation St. Gabriel*, S. C. 1882, 6 L. N. 60.

6. The plaintiff executed a mortgage in favor of defendant, and, on the faith of the representation that only one other mortgage existed on the property, the defendant made advances. The representation was untrue, the property being at the same time mortgaged to its full value. The defendant caused the plaintiff to be prosecuted criminally. A bill was found, but the plaintiff was acquitted by the petit jury—*Held*, that the defendant acted with probable cause. *Grothé* vs. *Saunders*, S. C. 1882, 5 L. N. 213; confirmed in appeal.

7. Three workmen had been employed by a Dr. T. (who, in right of his wife, was co-proprietor along with the defendants in the two present cases of some real estate in this city) to pull down a building. They were all three arrested at the instance of the defendants

and brought before a magistrate, who discharged them, on a charge of unlawfully doing damage to property, and they then, each of them, brought an action for damages laid at $210. *Per Curiam* :—The first case came before the Hon. Justice Sicotte, and he gave judgment for the plaintiff with $25 damages and costs as in the lowest class of action in this court. In the present two cases, which were heard before me, the counsel for the defendant contended there was no evidence to show the workmen had authority from T; but the fact is alleged by the defendant himself in his protest served upon these workmen, that Mrs. T. was causing a portion of the property to be pulled down—*i.e.*, that the men were working there by order of one of the co-proprietors. The defendant knew what these men were doing there; and the charge he brought against them was without cause, and under a mere color of law. It was also contended that in the event of damages the costs should be those of the Circuit Court, but that would be in effect to punish these men for the exercise of their right of action. I adhere to the judgment given in the other case, and in these two I give $25 damages and costs as in lowest class action in this court. *Dufresne* vs. *Ross*, S. C. 1882; *Lauzon* vs. *Ross*, 6 L. N. 22.

8. In an action of damages for false arrest under *capias—Held*, that the fact that the debtor is leaving the province is not of itself evidence of an intent to defraud, but the affidavit for *capias* must contain reasons sufficient to satisfy the court that the plaintiff had reasonable and probable cause to believe that the debtor was actually about to leave with a fraudulent intent, without which the defendant is entitled to damages. *Brosseau* vs. *Seybold*, S. C. 1883, 6 L. N. 389.

9. The plaintiff was arrested on a *capias*, on the ground that he had refused to make any settlement of his debt; that he was about to sell his estate and to leave the country. It appeared that the plaintiff had called a meeting of his creditors and informed them of the proposed sale, to which the majority of those present agreed—*Held*, that there was not probable cause. *Marchand* vs. *Snowdon*, S. C. 1884, 7 L. N. 44.

10. Where a person, not licensed to sell, was arrested while writing down orders for the house which he represented—*Held*, that the police officer had probable cause for the arrest, under a by-law of the corporation forbidding to sell without license. *Corporation de Québec* vs. *Piché*, Q. B. 1884, 11 Q. L. R. 249.

11. Where the respondent converted to his own use certain straw bought by him with money furnished to him by the appellant and intended for the appellant's benefit, there was probable cause for his arrest. *Copeland* vs. *Leclerc*, 1886, M. L. R., 2 Q. B. 365.

12. Where B., while passing along a street, pushed a drunken man, so that he reeled against a shop window and broke it, and the shopkeeper, coming out, caused the arrest of both B. and the drunken man on the charge of breaking his window—*Held*, that there was probable cause for the arrest. *Barrette* vs. *Turner*, C. Ct. 1886, 9 L. N. 314.

13. Where an information was laid by the defendant against a person as a dangerous lunatic, without the consent or knowledge of his friends and relatives, and it appeared that the person had always been perfectly harmless, and that defendant's apparent motive was to oust him from the house occupied by him, which belonged to the defendant, it was held that the proceedings were instituted without probable cause, and damages were awarded. *Généreux* vs. *Murphy*, C. R. 1891, M. L. R., 7 S. C. 403.

14. Where articles missing are found in the possession of a servant or other person in a position to take them, and are not reasonably accounted for, there is probable cause for an arrest on a charge of larceny of the person in whose possession the property is found. The subsequent acquittal of the accused raises no presumption of absence of probable cause. *Pinsonneault* vs. *Sebastian*, C. R. 1887, M. L. R., 3 S. C. 116, 31 L. C. J. 167.

15. A creditor causing the arrest of his debtor on a *capias* without probable cause, and by false allegations in his affidavit, will be liable in damages, malice being presumed in such a case. *Drapeau* vs. *Desbauriers*, Q. B. 1888, 16 R. L. 433, 32 L. C. J. 191.

IV. SET OFF.

In an action of damages for, *inter alia*, malicious prosecution and false arrest, it appearing that the plaintiff had also prosecuted the defendants criminally, and there being no documentary proof of the prosecution of which he complained—*Held*, that the prosecution by the plaintiff could be set off against the prosecution by the defendants, and action dismissed. *Gadbois* vs. *Laforce*, S. C. 1881, 4 L. N. 244.

FAMILY.

Member of.—Who can be. (See *Knapp* vs. *Trites*, 2 R. C. 245, a New Brunswick case.)

FAMILY COUNCIL.

The fact that a family council is composed in part of friends, though there are relations enough, and the fact that the tutor appointed is not a relation, are not grounds of absolute nullity, and can only be invoked where the rights of the minors have been prejudiced thereby. *Banque Jacques Cartier* vs. *Pinsonneault*, 1884, M. L. R., 1 S. C. 18.

The neglect to summon all the relations to a family council does not invalidate the proceedings, if the relations were not systematically excluded, and the minors suffered no prejudice. *Caty* vs. *Perrault*, 1884, M. L. R., 1 S. C. 131.

FEES.

See Advocates—Bailiffs.

Of Constable.—By order in council of the Provincial Government (Quebec) costs of summoning witnesses and their taxation and other expenses attending the preliminary investigation of criminal offences, including constables' fees, are chargeable to the party prosecuting and not to the Crown, in cases where the prisoner is not committed or held to bail to stand his trial. The defendant having obtained the services of plaintiff as high constable in connection with an information for a misdemeanour, specially undertook to pay plaintiff's fees therefor "according to the government regulations now existing." It appearing that the prisoner had been sent for trial—*Held*, that the defendant could not be made liable for the fees due the plaintiff on account of the services so rendered by him. *Gailloux* vs. *Bell*, C. R. 1877, 4 Q. L. R. 264.

Of Court.—In an action against a firm of advocates, by the clerk of the Court of Appeals in the name of the Crown, for certain office fees and taxes, mentioned in the tariff of the court, which fees and taxes, it was alleged, formed part of the fund known as the fee fund —*Held*, that the fee of office and taxes payable to the Clerk of Appeals belong to and form part of the revenue of the Crown, and that the right of action for the recovery of such fees and taxes was vested in the Crown alone, and not in the Clerk of Appeals, who was simply the agent for their collection. *Regina* vs. *Holt*, C. Ct. 1862, 13 L. C. R. 306.

Of Cullers.—A suit for fees for the mensuring of timber by licensed cullers acting under the supervisor of cullers at Quebec, pursuant to C. S. C., ch. 46, is properly brought in the name of the Crown. *Laflamme* vs. *Prendergast*, S. C. 1878, 4 Q. L. R. 285.

Of Registrar of Vice-Admiralty Court.—In a suit before the judge of the Court of Vice-Admiralty for fees of registrar, the court disclaimed all jurisdiction in the matter. *Drolet in re*, V. A. C. 1859, 2 S. V. A. C. 1.

Of Judges of Vice-Admiralty Court. The right of the judges of the Vice-Admiralty to exact fees is of immemorial usage, introduced into this country after the conquest. *Wilson* vs. *Kerr*, K. B. 1828, S. R. 341.

Of Vice-Admiralty Court.—Since the passing of the Imperial Statute 2 William IV, cap. 51, the establishment of fees in the Vice-Admiralty Court here is vested exclusively in the king in council, and the table of fees established under that statute having been revoked without making another, it is not competent to the court to award a *quantum meruit* to its officers. *The John & Mary in re*, S. V. A. C. 64, and *The London in re*, V. A. C. 1857, S. V. A. C. 140.

FEMME MARIÉE.

See Marriage—Marriage Covenants—Married Women.

FENCE.

See also Boundaries.

For legal definition of the word "Fence," see French case reported 8 L. N. at p. 235.

FERRY.

See Municipal Corporation.

The conveying or crossing of persons, etc., over a river, within the limits of another's exclusive right of ferriage and transport, although done gratuitously, if it ultimately produce gain to the person working the unauthorized ferry or crossing, is a crossing for hire and gain within the meaning of the statute, and an infringement of the exclusive rights created thereunder. *Leprohon* vs. *Globensky*, S. C. 1859, 3 L. C. J. 310.

FERRY BOAT.

The proprietor of a ferry boat is liable as a common carrier for the loss or damage of things entrusted to him, unless he proves that

such loss or damage was caused by a fortuitous event, or other ground of exemption under Art. 1675 C. C. And no modification of this liability occurs with respect to a horse driven on the ferry boat by a traveller who remains on board with the animal during the passage. *Robert* vs. *Laurin*, C. R. 1882, 26 L. C. J. 378. (There was no appeal from the judgment in Review. Reporter's note.)

FILIATION.

See PATERNITY.

The *adjudicataire* of a substituted immoveable, who was authorized to retain part of the purchase money until the opening of the substitution, is bound by the acknowledgment made by his *auteurs* of the civil status of the *grevé* who is asking for the production of the money. *Beaudry* vs. *Chevalier*, 1887, M. L. R., 3 Q. B. 159, 16 R. L. 222.

FIRE MARSHAL.

Witnesses before.—A witness summoned before the fire marshal on a charge of incendiarism may refuse to answer any question that will tend to criminate him. *Dixon exp.*, Q. B. 1872, 2 R. C. 231.

FISHERIES.

Provincial Rights.—The federal department of Marine and Fisheries cannot grant fishing rights in the province in rivers which are not floatable, nor can the Quebec government grant licenses to fish therein. *Leboutillier* vs. *Hogan*, S. C. 1888, 17 R. L. 463.

Rights of Foreigners.—In a case prosecuted by the attorney general, before the Vice-Admiralty Court, for illegal fishing—*Held*, that a foreign vessel, illegally fishing in British waters within three miles of the coast of Canada, and not navigated according to the laws of the United Kingdom, or of Canada, and not having a license to fish, contrary to the provisions of Canadian Acts of Parliament, 31 Vic., cap. 61, and 33 Vic., cap. 15, must be declared to be forfeited. *The Samuel Gilbert in re*, V. A. C. 1871, 2 S. V. A. C. 167

And in another case a claim for a schooner, being a foreign vessel and cargo, was rejected, and forfeiture declared for fishing in Canadian waters, contrary to the fishery law. *The Franklin Schenke in re*, V. A. C. 1872, 2 S. V. A. C. 169.

Trespass on.—To support an action for a trespass on a fishery on the banks of the St. Lawrence, proof of possession by title from the Crown is necessary. *Marin* vs. *Lefebvre*, K. B. 1816, 1 Rev. de Lég. 354.

FIXTURES.

Meaning of.—(See also under title "LESSOR AND LESSEE," "IMMOVEABLES.") Where it is stipulated that the "fixtures and fitting" erected by the tenant in a restaurant were to remain the property of the landlord, the terms included the bar, bar-shelving, oyster counter, gasaliers and other gas fixtures. *Duperrouzel* vs. *Seath*, S. C. 1886, 9 L. N. 380.

FRAIS.

See COSTS.

FRANCE.

Essay on Judicial History of, 1 Rev. de Lég. 477, 5 L. N. 137.

FRAUD.

I. ACTION PAULIANA. 1-9.

II. EFFECT OF. 1-5.

III. FRAUDULENT DECLARATION BY GARNISHEE. 1-2.

IV. PRESUMPTION OF. 1-5. (See *infra* No. VIII.)

V. RATIFICATION.

VI. REVOCATORY ACTION. 1-2. (See *supra* "ACTION PAULIANA.")

VII. RIGHTS OF CREDITORS. 1-3.

VIII. TRANSFER IN FRAUD OF CREDITORS. 1-34.

IX. WHAT CONSTITUTES. 1-3. (See also *supra* "TRANSFER IN FRAUD OF CREDITORS.")

See also DONATIONS.

" SALE.

I. ACTION PAULIANA.

1. Contracts in fraud of creditors can be set aside by them in an incidental proceeding, without a direct action. *Gillies* vs. *Kirwin*, S. C. 1881, 12 R. L. 1; *Marin* vs. *Bissonnette*, C. R. 1878, 1 L. N. 242; *Cumming* vs. *Smith*, Q. B. 1859, 5 L. C. J. 1.

2. An action will lie to set aside the sale or transfer of property at the suit of the creditors, notwithstanding the sale has never been registered. *Ethier* vs. *Paquette*, S. C. 1882, 12 R. L. 184.

3. In an action to set aside a sale in which the purchaser had been charged to pay a certain sum of money to a creditor of the vendor, it was pleaded, among other things, that the creditor had an interest and should have been called in—*Held*, dismissing the plea, as it did not appear by the declaration that the delegation of payment had been accepted by the creditor. (*Ib.*)

4. Judgments rendered against a debtor can be attacked by his creditors as being rendered in fraud of their rights. *In re Duberger*, S. C. 1890, 13 L. N. 402.

5. An opposition to judgment is in effect an action *Pauliana* applied to a judicial act. (*Ib.*)

6. A judgment annulling a separation of property will be in favor of all the insolvent's creditors. (*Ib.*)

7. In order to maintain an action *Pauliana* against a third party who has acquired property from the insolvent by onerous title, his complicity in the fraud must be alleged and proved. *Desrosiers* vs. *Meilleur*, S. C. 1892, 2 Que. 411.

8. The revocation of a contract on the ground of fraud is pronounced in favor of all the creditors whose rights it infringes, and not only in favor of the creditor who attacks the contract. (*Leduc* vs. *Tourigny*, Q. B. 1883, 17 Q. L. R. 385, discussed); *Beaubien* vs. *Lévesque*, C. R. 1892, 2 Que. 194.

9. And in this respect there is no distinction between a payment (C. C. 1036) and a contract, where both are made by an insolvent with intent to defraud his creditors. (*Ib.*)

II. EFFECT OF.

1. The plaintiff sought an account from the defendant of the value of two vessels, based on certain written agreements between them, the plaintiff and defendant, concerning the vessels in question, it being contended that the agreements in question were entered into between the parties with intend to defraud third persons—*Held*, that, even were this true, the agreement would nevertheless be valid and binding between the parties thereto. *Shaw* vs. *Jeffrey*, P. C. 1860, 10 L. C. R. 340, 13 Moore P. C. 432.

2. An agreement compromise may be set aside for what the old French Law terms *dol* or want of good faith in either of the contracting parties. *Trigge* vs. *Lavallée*, P. C. 1862, 7 L. C. J. 85 and 13 L. C. R. 132.

3. An assignment of hereditary rights obtained by fraud and fraudulent representations will be rescinded and set aside. *Herriman* vs. *Taylor*, Q. B. 1865, 9 L. C. J. 253.

4. One of the parties to a simulated and fraudulent deed of sale, and who participated in the fraud, cannot demand the revocation of the deed, even against him who first wished to consummate the fraud. *Gareau* vs. *Gareau*, Q. B. 1877, 24 L. C. J. 248.

5. Where of two innocent parties one must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud. *Babcock* vs. *Lawson* (English case), reported 2 L. N. 137.

III. FRAUDULENT DECLARATION BY GARNISHEE.

1. The plaintiff having taken *saisie-arrêts* against the sons of defendant, they answered that they had nothing. Nothing was done on these declarations for nearly two years, when the plaintiff by motion, unopposed, obtained leave to contest on the ground of fraud and collusion between father and sons. At the trial the sons admitted having known their father was insolvent, and having taken some furniture from him on account of claims they had against him, but urged the lapse of time and the limitation laid down by Art. 1040 C. C.—*Held*, in Review, reversing the judgment of the Court below, that there was no fraud, and if there was, the plaintiff had lost his right to contest by lapse of time. *Richard* vs. *Michaud*, C. R. 1882, 8 Q. L. R. 244.

2. In determining whether a declaration was made by a garnishee fraudulently and collusively, the principle applicable is, that it is only when an act operates a prejudice to legal rights that the motive can be questioned, and it is only a party who has been prejudiced that is entitled to complain. The facilitating of legal remedies by a debtor in favor of his creditors does not amount to fraudulent collusion. And in the present case there was sufficient evidence of the indebtedness declared by the garnishee, apart from the existence or validity of the lease referred to in the case. *Fairbanks* vs. *O'Halloran*, 1888, M. L. R., 4 Q. B. 163.

IV. PRESUMPTION OF.

1. A donation made by a weak and aged person for a small annual rent, not exceeding half of the annual revenue the property given, may be set aside for fraud, if the inference of fraud be not rebutted by evidence of

circumstances which plainly show that such inference is unfounded. *Bernier* vs. *Boisseau*, Q. B. 1813, 2 Rev. de Lég. 209.

2. *Held.*— That the deed of sale between E. & M. was fraudulent under the circumstances mentioned in this case. That want of possession and want of consideration are strong indications of fraud; delivery of possession is only presumptive evidence of honesty, but non-delivery is strong evidence of fraud. *Barbour* vs. *Fairchild*, S. C. 1856, 6 L. C. R. 113, 5 R. J. R. Q. 40.

3. Where in an action by an assignee to recover property transferred by an insolvent the day previous to his assignment, but before any act of insolvency had been committed—*Held*, that there was no public knowledge of the insolvency so as to create a presumption of fraud. *Mayrand* vs. *Salvas*, S. C. 1874, 6 R. L. 60.

4. Fraud is never presumed; it must always be proved. *Neault* vs. *St. Cyr*, Q. B. 1877, 3 Q. L. R. 147.

5. Where an insolvent gave to a relation a hypothec on his property—*Held*, that the fact of the relationship would give rise to a presumption of fraud. *Whitney* vs. *Shaw*, Q. B. 1871, 3 R. L. 439, and see *Lajoie* vs. *Poulin*, S. C. 1874, 5 R. L. 253; *Page* vs. *Evans*, Q. B. 1881, 4 L. N. 130, 1 Dorion's Q. B. R. 352.

V. RATIFICATION.

Ratification of a deed obtained by fraud, after the person defrauded has notice, prevents him from complaining of such fraud. *Montplaisir* vs. *Banque Ville-Marie*, Q. B. 1889, 18 R. L. 153.

VI. REVOCATORY ACTION.

(See "ACTION PAULIANA" *supra.*)

1. A direct action will lie to have a sale of moveables set aside on the ground of fraud, and this, though such sale had been a judicial one. *Ouimet* vs. *Senécal*, Q. B. 1860, 4 L. C. J. 133.

2. Prescription.—ART. 2258 C. C.—In a revocatory action, where defendant pleads prescription of 10 years, an answer that the *dol* which has given rise to the action was only discovered within the 10 years, is good in law. *Picault* vs. *Demers*, S. C. 1858, 2 L. C. J. 207.

VII. RIGHTS OF CREDITORS.

1. A creditor who exercises the rights of his debtor (Art. 1031) is not a third party, but merely represents his debtor, his *ayant-cause*; it is the debtor who acts through his intermediary, consequently the latter can only claim rights which the former can enforce. *Parent* vs. *Leclaire*, Q. B. 1892, 1 Que. 244.

2. Where a sale has been made in fraud of creditors, the latter can have it voided, but they cannot accept the part favorable to them and reject that which would be unfavorable. (*Ib.*)

3. Such construction must be given to the Insolvent Act in the matter of fraud as to leave creditors some latitude to exercise vigilance to secure their debts, and debtors hopeful and energetic to work out their salvation, if neither on the part of the one or the other there appears evident intention to defeat the remedies of creditors or obtain fraudulent preference in contemplation of insolvency. *Bell* v. *Rickaby*, Q. B. 1877, 3 Q. L. R. 243.

VIII. TRANSFERS IN FRAUD OF CREDITORS.

1. The firm of S. & W. H., in Lower Canada, being indebted to J. W., transferred seventy-five promissory notes to a factor on his account. At the time of the transfer S. & W. H. were insolvent. An attachment by garnishment having subsequently issued by other of the creditors of S. & W. H., the seventy-five notes in the hands of the factor were attached—*Held*, by the judicial committee, that the transfer having taken place before the execution of the attachment, was valid by the French law in force in Lower Canada. *Hutchison* vs. *Gillespie*, P. C. 1840, 3 Rev. de Lég. 427.

2. In order to set aside a deed of transfer on the ground of fraud, the insolvency of the assignor must be alleged and proved. *Bernier* vs. *Vachon*, C. Ct. 1858, 8 L. C. R. 286, 6 R. J. R. Q. 247.

3. A transfer *omnium bonorum* made by a trader while notoriously insolvent is at common law and according to the principles of the law of commerce, especially under the edict of Henry IV. of France, of 1609, absolutely null and void. *Cumming* vs. *Smith*, Q. B. 1866, 5 L. C. J. 1, 10 L. C. R. 122, 6 R. J. R. Q. 499.

4. Where action was brought on a transfer

of an unfinished contract—*Held*, reversing the judgment of the court below, that the transfer would not be presumed fraudulent because of the transfer of the money due on the part of the contract completed at the time of the transfer; but if the amount transferred exceeded the value of the work remaining to be done, the creditors of the transferor could compel the transferee to refund the surplus. *Berlinguet* vs. *Drolet*, Q. B. 1862, 12 L. C. R. 432.

5. M. obtained from all the creditors of D., an insolvent grocer, a subrogation of their rights and a transfer of the stock. He allowed D. to continue to sell the goods and collect outstanding accounts on his behalf, but reserved to himself the right to take possession of the stock and premises at any time he pleased. D. made new purchases of goods from N. and others with M.'s knowledge, and failed to pay for them. M. took possession of the stock, including the new goods, and sold the whole estate to another party. N. having served an attachment upon M.—*Held*, confirming judgment of the court below, that the sale by M. was in fraud of the new creditors of the insolvent, and that M. must pay the proceeds into court to be distributed among the said creditors. *McDonald* vs. *Niven*, Q. B. 1866, 2 L. C. L. J. 151.

6. Where the defendant, after judgment against him by plaintiff, on pretence of a *partage* between him and his daughters, of the effects of the community after his wife's death, transferred to his daughters certain stock which stood in his name, but no real transfer ever took place, and the stock still remained in the name and possession of the defendant—*Held*, that the seizure of the stock by plaintiff's must be maintained, and the opposition by defendant's daughters dismissed, *Torrance* vs. *Connolly & Connolly*, S. C. 1873. 5 R. L. 226.

7. One Farmer, an hotel-keeper, being largely indebted to the appellant, a notarial deed of sale, duly registered, was passed between them, whereby Farmer sold to the appellant, with right of redemption within three years, certain moveable and immoveable property, comprising the hotel and furniture, being the bulk of his estate, for a certain stated valuable consideration. Farmer remained in possession of the property under lease from appellant, and continued to carry on his business as usual. About ten months afterwards he became bankrupt, and the respondent was appointed his assignee. In the meantime, appellant had, with Farmer's consent, granted a lease of the moveables to Trihey and Johnson, in whose hands they were when respondent revendicated them as part of Farmer's insolvent estate. Trihey and Johnson did not contest, but the appellant intervened and claimed the effects under the deed of sale above mentioned. The respondent, contesting the intervention, prayed to have the deed in question annulled and set aside as having been made in fraud of Farmer's creditors—*Held*, that under the circumstances there was no fraud or illegal preference either within the provisions of the Insolvent Act or of the Civil Code, and that, even were fraud disclosed, the court could not, on such an issue, declare fraudulent and annul that part of the deed affecting the immoveables. *Bell* vs. *Rickaby*, Q. B. 1877, 3 Q. L. R. 243.

8. A commercial firm made a voluntary assignment of their stock, etc., to defendant, who took possession and paid some of the creditors, but not the plaintiff. The firm was in reality insolvent, the assets being insufficient to pay in full—*Held*, that defendant was liable to all the creditors equally, but as he had not pleaded the insolvency of the estate he must pay plaintiff in full. *Duguay* vs. *Seath*, S. C. 1879, 2 L. N. 108.

9. A quantity of timber was pledged by way of warehouse receipt for the payment of a draft, and if the draft was not paid the holder was to sell the wood and place the proceeds to the owner's credit. The owner, some months afterwards, became insolvent, the draft was not paid, and the pledgee sold the wood of which he never had actual delivery—*Held*, that the pledgee could not place the balance of the proceeds of the sale after payment of the draft to the credit of a former indebtedness of the owner. *Perkins* vs. *Ross*, Q. B. 1880, 10 R. L. 263, 6 Q. L. R. 65.

10. Plaintiff sold to defendant a soda water apparatus for $450, for the greater part of which he gave his promissory notes for nine monthly payments of $45 each, subject to the condition that no title was to pass to defendant until all the notes were paid, and that plaintiff should have the right to enter and retake possession of the apparatus in case of non-payment at maturity of either of said notes. None of the notes were paid, and on 12th October, 1878, defendant went into insolvency, having previously transferred to the other defendant, who was his brother-in-law,

and also a clerk in his employ, the property in question in payment of an antecedent debt —*Held*, on an attachment in revendication, that the transfer between the defendants was not in good faith, and could not prevent plaintiff from regaining possession of the property. *Tufts* vs. *Brownrigg*, S. C. 1879, 2 L. N. 323.

11. It was not proved in this case that at the date of the execution of the transfer made by Dinning and Webster to the Stadacona Bank, the latter knew or had reason to know that the transferers were insolvent. *Banque Stadacona* vs. *Walker*, Q. B. 1880, 10 R. L. 381.

12. Action by respondent, assignee to the insolvent estate of B. P. P. to set aside a deed of sale by P. to his daughter as made in contemplation of insolvency—*Held*, that the vendor was insolvent at the time of the sale, and the circumstance that the purchaser was the daughter of the vendor, that she had no apparent means to purchase the property, and from her position was not likely to have made savings to pay for it, were a sufficient presumption of fraud, in the absence of any evidence to the contrary to annul the sale. *Paye* vs. *Evans*, Q. B. 1881, 4 L. N. 130 and 1 Dorion's Q. B. R. 352.

13. A. sold a certain lot of land to B., and it was agreed that in default of payment of the price, A. might demand the resiliation of the deed. B. became insolvent, and A., knowing his insolvency, obtained a retrocession of the land at a less price—*Held*, that the retrocession under the circumstances must be deemed to be made with intent to defraud, and the contract was avoided. *Prevost* vs. *Gosselin*, S. C. 1882, 5 L. N. 381.

14. G. in 1878, being unable on account of the depression of business to meet his liabilities, applied to his creditors for an extension of time for the payment of their claims, showing a surplus of $6,000, after deduction of his bad debts. The creditors consented to grant his request, and agreed to accept G.'s notes at 4, 8, 12 and 16 months, on condition that the last of them should be endorsed to their satisfaction. N. (the respondent) agreed to endorse the last notes on condition that G. should deposit in a bank in his (N.'s) name $75 per week to secure him for such endorsation, and G. signed an agreement to that effect. Thereupon N. endorsed G.'s notes to an amount of over $4,000, and they were given to G.'s creditors. On 31st July, 1879, G., after having deposited $2,007.87 in N.'s name, in the Ville-Marie Bank, failed, and N. paid the notes he had endorsed, partly with the $2,007.87. B., as assignee of G., brought an action against N., claiming that the payments made to N. by G. were fraudulent, and praying that the money so deposited might be reimbursed by N. to B. for the benefit of all G.'s creditors—*Held*, affirming the judgment of the Court of Queen's Bench (2 Dorion's Q. B. R. 215), that the arrangement between G. and N., by which the moneys deposited in the bank by G. became pledged to N., was not void either under the Insolvent Act or the Civil Code; there was no fraud on the creditors, nor such an abstraction of assets from creditors as the law forbids, but a proper and legitimate appropriation of a portion of G.'s assets in furtherance and not in contravention of the rights of the creditors, giving at the most to the surety a preferential security which could not be said to have been in contemplation of insolvency or an unjust preference. *Beausoleil* vs. *Norraud*, Supreme Ct. 1883, 9 Can. S. C. R. 711.

15. A transfer by the defendant of his salary in advance has no effect as regards a creditor not consenting to such transfer and not profiting thereby. *Kenwood* vs. *Rodden*, C. Ct. 1886, 9 L. N. 222.

16. One of the defendants sold real estate to the other defendant who was his nephew, as well as bookkeeper of a firm in which the uncle was a partner; and the sale took place at a time when, in the opinion of the court, the insolvency of the uncle was generally known—*Held*, that the nephew must be presumed to have had knowledge of the uncle's insolvency, and the sale, under C. C. 1035, was annulled. *Banque Nationale* vs. *Chapman*, C. R. 1887, M. L. R., 3 S. C. 201.

17. The transfer of an immoveable by an insolvent in pursuance of an agreement entered into prior to his insolvency will not be voided as being in fraud of creditors. *Préfontaine* vs. *Barrie*, Q. B. 1887, 19 R. L. 501.

18. Where a person notoriously insolvent transfers a policy of life insurance to a creditor as collateral security for a pre-existing debt, and the amount of the insurance is received by such creditor after the death of the assignor, any other creditor may bring an action in his own name against such assignee, to set aside the assignment, and compel him to pay the money into court for distribution among the creditors generally.

Prentice vs. *Steel*, M. L. R., 5 S. C. 294, affirming M. L. R., 4 S. C. 319.

19. An onerous deed of conveyance of real estate followed by possession will not be set aside at the suit of a chirographary creditor as fraudulent and simulated, where the transferor was perfectly solvent at the time the deed was made, though his circumstances became embarrassed before the same was registered four years subsequently. *Eastern Tps. Bank* vs. *Bishop*, 1889, M. L. R., 5 Q. B. 216.

20. An insolvent trader cannot validly grant a mortgage on his immoveables to the prejudice of his creditors generally. *Stevenson* vs. *Lallemand*, 1889, M. L. R., 6 S. C. 305.

21. An onerous contract made by an insolvent debtor with a person who does not know him to be insolvent, and whose acts throughout show good faith, will not be set aside as simulated and fraudulent. *Adams* vs. *Boucher*, C. R. 1892, 2 Que. 183.

22. The transfer of an executory contract by an insolvent is not necessarily fraudulent. *Bernier* vs. *Doyon*, Q. B., Que., June 5th, 1879.

23. Where a debtor enters into a contract (twenty-three days before making a judicial abandonment of his estate), by which he transfers to one of his creditors practically the whole of his stock-in-trade and moveable property, he being at the time indebted to other creditors in a large sum which he has no means of paying, it may be presumed that the debtor was in a state of insolvency. *Gilmour* vs. *Létourneux*, Q. B. 1892, 1 Que. 294, confirming S. C., 14 L. N. 65.

24. Knowledge of the debtor's insolvency by the creditor with whom he contracted may be presumed from the fact that the creditor had been doing business with him for several years and had an intimate knowledge of his affairs; that the insolvent was indebted to him in a large amount; that the creditor held overdue paper of the insolvent, and was aware that he was indebted to other parties. (*Ib.*)

25. Knowledge of Insolvency.—An insolvent trader made a transfer of his moveable and immoveable property to his brother, a sailor, who afterwards executed a lease of the property back to the insolvent—*Held*, that the transfer was fraudulent, as the brother must be presumed to be acquainted with the circumstances of the insolvent. *Masson* vs. *McGowan*, C. R. 1866, 2 L. C. L. J. 37.

26. Payments made by an insolvent within the thirty days preceding the assignment are null only when the creditor to whom such payments shall have been made was aware of the insolvency or had probable reason to be aware of it. *Larivière* vs. *Sauvageau*, Q. B. 1870, 14 L. C. J. 139; C. R., 13 L. C. J. 210; *McArthur* vs. *Mulholland*, Q. B. 1879, 2 L. N. 211.

27. Where action was brought by the assignee to recover property transferred the day previous to the assignment, but before any act of bankruptcy had been committed—*Held*, that there was no public knowledge of insolvency such as to found presumption of fraud. *Mayrand* vs. *Salvas*, S. C. 1874, 6 R. L. 60.

28. Entering into an agreement to sell, and in effect selling all his household furniture, and especially all his implements of trade, is sufficient to put the purchaser on his guard that the vendor is insolvent and about to defraud his creditors. *Trahan* vs. *Gadbois*, S. C. 1874, 5 R. L. 690.

29. Where an insolvent, just before he called a meeting of creditors, transferred the bulk of his property to different parties, some of whom were his relations, the transfers were presumed to be fraudulent and set aside. *Fair* vs. *Baldwin*, C. R. 1878, 1 L. N. 77.

30. The defendants received from D. a payment of money within thirty days next preceding the issue of a writ of attachment in insolvency against him. They knew that D. had, during the previous two months, obtained large advances of money from them on forged warehouse receipts, and they had compelled him to take up certain paper long before maturity. In view of these facts, and of all the circumstances of the case as disclosed by the evidence—*Held*, that the defendants had reason to presume that the finances of their debtor were in a bad condition, and they had, therefore, probable cause for believing that he was unable to meet his engagements in full within the meaning of sec. 134 of the Insolvent Act of 1875, and the payment in question was consequently void. *Murphy* vs. *Stadacona Bank*, S. C. 1879, 5 Q. L. R. 321.

31. Where an hypothec has been acquired upon property within thirty days immediately preceding the declaration and admission of the mortgagee's agent, that the mortgagors

were notoriously insolvent and *en déconfiture*, such hypothec, in a report of distribution of the moneys realized on the property of the insolvents, cannot be invoked to the prejudice of a party who was a creditor at the time when the hypothec was given. Art. 2023 C. C. *Union Bank of Lower Canada* vs. *The Hochelaga Bank*, Supreme Ct. 1889, 12 L. N. 179, Cassel's Digest, 2nd edit., p. 351; Q. B. 1886, 14 R. L. 410.

32. A payment made by an insolvent debtor to one of his creditors who had knowledge of his debtor's insolvency is void, and such creditor will be ordered to remit the sum so received. *Hodgson* vs. *Banque d'Hochelaga*, Q. B. 1887, 15 R. L. 75.

33. Knowledge of the debtor's insolvency by the creditor with whom he contracted may be presumed from the fact that the creditor had been doing business with him for several years and had an intimate knowledge of his affairs; that the insolvent was indebted to him in a large amount; that the creditor held overdue paper of the insolvent, and was aware that he was indebted to other parties. *Gilmour* v. *Letourneux*, Q. B. 1892, 1 Que. 294.

34. A transfer of promissory notes made by a trader to a bank, as collateral security for a debt due by him to the bank, the manager of the bank, at the time of the transfer, having reason to know that the transferor is insolvent, is void under Art. 1036 C. C. *Canadian Bank of Commerce* vs. *Stevenson*, Q. B. 1892, 1 Que. 371; confirmed by Supreme Ct. 1892, 23 Can. S. C. R. 531, *Stevenson* vs. *Canadian Bank of Commerce*.

IX. WHAT CONSTITUTES.

1. A defendant designedly took down his own fence in order to allow his neighbor's cattle to enter his field, which they did, and thereupon the defendant seized them and detained them—*Held*, that his conduct was fraudulent, and that the seizure and detention of the cattle being consequently malicious and illegal, the plaintiff's action of damages would be maintained. *Turcot* vs. *Bazin*, K. B. 1813, 2 Rev. de Lég. 336.

2. It is not fraud for a father to purchase the furniture belonging to the husband of his daughter for her protection, and to leave her in possession of it in the common habitation of the family, and a purchase of this sort gives rise to no presumption of simulation. *Johnson* vs. *Scott*, Q. B., Montreal, 1882, 20 Sept., 1882.

3. Fraud can result from reticence when it is proved that by such reticence the party to whom fraud is imputed obtained a thing which he would not otherwise have obtained. *Halde* vs. *Richer*, C. Ct. 1890, 19 R. L. 260; and see *Lighthall* vs. *Chretien*, S. C. 1882, 11 R. L. 402.

FRAUDULENT SECRETION OF PROPERTY.

See CAPIAS, ETC.

1. An assignment by an insolvent firm containing a clause to the effect that no creditor should be allowed to participate in the property assigned, unless he first discharged the firm, is a secreting of the estate of the firm, within the meaning of the statute authorizing the issue of attachments before judgment. *Molsons' Bank* vs. *Leslie*, S. C. 1863, 8 L. C. J. 8.

2. Where a trading partnership obtained advances from a bank, under an agreement that the moneys derived from the sale of hemlock bark extract manufactured by the partnership should go in liquidation of the debt to the bank, and the partnership, while in a state of insolvency, and largely indebted to the bank, sells a quantity of bark extract and applies the proceeds to the payment of other debts, such an act does not amount to secretion. *Quebec Bank* vs. *Steers*, C. R. 1869, 13 L. C. J. 75; Q. B., 15 L. C. J. 155.

3. Appellants, being indebted to respondent for money expended upon certain dumping cars held by him under lease from them, made an assignment in insolvency, under the laws of Ontario, and their assignee sold the cars to one Beemer, whereupon respondent seized them, by attachment in the nature of a *saisie conservatoire*, alleging his debt, fraud and secretion, on the part of appellants, and that said cars were the only property they possessed in the Province of Quebec. Appellants petitioned to quash—*Held*, that the facts disclosed did not constitute a fraudulent secretion and were not sufficient to justify the attachment, and that respondent, by his proceedings, having acknowledged the legal existence of appellants, they had sufficient interest to contest the attachment; also that respondent having answered the petition to quash by a general denial only, would thereafter be restricted to the precise matter set up in his affidavit, and

could not avail himself of other proof in the record which might show him to be entitled to the remedy sought to be enforced. *Ontario Car Co.* vs. *Hogan*, Q. B. 1887, 13 Q. L. R. 362.

4. Where an insolvent debtor grants a mortgage upon his immoveables to one of his creditors, with the view of giving him a preference over the others, he is guilty of secretion within the meaning of Art. 773 C. P. C., and is consequently liable to imprisonment for a period not exceeding one year. *Banque de la Nouvelle Ecosse* vs. *L'Allemand*, S. C. 1890, 20 R. L. 314.

FREE AND COMMON SOCCAGE.

2 L. C. J. 1.

2 L. C. J. 70.

FRUITS AND REVENUES.

A person who retains an immoveable until his improvements and outlays are liquidated and paid, has a right to the fruits and revenues of the property, but he must deduct them from the amount which he claims for improvements, etc. *Dufour* vs. *Dufour*, C. Ct. 1883, 14 L. N. 54.

G.

GAGE.

See PLEDGE.

GAME LAWS.

Interpretation of Statute—Power to Search— Navigable Vessel— Jurisdiction of Magistrate—Prohibition. — *Held*, where a magistrate has jurisdiction to pronounce the confiscation of property under a penal enactment, it is not taken away by the fact that a search-warrant was improperly issued to search for the property brought before him. Thus, where the law gives the judge of the sessions of the peace at Quebec the power to decree the confiscation of furs which he finds to have been procured by killing out of season in violation of the game laws, he cannot be restrained by prohibition on the ground that the furs were seized on board a schooner, after a search had been made under a search-warrant, and that the law does not provide for the issuing of a search-warrant to search a schooner or any navigable vessel. *Jeannette* vs. *Hudson's Bay Co.*, Q. B. 1894, 3 Que. 211, reversing S. C., 4 Que. 127.

When furs are brought before a magistrate by a game-keeper with a demand of confiscation, the proper course is to try, first, the fact whether they were procured in violation of the law, and, after confiscation, to have them appraised in view of the right of appeal. But the making the appraisement before trial and confiscation is not such an irregularity as will afford ground for prohibition. (*Ib.*)

The proviso in Art. 1408 R. S. Q., "*except the skin when the animal has been killed during the time when hunting is allowed,*" does not entail the power of the magistrate to deal with furs brought before him, but affords a means of defence to be set up by plea. (*Ib.*)

It is not necessary in such proceedings that there be a complaint in writing, and when the agent of the owner is present, the issue and service of a summons may be dispensed with. (*Ib.*)

Per HALL, J. The words "or other building" in Art. 406, which provides for the issuing of a search-warrant in certain cases, include a schooner afloat. (*Ib.*)

Lower Canada Game Act—Violation of— Husband's Liability for Act of his Wife.—The husband, though absent, is liable for the penalty under the act, on the ground that his wife, acting as his agent in the ordinary course of his business, must be presumed to have had his authority for the illegal act complained of. *Regina* vs. *O'Donohue*, S. C. 1860, 5 L. C. J. 104.

GAMING CONTRACTS. (1)

I. ACTION FOR MONEYS LENT. 1-2.
II. BATTEAU RACES.
III. BROKERS' TRANSACTIONS. 1-17.
IV. EVIDENCED BY WRITING—PROOF.
V. HORSE RACING. 1-3.
VI. NOVATION.
VII. PAYMENT TO STAKEHOLDERS, 1-4.

(1) An act respecting gaming in stocks and merchandise, 51 Vict. (D), cap. 42 (1888).

I. ACTION FOR MONEYS LENT.

1. A loan of money made by a person who has ceased playing, to one of the players who continues, can be recovered by action at law. *Amesse* vs. *Latreille*, C. Ct. 1884, 7 L. N. 326.

2. But *held*, that a person who keeps a gambling place, and who, having an interest in the game, lends some money to one of his customers engaged in a game for money, in his establishment and under his eyes, knowing that such money was to be placed on the game, cannot recover the money so lent by action at law. *Eager* vs. *Lajeunesse*, C. Ct. 1884, 8 L. N. 190, and see *Chigot* vs. *Thibault*, Ct. of Cassation, 4th July, 1892, *Journal des Tribunaux*, 1892, 921.

II. BATTEAU RACES.

No action lies in law for the recovery of a bet made on batteau races. These do not come within the exception mentioned in our Civil Code (Art. 1927). *Wagner* vs. *L'Hostie*, S. C. 1877, 3 Q. L. R. 373.

III BROKERS' TRANSACTIONS.

1. Action to recover money advanced by plaintiff for the purchase of pork in the Chicago market for defendant through a firm there. Defendants pleaded that all their dealings with plaintiff were gambling transactions on margin, no property passing—*Held*, that the plaintiff was only an agent and not a party to a gambling transaction, and ought therefore to recover money so advanced by him. *Jones* vs. *Shea*, S. C. 1878, 1 L. N. 163.

2. A sale of goods to be delivered at a future period, admittedly made without any intention on the part of the seller to deliver or on the part of the purchaser to receive delivery of the goods, and on the understanding that the parties should settle with each other, at the period fixed for delivery, by the one party paying to the other the difference between the price of sale and that which might prevail at the period fixed for delivery, is a mere gambling transaction, and therefore illegal, null and void. *Shaw* vs. *Carter*, S. C. 1876, 26 L. C. J. 151.

3. A commission merchant acting for the vendor in such a case, and having a knowledge of the true character of the transaction, cannot recover from the vendor moneys advanced by him in connection with such sale. (*Ib.*)

4. Where a person had transactions with a stock broker for the purchase and sale of stocks on his account, and it was perfectly understood between the parties that the operations were fictitious, and that there would be no delivery of the stocks, but merely a settlement of the differences of prices—*Held*, that this was a gambling transaction, and that the consideration of a cheque given to the broker in the course of such transactions was illegal, and an action would not lie to recover the amount thereof. *Fenwick* vs. *Ansell*, S. C. 1882, 5 L. N. 290.

5. A customer deposited money with a broker to be used as "margin" in buying stock for speculative purposes. No delivery of the stock so purchased was intended, the broker's instructions being to realize as soon as a small profit could be made. In consequence of a declination in value, and the margin being thereby exhausted, the broker at one time sold stock at a loss—*Held*, that no action would lie against the broker under such circumstances, the contract being a gaming contract. *Allison* vs. *McDougall*, S. C. 1883, 27 L. C. J. 355 and 6 L. N. 93.

6. *Held*, that when a party employs a broker to sell pork, grain, stock, etc., for him on margin, he is bound to repay the broker for all expenses made in the execution of this mandate, and is also bound to pay the broker the usual commission for his services. *Denton & Co.* vs. *Arpin*, S. C. 1885, 29 L. C. J. 266.

7. Time bargains are not necessarily illegal, nor does the law refuse to enforce them, if they are made for serious transactions intended to be fulfilled, although it may happen, contrary to the expectation of the parties, that they are not really carried out as contemplated, but from unforeseen causes come to be settled by differences. But if, in contemplation of the parties, they are at their inception intended to be speculative transactions, to be settled by adjustment of prices according to the rise or fall of the market, and not by delivery of the subjects bought or sold, they become gambling transactions, and, under C. C. 1927, there is no right of action for the recovery of money claimed thereunder. *Macdougall* vs. *Demers*, 1886, M. L. R., 2 Q. B. 170, 30 L. C. J. 168.

8. Where brokers act for a person contracting as above to deliver grain at a future date (but without intention to make actual delivery), and the brokers, having full know-

ledge of the fictitious character of the transaction, disclose no purchaser or principal, they will be considered principals as regards the party contracting to deliver, and no action will lie by the brokers for the recovery of a deficiency upon the transaction. (*Ib.*)

9. The party who pays money to a broker for the purpose of speculating on margins has no action to recover the same from the broker (Art. 1927 C. C.). *Russell* vs. *Fenwick*, S. C. 1889, 17 R. L. 675.

10. A broker can recover from his client the difference between the purchase price and the selling price of stock actually bought and sold on behalf of such client. *Baldwin* vs. *Turnbull*, S. C. 1892, 1 Que. 402.

11. A principal instructed his broker to buy for him shares on the Montreal Stock Exchange. The principal, who was a bank clerk at the time he gave the instructions, had no intention of taking delivery of the shares, but intended to sell them again as soon as a profit should be obtainable owing to a rise in the price. The broker, however, took delivery, paid the full price by means of loans raised on the security of the shares, and resold when instructed. He received a commission of ¼ per cent. on each transaction, but any profit or loss accruing was credited or debited to the principal's account—*Held*, that delivery to the broker was delivery to the principal; that the transactions were not gambling transactions as between the broker and his principal, and, therefore, were not void by reason of Art. 1927 C. C. *Forget* vs. *Ostigny*, P. C. 1895, 11 The Reports 474; 1895 App. Cas. 318, reversing Q. B. (reported 1 Monthly Law Digest and Reporter 531) and S. C., 21 R. L. 387. (Compare U. S. Supreme Ct. case, *Irwin* vs. *Williar*, reported 7 L. N. 153.)

12. *Held* (reversing the judgment of the Superior Court, 2 C. S. 25), an action does not lie to recover from a broker a balance remaining in his hands of money which was deposited with him by the plaintiff as "margin" or security against loss on transactions in stocks which were being carried on by the broker for the plaintiff, and which were admittedly mere fictitious or gaming contracts. *Perodeau* vs. *Jackson*, C. R. 1892, 3 Que. 364.

13. A note given in settlement of a marginal stock transaction several months after operations have ceased, is none the less given for an illegal consideration and is void. *Clerk* vs. *Brais*, C. Ct. 1893, 4 Que. 181.

14. No action lies for the recovery of the amount of a promissory note given by the proprietor of what is commonly termed a "bucket-shop" to a customer in settlement of speculative transactions between them, *i.e.*, speculations on the rise and fall of prices of goods and stocks, without delivery of the things bought and sold. *Dalglish* vs. *Bond*, 1889, M. L. R., 7 S. C. 400.

15. A broker's client has an action of damages against his broker for refusal to deliver stocks which the latter undertook to buy for his client. *Ritchie* vs. *Barclay*, S. C. 1891, 21 R. L. 421.

16. The damages in such a case consist of the difference in the market price. (*Ib.*)

17. The transaction is a legitimate one where the client has previously bought stocks and had delivery through the same broker, where he paid twenty per cent. upon the stocks for which the present action is taken, such stocks being very stable, and where he has offered to take possession by paying the balance of purchase price, interest and commission, even although this offer was only made sixteen months after the stocks were bought on the exchange. (*Ib.*)

IV. EVIDENCED BY WRITING—PROOF.

Where a bet is evidenced by writing, parol testimony is inadmissible to change its terms. *Swift* vs. *Anderson*, C. R. 1890, 16 Q. L. R. 163.

V. HORSE RACING.

1. In an action to recover the sum of $50, the amount of the plaintiff's deposit in the hands of the stakeholder, for a race between two horses belonging to plaintiff and defendant, and the defendant demurred on the ground that betting contracts were illegal, and the money having been deposited for an unlawful purpose could not be recovered—*Held*, that betting on horse races by the owners of the horses was not illegal, and such bets could be enforced by suit. *Rickaby* vs. *Sutcliffe*, C. Ct. 1862, 13 L. C. R. 320.

2. A judgment creditor has the right to seize in the hands of third parties the amount of bets which they have lost to the defendant on a horse race, and which they are ready and willing to pay. *McGibbon* vs. *Brand*, S. C. 1884, 7 L. N. 228.

3. Betting on horse races does not give rise to an action to recover the money on other

things bet. *Swift* vs. *Anderson*, C. R. 1890, 16 Q. L. R. 163.

VI. NOVATION.

A gaming contract is not susceptible of novation. *Clerk* vs. *Brais*, C. Ct. 1893, 4 Que. 181.

VII. PAYMENT TO STAKEHOLDER.

1. In the case of a wager where the money is deposited before the event in the hands of a stakeholder, such deposit is equivalent to a payment within the meaning of Art. 1927 of the Code, and therefore the losing party has no right of action to recover back the amount so deposited in the absence of fraud. *McShane* vs. *Jordan*, S. C. 1868, 13 L. C. J. 61.

2. Where the stakes have been placed in the hands of a stakeholder, the winner of the bet has a right to recover it by action against the stakeholder, the deposit in his hands being assimilated to a payment. *Riendeau* vs. *Blondin*, M. L. R., 1 S. C. 406.

3. Where a bet is made with the condition that the stakes shall be held by a stakeholder, the withdrawal of his stake by one of the parties puts an end to the bet, and gives to the other party the right to recover his stake from the stakeholder. *Swift* vs. *Anderson*, C. R. 1890, 16 Q. L. R. 163.

4. So long as the bet is not won by one of the betters, the stakes in the hands of the stakeholder remain the property of the respective betters, and can be withdrawn by them. (*Ib.*)

GARDIEN.

See GUARDIAN.

GARNISHMENT.

See ATTACHMENT BY GARNISHMENT.

GIFT.

See DONATIONS.

GOOD-WILL. (1)

1. Of Partnership — Accounting. — *Held*, that the good will (*clientèle*) of a commercial partnership, dissolved by the death of one of the partners, does not become the property of his legal heirs, because said partnership is terminated by the death of one of the members; consequently no account is due. *Boyd* vs. *Boyd*, S. C. 1885, 29 L. C. J. 170.

2. Sale of.—The sale of the good-will implies the obligation to abstain from undue competition with the purchaser, and, therefore, the opening by a vendor of a similar shop in the immediate vicinity of the old stand, and the sending of circulars to the customers of the business sold, and thereby seeking to create the impression that the vendor had succeeded to the business sold, amounts to a violation of the obligations imposed by the contract of sale of good-will. (1) *Findlay* vs. *McWilliam*, Q. B. 1875, 23 L. C. J. 148.

3. —— Where a biscuit maker sold his stock in trade "with the good will and all the advantages pertaining to the name and business" of the vendor, the exclusive right to use the trade-mark of the vendor passed to the purchaser without express mention thereof in the contract. *Thompson* vs. *McKinnon*, C. R. 1877, 21 L. C. J. 335.

4. —— Action for breach of contract arising out of sale of good-will of the business. The defendant by deed of sale of date 11th March, 1882, being then a flock manufacturer, sold with promise of warranty to plaintiff certain moveables in the factory of defendant, No. 564 William street, together with the good-will of the business of wool flock manufacturing, which defendant had carried on for some time. The consideration was $4,000. It was well understood between the parties that the defendant should not on any account for the space of five years from date of deed enter into the manufacture of, or sale or business or deal or be terested in wool flock to the detriment and injury of said plaintiff. The complaint was that since the said date the defendant had continued to manufacture flock to the damage of plaintiff. The pretension of the defendant was that he had neither sold nor manufactured flock. 1. The article manufactured by defendant was obtained by a process different from that producing flock; 2. The article produced by defendant was composed of different elements; 3. It was not called flock; 4. It was much more costly than flock; 5. It served an entirely different purpose from flock. The defendant admitted that flock and woolfatts or carded shoddy are two articles resembling each other a great deal, and that in passing them from hand to hand it is difficult to distinguish them. *Per curiam.*—The court is

(1) See Article in 2 L. N., p. 281, reviewing cases Quebec, French and English.

(1) See Louisiana Case decided in a contrary sense, noted at p. 353, 6 Legal News.

satisfied that the article produced by the defendant comes from the article produced by the plaintiff, and that the defendant cannot produce his article, call it woolbatts or what you please, without producing the article made by plaintiff, the business of which and the good-will of which was sold by the defendant for a sum of $4,000. The court, therefore, thinks that the action of plaintiff is well founded. *Catelli* vs. *Cooper*, S. C. 1883, 6 L. N. 202.

5. —— William Johnson sold his business and the good-will thereof to a company now represented by the plaintiff, and stipulated that in the event of his retirement from the position of manager, he should be entitled to the use of his own name in carrying on a similar business, but he expressly bound himself not to use the style "William Johnson & Co."—*Held*, 1. The name "William Johnson & Sons (limited)," adopted by Johnson after ceasing to be manager and resuming business for himself, was not so similar to "William Johnson & Co." as to justify an injunction restraining its use. At the time William Johnson sold out his business and the good-will thereof, the word "Johnson" was well known as descriptive of paints and colors manufactured and sold by him—*Held*, 2. The right to use his name on resuming business for himself did not include the right to continue the use of the word "Johnson's" as descriptive of his paints and colors, this word having become the trade denomination of the paints. Although William Johnson had a right to do business in his own name, as a rival to plaintiff's, he did not occupy a better position than any other man named William Johnson would occupy. By acquiring the right to resume business in his own name, he did not take back the good-will of the old business which he had disposed of. 3. The same rule applies to the use of the words "Johnson's Floor Paints" on cards. 4. William Johnson had a right to use a *fac simile* of his own signature in connection with the advertisements and sale of his goods. 5. William Johnson, after having contracted not to use the name "William Johnson & Co.," had no right to circulate cards stating that "no one else has a right to use William Johnson's name." 6. William Johnson had no right to continue the use of the words "O. J. Vermillion" and "O. J. Vermillionnette," the letters "O. J." having become a trade mark for a particular article acquired by the plaintiff's with the business and good-will. The same rule applies to the term "Johnson's Magnetic Iron Paint."—Plaintiff's use a label with the four words "Johnson's Decorators' Pure Lead." On defendants' label were the words "Johnson's Pure Lead for Decorators' Use." The labels are of the same size, they both have an outside border of gold, of about the same thickness, with thin inside borders of black and white. The difference between the label would not be noticed by ordinary purchasers—*Held*, 7. The use of the defendants' label should be restrained. 8. Where an infringement of a right is proved, the party is entitled to nominal damages though no actual damage be established. *Canada Paint Co.* vs. *William Johnson & Sons*, S. C. 1893, 4 Que. 253.

GOVERNMENT EMPLOYEE.

Where a civil service employee under the Quebec Government has been retired on a pension, the amount of which has been fixed by an order of the Lieutenant-Governor in Council, such pension cannot be afterwards reduced on the ground that the pensioner had not served the necessary period to entitle him to a pension of that amount, where it appears that the Lieutenant-Governor in Council was in possession of all the facts of the case at the time the pension was granted. *Regina* vs. *Fortier*, Q. B. 1885, 14 R. L. 160.

GOVERNOR OF PROVINCE.

An action cannot be maintained against a governor of a province while in the administration of the government. *Harvey* vs. *Lord Aylmer*, K. B. 1833, S. R. 542.

GUARANTEE.

See SURETYSHIP.—WARRANTY.

GUARDIAN.

I. DISCHARGE. 1-4.
II. EXPENSES. 1-4. (See *infra* "REMUNERATION OF.")
III. LIABILITY OF. 1-31.
IV. OF GOODS SEIZED BY ORDER OF JUSTICE OF THE PEACE.
V. RIGHTS OF. 1-13.
VI. REMUNERATION OF. 1-7.
VII. WHO MAY BE A GUARDIAN. 1-2.

I. DISCHARGE.

1. A guardian is not discharged by the lapse of a year after proceedings taken against him to make him produce the goods. *Exparte McCaffrey*, Q. B. 1880, 25 L. C. J. 188; *Lepage* vs. *Garon*, C. R. 1885, 11 Q. L. R. 370.

2. **Contra.**—A guardian is discharged by the lapse of a year after his appointment. *Hallé* vs. *Hallé*, C. Ct. 1879, 5 Q. L. R. 390; *Rea* vs. *Merrill*, S. C. 1886, 14 R. L. 633.

3. A guardian is discharged by the lapse of a year after his appointment without proceedings. *Beaudry* vs. *Brown*, S. C. 1880, 3 L. N. 413.

4. Under articles 21 and 22 J., 19 Ord. of 1667, the guardian is discharged *de plein droit* after the lapse of a year from the date of his appointment, as well of his responsibility to account as of his guardianship. *Brecon* vs. *Kane*, Q. B., Montreal, 27 May, 1886.

II. EXPENSES.—(See *infra* "REMUNERATION.)

1. The plaintiff became the guardian of a vessel seized on the stocks, under an attachment in revendication issued at the instance of the defendant. Some time afterwards the vessel was launched by the parties in whose possession it was at the time of seizure, without any authority. She lay in port for fifteen months, and thereby suffered considerable damage. She moreover always remained *de facto* in possession of the last-named parties, and the disbursements incurred for the keeping and custody of the vessel were made, not by the plaintiff, but by a brother of one of the parties who held the possession of the vessel—*Held*, reversing the judgment of the court below (2 L. C. R. 118), that, in an action by the plaintiff to recover these disbursements, he had under these circumstances a claim against the defendant, at whose instance the seizure had been made. *Dinning* vs. *Jeffrey*, Q. R. 1852, 2 L. C. R. 360.

2. And on action by the guardian for the expenses of taking care of horse—*Held*, that he had no action against the party whose goods were seized, there being no contract, either express or implied, between them. *Dansereau* vs. *Girard*, C. Ct. 1866, 16 L. C. R. 380.

3. A voluntary guardian who has become necessary guardian, and who has been obliged to remove the goods seized and take them under his immediate care, has a right to an opposition *afin de conserver* for his costs on the proceeds of the sale according to proof. *Boucher* vs. *Brault*, S. C. 1872, 4 R. L. 237.

4. Where the guardian of a horse, harness and carriage seized, places them in a livery stable, the owner of such stable cannot sell the horse and harness, etc., for expenses of boarding the horse and storage of the harness and carriage, where he knew at the time he received them that the effects were not the property of the guardian, and that their sale would injuriously affect the party making the seizure. *Morris* vs. *Miller*, C. R. 1886, 14 R. L. 659.

III. LIABILITY OF.

1. Guardian failing to represent goods must remain under imprisonment, until he produce the same. *Wilson* vs. *Parisean*, S. C. 1856, 1 L. C. J. 253.

2. Guardian failing to represent goods must remain under imprisonment until he produce the same or pay their value. *Ouimet* vs. *McCallum*, S. C. 1856, 1 L. C. J. 158.

3. When a guardian, by way of answer to a rule for coercive imprisonment, pleads that the property is only worth a particular amount, it becomes the duty of the court, *avant faire droit*, to order proof of the fact. *Leverson* vs. *Boston*, Q. B. 1858, 2 L. C. J. 297.

4. Proof of the value of goods ordered to be restored by a guardian, under a rule for coercive imprisonment, may be established by the verbal admission of the plaintiff as to such value, made at the time of the seizure of the goods. *Leverson* vs. *Boston*, Q. B. 1859, 3 L. C. J. 223, reversing S. C., 3 L. C. J. 97.

5. A tender to the attorneys *ad litem* of the plaintiffs, who reside beyond the limits of the province, of the value so proved as above and of the costs on the rule, where the rule has been dismissed and an appeal sued out in consequence, but made before service of appeal, will entitle the respondent to the costs of appeal, where the judgment in appeal does not award a larger amount than that tendered. (*Ib.*)

6. On a rule such as the above, where the plaintiffs reside beyond the limits of the Province, the court will order the guardian to be relieved from imprisonment, on depositing the established value of the goods in the hands of the prothonotary. (*Ib.*)

7. Guardian is not liable to coercive imprisonment when the effects seized have been sold under other executions. *Blackiston* vs. *Patton*, C. Ct. 1851, 5 L. C. J. 56.

8. A defendant who becomes a voluntary guardian, under a writ of execution, is liable to coercive imprisonment, and the rule therefor need not be preceded by a notice to such defendant of the intended application for the rule; and a variance between the rule and the judgment thereon is not a ground for setting aside such judgment. *Brooks* vs. *Whitney*, Q. B. 1860, 4 L. C. J. 279.

9. When a guardian has received notice of motion for a rule *nisi* for coercive imprisonmen, for failing to represent property seized, he may proceed to proof before the issue of the rule, to establish that the property has been duly represented. *Jones* vs. *Martin*, S. C. 1867, 10 L. C. J. 331.

10. A rule for coercive imprisonment against a guardian will be granted without previous notice. *Rodier* vs. *McAvoy*, S. C. 1876, 20 L. C. J. 305.

11. A defendant may be appointed a guardian of his own effects siezed under execution, with his own consent, and when so appointed is liable to coercive imprisonment in the same way as any other guardian. *Curley* vs. *Hutton*, C. Ct. 1871, 15 L. C. J. 1[illegible] *Brooks* vs. *Whitney*, Q. B. 1865, 4 L. C. J. 279, 10 L. C. R. 214; *Beaudry* vs. *Brown*, S. C. 1880, 3 L. N. 413; *contra Patville* vs. *Guilmette*, S. C. 1868, 1 R. L. 51.

12. A rule for coercive imprisonment against a guardian for not representing an article seized must give him the option of producing the goods or paying the debt, otherwise it will be discharged. *Tessier* vs. *Rolland*, Q. B. 1893, 2 Que. 593.

12*a*. Where respondents demanded that appellant be imprisoned until he produce the property he took in charge *or pay its value*, it was *ultra petita* for the Court of Review to condemn the appellant to produce the effects *or pay the amount due to the seizing creditor*. (*Ib.*) But see *contra McCaffrey* vs. *Claxton*, Q. B. 1880, 25 L. C. J. 191, 3 L. N. 292. Dorion C. J., dissenting.

13. It is necessary to give the guardian the option of paying the value of the goods. *Lord* vs. *Moir*, C. Ct., 7 L. C. J. 80.

14. Contra.—*Watzo* vs. *Labelle*, C. Ct. 1882, 26 L. C. J. 121; *Exparte McCaffrey*, Q. B. 1880, 25 L. C. J. 188; *McCaffrey* vs. *Claxton*, Q. B. 1880, 25 L. C. J. 191; *Leverson* vs. *Boston*, Q. B. 1858, 2 L. C. J. 297.

15. *Held*, a rule against a guardian to effects seized under execution, which gives him the option of producing the goods seized, or of paying the value thereof, without stating what the value amounts to, and asks that he be imprisoned until he shall have paid an unascertained value of goods or amount of money is illegal, and will be set aside. *Evans* vs. *Wiggins*, S. C. 1892, 2 Que. 363, and see *Morin* vs. *Robitaille*, C. R. 1888, 32 L. C. J. 124. *Exparte Stephens*, M. L. R., 7 Q. B. 349.

16. A voluntary guardian failed to produce the effects seized when required to do so—*Held*, confirming the judgment of the court below, declaring a rule absolute against the guardian, that a voluntary guardian is liable to coercive imprisonment for failure to produce the things placed in his charge, and that, although from motives of equity where the value of the things is less than the amount of the debt, the courts have restricted the liability of the guardian to such value, yet proof of such value will rest on him. *Higgins* vs. *Robillard*, Q. B. 1861, 12 L. R. C. 3.

17. A guardian of goods seized in execution is not guilty of contempt of court for having refused to comply with an interlocutory judgment appointing a new guardian and ordering him to deliver the goods seized to such new guardian, when before service upon him of such judgment the first guardian has been served with a number of attachments after judgment attaching these goods in his hands. *Merchants Bank of Canada* vs. *The Montreal P. & B. Railway Company*, C. R. 1883, 6 L. N. 229.

18. Where a guardian puts in an opposition to the sale of the effects under his charge, such opposition being based upon illegal and fraudulent grounds with a view solely to retard the sale, he will be adjudged in contempt of court. *McCarthy* vs. *Jackson*, C. Ct. 1886, 9 L. N. 211.

19. A seizure had been made of goods and a guardian appointed. Subsequently the seizure had been quashed, and a rule having been taken against the guardian to produce the goods, he offered them on condition of payment of his fees and disbursements—*Held*, that the guardian's pretensions were unfounded, and the rule was made absolute. *Bédard* vs. *Lusignan*, S. C. 1880, 3 L. N. 86.

20. A judicial guardian refusing or neglecting to deliver the effects seized to the bailiff, charged with a writ of *venditioni exponas*, is not liable to coercive imprisonment until after a judgment ordering him to deliver up the

things has been served on him. *Gaucreau* vs. *Longobardi*, C. Ct. 1877, 3 Q. L. R. 195.

21. A guardian who has not received regular notice of the day, hour and place of sale is not in fault for not producing the effects when called upon to do so, and where he invokes such excuse at the time of sale, though insufficient if he has received notice, it cannot be made the grounds for a condemnation to imprisonment, in default of producing the things or paying the money. *McManamy* vs. *Boisclair*, C. R. 1884, 10 Q. L. R. 134.

22. A guardian is not liable to coercive imprisonment for failing to produce the effects seized unless he has signed the *procès-verbal* of seizure, or that his name appears thereon according to Art. 560 C. P. C., § 5. *Hamel* vs. *Marchildon*, Q. B. 1880, 10 R. L. 245.

23. The liability of a guardian to coercive imprisonment must result from an observance of the formalities required by law, regularly established by the inventory of seizure, which is an authentic document, and as in this case it did not appear by the inventory that the appellant had signed or had declared his inability to do so, the rule should have been discharged. (*Ib.*)

24. The defendant became guardian of the effects seized at the instance of the plaintiff, under a writ of attachment, and subsequently the same effects were seized and sold under a writ of execution, and the plaintiff brought action against the defendant, praying that he be held to produce the effects or pay the value —*Held*, that he had no such action, and that his only remedy was by process of attachment against the guardian to compel him to produce the effects or pay the value. *Berry* vs. *Cowan*, S. C. 1861, 11 L. C. R. 476.

25. In an action against a guardian, by a plaintiff, to compel him to deliver up the effects seized and placed in his charge—*Held*, that the guardian was not bound to deliver up the effects in his custody to any one but the person by whom he was so appointed. *Fréchette* vs. *St. Laurent*, C. Ct. 1862, 13 L. C. R. 20.

26. Where a guardian had ignorantly signed a *procès-verbal*, whereby he undertook, in default of producing the goods, to pay to the plaintiff the amount of his debt, interest and costs—*Held*, to be signed by error, and that the bailiff seizing had no power to insert such a stipulation in the *procès-verbal*. *Dupuis* vs. *Bell*, S. C. 1865, 15 L. C. R. 435.

27. A guardian who represents the effects seized in an injured condition by his fault will not be discharged from his guardianship unless he pay the plaintiff the value of the injury. *Brady* vs. *Courville*, C. R. 1883, 28 L. C. J. 165.

28. A guardian who has left the goods seized in the defendant's possession will be held to represent them or pay their value or the plaintiff's claim, even in case they have been sold by judicial sale. (*Ib.*)

29. *Held*, a voluntary guardian to effects seized under a writ of *saisie revendication* is not discharged from responsibility by the circumstance that the effects in his custody were subsequently seized and sold without his knowledge under a *saisie-gagerie* for rent, the guardian having left the effects in defendant's possession without an order of the court, and without his giving security, and the claim for rent having accrued under a lease by tacit reconduction, which only came into force subsequent to the guardian's appointment. To be relieved of responsibility the guardian is bound to show that the effects would have been sold for a privileged claim thereon existing at the time of the seizure had he taken possession. The position of the guardian in this case cannot be assimilated to that of a guardian under a seizure in execution when the goods seized are sold during his guardianship at the instance of another more diligent creditor. *Metropolitan Mfg. Co.* vs. *Garcau*, S. C. 1893, 3 Que. 483.

30. Respondent waived his right to a rule against the defendant for not producing the effects in question at No. 422 St. Denis street, by his subsequently seizing by recaption the same effects at No. 204 Sherbrooke street, by his accepting the appellant as guardian under the second seizure, and by notifying the latter to produce the effects at No. 204 Sherbrooke street for sale. *Tessier* vs. *Rolland*, Q. B. 1893, 2 Que. 593.

31. (By the S. C. & C. R.) A defendant who is not guardian of the effects seized cannot be imprisoned because they were not produced by the guardian. (*Ib.*)

IV. OF GOODS SEIZED BY ORDER OF JUSTICE OF THE PEACE.

The guardianship of effects seized under an order emanating from a justice of the peace belongs exclusively to the person making the seizure, and such person alone has the right to revendicate the effects from person who

has illegally taken possession of them, and even where the officer making the seizure has entrusted the guardianship of the goods to a third party. *St. Laurent* vs. *St. Laurent*, C. R. 1885, 12 Q. L. R. 124.

V. RIGHTS OF.

1. A guardian who has lost possession of the effects placed in his care may reclaim them by a *saisie revendication*. *Moisan* vs. *Roche*, Q. B. 1877, 1 L. N. 33 and 4 Q. L. R. 47, and *Gilbert* vs. *Coindet*, 4 Q. L. R. 50; *Mallette* vs. *Whyte*, Q. B. 1868, 12 L. C. J. 229; *Wheeler* vs. *Dupaul*, Q. B. 1887, 15 R. L. 564; confirming C. R., M. L. R., 1 S. C. 147, 29 L. C. J. 136.

2. *Held*, thus even where the effects are held by a party who claims them as proprietor. *Dumouchel* vs. *Lariviere*, S. C. 1891, 21 R. L. 79.

3. But a guardian cannot revendicate the seized effects from a third party who has bought them in good faith from the defendant where the guardian, having knowledge of the sale, allowed the purchaser to remove them without informing him that they were under seizure. *Duperré* vs. *Dumas*, C. Ct. 1882, 8 Q. L. R. 333. (*Moisan* vs. *Roche*, *supra* distinguished.)

4. A guardian of effects seized has a right to file an opposition to a second seizure of the same effects. *Smith* vs. *O'Farrel*, S. C. 1859, 9 L. C. R. 495, and *Langlois* vs. *Gauvreau & Gauvreau*, S. C. 1862, 12 L. C. R. 158.

5. A guardian of moveable property, under a seizure suspended by opposition, cannot oppose the sale of the same property seized under a subsequent execution. *Donally* vs. *Nagle*, S. C. 1858, 3 L. C. J. 135.

6. The defendant who has become guardian under an attachment for rent may, although he is *not bound* to, oppose the sale of the effects seized under a subsequent seizure, particularly where he has given notice to the plaintiff of such subsequent seizure. *Shelton* vs. *Kerns*, S. C. 1863, 7 L. C. J. 139.

7. *Contra.*—The right of a guardian to oppose the sale under a seizure subsequent to that under which he was appointed cannot be tested by motion. *Warren* vs. *Douglas*, C. Ct. 1863, 7 L. C. J. 140.

8. *Semble*, a guardian is bound to oppose the sale under a second seizure of the effects over which he has been appointed guardian. (*Ib.*)

9. But since the Code of Procedure—*Held*, that the guardian under a first seizure cannot oppose the second seizure of the same effects, where another guardian has been appointed. He can only demand his discharge, or that he be substituted for the second guardian. *Lefebvre* vs. *Bacon*, C. R. 1885, 11 Q. L. R. 28.

10. But *held*, that the guardian of a first seizure has interest to intervene on a seizure in a new suit. *Graham* vs. *Lepailleur*, Q. B. Montreal, 14 Dec., 1878.

11. A guardian of moveable property cannot, during the pendency of the seizure, compel the surrender to him of such moveable property by the defendant, in the absence of positive proof that the defendant is deteriorating it by improper use. *Palsgrave* vs. *Sénécal*, S. C. 1858, 3 L. C. J. 116.

12. A guardian of cattle and hay seized simultaneously, under the same writ, has a right to use the hay for feeding the cattle, even although it be afterwards proved that the cattle did not belong to the defendant. *Johnson* vs. *O'Halloran*, Q. B. 1873, 18 L. C. J. 221.

13. The guardian of property seized has, in virtue of a writ of compulsory liquidation, a right to a *saisie-revendication* against the bailiff and creditor seizing, if, notwithstanding the issue of the writ of liquidation, they persist in retaining the possession of the goods of the insolvent under an ordinary writ of execution or even of attachment for rent. *Whyte* vs. *Bisson*, C. R. 1871, 3 R. L. 449.

VI. REMUNERATION OF.

1. A guardian who has delivered to the party defendant the things which he had in charge, cannot maintain an action against the sheriff for his salary. *Tardiff* vs. *Shepherd*, K. B. 1813, 1 Rev. de Lég. 346 and 2 Rev. de Lég. 471.

2. In an action in revendication in which the defendant was appointed guardian—*Held*, that he had no right to retain the thing as security for the payment of his fees and expenses, the action having been dismissed, and the judgment notified to him. *Poutré* vs. *Laviolette*, S. C. 1859, 9 L. C. R. 360.

3. A guardian of moveable property under seizure cannot prevent the sale of the things until he is paid his fees of guardianship. *Monette* vs. *D'Amour*, C. Ct. 1883, 12 R. L. 418.

4. And where an official guardian is changed for a voluntary guardian, the former cannot refuse to transfer the things seized un-

til his fees are paid. *Durocher* vs. *Sarault*, C. Ct. 1884, 7 L. N. 96.

5. Action by a guardian for fees. The action was directed against both the bailiff who appointed him and the plaintiff in the case in which the appointment had been made. The latter made default, but the bailiff contested on the ground that he was not liable—*Held*, that there was no doubt of the liability of the bailiff towards the guardian, and that his proper recourse in such case was by an action in warranty against those who had employed him. *Bernard* vs. *Quesnel*, S. C. 1887.

6. A guardian's fees are not claimable from the defendant in the case. *Dooly* vs. *Ryarson*, C. Ct. 1875, 1 Q. L. R. 219.

7. A voluntary guardian or one furnished by the defendant cannot claim any remuneration. *Miller* vs. *Bourgeois*, S. C. 1871, 17 L. C. J. 158; *Whitehead* vs. *Dubeau*, S. C. 1884, 10 Q. L. R. 162; *Longpré* vs. *Cardinal*, 1888, M. L. R., 4 S. C. 441.

VII. WHO MAY BE A GUARDIAN.

1. Where the guardian is a voluntary guardian, and the things seized have remained in the possession of the defendant, the seizure is not affected by the minority of the guardian, notwithstanding he be not subject to coercive imprisonment. *Côté* vs. *Jacob*, C. Ct. 1876, 3 Q. L. R. 5.

2. A person interdicted for drunkenness cannot be appointed as guardian. *St. Laurent* vs. *St. Laurent*, C. R. 1885, 12 Q. L. R. 124.

GUARDIANSHIP.

Of Natural Child.—A natural child will be left to the care of its mother during the first six years of its existence, after which period it will be the duty of the father to look after and educate the child; in default whereof, he will be condemned to pay in advance to the mother the yearly cost of the care and maintenance of the child. *Dubois* vs. *Hébert*, Q. B. 1846, 7 L. C. J. 290.

GUIBORD CASE.

S. C. 1870, 3 R. L. 129; C. R., 2 R. L. 257; Q. B., 3 R. L. 179; P. C. L. R., 6 P. C. 157.

H.

HABEAS CORPUS.

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I. APPEAL IN MATTERS OF.

1. A judgment of the Superior Court, on an application for a writ of *habeas corpus* made originally before a judge, and sent up by him to the court for adjudication, is susceptible of a review and appeal. *Barlow* vs. *Kennedy*, Q. B. 1871, 17 L. C. J. 253.

2. It is competent to a party to inscribe in review from a judgment rendered on a writ of *habeas corpus* by a judge in Chambers. *Regina* vs. *Hull*, C. R. 1876, 3 Q. L. R. 136.

3. The Court of Queen's Bench has no revisory power, except by way of appeal, over the proceedings of the Superior Court, and it cannot, on an application for *habeas corpus*, examine into proceedings of the Superior Court in order to see whether a warrant committing a person to jail for resisting process in a civil suit requires him to pay in order to get his discharge a sum greater than he was condemned to pay by a judgment of the Superior Court. *Pollock exp.*, Q. B. 1881, 5 L. N. 293, and 2 Dorion's Q. B. R. 60.

4. The Superior Court and the judges thereof having concurrent jurisdiction with the Court of Queen's Bench in matters of *habeas corpus ad subjiciendum*, there is no appeal to the Court of Queen's Bench sitting in appeal

from the judgment of the Superior Court, or of a judge thereof, in such matters. *Mission de la Grande Ligne* vs. *Morisett*, 1889, M. L. R. 6 Q. B. 130, 19 R. L. 85, 33 L. C. J. 227.

5. In the case of *Cox* vs. *Hakes*, the House of Lords decided Aug. 5, 1890, that the Court of Appeal in England had no jurisdiction to hear an appeal from the granting of a writ of *habeas corpus*. (See 13 L. N. at p. 345 and 14 L. N. at p. 153.)

II. COMMITMENT BY PARLIAMENT.

1. A prisoner committed to the common jail by parliament during pleasure is entitled to his discharge as soon as parliament is prorogued, and such discharge may be obtained by *habeas corpus*. *Monk exp.*, K. B. 1817, 2 Rev. de Lég. 332.

2. On a petition for *habeas corpus* by a person committed by a warrant of the speaker of the House of Parliament of Canada—*Held*, that courts of justice and judges have power to issue writs of *habeas corpus* in matters of commitment by either houses of parliament. *Lavoie exp.*, S. C. 1855, 5 L. C. R. 99, 4 R. J. R. Q. 299.

III. COMMITMENT ILLEGAL ON ITS FACE. (See *infra* "WARRANT OF COMMITMENT.")

1. Where a commitment is illegal on its face, the court will not wait till the committing magistrate has been notified to produce the papers, but will order a writ of *habeas corpus* to issue *instanter*. *Messier exp.*, Q. B. 1865, 1 L. C. L. J. 71.

2. After a prisoner is committed for trial for arson, if the depositions on which the commitment is based do not establish his guilt, he will be admitted to bail. *Exparte Onasakeurat*, petitioner, S. C. 1877, 21 L. C. J. 219.

3. Where a prisoner has been committed by a magistrate for trial, the Court of Queen's Bench sitting in appeal will not order a writ of *certiorari* to issue, to bring up the preliminary examination, in order to see whether the committing magistrate had sufficient evidence before him to commit, even where it is alleged that the magistrate had no jurisdiction, the depositions before him showing that the offence was committed in a foreign country. *Exp. Narbonne*, Q. B. 1879, 25 L. C. J. 330.

IV. COURT MARTIAL.

A conviction by a court martial, of having fraudulently embezzled *or* misapplied a quantity of cord wood, is null and void (the 17th sec. of the Mutiny Act making embezzlement, *fraudulent* misapplication, etc., crimes), and a commitment to the common jail under such conviction will be quashed and the prisoner released from custody. *Exparte Robert Moor*, Q. B. 1867, 11 L. C. J. 94.

V. CUSTODY OF CHILDREN.

1. A writ of *habeas corpus* will lie to restore to a father the possession of his minor child. The father can only be deprived of the custody of his child where he is insane or guilty of gross misconduct, nor can he deprive himself of his paternal right, and any contract to the contrary cannot bind him, as it is immoral in the eye of the law. *Barlow* vs. *Kennedy*, Q. B. 1871, 17 L. C. J. 253.

2. Under the circumstances stated in this case, the persons brought up under the writ of *habeas corpus* being of the ages of fourteen and seventeen years respectively, the court would not exert any coercion on them. *Rivard* vs. *Goulet*, S. C. 1875, 1 Q. L. R. 174.

3. As a general rule, where a minor is brought up before the court by *habeas corpus*, if he be of an age to exercise a choice, the court leaves him to elect as to the custody in which he will be. *Reg.* vs. *Hull*, C. R. 1876, 3 Q. L. R. 136, confirming S. C., 2 Q. L. R. 255, reported *sub-nom. Stoppellbeu* vs. *Hull*; and see *Riley* vs. *Grenier*, S. C. 1888, 33 L. C. J. 1.

4. *Semble*, the above rule would not apply in the case of a girl under 16 leaving the house of her father, mother or other person having lawful charge of her. (*Ib.*)

5. Nor in the case of a refractory child, under 14, liable to be sent to an industrial school under the 32 Vic., c. 17. (*Ib.*)

6. A girl, aged 15, was placed in the household of a farmer by the manager of the "Knowlton Distributing Home." Soon afterwards the manager applied for a writ of *habeas corpus* in order to procure the restoration of the girl to her charge. The farmer, by an amended return to a writ, declared that he did not detain the girl, who was at liberty to go where she pleased. The girl herself, when examined by the judge, stated that she was happy and contented where she was, and would prefer remaining there to returning to

the home. No specific reasons were stated in support of the application except that it was for the welfare and benefit of the child that she should be removed, and that the farmer with whom she had been placed was about to go to the United States. The latter statement was contradicted by affidavit—*Held*, that under the circumstances the court would not, on a writ of *habeas corpus*, the object of which is the protection of personal liberty, make any order of a nature to exert coercion, but would leave the minor to follow her own inclination in the matter. *Regina* vs. *McConnell*, S. C. 1882, 5 L. N. 386.

7. The mother has an absolute right to the charge of a child aged 12 (the father being dead), unless it be established that she is disqualified by misconduct, or is unable to provide for the child. *Exparte Ham*, Q. B. 1883, 27 L. C. J. 127.

8. Where it appeared that the mother was a domestic servant, and that the child was well cared for by another, the court, before granting to the mother the custody of her child, required the production of affidavits to establish that she was in a position to provide for the child's wants. (*Ib.*)

9. The tutor appointed to a minor for the purpose of making an inventory, petitioned by writ of *habeas corpus* to obtain the custody of the child, on the ground merely that the step-mother, by whom the child had been brought up, was not properly fulfilling the agreement to take care of her—*Held*, that where there is no allegation that the child is restrained of its liberty, the court has a discretionary power to refuse the petition if not considered to be in the interest of the minor. *Regina* vs. *Scott*, S. C. 1889, 12 L. N. 231.

VI. DISCHARGE—EFFECT OF.

A person who has been discharged from custody upon a writ of *habeas corpus* cannot be arrested a second time for the same cause, or where no new or other cause of arrest is disclosed. And this principle was held to apply, though it appeared that the warrant was quashed on the first occasion by a judge in Chambers, on grounds which in a case precisely similar were subsequently held by the court to be insufficient. *Exp. Duvernay* and *Exp. Cotté*, Q. B. 1875, 19 L. C. J. 248.

VII. EXTRADITION.

(See under title "EXTRADITION.")

1. A warrant of commitment under the extradition treaty which omits to state that the accused was brought before the magistrate, or that the witnesses against him were examined in his presence, is bad upon the face of it, and must be set aside. *Brown exp.*, Q. B. 1866, 2 L. C. L. J. 23.

2. The offence charged in the warrant of arrest does not constitute a legal offence according to our laws. *Exparte John C. Eno*, Q. B. 1881, 10 Q. L. R. 165.

3. The party arrested is not one of the parties that could be legally arrested by the warrant. (*Ib.*)

4. In case of substantial defects the party arrested will be liberated under a writ of *habeas corpus*. (*Ib.*)

5. J. C. Eno, after having been liberated under a writ of *habeas corpus*, cannot be arrested again for the same offence by a warrant of the same magistrate. *Exparte John C. Eno*, Q. B. 1884, 10 Q. L. R. 173.

6. There is no legal evidence to substantiate the charge in the present case. (*Ib.*)

7. For these two reasons the prisoner J. C. Eno will be liberated. (*Ib.*)

8. Under the circumstances stated in this case, the petitioner for *habeas corpus* having produced a sworn petition to the effect that he had reason to believe he was about to be arrested, the law imposed upon the judge the imperative duty of granting the writ; and the officer charged with the warrant was bound to return it before the judge as soon as the writ was served upon him. *Exp. Eno*, S. C. 1884, 10 Q. L. R. 177.

9. A person committed for extradition, but not actually surrendered, is entitled to a *habeas corpus* before the full court, under Con. Statutes L. C., c. 95, sec. 28. *In re Hoke*, Q. B. 1887, 15 R. L. 99.

10. The function of the judge before whom the accused is brought on a writ of *habeas corpus* is to determine whether there is or is not legal evidence to justify the surrender of the prisoner. *In re Dubuan*, S. C. 1888, 32 L. C. J. 281.

VIII. GROUNDS OF.

1. A person convicted of an offence for which a statutory penalty was enacted, and condemned to pay a penalty less than that provided by the statute, but of the same amount

as that provided by another clause of the statute for an offence of a similar nature, must be released on *habeas corpus*. *Exparte Lynott*, Q. B. 1876, 7 R. L. 426.

2. Two brothers, named respectively Joseph and Louis Durocher, made depositions in a prosecution for selling liquor without a license, and the prosecution being dismissed, the party prosecuted brought an accusation of perjury against Joseph Durocher, in which the petitioner was arrested. Petitioner filed affidavits establishing that he was Louis not Joseph Durocher, which were uncontradicted—*Held*, that he must be liberated. *Exparte Durocher*, Q. B. 1876, 7 R. L. 436.

3. And, *semble*, that the omission of a voluntary examination of the accused would also justify his release on *habeas corpus*. (*Ib.*)

4. When a defendant has been condemned to the payment of costs and fine, which may be levied by warrant of distress, or to imprisonment in the default of sufficient distress, if the prosecutor has once put the goods of said defendant under seizure by means of his warrant of distress, he cannot afterwards cause the defendant to be imprisoned, even though the conviction remain unsatisfied. The prosecutor in that case must adopt either the one or the other of the above modes of proceeding. *Exp. Cusson*, S. C. 1876, 14 R. L. 261.

5. In any case tried under 32-33 Vict., c. 32, s. 2, ss. 3, 4, 5 or 6, if the prisoner be condemned to both fine and imprisonment, hard labor cannot be added to the sentence of imprisonment. *Exp. Lefebvre* and *Exp. Dufresne*, Q. B. 1881, 4 L. N. 253; *Exp. Burns*, Q. B., Que., 6 Dec., 1873.

6. A defendant who has been sentenced by a justice of the peace to pay a fine and costs, with the alternative of imprisonment, and after his arrest was released by the constable who made the arrest on payment of part of the fine, cannot be re-arrested for default to pay the balance. *Exp. Lapointe*, Q. B. 1885, 11 Q. L. R. 251.

IX. IN FORMA PAUPERIS.

The proceedings on a petition for *habeas corpus* in a criminal case may be conducted *in forma pauperis*. *Exp. Louise Gournote*, Q. B. 1875, 19 L. C. J. 336.

X. POWERS OF JUDGE IN CRIMINAL MATTERS.

1. Where the prisoner having been found guilty of larceny, and sentenced to be imprisoned for life, petitioned in chambers to be liberated on the ground that the sentence was illegal—*Held*, that the judge, under such circumstances, had no power to liberate him, his proper recourse being by petition to the crown for a remission of the punishment in whole or in part, as the Governor-General might see fit. *Exparte Plante*, Q. B. 1856, 5 R. J. R. Q. 33, 6 L. C. R. 106.

2. The court created by the Speedy Trials Act, ch. 35 of 32-33 Vict., is the Court of Quarter Sessions sitting without a jury and a Court of Record. *Exparte O'Cain*, Q. B. 1875, 13 R. L. 275.

3. A prisoner convicted before that court cannot be released from his sentence of imprisonment by means of a writ of *habeas corpus*, even if the requirements of sections 2 or 3 of the Act have not been fulfilled, provided that the conviction be good on its face. The remedy in such case is by means of a writ of error or by pardon. (*Ib.*)

4. On a petition for *habeas corpus* the judges have not the power to consider the proof made, for the purpose of liberating the prisoner, except in cases of extradition. *Exp. Narbonne*, Q. B. 1879, 10 R. L. 63, 3 L. N. 11.

5. The court, using its discretion as to granting bail, will refuse it in the case of a post office employee accused of stealing registered letters, where the evidence is such as to show grounds for conviction. *Ex parte Huot*, Q. B. 1882, 8 Q. L. R. 28.

XI. PROCESS IN CIVIL MATTERS.

1. A defendant in a civil suit detained in custody for want of bail cannot be discharged on *habeas corpus*. *Whitfield exp.*, K. B. 1813, 2 Rev. de Lég. 337.

2. The petitioner was imprisoned in virtue of a rule for coercive imprisonment issued for the non-satisfaction of a judgment rendered against him in an action for libel—*Held*, that a writ of *habeas corpus* cannot be granted to liberate a person charged with process in a civil suit, or to review the judgment of civil courts, or to question their regularity, but merely to keep the civil courts within their jurisdiction, and where an application for such writ has been refused by a judge in chambers, judicial comity will prevent another judge from entertaining it. *Donaghue exp.*, S. C. 9 L. C. R. 285; *Barber* vs. *O'Hara*, S. C. 1858, 8 L. C. R. 216.

3. A person illegally confined in goal under

civil process may be released on *habeas corpus*. *Exp. Fourquin*, Q. B. 1867, 16 L. C. J. 103.

4. A writ of *habeas corpus* will lie in the case of imprisonment for resisting process, and the debtor in such case, who has been once discharged, is no longer liable to coercive imprisonment for the same debt, as the act committed by him is an offence in the sense mentioned in section 11 of ch. 95 of the Cons. Stat. of L. C. *Exparte Crebassa*, Q. B. 1871, 15 L. C. J. 331.

5. A writ of *habeas corpus* will be granted to liberate a prisoner charged with process in a civil suit (*contrainte par corps* against a guardian) issued out of a court of inferior jurisdiction, when it appears on the face of the writ of arrest that the proceedings had are beyond the jurisdiction of the court from which it issued. *Lebeuf* vs. *Viaux*, S. C. 1874, 18 L. C. J. 214.

6. A *habeas corpus* will not be granted where the petitioner is detained in a suit for a civil matter before a court having jurisdiction over such matter. *Thompson exp.*, Q. B. 1877, 1 L. N. 102, 22 L. C. J. 89; *in re Sanderson*, S. C. 1876, 8 R. L. 108.

7. A person imprisoned under a process in a civil matter, where no excess of jurisdiction is shown, is not entitled to be discharged on *habeas corpus* on petition to the Court of Queen's Bench. *Exp. Cutler*, Q. B. 1877, 22 L. C. J. 85.

8. In a case like the above, if the petitioner can show that there is no judgment ordering his imprisonment, he will be entitled to his discharge. (*Ib.*)

9. A judgment ordering the imprisonment of a defendant until payment of debt, interest and costs, and also the costs of rule, will not justify a commitment which includes also sheriff's costs, and the defendant under such circumstances is entitled to be discharged on *habeas corpus*. *Exparte Martin*, Q. B. 1877, 22 L. C. J. 88.

10. A writ of *habeas corpus* will not be granted to liberate a prisoner charged with process in a civil suit, even though the writ of execution in virtue of which he was arrested appear to be irregular, if it is within the scope of the jurisdiction of the court from which it issued. *Healy exp.*, Q. B. 1878, 1 L. N. 103, 22 L. C. J. 138. (*Exp. Cutler* and *Exp. Martin supra*, distinguished.)

11. Where a person imprisoned on a civil process applied for a writ of *habeas corpus* on the ground of minority, the application was refused, as there was no notice to the party interested, and as the affidavit which only contained a general reference to the allegations of the petition was insufficient, inasmuch as it did not disclose any reasonable or probable ground for the issue of the writ. *Gauvreau exp.*, Q. B. 1878, 1 L. N. 53.

12. A writ of *habeas corpus* will lie to liberate a defendant arrested under a writ of *capias ad respondendum*, where want of jurisdiction in the court issuing the writ of *capias*, or of authority to the bailiff to make the arrest, appears upon the face of the proceedings. *McNeice* vs. *Foss*, S. C. 1882, 9 Q. L. R. 64.

13. The fact that a commitment orders the imprisonment of a guardian until payment of an amount apparently in excess of what is due, cannot be urged under a *habeas corpus*, a *habeas corpus* not applying to persons imprisoned under a process in a civil matter, unless there be manifest absence or excess of jurisdiction. *Exparte McCaffrey*, Q. B. 1880, 25 L. C. J. 188.

14. A person imprisoned under a writ of *contrainte par corps* for failing to produce effects of which he had been appointed guardian, petitioned for a writ of *habeas corpus*, on the ground that the warrant under which he was committed contained no enumeration of the effects he was required to produce—*Held*, that the petitioner being imprisoned under process in a civil matter, the court had no authority to grant a writ of *habeas corpus*, C. C. P. 1052. *Exparte Ward*, 1886, M. L. R., 2 Q. B. 405.

15. Where an order made by an inferior court is manifestly illegal, as where the guardian of goods under seizure is condemned to be imprisoned until he gives up the goods or pays the value thereof, and the value is not mentioned in the order, the discharge of the person imprisoned under such order will be ordered upon a petition for a writ of *habeas corpus*. (1) *Exparte Stephens*, 1891, M. L. R., 7 Q. B. 349.

XII. WARRANT OF COMMITMENT.

1. On the return of a writ of *habeas corpus* —*Held*, that a formal warrant of a commitment may be substituted for an informal one, and that the substitution need not be referred to in words in the subsequent warrant, since, so long as there is a good warrant authorizing the detention of the prisoner, it does not

(1) Authorities reviewed in this case.

matter how many bad warrants there are. *Regina* vs. *Murray*, Q. B. 1866, 2 L. C. L. J. 87.

2. A warrant of commitment must show with certainty that a specific offence has been committed for which imprisonment can be awarded; and therefore a commitment under the License Act which recited a conviction "for selling three glasses of whiskey and receiving payment therefor, contrary to the dispositions of the Statute in such case made and passed," without stating that the liquor was sold "by retail," was insufficient. *Ex parte Hébert*, S. C. 1873, 18 L. C. J. 156.

3. The place of sale must be stated in the commitment. (*Ib.*)

4. The commitment should state that the prisoner had made option of imprisonment in preference to a warrant of distress. (*Ib.*)

5. A warrant of commitment against sailors, under The Merchant Seamen's Acts, "for refusing to go to *their* work," is bad, and will be quashed on petition. *Exparte Johansen*, Q. B. 1874, 18 L. C. J. 164.

6. Where the court from which the process issued is a superior court, having jurisdiction over the subject matter, there is a presumption that its jurisdiction has been rightfully exercised, and it is not necessary that the cause of imprisonment be specified in the warrant of commitment so as to show that the court has jurisdiction. *Exp. Thompson*, Q. B. 1877, 22 L. C. J. 89.

7. The commitments in this cause, which set out the acts of the defendant, without specifying time, place or circumstances, and without stating such acts to have been illegally done, *held* insufficient and quashed. Where a commitment appeared to be bad, a certified copy of the conviction allowed to be produced to show that there was no valid conviction to support such commitment. *Exparte Dallaire*, Q. B. 1877, 4 Q. L. R. 201.

8. A warrant of commitment under the License Act, 41 Vict. (Q.), should state that the prosecutor had made option of imprisonment, or that a warrant of distress had issued, and the accused did not possess sufficient property to pay the fine and costs. *Trépanier exp.*, S. C. 1880, 10 R. L. 191.

9. A writ of *habeas corpus* to bring up the prisoner who had been committed on a charge of assault and battery was issued. For the accused it was urged that the commitment should have shown that the complainant had prayed for a summary trial (*Rev. Stat. Can.*, c. 178, s. 73), and was without warrant. His Honor, referring to Burns' Justice, Vo. Commitment, pp. 852-870, remarked that he would consider the law had been complied with if the conviction set forth the prayer of the complainant; but, as upon enquiry made, it was found that no conviction in writing existed, the prisoner was liberated. The learned judge added that either the conviction or commitment should have shown that the magistrate had jurisdiction, as the charge was not cognizable in a summary manner, except under certain circumstances. *Exparte Ouimet*, S. C. 1889, 12 L. N. 15.

10. On a petition for *habeas corpus*—*Held*, that a commitment setting out a conviction "for that the prisoner unlawfully did commit an aggravated assault" (omitting the word "maliciously") is sufficient. *McIntosh exp.*, Q. B. 1881, 5 L. N. 4.

11. And a typographical error in the date of a commitment, contradicted by the body of the document, does not invalidate the commitment. (*Ib.*)

12. And uncertainty of date in the commitment is not material where the date of sentence is apparent from the commitment, and the record thereof brought before the court or judge hearing the application for *habeas corpus*. (*Ib.*)

13. And the omission to state in the conviction that the prisoner was convicted on his plea of guilty, though very irregular, is nevertheless not fatal where the record is before the court, and shows that the prisoner pleaded guilty. (*Ib.*)

14. *Habeas corpus* will lie where a person is committed in default to find sureties to keep the peace, and the commitment does not allege that the complainant has declared that he fears bodily injury on account of the threats of the accused. *Gauthier exp. & Caya*, Q. B. 1880, 10 R. L. 536.

XIII. WHEN PETITIONER AT LARGE.

The appellant imprisoned under executions for penalties for selling liquor without license applied under Rev. Stats., 4 Series, cap. 99, for a discharge. The order was made returnable before the Supreme Court of Nova Scotia, and the discharge was refused. Before instituting an appeal from the judgment, the appellant, whose time of imprisonment had expired, was at large. On motion to dismiss the appeal for want of jurisdiction—*Held*, that an appeal will not lie in any case of proceedings upon a writ of *habeas corpus*, when

at the time of bringing the appeal the appellant is at large. *Fraser* vs. *Tupper*, Supreme Ct., 21 June, 1880, 3 L. N. 394.

HANDWRITING.

(See also "EVIDENCE"—"EXPERTS.")

1. **Comparison of.**—The signature to a writing, which is denied, cannot be proved solely by comparison of the disputed signature with other signatures which are admitted or proved to be genuine. *Paige* vs. *Ponton*, Q. B. 1877, 26 L. C. J. 155.

2. —— The courts in Lower Canada examined witnesses to prove the genuineness of a signature which was denied, and compared the handwriting of the instrument sued upon with the handwriting of two other documents put in evidence and admitted to be genuine. In such circumstances, the Judicial Committee, upon petition for that purpose, ordered the court in Lower Canada to transmit the originals for the purpose of inspection and comparison at the hearing of the appeal from the judgment of the court in Lower Canada. *McCarthy* vs. *Judah*, P. C., June 21, 1858, 12 Moore P. C. 47.

HARBOUR COMMISSIONERS. (1)

I. JURISDICTION. 1-5.
II. JUDGMENTS OF. 1-2.
III. LIABILITY OF. 1-3.
IV. PRIVILEGES OF.
V. QUORUM.
VI. RIGHTS OF.

I. JURISDICTION.

1. The Statute 16 Vict., ch. 24, extending the jurisdiction of the Harbour Commissioners westward to the Little River St. Pierre, and giving them "the control and management" of the harbour property within the limits specified, does not thereby vest in such commissioners any rights of property enabling them to bring petitory actions against neighbouring proprietors. *Harbour Commissioners of Montreal* vs. *Hall*, S. C. 1861, 5 L. C. J. 155.

2. On a petition for *certiorari*—*Held*, that the Harbour Commissioners have authority under their by-laws, made under 36 Vic., cap. 54, sec. 18, ss. 6 and 7, to suspend the license of a pilot guilty of a dereliction of duty. *Lisé exp.*, S. C. 1880, 3 L. N. 338.

3. The jurisdiction of the Harbour Commissioners of Montreal within certain limits does not exclude the right of the city to tax and control ferry-boats within such limits. *Longueil Navigation Co.* vs. *City of Montreal*, Supreme Ct. 1888, 15 Can. S. C. R. 566. Affirming Q. B., M. L. R., 3 Q. B. 172, and S. C., M. L. R., 2 S. C. 18.

4. *Held*, an investigation under the Pilotage Act, R. S. C., ch. 80, can only be conducted by the "pilotage authority," *i.e.*, the Board of Harbour Commissioners for the pilotage district in its corporate character. This Board has no power to delegate its functions to a committee, and a sentence pronounced by such committee is an absolute nullity which cannot be covered even by the acquiescence of the accused in the proceedings. *Toupin* vs. *Commis. du Hâvre*, S. C. 1893, 4 Que. 43.

5. The witnesses examined in such inquiry must be sworn. (*Ib.*)

II. JUDGMENTS OF.

1. The Harbour Commissioners may word a judgment so as to prevent its becoming executory immediately after the lapse of fifteen days from the day on which it was rendered. *Audet* vs. *Quebec Harbour Commissioners*, S. C. 1876, 2 Q. L. R. 249.

2. But the Harbour Commissioners cannot frame a judgment suspending a pilot so as to make it "take effect, in the event of an appeal, from the opening of navigation next year," inasmuch as by the statute the term of suspension should date from the day the judgment is affirmed in appeal. *Fontaine* vs. *Quebec Harbour Commissioners*, S. C. 1876, 2 Q. L. R. 251.

III. LIABILITY OF.

1. The Quebec Harbour Commissioners are not liable for damages caused to a schooner stranded upon a wreck sunk in the bed of the River St. Charles, neither are they bound to indicate the fact or the position of such wreck to navigators. The recourse of the owner of the damaged schooner is against the proprietor of the wrecked vessel so long as the Harbour Commissioners have not taken possession thereof. *Levasseur* vs. *Les Commissaires du Hâvre*, C. R. 1887, 13 Q. L. R. 245.

(1) An Act to amend and consolidate the Acts relating to the Harbour Commissioners of Montreal, 57 and 58 Vict. (D.), cap. 48.

2. Nor are the owners of adjoining wharves liable for damages caused by such a wreck, although situated close to their wharves. (*Ib.*)

3. Harbour Commissioners of Montreal are not bound to place buoys to indicate obstructions in every part of the channel of the St. Lawrence. *Harbour Commissioners of Montreal* vs. *Hus*, Q. B. 1886, 30 L. C. J. 126.

IV. PRIVILEGES OF.

Held, the Quebec Harbour Commissioners (created by the Statute, 22 Vic., ch. 32) are a corporate body, distinct from the Crown, and cannot claim the privileges of the latter in respect to the limitation of actions for ground rents and dues, vested in them in trust, on immovables originally granted by the Crown. *Quebec Harbour Commissioners* vs. *Roche*, S. C. 1892, 1 Que. 365.

V. QUORUM.

The petitioner complained that he had been illegally sentenced to three months' suspension from his functions as pilot by a tribunal composed of three members of the Board of Harbour Commissioners for Montreal—*Held*, on *certiorari*, that a quorum of five is required under 36 Vic., cap. 61, for the trial of charges against pilots. *Belleisle* vs. *Allan*, S. C. 1880, 3 L. N. 142.

VI. RIGHTS OF.

Action to revendicate a quantity of wood. The defendants pleaded that the wood had been placed on the wharves under their control, and as it obstructed the thoroughfare they had removed it as authorized by their by-laws Nos. 42 and 43, and claimed a right of retention for their disbursements until the payment thereof—*Held*, that by the evidence there was an undoubted obstruction, and the defendants had a right to remove it. Plea maintained. *Sleeth* vs. *The Harbour Commissioners*, S. C. 1880, 4 L. N. 2; C. R. 1881, 4 L. N. 126.

HEIRS.

I. Actions against. 1-7.
II. Actions by. 1-4.
III. Evidence of Heirship.
IV. Liability of. 1-4.
V. Of deceased Wife.
VI. Registration of Title.
VII. Rights of.

I. ACTIONS AGAINST.

1. Where action was brought against several heirs, and exception was filed on the ground that they had not all been made parties to the suit—*Held*, that this was not a valid objection if, in the progress of the action, they had all been brought into the suit by an interlocutory judgment of the court. *Viger* vs. *Pothier*, K. B. 1830, Stuart's Rep., p. 394.

2. A creditor suing heirs to have a judgment which has been obtained against the *de cujus* declared executory against them, need only allege the judgment, the decease and the filiation. *Trudel* vs. *Letendre*, S. C. 1885, 15 R. L. 179.

3. The maxim, *le mort saisit le vif*, applies to the minor heirs as well as to those who have attained the age of majority; the former may, therefore, be sued *de plano* and condemned to pay as unconditional heirs until they renounce the succession. (*Ib.*)

4. The beneficiary heir can also be sued by ordinary direct action, and condemned *ès-qualité* to pay the debts of the succession. (*Ib.*)

5. The creditors of the succession have an action to account against the beneficiary heir to compel him to produce a statement of all the property of the succession, and to have him condemned personally if necessary, but without prejudice to a direct action to have him condemned in his quality of beneficiary heir, and to seize in his hands the property of the succession. (*Ib.*)

6. Where an heir is indebted to the succession under which he takes, he can either be proceeded against directly for the debt, or be compelled to make return. The choice of these methods belongs to the other heirs and not to the debtor. And, moreover, they cannot be forced to wait for the debtor. *Hémond* vs. *Ménard*, C. R. 1888, 32 L. C. J. 256.

7. This rule also applies to debts due by an heir to a succession for causes arising since its opening. (*Ib.*)

II. ACTIONS BY.

1. In an action by heirs to obtain possession of an estate from a *tiers détenteur*, upon which the dower of the mother was charged—*Held*, that, as the defendant's title was derived from the mother, that they could not obtain possession so long as she survived. *Lemieux* vs. *Dionne*, K. B. 1817, 1 Rev. de Lég. 348.

2. The heir-at-law can maintain an action of account against the executor of the will of his ancestor. *McLean* vs. *McCord*, K. B. 1820, 1 Rev. de Lég. 349.

3. But an action in revendication cannot be maintained by the presumptive heir to an estate or succession of an absentee, if he be not curator to the estate of the absentee, or entitled to the possession thereof by virtue of an *envoi en possession* or the death of the absentee. *Gauvin* vs. *Caron*, K. B. 1819, 2 Rev. le Lég. 277.

4. Where one claims to be heir of an estate, he cannot at the same time bring action as creditor of the estate. *Fraser* vs. *Abbott*, S. C. 1873, 5 R. L. 231.

III. EVIDENCE OF HEIRSHIP.

On the contestation of an opposition filed to the seizure of certain property taken in execution as belonging to the defendant, in which the opposant claimed in virtue of a judicial sale to the purchaser from whom she inherited, and in virtue of a deed of partition of her share of the property—*Held*, that such partition among co-heirs, when duly homologated, is evidence sufficient, as against third parties, of the quality assumed by such heirs, and that it was not necessary that certificates of baptism or marriage should be produced. *Mallory* vs. *Hart*, Q. B. 1852, 2 L. C. R. 315, 3 R. J. R. Q. 223.

IV. LIABILITY OF.

1. In an action against an heir by a creditor of the deceased, where the heir pleaded by peremptory exception that the deceased had bequeathed all his property by will and that he himself was not in possession of any portion of the property, and the plaintiffs demurred on the ground that the defendant had not set up his renunciation of the succession—*Held*, reversing the decision of the court below, that the allegations of the plea were sufficient, and that the defendant ought to be allowed to go to proof on them. *Webb* vs. *Hall*, Q. B. 1864, 15 L. C. R. 172.

2. In an action against an heir for the amount of pew rent due by his late father in the parish church, and also for charges of interment—*Held*, there being three heirs, that he was only liable for one-third, and the judgment was reformed in conformity with such holding. *Fabrique de Montréal* vs. *Brault*, C. R. 1865 1 L. C. L. J. 66.

3. The heir of a deceased wife is liable for a debt due by her, although that debt may also be a debt of the community to which the heir has renounced. *Perrault* vs. *Etienne*, C. Ct. 1878, 22 L. C. J. 210.

4. Where several heirs leave it to one of them to liquidate the debts of the succession to the best advantage, the other heirs nevertheless remain liable to contribute to the payment of the debts and charges, each in proportion to his share in the succession. *Trudeau* vs. *Fahey*, S. C. 1892, 2 Que. 449.

V. OF DECEASED WIFE.

The heir of a deceased wife is seized by operation of law of her share of an immoveable *conquêts* of the community at the moment of her death. *Dallaire* vs. *Gravel*, Q. B. 1878, 22 L. C. J. 286.

VI. REGISTRATION OF TITLE.

Although Art. 2098 of the C. C. obliges the heir to register his title, the only penalty attached to his failure to do so is that all conveyances, transfers or real rights granted by him are without effect. *Dallaire* vs. *Gravel*, Q. B. 1878, 22 L. C. J. 286.

VII. RIGHTS OF.

The plaintiff seized, as belonging to the defendant, five immoveables. The opposant, her son, alleged that four of these immoveables belonged to the community between the defendant and his mother, and that he and his six brothers and sisters were owners of an undivided half, his share being a fourteenth; that he had sued the defendant for a partition and licitation, and asked that the four immoveables be relieved from the seizure—*Held*, that the co-heir of a community under such circumstances could ask that the seizure be suspended until after the conclusion of the partition, but could not ask for the distraction of the immoveables seized. *Hopital Général* vs. *Gingras*, C. R. 1884, 10 Q. L. R. 136.

HIGH CONSTABLE.

The plaintiff having a judgment against the high constable, seized some things in his office, and the defendant opposed the seizure on the ground that it was made within the limits of the court house, because they were seized in a public office, and also because being under the value of thirty dollars, they were exempt

from seizure under C. S. L. C., cap. 85, sec. 3 —*Held*, that the high constable was not a recording officer, and was not obliged to have an office for the execution of his duties. *Bussière* vs. *Faucher*, C. Ct. 1864, 14 L. C. R. 87.

HOTELKEEPERS AND INNKEEPERS, ETC. (1)

I. Allowing Gambling on Premises.
II. Closing on Sunday.
III. Deposit with. 1-7.
IV. License. (See also under title "Licenses.")
V. Lien. 1-14.
VI. Supplies to—Privilege for.

I. ALLOWING GAMBLING ON PREMISES.

A licensed innkeeper is not subject to a penalty for "knowingly suffering any person resorting to his house to play any game whatsoever at which money, etc., shall be lost or won." *Boivin* vs. *Vigneux*, Mag. Ct. 1872, 4 R. L. 704.

II. CLOSING ON SUNDAY.

Hotelkeepers are not obliged to close their hotels on Sunday, but only their bars. *Poitras* vs. *Corp. de Québec*, S. C. 1879, 9 R. L. 531.

III. DEPOSIT WITH.

1. A person attending a ball given at a hotel deposited his overcoat with a servant of the hotel, receiving a check therefor, and the coat afterwards could not be found—*Held*, on action brought, that the hotelkeeper was liable. *Bourgoin* vs. *Hogan*, C. Ct. 1864, 15 L. C. R. 424.

2. Action was brought by the plaintiff, a medical gentleman at Terrebonne, against a hotelkeeper in Montreal, to recover damages by reason of the plaintiff's mare having had her mane and tail shorn during the night while in the defendant's stable—*Held*, that the landlord receiving the horses at livery was responsible for such damage, and that without proof to the contrary the damage would be presumed to have been committed by his servants or by their neglect. *Durocher* vs. *Meunier*, S. C. 1858, 9 L. C. R. 8.

3. Action was brought to recover $240.19, alleged value of a valise and its contents, which was deposited with the landlord of a hotel by a traveller who asked leave to place it there, and went away without returning to lodge in the house, and on his return next day the valise had disappeared without any proof of bad faith on the part of the landlord or his servants—*Held*, that no action lay against the landlord for the loss, as the delivery to him was a *dépôt volontaire*. *Holmes* vs. *Moore*, S. C. 1867, 17 L. C. R. 113.

4. An innkeeper is responsible for the effects stolen from a traveller while lodging in his house, where it is not proved that the theft was committed by a stranger and was due to the negligence of the traveller, and the oath of the traveller is sufficient to prove the loss, as well as the value of the things stolen. *Geriken* vs. *Grannis*, Q. B. 1876, 21 L. C. J. 265.

5. An hotelkeeper is not liable for the loss of a valise left in his hotel by a traveller who is not a guest, but who merely deposits his valise for a few moments while passing. Such a deposit is not a necessary deposit, but a voluntary deposit. *Bernard* vs. *Lalonde*, C. Ct. 1885, 8 L. N. 215.

6. Where a hotelkeeper retains in his custody baggage belonging to a traveller during his absence from the hotel, and gives a check or receipt therefor, it is considered a necessary deposit, and his responsibility as hotelkeeper still subsists; and the value of baggage so deposited may be proved by the oath of the traveller. *McElwaine* vs. *Balmoral Hotel Co.*, 1891, M. L. R., 7 S. C. 139.

7. A hotelkeeper is not liable for the value of effects so retained in his custody when he proves that they were lost or destroyed by inevitable accident, such as a purely accidental fire, in the confusion caused by which the effects were stolen. (*Ib.*)

IV. LICENSE. (See under title "Licenses.")

The seizure of an hotel license is void. *Van de Vliet* vs. *Fenion*, S. C. 1885, 29 L. C. J. 147.

V. LIEN.

1. Innkeepers have no privilege on a piano brought into a hotel by a permanent boarder, as against the owner thereof, for the board of

(1) What constitutes the relationship between innkeeper and guest. See Article in 14 L. N. at p. 390, and see English case reported 14 L. N. at p. 281, and see an American case reported 8 L. N. at p. 198, where it was decided that a party taking a room in a hotel for purposes of prostitution was not a guest, and that the hotelkeeper would not be liable in such a case for money deposited with his clerk by such party.

such boarder. *Nordheimer* vs. *Hogan*, S. C. 1858, 2 L. C. J. 281.

2. A person hired a room from the defendants, hotelkeepers, and gave a concert therein, for which purpose the plaintiff lent the use of a piano of which he kept the key until the concert was over, after which it was again locked. The person failed to pay for the room, and the defendant seized the piano for the rent. On an attachment in revendication issued by the plaintiff—*Held*, that the hotelkeeper had no privilege on the piano to the prejudice of the owner. *Brown* vs. *Hogan*, S. C. 1851, 1 L. C. R. 414, 4 R. J. R. Q. 217; *Pierce* vs. *The Mayor, etc., of Montreal*, S. C. 1859, 3 L. C. J. 122.

3. An innkeeper has no right to detain the effects of a boarder who has remained three weeks in his inn without paying; and the boarder may revendicate his effects if so detained. *Verbois* vs. *Saucier*, C. Ct. 1860, 7 L. C. J. 126.

4. Hotelkeepers have no right to detain for their board the effects of persons who have boarded with them by the month. *Cooper* vs. *Downes*, C. Ct. 1863, 13 L. C. R. 358.

5. Travellers in Lower Canada, boarding at hotels from day to day only, are *pèlerins* within the meaning of the 175th Art. of the Custom of Paris. (*Ib.*)

6. A hotelkeeper has a privilege and right of retention for hotel charges on effects deposited with him, and that even when they do not belong to the person charged, but, on the contrary, belong to another to the knowledge of the hotelkeeper. *Lachapelle* vs. *Renaud*, Mag. Ct. 1873, 6 R. L. 217.

7. A boarder cannot remove his effects from his boarding house without paying his board. *Downie* vs. *Barrie*, S. C. 1879, 9 R. L. 513.

8. Where the plaintiff leased a room at $2 a month from defendant, a lodging house keeper, furnished it herself and cooked her own meals in it—*Held*, that she was a lodger within the meaning of Q. 39 Vic., cap. 23, and that defendant was entitled to retain her effects until payment of rent. *Lalonde* vs. *McGloin*, C. Ct. 1880, 3 L. N. 91.

9. An innkeeper can exercise his privilege for food and accommodation furnished to a guest upon effects brought into the hotel by such guest, though not his property and not forming part of his baggage. *Fogarty* vs. *Dion*, S. C. 1880, 6 Q. L. R. 163.

10. The lien of a hotelkeeper on the baggage and effects of his guest for the price of food and accommodation extends to goods belonging to third persons brought into the hotel by the guest with their permission, express or implied. *Marcuse* vs. *Hogan*, 1890, M. L. R., 6 S. C. 184, 20 R. L. 28.

11. The lien of a hotelkeeper on the effects of a guest under 39 Vic. (Q.), ch. 23, exists only for the price of board, and does not extend to charges for the custody of effects left behind by the boarder in the hotel on his departure. *Ferguson* vs. *Riendeau*, C. R. 1886, M. L. R., 2 S. C. 136.

12. The lien given to innkeepers and boarding house keepers upon the effects of their boarders or lodgers applies to the case where a proprietor leases a room to a tenant with the right to do his cooking in the proprietor's kitchen. *Henry* vs. *St. Hilaire*, C. Ct. 1888, 11 L. N. 153.

13. A boarding-house keeper can, after three months have expired, sell his boarder's effects in satisfaction of an unpaid board bill due by the latter. *Moore* vs. *Wallace*, C. Ct. 1890, 13 L. N. 311.

14. He can exercise this right independently of any other remedies. (*Ib.*)

VI. SUPPLIES TO—PRIVILEGE FOR.

The person who furnishes supplies to an hotelkeeper has no privilege for such supplies. And when the hotelkeeper lives with his family in his hotel, the privilege exists only for the portion of supplies consumed by himself and his family. *Ross* vs. *Blouin*, C. R. 1885, 11 Q. L. R. 9.

HOUSEKEEPER.

Who is.—See *Brewster* vs. *Nye*, S. C. 1873, 5 R. L. 195.

HUSBAND AND WIFE.

See Marriage.
" Marriage Covenants.
" Married Women.

HYPOTHEC.

I. Acceptance.
II. Action Hypothecary.
Against an Assignee. 1.
Against direct Debtor. 2.
Against Debtor for personal Debt. 3.

Against Defendant who pleads not Proprietor. 4-6.
Against Minor. 7.
Against Tiers Détenteur. 8-10. (See also *infra* No. XIII.)
Appeal. 11-12.
By Widow against Détenteur of Husband's Propres. 13.
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I. ACCEPTANCE.

For the validity of a deed of mortgage or for the security of such obligation—*Held*, reversing the judgment of the court below, that it is not necessary that the creditor be present, or that the deed be accepted by him, or by any one in his name. *Ryan* vs. *Halpin*, Q. B. 1856, 6 L. C. R. 61, 5 R. J. R. Q. 6.

II. ACTION, HYPOTHECARY.

1. Against an Assignee.—The ordinary hypothecary action cannot be exercised against an assignee who is in possession of immoveable property of an estate in his quality as such. *Dawes* vs. *Fulton*, S. C. 1878, 1 L. N. 213.

2. Against direct Debtor.—A hypothecary action may be instituted against the direct debtor, as well as against a *tiers-détenteur*, when such direct debtor is still in possession of the property hypothecated by him. *Lebrun* vs. *Bédard*, S. C. 1877, 21 L. C. J. 157.

3. Against Debtor for personal Debt.—An hypothecary personal action will lie against the personal debtor, with conclusions that the immoveable be declared affected by the hypothec and that the debtor be condemned personally to pay the debt, in default of which the immoveable be sold. *Curé, etc., de St. Paul* vs. *Lanouette*, C. Ct. 1879, 9 R. L. 542.

4. Against Defendant who pleads not Proprietor.—Hypothecary action must be brought against the holder under title of ownership and not against a tenant. *Globensky* vs. *Forget*, C. Ct. 1889, 18 R. L. 663.

5. —— But defendant's plea that he is not the owner or *détenteur* of the premises will be dismissed unless he indicates who is the real owner. *Imbault* vs. *Fisher*, Q. B. 1865, 30 L. C. J. 133.

6. —— Where the defendant pleads that he is no longer proprietor, having sold the property by a deed not registered, the plaintiff may, by a side bar writ in the same case, and under the same number, summon the party thus indicated as purchaser and have him condemned as the real *détenteur* of the property. And in such a case the original defendant must pay costs up to the plea filed, and if plaintiff contests, he must pay the costs of contestation. *Lalonde* vs. *Lynch*, Q. B. 1875, 20 L. C. J. 158, 17 R. L. 531, reversing S. C., 17 L. C. J. 38.

7. Against Minor.—In a hypothecary action a tutor may file a plea of surrender, but it must be founded on an *avis de parents*. *Taché* vs. *Levasseur*, K. B. 1812, 3 Rev. de Lég. 38.

8. Against Tiers-Détenteur. (See *infra* No. XIII).—An hypothecary action cannot be maintained against a *tiers-détenteur*, holding under a title from *Jean* Olivier Davis, in respect of a mortgage granted by *Joseph* Olivier Davis. *Lafleur* vs. *Doucgani*, Q. B. 1849, 7 L. C. J. 102.

9. —— An hypothecary action only lies against the *tiers-détenteur* where the debt is *claire et liquide*. *Leroux* vs. *Dicaire*, Q. B. 1869, 28 L. C. J. 310.

10. —— The *tiers détenteur* sued hypothecarily may oppose to the action all the grounds which the personal debtor might have opposed thereto. *Cité de Montréal* vs. *Murphy*, 1886, M. L. R., 3 S. C. 161, 31 L. C. J. 200.

11. Appeal.—An hypothecary action for arrears of school assessments is appealable, and therefore subject to review before three judges. *Commissaires d'Ecoles St. Norbert* vs. *Crépeau*, C. R. 1883, 10 Q. L. R. 49; *Contra Commissaires d'Ecoles de Sillery* vs. *Gingras*, C. R. 1880, 6 Q. L. R. 355.

12. —— An hypothecary action being in its nature real is appealable and the *enquête* therein ought therefore, or the requisition of either party, to be conducted as in an appealable cause. *Dupont* vs. *Grange*, Q. B. 1865, 10 L. C. J. 75.

13. By Widow against Détenteur of Husband's Propres.—A widow for a debt due to her by the community cannot support an action against the *détenteur* of her husband's *propres* without proving that the community cannot satisfy her demand. *Haussermann* vs. *Casgrain*, K. B. 1817, 1 Rev. de Lég. 380.

14. Debt must be due and exigible.—*Sylwin* vs. *Judah*, S. C. 1857, 7 L. C. R. 128; Q. B. 1861, 9 L. C. J. 179, 14 L. C. R. 421; *Beaulieu* vs. *Sirois*, 1 Rev. de Lég. 380.

15. Description of Property.—In an action in declaration of an hypothec, the designation of the co-terminous lands, required by Art. 2012 of the Civil Code, is not *à peine de nullité*, but is required only so that third parties may have a perfect knowledge of the land hypothecated; and provided that the land be sufficiently indicated, a mention of its boundaries is not absolutely necessary. *Frizzel* vs. *Hall*, C. R. 1876, 2 Q. L. R. 372.

16. —— In a hypothecary action against the *tiers détenteur* of an immoveable, situate

within the limits of a registration division, wherein Article 2168 of the C. C. is in force, that immoveable must be described by its cadastral number and by the description of it given in the cadastral book of reference. *Courteau* vs. *Gauthier*, S. C. 1884, 10 L. N. 98.

17. Divisibility of.—In a hypothecary action—*Held*, that a hypothecary action was indivisible in so far as respects the immoveable hypothecated. *McCarthy* vs. *Senécal*, S. C. 1860, 11 L. C. R. 41.

18. Exception of Discussion.— In an action in declaration of an hypothec, arising out of a deed in the nature of a transaction, by reason of a hypothecary claim after discussion —*Held*, confirming the judgment of the court below, that there must be discussion of all the estate, moveable and immoveable, of the debtor before recourse can be had against the *tiers détenteur*, and that the defendant was not bound to indicate the effects to be discussed. *DeBeaujeu* vs. *Deschamps*, Q. B. 1866, 16 L. C. R. 454 and 2 L. C. L. J. 68.

19. —- The transferee of a promissory note given in payment of the price of an immoveable, and secured by hypothec on such immoveable, may, after fruitless discussion of the makers and indorsers, take an hypothecary action against the holder of the immoveable property. *Quebec Bank* vs. *Bergeron*, Q. B. 1885, 11 Q. L. R. 368, 14 R. L. 170, reversing C. R., 11 Q. L. R. 88.

20. Exception of Subrogation— ART. 2071 C. C.—The transferee of the price of a prior sale, who has granted to the subsequent purchaser of the same property for a less price a longer delay for payment than that granted by the first deed of sale, and who has bound himself to the second purchaser to discharge him of the hypothec which existed against the immoveable for the price of the first sale, has no recourse against the transferor who had bound himself to *fournir et faire valoir*, nor against the *tiers détenteur* of property affected by that warranty, before the expiration of the delay thus granted, nor for the difference between the price of the first sale and the second. *Gagnon* vs. *Brochu*, C. R. 1890, 16 Q. L. R. 102.

21. Exchange of Properties — Discharge without Novation or Derogation.—Where the plaintiff had been a party to an exchange of properties between the donee of the plaintiff and the defendant as his personal debtor, as if the donation had been made to him, and in consequence that he discharged the donee personally without novation or derogation—*Held*, that the plaintiff had not thereby deprived himself of his hypothecary recourse against the defendant. *Leclair* vs. *Filion*, C. Ct. 1875, 7 R. L. 428.

22. For less than $40.—A hypothecary creditor can, even though his claim be for less than $40, take a hypothecary action against his debtor, holder of the hypothecated immoveable, although he has already obtained judgment against him personally for the same debt. *Dorval* vs. *Boucher*, S. C. 1879, 6 Q. L. R. 197; *Taillon* vs. *Poulin*, C. R. 1886, 13 Q. L. R. 155. *Contra*, *Campeau* vs. *Brouillet*, C. R. 1880, 16 R. L. 404.

23. Notice of Transfer.—In order to sustain a hypothecary action by a transferee, the debtor must have had notice of the transfer. *Aylwin* vs. *Judah*, Q. B. 1864, 14 L. C. R. 421, 9 L. C. J. 179.

24. Personal Condemnation. — Hypothecary creditors, whom a purchaser had obliged himself to pay by his deed of purchase, forfeit their rights to a personal action against him by suing him hypothecarily. *Desautels* vs. *Société de Construction de Montréal*, C. R., 2 L. N. 117; *Reeves* vs. *Perrault*, Supreme Ct. 1880, 10 Can. S. C. R. 616.

25. —— In a hypothecary action, the prayer for personal condemnation, in default of delivering up the property for sale *en justice*, is in accordance with the well recognized practice of our courts. *Homier* vs. *Lemoine*, S. C. 1869, 14 L. C. J. 58; *Société de Construction Métropolitaine* vs. *Bourassa*, S. C. 1876, 20 L. C. J. 304; *Leclair* vs. *Filion*, S. C. 1875, 7 R. L. 429; *Dubuc* vs. *Kidston*, Supreme Ct. 1889, 16 Can. S. C. R. 257, 12 L. N. 178. *Contra Renaud* vs. *Proulx*, Q. B. 1866, 16 L. C. R. 476.

26. Prescription.—The *actual* possession of ten years required to enable a purchaser in good faith to prescribe against a hypothecary debt, must be *exclusive* of the actual possession of the personal debtor; and in the present case, the interval between the 30th January, 1875, date of the purchase by C. V., and the 1st May, 1875, the date of C. V.'s obtaining possession from G. L., will not be reckoned to make up the period of ten years. *Vaillancourt* vs. *Lessard*, C. R. 1886, 9 L. N. 267.

27. —— The hypothecary action does not interrupt prescription with regard to the personal debtor, who may intervene in the cause and plead prescription acquired since the ser-

vice of the suit on the *tiers-détenteur*. *Cité de Montréal* vs. *Murphy*, S. C. 1886, M. L. R., 3 S. C. 161, 31 L. C. J. 200.

28. —— The respondents having lent a sum of money to one Liboiron, subsequently, on the 9th May, 1876, took a transfer of his property by a deed *en dation de paiement*, in which the registered title deed of Liboiron to the same was referred to, and by which it also appeared that the appellants had a *bailleur de fonds* claim on the property in question. Liboiron remained in possession and sub-let part of the premises, collected the rents and continued to pay interest to the appellants for some years on the *bailleur de fonds* claim. In 1887 the appellants took out an action *en déclaration d'hypothèque* for the balance due on their *bailleur de fonds* claim. The respondents pleaded that they had acquired in good faith the property by a translatory title, and had become freed of the hypothec by ten years' possession (Art. 2251 C. C.).

Held, reversing the judgments of the courts below, that the oral and documentary evidence in the case as to the actual knowledge on the respondent's part of the existence of this registered hypothec or *bailleur de fonds* claim was sufficient to rebut the presumption of good faith when they purchased the property in 1876, and therefore they could not invoke the prescription of ten years (Art. 2251 C. C.). Fournier, J., dissenting.

In their declaration the appellants alleged that the respondents had been in possession of the property since 9th May, 1876, and after the *enquête* they moved the court to amend the declaration by substituting for the 9th May, 1876, the words "1st Dec., 1886." The motion was refused by the Superior Court, which held that the admission amounted to a judicial avowal from which they could not recede. On appeal to the Supreme Court, it was—*Held*, reversing the judgment of the court below, that the motion should have been allowed so as to make the allegation of possession conform with the facts as disclosed by the evidence (Art. 1245 C. C.), Fournier, J. dissenting. *Baker* vs. *Société de Construction Métropolitaine*, Supreme Ct. 1893, 22 Can. S. C. R. 364.

29. **Proof of Title.**—Plaintiff in a hypothecary action, or invoking a hypothec, must prove that the grantor of the mortgage was proprietor of the immoveable hypothecated at the time when the mortgage was granted. *Renaud* vs. *Proulx*, S. C. 1866, 10 L. C. R. 476, Q. B. 1866, 2 L. C. L. J. 126; *Union Bank* vs. *Nutbrown*, Q. B. 1885, 11 Q. L. R. 217, 8 L. N. 76, confirming C. R., 10 Q. L. R. 287; *Gallien* vs. *Taillon*, C. R. 1893, 3 Que. 390.

30. —— And the same was held in the case of a judicial hypothec. *Taillon* vs. *Poulin*, C. R. 1886, 13 Q. L. R. 155.

31. —— The allegation in a hypothecary action of the granting of a hypothec is in effect an allegation that the person creating the hypothec had power to do so, and therefore under such allegation the court will admit evidence to prove the existence of such power. *Union Bank* vs. *Nutbrown*, Q. B. 1885, 11 Q. L. R. 217, confirming C. R., 10 Q. L. R. 287.

32. **Service.** — *Held*, reversing the judgment of the court below, that it is not necessary to serve a judgment *en déclaration d'hypothèque* on a defendant who is absent from the province and has no domicile therein. Art. 476 C. P. C. and Cons. Stats. L. C., ch. 19, sec. 15. *Dubuc* vs. *Kidston*, Supreme Ct. 1888, 16 Can. S. C. R. 357, 12 L. N. 178.

33. —— That the respondents, by not opposing the first seizure of their property, had waived any irregularity (if any) as to the service of the judgment. (*Ib.*)

34. **Unpaid Vendor** (*Bailleur de Fonds*). —Where hypothecary action was brought by the vendor against the transferee of the land sold for the amount of his *bailleur de fonds* claim—*Held*, that the defendant could not invoke a judgment rendered some years previously at the suit of the plaintiff as settling the amount due by the purchaser, and that the defendant could only deduct the amount of money actually received from his *auteur*, the purchaser. *Katham* vs. *Dunn*, Q. B. 1861, 12 L. C. R. 85.

35. —— The privilege of the unpaid vendor does not give rise to the hypothecary action unless it is registered, but it has preference over other unregistered claims and those of chirographic creditors. *Bérubé* vs. *Morneau* S. C. 1887, 11 Q. L. R. 90. Confirmed in Review, 30 April, 1888.

36. —— The defendant, when sued hypothecarily, can plead the same defence that his vendor and warrantor could raise. (*Ib.*) And see *Gagnon* vs. *Brochu*, C. R. 1890, 16 Q. L. R. 102.

III. ARREARS OF INTEREST.

The *tiers détenteur* is liable to be sued hypothecarily for all arrears of interest not prescribed, even those beyond two years and the current year, the rule laid down in the registry law being limited to the case of rival cre-

ditors. *Macdonald* vs. *Nolin*, Q. B. 1869, 14 L. C. J. 125, 2 R. L. 183.

IV. BY INSOLVENT.

1. A hypothec given during insolvency confers no privilege as against contemporaneous chirographary creditors. *Duncan* vs. *Wilson*, S. C. 1857, 2 L. C. J. 253.

2. In a case in appeal from a judgment dismissing a demand in declaration of a hypothec, where the case turned upon the question whether the mortgagor was insolvent within ten days subsequent to the registration of the hypothec, three of the judges in appeal were of opinion that a hypothec could not be held inoperative on the ground of its having been registered less than ten days prior to the *déconfiture* of the debtor, under the Consolidated Statutes of Lower Canada, cap. 37, sec. 7, the term insolvent not being equivalent to the term bankruptcy therein used, but in the present case they thought the *déconfiture* was not established even, and that the appeal must therefore be maintained on that ground. *Anderson* vs. *Généreux*, Q. B. 1863, 13 L. C. R. 371.

3. A hypothec acquired on the property of a non-trading debtor, whilst insolvent, is valid, in the absence of fraud. *McConnell* vs. *Dixon*, C. R. 1867, 11 L. C. J. 300.

4. *Mere insolvency* is not of itself a sufficient cause for setting aside a mortgage granted while the debtor was in that state, without proof either that such insolvency was *notorious*, or that there was really fraudulent collusion between the debtor and creditor. *Warren in re*, C. R. 1868, 12 L. C. J. 309. Reversed in appeal, but on the facts only. (See remarks of Torrance, J., in *Banque Jacques Cartier* v. *Meunier*, S. C. 1881, 4 L. N. at p. 215.)

5. No hypothec can be acquired on real property, since the coming into force of the Civil Code of L. C., without registration, and no hypothec can be acquired on the property of a person notoriously insolvent. *Banque Jacques Cartier* vs. *Ogilvie*, Q. B. 1874, 19 L. C. J. 100, reversing S. C., 3 Rev. Crit. 85.

6. The registration of a hypothec within thirty days preceding the insolvency of the debtor is without effect; the claim, however, should be collocated, under the circumstances, as an ordinary claim. *In re Dwyer*, S. C. 1879, 24 L. C. J. 171.

7. Contestation of the collocation for the amount of a mortgage granted by defendant April 28, 1880. The bank contested the collocation on the ground that at the date of the mortgage defendant was notoriously insolvent —*Held*, that though defendant's position about that time was doubtful, the proof of notorious insolvency was insufficient. *Banque Jacques Cartier* vs. *Meunier*, S. C. 1881, 4 L. N. 213.

8. A hypothec cannot be acquired to the prejudice of existing creditors, upon the immoveables of persons notoriously insolvent, or of traders within the thirty days previous to their bankruptcy. *Ronillard* vs. *Lapierre*, Q. B. 1885, 29 L. C. J. 257.

9. Where the circumstances disclose that the hypothec sought to be set aside was granted merely to take the place of an ample security previously held by the mortgagee, and that the hypothec was obtained by him in good faith, without apparent profit, solely to help his debtor and in ignorance of his insolveney (even assuming that a state of insolveney existed at the time), the right of the creditor to be collocated for the amount of his hypothec should be maintained. *Lefebvre* vs. *Lamontagne*, C. R. 1893, 3 Que. 158.

V. CONVENTIONAL.

1. A conventional hypothec must be for a sum certain and determinate stated in a deed. *Foisy* vs. *Germain*, Q. B. 1889, 18 R. L. 558.

2. A conventional hypothec has effect as between the parties thereto by the passing of the deed, and independently of registration, which is only required to give it effect as regards third parties. *Gauthier* vs. *Michaud*, C. R. 1889, 15 Q. L. R. 134.

VI. CREATED BY LEGACY.

1. By a clause in his will the testator left and bequeathed to the opposant the sum of fifty pounds sterling out of the moneys referred to in the will "annually, during her natural life, which my executor will regularly transmit to her." On opposition for payment out of an estate sold, which had belonged to the testator —*Held*, that no mortgage existed in favor of the opposant on such real estate. *Bonacina* vs. *Bonacina*, S. C. 1859, 10 L. C. R. 79.

2. A particular legatee has no claim by privilege or hypothec against the private estate of the sole testamentary executor and residuary legatee, prior to the creditors of the latter. *Smith* vs. *Brown*, P. C. 1837, 2 Rev. de Lég. 474, 2 Moore P. C. 35.

VII. CREATED BY DONATION.

A hypothec may be created by charges in favor of a third party in a donation of real estate, although there be no stipulation to that effect in the deed. *Dufresne* vs. *Dubord*, Q. B. 1877, 1 L. N. 42.

VIII. DESCRIPTION OF PROPERTY IN DEED.

1. Where the mortgaged property was described in the deed as being in Ste. Cecile, but was really in St. Fabien, and was so declared to be by plaintiffs—*Held*, that the action must be dismissed. *Rioux* vs. *Ouellet*, C. R. 1885, 11 Q. L. R. 117.

2. The description of an immoveable, for the purpose of registering a hypothecary claim, is complete by mentioning the lot and range, or part of lot and range. A clerical error in the deed constituting the hypothec, as to the number of the subdivision of the lot, did not affect the validity of the hypothec in this case. *Boisvert* vs. *Johnson*, C. R. 1887, M. L. R., 3 S. C. 182.

IX. DETERIORATING PROPERTY HYPOTHECATED.

(See also under title "CAPIAS." See also *infra* "HOLDER OF THE PROPERTY.")

1. The debtor is liable to coercive imprisonment for diminishing the value of the property hypothecated by removing buildings therefrom. The damages in such case are to be reckoned as the difference between the price the property would fetch at judicial sale, with the buildings thereon, and the price it would fetch without such buildings. *McCall* vs. *Pouliot*, C. R., 12 Q. L. R. 10; *Bélanger* vs. *Lacroix*, S. C. 1893, 3 Que. 479.

2. The debtor of a life rent, secured by hypothec upon an immoveable, who cuts a considerable quantity of timber on such immoveable and expresses his intention of continuing so to do, will be considered as damaging the immoveable with a view to defrauding his creditor; and the more so in that the cutting was done outside of certain limits agreed upon between the debtor and his creditor. *Bélanger* vs. *Lacroix*, S. C. 1893, 3 Que. 479.

3. The plaintiff may prove acts subsequent to the issue of the *capias* in order to establish the intention with which certain acts prior to the issue of the *capias* were done. (*Ib.*)

X. DISCHARGE OF.

1. Action to compel Creditor to give Discharge.—In an action against a hypothecary creditor who had been paid in full, to compel to give him a notarial discharge and acquittance—*Held*, confirming the judgment of the court below, that the creditor should have been put in default to do so, and such default should be alleged in the declaration. *Gagnon* vs. *Clouthier*, Q. B. 1872, 3 R. C. 50.

2. Proof of.—Evidence of payment of a hypothecary claim registered against an immoveable must be made by the production of a duly registered discharge. *Greene* vs. *Mappin*, 1887, M. L. R., 3 S. C. 393, 31 L. C. J. 163.

3. —— Proof of payment of a hypothecary debt, based on an authentic deed, cannot be made by oral testimony, even though the witnesses may swear that they had receipts proving payment, but could not after diligent search find such receipts. *Vaillancourt* vs. *Lessard*, C. R. 1886, 9 L. N. 267.

4. When part of Debt paid.—A hypothecary debtor, who has paid instalments of the amount due, is entitled to have a notarial discharge from the creditor for the payments made by him. *Christin* vs. *Morin*, 1888, M. L. R., 4 S. C. 469.

XI. FOR CONTEMPLATED ADVANCES.

A hypothec for advances contemplated, but which the creditor is not bound to make, nor the debtor to receive, is not valid for advances made in pursuance of such an agreement, as against a sale duly registered, before the making of the advances. *Désilets* vs. *Martel*, C. R. 1879, 5 Q. L. R. 125.

XII. FOR GENERAL CONTINUING ADVANCES.

Defendant owed plaintiff a balance for merchandise and gave the latter a hypothec on certain property as security. It was agreed in the deed that subsequent payments made on the running account should not be imputed on the debt guaranteed by the hypothec, but on subsequent sales, should any sums be owing thereon—*Held*, that such a hypothec was valid. *McCall* vs. *Pouliot*, C. R. 1886, 12 Q. L. R. 10.

XIII. HOLDER OF THE PROPERTY.

1. Demand of Security.—The purchaser of a property, who has undertaken to discharge certain hypothecary claims, equal in amount to the value of such property, cannot,

when sued hypothecarily by a creditor other than those he had undertaken to pay, but whose claim is posterior to theirs, require that such creditor give him security that the property when brought to sale will realize a sum sufficient to satisfy the claims he has undertaken to discharge, as he would have a right to do were he himself a hypothecary creditor for an amount equal to the value of the property, or had actually paid claims to that amount, so as to have himself acquired the same. *Tessier* vs. *Falardeau*, S. C. 1856, 6 L. C. R. 163, 5 R. J. R. Q. 54.

2. — A *tiers-détenteur* sued by a hypothecary creditor cannot oblige the plaintiff to give security for his improvements; he can only demand that his surrender of the immoveable be made subject to his privileged claim for the value of the improvements. *Commissaires d'Ecole St. Norbert* vs. *Crépeau*, C. R. 1885, 14 Q. L. R. 119.

3. — The holder sued hypothecarily, who has paid a previous hypothecary claim, can refuse to surrender the property until security be given to him that it will be sold for enough to pay such claim. *Perrault* vs. *Desjardins*, S. C. 1877, 21 L. C. J. 178.

4. — But a holder who has not renewed within the requisite delay after the deposit of the plans and books of reference, a former hypothecary claim which he discharged, cannot, before being forced to surrender the immoveable, require the suing hypothecary creditor to furnish security that the immoveable will be sold at a price sufficient to reimburse him for his hypothecary claim, which, before the above delay had expired, was a prior claim. *Théberge* vs. *Danjou*, C. R. 1886, 12 Q. L. R. 1.

5. Improvements.—In an hypothecary action—*Held*, that the defendant could not claim to be paid for his improvements before being compelled to abandon the property, and the only thing he could demand was security that the immoveable would be sold for a sufficient amount to reimburse him. *Withall* vs. *Ellis*, S. C. 1854, 4 L. C. R. 358, 4 R. J. R. Q. 191.

6. — *Held*, that a *tiers-détenteur* in good faith, who is sued by a hypothecary creditor, can claim the necessary expenses and improvements laid out upon the immoveable, to the extent of the additional value these outlays have given to the immoveable. *Bricault* vs. *Bricault*, S. C. 1881, 11 R. L. 63.

7. — A hypothecary creditor who sues a *tiers-détenteur* who has acted in good faith can only claim from the latter two years and the current year of interest on his claim. *(Ib.)*

8. — The *tiers-détenteur* who has made improvements on the immoveable hypothecated, cannot remove them after the judgment in declaration of hypothec, if by his title he is charged with the hypothec and obliged to pay the debt. *Société de Construction de Montréal* vs. *Desautels*, Q. B. 1881, 1 Dorion's Q. B. R. 183, reversing C. R., 2 L. N. 117, and restoring S. C., 2 L. N. 17.

9. — An owner whose property is seized at the suit of his personal creditors, has a right to take out of the proceeds of the sale, as against the hypothecary creditors, the improvements and expenses he has made during his possession, and with regard to them must be considered as a *tiers détenteur*. *Compagnie de Prêt et Crédit Foncier* vs. *St. Germain*, Q. B. 1881, 1 Dorion's Q. B. R. 192, 26 L. C. J. 39.

10. — The defendant, in making an abandonment, reserved buildings constructed by him on the property after the plaintiff got his mortgage—*Held*, that the reservation had no effect, and that the removal by defendant of the buildings while the property was under seizure was a deterioration within C. C. P. 646. *Gailloux* vs. *Bureau*, Q. B. 1884, 7 L. N. 90.

11. Liability for Costs of Deed and Registration and Insurance Premiums.—The cost of a deed of mortgage and its registration, and of premiums stipulated to be paid by the mortgager on insurance transferred as collateral, cannot be recovered by the mortgagee from a *tiers détenteur* of the land by hypothecary action. *Michon* vs. *Mouncey*, S. C. 1877, 6 Q. L. R. 238.

12. Personal Indebtedness.—A *tiers détenteur* of property, subject to a hypothec, is never presumed to be personally indebted or bound. *Banque du Peuple* vs. *Gingras*, S. C. 1852, 2 L. C. R. 243, 3 R. J. R. Q. 159; and see *Dubuc* vs. *Charon*, S. C. 1865, 9 L. C. J. 79; *Reed* vs. *Hunter*, Supreme Ct. 1880, 10 C. L. R. 346.

13. Rents—Obligation to surrender.—Art. 2021 C. C.—The holder of property sued hypothecarily for a debt can only avoid surrendering by paying the arrears and consenting to continue the payments in the future during his detention of the property. It is the duty of the holder of the property to offer the renewal deed and not for the creditor to

demand it. *Marcille* vs. *Prie et al.*, S. C. 1893, 4 Que. 327.

14. Removal of Buildings—Damages.—Where the plaintiff, who had a hypothec upon an immoveable which he had sold to the defendant for the balance of price of sale, brought action for $150 damages against the defendant, on the ground that he had removed some of the buildings from the property hypothecated to one adjoining, thereby diminishing the value of his hypothec, and demanding the plaintiff of his rights—*Held*, on proof that defendant had acted entirely in good faith, that the plaintiff was entitled to recover only to the extent of the diminution in value caused to the immoveable by the removal of the buildings, also costs of protest, etc. *Armstrong* vs. *Barrette*, C. Ct. 1868, 1 R. L. 645.

XIV. HUSBAND AND WIFE.

1. In an action by a wife, after the death of her husband, in declaration of her matrimonial hypothec on a certain immoveable property, which had been transferred by deed of exchange during the lifetime of her husband, with her own ratification—*Held*, that such right of hypothec was a moveable right, and could be validly alienated by the wife with the authorization of her husband. *Metrisse* vs. *Brault*, Q. B. 1859, 4 L. C. J. 60 and 10 L. C. R. 157.

2. When a special hypothec is granted in a marriage contract for a fixed sum, as covering dower, *preciput* and all other matrimonial rights, a married woman cannot sue hypothecarily for the recovery of matrimonial rights in excess of such fixed sum. *Demers* vs. *Larocque*, S. C. 1861, 8 L. C. J. 178.

3. No tacit or legal hypothec can subsist for *remploi de propres* on the property of the husband, as respects *propre* of the wife, sold since the Registry Ordinance has been in force. *Armstrong* vs. *Rolston*, S. C. 1861, 9 L. C. J. 16.

4. A hypothec granted by a surviving husband on an immoveable *conquêt* of the community, after the dissolution of the community, can only affect his half of the property. *Dallaire* vs. *Gravel*, Q. B. 1878, 22 L. C. J. 286.

5. The statute 4 Vic., cap. 3, sec. 36, does not prohibit a wife renouncing the exercise of her hypothec for matrimonial rights in property sold by her husband, and such renunciation could and [illegible] though she also [illegible] obtain a separation of property from her husband. *De la Gorgendière* vs. *Thibaudeau*, Q. B. 1871, 1 R. C. 478, 2 Q. L. R. 163. (1)

6. Where an obligation and mortgage has been executed by a wife assisted by her husband (described as acting as well in his own name as for the purpose of authorizing his wife) and by a curator to a substitution, as obligors, and the circumstances establish that the wife alone was really the borrower (the husband and curator being parties merely to authorize the transaction), the wife will be condemned to pay the amount of the obligation. *Francis* vs. *Bousquet*, C. R. 1883, 27 L. C. J. 115.

7. A wife's legal hypothec does not extend to the case of a donation of life rent by her husband to her, in the marriage contract, in the event of her survival. *Darignon* vs. *Roy*, Q. B. 1889, 18 R. L. 516, 34 L. C. J. 233.

8. Contra.—*Ouellette* vs. *Talbot*, S. C. 1889, 20 R. L. 118.

XV. HYPOTHECARY CREDITOR. (See *supra* "ACTION HYPOTHECARY," and see under title "IMMOVEABLES BY DESTINATION.")

1. A hypothecary creditor who opposes the sale and adjudication of a constituted rent for the price of an immoveable, and who is collocated on the proceeds of the sale, cannot, to the prejudice of the purchaser of the rent, file another opposition to the collocation. *Audet* vs. *Hamel*, K. B. 1841, 2 Rev. de Lég. 256.

2. An hypothecary creditor may oppose the sale of an immoveable, advertised subject to a life rent created since the date of his hypothec, and cause the land to be sold purely and simply. *Lamoges* vs. *Marsaut*, S. C. 1863, 7 L. C. J. 276.

3. An assignee to an insolvent estate having sold certain lots of land belonging to it, which were mortgaged to B. for about $9,600, and to S. for $756, paid $3,000 to B. and afterwards left the country, taking with him some $1,300 of the proceeds of the lots. The question which arose was, who should suffer the deficiency—*Held*, that S., the first mortgage creditor, was entitled to be paid in full as far as the proceeds would go. *Barteau in re*, S. C. 1872, 2 R. C. 179.

(1) See 3 Rev. de Leg. at p. 121, article by Louis Rène Lacoste.

4. A hypothec cannot be transferred to a later claim to the prejudice of intermediate creditors. *Dorval* vs. *Bourassa*, S. C. 1882, 8 Q. L. R. 218.

5. Hypothecary creditors are not represented by their debtor in suits subsequently brought against the latter in respect of the property hypothecated to them, and rescission pronounced against the former is not *res judicata* against the latter. *Ouellette* vs. *Rochette*, C. R. 1883, 9 Q. L. R. 289.

6. A hypothecary creditor is entitled to ask for a ventilation, where it appears that by taxing a number of lots *en bloc*, the taxes due on a much larger extent of property were imposed on a portion, the proceeds of which are being distributed. *Commissaires d'Ecole de St. Henri* vs. *Desmarteau*, C. R. 1882, 6 L. N. 82.

7. Where the holder of an hypothecated immoveable is personally responsible for the debt, it is no bar to a direct action against the debtor that the creditor has previously obtained a judgment *en déclaration d'hypothèque*, under which the debtor has abandoned the immoveable, even though the property has not been discussed, and the creditor can recover by direct action the costs incurred in the hypothecary action, as well as his debt. *Newton* vs. *Cruse*, S. C. 1882, 6 L. N. 107.

8. The revocation of the title deed of a mortgagor, on the ground of fraud and simulation, cannot affect the rights of a *bona fide* mortgagee for value. *Normandin* vs. *Normandin*, C. R. 1882, 27 L. C. J. 45.

9. Under no circumstances can a hypothecary creditor be collocated and paid interest beyond the date of the adjudication of the real property hypothecated. *In re Généreux*, C. R. 23 L. C. J. 221.

10. It is not competent to hypothecary creditors, who have not been collocated in a judgment of distribution, duly homologated, of the moneys arising from a sheriff's sale of the real property hypothecated in their favor, to sue to recover from a party alleged to have been illegally collocated in such report, on the ground that, according to the Registrar's certificate attached to the Sheriff's return, such party ought not to have been so collocated, and that plaintiffs should have been collocated for the amount of their demand preferentially to him. *McDonell* vs. *Buntin*, S. C. 1883, 27 L. C. J. 73.

11. Hypothecary creditors have no privilege on the rent of the property subject to their mortgage, received by the assignee of the mortgagor or holder, for the period between the date of the assignment and the sale of the property. *Dupuy* vs. *McClanaghan*, C. R. 1880, 27 L. C. J. 61, reversing S. C., 24 L. C. J. 243.

XVI. ILLEGAL.

A hypothec inserted in a registrar's certificate, furnished in conformity with the requirements of the Code of Civil Procedure, and created by a person who has not been proprietor inside of ten years, will be struck from the certificate on a petition to that end made by any of the parties to the case. *Armstrong* vs. *Hus*, S. C. 1871, 5 R. L. 397.

XVII. JUDICIAL.

1. A judgment registered against the *auteur* of a party who at the time of the rendering and registering of such judgment is in open and public possession of property as proprietor, under a title, does not create a hypothec upon the property, although the title of such party so in possession be not registered. *Ex parte Gamble*, S. C. 1861, 6 L. C. J. 169.

2. A judicial bond, executed in 1841, and not hypothecating any property on its face, but duly registered, operates as a mortgage on all the property of the bondsmen then held by them within the registration district. *Berthelet* vs. *Dease*, S. C. 1868, 12 L. C. J. 336.

3. On the contestation of a report of distribution—*Held*, that the hypothec created by a registered judgment on the property of an insolvent is valid in cases where, as a matter of fact, article 2023 of the Civil Code could not apply. *Dorwin* vs. *Thompson*, S. C. 1872, 3 R. C. 85.

4. A hypothec created by a judgment is sufficiently proved against the *tiers-détenteur* by producing a copy of the judgment with a certificate of registration, and a separate certificate given by the registrar stating in a marginal note that the property therein mentioned is charged with the payment of the said judgment. It is not necessary to prove the registration with the judgment of a notice containing a description of the hypothecated property. *Pacaud* vs. *Brisson*, C. R. 1886, 12 Q. L. R. 281.

5. Judicial hypothecs arising between the 31st December, 1841, and 1st September, 1860, only affect such immoveable property as the judgment debtor possessed at the time when the judgment was rendered. *Thompson* vs. *Marks*, S. C. 1886, 9 L. N. 372.

XVIII. LIABILITY OF UNIVERSAL LEGATEE FOR.

When a testator does not expressly direct a particular legatee to discharge a hypothec on an immoveable devised to him, Art. 859 C. C. does not bear the interpretation that such particular legatee is liable for the payment of such hypothecary debt without recourse against the heir or universal legatee. *Harrington* vs. *Corse*, Supreme Ct. 1882, 9 Can. S. C. R. 412, reversing Q. B., 26 L. C. J. 79.

XIX. LIFE RENT.

The 7th clause of the 16th Victoria ch. 206, does not apply to life rents created by will, and rents so created do not carry hypothec as against holders in good faith, unless the property be specially hypothecated by the will, and that for a fixed sum, conformably to the 28th clause of the 4th Vic., ch. 30. *Grégoire* vs. *Laferrière*, S. C. 1859, 3 L. C. J. 181.

XX. LOSS OF PROPERTY BY FIRE.

1. A creditor who has insured property hypothecated as security for a debt due to him, and who has been paid in part by the receipt of the insurance money from the Insurance Company, is not entitled to recover from his debtor more than the balance due, including the premiums paid by him and interest thereon. *Archambault* vs. *Lamère*, Q. B. 1882, 26 L. C. J. 236.

2. Where a hypothecary creditor, who holds a policy of insurance on the hypothecated property, pays the insurance money to the mortgagor to enable him to rebuild, he thereby loses his hypothec on the property and becomes an ordinary chirographic creditor, his receipt of the insurance money having extinguished the original claim. *Seybold* vs. *Garceau*, Q. B. 1888, 16 R. L. 676, 32 L. C. J. 316.

XXI. OBLIGATION WITH A TERM.

A debtor who sells an immoveable which he has hypothecated for a debt with a term diminishes the security of his creditor and loses the benefit of the term. *Gauthier* vs. *Michaud*, C. R. 1889, 15 Q. L. R. 134, 33 L. C. J. 76.

XXII. OF CROWN.

(See under title "CROWN—HYPOTHEC OF.")

1. Where the Crown obtained judgment for advances made the appellant, under 9 Vic., cap. 62, s. 18—*Held*, confirming the judgment of the court below, that the general mortgage given to the Crown for such advances attached without registration, although the loan was made after the borrower had rebuilt, and was not applied as contemplated. *Laroie* vs. *Regina*, Q. B. 1860, 11 L. C. R. 63.

2. Where the land of the defendant was about to be sold under a writ of execution, and an opposition was filed on the part of the Crown for the amount of a hypothec claimed to be due the Crown on the property of the defendant, as security for a loan to one Gerard, who had suffered by the fire of 1845—*Held*, confirming the judgment of the court below, and dismissing the contestation of appellant, that such hypothec did not require to be registered, and would, consequently, take priority of all those registered subsequent to the date of such loan. *Connor* vs. *The Solicitor General pro Regina*, Q. B. 1866, 16 L. C. R. 216.

XXIII. OF CO-PROPRIETOR.

1. Co proprietors of an undivided property, which is hypothecated for arrears of rent, are not jointly and severally bound to the payment of such arrears. *Papaus* vs. *Turcotte*, Q. B. 1864, 8 L. C. J. 152 and 15 L. C. R. 153.

2. The hypothec given by a co-proprietor on an undivided property exists in so far as the share of the said immoveable remains the property of the debtor after a partage, and then only exists to the extent of such share. *Monette* vs. *Molleur*, S. C. 1874, 6 R. L. 561.

3. The sale by a co proprietor of an undivided property of his undivided share to his co-proprietor, does not effect a partition, and therefore a mortgage given by the vendor continues to affect the part sold notwithstanding such sale. *Farin* vs. *Guérin*, C. R. 1893, 3 [illegible] 30.

XXIV. OF MINOR.

The legal hypothec of the minor on the property of the tutor only guarantees the administration of the tutor for any amount that may be found to be due to the minor at the termination of the tutorship. *Jones* vs. *Pied alue*, S. C. 1874, 5 R. L. 351.

XXV. OF VESSEL.

The purchaser at a sheriff's sale and first hypothecary creditor of a registered vessel cannot pretend that a subsequent hypothecary creditor cannot revendicate the vessel without offering the amount of the first hypothec.

The first hypothecary creditor must await the order of distribution. *Benning* vs. *Cook*, Q. B. 1871, 1 R. C. 241.

XXVI. ON BUILDING CONSTRUCTED ON PROPERTY OF ANOTHER.

A hypothec may be acquired by the proprietor of a building which he has constructed on the property of another, if he registers his claim. *PruPhomme* vs. *Scott*, C. R. 1885, 30 L. C. J. 156, M. L. R., 2 S. C. 63, and *Chalut* vs. *Bégin*, C. R. 1879, 5 Q. L. R. 119.

XXVII. ON LANDS HELD IN FREE AND COMMON SOCCAGE.

A general mortgage or hypothec does not effect land held in free and common soccage. *Paterson* vs. *McCallum*, K. B. 1830, Stuart's Rep. 429.

XXVIII. ON PROPERTY OF EXECUTOR.

Hypothec does not attach to the property of an executor, from the date of registration of the will under which he is appointed, but from the date of the registration of an authentic deed showing that he accepted the executorship. *Lamothe* vs. *Ross*, S. C. 1858, 2 L. C. J. 278, 9 L. C. R. 7; *David* vs. *Hayes*, S. C. 1858, 3 L. C. R. 440.

XXIX. ON SEIGNIORIAL LANDS.

1. A hypothec granted by a seignior on his *fief* and seigniory (described by its contents and boundaries) prior to the date of the publication of the notice of deposit of the *cadastre* thereof, created a good and valid hypothec on all lands in such *fief* and seigniory held and owned by said seignior. *Chisholm* vs. *Pauzé*, S. C. 1882, 26 L. C. J. 162.

2. The registration of such hypothec after the publication of the notice of deposit of said *cadastre* was valid, and preserved the hypothec so created as aforesaid. (*Ib.*)

3. Such hypothec on said lands was not affected by the failure of the mortgagee to file an opposition as required by ch. 40 of the Cons. Stat. of L. C., sec. 41. (*Ib.*)

XXX. ON SETTLERS' LANDS.

1. Where a squatter granted a hypothec upon a property belonging to the Crown, of which he was in possession without a patent, and the land was about to be sold under a writ of execution *de terris*—*Held*, confirming the judgment of the court below, on opposition filed, that hypothecs granted on such lots by persons who are in possession of and who have improved the same will not attach, and consequently convey no right to the mortgagees. *Pacaud* vs. *Peltier*, Q. B. 1864, 16 L. C. R. 305.

2. *Held* thus, even though he may afterwards obtain a concession of such land. *Lepage* vs. *Banville*, Q. B., Que., 8th March, 1879.

3. In May, 1868, one H. R. gave a mortgage on a property which he never possessed as owner, but only as occupant by permission of the Crown, in virtue of a location ticket which he shortly afterwards transferred to the *auteur* of respondent—*Held*, that the hypothec was worthless, but, even if it was valid, it was prescribed by a counter possession in good faith of upwards of ten years. *Pacaud* vs. *Rickaby*, Q. B. 1881, 1 Dorion's Q. B. R. 311, 1 Q. L. R. 245.

4. The holder of a location ticket granted a hypothec on his lot to a creditor, and afterwards sold the lot to his son, who obtained patent from the Crown. The hypothecary creditor then, by action *Pauliana* directed against father and son, asked the annulment of the sale as a fraud on his rights—*Held*, that the hypothec was void under Article 1743 of the Revised Statutes of Quebec, which forbids the hypothecation of, and exempts from seizure, a settler's lands held under location ticket; and inasmuch as the lot had never, in contemplation of law, been part of the debtor's *patrimoine* so as to be the pledge of his creditors, the plaintiff had no action *Pauliana* in respect of it. And, even if the sale were proved to be collusive, the court would not set it aside merely to enable the plaintiff to call upon the Crown to take proceedings for the annulment of the letters-patent as having been fraudulently obtained. The plaintiff's remedy, if any, in that direction, would be a direct application to the attorney-general, supported by affidavit. (The correctness of the report *Pacaud* vs. *Rickaby*, 1 Q. L. R., p. 245, questioned.) *Morin* vs. *Tremblay*, C. R. 1891, 17 Q. L. R. 272.

XXXI. PURGE OF.

1. The purchaser of an immoveable, hypothecated to the extent of fifty dollars in favor of a third party, to enable the latter to draw from it a life rent of six dollars a year and a right of pasturage, without any stipulation that such right of pasture must be exercised

on that particular immoveable, has no right to demand security or the purgation of the hypothec, if the plaintiff, as vendor, has failed to leave with him the amount of the hypothec. *Chabotte* vs. *Charby*, C. R. 1871, 3 R. L. 393, 16 L. C. J. 27.

2. But the purchaser himself may purge and liberate the property from such rent and right of pasturage by paying the amount of the hypothec. (*Ib.*)

XXXII. RADIATION.

1. The plaintiff, alleging that a judgment rendered against her husband had been registered against an immoveable belonging to her, asked that the hypothec be radiated. The defence was that the property really belonged to the husband, who had always remained in possession, the transfer from the husband to R., and from R. to the wife, being simulated and fraudulent, and constituting a sale from husband to wife by a person interposed—*Held*, that it being proved that the wife had no right to the property, her action for radiation of hypothec might be dismissed without her husband or R being in the cause. *Carter* vs. *McCaffrey*, Q. B. 1892, 1 Que. 97.

2. *Held*, by Meredith, C. J., with the concurrence of the other judges, that in petitions, such as the present, the hypothecs to be struck out must be specially described, and that each of the discharges or other papers relied on must be described in the same way, and a regular list of exhibits filed. *Loranger* vs. *DeGaspé*, S. C. 1877, 1 Q. L. R. 80.

XXXIII. RANKING OF CLAIMS.

(See under title "Registration.")

1. Appellant, holder of a *bailleur de fonds* claim on an immoveable in the possession of M. (being the unpaid balance of the price of sale from L. to M.), brought the property to judicial sale. Respondents were collocated by privilege on the proceeds, for the amount of an obligation with hypothec executed by L. before the sale, and transferred to respondents. The title of L.'s third *arrière auteur* had never been registered. The title of L. was not registered until after the sale to M. Respondents' hypothec was registered before the sale from L. to M., and the amount secured thereby was still due by L. at the date of his sale to M., and also at the date of the registration of that sale—*Held*, maintaining the collocation, that appellant, transferee of the rights of L., held the relation of debtor as regards the respondents; that L. could not by selling, and reserving to himself a *bailleur de fonds* claim, create in his own favor a preferential claim over that of his hypothecary creditor. *Dolan* vs. *Baker*, Q. B. 1892, 1 Que. 392.

2. Notwithstanding absence of registration of title, a hypothecary creditor has a valid hypothec as regards his debtor, and is entitled to be collocated by preference to him on the proceeds of the immoveable hypothecated. (*Ib.*)

3. Registration during a *saisie réelle* confers no right of hypothec to the prejudice of other creditors who have not registered their claims. *Gale* vs. *Griffin*, Q. B. 1857, 1 L. C. J. 266.

4. A person who consents to the hypothecation in favor of another of a property already hypothecated to himself will be held to have waived his priority of mortgage in favor of such other. *Symes* vs. *McDonald*, S. C. 1859, 9 L. C. R. 18.

5. And where on the contestation of a collocation it appeared that the contestants transferred to the plaintiff collocated certain hypothecary claims without reserving or mentioning the priority which they set up for other claims retained by them, the effect of which was to lead the plaintiff to believe that the claims so transferred to him would rank first—*Held*, under Article 2048 C. C., that contestants had forfeited their right of preference. *McCall* vs. *Bonacina*, S. C. 1882, 5 L. N. 215.

6. Where a hypothecary creditor, who is first in rank, cedes his right of preference on the moneys arising from the sale of a portion of the property hypothecated, in favor of another hypothecary creditor, who is only third in rank, such creditor having first rank cannot afterwards claim to rank for his full claim, without deduction of the moneys received under said sale, to the prejudice of a hypothecary creditor, who is second in rank, in the distribution of moneys arising from the sale of the balance of said property. *Pérodeau* vs. *Quintal*, C. R. 1882, 27 L. C. J. 74.

7. A hypothec granted by a debtor upon an immoveable of which he has possession as proprietor, and registered before registration of his title, ranks before a hypothec granted and registered since the registration of his title (Arts. 2098, 2013 C. C.). *Dubeau* vs. *Piette*, S. C. 1883, 12 R. L. 92.

8. Where a hypothec was granted on the 12th May, 1867, and registered on the 20th of the same month, but in the meantime the

property had been transferred but not registered until after the registration of the hypothec —*Held*, that the title of the owner of the hypothec would rank before that of the transferee, notwithstanding that he was in open and public possession of the property and notwithstanding the provision of Art. 2088 C. C. *Bricault* vs. *Bricault*, S. C. 1881, 11 R. L. 163.

XXXIV. REGISTRATION.

(See under title "Registration.")

A deed creating a mortgage passed since the Registry Ordinance came into force is invalid, as against a subsequent purchaser, unless registered before the title of such purchaser. *Chaumont* vs. *Grenier*, Q. B. 1862, 9 L. C. J. 208 and 12 L. C. R. 125.

XXXV. RENEWAL—CADASTRAL NUMBER—ABSENCE OF.

The absence of a cadastral number in the notice of renewal of a mortgage is fatal, and the correction of the notice, after the expiration of the delay for filing it, cannot be made retroactive. *Rioux* vs. *Ouellet*, C. R. 1885, 11 Q. L. R. 117.

XXXVI. SALE OF PROPERTY SUBJECT TO.

1. The sale of an immoveable, after the institution of a personal action to recover a debt for the payment of which the property is charged and affected, is null and void *quoad* the creditor plaintiff in the suit, who is entitled to seize the property, notwithstanding such sale. *Hans* vs. *D'Odet*, C. R. 1870, 15 L. C. J. 193.

2. The alienation, by the debtor, of an immoveable affected by the (unregistered) hypothec of a mutual insurance company does not purge such hypothec, which attaches to the land until full payment of the premium notes. *Charest* vs. *Stanstead & Sherbrooke Ins. Co.*, Q. B. 1885, 12 Q. L. R. 251.

XXXVII. SURRENDER OF HYPOTHECATED PROPERTY.

(See *supra* "Action Hypothecary.")

1. The surrender in a hypothecary action may be made at the office of the prothonotary, and notice thereof need not be given to the plaintiff. *Greaves* vs. *Macfarlane*, Q. B. 1353, 3 L. C. R. 426, 4 R. J. R. Q. 26.

2. In a hypothecary action judgment was rendered, condemning the defendant as proprietor and holder of the land to pay the plaintiff's claim, unless he preferred to abandon and deliver up the land to be sold within fifteen days from the signification of the judgment, and in default thereof after said delay he was condemned purely and simply to pay the debt. The judgment was signified on the fifteenth of March, and a surrender made on the 18th May *de plano* and without leave of the court. A motion made to reject the surrender was dismissed, and execution issued against the defendant's moveables, as being the personal debtor of the plaintiff—*Held*, confirming court below, that an opposition to such sale on the ground that the surrender was duly made must be maintained and *main levée* of the seizure granted. *Bélanger* vs. *Durocher*, Q. B. 1859, 9 L. C. R. 430, 7 R. J. R. Q. 307.

3. The effect of a surrender is to relieve the debtor of all personal liability, and he has no right, therefore, to claim security against such personal liability before giving up the property. *Perrault* vs. *Desjardins*, S. C. 1877, 24 L. C. J. 178.

4. Respondent and two associates bought a tract of land, half of which had been purchased by the vendor from the appellant. There was an amount due the appellant by the vendor which respondent and his associates, vendees, undertook to pay. On a hypothecary action being brought against the respondent and his co-vendees, the respondent made a surrender of his share. Then the appellant instituted a personal action against respondent, who pleaded that, as she had chosen to bring a hypothecary action, and the respondent had abandoned the immoveable, she had lost her recourse against the respondent personally—*Held*, that he was no longer personally liable. *Reeves* vs. *Geriken*, Q. B. 1879, 2 L. N. 67. In the Supreme Court, however, while it was held that a hypothecary creditor whom a purchaser obliged himself to pay by his deed of purchase, forfeits his right to a personal action against him, by suing him hypothecarily, yet as defendant had only surrendered a portion of the property, each owner's share of which was liable for the whole mortgage, he could only be relieved for a proportion equivalent to the part abandoned, and the judgment of the Court of Appeal was reversed. *Reeves* vs. *Perrault*, Supreme Ct. 1879, 10 Can. S. C. R. 616. (See also *Dubuc* vs. *Charon*, 9 L. C. J. 79; *Banque du Peuple* vs. *Gingras*, 2 L. C. R. 243).

5. Although the surrender leaves the surrenderer the right to resume the property at any time before the sale, on paying the plaintiff suing, and also the right to receive any surplus that the land may produce after payment of the legal claims, yet the surrenderer during the curatorship has no control or administrative power in relation to the real estate so surrendered. *Couture* vs. *Fournier*, C. R. 1880, 7 Q. L. R. 27.

6. The defendant surrenderer cannot be considered a *légitime contradicteur* in any proceeding to bring the property to sale, and a creditor having a judgment against the surrenderer ought to cause it to be declared executory against the curator before causing the real estate surrendered to be seized. (*Ib.*)

7. An hypothecary or privileged creditor who buys in lands sold for taxes, and who within two years is reimbursed by the owner, may, while he remains in possession of the lands, bring his hypothecary action against the owner, calling upon him to surrender the lands, such creditor's possession being only precarious and not that of a proprietor as regards the real owner. *Corrigan* vs. *Ross*, Q. B., Que., 5 June, 1876.

XXXVIII. TITLE.

(See *supra* "ACTION HYPOTHECARY.")

1. The respondent Molson hypothecated immoveable property which had formed part of his father's estate, and which he held under a deed of sale to him from two of the executors (he being one)—*Held* (confirming the judgment of the Court of Queen's Bench, Montreal, 6 L. N. 372), that where power was given by a will to two of the executors to sell immoveable property belonging to the estate, a sale by two of the executors to one of themselves was void. *Carter* vs. *Molson*, 8 L. N. 281, P. C. 1885.

2. The effect of the sale to respondent was merely to convey the property to him as his share of his father's estate, subject to the conditions of the will, by which the property and revenues were unseizable. (*Ib.*)

3. The registration of the deed of sale in which reference was made to the will, was sufficient notice to an onerous creditor of the title under which the respondent held the property hypothecated by him. (*Ib.*)

4. Even if this were not so, the appellant must be held bound by the knowledge which the agent to whom he confided the duty of attending to his interests possessed, that the property was held by respondent under conditions and limitations. (*Ib.*)

XXXIX. TRANSFER OF.

1. In the case of an assignment with the consent of the mortgagor of a mortgage, containing a covenant by the assignor to transfer to the assignee as collateral security a policy of insurance then held by the assignor on the buildings existing on the property mortgaged, the failure or neglect by the assignor to secure such transfer, and the consequent reception by the assignor of the insurance money under the policy, would not entitle the mortgagor to claim from the assignee the discharge of the mortgage. *Robert* vs. *MacDonald*, Q. B. 1874, 19 L. C. J. 90.

2. A transfer of a hypothecary claim during the period fixed for the renewal of real rights, even when the transfer conforms to all the conditions prescribed by Art. 2168 of the C.C., will not give to the transferee the rank of such hypothec, unless the transfer is accompanied by the notice prescribed by Art. 2172. *Roussel* vs. *Bureau*, C. R. 1879, 5 Q. L. R. 369.

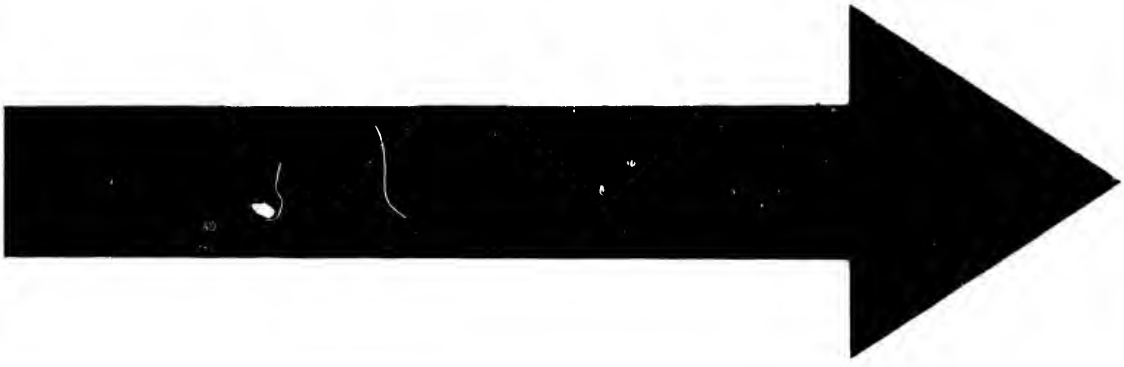
XL. WHO MAY HYPOTHECATE.

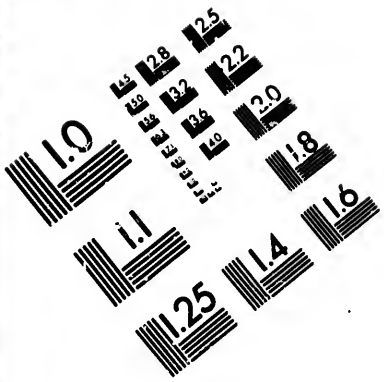
The vendor with faculty of repurchase has a right to hypothecate the immoveable sold. *Hainault* vs. *Chapdelaine*, Q. B. 1888, 32 L. C. J. 84.

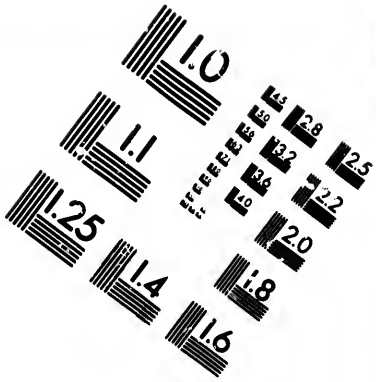
XLI. WHAT IT COVERS.

1. In a contestation between two persons concerning the sale of an immoveable—*Held*, reversing the judgment of the court below, that the hypothecation of a lot of land, described by its limits and bounds, is the hypothecation of a thing certain, although the contents assigned thereby be less than the actual contents of the thing itself, and in such case the hypothec covers the entire limit. *Labadie* vs. *Trudeau*, Q. B. 1853, 3 L. C. R. 155, 3 R. J. R. Q. 476.

2. And in another case, where an opposition was filed by children, founded on a stipulation in the contract of marriage between their parents, that the wife should have £500 in lieu of dower, to be enjoyed by her during her natural life, and to go to the children after her death—*Held*, confirming the judgment of the court below, that general mortgages created anterior to the passing of the Registry Ordinance, 4 Vic., cap. 30, attached to property purchased by the debtor subsequent to the passing







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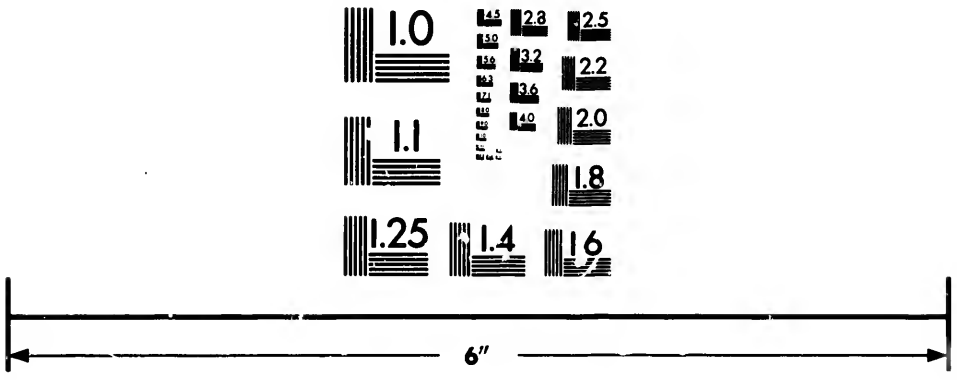

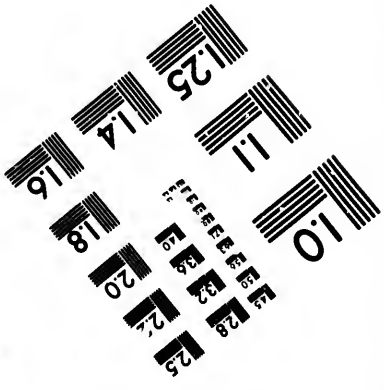

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of the said Ordinance. *Brown* vs. *Oakman*, Q. B. 1862, 13 L. C. R. 342.

3. An unregistered hypothec of a mutual insurance company covers the costs of a personal judgment obtained against the debtor for the amount of its premium notes. *Charest* vs. *Stanstead & Sherbrooke Ins. Co.*, Q. B. 1885, 12 Q. L. R. 254.

XLII. WHAT IS A HYPOTHEC?

1. A deed of acknowledgment or obligation executed before a notary *en brevet* does not create a mortgage. *Bélair* vs. *Goudreau*, K. B. 1810, Pyke's Rep., p. 57

2. Clause of warranty in a deed of exchange confers no hypothec, unless a specific sum of money be stipulated as the amount of such warranty. *Exparte Casavant*, S. C. 1858, 2 L. C. J. 139.

3. There are no sacramental words necessary to constitute a hypothec, so where two parties exchanged two lots of land in the following terms: *Lesquels morceaux de terre sus-* "*échangés resteront garants l'un de l'autre de* "*la somme de quinze cents piastres tel qu'il* "*est d'usage en fait d'échange.*"—*Held*, on contestation of a report of distribution, to be a good hypothec for that amount on the lot given in exchange. *Caya* vs. *Trust & Loan Company of Canada*, Q. B. 1880, 1 Dorion's Q. B. R. 10.

XLIII. WHEN IT TAKES EFFECT.

A hypothec given for a credit opened in favor of the mortgagor takes effect from the time it is granted and not from the time the advance is actually made. (1) *Quintal* vs. *Lefebvre*, S. C. 1880, 3 L. N. 347.

(1) See 3 L. N., p. 361, for comparison of this case with a similar New York case.

I.

IMMOVEABLES.

1. **By destination.**—The rolling stock of a railway is immoveable by destination, and as such is not liable to seizure under a writ of execution *de bonis*. (1) *G. T. R. Co. of Canada* vs. *The Eastern Townships Bank*, Q. B. 1865, 10 L. C. J. 11; *Wallbridge* vs. *Farwell*, Supreme Ct. 1889, 18 Can. S. C. R. 1; and see the *Rhode Island Locomotive Works* vs. *South Eastern Ry.*, Q. B. 1886, 31 L. C. J. 86; *Wyatt* vs. *Sénécal*, S. C. 1878, 4 Q. L. R. 76.

2. —— The appellant purchased at a bailiff's sale, held under a writ of *fieri facias de bonis*, for taxes, certain moveable effects forming the plant of a brewery (the proprietor of the brewery not objecting to the sale), and allowed the same to remain on the brewery premises on storage; the brewery was some months afterwards sold by the sheriff under a writ *de terris*, the plant being still thereon, and adjudged to the respondent. The appellant gave no notice of his claim on the goods, and filed no opposition to withdraw them, but, after the sale to respondent, sought to revendicate them in his hands—*Held*, dismissing the action, that the said effects were immoveables by destination, and, although the bailiff's sale had under the circumstances passed the property in the same to appellant, yet as he had allowed his property to be virtually included in the sheriff's advertisement of a brewery, he had only himself to blame if an innocent purchaser of the brewery retained all the plant which he found thereon when it was adjudged to him. *Budden* vs. *Knight*, Q. B. 1877, 3 Q. L. R. 273.

3. —— The constituent parts of a steam engine, as well as other parts of the machinery put and fixed in a building used as a carding mill, by the proprietor of such building, are immoveable, and the seizure thereof as moveables may be opposed by any one having a legal interest in the matter. *Philion* vs. *Bisson*, S. C. 1878, 23 L. C. J. 32.

4. —— The plaintiff seized, among other things, on the defendant railway, 3,000 railway sleepers, 1,950 railway fastenings, and a quantity of cord-wood and other things intended to be consumed in the running of the engines—*Held*, by all the judges, confirming the judgment of the court below, that the things so seized could not be considered im-

(1) This is only true in so far as the company placing the rolling stock on the railway is, at the time, owner both of the rolling stock and of the railway on which it is placed (see *Banque d'Hochelaga* vs. *Waterous Works Engine Co.*, Supreme Ct. 1897, 27 Can. S. C. R. 406), and so long as the rolling stock remains on the Company's road. (See remarks of Papineau J., in *Binks* vs. *Rector, etc.* 25 L. C. J., at p. 259.)

moveables by destination, under article 379 of our Code. *Wyatt* vs. *Levis & Kennebec* R. R. Co., C. R. 1880, 6 Q. L. R. 213.

5. —— Plaintiff also seized a quantity of office furniture, and other things of that kind, in daily use in the offices of the defendant, and described in the defendant's factum as "ameublement des bureaux—" Casault, J., held that the opposition ought to be maintained as regards some of the last-mentioned things, which, as he thought, were proved to be indispensable for the working of the railroad. Meredith, C. J., and Stuart, J., held that the opposition had been rightly dismissed, even as regards the last-mentioned things, there being no provision in our law such as is contained in the Code Napoléon in the following words: "Les objets que le propriétaire d'un fonds y a placés pour le service et exploitation de ce fonds sont immeubles par destination." (*Ib.*)

6. —— An organ placed in a church to be used in the public worship therein is an immoveable by destination. *Binks* vs. *Rector, &c., of Trinity Church*, S. C. 1881, 25 L. C. J. 258.

7. —— Machinery placed in a factory for the purpose of running the factory, although immoveable by destination, will nevertheless, where it is sold by judicial sale under a writ *de bonis*, be considered as moveable when removed from the factory. *Ville de Longueuil* vs. *Crevier*, S. C. 1886, 14 R. L. 116.

8. —— The mortgagee of an immoveable on which was placed certain machinery which had become immoveable by destination, cannot attach said machinery by attachment in revendication in the nature of a conservatory process in the hands of the defendant who has purchased the same in good faith. *Flannigan* vs. *Fee*, S. C. 1889, 13 L. N. 98.

9. **By Nature.**—The sale of Government timber limits is a sale of an immoveable. *Watson* vs. *Perkins*, Q. B. 1871, 18 L. C. J. 261.

10. —— Although the owner of a house is not the owner of the ground on which it stands, it is nevertheless an immoveable as long as it is not demolished, and is subject to the same hypothecs by which it was affected when it formed together with the ground a single property. *Chaloult* vs. *Bégin*, C. R. 1879, 5 Q. L. R. 119.

11. —— Buildings and improvements made by the occupant or usufructuary of land belonging to another are immovables, and can be mortgaged by such occupant or usufructuary. *Donais* vs. *Molleur*, C. R. 1881, 31 L. C. J. 141.

12. —— *Held*, that pipes and mains laid throughout the streets of a city by a gas and water company, under the authority of an Act of the Legislature, for the purpose of supplying gas and water to the inhabitants of the city, form part of the realty of the company and are taxable as real estate. *Sherbrooke Gas & Water Co.* vs. *Corporation of Sherbrooke*, C. Ct. 1891, 15 L. N. 22; *Lachute Town Corporation* vs. *Stuart*, C. Ct., 17th February, 1891.

IMPENSES ET AMELIORATIONS.

See Improvements.

IMPRISONMENT.

See Coercive Imprisonment—Habeas Corpus, etc.

1. A warrant of imprisonment issued against a person who has not been able to furnish sureties to keep the peace, must allege that the complainant declares he fears the accused will do him bodily harm, and if it does not contain such allegations the accused will be liberated on *habeas corpus*. *Gauthier* vs. *Caya*, Q. B. 1880, 10 R. L. 536.

2. But, *held*, that he could be arrested again and committed *de novo*, on the ground that he had not paid the costs of conviction, and that such costs need not be detailed in the new commitment. (*Ib.*), 10 R. L. 536.

3. The imposition of punishment by imprisonment for enforcing any law under the B. N. A. Act includes the power to impose its usual accompaniment, "hard labor." *Hodge* vs. *The Queen*, P. C. 1883, 28 L. C. J. 54.

4. On an application for a writ of *habeas corpus*—*Held*, that the general rule, that the period of imprisonment in pursuance of any sentence commences on and from the day of passing such sentence, does not suffer exception where the defendant is allowed to go at large after sentence without bail, and therefore where a defendant was allowed to go at large until the term of the sentence had expired, her commitment subsequently was held to be illegal. *Gervais Exp.*, Q. B. 1883, 6 L. N. 116.

5. In a similar case the commitment was held good as the term had not expired when it was made. *Hénault Exp.*, Q. B. 1883, 6 L. N. 121.

6. (Affirming the ruling in *Exparte Lefebvre*, 4 L. N. 253), that in any case tried under 32-33 Vict., c. 32, s. 2, ss. 3, 4, 5 or 6, if the prisoner be condemned to fine and imprisonment, hard labor cannot be added to the sentence of imprisonment. *Ex parte Carpenter*, Q. B. 1886, 9 L. N. 281.

7. That, under section 91 of chap. 29 of the 22 and 33 Vict., the term of imprisonment in pursuance of any sentence commences on and from the day of the passing of such sentence, and that the fact of the prisoner having become insane and having been transferred to an asylum during his term of imprisonment does not cause any interruption in the execution of the sentence. *Ex parte Armellini*, Q. B. 1886, 14 R. L. 311.

IMPROBATION.

I. Amendment of Declaration in.
II. Appeal in. 1-2.
III. Delays in. 1-4.
IV. Effect of.
V. Election of Domicile.
VI. Evidence in. 1-4.
VII. Exhibits in.
VIII. Motion to Reject.
IX. Proces-Verbal of Exhibit.
X. Stage at which it can be made. 1-3.
XI. Waiver of Right to.
XII. When it lies. 1-15.

I. AMENDMENT OF DECLARATION IN.

In an action in improbation—*Held*, reversing the judgment court below, that, even after the closing of the *enquête*, the plaintiff in improbation is entitled to amend his grounds of improbation, by adding thereto new facts brought out by the evidence adduced. *Perrault* vs. *Simard*, Q. B. 1856, 6 L. C. R. 24, 4 R. J. R. Q. 475.

II. APPEAL IN.

1. An appeal will lie from a judgment dismissing an improbation. *Beaudry* vs. *The Mayor, &c., of Montreal*, Q. B. 1886, 11 L. C. J. 28 and 17 L. C. R. 428.

2. Where a deed was declared to be false by a judgment of the Superior Court, the notary before whom it was executed, and who was one of the witnesses in the suit, was allowed to appeal on becoming transferee of the debt. *Defoy* vs. *Forte*, Q. B. 1879, 3 L. N. 36.

III. DELAYS IN.

1. A party will not be allowed to inscribe in improbation against a bailiff's return later than four days after the filing of the return, without cause shown. *Perry* vs. *Milne*, S. C. 1862, 6 L. C. J. 245.

2. Upon cause shown by affidavit, a party will be allowed to inscribe in improbation against a bailiff's return, after the four days limited by the rules of practice. (*Ib.*), 6 L. C. J. 243.

3. Where the defendant moved to be allowed to inscribe in improbation against a return of a bailiff, which certified that he served a true and certified copy of a judgment on the defendant, which was rendered on the 30th of April, 1861, and which required the defendant, within one month after the service upon him, etc., but in which copy the word "month" read "ninth"—*Held*, that the inscription might be allowed, even after the four days laid down in the Rules of Practice, on cause shown by affidavit. *Seymour* vs. *Horner*, S. C. 1862, 12 L. C. R. 90.

4. *Semble*, that copies of judgments served must be certified by the prothonotary of the court and not by attorneys. (*Ib.*)

IV. EFFECT OF.

The defendant in improbation (principal plaintiff) is not bound to answer the plea to the principal action before the improbation is terminated. *Martineau* vs. *Karrigan*, S. C. 1859, 3 L. C. J. 268.

V. ELECTION OF DOMICILE.

Not necessary. *Martineau* vs. *Karrigan* S. C. 1859, 3 L. C. J. 190.

VI. EVIDENCE IN.

1. In case of an improbation, with regard to a solemn testament, the witnesses to the will may be examined as witnesses, but their isolated evidence unsupported by other proof or presumption is not sufficient to maintain such inscription. *Lavallée* vs. *Demontigny*, S. C. 1859, 4 L. C. J. 47.

2. In the case of an improbation of a notarial deed and of the copy thereof produced, the party availing himself of such deed or copy is bound to produce the original deed or adduce reasonable evidence of its loss or destruction, his mere assertion that it has been so lost being wholly insufficient. And where

the judge is of opinion (as in present case) that forgery and perjury have been committed, he will, as a matter of duty, order the offenders to be prosecuted for their crimes. *Content* vs. *Lamontagne*, S. C. 1873, 17 L. C. J. 319.

3. A criminal conviction for forgery of the instrument attacked is conclusive evidence as to the falsity of the document. *Deadelin* vs. *Vincelette*, S. C. 1869, 14 L. C. J. 97.

4. In an action on a deed the defendant inscribed in improbation against it. The deed was very badly and illegibly written, and the subscribing witness swore positively that he was not present and did not sign it. The notary's daughter on the contrary swore that the witness was present and did sign it—*Held*, that the evidence of the witness should prevail, and the inscription was maintained. *Defoy* vs. *Forte*, Q. B. 1879, 3 L. N. 36.

VII. EXHIBITS IN.

The original minute of a notarial deed impeached in improbation is to be filed in most cases by the defendant in improbation *Paquet* vs. *Demers*, K. B. 18.. , 3 Rev. de Lég. 199.

VIII. MOTION TO REJECT.

The 108th Rule of Practice of the Superior Court is abrogated by Article 171 of the Code of Civil Procedure, and therefore a motion to declare the grounds of improbation inadmissible will not be allowed. *Mathieu* vs. *Barthe*, C. Ct. 1874, 5 R. L. 304.

IX. PROCES VERBAL OF EXHIBIT.

In case of improbation the *procès-verbal* of the exhibit attacked must be made immediately after its deposit. *Moreau* vs. *Leonard*, S. C. 1858, 2 L. C. J. 136.

X. STAGE AT WHICH IT CAN BE MADE.

1. According to the provisions of Article 164 of the Code of Civil Procedure, a party may inscribe in improbation at any stage of the case up to the closing of the *enquête*, the rule of practice of the 4th January, 1854, being repealed by that article. *Lynch* vs. *Duncan*, C. R. 1863, 15 L. C. J. 36.

2. An application to inscribe in improbation against the certificate of the prothonotary regarding the posting of a report of distribution will not be granted after the report has been homologated in favor of an opposant, who knew of the falsity complained of prior to the judgment homologating the report. *Pangman* vs. *Pauzé*, S. C. 1883, 27 L. C. J. 140.

3. A party cannot proceed by improbation against any document produced in a case after the closing of the *enquête*, where the facts on which the demand in improbation is founded were known to him before he pleaded to the merits. *Desilets* vs. *Trahan*, S. C. 1873, 5 R. L. 52.

XI. WAIVER OF RIGHT TO.

Where a defendant filed a petition in improbation, but omitted to move to set aside an inscription on the merits—*Held*, that he had virtually waived all pretensions to proceed on his inscription in improbation. *Phillips* vs. *Hart*, S. C. 1851, 1 L. C. R. 305.

XII. WHEN IT LIES.

1. Improbation cannot be had in regard to an instrument which bears none of the characteristics of authenticity. *Molson* vs. *Burroughs*, S. C. 1857, 2 L. C. J. 72.

2. A certificate of baptism from a register not authorized by law cannot be attacked by improbation. *Shaw* vs. *Sykes*, S. C. 1860, 5 L. C. J. 124.

3. If the grounds of improbation be such as will not, if proved, affect the deed impugned, they must be set aside. *Baby* vs. *Bernard*, K. B. 1810, 3 Rev. de Lég. 199.

4. In the case of a will, a suggestion that only one notary was present at the execution of the instrument is a reason for improbation. *Proulx* vs. *Proulx*, K. B. 1829, 3 Rev. de Leg. 199 and 2 Rev. de Lég. 61.

5. An inscription in improbation cannot be maintained against a notarial copy on account of a slight alteration or erasure, as in the present case, where the word "parties" had been altered so as to make it "party." *Halpin* vs. *Ryan*, Q. B. 1855, 5 L. C. R. 430, 4 R. J. R. Q. 463.

6. The correctness of a duly certified copy of a notarial deed may be attacked otherwise than by an inscription in improbation, and, therefore, the procedure by way of such inscription is unnecessary and ought to be rejected. *Dufresne* vs. *Lalonde*, S. C. 1876, 21 L. C. J. 105.

7. An inscription in improbation is not required to admit proof that money, the receipt of which is set forth in a deed, was really

never paid. *Doyon* vs. *Doyon*, C. R. 1871, 3 R. L. 445.

8. The certificate of the attorneys of one of the parties in a cause upon a copy of judgment, to the effect that it is a true copy, is not a falsity, nor is the return of the bailiff who served such a copy a falsity, and consequently improbation will not lie. *Perry* vs. *Milne*, S. C. 1862, 6 L. C. J. 243.

9. An omission in a deed by error or oversight does not constitute a ground for an action in improbation. *Sabine* vs. *Kraus*, C. R. 1872, 3 L. N. 267.

10. Improbation may be brought against a sheriff's title, even after it has been registered and after the property has passed into other hands by titles also registered, if the sheriff's title is false in any particular, and that at the instance of an interested creditor who has a hypothec for an annual rent omitted in the sheriff's title. *Carpenter* vs. *Dery*, Q. B. 1877, 5 Q. L. R. 311; and see *Société Permanente de Construction de Québec* vs. *Martin*, Q. B. 1880, 10 R. L. 619.

11. Where, to an action on a promissory note, the defendant filed a deed of composition and discharge subsequent to the maturity of the note, and the plaintiff attempted to prove by witnesses that the deed was not made at the date it bore—*Held*, that in no case could the truth of an authentic deed be called in question otherwise than by an inscription in improbation, save in the case of a bailiff's return. *Lewis* vs. *Frimeau*, S. C. 1883, 7 L. N. 39.

12. The resolutions of a joint stock company duly certified as such and filed in the case can only be attacked by improbation. *Desmarais* vs. *Mutual Benefit Society of Joliette*, S. C. 1882, 12 R. L. 198.

13. A certificate given by a judge of the sessions of the peace, setting forth that a recognizance for the appearance of a prisoner had been forfeited, is an authentic document, making conclusive evidence, and can only be contradicted by an improbation. *Reg.* vs. *St. Hilaire*, 1889, M. L. R., 5 S. C. 116.

14. An improbation is necessary in order to prove to the court that the writ of summons has been altered or falsified after it was issued. *Vendette* vs. *Bolduc*, S. C. 1893, 3 Que. 105.

15. The law having provided a method of ascertaining the falsity of acts by private writing, improbation will not lie to impugn such acts. *Lamarche* vs. *Brunelle*, Q. B. 1893, 3 Que. 74.

IMPROVEMENTS.

See also HYPOTHEC—USUFRUCT, etc.

I. NECESSARY IMPROVEMENTS.

II. ON LANDS OF ANOTHER. 1-11.

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V. SALE OF LANDS *à réméré*.

I. NECESSARY IMPROVEMENTS.

In an action against a *tiers-détenteur* by a hypothecary creditor—*Held*, following *Matte* vs. *Laroche* (4 Q. L. R. 65), that the terms of Art. 2072 C. C. as to the rights of the *tiers détenteur* for expenses and improvements were restricted, and referred only to necessary expenses and improvements of value. *Bricault* vs. *Bricault*, S. C. 1881, 11 R. L. 163.

II. ON LANDS OF ANOTHER.

1. Possessor of land in bad faith has no right of retention for improvements thereon. *Lane* vs. *Deloges*, S. C. 1856, 1 L. C. J. 3.

2. Plaintiff instituted a petitory action to recover possession of a parcel of land and its appurtenances in the township of Barnstown. The plaintiff derived his title from the patentee of the land in question, the letters patent bearing date June 27th. The demand was for possession, rents, issues and profits and for damages. Defendant pleaded possession, peaceably and openly, for thirty years and more, and had acquired title by prescription; that he had made valuable improvements, and should be authorized to retain possession until he had been paid for his improvements, or that he be permitted to remove them. The proof was that he had occupied for fifteen years, and had erected buildings on the property worth £125, which rendered the improvements worth altogether from £200 to £250—*Held*, that he was entitled to judgment for such improvements, and to retain possession until paid; and the proper mode of establishing the value of such improvements was by an *expertise*. *Stuart* vs. *Eaton*, S. C. 1857, 8 L. C. R. 113, 6 R. J. R. Q. 157.

3. In an action under the Squatter's Act, if the defendant prove that his possession of the plaintiff's land was with the knowledge of the plaintiff's agents, and that he had paid the taxes and made ameliorations, also to the knowledge of such agents, he is entitled to re-

cover the value of his ameliorations, and to retain possession of the land till he is paid the value of such ameliorations. *Ellice* vs. *Courtemanche*, Q. B. 1867, 11 L. C. J. 325, 17 L. C. R. 423.

4. A squatter, entering upon lands with a knowledge that he has no right to do so, and without making proper enquiries as to the real owner of such lands, will be held to have been in bad faith, and has no claim against the proprietor nor any lien upon such lands for the improvements he has made thereon during his occupancy with his own materials. *Gallarneau* vs. *Chrétien*, C. R. 1881, 10 Q. L. R. 83.

5. But where the Crown brings a petitory action, the defendant cannot claim the right to retain possession of the lands in question until payment of the value of his improvements. *Thompson* vs. *Desmarteau*, 1890, M. L. R., 6 S. C. 379.

6. A defendant who has made permanent and durable improvements upon a lot of land sought to be recovered by petitory action, has a right to be indemnified to the extent of the increased value given by such improvements to the lot, before being compelled to abandon the same. *Lawrence* vs. *Stuart*, Q. B. 1856, 6 L. C. R. 294.

7. A possessor in good faith is entitled to his ameliorations and to retain the lands until paid, and is not liable for the rents, issues and profits accrued previous to service of process. *Knowlton* vs. *Clark*, Q. B. 1864, 9 L. C. J. 243, *Nugent* vs. *Mitchell*, Q. B. 1887, 19 R. L. 569.

8. And he is entitled to the rents, issues and profits until paid for his improvements, at the charge of accounting to the owner of the land for the same. *Dufour* vs. *Dufour*, C. Ct. 1883, 10 L. N. 305.

9. The owner of a building erected on the land of another may, by registration of his deed conveying such building to another, acquire a real right on the improvements. *Prudhomme* vs. *Scott*, C. R. 1885, M. L. R., 2 S. C. 63, 30 L. C. J. 156; *Chaloult* vs. *Bégin*, C. R. 1879, 5 Q. L. R. 119; *Donais* vs. *Molleur*, C. R. 1887, 31 L. C. J. 141.

10. Such improvements are immoveable. (*Ib.*)

11. Where a third party erects buildings on the lands of another, he should take away such buildings at the time of surrendering the immoveable, and, unless he does so within a reasonable time, and the immoveable is sold with the improvements, he cannot claim their value by an opposition *afin de conserver*. *D'Orsennens* vs. *Christin*, Q. B. 1885, 30 L. C. J. 9.

III. RIGHT OF OWNER OF LAND TO, AS AGAINST UNPAID VENDOR IN THE EVENT OF SHERIFF'S SALE.

1. The owner of an immoveable which has been sold by the sheriff in execution of a judgment recovered by an ordinary personal creditor, can claim, as against claim of an unpaid vendor, for which he is not personally liable, to be paid the value of his improvements of said immoveable. *Compagnie de Prêt et de Crédit Foncier* vs. *St. Germain*, Q. B. 1881, 26 L. C. J. 39.

2. A personal creditor of such owner, having an hypothec on said immoveable, can legally exercise the right of such owner so to claim said improvements, in the absence of any action on the part of such owner. (*Ib.*)

3. The value of the claim of such owner must be settled by *contitation*. (*Ib.*)

4. Said claim for improvements need not be registered. (*Ib.*)

IV. RIGHTS OF LEGATEE TO.

Where a legatee by particular title is sued by a creditor of the estate to abandon the immoveable bequeathed to him, his right to improvements is not based on Art. 419 C. C., but he has a privilege on the price of the immoveable sold, under Art. 2072 C. Code. *Mattè* vs. *Laroche*, Q. B. 1878, 4 Q. L. R. 65.

V. SALE OF LAND A REMÉRÉ.

A clause of a deed of sale *à réméré* by which the vendor stipulates that the purchaser shall complete the works in progress on the immoveable sold, will not prevent the purchaser when sued hypothecarily from claiming a privilege for improvements. *Leprohon* vs. *De Bellefeuille*, 1884, M. L. R., 1 S. C. 156.

IMPUTATION OF PAYMENTS.

See PAYMENTS.

INCIDENTAL DEMAND.

See PROCEDURE—USUFRUCT.

INDECENT EXHIBITION.

See MUNICIPAL CORPORATION.

1. A by-law of the city of Montreal providing for the imprisonment of anyone exposing, sell-

ing or offering for sale an immodest or indecent object is *intra vires*. *Cité de Montréal* vs. *Sharpley*, Rec. Ct. 1886, 9 L. N. 148.

2. The Recorder's Court has jurisdiction to try offences under such by-law. (*Ib.*)

3. The fact that a piece of statuary is a work of art, or a copy after the work of a master, is not a good defence in an action under the by-law for exposing for sale in a window an indecent work of art and one which would corrupt public morals. (*Ib.*)

INDIANS. (1)

See also INTOXICATING LIQUORS.

1. Appeal under the Indian Act.—(See also under title "APPEAL TO QUEEN'S BENCH — SECURITY IN"). — Upon an appeal from a magistrate's conviction, under the Indian Act, the duty is imposed upon the judge not only of hearing the appeal, but of receiving evidence, whether such evidence was heard before the justice or not. *Jackson* vs. *Lefort*, S. C. 1887, 15 R. L. 636.

The sections of the Summary Convictions Act having reference to appeals have to be applied to appeals under the Indian Act. (*Ib.*)

Save as to objections on the face of the record which the appellant has to urge, the respondent ought to begin. (*Ib.*)

An exception contained in the clause enacting the offence ought to be negatived, but, if it be in a subsequent clause or section, it is matter for defence and need not be negatived. But the omission is in any event not fatal. (*Ib.*)

2. Exemption from Seizure.—The furniture and moveable effects generally of Indians are exempt from seizure, and are comprehended under the expression "property" used in the Statute respecting the Indians, 39 Vict., ch. 18. *Lepage* vs. *Walsh*, C. Ct. 1878, 22 L. C. J. 97, 4 Q. L. R. 81; *Durand* vs. *Sioui*, C. Ct. 1878, 4 Q. L. R. 93.

3. Lands.—The sale of Indian lands without the authority of the commissioner is illegal. *Commissioner of Indian Lands* vs. *Jannel*, C. R. 1865, 1 L. C. L. J. 111.

4. —— In an action concerning Indian lands—*Held*, confirming the judgment of the court below, that since the passing of the law respecting Indians and Indian lands (C. S. L. C., cap. 14), all rights of action relating to those lands, whether founded upon ownership or occupancy, are vested in the commissioner appointed under that act, and no individual member of an Indian tribe can maintain a real action in his own name concerning lands appropriated for the use of the tribe. *Bastien* vs. *Hoffman*, Q. B. 1867, 17 L. C. R. 238.

5. —— Indians have not by law any right or title by virtue whereof they can sell and dispose of the wood growing upon their lands set apart and appropriated to and for the use of the tribe or body of Indians therein residing, and such wood is held in trust by the Commissioner of Indian Lands in Lower Canada. *Commissioner of Indian Lands for L. C.* vs. *Payant*, S. C., 1856, 3 L. C. J. 313.

6. Rights of—How determined—Minors — Appointment of Tutor. — The rights of Indians are regulated and determined by the Indian Act (R. S. C., ch. 43), and not by the common law, which does not apply to them. A tutor to an Indian minor should be appointed through the ministry of the Superintendent General of Indian affairs, as indicated in said Act (sec. 20, sub.-sec. 8), and such tutorship conferred by the prothonotary, in the ordinary way, is of no effect. *Tiorahiata* vs. *Toriwaieri*, 1891, M. L. R., 7 S. C. 304.

(1) Amendments to the Indian Act, R. S. C., ch. 43, 51 Vict., ch. 22. 53 Vict., ch. 29. 54-55 Vict., ch. 30, 57-58 Vict., ch. 32.

An act for the settlement of certain questions between the government of Canada and Ontario, respecting Indian lands, 54-55 Vict., ch. 5.

IN FORMA PAUPERIS.

See PROCEDURE.

INJUNCTION. (1)

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IX. FOREIGN.
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(1) See cases of Injunction by telegraph reported in 3 L. N. 265 (English Case) and 5 L. N. 409 (American Case).

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To Restrain taking of Tolls. 41.
To Restrain Use of Trade Mark. 42-43.
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Where Question of Title involved. 45-46.
See also "Municipal Corporations."

I. ACTION NEGATOIRE.

The judgment in an action *negatoire* is in the nature of an injunction in chancery. *Savard* vs. *Moisan*, K. B. 1820, 1 Rev. de Lég. 378.

II. ADDRESS OF WRIT.

It is not necessary that the writ of injunction should be addressed to the party against whom it is sought. It can be addressed to the bailiffs of the district, commanding them "to summon the party to appear on a stated day to answer the petition annexed thereto, and to enjoin him, etc. *Corporation de Becuport* vs. *Cie. du Chemin de Fer*, Q. M. & C., S. C. 1888, 15 Q. L. R. 1.

III. APPLICATION FOR WRIT.

1. An application for an injunction enjoining the directors of company not to declare a specified dividend, must be preceded by notice; and the affidavit in support of the application will be held insufficient if it merely alleges information and belief. *Kane* vs. *Montreal Telegraph Co* S. C. 1876, 20 L. C. J. 120.

2. Case in which notice was held not necessary. *Boldue* vs. *Prevost*, Q. B. 1886, 31 L. C. J. 68.

3. The affidavit required by the Injunction Act (41 Vict., ch. 14, Q. 1878) is sufficient if it affirms generally the truthfulness of the allegations set forth in the petition without detailing the facts, and if deponent affirm to the best of his knowledge and belief that the facts referred to in the affidavit are true. *Central Vermont Railroad Company* vs. *Corp. of St. Johns*, S. C. 1885, 13 R. L. 313; *Lefebvre* vs. *Corporation de St. Aimé*, S. C. 1886, 14 R. L. 476; *Coté* vs. *Corp. St. Augustin*, C. R. 1887, 13 Q. L. R. 318.

4. An injunction may be applied for at the beginning of the suit, as well as during its pendency. *Canada Paint Co.* vs. *Johnson*, S. C. 1893, 4 Que. 253.

IV. CONTEMPT OF COURT.

An order of injunction, no matter under what circumstances obtained, must be implicitly observed, so long as it exists. *Clint* vs. *Quebec Harbour Commissioners*, S. C. 1888, 14 Q. L. R. 343 (*Joly* vs. *Macdonald*, Q. B. 1878, 23 L. C. J. 16, commented upon).

V. DAMAGES FOR MALICIOUSLY ISSUING.

Where a registered shareholder of a company finding the annual reports of the company misleading applies after notice for a writ of injunction to restrain the company from paying a dividend, and upon such application the company do not deny even generally the statements and charges contained in the plaintiff's affidavit and petition, there is sufficient

probable causes for the issue of said writ, and consequently the defendant, who upon the merits has succeeded in getting the injunction dissolved, has no right of action for damages resulting from the issue of the injunction. *Montreal Street Ry. Co.* vs. *Ritchie*, Supreme Ct. 1889, 16 Can. S. C. R. 622. Confirming Q. B., M. L. R., 5 Q. B. 77, 18 R. L. 12, and S. C., M. L. R., 3 S. C. 232.

VI. DELAYS.

1. Injunction to restrain one H., of the City of Montreal, from publishing in Canada certain books containing articles prepared for the Encyclopedia Britannica, the latter work having been registered by the appellants, under the Copyright Act of 1878. The respondents came in by intervention, and filed a preliminary plea on the ground that only four days' delay had been allowed in the service—*Held*, affirming the decision of the court below, that, as the case did not fall within any of the cases provided for by the Injunction Act of 1878, the delay should be the same as in ordinary suits. *Black* vs. *Stoddart*, Q. B. 1881, 1 L. N. 282 and 1 Dorion's Q. B. R. 287.

2. Where the proper delay has not been allowed between service and return, the objection can only be raised by preliminary exception, and such exception, unless accompanied by a deposit of the sum of money fixed by the rules of practice, is irregular, and must be rejected. *Canada Paint Co.* vs. *Johnson*, S. C. 1893, 4 Que. 253.

VII. DISSOLUTION.

An injunction may be dissolved by the court, notwithstanding it appears that proceedings for contempt are pending before another judge, against the party against whom the injunction issued, for disobedience thereto. *Marcil* vs. *Cité de Montreal*, C. R. 1893, 3 Que. 346.

VIII. DISCRETION OF COURT IN GRANTING. (See also *infra* "When it Lies.")

1. The Superior Court has a discretionary power, under the Q. S., 41 Vic., ch. 14, to issue a writ of injunction to the City of Montreal, ordering the city to suspend proceedings before the Recorder's Court, for the enforcement of an alleged illegal by-law, and this, even when the question of the validity of the by-law is pending before the Court of Appeal, but such discretion will only be exercised in the case of irreparable injury, especially if the injunction will cause serious injury to the city; and the condemnation to a fine, subject to imprisonment in default of payment, does not constitute such a case of irreparable injury. *Mallette* vs. *City of Montreal*, S. C. 1879, 24 L. C. J. 264.

2. The issuing as well as the quashing of a writ of injunction are entirely within the discretion of the court or judge. *Dobie* vs. *Board of Temp.*, S. C. 1879, 9 R. L. 574.

3. Where petitioner makes it appear that the defendant corporation has acted *ultra vires* in claiming taxes from the petitioner under 41 Vict., ch. 14, Que. 1878, this will be a ground for issuing the injunction, although the petition does not state that the injury complained of will be irreparable, and does not allege that the petitioner has no other remedy, this being in the discretion of the Court at the trial on the merits. *Central Vermont Ry. Co.* vs. *Corp. of St. John*, S. C. 1885, 13 R. L. 313.

IX. FOREIGN.

Although an injunction issue from an Ontario Court, restraining defendant from proceeding with a suit, the Superior Court of the Province of Quebec can, nevertheless, allow the defendant to take proceedings of an urgent character in such suit, without the latter incurring contempt of court as regards the Ontario Court. *Baxter* vs. *Howlett*, S. C. 1890, 20 R. L. 503.

X. FORM OF WRIT.

Held, reversing judgment of Superior Court, that a writ of injunction in the form of an ordinary writ of summons is sufficient. *Prefontaine* vs. *Cité de Ste. Cunegonde*, Q. B. 1894, 3 Que. 429.

XI. LACHES.

A delay of several months in commencing proceedings, after knowledge of all the material facts on which the plaintiff relies, will not bar his right to the remedy by injunction. *Canada Paint Co.* vs. *William Johnson & Sons*, S. C. 1893, 4 Que. 253.

XII. JOINDER OF SEVERAL INJUNCTIONS.

Several petitioners can unite in obtaining one injunction to restrain a municipal corporation from opening a road through petitioners' property. *Laferté* vs. *Corp. St. Aimé*, S. C. 1886, 14 R. L. 476.

XIII. MOTION TO QUASH.

An injunction can be quashed on a motion presented at the same time as an exception to the form and a declinatory exception. *Cie. du Ch. de Fer Atl. Can.* vs. *Stanton*, Q. B. 1885, 14 R. L. 35.

XIV. PROVISIONAL.

1. In a suit attacking the validity of an alleged transfer of the telegraph lines, and franchises and privileges of a telegraph company, the Court will not grant, before return of the action, an interlocutory order restraining the company from raising the rates of transmission in pursuance of the agreement, and where such petition was presented it was ordered to be joined to the principal demand and to stand until final judgment. *Low* vs. *Montreal Telegraph Co.*, S. C. 1881, 4 L. N. 293.

2. The provisional injunction or restraining order is assimilated to the writ of *mandamus*, and exists in our law in cases other than those specified in the Act, 41 Vic., cap. 14 (Q). *Crawford* vs. *Protestant Hospital for the Insane*, 1888, M. L. R., 4 S. C. 215.

3. A patentee during the pendency of an action instituted by him to restrain the infringement of his patent, is entitled to an *interim* injunction under 35 Vic. (D.), ch. 26, s. 24, on the production of affidavits that his patent is being infringed by the defendant, and further, of a judgment in another case, establishing that he (the plaintiff) had successfully maintained an action complaining of a similar infringement. *Baril* vs. *Pariseau*, S. C. 1879, M. L. R., 2 S. C. 352.

XV. SECURITY.

1. A private letter, whereby signers bind and oblige themselves jointly and severally to be responsible for and to pay the costs and damages which may be suffered by the respondents, etc., is not a compliance with the Quebec Injunction Act of 1878, 41st Victoria, ch. 14, s. 4, which provides that a writ of injunction shall not issue unless the person applying therefor first gives good and sufficient security in the manner prescribed by and to the satisfaction of the Court or a judge thereof. *Board of Management of Presbyterian Church* vs. *Dobie*, Q. B. 1878, 23 L. C. J. 229.

2. The Provincial Injunction Act of 1878, requiring security to be given before an injunction is granted, does not apply to an injunction under the Dominion Patent Law. *Baril* vs. *Pariseau*, 1879, M. L. R., 2 S. C. 352.

3. In an action to have the union of the various Presbyterian churches in Canada declared illegal, etc., etc., accompanied by a writ of injunction under the provisions of the Quebec Statute, 41 Vic., ch. 14, the defendants are entitled to demand security for costs under Art. 29 of the Civil Code (the plaintiff being a resident of Ontario), notwithstanding that security has been previously given (as regards the injunction proceedings) under section 4 of said Statute. *Dobie* vs. *The Board of Management of The Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland*, S. C. 1879, 23 L. C. J. 71.

4. The making of such demand is not a waiver of the right of the defendants to ask for an increase of security under the injunction proceedings under section 4 of said Statute. (*Ib.*)

5. The application for such increase may be made after the return day of the writ of summons, and within a reasonable time thereafter. (*Ib.*)

XVI. SUSPENSION DURING APPEAL.

1. The Court of Q. B., on application for a writ of appeal from a judgment of the S. C. refusing to set aside an injunction improperly issued, will suspend the injunction till final judgment on the appeal, and this notwithstanding that the writ of injunction has been violently disregarded by the appellants. *Joly* vs. *Macdonald*, Q. B. 1878, 23 L. C. J. 16. But see *Clint* vs. *Harbour Commissioners*, S. C. 1888, 14 Q. L. R. 313.

2. Inscription in Review suspends the writ of injunction. *Tiernan* vs. *Cie. de Chemin de Fer M. O. & O.*, Q. B. 1876, 8 R. L. 375.

XVII. SUFFICIENCY OF WRIT.

The injunction contained in a writ enjoining the defendants from continuing operations mentioned in the petition annexed to the writ is sufficient. *Laferté* vs. *Corporation Ste. Aimé*, S. C. 1886, 14 R. L. 476.

XVIII. WAIVER.

Judgment dismissing plaintiff's petition for a permanent injunction on the grounds:— 1st. Because the works were completed before the writ was served, and as the writ

called for the discontinuance of the works it could not be granted. 2nd. Because plaintiff had waived his right to his recourse by injunction, because he had allowed his claim to be referred to arbitration. *Poudrette* vs. *Ontario and Quebec R. R. Co.*, S. C. 1888, 11 L. N. 130.

XIX. WHEN IT LIES.

1. **In General.**—*Held*, that the courts and judges here have the power which existed in France under another name, and in England and the United States under the name of a writ of injunction, to restrain parties to a suit from doing anything that might change the position of the parties from what it was at the institution of the action. *Carter* vs. *Breakey*, S. C. 1876, 2 Q. L. R. 232.

2. —— The writ of Injunction is a civil remedy provided and regulated by the laws of England for the protection of property and the maintenance of civil rights, and the Imperial Statute, 14 Geo. III., chap. 83, sec. 8, having enacted in effect that, in the Province of Quebec "in all matters of property and civil rights, resort should be had to the laws of Canada as the rule for the decision of the same," and that all suits respecting such property and civil rights should "be determined agreeably to the said laws and customs of Canada" until changed by subsequent legislation; and the proceeding by Injunction not having been established by any subsequent legislation applicable to the said province, it cannot be allowed as a general remedy, or as a remedy in a case such as the present. *Carter* vs. *Breakey*, S. C. 1877, 3 Q. L. R. 113.

3. —— The powers, of a civil nature, of the Court of King's Bench and of the judges thereof, as created, defined and regulated by the provincial statute, 34 Geo. III., chap. 6, sec. 8, and now vested in the Superior Court, and in the Judges thereof, do not include the power of granting writs of injunction. (*Ib.*)

4. —— Although for the reasons above mentioned the writ of injunction never has been, and is not now, in this province, a legal remedy excepting in particular cases provided for by the Legislature, of which cases the present case is not one, yet, the prerogative writ of *mandamus*, which is generally used "for public purposes, and to compel the performance of public duties," has, at all times, since this province became a British colony, been a legal remedy therein, as an incident to the public law of the Empire. (*Ib.*)

5. —— The writ of injunction and the writ of *mandamus*, although they may, in some cases, produce "nearly identical effects," are not in principle, nor generally speaking, the same; and, therefore, the article 1022 of the Code of the Civil Procedure, expressly allowing the writ of *mandamus*, in certain cases, cannot be considered as tacitly allowing the writ of injunction in the same cases. (*Ib.*)

6. —— Even if the writ of *mandamus* and the writ of injunction ought to be considered as substantially the same, nevertheless the plaintiff would not be entitled to a writ of injunction in this case, it not being one in which a writ of *mandamus* would lie. (*Ib.*)

7. —— The present case is, in principle, distinguishable from the case of *Bourgouin* vs. *The M. N. C. Railway Company*, the grounds upon which it was held by the Court of Appeals that the plaintiff there could have maintained a *mandamus* not appearing in the present case. (*Ib.*)

8. —— It does not appear that a writ of injunction has ever been enforced in this province by final judgment in a case such as the present, and however desirable it may be that the procedure by injunction should be established by the Legislature, the attempt to introduce it by merely judicial authority would be equally dangerous and illegal. (*Ib.*)

9. —— In order to obtain a writ of injunction the petitioner must show a clear and indisputable right thereto, and that without such remedy he will well suffer a serious injury. *Delaney* vs. *Guilbault*, S. C. 1890, 19 R. L. 541; *White* vs. *Whitehead*, S. C. 1884, 7 L. N. 292; *Dobie* vs. *Board of Temporalities*, S. C. 1879, 9 R. L. 571; *Mallette* vs. *City of Montreal*, S. C. 1879, 24 L. C. J. 264.

10. —— And that he cannot obtain efficacious relief by any other form of action. *Webster* vs. *Watters*, Q. B. 1891, 21 R. L. 447; *Fish* vs. *Corp. d'Argenteuil*, S. C. 1891, 3 Themis 87.

11. —— The plaintiff must show that the inconvenience he will suffer by a refusal of the writ will exceed the inconveniences caused to the defendants in the event that the writ should issue. *White* vs. *Whitehead*, S. C. 1884, 7 L. N. 292.

12. —— The issue and quashing of a writ of injunction are entirely in the discretion of the court or judge. *Dobie* vs. *Board of Temporalities*, S. C. 1879, 9 R. L. 574.

13. —— The Injunction Act, in providing that the court or judge may grant a writ in certain cases under certain conditions, does not expressly or impliedly take away the common law right to an injunction in other cases which may not come under its provisions. *Canada Paint Co.* vs. *Johnson*, S. C. 1893, 4 Que. 253.

14. Against Commissioners of Public Works.—An injunction issued against the Commissioner of Public Works of the Province of Quebec, who takes possession of a public work in course of construction under the authority of the Public Works Act, will be set aside as improperly issued. *Joly* vs. *Macdonald*, Q. B. 1879, 23 L. C. J. 16, 10 R. L. 391.

15. Against Montreal Harbour Commissioners.—Where an injunction was demanded against the Harbour Commissioners of Montreal, on grounds which concerned the public generally—*Held*, that as the defendants' trust was not of a private but of a public nature, the proceedings should have been in the name of the attorney-general, and the demand was refused. *St. Lawrence Grain Elevating Co.* vs. *Harbour Commissioners*, S. C. 1879, 2 L. N. 197.

16. Against Co-Partners.—The plaintiff asking an injunction had addressed a letter to the defendants, his co-partners, proposing a dissolution on certain terms. That was on the 14th November, and he gave them until the 24th at 4 p.m. to accept. They made a declaration of acceptance before a notary on the 22nd of November, and that declaration was notified to the petitioner on the 24th. Plaintiff wishing to withdraw the offer asked for an injunction to restrain them from going on with the business. Order refused. *Demers* vs. *Lamarche*, C. R. 1880, 3 L. N. 117.

17. Against Quebec Harbour Commissioners.—An interim order of injunction will lie to restrain the Quebec Harbour Commissioners from proceeding on an arbitration under 39 Vict., ch. 62, sec. 14, where it is made to appear that such arbitration has already been held, and suit has been brought and is pending to recover the amount of the award. *Clint* vs. *Quebec Harbour Commissioners*, S. C. 1888, 14 Q. L. R. 343.

18. Against Municipal Corporations—The Superior Court has a discretionary power, under 41 Vict. (Que.), cap. 14, to issue an injunction to the city of Montreal, ordering the city to suspend proceedings before the Recorder's Court for the enforcement of an alleged illegal by law; and this even when the question of the validity of such by law is pending before the Court of Appeal. *Mallette* vs. *City of Montreal*, S. C. 1879, 24 L. C. J. 264.

19. —— On an application by a ratepayer for a provisional injunction to prevent the Corporation of Montreal and its officers from completing a contract with a gas company, which had been authorized by a resolution of the City Council—*Held*, that the order asked for would be useless, as the signatures of the Mayor and City Clerk to the writing evidencing the contract would not affect the rights of the parties, the illegality alleged, if it existed, being as effectual against the contract when signed as before. *Stephens* vs. *City of Montreal*, S. C. 1884, 7 L. N. 114.

20. —— When a municipal corporation exceeds its powers, a writ of injunction will lie against it. *Côté* vs. *Corp. de St. Augustin*, C. R. 1887, 13 Q. L. R. 348; *Quebec Warehouse Co.* vs. *Town of Lévis*, Supreme Ct. 1885, 11 Can. S. C. R. 265.

21. —— A writ of injunction will not lie against the town of St. Johns on the ground that its valuation of property is excessive, as the town's charter provides another mode of rectifying the valuation. *Central Vermont Ry. Co* vs. *Corp. of St. Johns*, S. C. 1885, 13 R. L. 343.

22. —— The Act 41 Vict. (Que.), cap. 14, does not authorize a writ of injunction to attack the validity of a municipal by law. *Fish* vs. *Corp. d'Argenteuil*, S. C. 1881, 3 Themis 87.

23. Against Railway Companies illegally taking Possession of Land.—The court not only has jurisdiction to interfere to restrain a company from affecting a man's land by deviating from the exact limits prescribed by the statute which gives them authority, but is almost bound to interfere, and will, as a matter of course, interfere, unless the damage is so slight that no injury has arisen, or is likely to arise, or unless the injury, if any has arisen, is so small as to be hardly capable of being appreciated by damages, or unless the remedy by action of damages is adequate and sufficient, or is, under the circumstances of the case, the proper remedy, or unless the trespass is one merely of a temporary nature. So where a railway company commenced works on the lands of a person without obtaining a warrant

of possession under the statute—*Held*, that it was a proper case for an injunction. *Everse* vs. *N. W. Ry. Co.*, 1886, M. L. R., 2 S. C. 290.

24. —— A writ of injunction will lie against a railway company which commences work on the lands of a person without having taken the proceedings and made the deposit required by the Railway Act. Such writ can be obtained by an owner of undivided property even where his co-proprietor consented to the possession of the railway company. *Cie. de Ch. de Fer de Beauharnois* vs. *Bergevin*, Q. B. 1889, 17 R. L. 113, and *Ib.* vs. *Hainault*, 17 R. L. 116.

25. Against Railway Commissioners.—Where the railway commissioners were proceeding with an expropriation of the property of petitioners—*Held*, that an order of the court would issue to prevent an illegal act without having recourse to a mandamus, and that in such case the service may be made at the elected domicile of the defendants. *Bourgoin* vs *Malhiot*, S. C. 1878, 7 L. N. 286.

26. Breach of Contract.—Article 1033*a*, § 3, C. P. C., says an injunction lies "whenever any person does anything in breach of "any written contract or agreement."—*Held*, 1. An injunction lies where the defendant, though not himself a party to the written contract, stands in the place of one who was a party, *e.g.*, where he has purchased a business and the good will thereof from a person to whom it was conveyed by the written contract, and the party asking for the injunction complains of a breach of such contract. *Canada Paint Co.* vs. *Johnson*, S. C. 1893, 4 Que. 253.

27. Demolition of Works.—The Injunction Act, 41 Vict., chap. 14, only extends to the suspension of works complained of, and not to the demolition of those already made. *Corporation of Sherbrooke* vs. *Sherbrooke Telephone Co.*, S. C. 1889, 12 L. N. 354. Confirmed in appeal, M. L. R., 6 Q. B. 100. (See remark of Johnson, J., on this point in *Municipalité de Pointe Claire* vs. *Cie. de Péage de Pointe Claire*, C. R., 1882, 5 L. N. 259.)

28. —— Where a landlord proceeds to make extensive improvements to premises leased by him, without the consent of the tenant, the latter can restrain him from proceeding by writ of injunction. *Bolduc* vs. *Prévost*, Q. B. 1886, 31 L. C. J. 68.

29. Pendente Lite.—A writ of injunction may be issued *pendente lite*. *Dupré* vs. *Hamilton*, K. B. 1816, 2 Rev. de Leg. 438; *Canada Paint Co.* vs. *Johnson*, S. C. 1893, 4 Que. 253.

30. To Prevent Encroachment.—The remedy by writ of injunction does not lie where another adequate remedy exists; and so, in the case of a dispute between adjoining proprietors of mining lands, where an encroachment is complained of, and it appears that the limits of the respective properties have not been legally determined by a *bornage*, an injunction will not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage*. *Anglo-Continental Guano Works* vs. *Emerald Phosphate Co.*, 1891, M. L. R., 7 Q. B. 196, 21 R. L. 288. (Appeal to Supreme Ct. quashed for want of juridiction, 21 Can. S. C. R. 422.)

31. To Prevent Illegal Proceedings by Member of an Inferior Tribunal.—The Superior Court has authority to issue a provisional order, on a writ of *quo warranto*, to prevent an illegal proceeding by a member of an inferior tribunal, such as the Board of Revisors acting under 37 Vict. (Que.), ch. 51, for the revison of the voters' lists. *Lamontagne* vs. *Stevenson*, S. C. 1883, 6 L. N. 53.

32. To Prevent Multiplicity of Suits (Bill of Peace).—Where several plaintiffs are each claiming a right against the same defendant, or where several defendants are sued separately by the same plaintiff, and it appears there is but a single question on the determination of which all the suits must depend, the Court may, in its discretion, grant an injunction to stay proceedings upon the several contestations until the question involved therein shall be determined in an action brought specially for the purpose of testing it. *North British and Mercantile Ins. Co.* vs. *Lamb*, S. C. 1882, 27 L. C. J. 222.

33. To Restrain the Cutting of Timber on Limits.—The holder of a location ticket obtained from the Crown for good consideration, and who has had for a long time the possession of public lands, is in the position of a *bona fide* possessor of real estate with a promise of sale, and is entitled to an injunction to restrain another person who is a lessee of Crown timber limits, under a license from the Commissioner of Crown Lands for the Province of Quebec, from cutting timber on lots occupied by him; and it does not matter that the location ticket might be null and illegal, as granted without authority by the Public Lands Department, until the question

is settled by the Courts of Justice. *Gilmour* vs. *Mauriot & Allaire*, P. C. 1889, 14 App. Cas. 645. Reported *sub nom. Gilmour* vs. *Paradis* in 33 L. C. J. 231.

34. To Restrain Corporate Meeting.—An individual shareholder in a railway company will not be entitled to an injunction forbidding a special meeting for the purpose of sanctioning a lease of the road to another railroad, until a meeting has been called, at which the accounts of the company have been submitted, unless fraud by the majority or corrupt influence upon the minority have been proved. *Angus* vs. *Montreal Portland and Boston Ry. Co.*, S. C. 1879, 23 L. C. J. 161, 2 L. N. 203.

35. To Restrain Execution of Judgment.—Application to a judge of the Queen's Bench in Chambers was made for an injunction to restrain the City of Montreal from executing a judgment of the Recorder's Court, pending an appeal from a judgment of the Superior Court, affecting the same matter. Application rejected, on the ground *inter alia* that it was very doubtful whether the Queen's Bench had power to issue such an order. *Mallette* vs. *City of Montreal*, Q. B. 1879, 2 L. N. 379.

36. —— But, on a subsequent application to the Superior Court—*Held*, that that Court had the power to issue such order, but would not exercise it unless the party petitioning were without other remedy and exposed to irreparable injury, especially if the issue of the injunction would cause serious injury to the party enjoined. (*Ib.*) S. C. 1879, 2 L. N. 399, and 24 L. C. J. 264.

37. To Restrain from Proceeding with a Bill of Complaint in Chancery in Ontario.—Since the passing of the Quebec Statute 41 Vic., ch. 14, injunctions can only be legally granted in the cases and instances specified in that Statute, and therefore the S. C[illegible] no jurisdiction to restrain (by injun[illegible], one of the parties to a suit, who resides in Montreal, from proceeding with a bill of complaint in chancery in the Province of Ontario, instituted by him since the service of this action, and wherein the matters proposed to be litigated are the same as in the present suit. (*Parent* vs. *Shearer*, S. C. 1879, 23 L. C. J. 42, 2 L. N. 125.

38. —— Even if the Court had jurisdiction in the premises, the application must be refused, inasmuch as it appears that the questions at issue are governed by the laws of Ontario, and consequently the right claimed will be more conveniently discussed under the bill of complaint in chancery. (*Ib.*)

39. To Restrain Issue of Debentures.—A writ of injunction was refused under the circumstances of this case, to restrain the town of Fraserville from issuing debentures to the Temiscouata Railway Co. as a *bonus*, granted under a by-law duly passed and approved by vote of the tax-payers. *Bélanger* vs. *Cie du Ch. de Fer de Temiscouata*, Q. B. 1889, 16 Q. L. R. 112.

40. —— A writ of injunction will not lie at the instance of a railway contractor to restrain the railway company from issuing debentures to another contractor, the work that should have been completed by the plaintiff having been given into the hands of the second contractor on default of the former to carry out his contract. *Cie de Ch. de Fer Atl. Can.* vs. *Stanton*, Q. B. 1885, 14 R. L. 65.

41. To Restrain the Taking of Tolls.—Application for a writ of injunction to order the removal of certain turnpike gates, and to restrain and forbid the taking of tolls at them; application refused on the grounds, 1st, that the statute of 1878, c. 14, authorizes injunctions only to *suspend* certain acts, proceedings and operations (sect. 1st) and, 2ndly, as regards the tolls, on the ground that they were taken from the public, and not from the party plaintiff, who had no right to complain on their own behalf. *Municipalité de la Pointe Claire* vs. *Cie de Chemin de Péage de la Pointe Claire*, C. R. 1882, 5 L. N. 259.

42. To Restrain use of Trade Mark.—Action for an injunction and for an account, and also in damages. The complaint set out an agreement of date 22nd February, 1877, by which the plaintiff undertook to furnish to defendants his dry brilliant body green, and also consented that his trade mark should be used by defendants for five years on the labels for said green, after it was ground by the company in pure refined linseed oil, and plaintiff complained that the company failed to furnish him with monthly accounts; that the company greatly adulterated the dry green furnished by plaintiff with divers inferior materials which took away the brilliancy of the green and impaired its coloring power, and more especially had used in such adulteration sulphate of barytes and other inferior materials, and sold and delivered large quantities of said inferior material, using the trade mark

of plaintiff, etc. Conclusion that the company be enjoined from using said trade mark upon any of said green so manufactured by the company; that they be condemned to furnish an account and pay over, etc. On the evidence, injunction granted as prayed for and general damages. *Martin* vs. *Dominion Oil Cloth Co.*, S. C. 1881, 4 L. N. 237.

43. —— In an action for the infringement of a trade mark, the plaintiff obtained an interim order to restrain the defendants from using it. Defendants filed an exception to the form on the ground that an injunction could not be had. *Per Curiam.*—This case is not covered by 42 Vic., cap. 22, of Quebec. Plaintiffs have cited 35 Vic., cap. 32, ss. 21, 22, as in favor of his proceeding. Sec. 21 says the court may, upon giving judgment for the plaintiff, award a writ of injunction to the defendant commanding him to forbear from committing, etc. This gives authority to the court on final judgment. It appears to the court that, as it has authority on the final judgment to dispose of the case in question, the plaintiffs are entitled to an interim order to prevent its disappearance. *Seigert* vs. *Cordingly*, S. C. 1882, 5 L. N. 131.

44. **Under Merchant Shipping Act.** —An injunction will lie under the Merchants' Shipping Act of 1854 (Imp.), sec. 65, with regard to a ship to be built or about to be built registered under the provisions of the Act of the Parliament of Canada, 36 Vic., cap. 128, s 36. *Dinning* vs. *Wurtele*, Q. B. 1877, 1 L. N. 33.

45. **Where Question of Title Involved.**—The court, as a general rule, will not decide a question of title upon a writ of injunction, more especially when there is a third party interested (here the Government of Quebec) who is not a party in the cause. *Gilman* vs. *Mallet*, S. C. 1889, 12 L. N. 322; *Gilmour* vs. *Trudel*, Q. B. 1887, M. L. R., 3 Q. B. 449 and P. C., 33 L. C. J. 231, 14 App. Cas. 645.

46. —— If the defendant disputes the plaintiff's legal title to the object in question, or denies its violation, the court will seldom, upon an interlocutory order, grant an injunction before the plaintiff has established his title. The burden lies upon the plaintiff of showing that his inconvenience exceeds that of the defendant. *White* vs. *Whitehead*, S. C. 1884, 7 L. N. 292.

INSAISISSABILITE.

See EXECUTION—EXEMPTION FROM.

INSCRIPTION.

See PROCEDURE.

INSCRIPTION EN FAUX.

See IMPROBATION.

INSOLVENCY.

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I. ASSIGNEE, CURATOR, TRUSTEE, ETC.

1. Accounting by.—Assignees under a deed of assignment of an insolvent estate are liable to account to a creditor, who was a party to the deed of assignment, for the estate sold by them to one of the bankrupts who failed to pay his purchase money, notwithstanding a clause in the deed that the assignees should not be liable for insolventary losses, and should only be responsible for what they should actually collect and for gross negligence. *Torrance* vs. *Chapman, et al*, S. C. 1861, 6 L. C. J. 32.

2. —— The insolvent has no action against the assignee to his insolvent estate to compel him to render an account of his administration. His only recourse is by petition or motion, and if he claims under a deed of composition and discharge, these must have been first deposited with the assignee to enable him to give notice of the same under the Insolvent Act. *Fraser* vs. *Patterson*, Q. B. 1871, 1 R. C. 248.

3. —— In an action to account by an assignor against his assignee, to which the assignee by his plea answered that he was not bound to render an account, and at the same time alleged that he had already accounted for the moneys as garnishee in another suit, produced an unsworn account, asked the court to declare the same to be a true and faithful account of his administration, and prayed for the dismissal of the plaintiff's action—*Held*, reversing the judgment of the Court of Queen's Bench (11 Q. L. R. 342), dismissing the plaintiff's action, and restoring the judgment of the Court of Review (13 Q. L. R. 129), that, although the parties had joined issue and heard witnesses to prove certain items of the unsworn account produced, the plaintiff was first entitled to a judgment of the court ordering the defendant to produce a sworn account supported by vouchers, and therefore his action had been improperly dismissed. *L'Heureux* vs. *La-*

marche, Supreme Ct. 1886, 12 Can. S. C. R. 460.

4. Actions Against.—Trustees to a bankrupt estate cannot be sued hypothecarily for a debt due by the bankrupt whom they represent. *Ward* vs. *Robertson*, S. C. 1864, 8 L. C. J. 180.

5. —— An assignee, under the Insolvent Act of 1864, cannot be sued for the recovery of the price of real estate sold to the insolvent. *Kuper* vs. *Stewart*, S. C. 1865, 11 L. C. J. 85.

6. —— In an action against an assignee in revendication of certain merchandise which had been deposited with the insolvent to sell on commission—*Held*, dismissing the plea of the defendant, that such goods were property held for the benefit of another, and did not vest in the assignee. *Lawlor* vs. *Walker*, S. C. 1867, 17 L. C. R. 349.

7. —— And *held*, also, that they could not be detained by the assignee, though seized by the landlord of the insolvent prior to the attachment of the insolvent estate, notwithstanding a claim filed by the landlord with the assignee asserting his lien upon the property in question for rent. (*Ib.*)

8. —— An assignee under the Insolvent Act of 1864 cannot be sued in warranty, in respect of a matter for which the insolvent was liable to guarantee the plaintiff in warranty. *Hutchins* vs. *Cohen*, S. C. 1870, 15 L. C. J. 235.

9. —— An action in revendication, claiming property from an assignee under the Insolvent Act of 1869 will be dismissed on demurrer. *Larocque* vs. *Lajoie*, S. C. 1872, 17 L. C. J. 41.

10. —— When an assignee sells real estate under the Insolvent Act of 1875 without declaring a right of *mitoyenneté* in favor of an adjoining property, and the owner of such adjoining property sues the purchaser in respect of such right of *mitoyenneté*, the purchaser has a right to sue the assignee in warranty. *Stewart* vs. *Farmer*, Q. B. 1879, 24 L. C. J. 79.

11. —— Under section 50 of Insolvent Act of 1869, and section 125 of Insolvent Act of 1875, all proceedings to establish a right of property in goods in the hands of the assignee must be by order of the judge, or of the Court on summary petition and not by ordinary action. *Fair* vs. *Désilets*, Q. B. 1881, 1 Dorion's Q. B. R. 212.

12. —— But under the Code of Procedure third parties have a recourse by ordinary action only to recover property in the hands of the curator. *St. Hyacinthe Oil and Paint Co.* vs. *Bédard*, S. C. 1890, 16 Q. L. R. 242.

13. Actions, Interventions and Continuance of Suits by—Authorization.—An action lies by the assignee to recover damages caused to an insolvent estate by an opposition founded on a simulated sale from the insolvent to opposant, defendant, without being specially authorized to bring such action by the creditors holding hypothecary claims on the real estate. *Brown* vs. *Smith*, S. C. 1869, 13 L. C. J. 288.

14. —— An interim assignee, under the Insolvent Act of 1875, did not possess the power of bringing suit on behalf of the insolvent estate without permission of the court or judge. *Evans* vs. *Généreux*, S. C. 1879, 2 L. N. 194.

15. —— Under the Insolvent Act 1875—*Held*, that the assignee did not require to be authorized by the inspectors to contest the claim of a creditor, and that in any case such want of authorization could only be raised by a preliminary plea. *Stafford* vs. *Darling*, C. R. 1879, 10 R. L. 24.

16. —— The curator to an abandonment does not require the authorization of the Court or judge to revendicate property of the insolvent in the hands of a judicial guardian appointed before the abandonment, and of the creditors in the case in which the guardian was appointed. (1) *Kent* vs. *Ross*, C. R. 1888, 16 R. L. 209.

17. —— Where the curator to an abandonment has been duly authorized to contest a claim upon the estate of the insolvent, the Court will not upon the contestation of the claim revise the judgment authorizing the curator to contest. *McFarlane* vs. *Fatt*, 1890, M. L. R., 6 Q. B. 251.

18. —— The curator appointed to an insolvent estate has no right to sue for the recovery of a debt due to the insolvent without the authorization of the creditors, or of the inspectors, or of the Court or judge. Such want of authority may be pleaded by exception to the form. *Kent* vs. *Gravel*, 1891, M. L. R., 7 S. C. 159.

19. —— A curator who takes proceedings with the authorization of the judge, but with-

(1) This holding relates only to the judgment of the Superior Court; the judgment of the Court of Review did not touch on the question of authorization. (See remarks of Pagnuelo J., in *Kent* vs. *Gravel*, M. L. R., 7 S. C., at p. 160.)

out acting on the advice of the creditors or inspectors, renders himself personally liable to the costs. *Poirier* vs. *Fulton*, S. C. 1893, 4 Que. 347.

20. —— Right to sue or Intervene. (See under title "Action—Interest in.")—An assignee of a plaintiff cannot, by motion, claim to be made a party to a cause, the proper course being to apply by petition, he being a stranger to the record. *Rose* vs. *Coutlée*, S. C. 1863, 7 L. C. J. 284.

21. —— —— Assignees or transferees in virtue of a voluntary assignment by an insolvent for the benefit of his creditors have no legal status to appear and plead on behalf of the insolvent estate. *Whitney* vs. *Bideaux*, S. C. 1861, 12 R. L. 518.

22. —— —— An assignee under a deed of assignment, executed with the approval of all the creditors of an insolvent, before the Insolvent Act of 1861, can exercise the same remedy *in rem* that the insolvent could otherwise exercise. *Starke* vs. *Henderson*, Q. B. 1865, 9 L. C. J. 238.

23. —— —— A trustee can intervene in an action in revendication by the insolvent. *Ste. Marie* vs. *Brown*, C. R. 1872, 1 R. L. 527.

24. —— —— An assignment not made under the provisions of the Insolvent Act, by an insolvent for the general benefit of his creditors, does not entitle the assignee to sue in his own name for anything connected with such assignment. (1) *Prévost* vs. *Drolet*, Q. B. 1874, 18 L. C. J. 300.

25. —— —— An assignee under the Insolvent Act of 1875 cannot be compelled to take up the *instance* in a suit pending at the time of the insolvency against the insolvents of whose estate he is the assignee. *Plessis* vs. *Lajoie*, S. C. 1878, 23 L. C. J. 213.

26. —— —— The assignee can only intervene in suits taken against the insolvent after the assignee's appointment, when he represents the whole of the creditors. He cannot intervene in behalf of a few only of the creditors; they must do so in their own names. *Roche* vs. *Words*, C. R. 1882, 8 Q. L. R. 122; *Proud* vs. *Foisy*, S. C. 1891, 21 R. L. 515.

27. —— —— The intervention in this case, moreover, fails in that it does now show an interest in the action brought by the plaintiff, inasmuch as it does not allege that the defendant was unwilling to or had failed to defend himself and contest the action in a proper and sufficient manner. (*Ib.*)

28. —— —— Since the abolition of the Insolvent act, the assignee acting in the interests of the mass of the creditors has no personal status before the Court. *May* vs. *Fournier*, S. C. 1885, 29 L. C. J. 190, M. L. R., 1 S. C. 389.

29. —— —— Overruling the decision of the Supreme Court of Canada in *Burland* vs. *Moffatt*, 11 Can. S. C. R. 76, and *Browne* vs. *Pinsonneault*, 3 Can. S. C. R. 102, an assignee under a voluntary deed of assignment by a debtor for the benefit of his creditors can, as such assignee, sue and be sued in respect of the estate and property assigned to him. Art. 19 C. C. P. is applicable to mere agents or mandatories who are authorized to act for others, and who have no estate or interest in the subject of the trusts; but is not applicable to trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties, and who have duties to perform in the protection or realization of the trust estate. *Perkins* vs. *Reynar*, P. C. 1887, 13 App. Cas. 120, 11 L. N. 9, 32 L. C. J. 55; reversing Q. B., 11 Q. L. R. 297.

30. —— —— In the present case, the trustees having derived their title with the assent of all the creditors, from the official assignee appointed to an insolvent estate under the Insolvent Act of 1875, were assignees of his rights, and were entitled to enforce a contract entered into with them in respect of the trust property in their possession. (*Ib.*)

31. —— —— *Held*, affirming judgment of Court below, that Art. 19 C. C. P. is not applicable to trustees in whom property has been vested by a registered deed, and to which deed defendant was a party. (*Burland* vs. *Moffatt*, 11 Can. S. C. R. 76, and *Browne* vs. *Pinsonneault*, 3 Can. S. C. R. 102, distinguished); *Mitchell* vs. *Holland*, Supreme Ct. 1889, 16 Can. S. C. R. 687, 12 L. N. 348.

32. —— —— The curator can bring an action *Pauliana* against the insolvent for the benefit of the creditors of the estate. *Dion* vs. *Plante*, C. R. 1890, 19 R. L. 184; confirming S. C., 18 R. L. 509.

33. Appointment, Election, etc.—Partner of insolvent firm claiming as creditor may vote at election of assignee. *Glasgow Bank* vs. *Thompson*, Q. B. 1872, 3 P. C. 47.

34. —— Under the Insolvent Act of 1875

(1) This case is incorrectly reported. See remarks of Dorion, C. J., in *Moffatt* vs. *Burland*, 4 Dorion's Q. B. R., at p. 75.

—*Held*, that one or more creditors whose claims exceed in the aggregate $500, and who are dissatisfied with a resolution of the creditors appointing an assignee, may in virtue of sec. 37 of the Act apply to a judge of the Superior Court in Chambers that the resolution be annulled or modified at the discretion of the judge, and that the election of the assignee be set aside. *Watson* vs. *Samson*, Q. B. 1877, 8 R. L. 607.

35. —— And on such petition the judge may reject the votes of certain creditors whose claims have not been contested before the vote, or whose claims have been contested for other reasons than those for which they are rejected by the judge. (*Ib.*)

36. —— And the Court may declare the election of the assignee null, and order a new meeting of creditors for the election of an assignee and of inspectors by the creditors entitled to vote. (*Ib.*)

37. —— Although articles 763 and seq. C. C. P., as amended by 48 Vict., ch. 22, use the expression "a curator," there is nothing in the law to exclude a joint curatorship composed of two or more persons. The appointment of a curator is in the Court or Judge, and not in the creditors, but creditors attending the meeting will be heard, and their suggestions as to the appointment will be considered by the Court. *In re Beaudet* vs. *Chinic*, S. C. 1887, 13 Q. L. R. 265.

38. Liability of.—An assignee who refuses or neglects to conform to a judgment ordering him to pay over money in his hands, may be compelled to do so by imprisonment. *Bates* vs. *Beaudry*, S. C. 1816, 1 Rev. de Leg. 360.

39. —— An insolvent cannot during his insolvency get damages against the assignee or creditors in relation to the estate, for he has no right of property therein. *Styce* vs. *Darling*, S. C. 1879, 9 R. L. 557.

40. —— A curator who does not immediately transmit to the prothonotary's office a contestation of a claim, as required by Art. 772a C. P. C., will be condemned to pay the costs incurred upon the petition of the creditor for payment of his dividend, even although the curator had previous to such petition notified the creditor that his claim would be contested. *Fauteux* vs. *Kent & Turcotte*, S. C. 1889, 17 R. L. 256.

41. Removal.—An assignment made by a co-partnership vests in the assignee the separate estates of the partners, as well as the co-partnership estate, and the removal of the assignee has the effect of removing him with respect to both estates. *In re Macfarlane*, S. C. 1868, 12 L. C. J. 239.

42. Recusation.—On a petition by a claimant, alleging facts which he claims to be legal grounds of recusation of an assignee, and claiming to be allowed to recuse the assignee, the judge will order the assignee to suspend all further proceedings, and order proof of the facts alleged in the petition. *In re Worthington*, S. C. 1873, 17 L. C. J. 169.

43. Remuneration and Reimbursement.—An assignee whose costs remain unpaid may contest the insolvent's petition for discharge, in his own name, without authorization from the creditors, and the obligation of having such bill taxed is on the insolvent, who should also tender the amount thereof to the assignee before asking for discharge. *In re Arsenault*, S. C. 1876, 2 Q. L. R. 89.

44. —— After the Court has discharged an assignee under the Insolvent Act of 1875, as regards his gestion of an estate, the insolvent is too late to ask an order on the assignee to pay over a sum of money, which he had not retained in his hands, for the costs of discharge of the insolvent. *In re Lortie*, S. C. 1879, 23 L. C. J. 56.

45. —— The judge has a right, in insolvent matters, on petition of the creditors, and after hearing of the parties, to revise the assignee's bill after taxation. *Fraser* vs. *Darling*, Q. B. 1880, 1 Dorion's Q. B. R. 217.

46. —— Appeal from a judgment taxing an assignee's bill of costs. The insolvent presented a petition for an order on the assignee to return him his estate on payment of $100 allowed him for his account by the inspectors. The assignee on his part presented a petition that his account be taxed at $168.96, which was done—*Held*, that the judge had power under the Act to tax the bill as he had done. *Delaburantaye* vs. *Beausoleil*, C. R. 1880, 3 L. N. 355.

47. —— And *held*, also, that the assignee is entitled to the costs of obtaining his discharge, even where the insolvent has obtained from his creditors a deed of composition and discharge. (*Ib.*)

48. —— An assignee under the Insolvent Act of 1875, who sells real estate subject to a mortgage, has a right to his commission on the amount of the mortgage as well as on the portion of the purchase money paid in cash. *In re David*, C. R. 1880, 25 L. C. J. 156.

49. —— The question was whether the assignees of the estate, Messrs. O. N. E. B. & O. H., should be paid for their services as such in preference to all other creditors—*Held*, that as the assignees had worked for the benefit of the creditors in general, having given notice of their quality, received the accounts of said creditors, made a detailed inventory and statement of the estate, submitted their inventory to the creditors in assembly, who had discussed the same, and who finally had appointed a committee to look further into matters, the creditors had thus benefited by the work of the assignees, and had virtually accepted them as their mandataries. A voluntary assignment as the one made by P. & B. to the assignees was recognized by law under Art. 799 of the Code of Civil Procedure, and is a mandate which the insolvents were forced to give, if they wished to avoid the issuing against them of a writ of *capias*. The assignees had not, perhaps, been able to liquidate the estate, but this was owing to the want of legislation on the point, and what they did was nevertheless within the limits of the functions conferred upon them by law. The lack of success of the assignees was not their fault, but the creditors' who had not *all* joined in to liquidate the estate out of court. *Bourgeois* vs. *Piedalue*, S. C. 1884, 29 L. C. J. 60, 7 L. N. 391.

50. —— Trustees of property of insolvent must be reimbursed and have a privilege for the moneys expended in administering the estate, as well as for their indemnity (*Ib.*), and see *Tansey* vs. *Bethune*, Q. B. 1884, 7 L. N. 133 and 134.

51. —— The Court, in taxing the remuneration of a liquidator to an insolvent company, will take into consideration the nature of the services rendered; and where it appeared that the services for the most part were such as might have been performed by any ordinary competent bookkeeper, it was held that $7 per day was an adequate remuneration. *Pleander* vs. *Fitzgerald*, Q. B. 1888, 5 M. L. R. 446.

52. —— Where the liquidator petitioned for his discharge as liquidator, and it appeared that he had appropriated to himself, from the funds received, an amount exceeding the remuneration fixed by the Court, and the evidence did not disclose the exact amount in which he was indebted to the estate, the Court refused to grant his discharge, without fixing any amount to be paid by him as a condition of obtaining his discharge. (*Ib.*)

53. Rights and Obligations generally.—Where an assignee of an insolvent trader holds money in his hands belonging to the trader's estate, the Court will order the assignee to pay over to an attaching creditor not a party to the deed. *McFarlane* vs. *Delisle*, 1859, 3 L. C. J. 163.

54. —— A decision of an assignee is final if not appealed from in three days. *In re Larivière*, S. C. 1867, 11 L. C. J. 265.

55. —— An assignee under the Insolvent Act of 1864 has a right to claim and be paid, as a *tiers* opponent, a sum of money deposited in the hands of the prothonotary by a *tiers-saisi* after judgment in a case of attachment before judgment, and in such a case the plaintiffs have a *lien* for their costs of attachment up to the time of the publication of the attachment under which the assignee was appointed; the right to be paid which will be reserved to the plaintiffs in the judgment awarding the moneys to the assignee. *Macfarlane* vs. *Bell*, S. C. 1865, 10 L. C. J. 26.

56. —— It is not necessary that under an assignment an assignee should have taken possession of the effects assigned to be considered the proprietor *ex-quad*. *Ste. Marie* vs. *Brown*, C. R. 1872, 4 R. L. 527.

57. —— Under the Insolvent Act, 1875—*Held*, that an assignee to an insolvent estate might sell the property of the estate by deputy. *Benard* vs. *Dupuy*, C. R. 1889, 3 L. N. 93.

58. —— The assignee cannot be summoned to declare as a garnishee what moneys he has in his hands belonging to the defendant, of whose estate he is the assignee. *Grothé* vs. *Lebeau*, S. C. 1876, 20 L. C. J. 300.

59. —— An assignee suing for the revocation of a deed of donation by the insolvent can join to his action an attachment in revendication of the moveable and effects donated. *Methot* vs. *Perrin*, S. C. 1873, 5 R. L. 695.

60. —— An assignee making advances to a claimant, on the understanding that he is to be repaid such advances from the dividends which may be declared on the borrower's claim, does so at his own risk, and in the event of such claimant, subsequently and before a dividend is declared, becoming insolvent, the assignee cannot set up such advances as a reason to refuse to pay the dividend to the assignee of the claimant. *Re Gareau*, S. C. 1878, 23 L. C. J. 64, and in the same sense *In re Hénault*, Quebec, 11th Feb., 1879.

61. —— The plaintiffs were trustees under a deed of assignment from insolvents, with authority to carry on the business until it should

be wound up, which was to be completed in two or three years. The business was not wound up in that time, but was carried on by the plaintiffs on an extensive scale with funds raised on their own credit, and large losses were incurred—*Held*, by the majority of the Court, in an action by the plaintiffs against creditors who had signed the trust deed, to oblige them to repay the amount of such losses, that the plaintiffs were not under the circumstances agents of the creditors, so as to make the latter liable for the result of their operations. *Chinic* vs. *Garneau*, Q. B. 1884, 7 L. N. 210.

62. The assignees appointed under the special Act of the Dominion, 41 Vict., ch. 38, are clothed with all the powers of assignees under the Insolvent Act of 1875. *Ross* vs. *Converse*, Q. B. 1883, 27 L. C. J. 143.

63. —— Creditors, by assenting to and ratifying a deed of assignment by an insolvent trader, do not become liable to warrant the acts of the assignee. They do not act jointly and severally in appointing a common mandatary, but each simply gives his sanction, *quoad* his individual interest to the appointment of the assignee by the insolvent as his agent and administrator. And so, where the assignee sold the stock of an insolvent, and the purchaser was unable to obtain possession, it was held an action of damages did not lie by the purchaser against creditors who had assented to the appointment of the assignee. *Marchildon* vs. *Denoon*, 1886, M. L. R., 3 Q. B. 12.

64. —— Where a curator to an insolvent estate obtains the authorization of the judge to continue the insolvent's business, and by virtue of such authorization manufactures and delivers goods to a person who had ordered them in exchange for goods which the insolvent had delivered prior to his insolvency, and which did not suit the purchaser, the curator cannot claim the price of goods ordered since the insolvency, but can only claim the goods which they were to replace. *Angus* vs. *Watson*, Q. B. 1889, 17 R. L. 664.

65. —— When a curator to an insolvent estate makes an advance to one of the creditors on the strength of a future dividend, and on the condition that the sum so advanced shall be repaid, "if any difficulty should arise in the distribution of the estate," such condition is realized where the firm of which the party receiving the advance is a member, becomes insolvent. *Bédard* vs. *Robitaille*, C. R. 1890, 16 Q. L. R. 308.

66. —— Where an insolvent trader abandons his property for the benefit of his creditors, and a curator is appointed, a creditor of the insolvent cannot sue the curator and dispossess him of property with which the law has seized him to administer in the interest of the creditors in general. *Bédard* vs. *Lemieux*, Q. B. 1890, 16 Q. L. R. 173.

67. —— Revendication in the hands of a curator to an insolvent estate of certain debentures illegally pledged by the insolvents and redeemed by the curator—*Held*, that such curator could have no greater rights over such debentures than had the bank pledgee—and it appearing that the full amount for which they, with other securities, had been pledged, had been more than covered from the proceeds of such other securities, the debentures must be returned by the curator to the respondent, their rightful owner—*Semble*, that in any case the curator could not be held to have been subrogated in the rights of the bank pledgee. *Quære*, When so redeeming the debentures, was the curator, in contemplation of law, acting for the insolvents or for the creditors of the estate, or in the interest of both? *Rattray* vs. *Méthot*, Q. B. 1890, 16 Q. L. R. 263.

68. —— (Modifying the decision of Malhiot, J.) The curator to the estate of a trader who has ceased his payments has no right to receive, collect and recover property acquired by the latter after his abandonment. *Quebec Bank* vs. *Cormier*, C. R. 1891, M. L. R., 7 S. C. 283.

69. —— The curator to an estate judicially abandoned is entitled to obtain possession of the books of account of the insolvent from a person in whose hands the books were placed by the insolvent for the collection of debts on commission. *In re Trudeau*, 1891, M. L. R., 7 S. C. 451.

70. —— Appellants purchased at one time a particular lot of bark from M., paying full value therefor. This bark remained in M.'s possession at the time of his assignment—*Held*, that M.'s curator was not entitled to retain, in behalf of the estate, property acquired by appellants from M. before, but not delivered to them at the time of the assignment. *Chureh* vs. *Bernier*, Q. B. 1892, 1 Que. 258.

71. —— Appellants entered into a further agreement with M., that he should manufacture extract from their bark piled on M's. premises. M. proceeded to do so, but used indiscriminately bark belonging to appellants

and other parties—*Held*, that it being impossible to identify the extract manufactured from appellants' bark, they were not entitled to revendicate any portion of the extract from the curator. (*Ib.*).

72. —— An assignee to an insolvent estate under the Act of 1875 is merely the mandatory of the parties. The abandonment of his estate by the insolvent does not deprive him of an interest in his property. He still remains liable to his creditors for the whole of his debts, and consequently has an equal interest with them in seeing that the estate is managed to the best advantage. Thus, where the curator fails to take proceedings to recover property belonging to the insolvent, the latter can take such proceedings in his own name. *Lemay* vs. *Martel*, Q. B. 1892, 1 Que. 160, and *in re Dinning*, S. C. 1877, 4 Q. L. R. 37.

73. —— Under Art. 763 C. P. C., an abandonment of property has the effect of depriving the insolvent of the possession of his property in favor of the curator appointed in the interest of the creditors for the purpose of administering and realizing upon the property assigned, *subject to the rights and obligations which may attach to such property.* *Tourville* vs. *Valentine*, Q. B. 1893, 2 Que. 588.

74. Security by.—Where, at a meeting of creditors under Insolvent Act of 1875, an official assignee, other than the one to whom the writ was addressed, was appointed creditors' assignee, and afterwards absconded with the funds of the estate—*Held*, that his sureties were liable. *Delisle* vs. *Letourneux*, S. C. 1880, 3 L. N. 207.

75. —— Where an official assignee under the Insolvent Act of 1875 has taken possession of an insolvent estate in that capacity, and subsequently the creditors have continued him assignee to the estate without exacting any further security, and while acting as assignee of the creditors he makes default to account for moneys of the estate, the creditors have recourse upon the bond given for the due performance of his duties as official assignee. *Letourneux* vs. *Dansereau*, Supreme Ct. 1886, 12 Can. S. C. R. 307; confirming Q. B., M. L. R., 1 Q. B. 357, which reversed S. C., 5 L. N. 339.

II. ASSIGNMENT, ABANDONMENT, ETC. (1)

1. Acceptance of.—The acceptance of an assignment under the Insolvent Act of 1869 must be made by the official assignee in person, and cannot be made by an attorney. *Hervey* vs. *Rimmer*, S. C. 1869, 14 L. C. J. 24.

2. By Non-traders.—Where a person who was sued made an assignment in insolven , and judgment having gone against him, and his effects having been sold by the sheriff, the assignee petitioned that the sheriff be ordered to deliver over to him the moneys levied by the sale—*Held*, that, as it was plain that the defendant was not a trader, and the other creditors ignored the assignment, the assignment was clearly a fraud and the petition of the assignee was dismissed. *Mongeau* vs. *Laroque & Gigault*, C. R. 1877, 1 L. N. 78.

3. —— And where a writ of attachment was sued out by a father against his son, who was not a trader, and a creditor intervened—*Held*, that the insolvency proceedings were evidently in fraud of the other creditors and were set aside. *Turgeon* vs. *Coupal*, C. R. 1878, 1 L. N. 77.

4. By Partners.—An assignment under the act by one member only of a copartnership cannot operate as an assignment of the partnership estate. *Cournoyer* vs. *Tranchemontagne*, C. R. 1874, 18 L. C. J. 335, 5 R. L. 327; reversing S. C., 4 R. L. 717.

5. —— And, *held*, that the same principle applies to an abandonment under the Code of Procedure, and that the abandonment must comprise not only the partnership property, but also the individual property of the partners. *Reid* vs. *Bisset*, C. R. 1889, 15 Q. L. R. 108.

6. Cession otherwise than under the Insolvent Acts.—(See also "ASSIGNEES, CURATORS, ETC.")—An intervention was filed by the respondents to a writ of attachment sued out by the plaintiff, in virtue of which certain goods were seized as belonging to defendants' insolvent estate, but which the respondents claimed as having been assigned to them by the insolvent for the benefit of the creditors—*Held*, reversing the judgment of the court below, that an insolvent debtor cannot transfer or assign over his stock in trade to two of his creditors in trust for the benefit of the whole, without the consent of all the creditors, and when such an assignment is made, and the assignees, having taken the keys from the debtor, lock up the shop and take an inventory, and advertise the goods for sale at auction for the benefit of the creditors generally, the creditors may, notwithstanding, seize the goods as being still in the possession of

(1) Can a trader without assets make an assignment? Article by D. Girouard in 2 Rev. Crit. 63.

the insolvent, there being no sufficient transfer or delivery in law to transfer the property to the assignees. *Withal* vs. *Young*, Q. B. 1859, 10 L. C. R. 149.

7. —— An assignment voluntarily made by an insolvent, with the sanction even of the majority of his creditors, and containing a condition that the debtor is to have a full discharge, is inoperative as regards a dissenting creditor, and may be attacked by him by means of a *saisie-arrêt*, not only in the hands of the assignees themselves, but also in the hands of a vendee of the whole or a portion of the estate. *Macfarlane* vs. *McKenzie*, Q. B. 1861, 5 L. C. J. 106.

8. —— An abandonment of property under the common law made by a debtor in favor of his creditors, without a discharge from them, does not deprive the debtor of his rights of ownership, the creditors being merely administrators or *procuratores in rem domini*, with the right of disposing in their interest and in the interest of their debtor of the property ceded to them. The debtor still retains the right to take measures to preserve his property from spoliation by third parties. *Rivard* vs. *Belle*, S. C. 1866, 1 R. L. 571.

9. —— A creditor who has consented to his debtor making an assignment otherwise than under the provisions of the Insolvent Act, cannot avail himself of such assignment as a ground to obtain a compulsory liquidation under the act. *Whyte* vs. *Cohen*, S. C. 1869, 14 L. C. J. 83.

10. —— A cession made otherwise than under the Insolvent Act does not give rise to compulsory liquidation, after the expiration of the three months following the date of such cession. *Hutchins* vs. *Cohen*, S. C. 1869, 14 L. C. J. 85.

11. —— A trader may, in the absence of an Insolvent Act, abandon his property to one or more of his creditors in trust for his creditors in general. *Lanouette* vs. *Tongas*, S. C 1883, 6 L. N. 123.

12. —— The creditor to whom such insolvent has assigned can dispose of the stock assigned to him, and his acts will be upheld unless fraud be proved against him. (*Ib.*).

13. —— An abandonment of his property by a trader who has ceased his payments, to three trustees for the benefit of his creditors, constitutes a mandate which does not prevent the seizure and sale of the effects so abandoned at the instance of a creditor not a party to the deed of transfer. *Tourangeau* vs. *Dubeau*, S. C. 1884, 10 Q. L. R. 92.

14. —— In such an event the trustees cannot sue for the recovery of the property so seized, and their intervention will be dismissed with costs against them personally. (*Ib.*).

15. —— Assignment to a trustee, since the repeal of the Insolvent Act, is without effect as regards the rights of third parties, acquired before such abandonment. Trustee has not the *status* before the court to enable him to act in the name of creditors. *May* vs. *Fournier*, S. C. 1885, 29 L. C. J. 190.

16. —— Although a voluntary assignment by a debtor to his creditors does not deprive the debtor of the ownership of his estate, it nevertheless constitutes in favor of the creditors an irrevocable mandate, the effect of which is to deprive the debtor of the right of disposing otherwise of the property so assigned. *Jacob* vs. *Jacob*, 1886, M. L. R., 2 S. C. 258.

17. —— Judicial abandonment under Art. 763 C. P. C., and 48 Vic. (Q.), ch. 22, does not apply to the liquidation of a succession belonging to minors; and therefore an assignment made by a tutor of the property of insolvent minors, at the request of a creditor, is illegal, and will be set aside. *Tourville* vs. *Dufresne*, 1887, M. L. R., 3 S. C. 288.

18. Deed of.—The limitation in a deed of assignment requiring a creditor who receives his proportion of the estate of an insolvent trader, to give a discharge in full, is inoperative as respects creditors not parties. *Macfarlane* vs. *Delisle*, S. C. 1859, 3 L. C. J. 163.

19. —— A deed of assignment not signed by all the creditors does not vest the property of the bankrupt in the assignees absolutely, and they consequently have no legal capacity to implead as such. *Chevalt* vs. *DeChantal*, S. C. 1861, 8 L. C. J. 85.

20. Demand of.—Two creditors, whose claims together amounted to $500, made a demand against their debtor for an assignment of his estate and effects under the Insolvent Act of 1864, and it appeared in evidence, on the debtor's petition to stay the proceedings, that one of the creditors had made the demand solely in order to obtain payment of the amount due him—*Held*, that the demand was made without reasonable ground, and merely as a means of enforcing payment, and was, therefore, contrary to the insolvent act, and the conclusion of the petition to stay proceedings must be

granted. *Lacombe* vs. *Lanctot*, C. R. 1865, 16 L. C. R. 166 and 1 L. C. L. J. 110.

21. —— The *onus probandi* is on the petitioner, under sub-section 3 of section 3 of the Insolvent Act of 1864, to establish that his stoppage is only temporary, and that his assets are sufficient to meet his liabilities. *McCready* vs. *Leamy*, C. R. 1866, 11 L. C. J. 193.

22. —— The debtor upon whom the creditor has served a demand of assignment in virtue of the 12th sec. of the Insolvent Act of 1869 has against such creditor, besides the condemnation to triple costs, an action of damages where the demand has been made simply as a means of enforcing his claim. *Sénécal* vs. *Beauchemin*, S. C. 1874, 6 R. L. 71.

23. —— In the case of a joint demand by two creditors for an assignment under the Insolvent Act of 1864, the one creditor cannot make proof for the other, and the claim of one of such creditors based on a transfer, unsignified at the time of the demand (although signified subsequently) cannot avail in support of the demand. *Turgeon* vs. *Taillon*, S. C. 1869, 13 L. C. J. 19.

24. —— A creditor, whose name is in litigation and disputed in the S. C., is not debarred from demanding an assignment under the act, and this, notwithstanding an appeal from a judgment on such claim, when the debtor consented to the judgment being executed. *Buchanan* vs. *McCormick*, Q. B. 1875, 19 L. C. J. 29.

25. —— A demand of assignment under the act will be set aside, unless it be distinctly proved that the defendant has failed to meet his liabilities generally as they become due. *Beard* vs. *Thomson*, C. R. 1877, 21 L. C. J. 299.

26. —— To a demand of assignment by the respondent, the appellant answered that the demand was not made within three months following the protest of the notes upon which the claim was founded; that the Bank of Montreal had previously made a similar demand, which was still pending, and had the effect of stopping others, and that the bills on which the respondents were proceeding were made before the coming into force of the Insolvent Act of 1875, and therefore the proceedings in insolvency should have been under the act of 1869. Judgment dismissing answer on all these grounds approved in appeal. *Knight* vs. *La Banque Nationale*, Q. B. 1876, 9 R. L. 724.

27. —— The fact that the debtor's apparent effects were seized and sold by another creditor does not prevent a demand of assignment. *Parent* vs. *Trudel*, C. R. 1887, 13 Q. L. R. 136.

28. —— A demand of assignment made to a trader who has ceased his payments should be made by the creditor himself or a specially authorized agent, the latter presenting his power of attorney. *Reid* vs. *Bisset*, C. R. 1889, 15 Q. L. R. 108.

29. —— But, where the debtor alleges that his abandonment was duly and legally made, he cannot take advantage of an irregularity or informality in the demand of abandonment. (*Ib.*)

30. Effect of. — See *supra* "CESSION OTHERWISE THAN UNDER THE INSOLVENT ACTS" and see "ASSIGNEES, CURATORS, ETC.")—An assignment by an insolvent under the Insolvent Act of 1864 transfers to the assignee effects already under seizure, and an opposition filed by the assignee claiming the effects seized to be divided among the creditor. under the insolvent act will be maintained *Bacon* vs. *Douglas*, C. Ct. 1865, 15 L. C. R. 456.

31. —— Notwithstanding an assignment under the Act by a defendant in a suit, he may still continue to act in the suit in his own name. *Morin* vs. *Henderson*, S. C. 1876, 21 L. C. J. 83.

32. —— Notwithstanding an abandonment of property and the appointment of a curator, a judgment creditor can seize and sell by sheriff's sale an immoveable belonging to his debtor included in the abandonment. *St. Jorre* vs. *Morin*, S. C. 1886, 10 L. N. 14.

33. —— The appointment of an assignee, under the Insolvent Act, to a defendant against whom a hypothecary action was pending, was held not to revoke the power of a sequestrator appointed during such hypothecary action. *Heritable Securities* vs. *Racine & Bourbonnière*, S. C. 1880, 3 L. N. 199.

34. —— Where a writ of compulsory liquidation issues against a firm, the individual estates of the co partners vest in the assignee as well as the co-partnership estate. *Hamilton* vs. *Roy*, S. C. 1878, 1 L. N. 592.

35. —— Proceedings after the defendant has made an abandonmsnt of his property are not absolutely null, under Art. 769 C. C. P., and the court, according to the circumstances, may authorize the proceedings to be con-

tinued. *Thompson* vs. *Kennedy*, S. C. 1888, 16 R. L. 522, M. L. R., 4 S. C. 443.

36. —— An insolvent debtor loses the benefit of the term, even in regard to privileged creditors, who can after his insolvency proceed against him before the term has expired. *Beaudry* vs. *Kelly*, S. C. 1889, 17 R. L. 370.

37. —— A plaintiff who assigned under the Insolvent Act of 1875, and who had not obtained his discharge, remains under the effect of that law, and cannot take an action at law without giving security for costs. *Thompson* vs. *Maynard*, Mag. Ct. 1889, 12 L. N. 251.

38. Irregular.—A general assignment by an insolvent, not under the provisions of the Insolvent Act, is a fraudulent conveyance within the meaning of that Act. *Calvin* vs. *Tranchemontagne*, S. C. 1870, 14 L. C. J. 210.

39. To whom made. — A voluntary assignment made to an official assignee who does not reside in the district where the insolvent resides and carries on his business, is null. *Douglas* vs. *Wright*, C. R. 1867, 11 L. C. J. 310; *Hingston* vs. *Campbell*, 11 L. C. J. 315.

40. —— **Contra.**—An insolvent under the Insolvent Act may validly make a voluntary assignment of his estate and effects to any official assignee, whether resident within the district or county wherein such insolvent has his place of business or not. *Brown* vs. *Douglas*, Q. B. 1868, 13 L. C. J. 29; *Exp. Smith*, S. C. 1867, 12 L. C. J. 51.

41. —— In case of an assignment made to an official assignee, non-resident in the county or place where the insolvent has his domicile, evidence must be adduced by the party pleading such assignment that there is no official assignee so resident in such county, and this, notwithstanding that the sheriff, in his return to the writ of attachment, certifies that there is not an official assignee so resident, and that in consequence thereof he has appointed a special guardian. *Martin* vs. *Thomas*, S. C. 1870, 15 L. C. J. 236.

42. —— An assignment under the Insolvent Act of 1869 by an insolvent residing in the county of Hochelaga to an official assignee residing in the City of Montreal is illegal, and an official assignee resident in the county has an interest sufficient to enable him legally to petition for a prohibition against the interim assignee under such assignment. *In re Gravel*, S. C. 1873, 17 L. C. J. 326.

43. —— An abandonment under the Insolvent Act of 1869, made to an official assignee not residing in the county of the debtor's domicile, will not be annul'ed after the nomination of the assignee. *Martin* vs. *Gravel*, S. C. 1873, 5 R. L. 478.

III. ATTACHMENT FOR COMPULSORY LIQUIDATION.

1. The court has no discretion to exercise, in the case of failure to appear and petition against an attachment within five days from the return of the writ of attachment, and a defendant will not be admitted to present such petition after the five days, even on cause shown. *May* vs. *Larue*, S. C. 1865, 10 L. C. J. 113.

2. The holder of a note dated previously to the proceedings in compulsory liquidation need not prove that it was really made at its apparent date; and the fact that the note had been given as collateral security does not deprive the holder from adopting thereon proceedings in compulsory liquidation. *Hutchins* vs. *Cohen*, S. C. 1869, 14 L. C. J. 85.

3. The filing of a declaration in an attachment for compulsory liquidation, under the Insolvent Act of 1869, is irregular, and will be rejected on motion of defendant. *MacIntosh* vs. *Davis*, S. C. 1870, 14 L. C. J. 235.

4. The right to petition to quash a writ of attachment in compulsory liquidation is purely personal to the debtor, and cannot be exercised by a person to whom he has made a voluntary assignment. *Watson* vs. *City of Glasgow Bank*, Q. B. 1870, 14 L. C. J. 309.

5. A writ of attachment under the Insolvent Act issued on the affidavit of a person not authorized by the plaintiff, is void, and will be quashed. *Peckett* vs. *Plinguet*, S. C. 1872, 1 R. L. 544.

6. Although a commercial firm be dissolved, the members thereof are still partners for the liquidation of the affairs of the old partnership, and a writ of compulsory liquidation under the Insolvent Act of 1869 against them as co-partners is well founded. And, under any circumstances, upon the principle that interest is the measure of actions, a creditor of one of the individual partners has no right, as against the creditors of the dissolved firm, to oppose the attachment. *City of Glasgow Bank* vs. *Arbuckle*, C. R. 1870, 16 L. C. J. 218.

7. Where a trader carries on business in more places than one, a writ of attachment

under the Act can only issue at his ch[illegible] one of his principal places of business. *Brockville & Ottawa R. W. Co.* vs. *Foster*, S. C. 1877, 21 L. C. J. 107.

8. The return day of a writ of attachment under the Act must not be later than five days after service of the writ. (*Ib.*)

9. Where an attachment has been issued under the Act and the defendant has petitioned to quash within the five days, the plaintiff cannot discontinue his attachment, and the defendant has a right (notwithstanding such discontinuance) to a judgment on his petition. *Ford* vs. *Short*, S. C. 1877, 21 L. C. J. 198.

10. The provisions of sec. 14 of the Act do not apply to a creditor who desires to attack the validity of an attachment under the act, on the ground that his debtor (the insolvent) is not really a trader within the meaning of the act, and that he is moreover not really insolvent, and, therefore, such creditor may intervene at any time and contest the proceedings, and in so doing he does not require to allege that he is an unsecured creditor for an amount exceeding $100. *Langevin* vs. *Grothé* Q. B. 1876, 21 L. C. J. 247.

11. An affidavit made in the form B in connection with sec. 9 of the Insolvent Act of 1875, but not disclosing whether the debt is or is not secured, is sufficient, and an attachment based thereon will be upheld. *Barbeau* vs. *Larochelle*, Q. B. 1877, 3 Q. L. R. 187, reversing S. C., 3 Q. L. R. 31.

12. The affidavit required for a writ of attachment under the Insolvent Act may be sworn before the prothonotary or his deputy, notwithstanding the omission to include this officer in the enumeration in section 105 of the Act. *Hilyard* vs. *Harmburger*, S. C. 1878, 1 L. N. 106.

13. The affidavit for attachment under the Act is sufficient if it follow the statutory form, and it is not necessary for the plaintiffs to state in such affidavit what guarantees they hold for the payment of their claim. *Thibodeau*, vs. *Jasmin*, C. R. 1878, 22 L. C. J. 228.

14. An attachment under the Insolvent Act of 1875 cannot be set aside otherwise than by proceedings in the Superior Court sitting in insolvency. *Clement* vs. *Heath*, C. Ct., 1878, 22 L. C. J. 54.

15. Where the proof showed that the claim upon which the attaching creditor had founded his demand for a writ was trumped up for the purpose, the writ was set aside. *Logan* vs. *Kearney*, C. R. 1879, 2 L. N. 386.

16. Under the Insolvent Act, 1875—*Held*, that the affidavit for attachment was insufficient and irregular, and the writ issued thereunder would be quashed, and the attachment set aside, when such affidavit merely states the alleged debt to be "for the balance due on a note of $410," without showing whether the note referred to is or is not a negotiable instrument, nor disclosing the nature of the defendant's liability thereon. *Home* vs. *Connolly*, S. C. 1879, 5 Q. L. R. 259.

17. Under the Insolvent Act, 1875—*Held*, that a writ of attachment in insolvency, which was not returned, must be treated as a nullity, and no other creditor of defendant could found any proceedings on it. *Quebec Bank* vs. *Kapp*, S. C. 1879, 2 L. N. 412.

18. Under the Insolvent Act of 1875, where the writ was contested on the ground of the insufficiency of the affidavit—*Held*, an acknowledgment by the defendant of his inability to pay his liabilities in cash was insufficient to justify the writ, which was therefore quashed. *Milloy* vs. *O'Brien*, C. R. 1880, 3 L. N. 101.

BUILDING AND JURY FUND.

Where the estate of the insolvent, comprising moveables and immoveables, is sold *en bloc*, the one per cent. for the building and jury fund is payable on the ascertained proceeds of the real estate, and it is the duty of the assignee to retain this percentage out of the first payment on account of the price of sale. *Chaureau* vs. *Evans*, S. C. 1880, 24 L. C. J. 343.

V. CLAIMS IN.

(See also under title "MARRIAGE COVENANTS."

1. On the contestation of a report of distribution of the estate of an insolvent, where several questions arose as to the respective rights of the creditors.—*Held*, that an acknowledgment of indebtedness or confession of judgment by a bankrupt in favor of a creditor is no evidence as against other creditors, and on contestation of such a claim, on a plea of fraud or collusion, it is the duty of the creditor to establish his claim and to adduce evidence of the consideration of the debt claimed. *Bryson* vs. *Dickson*, Q. B. 1863, 3 L. C. R. 65, 3 R. J. R. Q. 426.

2. Payment by a third party of sums due by an insolvent debtor without transfer or subro-

gation, creating a debt subsequent to the insolvency, will not give to such a party a right to rank on the insolvent estate of the debtor. *Bryson* vs. *Dickson*, Q. B. 1863, 3 L. C. R. 65, 3 R. J. R. Q. 426.

3. In an action by a creditor against the sureties of an insolvent who effected a composition of 10s in the £—*Held*, in an action against the sureties for payments due under the composition, the plea being that the plaintiff was bound to deduct from such payments the amount of certain notes which he had retained as further security, that the plaintiff was bound only to deduct the amount of such notes from the total amount of his claim. *Joseph* vs. *Lemieux*, C. R. 1867, 17 L. C. R. 170.

4. Where the endorser of a note became insolvent, and compounded with his creditors, including the holder of the note, who, however, reserved his recourse against the other parties to the note, and the maker also became insolvent, the endorser cannot rank on the note against the estate of the maker so long as the holder has not been paid in full. *In re Bessette*, C. R. 1870, 15 L. C. J. 126. Reversing S. C., 14 L. C. J. 21.

5. Where a claimant in insolvency has received as holder of a note a composition on the amount of his claim from the endorser, in consideration of which he has released the endorser, reserving his recourse against the other parties to the note, whatever the claimant has received from the endorser must be deducted from his claim against the maker's estate (*Ib.*)

6. A partner cannot file a claim against the personal estate of his co-partner insolvent for the balance of an unliquidated account. *Rapin in re*, S. C. 1874, 5 R. L. 451.

7. On a petition by certain creditors of the insolvent, that one F should be appointed assignee under the Act of 1875—*Held*, that the vouchers upon which the claim of the petitioner was based should be produced, and therefore that they were not entitled to petition as legally proved creditors, and that the claims must be accompanied and explained by the giving of sufficient particulars. *In re Coté* S. C. 1876, 1 Q. L. R. 200.

8. In the contestation of a claim before an assignee, the assignee having first verbally fixed upon a convenient day for hearing and taking evidence, the contestant inscribed the matter with due notice, and all the parties interested, including the assignee, appeared on the day fixed, and showed their acquiescence as to the regularity of the proceedings, by allowing the assignee to give an award without objection, the proceedings will be held to be irregular, inasmuch as by sec. 71 of the Insolvent Act of 1869, the day for proceeding to take evidence should have been fixed by the assignee in writing, and the assent of the parties to the above mode of proceeding would not waive the irregularities. *In re Davis*, S. C. 1870, 15 L. C. J. 131.

9. The Act of 1875 did not alter the law in force in this Province in respect of the rights and privileges of the insolvent's employees. *In re Beaulieu*, C. R. 1877, 9 R. L. 380.

10. Journeymen painters in the employment of the insolvent should not be collocated on the dividend sheet as privileged creditors, but only as ordinary creditors. (*Ib.*)

11. A creditor can claim from his debtor upon the latter's second failure, the whole of his claim against him which existed at the time of the first failure, where there was a composition and the debtor failed to comply with its terms. *In re Clark & Clayton*, S. C. 1872, 4 R. L. 295.

12. The holder of negotiable paper, the maker and endorser of which have both become insolvent, and who has received a dividend from one of them, cannot prove his claim against the estate of the other for the full amount mentioned in the paper—on the contrary he must deduct the amount of the dividend received from the estate of the other party. But if, after proof made, dividends are received from the estate of another party, the creditor is, nevertheless, entitled to dividends upon the whole amount proved; provided the dividends do not exceed 100 cents in the dollar on the balance really due. *In re Rochette*, S. C. 1877, 3 Q. L. R. 97.

13. In the case of a claim by a firm, the names of the partners must be given in full. *In re Dinning*, S. C. and Q. B. 1877, 4 Q. L. R. 26.

14. Where an individual trades alone under the assumed name of a partnership, it need not be specially stated that he has no partners, unless the plural be used to designate the claimant in the body of the claim. (*Ib.*)

15. A claim should contain a sufficient exposure of the cause of demand, within the meaning of art. 50 C. C. P., but need not allege more than an action in the Circuit Court. (*Ib.*)

16. Claims must be accompanied by the vouchers on which they are based, or by an

affidavit or other evidence to justify the absence of such vouchers. (*Ib.*)

17. Secured creditors must specify the nature of their security, and give a description of the several properties or effects, not *en bloc* but separately, and a claim not giving such description is irregular and informal and should be rejected. (*Ib.*)

18. A claim made in Great Britain and there attested under the provisions of the law substituting attestation for an oath in certain cases, is not a proved claim under our statute, saving the case of a person objecting to be sworn for conscientious motives. (*Ib.*)

19. A power of attorney by a president, cashier or manager of a bank, to a person not an employee of the bank, is invalid in the absence of anything to show the power of those officers to grant the same. (*Ib.*)

20. A creditor who by reason of informality in his claim had no legal *status* at a meeting of the creditors, cannot petition against resolutions there adopted, and his petition will be dismissed with costs. (*Ib.*)

21. The Judge will act under section 102 without a special reference of the case to him for that purpose, if all the documents are before him. But, *held* by the Court of Appeals, that, under the circumstances of this case, the judgment should have rescinded the proceedings of creditors and appointment of assignee and inspector, and ordered a new meeting of creditors. (*Ib.*)

22. Where a claim in insolvency was contested, the only proof of which claim was a debtor and creditor account produced by the plaintiff showing a balance against the insolvent.—*Held*, insufficient and claim dismissed. *Davidson* vs. *Riddel*, C. R., 3 L. N. 55, confirming S. C. 2 L. N. 348.

23. In May, 1879, the appellant proved a claim against the insolvent estate of A. S. with a declaration that the bank held security which could not then be valued. In September following, the bank filed an amended claim which was withdrawn on the 4th of December, when the bank filed another amended claim. In the meantime the bank had received from parties primarily liable, on negotiable instruments endorsed by the insolvent, various sums on account, amounting in all to $1,423.—*Held*, confirming the judgment of the Superior Court, that the appellant was bound to deduct that sum from the amount of its claim, and also a further sum of $500 for rebate of interest on notes which were current when the writ of attachment issued against the insolvent. *Bank of Toronto* vs. *Fair*, Q. B. 1881, 1 Dorion's Q. B. R. 230.

24. A claim in insolvency (attested under oath and accompanied by vouchers), if contested, must be substantiated by legal evidence on the points raised, and if claimant requires further particulars of contestation than those stated, he must demand them before evidence is gone into. But a mere plea of general issue will not throw the *onus probandi* on the claimant. *Watson* vs. *Samson*, Q. B. 1878, 4 Q. L. R. 365.

25. Under the Insolvent Act of 1875—*Held*, that in the case of a promissory note the claim of the bearer was sufficiently indicated in the statement furnished to the assignee by the insolvent, if given in the name of a third party, indorser of the note. *Merchant's Bank* vs. *Sampson*, S. C. 1878, 4 Q. L. R. 375.

26. And in such case, the bearer who has not received notice nor filed a claim, is represented for all the purposes of the insolvency by the indorser whose name is thus given in the place of his own, as a creditor of the insolvent, and the signature of the indorser to the deed of composition and discharge binds the bearer for all legal purposes. (*Ib.*)

27. A creditor under the Insolvent Act, 1875, who had not produced his claim, but whose name had been included in the list furnished by the insolvent, did not lose his recourse for payment according to the terms of a composition against the surety of the insolvent when the insolvent failed anew. *Boissonnault* vs. *Archer*, C. Ct. 1879, 5 Q. L. R. 352.

28. And this recourse remained, although he had not been included in the composition sheet and had not been paid by the insolvent according to its terms. (*Ib.*)

29. In another case the appellant, assignee to the insolvent estate of the Morris Run Coal Co., filed a claim on the insolvent estate of the Moisic Iron Co., for a balance of $330,214.79. The respondents contested the claim, alleging that $36,129.18 was not due by the Moisic Iron Co., but by a former company; that if the balance had been advanced, it should be imputed in payment of $250,000 of stock transferred as paid up-stock, by Mr. W. M. to other parties, but in reality for the Morris Run Coal Co., and which was never paid—*Held*, that out of the sums claimed, that of $36,129.18 was due by the Moisic Co., and not by the Moisic Iron Co. That the Morris

Run Coal Co. owned $200,000 of the stock of the Moisie Iron Co., which had never been paid for, and that the balance of their claim must be imputed in payment of their stock. *Lynch* vs. *Henshaw*, Q. B. 1881, 1 Dorion's Q. B. R. 242.

30. The Consolidated Bank of Canada proved a claim for $153,464.68 against the insolvent estate of M. B., secured by the individual liability of H. M. and J. C. B., two of the members of the firm, under a letter of guarantee of the 26th January, 1876, this security valued in the claim at $75,000, and also an account from M. & B. of mortgages in the property of W. P. B. for $25,000 each and valued at $45,000. The Merchants' Bank proved its claims secured by a transfer of another mortgage on W. P. B.'s property for $25,000, and which the Bank valued at $13,000. On the claim made by the Consolidated Bank, L., a creditor of M. & B., contested the transfer made by M. & B. to the Bank of the two mortgages against B.'s property, and asked that this transfer be set aside as having been made in fraud of the creditors. On the claim of the Merchants' Bank, L., on the same grounds, contested the transfer made to the Bank by M. & B. of their other mortgage on W. P. B.'s property. R. and others, also creditors of M. & B., contested the claim made by the Consolidated Bank, the validity and effect of the letter of guarantee given by H. M. and J. C. B., on their private estates, as being in fraud of the creditors of the firm —*Held*, that as these contestations could not affect the claims of the Consolidated Bank and of the Merchants' Bank against the estate of M. & B., the contestants had shown no interest in their contestations, and that the creditors could only challenge the validity of the security held by the Banks by a direct action in the Superior Court, or by contesting the claims which might be made upon such security on the individual estates of H. M. and of J. C. B. or of W. P. B. respectively. *Consolidated Bank* vs. *Leslie*, Q. B. 1881, 1 Dorion's Q. B. R. 198.

31. The creditor of a hypothecary debt, bearing interest due by one of the partners, is entitled to be paid interest in full up to date of collocation, out of the private estate of the partner before the creditors of the firm are entitled to rank against the private estate. *Consolidated Bank* vs. *Moat*, Q. B. 1883, 6 L. N. 358.

32. A creditor who consents, without reserve, to a composition with his debtor, cannot retain collateral securities given by the latter, or a pledge, unless it be for the purpose of a guarantee of the amount of the composition. *Roy* vs. *Faucher*, S. C. 1885, 17 R. L. 287.

33. When a hypothec has been acquired upon property within thirty days immediately preceding the declaration and admission of the mortgagee's agent, that the mortgagees were notoriously insolvent and *en décomfiture*, such hypothec, in a report of distribution of the moneys realized on the property of the insolvents, cannot be invoked to the prejudice of a party, who also was a creditor at the time when the hypothec was given. *Union Bank of Lower Canada* vs. *Hochelaga Bank*, Supreme Ct., 1889, Cassel's Digest, 2nd edit. p. 351, confirming Q. B., 14 R. L. 410.

34. *Held*, per Ritchie, C. J., and Taschereau, J., affirming the judgment of the Court below. Strong & Fournier, J.J. *contra*, that a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt, but is obliged to deduct from his claim the amount previously received from the estates of the other parties jointly and severally liable therefor. *Ontario Bank* vs. *Chaplin*, Supreme Ct. 1890, 20 Can. S. C. R. 152, confirming Q. B., M. L. R., 5 Q. B. 407, 17 R. L. 246, S.C. 15 R. L. 435.

35. Per Gwynne and Patterson, J.J. That a person who has realized a portion of his debt upon the insolvent estate of one of his co-debtors, cannot be allowed to rank upon the estate (in liquidation under the Winding-Up Act) of his other co-debtors jointly and severally liable, without first deducting the amount he has previously received from the estate of his other co-debtor. (*Ib.*)

36. The 48th Vict, ch. 22, does not affect the common law as to right of creditor to claim against the insolvent estate of a joint debtor. *In re Chinic*, S. C. 1888, 14 Q. L. R. 265.

37. Under the common law of this Province, a creditor claiming against the estate of a joint debtor is entitled to take a dividend on his claim, only after deduction thererrom of whatever he may have received from his other joint-debtors. (*Ib.*)

38. Money due by the creditor at the time of the claim is to be set off against it and not against the dividend to be declared upon it. (*Ib.*)

39. Under the common law of this Province, a creditor claiming against the estate of a joint debtor is bound to give credit for whatever he may have received from his other joint debtors. *In re Chinic*, S. C. 1888, 14 Q. L. R. 289.

40. *Held*, (reversing the judgment of the Court of Review, M. L. R., 2 S. C. 338), that a creditor who holds notes or merchandise as collateral security, is not entitled to be collocated upon the estate of his debtor in liquidation, under a voluntary assignment, for the full amount of his claim, but is obliged to deduct any sums he may have received from other parties liable upon such notes, or which he may have realized upon the goods; and it does not matter at what time such sums have been received on account, provided it is before the day appointed for the distribution of the assets of the estate on which the claim is made. *Thibaudeau* vs. *Benning*, Q. B. 1890, M. L. R., 5 Q. B. 425, 17 R. L. 173, 33 L. C. J. 39. Confirmed in Supreme Ct. *sub nom. Benning* vs. *Thibaudeau*, 1890, 20 Can. S. C. R. 110.

41. The curator should collocate the creditors according to their apparent rights and not according to their unfounded claims. *Eveleigh* vs. *Marcotte*, S. C. 1890, 20 R. L. 603.

42. Appellant and respondent, being creditors of the Quebec Shoe Company, then in financial difficulties, and being desirous of averting its insolvency, covenanted together that appellant should secure to respondent the payment of 75 p.c. of the amount of his claim, it being agreed that appellant should pay in full each note due by the company to respondent at maturity, and that respondent would accept and pay appellant's drafts, or those of the company, for 25 p.c. of the amount of each note so paid. This agreement was carried out, but the company was nevertheless forced into liquidation, and both parties filed claims for the 25 p.c. of respondent's original claim—*Held*, maintaining the contestations of both claims, that the carrying out of the said agreement had not the effect of conveying to appellant the amount of respondent's original claim, but simply of releasing the company from the payment of 25 p.c. of the amount of such claim. *Rochette* vs. *MacIntosh*, Q. B. 1890, 17 Q. L. R. 381.

43. *Held*, reversing the judgment of Pagnuelo, J., M. L. R., 5 S. C. 426 (Dorion, C. J., and Cross, J., *diss.*), that the claim filed by the respondent on the insolvent estate of John Stephen was not legally established by the evidence, which was as follows:—1. that the claim was mentioned by the insolvent in his *bilan*, but under a different name; 2. affidavit of claimant filed with his claim, and copy of transfer to him from Francis Stephen; 3. evidence that claimant consigned goods to Francis Stephen who handed them over to John Stephen, the insolvent. *Hagar* vs. *Seath*, 1890, M. L. R., 6 Q. B. 394.

[The judgment of the Court below being reversed solely on the insufficiency of the proof of claim, the question of prescription was not passed upon by the majority of the Court.]

VI. COLLUSION IN.

(See also under title "FRAUD."

1 On evidence of collusion, writ of attachment under Insolvent Act, 1875, quashed and set aside. *Nowell* vs. *Reeves & Kilby*, S. C. 1879, 2 L. N. 301.

2. The circumstances of this case do not disclose fraud, concealment or collusion, or any attempt whatever by plaintiff to obtain a preference over other creditors. There is no principle of common law, statutory provision or rule of public policy sanctioned by jurisprudence, requiring that all creditors being parties to a deed of composition should, irrespective of the existence of good or bad faith, detriment, injustice or misfeasement, or otherwise, be in perfectly the same position, to the extent of invalidating security given to one or more creditors, because others had not received it. *Bank of Montreal* vs. *Audette*, S. C. 1878, 4 Q. L. R. 254.

3. A writ of attachment issued under the Insolvent Act, 1875, upon information given by the insolvent himself, was held not to constitute a fraudulent collusion entitling the other creditors to ask that the proceedings in insolvency be quashed. *Davidson* vs. *Lajoie*, Q. B. 1881, 1 Dorion's Q. B. R. 285.

VII. COMPENSATION.

1. A dividend payable under a dividend sheet, under the Act, cannot be retained by the assignee of the estate by way of set-off or compensation against a debt due to the assignee by the creditor collocated, as endorser of certain notes given in payment of a sale of the stock in trade of the insolvent by the assignee to another party. *Walker* vs. *Doutre*, Q. B. 1878, 23 L. C. J. 317.

2. Under sec. 107 of the Insolvent Act of 1875 compensation accrues, in respect of debts falling due after the insolvency, when the transactions leading thereto began prior to such insolvency. *Miner* vs. *Shaw*, S. C. 1879, 23 L. C. J. 150.

VIII. COMPOSITION.—(See also under title "BILLS AND NOTES.")

1. A deed of composition between a firm and the creditors of that firm, in which it is stipulated that all the creditors should sign it, is not valid or binding upon any of the creditors unless they all sign. *Cuvillier* vs. *Buteau*, Q. B. 1842, 1 Rev. de Lég. 109.

2. A debtor having obtained composition of his debt and time for payment of the balance, failed to pay such balance according to the terms of the composition—*Held*, that the creditor was entitled to the whole amount of the debt, and that notwithstanding the defendant tendered the amount of the composition before the institution of the action. *Beaudry* vs. *Barrille*, Q. B. 1845, 1 Rev. de Lég. 33.

3. Under a writ of attachment issued at the instance of certain creditors who had been induced to sign the composition, but who subsequently discovered fraud, the deed of composition was set aside on proof that they had been induced to sign by fraudulent misrepresentations. *Girard* vs. *Hall*, Q. B. 1865, 1 L. C. L. J. 58.

4. A deed of composition is not rendered null by default of payment within the specified delays, if the creditor has consented to alter the composition without the assent of the debtor who compounded. *Boudreau* vs. *Damour*, S. C. 1859, 3 L. C. J. 124.

5. An agreement to accept a composition, and, on receipt thereof, to give a full discharge for the whole debt, will not prevent the creditor, on failure of the debtor to pay such composition in full, from recovering his original claim, less the amount actually paid on account; nor will the creditor's right so to recover be affected by the surrender to the debtor of the notes which constituted the principal evidence of the original debt. *Brown* vs. *Hartigan*, S. C. 1860, 5 L. C. J. 41.

6. Where a party sends his creditor by letter the notes of third parties as a composition of the debt he owes, and the creditor retains them, he is bound by the composition, although the notes may not be paid at maturity. *Roy* vs. *Turcotte*, C. Ct. 1862, 7 L. C. J. 53.

7 A note given by an insolvent (before the Insolvent Acts of 1864 and 1865) to one of his creditors, for the purpose of obtaining his signature to a deed of composition, cannot serve as a ground of action against such insolvent; such note, so given, being considered a fraud on the other creditors. *Sinclair* vs. *Henderson*, Q. B. 1864, 9 L. C. J. 306; *Contra*, *Greenshields* vs. *Plamondon*, Q. B. 1860, 8 L. C. J. 192.

8. Where action was brought for a balance due on an account for goods sold and delivered, and an agreement in the following terms was pleaded: "We, the undersigned creditors, "hereby agree to take 2s. 6d. in the £ for our "respective claims set forth in the annexed "statement, and on payment thereof, within "six weeks from date, we hereby agree and "undertake to grant him a discharge in full." *Held*, that such an agreement effected a novation of the original debt. *Tees* vs. *McCulloch*, S. C. 1866, 2 L. C. L. J. 135.

9. When a creditor agrees to a composition with one of two members of an insolvent firm (without discharging the other) and obtains security for such composition, and afterwards releases the compounding debtor (without the consent of the other debtor) for a less amount than the composition, and surrenders the security, the other member of the firm, in an action against him by such creditor to recover the balance of his claim, may successfully resist the action by an *exceptio cedendarum actionum*. *Molsons Bank* vs. *Connolly*, S. C. 1872, 17 L. C. J. 189.

10. Where a deed of composition under the Insolvent Act of 1869, has been contested, the composition cannot be exacted until after the delays specified in the Act shall have transpired. *Yuile* vs. *Munro*, S. C. 1875, 20 L. C. J. 25.

11. Where a composition is unpaid, the debt revives in full. *Rolland* vs. *Seymour*, S. C. 1879, 2 L. N. 324.

12. An insolvent co-partnership cannot, under the Insolvent Act of 1875 and Amending Acts, offer two compositions; one to the creditors of the co-partnership, and the other to the creditors of the co-partners individually or of any of them. *Gelinas* vs *Drew*, C. R. 1877, 3 Q. L. R., 361.

13. Irrespective of the objection above stated, the deed of composition before the Court could not be confirmed; because as regards the co-partnership composition it is assented to by the co-partnership creditors only,

and is not assented to by the required majority of those creditors—because even as regards the compositions offered to the creditors of the co-partners individually, the creditors of the co partnership had a right to vote, and the last mentioned compositions are not assented to by the required statutory majority of the separate creditors and co-partnership creditors counted together. (*Ib*).

14. The indorser of composition notes is not discharged from liability thereon by the mere fact that the compounding creditors have secretly stipulated with the debtor that he shall pay them an amount in excess of the composition rate, as the condition of their consent to the composition; and especially where the indorser, as the consideration of his indorsement obtained a transfer of the insolvent's entire stock-in-trade and assets which he still retained when sued on the composition notes. But the indorser is entitled to a deduction of all sums that the creditor has received in excess of the composition notes. *Martin* vs. *Poulin*, Q. B. 1880, 4 L. N. 20, 1 Dorion's Q. B. R. 75.

15. The indorser of a composition note given by a debtor to his creditor in carrying out a settlement for 50 cents in the dollar, is not liable for the amount of such note if the debtor secretly gives the creditor his own notes for and pays the balance of the creditor's claim. *Arpin* vs. *Poulin*, Q. B. 1878, 22 L. C. J. 331, 1 L. N. 290.

16. A composition, being an act of liberality towards a debtor, must be strictly complied with by him. *Ross* vs. *Bertrand*, C. Ct. 1886, 9 L. N. 314.

17. When an insolvent compounds with his creditors, and in order to obtain the signature of one of them to the deed of composition, offers him better terms than the rest, he cannot plead fraudulent preference to escape such creditor's claim. *Chapleau* vs. *Lemay*, C. Ct. 1886, 14 R. L. 198.

18. Composition between the creditors and the indorser of a note, does not free the promissor. *Banque Nationale* vs. *Bétournay*, C. R. 1887, 18 R. L. 175.

19. Where a composition deed provides that the insolvent shall be entitled to a re-conveyance of his estate, on placing in the hands of the assignee notes covering the composition, and the assignee has re-conveyed the estate without receiving a note for a creditor who had filed a claim, the Court will order the assignee to deliver such note to such creditor *In re* Murray, S. C. 1877, 21 L. C. J. 123.

20. Where creditors agree by a composition deed (not executed under the Insolvent Act) to release their debtor absolutely, and the deed provides that, in case the debtor go or be forced into insolvency under the Act, the claims of the creditors should revive in full, but that the creditors signing the deeds should, in that case, enter into a new composition deed under the Act, such creditors could not be compelled, in case of subsequent insolvency under the Act and the execution of a new deed of composition under the Act, to accept a composition on the mere balance then remaining unpaid to them of the original composition, but, on the contrary, would be entitled to rank for the full balance unpaid on their original claims. *Rafter* vs. *Moses*, Q. B. 1878, 23 L. C. J. 297.

21. A creditor who holds collateral securities, and who compounds with his debtor, without any reserve, can only keep the collaterals as security for the amount of the composition. *Heney* vs. *Primeau*, S. C. 1889, 18 R. L. 271.

22. Where the creditors compound with their debtor for 5 cents in the dollar cash, such composition can be revoked if not acted on by the debtor in a reasonable time. *Bolt* vs. *Lee*, S. C. 1886, 16 R. L. 53.

23. A delay of 16 months in the payment of a debt as reduced by the composition, justifies a creditor in revoking his consent to the composition. (*Ib*).

24. The authority of a clerk to bind his employer to agree to a composition with a debtor must be of an express and unequivocal character. A clerk attending a meeting of creditors on behalf of his employer will not be assumed to possess such power. *Vineberg* vs. *Beaulieu*, 1888, M. L. R. 4, S. C. 328.

25. The assent of a creditor, at a meeting of creditors, to a composition, even if proved, would not bind him to accept the terms of a deed of composition and discharge by which the original claims of the creditors are novated, and replaced by composition notes. (*Ib*).

26. Where an agreement of composition is prepared, by which the creditors agree to accept a composition on the amount of their respective claims, and the agreement is not signed by all the creditors as was contemplated, and it does not appear that those who signed, individually intended to compound for the amount of their respective claims indepen-

dently of the other creditors, novation is not effected of the claim of a creditor who signed the agreement but who subsequently refused to accept the composition, and did not in fact receive the same. *McDonald* vs. *Seath*, 1889, M. L. R., 6 Q. B. 168.

27. Even supposing the composition agreement to be binding, the curator to the judicial abandonment subsequently made by the debtor was bound, in his tender, to give the creditor the benefit of the option contained in the agreement, viz., satisfactory endorsed notes for 40 cents on the dollar, or 35 cents in cash, and in contesting the creditor's claim for the amount of the original debt, was bound to repeat the tender with option as above stated. (*Ib.*)

28. On the 20th December, 1883, the creditors of one L. resolved to accept a composition payable by his promissory notes at 4, 8 and 12 months. At the time L. was indebted to the Exchange Bank (in liquidation), who did not sign the composition deed, in a sum of $14,000. B. *et al.*, the appellants, were at that time accommodation indorsers for $7,415 of that amount, but held as security a mortgage dated the 5th September, 1881, on L.'s real estate. The bank having agreed to accept $8,000 cash for its claim, B. *et al.*, on the 8th January, 1884, advanced $3,000 to L., and took his promissory notes and a new mortgage registered on the 13th January for the amount, having discharged and released on the same day the previous mortgage of the 5th September, 1881. This new transaction was not made known to D. *et al.*, the respondents, who, on the 14th January, 1884, advanced a sum of $3,000 to L. to enable him to pay off the Exchange Bank and for which they accepted L.'s promissory notes. L., the debtor, having failed to pay the second instalment of his notes, D. *et al.*, who were not originally parties to the deed of composition, brought an action to have the transaction between L. and the appellants set aside and the mortgage declared void on the ground of having been granted in fraud of the rights of the debtor's creditors.—*Held*, reversing the judgment of the courts below, (19 R. L. 488, 16 R. L. 243) that the agreement by the debtor L. with the appellants was valid, the debtor having at the time the right to pledge a part of his assets to secure the payment of a loan made to assist in the payment of his composition. (The chief justice and Taschereau J. dissenting.)

Per Fournier, J.—The mortgage having been registered on the 13th January, 1884, the respondent's right of action to set aside the mortgage was prescribed by one year from that date; Art. 1040 C. C. *Brossard* v. *Dupras*, Supreme Ct. 1890, 19 Can. S. C. R. 531, reversing Q. B. 19 R. L. 488, and S. C. 16 R. L. 243, reported *sub nomine Lamoureux* vs. *Dupras*.

IX. COMPOSITION AND DISCHARGE. (1)

1. Where the assignee has received a deed of composition and discharge from the insolvent, signed by a majority in number, and three quarters in value of his creditors, he can re-convey the estate to the insolvent after the said deed has been ratified at a meeting of the creditors; he need not await the ratification of the deed by the Court. *In re Fabrre*, S. C. 1878, 8 R. L. 629.

2. So soon as a deed of composition and discharge has been executed, in accordance with the provisions of section 52 of the Act, the assignee is bound, under section 60 of the Act, to re-convey the estate to the insolvent, without waiting for the confirmation of the deed by the Court or Judge. *In re Hachette*, C. R. 1878, 22 L. C. J. 245, 1 L. N. 532.

3. A deed of composition and discharge signed by the secretary of a company without special power to that effect is invalid. *Bolt & Iron Co'y.* vs. *Gongeon*, S. C. 1884, 7 L. N. 40.

4. Under Insolvent Act, 1875—*Held*, that the assignee could not be compelled to re-convey the estate to the insolvent until the confirmation of the deed of composition by a meeting of creditors. *Beattie* vs. *Riddell*, S. C. 1879, 2 L. N. 302.

5. The assignee cannot refuse to re-convey the estate to the insolvent, because he has not paid the instalment due under the deed of composition. *In re Piton*, S. C. 1879, 6 Q. L. R. 15.

6. These instalments cannot be exacted until the insolvent has been put in possession of his estate in the terms of the deed of composition and according to law. (*Ib.*)

7. Nor can the assignee recover possession of the insolvent's estate because the latter has not paid the instalments due under the deed of composition, except where the discharge is conditional. *In re Piton*, S. C. 1879, 6 Q. L. R. 33.

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(1) Deeds of Composition and Discharge between Co-partners and their Creditors under the Insolvent Act of 1879. Article by William H. Kerr in 1 Rev. Ct. 171, 405.

8. In the absence of an express stipulation in a deed of composition, the discharge is absolute in its effect, even though the insolvent fail to pay the instalments. (*Ib.*)

X. CONFLICT OF LAWS.

1. No Judge in the Province of Quebec has a right to interfere with Insolvency proceedings originated in Ontario, where the insolvent has his domicile, even though the assignee reside in the Province of Quebec, and the affairs of the estate be conducted in Montreal. *In re McDonnell*, S. C. 1871, 15 L. C. J. 145.

2. The provincial laws for the collection and distribution of an insolvent's estate are not applicable outside the province. *Pacaud* vs. *Tousigny*, C. R. 19 Q. L. R. 54.

XI. CONTINUING BUSINESS.

1. It is within the power of the majority of the creditors to allow an insolvent to carry on his business without giving security or an inventory being taken, but the court will grant to a creditor petitioning against such a proceeding *acte* of his petition to avail as a formal protest against the insolvent, assignee, and all others concerned, in so far as the proceedings complained of have any tendency to bind the petitioner to any greater extent than he can be legally bound by the same. *Lamontagne in re* S. C. 1876, 2 Q. L. R. 160.

2. On a petition by an insolvent, praying to be allowed to continue his business pending the contestation of the writ—*Held*, reversing the judgment of first instance, that the court or a judge might permit him to do so on giving security for the value of his stock in trade and assets. *Anderson* vs. *Gervais*, C. R. 1878, 1 L. N. 579, and 22 L. C. J. 277; & *Fisher* vs. *Malo*, S. C. 1876, 22 L. C. J. 276.

3. The Court or Judge has power to authorize an insolvent to continue his trade, after the writ of attachment has been quashed, during the pendency of proceedings in Review of the judgment quashing the attachment. *Fisher* vs. *Malo*, S. C. 1878, 22 L. C. J. 276.

4. The Court or Judge may permit a trader to continue his trade during the pendency of proceedings on a contestation of the writ of attachment, on his giving security to the full value of his assets. *Anderson* vs. *Gervais*, C. R. 1878, 22 L. C. J. 277.

XII. DELAYS IN.

An insolvent who has permitted the five days allowed by the Act to petition to elapse, will not be allowed to appear afterwards. *May* vs. *Larue*, S. C., 1 L. C. L. J. 97.

XIII. DISCHARGE.

(See also "COMPOSITION AND DISCHARGE."

1. A discharge granted to a bankrupt by two-thirds in number and value of the creditors, who have proved under the commission, by a composition in virtue of the statute 7 Vic. cap. 10, is not binding upon those of the remaining creditors who have hypothecary claims, and who have not required that the real estate should be sold for the payment of their claims, and who have not released to the assignee the property hypothecated, and such creditors have still their personal action against the said bankrupt. *Ferguson* vs. *Cairns*, Q. B. 1845, 1 Rev. de Lég. 89.

2. Where to an action by a notary against a vendor for making a *livre terrier* the defendant pleaded a certificate of discharge in bankruptcy under a commission issued in 1848—*Held*, that the debt was proveable under the commission, and was discharged by the effect of the certificate. *David* vs. *Hart*, S. C. 1859, 10 L. C. R. 453.

3. Where it was proved that the insolvent had granted fraudulent preferences and had traded extensively without capital, though without the intention of committing fraud, his discharge was refused. *Watt exp.*, S. C. 1867, 2 L. C. L. J. 284.

4. Under the Insolvent Act of 1861 a discharge will be confirmed, unless positive proof be adduced of "fraud or fraudulent preference" on the part of the insolvent. *Ex-parte Thurber*, S. C. 1867, 11 L. C. J. 35.

5. A party buying goods on credit and knowing his affairs to be in a bad state, although without intending to defraud the vendor, and subsequently declaring himself insolvent, is not entitled to his discharge under the Act. *Exparte Tempest*, S. C. 1867, 11 L. C. J. 57.

6. A trader, purchasing goods for cash, at a time when he must have known that he could not meet his liabilities, and converting the goods into money and applying the proceeds to his own use, and to the payment of certain creditors, and withholding payment of the goods during five days under various pretences, and then declaring himself insolvent,

is guilty of fraud, within the meaning of the Act, and is therefore liable to have his discharge suspended or altogether refused. *In re Frear*, S. C. 1868, 12 L. C. J. 315.

7. Under the provisions of the Insolvent Act of 1869, a trader presenting himself to the Court for discharge must have been trading at or after the passing of that Act. *In re Villeneuve*, S. C. 1871, 3 R. L. 519.

8. An insolvent is discharged, by a composition deed with the requisite numbers of his creditors confirmed by the Court, from debts which the creditor has claimed from the assignee of the estate of the insolvent, but not as regards costs incurred subsequent to making the claim by the litigation of the insolvent. *Tate* vs. *Charlebois*, S. C. 1870, 14 L. C. J. 215.

9. On a petition for the discharge of an insolvent under the Act of 1869, a year after the assignment or issue of the writ of attachment, the judge may *ex mere motu* order an examination into all the transactions of the insolvent, and require from the assignee a detailed report of all the affairs of the insolvent, and that, although the petition for discharge is not opposed by any interested party. *In re Sutherland*, S. C. 1872, 3 R. L. 579.

10. On a contestation of an application for discharge—*Held*, that the insolvent is bound to proceed first and show that he has fulfilled the conditions prescribed by the Insolvent Act. *Soloman in re & Samuel*, C. R. 1872, 2 R. C. 232.

11. The insolvent petitioned for his discharge, alleging that more than a year had passed since his insolvency, and that, having conformed to the requirements of the law, the judge was bound to grant him a discharge. The party had made a voluntary assignment, and from that time to the time of application not one meeting had been called under the Act; there was no public examination of the insolvent, and in fact, nothing done—*Held*, that the petition must be rejected. *Quesnel et al. exp.*, S. C. 1872, 2 R. C. 478.

12. An insolvent petitioning for his discharge under the Act must give notice by mail to all creditors and representatives of foreign creditors within Canada, in addition to the notices required to be given by advertisement. *In re Esinhart*, S. C. 1874, 18 L. C. J. 72, 5 R. L. 436.

13. An insolvent cannot get his discharge until he has served his creditors with a notice as required by sec. 117 of Insolvent Act. *Ex-parte Poulin*, S. C. 1874, 5 R. L. 254.

14. On an application for confirmation of a deed of composition or discharge—*Held*, reversing the judgment of Court of Review and confirming that of the Court of original jurisdiction, that, in order to form the majority in number and three-fourths in value required by the Insolvent Act of 1869, the creditors only who have filed their claims with the assignee in accordance with sec. 122, and whose claims have been proved, are to be considered. *Toussaint* vs. *Wurtele*, Q. B. 1871, 1 Q. L. R. 89 and 127.

15. Nor can one oppose to such application the insufficiency of the notices required by secs. 97 and 117 if the insolvent have given the notice required by sec. 101. (*Ib.*)

16. Nor is the fact that the insolvent has been put in possession of the estate after the deposit of the deed of composition, against the wishes of a creditor, a reason for refusing a confirmation of his discharge. (*Ib.*)

17. Nor is an unaccepted offer of preference made by a third party, without the participation of the insolvent, a reason. (*Ib.*)

18. On a contestation of an application for a discharge no fee will be allowed for articulation of facts or for appearance of counsel at *enquête*. *Re Inglis*, S. C. 1877, 20 L. C. J. 184.

19. On an application for discharge by an insolvent who had made a voluntary assignment under the Act of 1869—*Held*, that as nothing had been done after his assignment, no meeting had been held, and his estate would not pay a cent on the dollar, he was not entitled to his discharge. *Chester* vs. *Poirier* S. C. 1877, 7 R. L. 673.

20. A creditor of an insolvent under the Insolvent Act of 1875 has a right to oppose the granting of a discharge to the insolvent on the ground that he has recklessly granted or indorsed accommodation paper. *In re Johnston*, C. R. 1878, 23 L. C. J. 160.

21. Where an insolvent, who was indebted to Duhamel, Rainville & Rainville, merely put the name "Duhamel" in his list of debts, without specifying any amount—*Held*, that he was not discharged from the claim by his discharge under the Act. *Duhamel* vs. *Payette*, S. C. 1878, 1 L. N. 162.

22. A discharge in insolvency under the Act of 1864 is not invalidated by the omission to state in the list of creditors that the debt

sought to be recovered was due to the creditor *in her quality of tutrix*. *Levy* vs. *Barbeau*, Q. B. 1879, 23 L. C. J. 216.

23. Discharge under Insolvent Act, 1875, contested on the ground *inter alia* that the insolvent had kept no cash book. Insolvent contended that the bank book answered all the purposes of one—*Held*, that the want of a properly kept cash book was sufficient to justify the suspension of the discharge. *Donovan* vs. *McCormick*, S. C. 1879, 2 L. N. 322.

24. Rule against a guardian, insolvent, for refusing to return his books to the assignee to his estate, with a demand for his imprisonment under sec. 25 Insolvent Act, 1875—*Held*, that the insolvent, having received a confirmation of his discharge from insolvency, was no longer subject to the summary jurisdiction of said section. *Seath* vs. *Fair*, S. C. 1880, 3 L. N. 167.

25. A claim that was not filed, and did not appear among the insolvent's list of debts, was held not to be covered by the discharge, and the insolvent was still liable for it. *Royal Institution for the Advancement of Learning* vs. *Simpson*, S. C. 1880, 3 L. N. 413.

26. Where to an action on a promissory note by a third holder the maker pleaded that he had been insolvent and had included the payee in his list of creditors, and the payee had filed his claim and defendant had since obtained a discharge—*Held*, that this was no answer to a third holder without proof of compliance, and observance on the part of the defendant of the provisions of sec. 61 of the Insolvent Act of which there was none, nor any proof that plaintiff had been notified of the petition for discharge. *Bank of America* vs. *Copland*, S. C. 1881, 4 L. N. 154.

27. Where an insolvent on his petition for discharge after a year, which was contested by the assignee on behalf of the creditors, refused to go into explanations of the deficit in his estate, which was a large one, the discharge was refused. *Mulholland* vs. *Fair*, S. C. 1881, 4 L. N. 333.

28. The petitioner P. was an insolvent, and applying for his discharge, and opposed by F. The opposition was successful on the ground that the petitioner had not kept proper books of account showing his receipts and disbursements as required by Insolvent Act, 1875. Sec. 56. *Pilon* vs. *Foucault*, C. R. 1883, 6 L. N. 358.

29. The validity of an assignment in insolvency may be contested on the application of the insolvent for his discharge. *Dillon* vs. *Beard*, S. C. 1883, 7 L. N. 103.

30. Where an Insolvent (under the Insolvent Act, of 1875) in the statement of his affairs described a note given by him as having been made in June, whereas it was made in December—*Held*, that he was not freed from liability thereon by a discharge in insolvency. *Arpin* vs. *Roy*, C. R. 1884, 28 L. C. J. 38.

31. A creditor of an insolvent to the extent of less than $100, and who has never appeared on the insolvent's statement, can exercise his recourse against the latter and compel him to pay, although he has obtained his discharge. *Bergeron* vs. *Roy*, C. Ct. 1884, 7 L. N. 414.

32. An insolvent was not obliged to give notice of his application for discharge, under the above Act, to a person who became transferee of a schedule debt subsequent to the date of the assignment. *Girouard* vs. *Dufort*, S. C. 1886, M. L. R. 2, S. C. 179.

33. A certificate granted by the prothonotary in the case of a liquidation originating under the Act of 1869, to the effect that the insolvent had not obtained a discharge, is not in itself sufficient proof that, in an action occurring 12 years after, a person bearing the same name was an undischarged insolvent. *Trudel* vs. *Langlier*, S. C. 1887, 14 Q. L. R. 35.

34. A discharge granted to an insolvent under the Act of 1875 and a deed of composition, has the effect of freeing him both of his personal debts and those which he contracted as a member of a partnership in liquidation. *Chinic* vs. *Compagnie Minière de Coloraine*, Q. B. 1877, 14 Q. L. R. 53.

XIV. DISTRIBUTION.—(See also "CLAIMS.")

1. A payment by the sheriff, under a judgment of distribution, to an opposant therein collocated at a time when such opposant was no longer possessed of his estate (having assigned the same under the Act) is good, and cannot be questioned subsequently by the assignee. *Salvas* vs. *Lerreux*, C. R. 1874, 18 L. C. J. 293.

2. Where a seizure of immoveables has been made by the sheriff before the owner made a judicial abandonment, and the sale takes place subsequently, the distribution of the proceeds should be made by the curator to the

estate. *Baker* vs. *Gariepy*, 1890, M. L. R. 6, S. C. 385.

3. The distribution of the proceeds of the sale of an insolvent's immoveables by a sheriff, should be made by the curator where the abandonment was made since the seizure of the immoveables. But, if the sheriff returns the proceeds into the Court, and they are distributed, a creditor cannot, after such distribution, demand that such proceeds shall be remitted to the curator for distribution. *Talbot* vs. *Laverdière*, S. C. 1891, 20 R. L. 507.

4. Dividend Sheet.—A dividend sheet, unpublished according to the requirements of the Act, is null and void. *Re Larivière*, S. C. 1867, 11 L. C. J. 265.

XV. EFFECT OF.—(See *supra* "ASSIGNMENT, ETC., EFFECT OF.")

1. Even an insolvent debtor preserves the right of free disposal of his property, and any alienation thereof in good faith is valid as against his creditors. *Desrosiers* vs. *Meilleur*, S. C. 1892, 2 Que. 411.

2. A debtor's insolvency loses him the benefit of the term agreed upon. *Furniss* vs. *Bleault*, S. C. 1886, M. L. R. 2, S. C. 419.

XVI. FOREIGN ASSIGNMENT.

1. A bankrupt assignment, made under the provisions of an Act of Congress of the United States of America, will not transfer immoveable property in Canada. *Macdonald* vs. *Georgian Bay Lumber Co.*, Supreme Court 1878, 2 Can. S. C. R. 365.

2. An English commission in bankruptcy does not act in Canada as an absolute conveyance of the bankrupt property to the assignee, nor does it affect the privileges of provincial creditors; but the assignee may, by action, attach the property of the bankrupt, and out of the proceeds take the share which belongs to the English creditors. *Bruce* vs. *Anderson & Randall*, K. B, 1818, 2 Rev. de Lég. 75.

3. Nor can a commission in bankruptcy suspend proceedings in execution of a judgment of the Court of Queen's Bench. *Macfarlane* vs. *Lanctot & Brault*, Q. B. 1845, 1 Rev. de Lég 45.

4. See *Allen* vs. *Hansen*, 18 Can., S. C. R. 667, as to Foreign Corporation doing business in Canada, being wound up in Canada as well as in the foreign country.

XVII. HYPOTHECS.—(See also under title "HYPOTHEC.")

A debtor against whose property a judgment has been registered, and who afterwards makes an assignment, and obtains back his estate by a composition with his creditors, in which he undertakes to pay the hypothecs on his property in full, cannot have the hypothec so registered set aside, at his own suit, on the ground that it is a fraud on his creditors. *Foster* vs. *Baylis*, Q. B. 1877, M. L. R. 3 Q. B. 421.

XVIII. IMPRISONMENT UNDER THE INSOLVENT ACTS AND CODE OF PROCEDURE.

1. If an insolvent receive a sum of money during the interval between the notice of meeting of creditors and the appointment of the assignee, and refuses to pay over the money to the assignee, it is a "retaining and withholding without lawful right," within the meaning of the Amending Act of 1865. *In re* Warmington, S. C. 1868, 12 L. C. J. 237.

2. Where the Court is satisfied that the fraud charged, in an action under the 92nd Section of the Act, has been proved, the insolvents will be ordered to be imprisoned, in default of payment of *costs* as well as of the debt. *Rogers* vs. *Sancer*, Q. B. 1873, 18 L. C. J. 57.

3. *Contra.*—In ordering imprisonment under the 92nd Section of the Act the Court is bound to limit the payment, by way of release (in the precise words of the Act), to the "debt or costs." *Warner* vs. *Buss*, S. C. 1873, 18 L. C. J. 181.

4. A debtor who, having failed to meet his liabilities, gives accommodation notes, knowing his insolvency, and buys goods on credit, without disclosing these facts to the vendor, commits a fraud within the meaning of the Act, and is liable to be imprisoned accordingly. *Watson* vs. *Grant*, S. C. 1877, 21 L. C. J. 222, 1 L. N. 65.

5. Application was made by the defendant to be discharged from imprisonment under capias, on the ground that he had made an assignment of his estate for the benefit of his creditors, just previous to the issuance of the capias—*Held*, that as the Insolvent Act did not take away the right of capias after assignment, and as the circumstances showed systematic fraud on the part of the defendant, the application must be refused. *Stevenson* vs. *McOwan*, S. C. 1867, 3 L. C. L. J. 38.

6. "The Court" in Section 136 of the Act of 1875, in the Province of Quebec, means the Superior Court, and not the Judge sitting in insolvency, and the demand for the imprisonment of the debtor provided by said section is made in an ordinary suit and not by a petition in insolvency. *Re Gear*, S. C. 1877, 21 L. C. J. 279.

7. A *capias* may lie against a defendant who has assigned under the Act. *Robertson* vs. *Hale*, S. C. 1877, 21 L. C. J. 38.

8. In an action for imprisonment under section 136 of the Act, it is not necessary to bring a separate action on each separate invoice of goods, but one action will suffice as respects all the purchases. *Caldwell* vs. *Macfarlane*, Q. B. 1877, 22 L. C. J. 78, 1 L. N. 4.

9. The fact that an insolvent purchases on credit, and does not divulge to the seller the position of his affairs, is not in itself sufficient from which to presume an intention to defraud, and the hope of recovering himself, which a buyer may have, and the fact that he purchases half for cash, which he pays, and the other half at three months, will relieve him from liability under the Insolvent Act of 1875. *Convey* vs. *Renouf*, C. R. 1879, 5 Q. L. R. 224.

10. A merchant who purchased goods knowing himself incapable of paying for them—*Held*, guilty, and condemned to two years' imprisonment under sec. 136 of Insolvent Act, 1875. *Gault* vs. *Fauteux*, S. C. 1878, 10 R. L. 62.

11. In an action against a trader, under the Insolvent Act 1875, for obtaining goods on credit, knowing himself to be insolvent, two years was ordered unless the debt was sooner paid. *Wilkes* vs. *Beaudry*, S. C. 1879, 2 L. N. 157.

12. Declaration that on the 2nd August, 1878, and on the 6th August of the same year, defendant purchased goods from plaintiff, and went into an insolvency on 20th of same month. Conclusion, that defendant be declared to have known at the time these purchases were made that he was insolvent, and that he be imprisoned under sec. 136 of the Act (1875). Evidence, that defendant did not know plaintiff at all, but had been solicited by an agent to purchase, that he had refused, and that the agent, after long solicitation, had taken down an order without his consent. That the goods were sent, but never put into stock or taken possession of by defendant. Demand for imprisonment rejected. *Hird* vs. *Fauteux*, S. C. 1879, 2 L. N. 222.

13. This was a petition under the Insolvent Act, sec. 150, charging that the bankrupt had always failed to disclose the assets belonging to his estate; that, within thirty days before the attachment, he had received moneys for which he had failed to account, etc. The bankrupt was deficient in his cash; his books were miserably kept; but His Honor did not see clearly that he had brought himself within the provisions of the section of the Act. The petition would be rejected, but without costs, seeing the grossly negligent way in which the insolvent kept his books and mismanaged his business, to the detriment of his creditors, and seeing also the character of the insolvent's answer to the petition, and the charges contained in it against the petitioner. *In re Bowie*, S. C. 1874, 7 R. L. 228.

14. But in another case against the same defendant, in which he had bought goods on credit in March and April, 1878, and it was established that his business had shewn a deficit of $2,300 in 1876—*Held*, liable to imprisonment under the 136th section of the Act. *Leclaire* vs. *Fauteux*, S. C. 1879, 10 R. L. 109.

15. During the spring of 1875 the appellant got the respondent to indorse several notes and to accept several bills of exchange. In the following August the appellant became insolvent without having extinguished the obligations which respondent had assumed for him. Respondent demanded that the appellant be imprisoned, because, when he got the respondent to undertake these indorsements and acceptances, the appellant knew that he was incapable of meeting his engagements—*Held*, that the appellant had not hidden his embarrassed circumstances from the respondent when he asked the latter to assist him, and their friendship had continued for over ten months after the appellant had failed without the respondent making any complaint; that the appellant having since his failure paid over one-third of the debt, even out of personal funds which were exempt from seizure, excluded all presumption of fraud on his part. Imprisonment refused. *Boyer* vs. *Barthe*, Q. B. 1880, 1 Dorion's Q. B. R. 120.

16. The defendant was a director of the Exchange Bank, which suspended payments on the 17th September, 1883, and had at the time some $13,000 deposited to his credit in

the Bank. The day following the suspension of the Bank the defendant made his cheque upon the Bank to the amount of $8,000, which was paid by $3,000 in species and a cheque for $5,000 on another bank, and on the 28th of the same month he received another $2,000 also by cheque on another bank, which was accepted and paid, making in all $10,000, which he drew from the Bank subsequently to its suspension—*Held*, by the Police Magistrate that these acts constituted an undue and unfair preference under 34 Vict., cap. 5, sec. 61 (1), and notwithstanding subsequent acts shewing good faith, such as the refunding of the money, the accused was committed for trial, convicted by a jury and sentenced to a few days in gaol. *Regina* vs. *Buntin*, Police Ct. 1884, 7 L. N. 228.

17. *Held*, that where a debtor makes an abandonment of his property for the benefit of his creditors, which abandonment is contested as fraudulent, and the debtor is condemned to imprisonment for fraud, such term of imprisonment, when served, exhausts the penalty, although no further abandonment is made by the debtor, who must be discharged from further imprisonment. *Ogilvie* vs. *Farnan*, C. R. 1889, 34 L. C. J. 282.

XIX. JUDGMENT OBTAINED IN FRAUD OF CREDITORS.

1. Judgment obtained in fraud of creditors—Insolvent Act—Sale en bloc—Notice—Prescription—Intervention.—John Stephen, in 1865, became an insolvent under the Insolvent Act of 1864. The principal asset was the share to which he would become entitled on the division of his deceased father's estate, which division was not to take place until the youngest child became of age (in 1881). In the meantime the insolvent's share of the revenues accumulated in the hands of the executors, and was at the disposal of his assignee, but was not claimed by him, and remained in the hands of the executors. John Stephen obtained his discharge, and long afterwards, in 1879, made an offer of ten cents on the dollar for his estate. This offer amounted to about $3,000. At this time there was nearly double that amount of accrued revenues in the hands of the executors. The offer was accepted by a resolution of creditors at a meeting which was called without specifying the object in the notice thereof, and creditors who were themselves insolvent attended and voted. An order of the Insolvent Court was obtained on the 17th of April, 1879, ordering the assignee to carry out the resolution, and the estate was then re-conveyed to John Stephen, who paid the ten cents out of the accumulated revenues and retained the surplus. He subsequently, in 1881, sold his share of his father's estate to his brother, George C. Stephen, the appellant, for $5,000. On a petition by a creditor to the Insolvent Court to revoke the judgment of 17th April, 1879, as having been obtained fraudulently, the assignee not having disclosed the true position of the estate—*Held*, 1. That the Insolvent Court had jurisdiction to entertain the petition and revoke the judgment of 17th April, 1879, and that an action at law to set aside the sale of the estate was not necessary. *Stephen* vs. *Hagar*, Q. B. 1885, M. L. R., 4 Q. B. 298.

2. The prescription of one year under Art. 1040 C.C. did not apply, as John Stephen, having obtained his discharge before he purchased the estate, was not a debtor. (*Ib.*)

3. The judgment of 17th April, 1879, should be revoked, the resolution of creditors authorizing the sale *en bloc* being illegal, the meeting not having been called in accordance with sec. 38 of the Insolvent Act of 1875, and the assignee having concealed the true position of the estate. (*Ib.*)

4. The intervention of George C. Stephen was unfounded, his purchase of his brother's share of the real estate not being impugned by the present proceeding. (*Ib.*)

XX. JURISDICTION.—(See *supra* "CONFLICT OF LAWS.")

1. A party who has for upwards of six months acquiesced in the proceedings taken against him under the Act cannot afterwards question the jurisdiction of the Court. *Fulton* vs. *Lefebvre*, S. C. 1877, 21 L. C. J. 23.

2. Under the Insolvent Act of 1875 a judge in chambers has the power to resiliate a deed. *Lecy* vs. *Connolly*, S. C. 1881, 7 Q. L. R. 224.

XXI. KNOWLEDGE OF.—(See under title "FRAUD," page 616.)

After the advertisement of the sheriff that a writ of attachment has issued, the public is bound to know the incapacity of the insolvent to sell his property, and this state of things continues during the pendency of an appeal, rendered necessary by dismissal of the

original procedure. A sale of any property, under such circumstances, although the property be not actually seized in consequence of its having been secreted, is absolutely null, and the property may be revendicated by the guardian in the hands of the purchaser, who will not be allowed to claim reimbursement of his purchase money. *Mallette* vs *Whyte*, Q. B. 1868, 12 L. C. J. 229.

XXII. LIABILITY OF CREDITORS.

1. Under the Insolvent Act, 1875—*Held*, that an assignee had no power to bind creditors personally for the costs of an action which he had caused to be discontinued. He was subject to certain limitations, and for certain purposes the agent of the estate of the insolvent, but he was not for any purpose the agent of the creditors individually, and therefore could not bind them. *Crépeau* vs. *Glover*, C. R. 1879, 5 Q. L. R. 235.

2. The liability of creditors interested in the winding up of an insolvent estate is not governed by Art. 1726 C. Code but by Arts. 1117 and 1118 C. Code, which enact that the joint and several obligation of several debtors is divided of right among them, and that, if one of them pays the debt in full, he can only recover from the others the share and portion of each of them. *Chinic* vs. *Ross*, Q. B. 1887, 13 Q. L. R. 297.

3. The appellants in this case, plaintiffs in warranty, have no joint and several recourse against the creditors for any condemnation that may go against them. (*Ib.*)

4. *Held*, that while creditors, or inspectors, of an insolvent estate are not, *ipso facto*, liable individually for legal expenses incurred in respect of the liquidation of the estate, and for the payment of which assets do not exist, they may make themselves so liable by some act of direct authorization or interference, *e.g.*, by consultations with counsel, by giving them instructions, and by advances of money paid through the curator. Such liability is joint, in proportion to the amount of the creditors' claims against the estate. (1) *Laflamme* vs. *Ontario Bank*, S. C. 1892, 1 Que. 371.

XXIII. MEETING OF CREDITORS.

1. A meeting of creditors, duly convened under the Insolvent Act of 1864, may be lawfully adjourned to a subsequent day, without repeating the advertisements and notices required by the Act for meetings of creditors. *In re MacFarlane*, S. C. 1868, 12 L. C. J. 241.

2. A meeting adjourned at the call of the assignee is adjourned *sine die*, and new notices are necessary before meeting again. *Consolidated Bank* vs. *Davidson & Stanley*, S. C. 1879, 2 L. N. 348. Confirmed in Review, 3 L. N. 56.

3. Where a meeting of creditors is called, those who do not attend are regarded as assenting to the resolution of those who are present, and that the advice of the creditors who are present is deemed to be the advice of all the creditors. *Cloyes* vs. *Darling*, S. C. 1884, 16 R. L. 649.

XXIV. NOTICE.

(See also "Meeting of Creditors.)

1. The notice required by the 101st section of the Insolvent Act of 1869 cannot be given by advertisement in the weekly edition of a daily newspaper. *Hope* vs. *Franck*, Q. B. 1873, 18 L. C. J. 28.

2. The giving of notice required by section 105 of the Insolvent Act of 1869 does not include the necessity of notice to each individual creditor required by section 117. *In re Starke*, C. R. 1874, 18 L. C. J. 288.

XXV. PREFERENTIAL PAYMENTS.

(See under title "Fraud.")

XXVI. PRIVILEGED COSTS.

(See also under title "Privilege.")

1. The costs of opening and administering the insolvent's estate are not generally made in the interest of the hypothecary creditors, whose rights are assured. *In re DuBerger*, S. C. 1890, 13 L. N. 110.

2. Only those costs which are incurred in the conservation and liquidation of the insolvent's immoveables can be considered as privileged law costs. (*Ib.*)

XXVII. PROCEDURE.

1. Examination of Witnesses.—An insolvent summoned to give evidence touching his estate and effects cannot be cross-examined by his own counsel. *In re Fraser*, S. C. 1868, 12 L. C. J. 272.

2. —— A creditor is not debarred from his right to examine the insolvent under oath, before a judge, by the mere fact that a com-

(1) This case reviews all the authorities.

position deed (purporting to be duly executed) has been deposited with the Prothonotary, and that a notice has been given by the insolvent of his intention to seek its confirmation. *In re Bowie*, S. C. 1869, 13 L. C. J. 191.

3. —— An order for the examination of witnesses made on the eve of a voluntary assignment, under the Act, of a partnership estate by two only, out of three partners, is irregular, and a petition for examination should, moreover, state satisfactory reasons for the order. *In re Lusk*, S. C. 1872, 17 L. C. J. 47.

4. —— An insolvent is not bound to answer a question which may tend to criminate him. *In re Beaudry*, S. C. 1877, 21 L. C. J. 196.

5. —— An insolvent cannot be cross-examined by his counsel on his examination by the creditors in court. *In re Lamontagne*, S. C. 1876, 2 Q. L. R. 156.

6. Stay of Proceedings.— A petition by an insolvent to stay proceedings under the Insolvent Act of 1869, made after the expiration of five days from the demand of an assignment, on the ground that the insolvent has executed a deed of assignment to an official assignee, is too late. *Thomas* vs. *Martin*, Q. B. 1872, 17 L. C. J. 11; confirming C. R., 15 L. C. J. 236.

7. —— An insolvent cannot stay the proceedings of a plaintiff until the assignee takes up the suit in place of the insolvent. *Wilson* vs. *Brunet*, C. R. 1877, 21 L. C. J. 209.

XXVIII. PROVISIONAL GUARDIAN.

1. The guardian to an insolvent estate may revendicate property illegally sold by the insolvent in the hands of the purchaser. *Mallette* vs. *Whyte*, Q. B. 1868, 12 L. C. J. 229.

2. The provisional guardian appointed to property judicially abandoned must be resident within the Province of Quebec. *McDougall* vs. *McDougall*, 1887, M. L. R., 3 S. C. 148, 31 L. C. J. 202, 15 R. L. 363. (1)

3. The decision of the prothonotary appointing a provisional guardian may be revised by the court or judge. (*Ib.*)

4. Where the interests of the provisional guardian appointed by the prothonotary are adverse to those of the creditors generally, his appointment may be set aside. (*Ib.*)

(1) See *Bate* vs. *Lang*, 9 Leg. News, p. 393, for decision of Superior Court, Ottawa; Wurtele, J., to the same effect.

XXIX. REVENDICATION IN.

(See also under title "REVENDICATION.")

1. In case of insolvency the revendication allowed under articles 1998 and 1999 of the Code must be effected within fifteen days of the sale, and within eight days of the delivery of the goods revendicated. *In re Sylvestre*, S. C. 1871, 15 L. C. J. 303.

2. Goods in the possession of the assignee to an insolvent estate cannot be revendicated by way of an attachment in revendication, the proper proceedings being under sec. 50 of the Ins. Act of 1869. *Ouimet* vs. *Tees*, S. C. 1873, 5 R. L. 483.

XXX. REVOCATORY ACTION.

Where an opposant claims from an assignee land which the latter holds under deeds of sale to the insolvent, and the vendors are not in the cause, recourse must be had to the revocatory action, in which all concerned shall be parties. *Re Woods & Co.*, S. C. 1879, 23 L. C. J. 65.

XXXI. RIGHTS OF CREDITORS.

1. On an opposition *afin de distraire* filed by one to whom the defendant had sold her stock in trade, which the plaintiff alleged was null, inasmuch as the defendant was insolvent at the time of the pretended sale—*Held*, that a creditor could not set up the nullity of a sale made by an insolvent under the Insolvent Act of 1875, except in so far as it was made to his prejudice and in fraud of his rights. *Sharing* vs. *Meunier*, Q. B. 1857, 1, L. C. J. 142 and 7 L. C. R. 250, 5. R. J. R. Q. 222.

2. The estate and effects of an insolvent are the common security of all his creditors. *Cumming* vs. *Smith*, Q. B. 1859, 5 L. C. J. 1; reversing S. C., 2 L. C. J. 195.

3. Under the insolvent acts, a creditor whose debt has not matured may commence proceedings against his debtor who is insolvent. *Moore* vs. *Luec*, Ont. Com. Pleas, 1868, 13 L. C. J. 113.

4. Where a creditor agreed that the debtor should make an assignment otherwise than in the manner prescribed by the Act—*Held*, that he could not avail himself of such assignment to subject the estate of the debtor to compulsory liquidation. *Pecket* vs. *Plinquet*, S. C. 1872, 4 R. L. 544.

5. A general authorization given by a creditor to represent him at a meeting of creditors

called by an insolvent, which contains everything necessary to protect his interests, is a sufficient authorization to the person furnished with it to sign a deed of assignment such as may be approved by the meeting. (*Ib.*)

6. Section 68 of the Insolvent Act requires, in order that a creditor may take proceedings in his own name, first a demand upon and refusal by the assignee to take the proceeding, and then the permission of a judge to do so —*Held*, that such conditions are to enable the creditor to secure for himself all the advantages derived from these proceedings; but by the common law any creditor may take, at his own risk, in the common interest of the creditors, all such proceedings as will tend to bring into the common fund anything which it is attempted to direct from it, and there is nothing in the insolvent law differing from the common law on this point. *In re Dinning*, S. C. 1877, 4 Q. L. R. 37. Confirmed in appeal, 7 Dec., 1877.

7. A creditor for an amount under $500 is without quality to petition against resolutions passed at a meeting of creditors or against the appointment of an assignee. *In re Morgan & Sons*, S. C. 1877, 3 Q. L. R. 376.

8. A creditor who has proved his claim according to section 104 of the Insolvent Act of 1875 is entitled to vote for the appointment of an assignee, although his claim has been contested and the contestation is still pending. *Murphy* vs. *Connolly*, Q. B. 1878, 4 Q. L. R. 368.

9. A creditor who has specified the value of the securities which he holds, as required by section 84, is entitled to vote as a creditor for that portion of his claim which is in excess of the values of such securities. (*Ib.*)

10. A commissioner to receive affidavits to be used in the Supreme Court of Judicature in England is an officer duly authorized to receive the oath of a creditor to a claim to be filed in Insolvency under sections 104 and 105 of the Insolvent Act, 1875. (*Ib.*)

11. A creditor who has proved his claim as being unsecured, and who has not claimed any privilege, is entitled to vote for the appointment of assignee, as an ordinary creditor, more particularly if the claim does not appear on its face a privileged one. (*ib.*)

12. Where a creditor objected to certain proceedings had by the assignee—*Held*, that as his claim was on notes which were filed he had no status to object. *Consolidated Bank* vs. *Davidson*, S. C. 1879, 2 L. N. 348. Confirmed in Review, 3 L. N. 56, *sub nom. Davidson, et al., in re.*

13. The creditors are not bound to accept the highest tender for the assets of an insolvent estate, sold under sec. 41 of the Act, and are free to act as they deem best for the interests of the estate. *In re McCarville*, S. C. 1874, 18 L. C. J. 139.

14. An order obtained by a creditor for the delivery of goods by fraud and artifice, will be set aside on petition of the assignee. *In re Cable*, S. C. 1877, 21 L. C. J. 121.

15. A creditor has a right to sue and recover judgment against his debtor notwithstanding that the estate of the debtor may have been placed in compulsory liquidation under the Act, and, consequently, proceedings in appeal in which the debtor is a party cannot be suspended on the ground that the debtor has made an assignment under the Act. *Archambault* vs. *Westcott*, Q. B. 1878, 23 L. C. J. 292.

16. Where a commercial firm being creditors of an insolvent took action under section 68 of the Insolvent Act, 1875, to recover money paid to the appellants after the insolvency—*Held*, reversing the judgment of the Court of Review (2 L. N. 253), that, as the appellants had received the amount on conservatory process, there was no fraud, and they had as great a right to it as the respondents. *Banque Jacques Cartier* vs. *Beausoleil*, Q. B. 1881, 4 L. N. 116, and 1 Dorion's Q. B. R. 151.

17. Where there is a surplus in the private estate of one member of an insolvent firm after paying his creditors the amount of their claims as filed, but a deficiency in the firm estate to pay firm creditors, the latter have no claim upon such surplus until the private creditors, who have interest-bearing claims, have been paid interest from the date of filing the same till payment. *In re Mulholland*, S. C. 1883, 6 L. N. 171.

18. The respondents, who were creditors to an amount exceeding $4,000 of the insolvent firm of C. and M., complained that the appellants had received from C. & M. a sum of $3,824 while the latter were insolvent, and the object of the action was to have appellants ordered to pay this money into Court for the benefit of C. & M.'s creditors generally. The appellants demurred to the action, on the ground that the respondents were not entitled to come into Court individually and (without alleging any transfer to themselves of the

rights of the other creditors or any authorization by the creditors) claim to have the payment set aside—*Held*, that a creditor who alleges that his debtor while insolvent had made payments to another creditor, knowing his insolvency, has a right under Art. 1036 C. C. to sue the latter in his own name and to ask that such sums be paid into Court for the benefit of the creditors generally. *Boisseau* vs. *Thibaudeau*, Q. B. 1884, 7 L. N. 274, 12 R. L. 672. (See *Thompson* vs. *Molson's Bank*, 8 L. N. 363.)

19. It is not a good defence to an action to plead that the defendant had made an assignment under the Insolvent Act of 1869, and had not yet obtained his discharge, the creditor having a right to sue and obtain a judgment against his debtor. *Canadian Mutual Fire Ins. Co.* vs. *Blanchard*, 1886, M. L. R., 2 S. C. 61.

20. Only the creditors of an insolvent at the date of the hypothec can attack a hypothec acquired against the latter during his notoriously insolvent condition. *Pacaud* vs. *Brisson*, C. R. 1886, 12 Q. L. R. 281.

21. The Molson's Bank took from one H. several warehouse receipts as collateral security for commercial paper discounted in the ordinary course of business, and having a surplus from the sale of the goods represented by the receipts after paying the debts for which they were immediately pledged, claimed under a parol agreement to hold that surplus in payment of other debts due by H. —H. having become insolvent, T. (appellant), under art. 1031 C. C., brought an action against the bank claiming that the surplus must be distributed ratably among the creditors generally. H. was a member of the firm of H. & H., and they were not parties to the suit—*Held*, affirming the judgment of the courts below, that the parol agreement was not contrary to the provisions of the Banking Act, ch. 120, secs. 53 et seq., that after the goods were lawfully sold, the money that remained, after applying the proceeds of each sale to its proper note, was simply money held to the use of H., subject to the terms of the parol agreement. (Ritchie, C. J., *dubitante*, and Fournier, J., dissenting). Per Taschereau, J., that H. & H. ought to have been made parties to the suit. *Thompson* vs. *Molson's Bank*, Supreme Ct. 1889, 12 L. N. 339, 16 Can. S. C. R. 664.

22. (Following *Boisseau* vs. *Thibaudeau*, *supra*.) A creditor who alleges that his debtor while insolvent has made payments to another creditor who was aware of his insolvency is entitled to sue the latter in his own name, and to ask that such moneys be paid into Court for the benefit of the creditors generally. Where a curator has been appointed to the insolvent, the curator may bring the action, and, in his default, it is competent to any creditor to bring it. *Jeannotte* vs. *La Banque de St. Hyacinthe*, 1890, M. L. R., 7 S. C. 21.

23. *Held*, there is no power in the court or judge to order the curator of an insolvent estate to lend his name to certain creditors for the purpose of an appeal from a judgment dismissing the contestation of a claim, such appeal, if it exists, belonging to the creditors by law as a means of protecting their individual rights. *In re Langlois*, S. C. 1893, 4 Que. 444.

XXXII. RIGHTS OF INSOLVENT.

(See also "Carrying on Business," and "Assignee, Etc.")

1. Where an assignment was made by an insolvent debtor to trustees for the benefit of his creditors, which assignment was subsequently resiliated by the payment of his debts—*Held*, confirming the judgment of the court below, that he was entitled to be placed in possession of the remainder of the effects assigned, as well as those that remain, as the moneys, proceeds of those sold, and that he was entitled to recover such effects even in the hands of third parties, without notification of the judgment awarding it, saving the question of costs of recovery. *Hagan* vs. *Wright*, Q. B. 1860, 11 L. C. R. 92.

2. The fact that an insolvent has included a claim in his list of liabilities does not prejudice his defence to such claim. *Hood* vs. *Barsalou*, S. C. 1878, 1 L. N. 621.

3. Application under Insolvent Act of 1875 by an insolvent, alleging injury to the estate pending the contestation of the writ, to be allowed to manage the property, to reap crops, etc., and for an allowance of $20 a week maintenance—*Held*, that the Court had no power to grant such an order. *Milloy* vs. *O'Brien*, S. C. 1879, 2 L. N. 372.

4. The plaintiff, just after his discharge from insolvency, took action against the assignee and inspectors of his estate for breach of contract for selling the estate to another, after entering into a written contract with him to retransfer it to him for 40 cents on the dollar—*Held*, that, as he had

nothing at the time the contract was entered into, he could have suffered nothing by the violation of it. *Styce* vs. *Darling*, S. C. 1879, 2 L. N. 250, 9 R. L. 557.

5. Where an insolvent trader becomes suddenly insane, and one of creditors, without formal opposition from his family, takes possession of his estate and disposes of the same in good faith and for its actual value, in the interest of the creditors of the estate, the insolvent will have no action of damages against such creditor. *Versailles* vs. *Grenier*, S. C. 1884, 12 R. L. 604.

XXXIII. RIGHT OF ACTION BY REASON OF INSOLVENCY.

Where two persons, E. and M., had been in co-partnership under the firm name of "W. M. & Co.," and E. having subsequently entered into partnership with other parties under the name of J. E. & Co., by an agreement passed in July, 1855, M. agreed with J. E. & Co. to assume all the liabilities of W. M. & Co. to pay the amount due E. & Co. in four instalments, and to give security, on condition that he should be allowed to cut timber on certain timber limits of E. & Co. He subsequently cut timber without giving security, and the timber was transferred to the firm of Symes & Co., which had made advances to him. M. paid E. & Co. the first instalment of the above-mentioned debt by his notes, one for £1,500, which E. & Co. paid away to a third party, and one for £800, which E. & Co. placed to the credit of M. & Co., E. & Co. having, by attachment before judgment, seized the timber cut as in the possession of M. and having sued for the whole debt—*Held*, that the plaintiffs, not having alleged the insolvency of M. in their declaration, could not base their right to sue for the whole of the debt on such insolvency, and the allegation of his insolvency in their special answer could not avail to supply the deficiency in their declaration. *Moffatt* vs. *Young*, Q. B. 1866, 2 L. C. L. J. 60.

XXXIV. SALE OF INSOLVENT'S ESTATE.

(See also under title "SALE.")

1. When an assignee improperly refuses a bid for real property offered by him for sale under the Act, and adjudges the property to the previous bidder, the judge will set aside the adjudication, and order the property to be adjudged to the party whose bid was rejected. *In re Leger*, S. C. 1872, 17 L. C. J. 84.

2. An assignee who sold outstanding debts due to the insolvent under the 44th sec. of the Act, according to a schedule exhibiting the original amounts of such debts without deduction of payments received by the assignee on account, was bound to account for and pay over to the purchaser of such debts the full amount of such payments so made to the assignee, notwithstanding that the conditions of sale declared:—"that the sale is made without any guarantee whatever or any warranty of any kind or description whatever, so much so that no warranty is given that the debts have even existence,"—and notwithstanding also that the audience were informed by the auctioneer that dividends had been paid, and that the amounts in the schedule were the original amounts without deduction of such dividends, and notwithstanding, further, that the total amount paid for such debts was only a few dollars and the payments in question amounted to more than 600 dollars. *Lafond* vs. *Rankin*, Q. B. 1873, 18 L. C. J. 62.

3. The assignee of an insolvent estate under the Insolvent Act, 1875, sold it *en bloc* by inventory, in which certain shares of a company were set down at $5,642.76. The purchaser paid the total amount of the purchase money, on the condition that the assignee would pay for any deficiency in the assets sold according to the pencil estimate on the inventory. It appeared that the $5,642.76 represented the amount paid on $15,000 of stock, that the balance was unpaid, and that paid-up stock could not be delivered to the purchaser —*Held*, that the assignee was bound to return the proportionate value of paid-up stock to the amount of $5,642.76, and, in the absence of any allegation, that $2,000, the pencil estimate on the inventory, was not a fair estimate, the assignee was condemned to return that sum. *Dixon* vs. *Perkins*, Q. R. 1880, 3 L. N. 364, 1 Dorion's Q. B. R. 1.

4. Where a party obtains a good title to an immoveable a long time after the insolvency of his *auteur*, but who failed to register his title before the insolvency, he can, nevertheless, prevent the sale of the immoveable by the assignee and have the immoveable withdrawn from the sale. *In re Grothé*, S. C. 1882, 12 R. L. 218.

5. Where in a deed of sale it is expressed that the vendor in his quality of assignee to

the insolvent has received the price of the sale from the purchaser, it cannot afterwards be maintained, on the ground of the falsity of such statement, that the vendor in his quality being personally indebted to the purchaser's principal, compensation took place to the extent of that indebtedness. *Savoie* vs. *Rainville*, Q. B. 1885, 14 R. L. 364.

6. In such a case the purchaser is liable to the insolvent for the whole price of sale, and can only claim credit on such price for such sums as have been actually paid to the vendor thereon. (*Ib.*)

7. Where the curator has sold the book debts at public sale, and handed the purchaser the books containing the names of the debtors and the details of the accounts, he is not entitled to revendicate the books, not having any interest to do so, and the books being indispensable to the purchaser of the debts. *Kent* vs. *Granger*, 1889, M. L. R., 5 S. C. 40.

8. Where a person who had tendered for the purchase of an insolvent estate, and who had put in two bids, and, acting in collusion with the insolvent, bought off a higher bidder in order that his own lowest tender might be accepted, this artifice was a fraud upon the creditors of the estate, and they, or any one of them, might recover from such bidder the amount of damage caused thereby to the estate. *Jacobs* vs. *Ransom*, 1889, M. L. R., 5 Q. B. 260.

9. Two or more independent firms, creditors of the insolvent, may unite in such action, and claim one money condemnation. (*Ib.*)

10. The amount recovered in such action is an asset of the estate, and must be distributed as such, and cannot be wholly paid to the creditors who instituted the suit. (*Ib.*)

11. In 1876, D., a trader, mortgaged to plaintiff an immoveable, situate in Fraserville, as security for a loan. In 1879, D. became insolvent and assigned; the immoveable, as part of his estate, was duly advertised by the assignee and put up to auction at Fraserville, but withdrawn, and at a subsequent auction held in Quebec, in 1881, after advertisement in local papers only, was sold and adjudicated by the assignee to the present defendant, who paid the price and received a deed of sale. After the first attempted auction, viz., in 1880, the plaintiff had obtained an order of court upon the assignee to proceed to immediate sale. In 1885, the plaintiff brought the present hypothecary action against the defendant as *detenteur* of the immoveable for a balance of the loan made to D. The defendant pleaded his deed, to which the plaintiff replied specially that the pretended sale had been unaccompanied by the formalities required by the Insolvent Act of 1875. To this the defendant demurred, contending that the sale could only be attacked by a direct proceeding or petition in the insolvency record—*Held*, dismissing the demurrer, that if, as averred by plaintiff, the legal formalities had not been observed, the assignee's sale could have no more effect against plaintiff than a sale made by the insolvent himself prior to his insolvency, and the special answer was therefore good in law—*Held*, also, that a sale in the city of Quebec could not purge of its hypothecs property situate in the district of Kamouraska, and that in any case defendant's title was not a sufficient one under section 75 of the Insolvent Act, and the plaintiff's action must be maintained—*Semble*, that the order of Court obtained by plaintiff to compel the assignee to proceed to sale, after the first duly advertised but unsuccessful auction, was not a "consent of the hypothecary creditor," within the meaning of section 75 of the act, so as to justify a postponement of the sale to such time as might "be deemed most advantageous to the estate," or to allow of a sale otherwise than by public auction after two months' advertisement in the *Official Gazette*. *McDonald* vs. *Roy*, C. R. 1886, 12 Q. L. R. 37.

12. The sale, by the curator, of the book debts of an insolvent, has the effect of a judicial sale. *Guilbault* vs. *Desmarais*, S. C. 1890, 18 R. L. 517.

13. The sale of an insolvent's book debts at a fixed price is not subject to the terms of Art. 1582 C. C. (*Ib.*)

XXXV. SECURITY FOR COSTS BY INSOLVENT.

1. The security mentioned in sec. 42 of the Insolvent Act of 1869 can only be ordered by the Court and not by a judge. *Lynch* vs. *St. Amour*, S. C. 1874, 5 R. L. 414.

XXXVI. SERVICE IN.

1. A debtor who has made a cession otherwise than under the Act cannot be served at his old place of business, when he has really ceased to do business there and the business has been continued there merely by the assignee. *Hutchins* vs. *Cohen*, S. C. 1869, 14 L. C. J. 113.

2. A petition calling in question the validity of an assignment under the Act must be served upon the insolvent as well as upon the assignee. *In re Gravel*, S. C. 1872, 17 L. C. J. 23.

XXXVII. STATUS OF INSOLVENT.

An insolvent under the Act has no legal interest to plead an assignment made by him under the Act, in bar of proceedings in compulsory liquidation. *Martin* vs. *Thomas*, C. R. 1870, 15 L. C. J. 236.

XXXVIII. STATEMENT.

1. Under the Insolvent Act of 1875, the insolvent is only bound to mention in his statement those who are creditors at the date of his failure; therefore, a lawyer who has obtained distraction of costs in a judgment rendered after the failure cannot claim to have his name placed in the statement, even though it be made out after the judgment was rendered. *Desmarteau* vs. *Mills*, C. R. 1884, 13 R. L. 54.

2. The insertion of the plaintiff's name in the statement enables the debtor to invoke against the lawyer the benefit of sec. 61 of the Insolvent Act. (*Ib.*)

3. The delay given by Arts. 773 and 774 C. C. P. to contest the insolvent's statement, and to make proof of the allegations of the contestation, can only be prolonged to two months where the delay of four months mentioned in Art. 773 has not expired. *Woodward* vs. *McKenzie*, S. C. 1889, 17 R. L. 700.

XXXIX. WHAT CONSTITUTES.

1. *Held*, that when a trader in business ceases, and his debts remain unpaid, this constitutes insolvency which would exclude all preference, *McKenzie* vs. *Quebec Bank*, Q. B. 1830, 3 R. L. 457.

2. Action upon a promissory note dated 1st September, 1881, and payable at six months, due 4th March, 1882. The plaintiff alleged the insolvency of the defendants and contended that in consequence they could not obtain the benefit of the term—*Held*, that a company ceasing to meet its ordinary payments as they become due, though its nominal assets may be equal to its liabilities, will be deemed insolvent, and cannot claim the benefit upon a promissory note not yet become due. *Corcoran* vs. *Montreal Abattoir Co.*, S. C. 1882, 6 L. N. 135.

3. A firm which has ceased to meet its ordinary payments as they become due will be deemed insolvent within the meaning of 1092 C. C., and the insolvency of the firm entails that of the partners individually. *Ontario Bank* vs. *Foster*, S. C. 1883, 6 L. N. 398.

4. In order to prove insolvency or *déconfiture*, it must be shown that the assets of the debtor are less than his liabilities. *Mantha* vs. *Simard*, S. C. 1883, 6 L. N. 195.

5. Inability to pay a particular debt does not constitute a trader a bankrupt within the meaning of No. 23 of Art. 17 of the Civil Code. To constitute a trader a bankrupt within the meaning of that Article, he must have ceased to meet his payments in general. *Sirois* vs. *Beaulieu*, C. R. 1887, 13 Q. L. R. 293.

6. The provisions of 45 Vict. (D.), ch. 23, override any rule as to insolvency contained in the Civil Code. *Exchange Bank of Canada* vs. *Montreal Coffee House Association*, C. R. 1886, M. L. R., 2 S. C. 141.

7. A trader who cannot meet his liabilities is properly thrown into insolvency. And it is no ground for a petition to have the writ of attachment quashed that the note which forms the subject of the creditor's debt is not yet due. *Rutherford* vs. *Banque Nationale*, Q. B., 21 Dec., 1878.

8. A party became insolvent and assigned. Before his estate was wound up, and while his property was still in the hands of the assignee, he obtained his discharge and recommenced business. He contracted a new debt, and judgment went against him, on which an execution issued, and his creditors seized part of his estate in the hands of the assignee to the previous insolvency. The property was allowed to remain under seizure more than fifteen days. This was held to be an act of insolvency. *Bank of Toronto* vs. *Henderson*, Q B., 21 Sept., 1878.

XL. WHO ARE SUBJECT TO THE ACT OF 1869. (1)

Although an insolvent may not have traded for over three years, yet, if the debts due by such insolvent when in trade are unpaid, the insolvent will be liable to proceedings under the Act, and that even at the suit of a creditor whose claim is non-commercial. *Buchanan* vs. *McCormick*, Q. B. 1875, 19 L. C. J. 29.

(1) Can a person who ceased to be a trader before the passing of the Act of 1869 take benefit of the Act? Article by D. Girouard in 2 Rev. Crit., p. 65.

INSPECTION, INSPECTORS.

Of Fish and Oil.—The inspector of fish and oil has a right to charge the fee allowed him for the inspection of a tierce, although it only contains really 42 to 43 gallons, Winchester measure, notwithstanding the provisions of the Statute 36 Vic., ch. 47, sec. 4, which makes the Imperial gallon the standard of measure of liquids. *Morin* vs. *Lord*, C. Ct. 1874, 22 L. C. J. 211, 7 R. L. 43.

Pickled fish may be sold without inspection at the place where pickled or packed. *Auld* vs. *Fraser*, S. C. 1880, 6 Q. L. R. 157.

Of Leather.—By virtue of 37 Vict., ch. 45, nobody other than the inspector of leather has the right to stamp leather with a mark shewing its superficial measure when such leather is for sale. *Delisle* vs. *Fortin*, Q. B. 1878, 4 Q. L. R. 289.

Of Roads—(See under title "MUNICIPAL CORPORATION.")—The inspector of roads is an officer within the meaning of the Provincial Statute 14 and 15 Vic., ch. 54, entitled to a month's notice of action for damages in consequence of an act performed by him in that capacity, although such act may have been committed without legal authority. *Jetté* vs. *Choquette*, Q. B. 1856, 1 L. C. J. 148.

INSURANCE.

(*a*) *Accident.*
(*b*) *Fire.*
(*c*) *Guarantee.*
(*d*) *In General.*
(*e*) *Life.*
(*f*) *Live Stock.*
(*g*) *Marine.*
(*h*) *Insurance Companies.*

(*a*). ACCIDENT INSURANCE.

I. ACCIDENT.
What is, 1.
Risks incidental to employment. 2.
II. DELAY TO SUE COMPANY.
III. NOTICE OF ACCIDENT.
IV. PARTNERSHIP—DISSOLUTION—INTEREST OF RETIRING PARTNER.

I. ACCIDENT. (1)

1. What is.—An accident policy issued by the defendants was payable "within thirty "days after sufficient proof that the insured, "at any time during the continuance of this "policy, shall have sustained bodily injuries "effected through *external, accidental and "violent means*, within the intent and meaning of this contract and the conditions hereunto annexed, *and such injuries alone shall "have occasioned death* within ninety days "from the happening thereof....Provided "always that this insurance shall not extend "to hernia, nor to any bodily injury of which "there shall be no external and visible sign, "*nor to any bodily injury happening directly "or indirectly in consequence of disease, nor "to any death or disability which may have "been caused wholly or in part by bodily infirmities or disease*, existing prior or subsequent to the date of this contract, or by "the taking of poison, or by any surgical "operation or medical or mechanical treatment, *nor to any case except where the injury aforesaid is the proximate or sole "cause of the disability or death.*" The insured was accidentally wounded in the leg by falling from a verandah, and within four or five days the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued twenty-three days after the accident. There was some conflict in the evidence as to whether the erysipelas resulted solely from the wound, but the Court found, on the facts, that the erysipelas followed as a direct result from the external injury—*Held*:—1. That the external injury was the proximate or sole cause of death within the meaning of the policy, and that the plaintiff was entitled to recover. *Young* vs. *Accident Insurance Co. of North America*, 1890, M. L. R., 6 S. C. 3. Confirmed in Appeal, M. L. R., 7 Q. B. 447, and in the Supreme Court on this point, 20 Can. S. C. R. 280, *Accident Ins. Co.* vs. *Young*, but reversed on question of notice.

2. Risks Incidental to Employment.—M., who was described in the application for insurance as "Superintendent of the International Railway," was insured by the company appellant against accidents. By one of the conditions of the policy it was stipulated as follows:—"The insured must at all times observe due diligence for personal safety and protection, and in no case will this insurance be held to cover either death or injuries occurring from voluntary exposure to obvious danger of any kind, nor death or disablement....from getting or attempting to get on or off any railway train, etc., while the

(1) See American case reported 10 L. N. 124 as to suicide, and another case 10 L. N. 321 as to inhaling illuminating gas. See several English cases reviewed 3 L. N. 358.

same is in motion." M., when travelling on the business of his railway, was killed while getting on a train in motion. *Held*:—That, inasmuch as M. was insured as superintendent of a railway, and there was evidence that his duties required him to get on and off trains in motion, of which fact the insurers had knowledge, the condition did not apply, and the company was liable. *Accident Ins. of N. A.* vs. *McFee*, 1891, M. L. R., 7 Q. B. 250.

II. DELAY TO SUE COMPANY.

Where it is proved that the death of the insured was caused by external, accidental and violent means, the company can be sued before the expiration of the ninety days accorded it where it refuses to pay the amount of the policy before the expiration of that period. *Citizens' Ins. Co. of Can.* vs. *Boisvert*, Q. B. 1885, 14 R. L. 156.

III. NOTICE OF ACCIDENT.

The policy provided that "in the event of "any accident or injury for which claim may "be made under this policy, immediate notice "must be given in writing, addressed to the "manager of this company at Montreal, stating "full name, occupation and address of the in-"sured, with full particulars of the accident "and injury; and failure to give such imme-"diate written notice shall invalidate all "claims under this policy."

On the 21st March, 1886, the insured was accidentally wounded in the leg by falling from a verandah, and within four or five days the wound which appeared at first sight to be a slight one was complicated by erysipelas, from which death ensued on the 13th April following. The local agent of the company at Simcoe, Ontario, received a written notice of the accident some days before the death, but the notice of the accident and death was only sent to the company on the 29th April, and the notice was only received at Montreal on the 1st May. The manager of the company acknowledged receipt of proofs of death, which were subsequently sent without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and therefore the company could not recognize their liability. On appeal to the Supreme Court—*Held*, reversing Courts below, Fournier & Patterson dissenting (M. L. R., 7 Q. B. 447; M. L. R., 6 S. C. 3), that the company had not received sufficient notice of the death to satisfy the requirements of the policy, and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this way. *Accident Ins. Co. of North America* vs. *Young*, Supreme Court 1891, 20 Can. S. C. R. 280.

IV. PARTNERSHIP—DISSOLUTION—INTEREST OF RETIRING PARTNER.

The life of J. S. McLachlan was insured against accident as one of the members of the firm of McLachlan Brothers & Co., the insurers (defendants) undertaking to pay the sum of $10,000, within 90 days after the death of one of the persons named in the policy, to the surviving representatives of the firm. By one of the provisions of the policy it was stipulated that, when a member "*quit the firm*," the insurance should cease on his person. J. S. McLachlan ceased to be a partner seven months before his death by drowning, and the dissolution was duly registered. In answer to one of the questions submitted, the jury found that the firm was dissolved, "but J. S. McLachlan had a continued and active interest in the business"—*Held*, that the insurance, as far as J. S. McLachlan was concerned, lapsed at the date of the dissolution of the partnership, and the fact that he continued to have an interest in the business did not entitle the other partners to maintain an action upon the policy. *McLaughlin* vs. *Accident Ins. Co. of N. A.*, M. L. R., 4 S. C. 365. Reversed in appeal, on the ground that, inasmuch as the jury were not asked, and did not state, in the precise words of the condition, whether J. S. McL. had "*quit the firm*" on the 18th November, and their answers were insufficient to enable the Court to render a correct judgment thereon, it was a case in which the Court should order a new definition of facts for the jury, with leave to the parties to proceed by *venire de novo*. M. L. R., 6 Q. B. 39.

(*b*) FIRE INSURANCE. (1)

I. Agency. 1-5.

II. Application. 1-2.

III. Appraisement of Loss. (See also under "Arbitration" as to agreement to arbitrate.)

IV. By Mortgagee.

(1) See Mr. Justice McKay's notes on fire insurance, published in the Legal News, commencing vol. 13, p. 140.

V. By Wife.
VI. Change of Risk. 1-8.
VII. Change of Title. 1-2.
VIII. Concealment, Misrepresentation, Misdescription, etc. 1-20. (See also "Second Insurance" and "Waiver.")
IX. Delay to file Claim.
X. Division of Loss.
XI. Exemption Clause in Policy.
XII. Identity of Property. 1-2.
XIII. Insurable Interest. 1-8.
XIV. Interest on Loss.
XV. Interim Receipt. 1-7.
XVI. Leaving Premises Unoccupied. 1-2.
XVII. Liability of Insurer. 1-5.
XVIII. Mutual Fire Insurance.
Arbitration under the Act. 1.
Assessments.
Cancellation of Policy. 2.
Compensation — Directors' Fees. 3-4.
Details of Losses on which Assessment Based. 5-10.
Prescription of Claim for. 11.
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Double Insurance. 13-15.
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Power of Company to Borrow. 18-19.
Rights of Foreign Companies. 20.
Transfer of Policy. 21.
XIX. Notice and Proof of Loss. 1-14.
XX. On Coals.
XXI. On Goods in hands of Assignee. 1-3.
XXII. Payment of Premiums.
XXIII. Right of action against Insurance Company.
XXIV. Right of Insured when Company Rebuilds.
XXV. Rights of Third Parties under the Policy. 1-3.
XXVI. Sale of Property Insured.
XXVII. Second Insurance. 1-7.
XXVIII. Term of Policy.
XXIX. The Contract.
XXX. Transfer of Insurance. 1-2. (See also "Notice and Proof of Loss" and "Insurable Interest.")
XXXI. Valuation of Property and Loss by Insured. 1-8.
XXXII. Waiver. 1-7. (See also under other sub-titles.)
XXXIII. Warranty. 1-3. (See also under other sub titles.)
XXXIV. What Goods are covered by the Policy. 1-7.

I. AGENCY.

1. An insurance company is bound by the acts of its agent acting within the scope of his duties, and where an agent receives a telegram from the head office instructing him to join with the other companies in arriving at a settlement of the claim, and did in effect agree to pay his company's share to the insured in the proportion settled by the agents of the various companies, he does not exceed the limits of his mandate, and his company will be liable for his agreement with the insured, even though the action of the agent in joining with the other companies was brought about by an error in the telegram which had given the words "promptly decide to join" instead of "promptly decline to join." *Cie. d'Assurance Provinciale* vs. *Roy*, Q. B. 1879, 10 R. L. 643.

2. And an insurance agent acting within the scope of his employment and in the name of his principal cannot be held personally responsible. *Picard* vs. *La Cie. d'Assurance*, etc., 1886, M. L. R., 2 S. C. 117.

3. The insured is not liable for misrepresentation of agent to company without the knowledge of the insured. *Ottawa Agricultural Ins. Co.* vs. *Boutigé*, Q. B. 1879, 2 L. N. 394.

4. The defendant, an insurance broker, was the agent in Montreal of two foreign insurance companies, one of which instructed him to cancel a certain risk in Montreal, which the defendant had accepted. After suggesting a reconsideration, and the order being repeated, he complied, and he then immediately transferred the insurance to the other company for which he was agent, without informing them that the risk had been refused by the first company. He made the transfer, moreover, without the knowledge of the insured and without notice to them. On the same day a fire occurred in the premises in-

sured, and the loss was paid by the company to which the insurance had been transferred. In an action afterwards brought by the latter against the agent, to be reimbursed the amount of the loss which they alleged they had paid without cause, and upon false representations by the agent—*Held*, affirming the judgment of Wurtele J. (M. L. R., 5 S. C. 262), that the transfer of the insurance being made by the defendant in good faith, before the fire occurred, and in accordance with the custom of insurance brokers in Montreal, there was no fraud on his part, and he could not be held liable. *Connecticut Fire Ins. Co.* vs. *Kavanagh*, 21 R. L. 320, M. L. R., 7 Q. B. 323. Affirmed by the Privy Council [1892], App. Cas. 473, 15 L. N. 308, the Privy Council refusing to allow a new issue as to negligence to be raised in appeal.

5. The agent of an insurance company has no power to insure a house against fire and to give delay for the payment of the premium. Where a promissory note was given for the premium of a fire policy, and no policy was issued, and the building was destroyed by fire after the note had become due and dishonored, the insured could not recover, the Judicial Committee holding that the powers of the agent being public must be taken to have been known to the insured, and that the acts of the agent in the transaction were *ultra cires* and void, not being within the scope of his general authority as agent, and, therefore, not binding upon the insurance company. *Montreal Assurance Co.* vs. *McGillivray*, P. C. 1859, 13 Moore 87.

II. APPLICATION.

1. When the application is referred to in the policy as forming part thereof, it will control the provisions of said policy, where there is a variance with respect to the description of the premises insured. *Vezina* vs. *Canada Fire and Marine Ins. Co.*, S. C. 1883, 9 Q. L. R. 65.

2. An insurance company cannot collect the premiums on a policy, where the latter is not issued in conformity to the application. *Canadienne Cie. d'Assur. sur la Vie* vs. *Perrault*, S. C. 1889, M. L. R., 5 S. C. 62.

III. APPRAISEMENT OF LOSS.

(See also under title "Arbitration" as to agreement to arbitrate.)

Where, after the fire, the parties agree to an appraisement of the loss (for which liability is admitted), the award is final and conclusive as to the extent of the loss sustained by the insured. *Heron* vs. *Hartford Ins. Co.*, 1888, M. L. R., 4 S. C. 388.

IV. BY MORTGAGEE.

The insurance by a mortgage creditor of the house or building subject to his mortgage is not an insurance of the building *per se*, but only of the creditor's security for the payment of his debt, and to support an action on the policy there must be a loss existing at the time of action brought, and if before action brought, the premises be re-built, whereby the creditor's security is restored, he cannot recover as for a loss. *Mathewson* vs. *Western Assurance Co.*, S. C. 1859, 4 L. C. J. 57, 10 L. C. R. 8.

V. BY WIFE.

A woman common as to property and under coverture cannot validly insure in her own name the household furniture belonging to the community without the authorization of her husband. *Rousseau* vs. *La Compagnie d'Assurance Royale*, 1885, M. L. R., 1 S. C. 395.

VI. CHANGE OF RISK.

1. The mere substitution of one office for another in a case of fire insurance does not necessitate the giving of notice, as in the case of a new or double insurance. *Pacaud* vs. *Monarch Insurance Company*, S. C. 1857, 1 L. C. J. 284.

2. *Held*, reversing the judgment of the Court below, that a policy of insurance is vitiated by changes which increase the risk in the buildings insured, without legal notice to the insurers. *British American Land Company & The Mutual Fire Insurance Company*, C. R. 1865, 1 L. C. L. J. 95.

3. A colourable lease made to an individual for the purpose of constituting him a warehouseman upon whose receipts the goods assured would be dealt with does not affect the risk and void the policy of an insurance upon certain goods *assured whether their own property held on trust or on consignment.* That the non-disclosure of a previous policy made a condition of a policy insurance can be waived by transactions and special circumstances. *Lancashire Ins. Co.* vs. *Chapman*, P. C. 1875, 7 R. L. 47; confirming Q. B., which reversed S. C., 13 L. C. J. 36.

4. In the case of a fire policy of buildings described as dwellings, endorsed to the effect that any change of occupation, by which the risk is increased, must be notified in writing to the insurance company and endorsed on the policy, and that in default thereof the insurance shall be null and void—*Held*, that the change of occupation to a tavern without notice to or consent of the company does not render the policy void, when the jury state in their special findings that an intermediate change of occupation into a vinegar factory had been sanctioned by the company, and that the risk of the tavern was not greater than that of the vinegar factory. *Campbell* vs. *The Liverpool and London Fire and Life Ins. Co.*, Q. B. 1869, 13 L. C. J. 309.

5. The placing of a gasoline engine in insured premises, without the consent of the insured, is a violation of the policy. *Matthews* vs. *The Northern Assurance Co.*, S. C. 1871, 3 R. L. 450.

6. Premises insured as a tannery and leather dressing house were used for drying nine bales of cotton—a substance which it was proved was more inflammable than the stock of a tannery. The fire first appeared in the cotton. By a condition of the policy the use of the premises for more hazardous purposes avoided the contract. The jury found that the drying of cotton was not a material alteration in the use of the premises, and that the alteration did not increase the risk—*Held*, that there being evidence that the insured, by the use of the premises for drying cotton, increased the risk, the verdict was contrary to the evidence adduced, and a new trial was ordered. *Mooney* vs. *Imp. Fire Ins. Co.*, C. R. 1886, M. L. R., 3 S. C. 339.

7. A condition in a policy to the effect that no lime or ashes shall be kept in wooden vessels in or near the buildings insured is not violated by the placing of cold ashes in the building. *Montmagny Mutual Fire Ins. Co.* vs. *Carbonneau*, Q. B. 1888, 15 Q. L. R. 86, 16 R. L. 275.

8. Where a building is insured as a sawmill, the risk is not enhanced because it confines itself to sawing shingles instead of planks as formerly. *Tessier* vs. *Cie. d'Assur. de Rimouski*, S. C. 1890, 19 R. L. 145.

VII. CHANGE OF TITLE.

1. The sale of a property for municipal taxes under the Municipal Code, followed by the redemption of the property in accordance with the said Code, is not such an alienation as would avoid a policy of insurance either under the conditions endorsed upon it, or under the provisions of Article 2576 of the Civil Code. *Pâquet* vs. *Citizens Insurance Co.*, S. C. 1878, 4 Q. L. R. 230.

2. Where the policy prohibited change of title without the permission of the company, a sale of the property by way of protecting a person becoming judicial surety, the resolution of such sale depending on the termination of the suretyship makes the policy null. *Semmelhaack* vs. *Canada Fire and Marine Ins. Co.*, S. C. 1881, 4 L. N. 205.

VIII. CONCEALMENT, MISREPRESENTATION, MISDESCRIPTION, ETC.—

(See also "Second Insurance" and "Waiver.")

1. In an action on a policy of insurance, which described the premises insured as a house bounded in rear by a stone building covered with tin and by a yard, in which yard there was being erected a first-class shed, which communicated with the buildings insured—*Held*, reversing the judgment of the Court below (2 L. C. R. 200), to be good, although it was proved that there existed between the house and stone building a brick building covered with shingles communicating to both by doors, inasmuch as the omission to mention such doors in the description was not proved to have been a fraudulent concealment, and inasmuch as it was not established that the fire had been occasioned or had extended by means of such apertures. *Casey* vs. *Goldsmid*, Q. B. 1854, 4 L. C. R. 107, 3 R. J. R. 144.

2. An action on a policy against fire, for the value of a house attached on both sides to other buildings, and inhabited for a portion of the time during which the policy was running by four tenants, is maintainable, though the house is described in the policy as detached from other buildings and inhabited by two tenants; provided it be proved that the error in the description of the house was made by the agent of the insurers, and that the increased number of tenants were not in the house either at the time of the effecting of the policy or at that of the fire. *Somers* vs. *Athenæum Insurance Society*, S. C. 1858, 3 L. C. J. 67, 9 L. C. R. 61.

3. The parol testimony of the agent is sufficient to sustain the answer and sustain the action. (*Ib.*)

4. An answer to a plea by defendant alleging the misdescription may be made, admitting the misdescription, but charging the error upon the plaintiff's agent, and it is no departure. (*Ib.*)

5. It makes no difference that the policy was for a year before the fire in plaintiff's possession unobjected to, with a printed notice upon it to examine it and see if it was correct. (*Ib.*)

5*a*. Or, that the diagram to which reference was made, both in the interim receipt and in the policy, corresponded with the description in the policy. (*Ib.*)

6. The true description of the premises need not be alleged in the declaration, nor the error alluded to. (*Ib.*)

7. The failure of the assured to disclose the existence of a fulling-mill under the same roof as the building insured and destroyed by fire is not a material concealment or misrepresentation, although it be proved that, had the disclosure been made, the premium of insurance would have been made in excess of that charged; when the plaintiff's witnesses concur in stating that the risk was not thereby increased. *Wilson* vs. *State Fire Ins. Co.*, S. C. 1862, 7 L. C. J. 223.

8. Where the insured after the destruction of his premises brought action for the amount of insurance, and the company contested, principally on the ground that a wooden building in the rear of the premises, which were insured as a store or warehouse, was used as a kitchen, unknown to the defendants—*Held*, that there was concealment on the part of the plaintiff in not representing that such apartment was used as a kitchen, and the plaintiff, therefore, could not recover. *Barsalou* vs. *The Royal Insurance Company*, S. C. 1864, 15 L. C. R. 1.

9. Where the assured, in his application, described the building to be insured as "isolated," the mere fact that this word was explained in a printed note below the assured's signature to mean at a distance of 100 feet from the building, and that the building was not at that distance, would not invalidate the insurance in the absence of proof that the assured knew of this explanation at the time he signed the application. *Pacaud* vs. *The Queen Insurance Co.*, Q. B. 1876, 21 L. C. J. 111.

10. When a party applies to one agent of an insurance company and is refused insurance, and afterwards applies to another agent of the same company, and secures insurance through him in the ordinary mode, and preceded by the usual inquiries, the fact that such party does not mention that he had before applied to another agent of the same company for insurance and was refused is not the concealment of a material fact to render the insurance void. *Goodwin* vs. *Lancashire Fire, etc., Ins. Co.*, Q. B. 1873, 18 L. C. J. 1; reversing C. R., 16 L. C. J. 298.

11. A mere threat to burn plaintiff's store made during an election excitement, and several months prior to the insurance being effected, was not such a threat, the omission to disclose which at the time of effecting the insurance would amount to a concealment of a material fact. *Kelly* vs. *Hochelaga Mutual Fire Ins. Co.*, C. R. 1880, 24 L. C. J. 298.

12. Action on an insurance policy issued by respondents by which they insured certain articles known as scythe sharpeners, which the appellants were manufacturing, as well as the materials used by appellants for their manufacturing establishment for the sum of $800.00. After the insurance was effected, the appellants moved their manufacturing establishment into a new building and obtained the consent of the respondents that the policy already effected should cover the risk in the new building. The respondents to the action pleaded that the insurance had been obtained by false and fraudulent representations as to the value, nature and quality of the goods insured, that subsequently to the issuing of the policy the appellants represented that the risk in the new building was not increased, when in fact it was materially increased, that the appellants sustained no loss nor damage, as the articles insured were worthless, and further that no expertise was ever had, as required by law. The court below dismissed the action, but in Appeal judgment reversed on the ground of want of proof of fraud or misrepresentation. *Holmes* vs. *Mutual Fire Insurance Company of Stanstead and Sherbrooke*, Q. B. 1880, 1 (Dorion's) Q. B. R. 84.

13. An insurance was effected on a saw mill, without disclosing the fact that the building contained a planing machine—*Held*, this was a material fact which it was incumbent on the insured to disclose, and the concealment of it rendered the insurance null and void. *Aitkin* vs. *National Insurance Co.*, Q. B. 1878, 1 L. N. 531.

14. A policy of insurance on a house is not null, although the assurer who occupies

the house as institute of a substitution has not declared the fact. An assurance on house effects is not rendered null although some of these effects be placed in a summer kitchen belonging to the premises if the place where they are at the time of the assurance is not specially declared, and it is proved that the articles are such as properly belonged to such kitchen. *Cie. d'Assurance Mutuelle Contre le Feu de Montreal* vs. *Villeneuve*, Q. B. 1886; confirming S. C., 29 L. C. J. 163.

15. The concealment by the insured of the fact that the risk had been refused by another company, in consequence of two fires having occurred previously on the same premises under suspicious circumstances, is a material concealment, and renders the contract void. *Minogue* vs. *Quebec Fire Ass. Co.*, C. R. 1885, M. L. R., 1 S. C. 478; confirming S. C., M. L. R., 1 S. C. 417.

16. When a company has entered into negotiations with the other companies concerned as to the proportion of loss each is to pay, it cannot refuse to settle the insured's claim on the ground of fraud and misrepresentation. *Sovereign Fire Ins. Co.* vs. *Pruneau*, Q. B. 1885, 14 R. L. 362.

17. And in any event these grounds of nullity could only avail where the voiding of the policy is concluded for. (*Ib.*)

18. The failure to disclose all existing mortgages upon the property insured, in answer to a specific question upon the subject, even in the absence of an express condition in the policy, is a cause of nullity. *McKay* vs. *Glasgow & London Ins. Co.*, C. R. 1888, M. L. R., 4 S. C. 124, 32 L. C. J. 125.

19. The non-disclosure of existing insurances, in violation of the condition of the policy, is a cause of nullity, even where the undisclosed insurance was effected by a third person if the insured had knowledge of it. And he will be assumed to have knowledge where his deed bound him to insure in favour of his vendor, or, in default, to pay the premiums. (*Ib.*)

20. Unless it be expressly so stipulated, the insured is not bound to notify the insurer that he has, subsequently to the insurance, mortgaged the property insured, or the property wherein the things insured are placed. *Richmond Fire Ins. Co.* vs. *Fee*, Q. B. 1888, 14 Q. L. R. 293.

IX. DELAY TO FILE CLAIM.

Action to recover under a fire policy for loss by fire. Plea, that the plaintiff claimed for her absentee husband, the owner of the property, and had no quality to claim; that the party insured had no insurable interest; that it was a condition of the policy that unless a claim were made within three months after the fire that all benefit under the policy should be forfeited and that no claim was made within three months; that an irregular, illegal claim made by plaintiff within twenty days after the fire was immediately rejected, and no action was taken within twelve months, and it was a condition that, unless action was taken within three months after rejectio the claim should be forfeited—*Held*, th he claim was too late. *Armstrong* v *Northern Assurance Company*, S. C. , 4 L. N. 77.

X. DIVISION OF LOSS.

1. In an insurance case—*Held*, that in the case of certain undetermined quantities of ashes belonging to different persons damaged by water, and subsequently destroyed by fire, each of the parties interested was bound to bear his proportion of the reduction made upon the amount insured by reason of the loss caused by water, inasmuch as there were no means of ascertaining to whom the ashes damaged by water belonged. *Gilmour* vs. *Dyde*, S. C. 1861, 12 L. C. R. 337.

2. Where, by a condition of the policy, the insurers are in no case to be liable for any greater proportion of the loss than the amount insured by them bears to the total insurance on the property, they are entitled to have the claim reduced in accordance with such clause, though the other insurance be still unpaid, and a contestation in relation thereto be still pending. *Heron* vs. *Hartford Insur. Co.*, 1888, M. L. R., 4 S. C. 388.

XI. EXEMPTION CLAUSE IN POLICY.

A policy of insurance containing the following clause is legal, viz.:—"The company will not be answerable for any loss or damage by fire occasioned by earthquakes or hurricanes, *or by burning of forests;* and this policy shall remain *suspended and of no effect* in respect of any loss or damage (*however caused*) which shall happen or arise, *during the existence of any of the contingencies aforesaid.*" And in order to exempt the company from liability it is only necessary to prove that at the time

of the loss the neighboring forests were burning. *Commercial Union Assurance Co.* vs. *Canada Iron Mining and Manufacturing Co.*, Q. B. 1873, 18 L. C. J. 80.

XII. IDENTITY OF PROPERTY.

1. A question arose as to the identity of the buildings destroyed with those insured, there being a number of buildings insured, and only one burnt—*Held*, that the reception by the secretary of the company of a premium for additional insurance after the fire was, under the circumstances, an acknowledgment of the plaintiff's pretensions. *Quenneville* vs. *The Mutual Insurance Co.*, C. R. 1866, 1 L. C. L. J. 116.

2. In an action for the recovery of the insurance of said goods, it is sufficient to establish that goods of the character and brand and of the quantity claimed were actually in the building where the goods were stored at the time of the insurance, and at the time the building and its contents were wholly burnt, without proving the actual identification of the goods described in the warehouse receipt. *Wilson* vs. *Citizen's Ins. Co.*, Q. B. 19 L. C. J. 175.

XIII. INSURABLE INTEREST.

1. Insurance was effected in favor of the mortgagee and as a further security for the mortgage—*Held*, on action for the amount of the insurance, by the mortgagee, confirming the judgment of the court below, that a sale of the property by the mortgagor, pending the contract of insurance, did not deprive the mortgagee of her insurable interest, though part of the consideration of such sale was a promise by the purchaser to pay the mortgagee her debt, as she was not a party thereto. *The Montreal Assurance Co.* vs. *McGillivray*, Q. B. 1857, 2 L. C. J. 221 & 8 L. C. R. 401, 4 R. J. R. Q. 406. Reversed in Privy Council on another point. (See 13 Moore's P. C. 87, 9 L. C. R. 488.)

2. A chirographary creditor has no insurable interest in the stock which is in the store of his debtor, and therefore cannot validly insure it. *Hunt* vs. *Home Ins. Co.*, S. C. 1871, 3 R. L. 455.

3. A *bona fide* equitable interest in property of which the legal title appears to be in another may be insured, provided there be no false affirmation, representation or concealment on the part of the assured, who is not obliged to represent the particular interest he has at the time, unless inquiry be made by the insurer,—and such insurable interest in property of which the assured is in actual possession may be proved by parol evidence. (1) *Whyte* vs. *Home Insurance Co.*, S. C. 1870, 14 L. C. J. 301.

4. Although A is merely the agent of B, in obtaining from C an advance of money on certain goods, yet if he render himself liable to C. for any loss which might arise after the sale of the goods, he has an insurable interest in the goods, and can therefore legally insure them in his own name to the full extent of the loan. *O'Connor* vs. *Imperial Insurance Co.* S. C. 1869, 14 L. C. J. 219.

5. In the case of an insurance of a number of barrels of oil, purchased by the insured, but not actually identified and separated from other barrels of oil contained in the building in which the oil was stored, the insured has nevertheless an insurable interest as proprietor in the property sold. And a verdict of a jury in favor of the insurance company, based on a charge of the judge that the property in the oil did not, under the circumstances, pass to the insured, will be set aside and a new trial granted. *Mathewson* vs. *Royal Insurance Co.*, Q. B. 1871, 16 L. C. J. 45.

6. Goods held under a duly endorsed warehouse receipt, as collateral security for advances, may be properly and legally insured as being the property of the holder of such receipt, being the party who made the advances. *Wilson* vs. *Citizens Ins. Co.*, Q. B., 19 L. C. J. 175.

7. The usufructuary has a sufficient interest to insure a house of which he has the usufruct, but in case of loss he can only claim the value of his interest in the property. *St. Amand* vs. *Cie. d'Assurance de Québec*, S. C. 1883, 9 Q. L. R. 162, 14 R. L. 27.

8. The appellants granted a fire policy to one T. on divers buildings and their contents for $3,280. In his written application T. represented that he was the owner of the premises, while he had previously sold them to S., the respondent, subject to a right of redemption, which right T., at the time of the application, had availed himself of by paying back to S. a part of the money advanced, leaving still due to S. a sum of

(1) This case went to Review, and an appeal was made to the Privy Council (see 19 L. C. J. 196).

$1,510. Subsequent to the application, and after some correspondence, the respective interests of T. and S. in the property were fully explained to the appellants through their agents. Thereupon a transfer for (the amount being in blank) was made to S. by T. and accepted by the appellants. The action was for $3,280, the amount of insurance in the building and effects—*Held*, that at the time of the application for insurance T. had an insurable interest in the property, and as the appellants had accepted the transfer made by T. to S., which was intended by all parties to be for $1,500, the amount then due by T. to S., the latter was entitled to recover the said sum of $1,500. 2nd. That S. having no insurable interest in the moveables, the transfer made to him by T. was not sufficient to vest in him T.'s rights under the policy with regard to said moveables. *Ottawa Agricultural Ins. Co.* vs. *Sheridan*, Supreme Ct. 1879, 5 Can. S. C. R. 157; confirming Q. B., 2 L. N. 206.

XIV. INTEREST ON LOSS.

Interest on loss may be awarded from the date of the fire. *Montreal Assurance Co.* vs. *McGillivray*, Q. B. 1857, 2 L. C. J. 221.

XV. INTERIM RECEIPT.

1. When a Fire Insurance Co.'s local agent, acting within the scope of his powers and according to usage with such company, receives the premium for an insurance and grants an interim or deposit receipt, subject to the approval of the chief officer of such company and the condition of the company's policies, the applicant is insured until he has notice that the risk is declined. *Goodwin* vs. *Lancashire Fire & Life Insur. Co.*, Q. B. 1873, 18 L. C. J. 1; reversing C. R. 16 L. C. J. 298.

2. When a company absolutely repudiates the insurance effected by interim or deposit receipt, and when the policy has not issued, the right of action accrues at once, and there is no necessity of giving the preliminary notices and conforming to the delay and other conditions precedent, in case of loss, indorsed upon the company's policies. (.)

3. Where a fire insurance is effected on a mere receipt for the premium, containing a stipulation that it is issued subject to the conditions on the ordinary forms of policy of the insurance company, but no policy is actually issued, although asked for by the assured, the condition regarding other insurances on such ordinary forms of policy will be sufficiently complied with by notice of the additional insurance being furnished after the fire, and in time to secure contribution by the other companies. *Lafleur* vs. *Citizens Insurance Co.*, Q. B. 1878, 22 L. C. J. 247, 1 L. N. 518.

4. In the case of an interim insurance by an agent in the following words,—"Received from Messrs. Tough & Wallace, Coaticooke, (Post Office, Coaticooke) the sum of $20, being the premium for an insurance to the extent of $2,500 on the property described in the application of this date numbered ——, subject, however, to the approval of the Board of Directors in Toronto, who shall have power to cancel the contract at any time within thirty days from this date, by causing a notice to that effect to be mailed to the applicant at the above Post Office,"—a notice by the company annulling the contract, mailed to the applicant at the Post Office, Toronto, within the thirty days, but not received in time for delivery by the Post Office at Coaticooke until after the fire, had not the effect of cancelling the insurance. *Tough* vs. *Provincial Insurance Co.*, Q. B. 1875, 20 L. C. J. 168; reversing C. R. 17 L. C. J. 305.

5. In an action for an insurance premium to which payment had been pleaded—*Held*, that the form known as an interim receipt did not establish payment. *Canadian Fire Insurance* vs. *Keroack*, S. C. 1879, 2 L. N. 272.

6. The defendants granted the plaintiff an interim insurance receipt containing the following conditions: "Subject to....the approval of the directors which will be signified "by the issue of a policy within thirty days "from date.....Notice of rejection of risk received at the post office address of applicant, "as given in application, cancels this receipt "and insurance if not otherwise conveyed"—*Held*, that the mere lapse of the thirty days without the issuing of any policy did not put an end to the insurance effected under the receipt. *Turgeon* vs. *Citizens Insurance Co. of Canada*, C. R. 1883, 9 Q. L. R. 78.

7. *Held*, the insured cannot be held to a compliance with any conditions of the regular policy issued by the insurance company which enlarge or vary the terms of the interim contract, so long as the company has neither repudiated nor cancelled the interim receipt, nor substituted a regular policy for it. *Citizens Ins. Co.* vs. *Lefrançois*, Q. B. 1893, 2 Que. 550.

XVI. LEAVING PREMISES UNOCCUPIED.

1. The insured cannot recover upon a policy which contains a condition making the contract void if the premises be left unoccupied for more than fifteen days without notice to the company, and it appears that the premises were vacant at the time of the fire, and had been so for a much longer time than fifteen days without notice. *Cardinal* vs. *Dominion Fire & Marine Insurance Co.*, S. C. 1880, 3 L. N. 367.

2. Under the circumstances of this case, the company were bound by the notice given to their agent by the insured that, being about to leave the country, his dwelling-house would be left uninhabited, but in charge of a neighbor—notwithstanding a condition in the policy that the same should be void if the company's consent to any dwelling being so left were not obtained from the head-office and endorsed on the policy. And the refusal of the company to recognize or entertain the plaintiffs' claim amounted to a waiver of their right to demand from him the details of his loss prior to his bringing suit. *Agricultural Insurance Co. of Waterloo* vs. *Ansley*, Q. B. 1888, 15 Q. L. R. 256, 17 R. L. 108; confirming C. R. 14 Q. L. R. 183.

XVII. LIABILITY OF INSURER.

1. In insurances against fire the insurer pays the amount of any loss which does not exceed the amount insured, although the goods insured be of greater value. *Peddie* vs. *The Quebec Fire Assurance Co.*, K. B. 1824, S. R. 174.

2. The plaintiff obtained judgment against the insurance company for £200, being amount insured by them on his stock and utensils in trade as a general turner: by the policy the appellants agreed to pay or make good to the insured all such loss or damage as the said insured should suffer by fire. On appeal, *held*, that the defendants were liable only for the actual market value of such stock at the time of the loss and not for the actual cost thereof, or the sum which it may have cost the party insured, notwithstanding that he had not insured his profits on the subject of insurance. *Equitable Fire & Life Insurance Co.* vs. *Quinn*, Q. B. 1861, 11 L. C. R. 170.

3. Insurers against loss or damage by fire are liable for the value of goods stolen at a fire. *McGibbon* vs. *Queen Insurance Co.*, S. C. 1866, 10 L. C. J. 227.

4. In the absence of satisfactory evidence that certain goods, the value whereof is claimed under a fire policy, were actually destroyed or damaged by fire, or stolen, the claim therefor cannot be recovered. *Harris* vs. *London & Lancashire Fire Insurance Co.*, S. C. 1866, 10 L. C. J. 268.

5. If the evidence leaves a certain amount of doubt as to the actual value of the buildings destroyed, the balance should be turned against the insurance company rather than against the insured. Insurers should exercise vigilance as to over valuations when they are taking the risks and accepting the premiums, rather than after the loss occurs and they are called upon to discharge their part of the obligation. *Citizens Insurance Co.* vs. *Lefrançois*, Q. B. 1893, 2 Que. 550.

XVIII. MUTUAL FIRE INSURANCE.

1. Arbitration under the Act.—Where a Mutual Fire Insurance Co. incorporated under (45 Vict., ch. 51 [1882]) refuses to recognize the claim of the insured on the ground of breach of the conditions of the policy, the insured is not compelled to resort to arbitration under secs. 51 and 57 of that Act to recover his claim, but may proceed by action at law. *Montmagny Mutual Fire Assurance Co.* vs. *Carbonneau*, Q. B. 1888, 16 R. L. 275, 15 Q. L. R. 86.

2. Assessments—Cancellation of Policy.—The cancellation of a policy by a Mutual Insurance Company is a sufficient ground to defeat an action brought against the policy holder for a call made one month after the cancellation, if there is no proof that the call is made to meet losses anterior to the cancelling. *Hochelaga Mutual Insurance Co.* vs. *Girouard, et al.*, C. R. 1881, 7 Q. L. R. 348.

3. —— Compensation — Directors' Fees.—Persons who become members of a Mutual Insurance Company and pay premiums under 40 Vic., cap. 72, sec. 35, are liable as members for assessments for losses, and arrears of directors' fees cannot be offered in compensation of an assessment to meet specific losses. *Hochelaga Mutual Fire Insurance Co.* vs. *Lefebvre*, S. C. 1883, 6 L. N. 236 and Q. B. 1885, 7 L. N. 226.

4. —— —— And *held*, also (reforming in this respect the judgment of the Superior Court,) that although fees due appellant as directors could not be set up in compensation against such extra assessments, yet, as the company and liquidators had agreed to allow

such fees in reduction thereof, the appellant ought not to be condemned for more than respondents had agreed to accept. (*Ib.*)

5. —— Details of Losses on which Assessment Based.—It is not competent to a person insured in a Mutual Insurance Company, when called upon to pay assessments on his premium note, to compel the company to enter into a detailed statement of the losses in order to establish the correctness of the assessments made by the directors. The latter in making the assessments are the agents of the insured, who in the absence of fraud is *quoad* such assessments, bound by their acts and by the terms of the premium note. *Giles* vs. *Brock*, C. Ct. 1882, 5 L. N. 369.

6. —— —— In actions by the company for an assessment, it is bound to prove that the assessment was necessitated by losses actually incurred by the company since the signing of the premium note by the insured, and that the assessment was made in proportion to the said note. *Compagnie d'Assurance Mutuel* vs. *Proteau*, C. Ct. 1883, 6 L. N. 85.

7. —— —— The defendant will be allowed to prove that the assessment was made fraudulently and without just cause. (*Ib.*)

8. —— —— Members of a Mutual Insurance Company are only liable for losses during the period that their policies remain in force, and the assessment should show that the losses have been incurred during the period in which the policy was in force. *Banque Molson* vs. *Compagnie d'Assurance Mutuelle de Joliette*, S. C. 1883, 13 R. L. 392.

9. —— —— In an action for calls under a Mutual Insurance policy it is necessary to allege and prove the losses for which the calls are made. *Mutual Fire Insurance Co. of Joliette* vs. *Dupuis*, Q. B. 28 L. C. J. 179.

10. —— —— The liquidators of a Mutual Insurance Company in suing members on assessments must prove the losses, the debts and expenses which rendered it necessary, and must in every respect conform to the notices. *Assurance Mutuelle de Joliette* vs. *Bourgoin*, C. R. 1884, 10 Q. L. R. 110.

11. —— Prescription of Claim for.—In matters of mutual insurance the call made on each of the insured to make up losses incurred by a fire, is not subject to the prescription of five years. *Giles* vs. *Lalumière*, C. Ct., 28 L. C. J. 287.

12. Attachment of Assessments.—In the absence of fraud, negligence or mal-administration, it is not competent to a judgment creditor of a Mutual Fire Insurance Company of the Province of Quebec to attach monies payable to the company by way of assessments under the provisions of the Liquidation Statute, 28th Vic. ch. 13. *Savoie* vs. *Compagnie d'Assurance Mutuelle contre le Feu d'Hochelaga*, S. C. 1882, 26 L. C. J. 166.

13. Double Insurance.—The 23rd section of the Act 4 William IV, ch. 33, respecting double insurance on *houses or buildings*, does not apply to insurances on *goods*. *Chalmers* vs. *Mutual Fire Ins. Co. of Stanstead and Sherbrooke Counties*, Q. B. 1858, 3 L. C. J. 2.

14. —— The statutory requirement applicable to insurance in mutual insurance companies that the consent of the directors to a double insurance must be signified by an indorsement on the policy, or other acknowledgment in writing, is not satisfied by evidence of mere knowledge by the insurers of other insurance. *Dustin* vs. *Hochelaga Mutual Fire Ins. Co.*, C. R. 1881, 4 L. N. 295.

15. —— A policy of insurance issued by a Mutual Fire Insurance Company will be held void under sec. 30 of chap. 68 C. S. L. C., if a second insurance has been taken upon the same property for the benefit of a mortgage creditor (of which the premiums are paid by the owner) without notice to company issuing first policy. *Blais* vs. *Stanstead Mut. Fire Ins. Co.*, S. C. 1886, 15 R. L. 60.

16. Hypothec and Double Insurance.—A policy issued under Que. 45 Vict., ch. 51 (1882), will not be voided because the insured hypothecated the immoveable upon which the insured buildings were built, and the hypothecary creditor, with the consent of the owner of the buildings, insured them in another insurance company without notifying the mutual company, when the mutual company does not prove that its by-laws prohibited the mortgaging of property insured by it, or the placing of double insurance thereon without previous notice to it. *Cie. d'Assurance Mutuelle de Richmond* vs. *Fee*, Q. B. 1888, 16 R. L. 461.

17. Liability of Members. (See also "Assessments.")—A mutual insurance company incorporated under ch. 68 C. S. L. C. is not an ordinary partnership. The members' liability is determined and limited by sec. 12 of the said Act, and the directors cannot involve them in a greater liability than that provided by the Act. *Banque Molson* vs. *Cie. d'Assurance Mutuelle de Joliette*, S. C. 1883, 13 R. L. 392.

18. Power of a Company to Borrow.—A mutual insurance company incorporated under ch. 68 Consolidated Statutes of Lower Canada can only borrow money for the purposes of paying off losses incurred and casual expenses, and to avoid making more than one assessment per annum. *Banque Molson* vs. *Cie. d'Assurance Mutuelle de Joliette*, S. C. 1893, 13 R. L. 392.

19. —— The capital sum of such loan need not be stated in the assessment, but only the interest thereon. (*Ib.*)

20. Rights of Foreign Companies.—Action to recover the amount of an assessment due upon a premium note Plea that since the passing of the Dominion Insurance Act of 1877, Mutual Fire Insurance Companies having their head office in the Province of Ontario had no right to do business in the Province of Quebec. *Held*, that the company having its head quarters in the City of Hamilton, Ont., and doing business in the Province of Quebec previous to 1877, had a right to do business in this Province since. *Victoria Mutual Fire Ins. Co.* vs. *Mullin*, C. Ct. 1883, 6 L. N. 390.

21. Transfer of Policy.—P. transferred to appellant two insurance policies issued by respondent. Subsequently the property insured was destroyed by fire, but after P. had ceased to have any interest in such property. On a claim by appellant to recover the amount of such policies—*Held*, that the assignee of a policy issued by a Mutual Insurance Co. can only exercise such claims as the transferor himself could have done, and that in the case in point, P. having ceased to have any title to the property insured when the fire occurred, could not recover the amount insured under the policies aforesaid, and that the appellant was therefore debarred from such claim. *Willey* vs. *Mutual Fire Ins. Co. of Stanstead*, Q. B. 1881, 2 Dorion Q. B. R. 29.

XIX. NOTICE AND PROOF OF LOSS.

1. If a condition laid down by a policy of insurance requires that in the event of loss, and before payment thereof, a certificate to be procured under the hand of a magistrate or sworn notary of the city and district, importing that they are acquainted with the character and circumstances of the persons insured, and do know or verily believe that they have really, or by misfortune and without fraud, sustained by fire loss and damage to the amount therein mentioned, said certificate is a condition precedent to the recovery of any loss from the insurers on the policy; and if a certificate be procured in which a "knowledge and belief" as to the amount of loss is omitted, it is insufficient. *Scott* vs. *The Phœnix Ins. Co.*, P. C. 1828, Stuart's Rep. 354.

2. The delay laid down by the rules and conditions of an insurance company for notifying the company of the fire and the circumstances connected with it, is not in all cases absolutely fatal to the right of the insured to recover in case of non-compliance. *Dill* vs. *The Quebec Assurance Co.*, 1 Rev. de Lég. 113, Q. B. 1844.

3. The furnishing of a certificate required by the condition of a policy of insurance signed by three respectable persons, that they believed that the loss had not occurred by fraud, is a condition precedent, without compliance with which the assured cannot recover. *Racine* vs. *The Equitable Ins. Co. of London*, S. C. 1861, 6 L. C. J. 89.

4. The preliminary proofs under a fire policy made after the 15 days, within which the conditions endorsed thereon required the same to be furnished, are sufficient, and specially so when the conditions state,—after the provisions as to the 15 days,—that "until" such proofs are made no right of action shall accrue. *Lafarge* vs. *Liverpool & London & Globe Ins. Co.*, S. C. 1873, 17 L. C. J. 237.

5. Where it is impossible for the assured to give a detailed statement under oath of his loss, supported by books and vouchers, owing to their being burnt, the condition of the policy requiring such statement will be satisfied by his giving affidavits as to the value of the property lost. *Perry* vs. *Niagara District Mutual Fire Ins. Co.*, S. C. 1877, 21 L. C. J. 257.

6. The condition in a policy of insurance to the effect that all persons insured shall, as soon after the loss by fire as possible, deliver in a particular account of such loss or damage, signed with their own hand and verified by oath or affirmation, is waived by the fact of the agent of the company and the person insured each choosing valuators who make a valuation of the loss, and by the fact of the company offering the insured a less amount than the valuation in settlement, showing that they only disputed as to the amount to be paid. *Converse* vs. *Prov. Ins. Co. of Canada*, C. R. 1877, 21 L. C. J. 276.

7. Where a policy of fire insurance has been transferred in trust, and a condition of the policy requires that the assignor shall in such case make and furnish the necessary proofs

in support of the claim for loss before the same shall be recognized and payable, the making and furnishing of such proofs by the assignor and not by the assignee is a condition precedent to the right of the assignee to recover the amount of the loss. *Whyte v. Western Assurance Co.*, P. C. 1875, 22 L. C. J. 215, 7 R. L. 106.

8. Where a condition of a fire policy requires the making and furnishing of proofs of loss within a specified time, and declares that, until they are furnished, the loss shall not be payable, the delay is a material part of the condition, and consequently (in the absence of waiver) the assured cannot recover unless he sends in the proper proofs within the prescribed delay. (*Ib.*)

9. The mere silence of the company, with regard to proofs sent after the delay prescribed by the condition of the policy, does not amount to a waiver of the condition by the company, nor does the declaration by the company at that time that it did not consider itself liable amount to a waiver by the company of the benefit of the condition. (*Ib.*)

10. Where a company refuses to pay a claim and does not at the time complain of the informalities contained in the notice of loss, this amounts to waiver on its part of the right to obtain a notice in another form or more detailed. (1) *Garceau vs. Niagara Mutual Ins. Co.*, C. R. 1877, 3 Q. L. R. 337.

11. Where the loss under a fire insurance of goods is made payable to a party other than the person who effects the insurance, and such third party becomes owner of the goods by a transfer to him of the warehouse receipts of such goods, such third party becomes thereby the party assured, and can, therefore, legally make all necessary preliminary proofs of loss. *Stanton vs. Home Insurance Co.*, Q. B. 1879, 24 L. C. J. 38, confirming S. C. 21 L. C. J. 211.

12. In the above case the proof of loss was not satisfactorily established. (*Ib.*)

13. To an action for insurance the company pleaded irregularities in the notices and preliminary proofs of loss—*Held*, that as the company had joined in an arbitration with knowledge of all the facts, it had waived the right to object, and could not raise the point afterwards. *Canadian Mutual Fire Insurance Co., vs. Donovan*, Q. B. 1879, 2 L. N. 229.

14. A condition of the policy requiring notice of loss to be given, and a particular statement thereof to be delivered by the insured within 15 days after the fire, may be waived and dispensed with by a distinct denial of liability, and refusal to pay, on the part of the company. *Herald Co., Ltd. vs. Northern Assur. Co.*, 1888, M. L. R., 4 S. C. 254.

(1) But in Accident Ins. Co. of North America *vs.* Young, 20 Can. S. C. R. 280. (See under title "ACCIDENT INSURANCE") the distinction was pointed out between defects of form in the notice, which could be remedied by the insured if notified, and failure to give notice within the proper delay; a defect which might be incurable so far as the company is concerned, and therefore needless for them to notify the insured.

XX. ON COALS.

An insurance against fire effected against a certain quantity of coals, covers not only those deposited at the time, but those deposited since, and covers also loss or risk arising from spontaneous combustion. *British American Ins. Co. vs. Joseph*, Q. B. 1857, 9 L. C. R. 448.

XXI. ON GOODS IN HANDS OF ASSIGNEE.

1. A loss under a fire policy effected by an official assignee under the Insolvent Act of 1875, to whom an assignment had been made under the Act, is recoverable by the assignee subsequently elected by the creditors, notwithstanding that in the policy the assured is described simply as "official assignee," the loss being made payable to the estate. *Elliott vs. National Ins. Co.*, Q. B. 1878, 23 L. C. J. 12, 1 L. N. 450, reversing S. C., 21 L. C. J. 242.

2. The loss, in a case such as the above, may be so recovered, notwithstanding that the fire shall have occurred after the appointment of the second assignee, and that his appointment has not been specially communicated to the insurance company before the fire. (*Ib.*)

3. Under the circumstances, there was not any change of ownership or possession. (*Ib.*)

XXII. PAYMENT OF PREMIUM.

A condition in a policy of a Mutual Fire Insurance Co. provided that in case any promissory note for the first payment on any deposit note should remain unpaid for thirty days after it was due, the policy should be void as to claims occurring before payment—*Held*, that the company in accepting a note for such first payment, but acknowledging receipt by the policy as for cash paid, waived the condition. *Massé vs. Hochelaga Mutual Ins. Co.*, S. C. 1878, 1 L. N. 338 & 22 L. C. J. 124.

XXIII. RIGHT OF ACTION AGAINST INSURANCE COMPANIES.

Where an insurance company, having its head office in Ontario, insures a building in a certain district in Quebec, such company cannot be sued for loss on the building insured in the district where the loss occurred, the application for insurance having been made in another district through an agent of the company, and the policy being dated at the company's office in Ontario. *Banque d'Ontario* vs. *Cie. d'Assurance Standard*, C. R. 1887, 15 R. L. 380.

XXIV. RIGHTS OF INSURED WHERE COMPANY REBUILDS.

The plaintiff's house had been destroyed by fire, and the insurance company availed themselves of a clause in the policy by which they had the option to rebuild, but afterwards refused to re-deliver in the condition in which the insured claimed it should be—*Held*, on action brought, that the plaintiff was entitled to an expertise, and so long as the company had not complied with that condition he was not bound to receive the house, and the circumstance of his having, during reconstruction, made suggestions to the builder could not be held to deprive him of his right to an expertise. *Alleyn* vs. *Quebec Assurance Company*, S. C. 1861, 11 L. C. R. 394.

XXV. RIGHTS OF THIRD PARTIES UNDER THE POLICY.

1. Where a fire policy, taken out by the owner of real property, declares that the loss, if any, is payable to certain persons named, "as mortgagees to the extent of their claims," such persons become thereby the parties assured to the extent of their interest as mortgagees, and their rights and interest cannot be destroyed or impaired by any act of the owner of the property. *Black* vs. *National Insurance Co.*, Q. B. 1879, 24 L. C. J. 65.

2. *Held*, (Cross and Doherty, JJ., diss.), following *Black* vs. *National Insurance Co.*, *supra*, that where a policy of insurance against fire, taken out by the owner of real property, declares that the loss, if any, is payable to a person named therein (without specifying the nature of his interest), such person becomes thereby the party insured, to the extent of his interest, and his right cannot be destroyed or impaired by any act of the owner of the property (*e. g.* an assignment of the property insured without notice to the company); and he may make the preliminary proofs of loss in his own behalf notwithstanding an express provision in the policy to the contrary. (1) *National Assurance Co. of Ireland* vs. *Harris*, 1889, M. L. R., 5 Q. B. 345, 17 R. L. 230.

3. A creditor who takes out a policy of insurance, for his own protection, and at his own expense, on his debtor's property, is not bound to account to the debtor for any portion of the amount paid to him under such policy. *Archambault* vs. *Galarneau*, S. C. 1877, 22 L. C. J. 105.

XXVI. SALE OF PROPERTY INSURED.

The sale of property insured does not convey to the purchaser the policy of insurance, without a transfer of the policy and by mere operation of law. *Forgie* vs. *Royal Insurance Co.*, Q. B. 1871, 16 L. C. J. 34.

XXVII. SECOND INSURANCE.

1. In the case of a policy of insurance granting permission in the body thereof to insure elsewhere, on giving notice to that end to the directors of the company, in order that the second insurance might be endorsed on the policy, and requiring by the by-laws of the company printed on the back of the policy that such notice be given and such second insurance endorsed on the policy *à peine de nullité*, a notice of such second insurance after the fire, and, as a consequence, not endorsed on the policy, is sufficient. *Soupras* vs. *Mutual Fire Ins. Co. for the Counties of Chambly and Huntingdon*, S. C. 1857, 1 L. C. J. 197.

2. The condition usually endorsed on policies of insurance respecting double insurance is binding in law, and its performance will not be held to be waived by the company, if their agent, on being notified of such double insurance after the fire, make no specific objection to the claim of the assured on that ground. *Western Assurance Co.* vs. *Atwell*, Q. B. 1858, 2 L. C. J. 181; reversing S. C., 1 L. C. J. 278.

3. One M. (represented by the assignee, the appellant) effected an insurance on his stock with the respondents, and in the policy there was a condition that insurances elsewhere would make the policy void, unless the company received notice of such subsequent insurances. M. failed by some inadvertence to give the required notice of an insurance effected subsequently in the Commercial Union Insurance Co.—*Held*, that he could

(1) See Article 13 L. N. 89.

not recover on the policy. *Beausoleil* vs. *Canadian Mutual Fire Insurance Co.*, Q. B. 1877, 1 L. N. 4.

4. When by a condition of the policy the insured is bound to give notice of other insurance, his omission to do so voids the contract. And even when the subsequent insurance is effected by a hypothecary creditor, the result is the same if the insured is aware of such subsequent insurance. *Picard* vs. *Compagnie d'Assurance de l'Amérique Britannique*, 1886, M. L. R., 2 S. C. 117, 14 R. L. 136.

5. An admission by the insured in his sworn statement of loss, that the property, which was insured by policy which contained a condition that there shall be no other insurance, was in fact insured in another company, is not in itself sufficient proof of the violation of this condition, and a second insurance in a company of bad reputation, and which has no license from the Federal Government, is not a violation of the condition as to second insurance, even though the insured was in the belief that the second company was of good standing. *National Ins. Co.* vs. *Rousseau*, Q. B. 1887, 13 Q. L. R. 295.

6. One policy can cover several distinct insurances, and in that case one of these insurances might be affected by causes not affecting the other insurances. (1) *Richmond Fire Ins. Co.* vs. *Fee*, Q. B. 1888, 14 Q. L. R. 293.

7. Unless it is formally so stipulated, the insured is not bound to notify the insurer of subsequent insurance in his property. (*Ib.*)

XXVIII. TERM OF POLICY.

Where the insurance runs from one day named in the policy to another day named therein, "both inclusive," the contract does not expire until midnight on the last day. This rule could only be rebutted by evidence of a clearly established and invariable custom to the contrary, which, in the present case, was not shown to exist. *Herald Co.* vs. *Assurance Co.*, 1888, M. L. R., 4 S. C. 254. (No appeal was taken from this judgment.)

XXIX. THE CONTRACT.

Where several subjects are covered by one contract of insurance, the contract is indivisible, and where the insured incurs a forfeiture as to one subject, the policy is wholly voided. *Mackay* vs. *Glasgow & London Ins. Co.*, 1888, M. L. R., 4 S. C. 124. (But see *Richmond Fire Ins. Co.* vs. *Fee*, 14 Q. L. R. 293, apparently *contra*.)

(1) But see Mackay vs. Glasgow & London Ins. Co., C. R. 1888, M. L. R., 4 S. C. 124.

XXX. TRANSFER OF INSURANCE.

(See also "Notice and Proof of Loss," "Insurable Interest.")

1. An assignee of a policy against loss by fire may recover without furnishing any statement of loss whatever. *Wilson* vs. *State Fire Ins. Co.*, S. C. 1862, 7 L. C. J. 223.

2. Where the insured has transferred a portion of the insurance, and the said transfer has been duly signified to the insurance company, he has no right of action against the insurance company in respect of the amount so transferred. *Citizens' Ins. Co.* vs. *Lefrançois*, Q. B. 1893, 2 Que. 550.

XXXI. VALUATION OF PROPERTY BY INSURED.

1. The condition of a policy imposing the penalty of a forfeiture of all remedy upon it, in the event of any fraudulent overcharge, is not comminatory, but will be carried out, if such overcharge be proved. *Thomas* vs. *Times & Beacon Fire Assurance Co.*, S. C. 1858, 3 L. C. J. 162.

2. Mere over-valuation will not of itself, in the absence of proof of bad faith, invalidate the policy. *Pacaud* vs. *Queen Ins. Co.*, Q. B. 1876, 21 L. C. J. 111.

3. Under a clause in a policy of insurance, that if there appear fraud in the claim made to a loss, or false swearing or affirmation in support thereof, the claimant shall forfeit all benefit under such policy, the court will reject the claim of the policyholder, if the company establish that the claim is unjust and fraudulent, and far in excess of the actual loss, to the knowledge of the policy-holder. *Grenier* vs. *Monarch Fire & Life Assurance Co.*, S. C. 1859, 3 L. C. J. 100.

4. In a case such as the above general evidence may outweigh positive testimony, where the latter is not consistent, and where there are presumptions against its truth. (*Ib.*)

5. When a policy contains the condition that if there appear any fraud or false statement, the insured shall be excluded from all benefit under the policy, and the insured fraudulently exaggerates his claim for loss, he will be held to have forfeited all claim under the policy. *Seghetti* vs. *Queen Ins. Co.*, S. C. 1866, 10 L. C. J. 243.

6. Where a party insured claims to have lost by fire more than double the amount subsequently ascertained by the valuators named by himself and the insurance company to be the true amount of loss, the claim will be held to be fraudulent, in the absence of clear evidence to the contrary. *Laroeque* vs. *Royal Ins. Co.*, S. C. 1878, 23 L. C. J. 217.

7. The reference to valuators (without waiver of the conditions of the policy) will not deprive the insurance company of the benefit of the condition, that all claim under the policy shall be forfeited in the case of fraud in the claim or false swearing by the insured. (*Ib.*)

8. Where the value of the property is not easily arrived at, and the evidence is conflicting, a claim will not usually be held to contain over-valuation, unless the amount demanded be about double the actual value. An apparent over-valuation of about 20 p.c. was in the present case held not fraudulent. *Northern Assurance Co.* vs. *Prevost*, Q. B. 1881, 25 L. C. J. 211.

XXXII. WAIVER. (See also other Sub-titles.)

1. Where an insurance company had, by resolution of its board, nearly three months after a fire, objected to a claim, without referring to the delay in filing—*Held*, that they had waived the right to use that as a plea. *Ducharme* vs. *The Mutual Insurance Co. of Laval, Chambly and Jacques Cartier*, S. C. 1879, 2 L. N. 115.

2. The preliminary proofs made in this case were sufficient, and the respondent waived any right to complain of any delay in furnishing the same. *Black* vs. *National Ins. Co.*, Q. B. 1879, 24 L. C. J. 65.

3. The acceptance by an insurance company of the preliminary proof of loss, after the expiration of the delay required by one of the conditions of the company's policies, and the statement by the company that it refused to acknowledge any claim on account of the undisclosed threat of incendiarism, amounted to a legal waiver of the condition. *Kelly* vs. *Hochelaga Mutual Fire Ins. Co.*, S. C. 1880, 24 L. C. J. 298.

4. Where after a fire the insurers and the insured proceed amicably to an estimate of the loss without requiring the observance of forms laid down in the conditions of the policy and on which they had a right to insist, they will be held to have waived such formalities, and the report of the experts cannot be set aside for want of them. *Demontigny* vs. *Compagnie d'Assurance Agricole de Watertown*, Q. B. 1881, 2 Dorion's Q. B. R. 27.

5. Where, after a fire, the insured notified the insurance company of other insurances upon the same property, and the agent of the company thereupon furnished the insured with a printed form upon which to make a claim for him, and appointed valuators to value the same, and submitted the estimation of the damage caused by the fire to the arbitration of persons named by themselves and the insured, the company thereby acknowledged the existence and validity of their policy as a valid and binding contract, and waived any and all objections which they might otherwise have urged, founded on the want of notice of the other insurances effected in other companies. *Fonderie de Joliette* vs. *Cie. d'Assurance de Stadacona contre le Feu et sur la Vie*, Q. B. 27 L. C. J. 194.

6. Refusal on the part of the insurer to consider the loss suffered by the insured constitutes a waiver on its part to require details of loss from the insured before the latter sues. *Cie. d'Assur. de Watertown* vs. *Insley*, Q. B. 1888, 17 R. L. 109.

7. And held thus where the company refuses to acknowledge part of the claim and offer to pay the balance. *Ouimet* vs. *Glasgow & London Ins. Co.*, S. C. 1890, 19 R. L. 27.

XXXIII. WARRANTY.

(See under other sub-titles.)

1. A clause in a fire policy, that the house was "*a être lambrissée en brique*," does not constitute a warranty of a promissory nature that the house will be immediately covered with brick, but merely expresses the intention of the insured to brick the building when circumstances would permit. Moreover, if the insurance company, after the expiration of a year, accepts a renewal premium while the house is still, to their knowledge, in the same state, the company cannot take advantage of the words cited. *Northern Assurance Co.* vs. *Provost*, Q. B. 1881, 25 L. C. J. 211.

2. Breach of the obligation on the part of the insured, who is not the owner of the property insured, to declare his interest therein, even where it constitutes a warranty in or condition of the policy, does not give rise to an absolute nullity but only to a relative nullity, which can be invoked by the insurer alone.

The latter is presumed to have waived it where having knowledge of this ground of nullity, he does not avail himself of it but acknowledges the obligation arising from the policy. *St. Amand* vs. *Cie. d'Assurance de Québec*, S. C. 1883, 9 Q. L. R. 162.

3. The above holds in regard to all warranties in policies, and consequently in regard to a warranty whereby the insured obliges himself to send the insurer fourteen days after the fire a detailed statement of his loss. But even though the insurer does not avail himself of the expiration of the delay for sending in the statement, this does not deprive him of the right to demand the statement. (*Ib.*)

XXXIV. WHAT GOODS ARE COVERED BY THE POLICY.

1. An endorsement on a policy issued under the provisions of 4 Wm. IV., ch. 33, consenting to the removal of the goods insured from the building described in the policy to another building and signed by the secretary alone, is binding on the company. *Chalmers* vs. *Mutual Fire Ins. Co. of Sherbrooke*, Q. B. 1858, 3 L. C. J. 2.

2. An insurance on goods described as being in Nos. 317, 319 St. Paul Street, does not cover goods in the premises No. 315 adjoining. And a verdict of a jury adverse to this doctrine, although supported by the charge of the judge, will be set aside. *Rolland* vs. *North British and Mercantile Ins. Co.*, S. C. 1869, 14 L. C. J. 69.

3. A fire policy in favor of a party, on coal oil "his own, in trust, or on consignment," covered his loss on oil destroyed by fire in Middleton's sheds, warehouse receipts for which granted by Middleton in favor of Thomas Ruston had been transferred by Ruston to such party, and on which receipts such party had made advances to Ruston, who obtained such advances really for Middleton, without the party advancing, however, being aware of the fact. *Stanton* vs. *Ætna Ins. Co.*, Q. B. 1872, 17 L. C. J. 281.

4. An insurance of goods described as being in No. 319 St. Paul street will be held to cover the same goods, although removed into the premises No. 315 adjoining, if the agent of the insurance company at the end of the first year of the insurance examined the premises and consented to a renewal of the policy; and such a variation does not constitute a new contract, but only a slight change in the old contract approved of by the parties. *Rolland* vs. *The Citizens' Ins. Co.*, C. R, 1877, 21 L. C. J. 262.

5. The question as to the consent of the company to a change of the location of the goods insured is a matter of fact properly left to the jury. (*Ib.*)

6. Where a company insures a house, a summer kitchen and shed with all the contents "of said house," and where some of the contents are such that their natural place is in the shed, *i. e.*, the coal, the insurance covers all the goods in the house, even those which have been taken into and belong naturally to the summer kitchen or shed. *Cie. d'Assurance Mutuelle contre le Feu de Montréal* vs. *Villeneuve*, 1886, M. L. R., 2 Q. B. 89, confirming S. C., 29 L. C. J. 163.

7. A policy of insurance was effected on goods of the insured in No. 319, and the insurance was afterwards renewed without variation of its original conditions. Before the renewal, the insured had extended his premises into No. 315, and the company's agent visited the establishment, and saw the portion of both buildings occupied by the insured, and the goods contained therein. A fire destroyed the goods in No. 315, and slightly injured those in 319. In an action on the policy claiming for the loss both in No. 319 and in No. 315, the jury found the facts as above stated, and both parties moved for judgment on the verdict.—*Held*, that on the facts found by the jury as above, the judgment should be for the defendants as to the loss of goods in No. 315, the inspection of the premises by the company's agent, before the renewal of the policy, not being sufficient to establish an agreement to vary the terms of the policy in respect of the locality in which the goods were represented to be. *Citizens Ins. and Invest. Co.* vs. *Lajoie*, 1883, M. L. R., 4 Q. B. 362.

(c) GUARANTEE INSURANCE.

I. Committal and Discovery of the Defalcation.

II. Notice of Defalcation. 1-4.

III. What gives rise to Liability of the Company insuring. 1-8.

I. COMMITTAL AND DISCOVERY OF THE DEFALCATION.

By a condition of the policy it was provided that the company should make good to the employer such pecuniary loss as might be sustained by him by reason of the dishonesty

of the employee "committed and discovered during the continuance of this agreement, and within three months from the death, dismissal or retirement of the employee." The policy lapsed, and a defalcation was discovered four months afterwards—*Held* (by the Superior Court), that the company was not liable in respect of such defalcation, inasmuch as it was not *discovered* as well as *committed* during the continuance of the agreement. *Commercial Mut. Bldg. Soc.* vs. *London Guarantee and Accident Co.*, 1891, M. L. R., 7 Q. B., 307, 21 R. L. 275.

II. NOTICE OF DEFALCATION.

1. Where the condition of a guarantee bond required the employer to give notice immediately to the guarantor, of any criminal offence of the employee entailing loss for which a claim was liable to be made under the bond, and the employer, although aware of a defalcation on the 25th, did not give notice thereof to the guarantor until the 27th, after the employee had fled the country; that the bond was forfeited. *Molsons Bank* vs. *Guarantee Co. of N. America*, 1886, M. L. R., 4 S. C. 376.

2. Policy also contained a clause that on the discovery of any fraud or dishonesty on the part of the employee, the employer should immediately give notice to the company. A defalcation was discovered April 6, and the company was not notified until April 17, when the employee had left the country—*Held* (by the Court of Queen's Bench), that the employer was not entitled to recover under the policy. *Commercial Mutual Bldg. Soc.* vs. *London Guarantee and Accident Ins. Co.*, 1891, M. L. R., 7 Q. B. 307.

3. On the 30th of May, a cashier did not appear at his office, and a number of the cheques certified by the ledger keeper, as above mentioned, were presented and paid although he had no amount to his credit to check against. On the following day the bank gave notice of the defalcation to the local agent of the guarantee company—*Held*, that the notice was given *en temps utile*, and the bank was not guilty of negligence. *London Guarantee and Accident Co.* vs. *Hochelaga Bank*, Q. B. 1893, 3 Que. 25.

4. By a condition of a guarantee policy insuring the honesty of W., an employee, it was stipulated that the employers should, immediately upon its becoming known to them, give notice to the guarantors that the employee had been guilty of any criminal offence entailing or likely to entail loss on the employers, and for which a claim was liable to be made under the policy. On the 22nd June the employers' auditors notified them that an unexplained deficiency, amounting to $300 or $400, existed in the accounts of W., who was their secretary treasurer. Respondents did not notify the guarantors, but gave W. a week to explain or rectify the matter. On the 29th of the same month the auditors, about 4 p.m., notified the employers of their discovery that a cheque for $14,000, received by W. about a year before, had not been entered in his cash book, although it had been regularly credited to the employers' account at their bankers. The matter was discussed between the employers and the auditors that evening, but notice of the discovery was not given to the guarantors until the following morning, when W. failed to appear at his place of business, and they did not authorize his arrest or detention until some hours afterwards, when it was too late to intercept him in his flight from the country—*Held*, that the employers had not complied with the conditions of the contract as to immediate notice, and were not entitled to recover under the policy. *Harbor Commissioners of Montreal* vs. *Guarantee Co. of N. A.*, Supreme Ct. 1891, 22 Can. S. C. R. 542, confirming Q. B. 1892, 2 Que. 6, which reversed S. C. 1890, 20 R. L. 14.

III. WHAT GIVES RISE TO LIABILITY OF COMPANY INSURING.

1. The Bank of Toronto obtained a policy of assurance from the European Assurance Society, insuring them against such loss as might be occasioned to the bank by the want of integrity, honesty or fidelity, or by the negligence, defaults, or irregularities of Alex. Munro, their agent at Montreal. Munro subsequently allowed Nichols and Robinson to overdraw their account to the amount of $47,844, whilst he knew they were not able to pay that sum—*Held*, that the European Assurance Society was responsible to the bank for that irregularity. *European Ins. Soc.* vs. *Bank of Toronto*, P. C. 1875, 7 R. L. 57, affirming Q. B. which affirmed C. R. 14 L. C. J. 186, which reversed S. C. 13 L. C. J. 63.

2. Where the employee guaranteed loses a large sum of money belonging to his employer through negligence, the guarantor, who had undertaken to make good any loss which by law the employee would be bound to make good, is liable to pay the amount thus lost. *Citizens Ins. Co.* vs. *Grand Trunk R. W. Co.*,

Q. B. 1880, 25 L. C. J. 163, 3 L. N. 311, confirming S. C. 22 L. C. J. 235, 1 L. N. 485.

3. The teller of a bank endorsed on a parcel of bank notes the amount which it was supposed to contain. It was subsequently discovered that the parcel was $6,300 short, and it was ascertained that a deficiency of the same amount existed in the teller's accounts and had been during several years skilfully covered up and concealed from the authorities of the bank who had made the usual inspections—*Held* that a guarantee insurance company which had guaranteed the fidelity of the teller was liable for the deficiency, but only to the extent which occurred after the contract was made. *Banque Nationale* vs. *Lespérance*, S. C. 1881, 4 L. N. 147.

4. In August, 1882, the defendants issued a policy of insurance by which they undertook to indemnify the plaintiffs for any loss they might sustain through fraud or dishonesty on the part of E., the cashier or clerk of the plaintiffs, which policy was renewed from year to year. In September, 1885, E. received certain sums of money for the plaintiffs, amounting to $2,085, which money disappeared from the safe in plaintiff's office; E. was arrested and tried before the Court of Queen's Bench for larceny of the amount in question, but was acquitted. Plaintiff's action was to recover the amount of the guarantee policy from defendants—*Held* that E. having received the said money in the course of his duties as cashier or clerk of the plaintiffs, and failed to account for the same, and defendants not having proved that this failure was due to a fortuitous event or *force majeure*, said defendants were liable for the amount of the said policy, notwithstanding the acquittal of E. by the Court of Queen's Bench. *Protestant Board of School Commissioners* vs. *Guarantee Co. of N. A.*, S. C. 1889, 31 L. C. J. 254.

5. The cashier of a bank removed bundles of notes from the bank premises to his residence, for the purpose of signing them, but it appeared that he brought them all back, and subsequently, in his office in the bank, he put a number of $5 notes in the bundles instead of $10 notes, and thus defranded the bank of $8,140—*Held*, in intrusting the notes to the cashier to be signed there was no negligence on the part of the bank involving a violation of the terms of the contract, and the loss was one caused by "fraud and dishonesty amounting to embezzlement," on the part of the employee, and came under the guarantee given by the policy. *London Guarantee and Accident Co.* vs. *Hochelaga Bank*, Q. B. 1893, 3 Que. 25.

6. The same employee, shortly before his flight from the country, caused his own cheques to the amount of $15,574 to be certified by the ledger keeper of the bank, although he, the cashier, had no funds there—*Held*, this act, although technically speaking not constituting the crime of embezzlement, was "fraud and dishonesty amounting to embezzlement" on the part of the cashier, and came under the guarantee of the policy. These words in the policy have to be taken in their ordinary or vulgar sense, as otherwise the words "fraud or dishonesty" would be without effect. (*Ib.*)

7. The fact that the bank recovered a large part of the money taken did not affect its right to claim under the policy, there being a balance of total loss remaining which exceeded the amount of the policy. (*Ib.*)

8. The claim of the bank was not affected by its communications with the employee after his flight, such communications not having had any injurious effect as regards the guarantee company. (*Ib.*)

(*d*) INSURANCE IN GENERAL.

(See also the various insurances.)

I. Agency.
Commission. 1.
Holding out. 2.
Mistake in Policy by Agent. 3-4.
Powers of Agent. 5 6.
Privity of Contract. 7-8.
II. By Agent of the Insured.
III. Conditions of Policy. 1-5.
IV. Evidence.
V. Interpretation of Policies.
VI. Lex Loci Contractus. 1-2.
VII. Premium Notes. 1-2.
VIII. Subrogation of Insurer. 1-7.
IX. The Contract. 1-5.
X. Transfer of Policy.

I. AGENCY.

1. Commission.—Appellant, in February, 1869, agreed to serve respondents as manager of the Life and Guarantee Departments of the respondents' business at a salary of $2,000 and a commission of ten per cent. on the net balance carried over on the 31st December of each year in the Life and Guarantee Insurance Department, after payment of all losses

and expenses therein, the said agreement to date from and after the first of May, 1869, with a free dwelling on the premises of the respondent. Appellant entered into the service of respondent as manager under such agreement, and continued to act for them from May, 1869, to May, 1870. The appellant then contended that the net balance in the guarantee department which should have been carried over, and upon which he was entitled to his commission of ten per cent. from the 31st Dec., 1869, was $12,469.68, and in lieu the respondent erroneously made the net balance $7,154.64, by deducting therefrom certain losses, etc.—*Held*, that he was not entitled to his ten per cent. on accounts unsettled on the 31st Dec., and his claim must be reduced in proportion. *Rawlings* vs. *Citizens' Insurance & Investment Co.*, Q. B. 1876, 8 R. L. 398.

2. Holding out.—Where a company authorizes a canvasser or solicitor to take insurances in its name, this is a holding out to the insured that such canvasser or solicitor is its agent. *Ansley* vs. *Watertown Insurance Co.*, C. R. 1888, 14 Q. L. R. 183.

3. Mistake in Policy by Agent.—A misdescription in the policy, inserted there by the agent of the company, will be deemed the fault of the company. *Vezina* vs. *Can. Fire & Marine Insurance Co.*, S. C. 1883, 9 Q. L. R. 65.

4. —— Under the circumstances, parol evidence will be admitted to prove the intention of the assured. (*Ib.*)

5. Powers of Agent.—An agent of an insurance company, whose powers are limited to receiving applications for insurance for transmission to the head office and for the collecting of premiums, has no power to waive any of the conditions of the policies. *Baillie* vs. *Provincial Insurance Co. of Canada*, C. R. 1871, 21 L. C. J. 274.

6. —— The agent of an insurance company has no authority to accept an insurance and give a receipt for the premium in exchange for a receipt for his individual debt to the person insuring, and such act on his part will not bind the company. *Citizens' Insurance Co. of Canada* vs. *Bourguignon*, 1886, M. L. R., 2 Q. B. 22.

7. Privity of Contract.—The agent of a life insurance company has no right of action against a person who, through his instrumentality has applied for a policy of insurance, but who has not paid the premium, to recover the commission to which he, the agent, would be entitled from the company on procuring such insurance. *Darelay* vs. *Henault*, 1890, M. L. R., 6 S. C. 205

8. —— Where an agent of a life assurance company obtains for an individual a policy of insurance upon his life, in consideration of his giving his promissory note to the agent individually for the first year's premium, less the agent's commission, there is privity of contract between the agent and the maker of the note, and the note being given for good and valid consideration, the agent can maintain an action upon the same. *Alexander* vs. *Taylor*, C. R. 1880, 25 L. C. J. 252.

II. BY AGENT OF THE INSURED.

The agent of a railway company gave his own individual notes to an insurance company for a premium of marine insurance, and took the policy of insurance in his own name, and afterwards gave the notes of the firm to which he belonged for the same debt—*Held*, that the railway company was liable in a direct action for the amount of the premiums, and that on an intervention by the firm, the renewal notes filed in the case would be declared inoperative as against the intervening parties, and be ordered to be delivered up to them. *Montreal Fire Insurance Company* vs. *The Stanstead, Shefford and Chambly Railway Co. & Wood et al.*, S. C. 1863, 13 L. C. R. 233.

III. CONDITIONS OF POLICY.

1. A condition in a policy that no action can be brought for the recovery of the loss after the expiration of six months from the occurrence of the fire, is inoperative as a bar to an action instituted after that period. *Wilson* vs. *State Fire Insurance Co.*, S. C. 1862, 7 L. C. J. 223.

2. The condition endorsed on a policy, to the effect that no suit or action shall be sustainable for the recovery of any claim under the policy, unless commenced within twelve months next after the loss shall have occurred, is a complete bar to any such suit or action instituted after the lapse of that term. *Cornell* vs. *Liverpool and London Fire and Life Insurance Co.*, Q. B. 1869, 14 L. C. J. 256. *Whyte* vs. *Western Assurance Co.*, P. C. 1877, 22 L. C. J. 215, 7 R. L. 106. *Rousseau* vs. *Cie d'Assurance Royale d'Angleterre*, S. C. 1885, 1 M. L. R. 395. *Allen* vs. *The Merchants' Marine Insurance Co.*, Q. B. 1887, 3 M. L. R. 293,

16 R. L. 232. *Simpson* vs. *Caledonian Insurance Co.*, Q. B. 1893, 2 Que. 209. (The alleged ruling in *Anchor Marine Insurance Co.* vs. *Allen*, 13 Q. L. R. 4, 16 R. L. 180—that such condition is invalid—questioned and denied in *Allen* vs. *Insurance Co.* in Q. B., which was confirmed in Supreme Court, 15 Can. S. C. R. 488, 33 L. C. J. 51.)

3. Correspondence between the insured, or persons claiming to represent him, and the insurer on the subject of a loss, without any admission of liability on the part of the insurer, is not a "prosecution" of the claim by the insured within the meaning of the above condition. *Allen* vs. *Merchants' Marine Insurance* Co., 1887, M. L. R., 3 Q. B. 293.

4. Where a condition in a policy of a mutual fire insurance company provided that in case any promissory note for the first payment on any deposit note should remain unpaid for 30 days after it was due, the policy should be void as to claims occurring before payment, the company, accepting a note for such first payment, but acknowledging receipt by the policy as for cash paid, waived the condition. *Massé* vs. *Hochelaga Mutual Insurance Co.*, S. C. 1878, 22 L. C. J. 124.

5. It is not necessary that the insured should accept or sign the conditions stated on the back of the policy where it contains a clause declaring that these conditions shall form part of the contract; and where the insured, after having received such a contract, does not repudiate it, but instead makes it the basis of an action for the recovery of the amount claimed by him, he cannot object to one part of the instrument and accept the other. *Simpson* vs. *Caledonian Insurance Co.*, Q. B. 1893, 2 Que. 209.

IV. EVIDENCE.

Certificate of secretary of insurance company made evidence by Ontario Statute will also be received here. *Cadieux* vs. *Canadian Montreal Fire Insurance Co.*, C. R., 28 L. C. J. 109.

V. INTERPRETATION OF POLICIES.

Policies of insurance are to be construed by the same rules as other contracts and agreements, therefore, where there is an express warranty there is no room for implication of any kind. *Scott* vs. *The Fire Insurance Co. of Quebec*, K. B. 1821, 2 Rev. de Leg. 76.

VI. LEX LOCI CONTRACTUS.

1. Although a policy of life insurance issued by a company having its head office in New York but licensed to do business in Canada, and issued and payable in New York, on the life of a person resident in Montreal, and on application made through the company's agent in Montreal, is a Canadian policy within the meaning of the Dominion Statute 40 Vic, ch. 42, the contract is nevertheless a New York one, and payment of the amount covered by the policy must be demanded there before the company can be considered in default. *Equitable Life Ass. Co. of the U. S.* vs. *Perrault*, Q. B. 1882, 26 L. C. J. 382.

2. And although the assured died in Montreal, payment under judgment of the Superior Court of New York to the administrator of the assured's estate in New York was a complete bar to any suit for the recovery of the amount of the policy in Montreal. (*Ib.*)

VII. PREMIUM NOTES.

1. Where a note is taken for the premium, and the policy acknowledging the payment of the premium is delivered over, the non-payment of the note at maturity will not invalidate the insurance. *Compagnie d'Assurance de Cultivateurs* vs. *Grammon*, Q. B. 1879, 24 L. C. J. 82.

2. The premium in this case having been satisfactorily guaranteed to the company, the policy was thereby kept in full force and effect, and did not become void on non-payment of the premium note at maturity. *Anchor Marine Ins. Co.* vs. *Corbett*, Supreme Ct. 1881, 9 Can. S. C. R. 73.

VIII. SUBROGATION OF INSURER.

1. Action was instituted by the appellants, as *subrogés* of the Fabrique of the Parish of Boucherville, for the recovery of so much loss and damage sustained by the Fabrique in the destruction by fire, originating from the respondent's steamboat, of the parish church and sacristy of Boucherville as insured by the appellant's policy of assurance, and as they had paid to the Fabrique. The defendants pleaded the general issue only. The action being sustained, the defendants appealed to the Provincial Court of Appeals, where the judgment was reversed on the ground that the action had been brought by the plaintiffs as possessing an original right of action, instead of as the assigns or *subrogés* of the Fabrique.

The plaintiffs in turn appealed to the Privy Council, which held that on paying the loss they, the appellants, had a right to be subrogated; that the warden in charge of the Fabrique had a right to receive the money and subrogate them, the plaintiffs, in their rights, although he could not legally make an assignment by way of sale of any such rights and actions without special authority; and that, under a plea of a general issue, the defendants could not require that the other parties injured by the same fire be joined in an action so as to save them the costs of more than one action. *Quebec Fire Insurance Co.* vs. *St. Louis & Molson*, P. C. 1851, 1 L. C. R. 222, 2 R. J. R. 472, 7 Moore 286.

2. Action to recover the value of a cargo of peas lost on the scow "Marie Joseph," in consequence of a collision with a steamboat belonging to defendants in Lachine Canal. Plea that plaintiff had been paid the value of the peas by the insurers, for whom plaintiffs were a mere *prête nom* and had no interest—*Held*, confirming the judgment of the Court below, that, notwithstanding the payment by the insurers, the latter had no right to sue until notice of the transfer and subrogation, and the action was properly brought. *Richelieu & Ontario Navigation Co.* vs. *Lafrenière*, Q. B. 1879, 2 L. N. 264.

3. Where an insurance company pays a portion of the insurance money, and later on gives its promissory note for the balance at the same time that the insured gives his receipt for the whole amount, it cannot obtain from the insured a conventional subrogation of his rights against the author of the fire, under the terms of Art. 1155 C. C. *Cedar Shingle Co.* vs. *Cie. d'Assurance de Rimouski*, Q. B. 1893, 2 Que. 379.

4. Such company not coming under any of the heads of Art. 1156 C. C., cannot claim a legal subrogation. (*Ib.*)

5. As the insured had not assigned any of his rights to the insurer at the date of payment of the insurance money, the insurer cannot claim the benefit of Art. 2584 C. C. (*Ib.*)

6. The insurer who has paid the insurance money to the insured has only the remedy against the author of the fire provided by Art. 1053 C. C. (*Ib.*)

7. Where an insurance company is sued upon a policy of fire insurance for the amount of a loss, an action *en garantie* by the insurance company will not lie against a railway company through whose alleged fault and negligence the fire occurred, the liability on which the action is based in the two cases being entirely dissimilar in nature and principle. (1) *Central Vermont Ry. Co.* vs. *Cie d'Assurance*, Q. B. 1893, 2 Que. 450.

IX. THE CONTRACT.

1. Where a mortgagor, with a view of obtaining further delay for the payment of his debt, undertook to procure an insurance upon the premises in the name of the mortgagee, and to this end negotiated with the appellants, an insurance company, through their manager and general agent, an insurance upon the premises to the extent of £3,000, for the premium of which he gave his note, payable to the order of the manager, which was dishonored at maturity, and no policy or interim receipt had been issued by the company—*Held*, reversing the decisions of both the Canadian courts (2 L. C. J. 221 & 8 L. C. R. 401), that, under the company's charter, no contract of insurance existed without the issue of a policy or interim receipt, and that verbal evidence could not be received of such contract. *Montreal Assurance Company* vs. *McGillivray*, P. C. 1859, 9 L. C. R. 488, 13 Moore P. C. 87.

2. A contract of insurance alleged to have been made in Montreal by an agent thereof an insurance company of New York, whose charter and by-laws provide that it can only contract in New York, and by its president or vice-president, is null and void. And the statements or admissions of an agent, made after the contract has been performed, are inadmissible as evidence. *Redpath* vs. *Sun Mutual Insurance Co.*, S. C. 1869, 14 L. C. J. 90.

3. An insurance, by simple receipt for the premium, is legal and binding without the issue of a policy, and the interest in the insurance money may be legally assigned by any simple form of transfer endorsed on the receipt, and such transfer does not require the consent or acceptance of the insurance company to make it binding. *O'Connor* vs. *Imperial Insurance*, S. C. 1870, 14 L. C. J. 219.

4. Where it appeared, in an action by a mutual insurance company upon a premium note, that the company had never delivered a policy—*Held*, that the application and the premium note were null and without effect. *Giles* vs. *Jacques*, 1885, M. L. R., 1 S. C. 166, 29 L. C. J. 138. (This case was reversed in

(1) Compare *Cedar Shingle Co.* vs. *Ins. Co. supra.*

appeal, but on another point. M. L. R., 7 Q. B. 456.)

5. An insurance company which does not issue to the insured a policy in conformity to the application, cannot exact the premiums payable under the contract, and the insured can discontinue payment of premiums. *Canadienne Cie d'Assur. sur la Vie* vs. *Perrault*, S. C. 1889, M. L. R., 5 S. C. 62.

X. TRANSFER OF POLICY.

A policy of insurance cannot be transferred without the consent of the insurer, and notice of transfer is not in itself sufficient. *Corse* vs. *The British American Insurance Company*, C. R. 1871, 1 R. C. 243.

(e) LIFE INSURANCE.

I. Amount Payable to Wife.
Aliment. 1.
Amount claimed by daughter and second wife. 2.
Collocation. 3.
Divorce.—Effect of. 4.
Revocation of benefit to wife.—Stipulation for benefit of third person.—Acceptance. 5.
Transfer. 6-7.
II. Concealment, Misrepresentation, etc. 1-7.
III. Error in Policy. 1-3.
IV. Executor.
V. Increase of Risk. 1-2.
VI. Insurable Interest. 1-3.
VII. Novation.
VIII. Parol Evidence.
IX. Premiums.
X. Surrender Value.
XI. Transfer. 1-2.
XII. Where Action on Policy may be Brought.

I. AMOUNT PAYABLE TO WIFE. (1)

1. Aliment.—The provisions of the Statutes enabling insurance to be effected in favor of wives and children are in the nature of *alimens*, and, therefore, such insurances are free from the claims of the creditors of both husband and wife. *Vilbon* vs. *Marsouin*, Q. B. 1874, 18 L. C. J. 249.

(1) See English case of *Cleaver* vs. *Mut. Reserve*, reported 14 L. N. 379. Death of insured caused by felonious act of wife.

2. Amount claimed by daughter and second wife.—P. effected an insurance on his life, for the benefit of his wife. The wife died first, and by her will named P. her universal legatee. P. married again, the contract of marriage stipulating separation of property. There was never any assignment of the policy for the benefit of the second wife. P. predeceased his second wife, and by his will bequeathed all his property to his daughter by the first marriage. The amount of the policy being claimed both by the daughter and the second wife, the insurance company deposited the amount in court—*Held*, that the daughter was entitled to the amount of the insurance. *In re Ætna Life Ins. Co.* vs. *Gosselin*, S. C. 1892, 2 Que. 392.

3. Collocation.—Where the curator to the vacant estate of the deceased, after petition to that effect, called in the creditors of the deceased, in order to a settlement of their claims according to the sufficiency of the moneys realized from the estate, and the Attorney-General claimed to be collocated by privilege on behalf of the Crown in the sum of £700 due by the deceased as revenue inspector for moneys collected, etc., and the widow of the deceased and his trustees, in whom was vested a policy of life insurance for £500 on the life of the deceased for the benefit of his wife and children, claimed to be paid the amount of insurance out of the moneys—*Held*, setting aside the collocation of the prothonotary, that, notwithstanding the premiums were paid by the husband, and the assignment to the trustees was not entered on the books of the company, that they could claim the insurance on behalf of the widow, who claimed to be collocated accordingly. *Spiers exparte*, S. C. 1859, 9 L. C. R. 450.

4. Divorce, effect of.—*Held*, where an insurance is effected upon the life of the husband, the amount whereof is payable to his wife on a date named in his policy or on the previous death of the husband, and the parties are subsequently divorced, the wife ceases to have any claim to the amount of the policy, which reverts to the husband. *Hart* vs. *Tudor*, S. C. 1892, 2 Que. 534.

5. Revocation of benefit to wife—Stipulation for benefit of third person—Acceptance.—In 1869 R. insured his life under the provisions of 29 Vict. (Q.) ch. 17, insurance payable to his wife should she survive him, or, failing her, for the benefit of his children. In 1878, the Act 41-42 Vict. (Q.)

ch. 13, was passed, which enables a person who has effected an insurance for the benefit of his wife, or of his wife and children, etc., to revoke the benefit to the person or persons named in the policy, and to make a re-apportionment, but sect. 1 excepts rights accrued before the coming into force of the Act, all which rights "shall remain in force and continue to apply." By virtue of the Act, R., in 1880, executed a document which did not mention his wife in the first paragraph, but merely stated that he desired to revoke the benefit conferred by the insurance upon his children generally. In the second paragraph, however, he declared his option that the insurance should be payable to one son named therein (the appellant), *and not to his wife*. R. having died in 1892, the wife and the son named in the revocation, each asserted a right to the insurance.

Held, (reversing R. J. Q., 5 C. S. 200):—1. The document in question, although faulty in the wording of the first paragraph thereof, nevertheless in the second paragraph sufficiently expressed a revocation of the benefit to the wife.

2nd. Persons named as beneficiaries in policies issued while the Act 29 Vict. (Q.) ch. 17, was in force have no accrued or vested right within the meaning of 41-42 Vict., ch. 13, and the revocation and re-appropriation made in 1880 were valid.

3rd. In any event, under Act 1029 C. C., the husband had power to revoke the stipulation for the benefit to the wife so long as she had not signified her assent thereto. *Rees* vs. *Hughes*, Q. B. 1894, 3 Que. 443.

6. Transfer.—The amount of an insurance effected on the life of the husband, payable to the wife at his death, being unassignable under the provisions of R. S. Q. 5604, a transfer of such insurance by the wife is null, and she is entitled to claim the amount thereof notwithstanding the transfer. *Cusson* vs. *Faucher*, S. C. 1892, 3 Que. 265.

7. —— The appellant's interest in the policy was as assignee of Dame M. H. B., the wife of one Charles L., to whom the insured had transferred his interest in the policy on the 27th October, 1876—*Held*, per Strong, Taschereau and Gwynne J. J., that the appellant had no *locus standi*, there being no evidence that M. H. B. had been authorized by her husband to accept or transfer said policy. *Boyce* vs. *The Phœnix Mutual Life Ins. Co.*, Supreme Court 1887, 14 Can. S. C. R. 723, confirming Q. B., M. L. R., 2 Q. B. 323.

II. CONCEALMENT, MISREPRESENTATION, ETC.

1. Where an applicant for life insurance, in answer to printed questions, mis-states his age, or declares his health to be good, whereas it is bad, or fails to disclose the name of medical attendants though he had them, and answers as if he had none, and upon such answers, which are made to form a part of the contract, a policy is issued by the insurer, such policy is void. *Hartigan* vs. *International Life Assurance Society*, S. C. 1863, 8 L. C. J. 203.

2. Where a party insured declares that he is in good health, whereas he is afflicted with a serious disease likely to shorten his life, the policy will be void in view of such concealment. *Masson* vs. *L'Association de Prévoyance Mutuelle du Canada*, S. C 1884, 29 L. C. J. 161.

3. Insurance.—Where, by the terms of a policy of insurance, the statements and representations of the application of the policy are made part of the contract, and by the policy all such statements and representations are warranted to be true, and the application contains false representations and fraudulent suppressions, the same may be urged by the insurer as a cause of nullity in the contract, and an action lies to have the policy cancelled and delivered up. *N. Y. Life Ins. Co.* vs. *Parent*, S. C. 1876, 3 Q. L. R. 163.

4. —— Where the misrepresentations contained in the application are to the knowledge of the assured, such nullity may be invoked by the insurer without any return of premiums paid. (*Ib.*)

5. —— An assignment of the policy can convey no greater rights under the same than the assured himself had. (*Ib.*)

6. —— In the case of an untrue answer given by the insured as to his health, the policy containing a condition that it should be void in case of misrepresentation by the insured, the policy, although unconditional, will be void *ab initio*, and the insurer can invoke such nullity against the person in whose favour the policy was made payable and is not obliged to return any part of the premium paid. *Venner* vs. *Sun Life Ins. Co.*, Supreme Court, 1889, 17 Can. S. C. R. 394.

7. —— The statements constituting the misrepresentations being referred to in express terms in the body of the policy, the provisions of secs. 27 and 28 R. S. C., ch. 134, could not be relied on to validate the policy, assuming such enactments to be *intra vires* of the Par-

liament of Canada, which point it was not necessary to decide. (*Ib.*)

III. ERROR IN POLICY.

1. Action on a premium note given for a life insurance policy. Plea that the policy was different from what was agreed upon between defendant and the plaintiff's agent. The policy was payable at death only, whereas it was to be made payable in twenty years. The evidence was conflicting, but in review *held*, reversing the first judgment, that the defendant evidently understood that it would be made payable in twenty years and action dismissed. *Sun Mutual Life Insurance Company vs. Béland*, C. R. 1881, 5 L. N. 42.

2. Where a person's life is insured for $4,000, and by an error of calculation the agent represents to the insured that the annual premium will be $168.56 according to the usual rates, and the insured accepts and agrees to pay such premium, and gives notes therefor for the first year, the company cannot afterwards force him to pay the premium usually charged by it, even where it is proved that the insured knew the usual rate for $4,000 to be $188.56, but that his consent was obtained by mutual error. The only right the insurer has in such a case, is to demand the nullity of the contract. *Christmas* vs. *Bordua*, S. C. 1885, 15 R. L. 534.

3. Action to recover the amount of a policy of insurance issued by the appellants for the sum of $2,000, payable at the death of the respondent, or at the expiration of eight years, if he should live till that time. The premium mentioned in the policy was the sum of $163.44, to be paid annually, partly in cash and partly by the respondent's notes. The appellants, by their plea alleged that the insurance had been effected for $1,000 only, and that the policy had by mistake been issued for $2,000 ; that as soon as the mistake had been discovered they had offered a policy for $1,000, and that previous to the institution of the action they had tendered to the respondent the sum of $832.97, being the amount due, which sum, with $25.15 for costs (which had not been tendered) they brought into court. Since October, 1869, when a new policy was offered, the premiums were paid by the respondent and accepted by the appellants, under an agreement that their rights would not thereby be prejudiced, and that they would abide by the decision of the courts of justice to be obtained after the insurance should have become due and payable. Parol evidence was given to show how the mistake occurred, and it was established that the premium paid was in accordance with the company's rates for a $1,000 policy—*Held*, that the insurance effected was for $1,000 only and that the policy had by mistake been issued for $2,000. *Ætna Life Ins. Co.* vs. *Brodie*, Supreme Court 1879, 5 Can. S. C. R. 1.

IV. EXECUTOR.

An executor of a deceased person whose life was insured, cannot claim the amount of the life insurance without producing the policy, particularly when such policy is held by a third party for advances made and to be made. *Conway* vs. *Britannia Life Assurance Company*, S. C. 1864, 8 L. C. J. 162.

V. INCREASE OF RISK.

1. The application, after the usual answers and declarations, contained an agreement that should the applicant become as to habits so far different from the condition in which he was then represented to be as to increase the risk on the life insured, the policy should become null and void. The policy stated by its terms that if any of the "declarations and statements" made in the application should be found in any respect untrue, the policy should be null and void. The applicant stated himself to be of temperate and sober habits.

On an action on the policy by an assignee, it was proved that the insured became intemperate during the year preceding his death, but the medical opinion was divided as to whether his intemperate habits materially increased the risk—*Held*, on the merits, per Ritchie, C. J., and Strong, J. (Fournier and Henry, J. J. *contra*) that there was sufficient evidence of a change of habits which in its nature increased the risk on the life insured to avoid the contract. *Boyce* vs. *The Phœnix Mut. Life Ins. Co.*, Supreme Ct. 1887, 14 Can. S. C. R. 723, confirming Q. B., M. L. R., 2 Q. B. 323.

VI. INSURABLE INTEREST.

1. A creditor obtained an insurance on the life of his debtor for an amount greatly in excess of his real interest. Both the creditor and the agent of the insurance company were ignorant that such extra insurance was invalid—*Held*, that the insured was entitled to

recover the excess of premium paid on the larger sums, and that in the absence of proof to the contrary the Court would assume that the premium for the smaller sum was proportional to that paid for the larger sum. *London & Lancashire Life Insurance Co.* vs. *Lapierre*, Q. B. 1878, 1 L. N. 506.

2. G. applied to respondent's agent at Quebec for an insurance on his life, and having undergone medical examination, s d signed and procured the usual papers, which were forwarded to the head office at New York, a policy was returned to the agent at Quebec for delivery. G. was unable to pay the premium for some time, but L., a' the request of the agent at Quebec, who had been entrusted with a blank executed assign ent of the policy, paid the premium and took the assignment to himself. Subsequently L. assigned the policy and the premiums were thenceforth paid by the assignee. Prior to G.'s death, the general agent of the company inquired into the circumstances and authorized the agent at Quebec to continue to receive the premiums from the assignee—*Held*, (Gwynne, J., dissenting)—That at the time the policy was executed for G., he intended to effect a *bona fide* insurance for his own benefit, and as the contract was valid in its inception, the payment of the premium when made related back to the date of the policy and the mere circumsta ce that the assignee, who did not collude with G. for the issue of the policy, had paid the premium and obtained a assignment, did not make it a wagering po y. *Vezina* vs. *New York Life Ins. Co.*, upreme Ct. 1881, 6 Can. S. C. R. 30, rever g Q. B. 3 L. N. 322, 25 L. C. J. 232.

3 In this case, the party assured was but a *prête-nom*, the policy was transferred immediately after it was issued, and was in the hands of the defendant nothing more than a wager or speculative policy. *New York Life Ins. Co.* vs. *Parent*, S. C. 1876, 3 Q. L. R. 163.

VII. NOVATION.

The indication by the insured of the person to whom the policy should be paid in case of death, and the consent of the company to pay such person, does not effect novation. Art. 1174 C. C., and the provisions contained in Art. 1180 C. C. are not applicable in such a case. *Fenner* vs. *Sun Life Ins. Co.*, Supreme Ct. 1889, 17 Can. S. C. R. 394.

VIII. PAROL EVIDENCE.

In an action on a life policy, parol evidence of age will not be admitted until the non-existence of baptismal registers has been proved. *Hartigan* vs. *International Life Assur. Co.*, S. C. 1863, 8 L. C. J. 203.

IX. PREMIUM.

(See "Error in Policy.")

The non-payment of premium on a life-policy, within the delay specified therein, does not operate a nullity of the policy, when the assurer is a foreign company which has ceased to do business in the place indicated in the policy as that where the premium shall be paid, and has no known legally constituted agent there. *Dorion* vs. *Positive Government Life Assur. Co.*, S. C. 1878, 23 L. C. J. 261.

X. SURRENDER VALUE.

The surrender value of a policy is everywhere the same. *Vennor* vs. *Life Ass'n of Scotland*, Q. B. 1886, 30 L. C. J. 303.

XI. TRANSFER.

1. The assignment of a policy of life insurance is governed by the law of the place where the assignment is made, and not of the place where the policy was issued, or where it is payable. *Prentice* vs. *Steele*, C. R. 1889, M. L. R., 5 S. C. 294; affirming M. L. R., 4 S. C. 319.

2. Where a person notoriously insolvent transfers a policy of life insurance to a creditor as collateral security for a pre-existing debt, and the amount of the insurance is received by such creditor after the death of the assignor, any other creditor may bring an action in his own name against such assignee, to set aside the assignment, and compel him to pay the money into Court for distribution among the creditors generally. (*Ib.*)

XII. WHERE ACTION ON POLICY MAY BE BROUGHT.

Where, before the expiry of the ninety days' delay allowed by the policy, an insurance company positively refuses payment of a death claim, suit may be brought upon such policy without awaiting the termination of such delay. *Citizens Insurance Co.* vs. *Boisvert*, Q. 1885, 11 Q. L. R. 377.

Whyte vs. *The Western Assurance Co.*, P. C. 22 L. C. J. 215.

(*f*) LIVE STOCK INSURANCE.

The company held liable in this case for the loss of a horse insured by them, the death arising from the effects of the roughness of the sea. *Limer* vs. *Western Assur. Co.*, S. C. 1874, 7 R. L. 242.

(*g*) MARINE INSURANCE.

I. Abandonment and the Loss.
  Notice of Abandonment—Waiver. 1.
  Notice of Abandonment — Constructive total Loss. 2.
  Action for total Loss—Partial Loss. 3.

II. Action on Policy by undisclosed Principal. 1-2.

III. Arbitration.

IV. Conditions of Policy. (See "Warranty" *infra* and see "Insurance in General.")

V. Deviation—Extra Premium.

VI. Indorsement of Policy.

VII. Insurable Interest. 1-2.

VIII. Insurance of Cargo. 1-3.

IX. Insurance of Vessel against Fire—Meaning of word "Premises."

X. Proprietors of Half Share of Vessel.

XI. Repairs.

XII. Seaworthiness. 1-3. (See also *infra* "Warranty.")

XIII. Warranty. 1-5. (See also "Seaworthiness."

I. ABANDONMENT AND THE LOSS.

1. Notice of Abandonment—Waiver.—If notice of abandonment of a wrecked vessel be given by the insured to the insurers, and the latter thereupon instruct their agent to visit the wreck and look after their interests generally, and make no answer of any kind to the notice, and the agent acting on such instruction takes possession of the vessel and causes the wreck to be brought to a port and sold, although ostensibly for salvage charges, the abandonment will be held to have been accepted, and the insurer barred from pleading a warranty by the assured which would otherwise have prevented the assured from recovering. *Prov. Ins. Co., of Canada* vs. *Ledue*, P. C. 1874, 19 L. C. J. 281, 5 R. L. 579.

2. Notice of Abandonment — Constructive Total Loss.—A steam barge owned by S, which was loaded with sand, sank on the 28th September, 1875, while anchored in the river St. Lawrence. About a week afterwards it was raised by the insurers under the salvage clause of the policy, and floated, when it was found that there was an auger hole in the bilge of the barge where a pipe had gone through to supply water to the engine and boiler, from which the pipe had been removed, and the hole filled with a small wooden plug which had come out. On December 6th, 1875, S formally notified the insurers that he abandoned the barge, which was subsequently sold with the consent of all the interested parties for $150. The insurers resisted payment of the claim, and S entered action to recover as for a total loss—*Held*, reversing the judgment of the Court of Queen's Bench, that on the evidence as submitted, the plaintiffs could not recover as for an actual or constructive total loss—*Held*, by Fournier, J., that the notice of abandonment was not given in conformity with Article 2544 C. C., and was not within a reasonable time. *Western Assurance Co.* vs. *Scanlan*, Supreme Ct. 1886, 33 L. C. J. 301, 13 Can. S. R. 207; reversing Q. B. 15 R. L. 449.

3. Action for Total Loss — Partial Loss.—In an action for total loss on a policy of marine insurance, the plaintiff can recover as for a partial loss. *Merchants' Marine Ins. Co.* vs. *Ross*, Q. B. 1884, 10 Q. L. R. 237.

II. ACTION ON POLICY BY UNDISCLOSED PRINCIPAL.

1. An undeclared principal can sue on the contract of marine insurance made by his agent, in the agent's name. *Anchor Marine Ins. Co.* vs. *Allen*, Q. B. 1886, 14 R. L. 449, 13 Q. L. R. 4.

2. The contract in the present case was the receipt, or binding application, and not the policy. (*Ib*)

III. ARBITRATION.

A condition in a marine policy that any difference between the company and the assured as to the loss or damage, should be settled by arbitration, is not of a nature to exclude the ordinary action before the com-

mon law courts. (1) *Anchor Marine Ins. Co.* vs. *Allen*, Q. B. 1886, 13 Q. L. R. 4; *contra* *Anchor Marine Ins. Co.* vs. *Corbett*, Supreme Ct. 1882, 9 Can. S. C. R. 73.

IV. CONDITIONS OF POLICY. (See "WARRANTY" *infra* and see "INSURANCE IN GENERAL.")

The provision in a policy that a vessel must not be below "Class BI," without reference to any particular classification, will not render it necessary that such vessel should not be below class BI in a classification of vessels made on behalf of lake underwriters and for their information. But it will be construed as meaning that the vessel should not be below the class of vessels recognized by mariners as BI, if there be any such class. *Cusack* vs. *Mutual Ins. Co. of Buffalo*, S. C. 1862, 6 L. C. J. 97.

V. DEVIATION—EXTRA PREMIUM.

Held, that this case did not constitute a deviation from the voyage described in the charter party, and that the vessel was not liable for an extra premium of insurance exacted in consequence of the vessel touching at said port. *Peters* vs. *Canada Sugar Refining Co.*, Q. B. 1886, 31 L. C. J. 72.

VI. INDORSEMENT OF POLICY.

An indorsement upon an open policy of a cargo for insurance is incomplete if the name of the vessel by which such cargo is shipped is in blank; but it is perfected by a notice to the insurers of the name of the vessel whether they fill up the blank or not. *Cusack* vs. *Mutual Ins. Co. of Buffalo*, S. C. 1862, 6 L. C. J. 97.

VII. INSURABLE INTEREST.

1. A deposit by the insured of bills of sale and documents requisite to prove ownership of a vessel, with the collector of customs for registration, is sufficient to give an insurable interest, though actual registration be not made till after the destruction of the vessel by fire. *Moore* vs. *Home Ins. Co.*, S. C. 1869, 14 L. C. J. 77.

2. One of two trustees, part owners, can insure a vessel. (*Ib.*)

VIII. INSURANCE OF CARGO.

1. On demand for indemnity, under a marine policy, it is necessary to prove that the damage claimed was caused by some peril insured against, and the mere fact that the goods insured were damaged to a trifling extent by salt water, does not constitute such proof. *Sun Mutual Insurance Co.* vs. *Masson*, S. C. 1859, 1 L. C. J. 23.

2. A survey of goods alleged to be damaged, made without notice to the underwriter, followed by a sale at nine of the clock, in the morning of the second day after the survey, at which sale the claimant bought in the goods, is irregular, and such proceedings afford no criterion of the extent of damage the good shave sustained. (*Ib.*)

3. The owner of a cargo which has been insured can recover the insurance thereon if the loss of the vessel containing the cargo was in no sense due to any cause over which the insured had any control or could prevent. *Nickle* vs. *Cie d'Assurance Mut. de Buffalo*, Q. B. 1861, 12 R. L. 667.

IX. INSURANCE OF VESSEL AGAINST FIRE.

Meaning of word "Premises." — In the case of an insurance against fire, in respect of a steam vessel, where the form of policy used is properly applicable to the insurance of houses or buildings, the condition "that if "more than 20 lbs. weight of gunpowder "should be on the *premises* at the time when "any loss happened, such loss should not be "made good," will be held in law to apply to the vessel, for though the word *premises* in popular language signifies buildings, in legal language they mean the subject or things previously expressed or referred to; and if it be proved that more than 20 lbs. weight of gunpowder were on the vessel, at the time of the fire, the policy will be void, even though the loss be not thereby caused or increased. *Beacon Fire and Life Insurance Co.* vs. *Gibb*, P. C. 1862, 7 L. C. J. 57, 13 L. C. R. 81.

X. PROPRIETOR OF HALF SHARE OF VESSEL.

The party insuring (although proprietor only to the extent of one-half of the vessel) has a right to recover one-half on the value thereof as fixed in the Policy, so long as it does not exceed the amount insured, and the insurer cannot, consequently, limit his claim to one-half of the amount insured. *Leduc* vs. *Provincial Insurance Co., of Canada*, S. C. 1870, 14 L. C. J. 273.

(1) See under title "Arbitration" as to this question.

XI. REPAIRS.

Under the sue and labor clause in the policy, the assured had a right to recover the proportion of the cost of repairs caused by striking on said rock, which the value of the vessel bore to the sum insured, in addition to the sum insured; the vessel having been totally wrecked subsequently to the making of said repairs. *Leduc* vs. *Western Assurance Co.*, Q. B. 1881, 25 L. C. J. 280.

XII. SEAWORTHINESS.—(See also "WARRANTY.")

1. If a vessel be portworthy at the time a marine insurance is effected, her becoming unportworthy shortly afterwards by the act of those in charge of the vessel will not render her insurance void. *Cross* vs. *British America Insurance Company*, Q. B., 22 L. C. J. 10.

2. Where the freight of a schooner was insured for a voyage "from Mingan, on the North Shore, to Recollect, *via* Cow Bay, Cape Breton," and from Recollect to Montreal, and she struck a rock at Bersimis, prior to reaching Mingan, and after leaving Cow Bay, proved to be so leaky that she had to be repaired twice at Sydney, and where in the Captain's protest (adopted by the assured) the condition of the vessel was declared to be attributable to the injury received by striking on the rock at Bersimis, the vessel will be held to have been unseaworthy at Mingan, and when she sailed thence, and consequently, that the insurance never attached. *Leduc* vs. *Western Assurance Co.*, Q. B. 1881, 25 L. C. J. 55.

3. In another case arising out of the insurance of the vessel the freight of the cargo of which was insured under the policy referred to in the above case—*Held*, that when a vessel is seaworthy at the port of departure named in a marine policy, and becomes unseaworthy afterwards by striking on a rock during the voyage, the insurance risk attached at the time she left port. *Leduc* vs. *Western Assurance Company*, Q. B. 1881, 25 L. C. J. 280, 1 Dorion's Q. B. R. 273.

XIII. WARRANTY.—(See "SEAWORTHINESS.")

1. The following words, describing the subject assured, written upon the face of the policy, "of the steamer Malakoff, now lying in Tate's dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec," etc., do not amount to a warranty that the vessel shall actually navigate, but merely indicate an intention so to do. *Grant* vs. *Ætna Insurance Company*, P. C. 1862, 6 L. C. J. 224, 12 L. C. R. 386, reversing all the decisions in the Courts below, Q. B. 5 L. C. J. 285, S. C. 8 L. C. J. 13, Q. B. 8 L. C. J. 141, 14 L. C. R. 493.

2. Every person who proposes to insure his ship against sea perils during a sea voyage impliedly warrants her in every respect to be in a fitting condition to continue on that voyage, and to encounter all common dangers and perils with safety, and this applies to every insurance on a voyage policy, whatever be the nature of the interest insured. *Lemelin* vs. *The Montreal Insurance Company*, S. C. 1873, 1 Q. L. R. 337.

3. And *held*, also, that the warranty of seaworthiness was strictly a condition precedent to the obligation of insurance, and if it was not performed the policy did not attach; and if this condition were broken at the inception of the risk, in any way whatever, there was no contract of insurance, and the policy was wholly void, and the fact of the insurers having examined the vessel before taking the risk constituted no waiver of the implied warranty of seaworthiness. (*Ib.*)

4. The implied warranty of seaworthiness applies to the state of the vessel at the commencement of the voyage, and, if seaworthy then, the insurer is responsible for all the ordinary incidents arising in the course of the voyage; it is breach of this warranty, (1) that defects existed in the boiler at the time of sailing, rendering repairs to it after sailing necessary; (2) that the chief engineer had never before been to sea and was ignorant of the management of boilers in salt water. *Quebec Marine Insurance Company* vs. *Commercial Bank of Canada*, P. C. 1870, 7 Moore N. S. 1, reversing Q. B. 1869, 13 L. C. J. 267.

5. *Held*, (Fournier & Henry J. J. dissenting) that the words from "Quebec to Greenock, vessel to go out in tow," meant that she was to go out in tow from the limits of the harbour of Quebec in said voyage, and the towing from the loading berth to another part of the harbour was not a compliance with the warranty. *Provincial Ins. Co.* vs. *Connolly*, Supreme Court 1879, 5 Can. S. C. R. 258, reversing Q. B. 1 L. N. 33, 8 Q. L. R. 78, and restoring S. C., 8 Q. L. R. 74.

(*h*) INSURANCE COMPANIES.

(See also under title "Company and Corporation Law.")

Foreign.—Foreign insurance companies doing business in Montreal can only be sued in Canadian courts upon obligations assumed by them in Canada. *Cie de Nav. du Richelieu & Ont.* vs. *Phœnix Insurance Co. of Brooklyn*, 1886, M. L. R., 2 S. C. 192.

Foreign insurance companies in matters of registration must follow the procedure laid down by (Q.) 40 Vic., ch. 15 and (Q.) 45 Vic., ch. 47. But where a company has been irregularly registered, it can, even after the expiration of the sixty days from commencing operations, rectify the irregularity, and the officials responsible will not be liable in an action to recover the penalty for non-registration provided by the statute, provided that no action had been taken under the statute before the amended registration had been made. *Glasgow and London Insurance Co.* vs. *Lord*, Q. B. 1889, 34 L. C. J. 142.

Taxation.—The Provincial Statute, 39th Vict., ch. 7, imposing a tax on insurance companies, is unconstitutional. *Angers* vs. *Queen Insurance Co.* P. C. 1878, 3 App. Cas. 1090.

And insurance companies are liable to repay the amounts paid for stamps on insurance policies under the above Act. *David* vs. *Stadacona Insurance Co.*, C. Ct. 1880, 3 L. N. 118.

INTERDICTION.

I. Action against Person Interdicted.
II. Action by Person Interdicted. 1-2.
III. Curator. (See also under title "Curator.")
Appointment. 1-3.
Accounting. 4.
Authorization to Sue. 5.
Assumption of Curatorship by Person not appointed. 6.
Joint Curator—Power of Curator. 7.
IV. Effect of as to Third Parties. 1-2.
V. For Drunkenness. 1-2.
VI. For Imbecility or Insanity. 1-2.
VII. For Prodigality. 1-2.
VIII. Jurisdiction and Power of Judge. 1-2.
IX. Maintenance of Person Interdicted.
X. Mis-en-cause. 1-2.
XI. Of Attorney.
XII. Pendente Lite. 1-3.
XIII. Sale of Necessaries to Person Interdicted.
XIV. Separation from Family.
XV. Who may demand.

I. ACTION AGAINST PERSON INTERDICTED.

Costs.—Action against an interdict personally because his name was not correctly spelled in the register of interdicts. The judicial adviser was afterwards called in; judgment against the latter, but not against the interdict personally. *Ritchot* vs. *Hayrren*, S. C. 1879, 2 L. N. 248.

II. ACTION BY PERSON INTERDICTED.

1. An interdict for drunkenness is absolutely incapable of suing without the assistance of his curator, and an action taken by such a party without assistance will be dismissed, but without costs. *Heppel* vs. *Billy*, Q. B. 15 Q. L. R. 41, 19 R. L. 465.

2. Although an action taken by an interdict without the assistance of his curator should be dismissed, the costs of said action cannot be charged to the interdict, and the curator can oppose the seizure of the interdict's effects for such costs without first having the judgment granting them quashed. (*Ib.*)

III. CURATOR.

1. Appointment.—The father of an interdict ought of right to be appointed his curator, in the absence of any grave objection to such appointment, even when the majority of the family council thinks otherwise, and the insolvency of the father is not of itself a legal objection to such appointment. *Dufaux* vs. *Robillard*, Q. B. 1876, 20 L. C. J. 288, 7 R. L. 470.

2. —— The judge is not bound to follow the advice of the majority of the relatives and friends assembled to advise upon the appointment of a curator to the interdict. (*Ib.*)

3. —— The appointment as curator to an interdicted person of a party residing in Ontario is illegal, and will be annulled and set aside, in a suit for removal by a daughter of the interdict, even if she be not dependent on her father for support, and a new curator, resident within the province, will be ordered to be

appointed by the court. *Legge* vs. *Legge*, S. C. 1879, 24 L. C. J. 83.

4. Accounting.—A curator to an interdict can, upon summary petition of the interdict's brother-in-law, be condemned to give a summary account of his curatorship under Arts. 309 and 343 C. C. *Robillard* vs. *Laramie*, S. C. 1885, 13 R. L. 668.

5. Authorization to Sue.—A curator to an interdict for insanity does not need the authorization of the judge to bring an action to resiliate a sale made by the interdict before his interdiction, but where, owing to his infirmity of mind, he could not give a legal consent. *Rivard dit Dufresne* vs. *Forcier*, C. R. 1889, 18 R. L. 128.

6. Assumption of Curatorship by Person not appointed.—Where persons assume the duties of curator to an interdicted person and the control of his property, they will be responsible for their administration, and accountable as if they had been regularly named curator to the interdict. *Corbeil* vs. *St. Aubin*, Q. B., 26 Feb., 1884.

7. Joint Curator—Powers of Curator—Purchase of Diamonds.—Where two persons have been appointed joint curators to a person interdicted for insanity, one of them cannot make the estate of the interdict liable for the price of goods bought by such curator without the knowledge or consent of his co-curator. Where the income of the estate of an interdicted person is barely sufficient for the board and maintenance of himself and his wife, the latter cannot make the estate liable for the price of diamonds purchased by her, the value of the diamonds being greatly beyond the means of the interdict. *Hemsley* vs. *Morgan*, M. L. R., 7 S. C. 273.

IV. EFFECT OF AS TO THIRD PARTIES.

1. An interdiction and the appointment of a family council, at the request of the party interdicted, have no effect as regards a creditor with whom the party interdicted has contracted, and the contract is valid, although the family council did not assist, provided the interdiction was not notified to the creditor and was not entered in the register of interdicts. *De Chantal* vs. *De Chantal*, Q. B. 1852, 2 L. C. R. 469, 3 R. J. R. Q. 324.

2. The incapacity arising from insanity only begins from the date of the interdiction, and up to that time the interdict remains, as regards third persons, at the head of his patrimony and preserves the gestion thereof; and third persons, not having quality to demand the interdiction, are entitled to serve all necessary notices and significations on the interdict prior to his actual interdiction. *Symes* vs. *Farmer*, S. C. 1883, 27 L. C. J. 185.

V. FOR DRUNKENNESS.

1. An interdiction for habitual drunkenness, under Quebec Act. 33 Vic., ch. 26, can only be pronounced by a judge; the prothonotory not having jurisdiction in the premises, even in the case of absence of the judge. Exp. Therien, S. C., 17 L. C. J. 174.

2. The interdiction of a person as an habitual drunkard has the same effect as interdiction for prodigality, and a contract entered into by an habitual drunkard before interdiction is as valid as would be the contract of a prodigal under the same circumstances. *Metayer* vs. *McVey*, 1888, M. L. R., 4 S. C. 21.

VI. FOR IMBECILITY OR INSANITY.

1. Donation by Imbecile.—Per Ramsay, J.—The court in this case would not be guided by any speculative opinions on the subject of insanity, but would deal with the case before it. The question was whether this person was responsible. His Honour found nothing in the evidence to establish insanity. The subsequent interdiction had no retroactive effect. The judgment setting aside the donation would therefore be reversed. *Rowier* vs. *Collette*, Q. B. 1886, 31 L. C. J. 14.

2. Rights of Imbecile before Interdiction.—An insane or imbecile person is in the full enjoyment of his rights so long as he is not interdicted, and may validly defend them in a court of justice. *D'Estimauville* vs. *Tousignant*, S. C. 1874, 1 Q. L. R. 39.

VII. FOR PRODIGALITY.

1. When a person has been interdicted for prodigality according to law, every one is presumed to have knowledge thereof; and a tradesman who continues to supply goods on credit to the interdicted person, without the sanction of the curator, and to an extent greatly in excess of what the means of the interdicted person would justify, cannot recover from the curator the value of such goods, even when they are household supplies,—especially, where the curator has otherwise provided for the subsistence of the interdicted person.

Riendeau vs. *Turner*, C. R. 1889, M. L. R. 5, S. C. 278, 17 R. L. 576.

2. An interdiction for causes of prodigality may be superseded by the court. *Duchêneau exp.*, K. B. 1814, 2 Rev. de Leg. 438.

VIII. JURISDICTION AND POWER OF JUDGE.

1. A judge of the Superior Court residing in Montreal can hear and decide in another district where a judge resides, a demand for interdiction of an habitual drunkard, and the interdiction can take place in other than the *chef-lieu* of the district. *Lafontaine* vs. *Lafontaine*, S. C. 1889, 34 L. C. J. 111.

2. The Court is not bound to follow the advice of the family council. (*Ib.*) And see 7 R. L. 470.

IX. MAINTENANCE OF PERSON INTERDICTED.

Where relatives of the interdicted person make an *acte d'accord* by which they agree to maintain such interdicted person for his revenues, which are not large, nor more than necessary for his support, the heirs of the person interdicted will be bound thereby. *Corbeil* vs. *St. Aubin*, Q. B. Montreal 26 Feb., 1884.

X. MIS-EN-CAUSE.

1. *Held*, that the curator to a person voluntarily interdicted must be brought into the proceedings, in order to obtain a rule for imprisonment for a false bidding, and that, although the false bidding occurred before the interdiction. *Fourquin exp.*, Q. B. 1867, 3 L. C. L. J. 118.

2. A judgment obtained against a person interdicted by reason of insanity, whose curator is not a party to the suit, is null *de plein droit*. *Sproat* vs. *Duniere*, 2 Rev. de Lég. 438, K. B., and *Sproat* vs. *Chandler*, 3 Rev. de Lég. 391, K. B. 1819.

XI. OF ATTORNEY.

An attorney guilty of contempt in the face of the court may be immediately interdicted. *Binet exp.*, K. B. 1818, 2 Rev. de Lég. 438.

XII. PENDENTE LITE.

1. Where a party to a suit is interdicted for prodigality *pendente lite*, he ceases to be capable of any further proceeding in the cause, and the suit must be taken up in his behalf by the curator appointed to him. *Greene* vs. *Mappin*, 1889, M. L. R., 5 Q. B. 108, 17 R. L. 584.

2. An intervention in the suit by the curator, for the purpose of assisting the interdict, is of no effect; and an appeal by the interdict, so assisted by the curator, will be rejected. (*Ib.*)

3. Where the opposite party has only raised the objection to the irregularity of the proceedings by his factum and argument on the appeal, no costs will be allowed to him on the dismissal of the appeal. (*Ib.*)

XIII. SALE OF NECESSARIES TO PERSON INTERDICTED.

A creditor has a right of action against the curator to an interdict, in his quality, for necessaries supplied to the interdict personally and without the assistance of the curator. *Valade* vs. *Levy*, C. Ct. 1887, 10 L. N. 350.

XIV. SEPARATION FROM FAMILY.

The curator to an interdict for insanity cannot separate the interdict from his family in order to place him in a hospital. *Moore* vs. *O'Neil*, Q. B. 1874, 5 R. L. 646.

XV. WHO MAY DEMAND.

An alliance exists even after the decease of the party who caused it, and the party allied may demand the interdiction for insanity. *Brunet* vs. *Lelang*, S. C. 1892, 1 Que. 249.

INTEREST. (1)

I. Arrears of. 1-3.
II. Exorbitant. 1-2. (See *infra* "Usurious.")
III. Interest on Interest. 1-4. (See *infra* "On Coupons.")
IV. Manner in which it is to be Computed.
V. Nature of.
VI. On Coupons.
VII. On Loans by Corporations. 1-3.
VIII. On Unpaid Shares.
IX. Recovery of. (See "Right to.") 1-2.

(1) See an Act respecting interest 60-61 Vict. (D.), ch. 8. When rate of interest not *per annum*, more than 6 per cent not recoverable unless contract states the equivalent rate *per annum*.

X. Right of Crown to receive.
XI. Right to. 1-12.
XII. Usurious. (See also *supra* "Loans by Corporation.")
XIII. When it Accrues. 1-11. (See also "Right to.")
See also Arbitration.
" Bills and Notes.
" Hypothec.
" Insolvency.
" Payment.
" Prescription.

I. ARREARS OF.

1. No interest can be allowed upon a judgment for the arrears of one or more years constituted rent. *Guenet* vs. *Hudson*, K. B. 1818, 2 Rev. de Lég. 439.

2. A notarial obligation, bearing date previously to the Act 4 Vic., cap. 30, if registered, though without a memorial of claim for any specific amount for arrears of interest which may be due, is sufficient to preserve the rights of the creditors for the whole amount of interest due, it being unnecessary that any memorial for arrears of such interest should be registered. *McLachlan* vs. *Bradbury*, Q. B. 1848, 3 Rev. de Lég. 340; *Pelletier* vs. *Michaud*, S. C. 1850, 1 L. C. R. 165.

3. Interest on seigniorial arrears, due in virtue of a subsequent convention, are liable to registration. *Mogé* vs. *Lapré*, S. C. 1857, 1 L. C. J. 255.

II. EXORBITANT. (See "Usury Laws.")

1. In a case against a vessel—*Held*, that maritime interest at the rate of 25 per cent. upon a bottomry bond given at Quebec would not be considered exorbitant. *Whyte* vs. *The Deadalus*, K. B. 1818. S. R. 130.

2. Interest at the rate of ten per cent. per annum payable by a minor is not necessarily exorbitant. It depends upon the circumstances whether it is or not. *Watts* vs. *Paquette*, Q. B. 1876, 9 R. L. 252.

III. INTEREST ON INTEREST. (See *infra* "On Coupons.")

1. The fact of a plaintiff attempting to capitalize interest already accrued is not a sufficient ground for dismissing the action, although the court may refuse to grant that portion of it which claims such compound interest. *Dionne* vs. *Valleau*, Q. B. 1870, 2 L. C. L. J. 112.

2. A plaintiff who sues for a debt, principal and interest, has a right to interest on the principal and the interest which has accumulated since the bringing of his action, if he so conclude. *Bourassa* vs. *Roy*, S. C. 1879, 9 R. L. 553.

3. The obligation to pay interest on interest from the time money is received is incumbent only on those who receive money for parties incapacitated. *Dorion* vs. *Dorion*, Q. B. 1885, M. L. R., 1 Q. B. 483.

4. An agreement to the effect that accrued interest shall bear interest from the date on which it will become payable until payment, is valid, and effect will be given to such an agreement. *Campbell* vs. *Bell*, C. Ct. 1888, 11 L. N. 346.

IV. MANNER IN WHICH INTEREST IS TO BE COMPUTED.

28 L. C. J. 301.

V. NATURE OF.

Annual interest is distinct from the principal sum which gives rise to it, and as such is governed by the Code, even where the debt existed before the Code. *Hébert* vs. *Ménard*, S. C. 1876. 10 R. L. 6.

VI. ON COUPONS.

Interest runs on the interest of coupons of railway debentures from the dates on which they respectively fall due without the necessity of putting the debtor in default *Desrosiers* vs. *Montreal, Portland & Boston Ry. Co.* C. R., 1883, 28 L. C. J. 1, 6 L. N. 388. *Contra Macdougall* vs. *Montreal Warehousing Co.*, S. C. 1880, 3 L. N. 64.

VII. ON LOANS BY CORPORATIONS.

1. The plaintiff claims the sum of $170.33, amount of coupons due on bonds. The defence was that the bonds were issued under Q. 37 Vic. cap. 57, and that the Legislature could not enact a law authorizing the company to enter into any contract binding on it by which a rate of interest higher than six per cent. was to be paid, and that the cou-

pons being at the rate of seven per cent. the obligation was void, or at most good only for six per cent. The answer to this was that the company was authorized to borrow and could legally agree to pay seven per cent. or such other rate as might be specially agreed upon. —*Held*, maintaining the action. *Macdougall* vs. *Montreal Warehousing Co.*, S. C. 1880, 3 L. N. 64, *and Royal Canadian Insurance Co.* vs. *Montreal Warehousing Co.*, 3 L. N. 155.

2. And *held* that corporations, other than banks, may validly lend at any stipulated rate of interest. *Royal Canadian Insurance Co.* vs. *Montreal Warehousing Co.*, S. C. 1880, 3 L. N. 155.

3. *Held*, A contract of loan made by a corporation subject to the usury laws then in force, and embodied in C. S. C. ch. 58, s. 9, in which contract a higher rate of interest was stipulated than that permitted by law, is an absolute nullity; and no subsequent acknowledgment or tender by the debtor can give such contract validity, so as to enable the creditor to recover thereunder. *Montreal Loan and Mortgage Co.* vs. *Bond*, S. C. 1893, 3 Que. 537. *Contra Corporation du Seminaire de Nicolet* vs. *Pauzé*, which held that the contract was void only as to the excess of interest charged. S. C. 1882, 11 R. L. 438.

VIII. ON UNPAID SHARES.

Under the statute governing building societies, the latter cannot exact interest on unpaid shares. *Hughes* vs. *Cie des Villas du Cap Gibraltu*, 1889, M. L. R. 5, S. C. 129. Confirmed in Review, 31 L. C. J. 24.

IX. RECOVERY OF.

(See Rights.)

1. Where action was brought by a transferee to recover usurious interest paid under the old law—*Held*, reversing the judgment of the Superior Court that, notwithstanding the money was paid by only one of the assignors and his wife, the asignee or transferee could legally claim under an assignment from the whole family, the other having no interest in the transaction. *Kierskowski* vs. *Dorion*, Q. B. 1866, 2 L. C. L. J. 69, P. C. and 14 L. C. J. 29.

2. In an action to recover the amount of a promissory note the defendant pleaded that the plaintiffs offered to take $200 cash and notes for the balance, which he, the defendant, had agreed to, but now plaintiff wished to charge interest at the rate of twenty per cent. on the accepted notes, while the defendant urged that he was not bound to pay interest at all—*Held*, reversing the judgment of the court below, that the understanding appeared to be that no interest should be charged. *Legendre* vs. *Fauteux*, Q. B. 1865, 1 L. C. L. J. 37.

X. RIGHT OF CROWN TO RECEIVE.

The crown can recover interest where a private individual would be entitled to it, as in an action for money under a written contract, on account of a third person, in which it may be recovered from the date of service of process. *Attorney-General* vs. *Black*, K. B. 1828, Stuart's Report 321.

XI. RIGHT TO.

1. On an action by a bank against its manager for damages for breach of trust—*Held*, that interest was not recoverable in respect of such claim, or in respect of loss said to have accrued through his conduct. *Bank of Upper Canada* vs. *Bradshaw*, P. C. 1867, 17 L. C. R. 273.

2. Where there has been a book account and also a promissory note, and accounts stated have been rendered, including both and charging interest, the Court will not strike off the interest where the defendant has not pleaded an imputation of his payments as against the note. *Torrance* vs. *Philbin*, S. C. 1860, 4 L. C. J. 287.

3. Tender without deposit does not prevent interest from accruing. *Dumont* vs. *Laforge*, S. C. 1874, 1 Q. L. R. 159.

4. Interest does not run *ex lege* on sums paid by the proprietor of the premises on behalf of the lessee. *Desloriers* vs. *Lambert*, C. C. 1875, 1 Q. L. R. 365.

5. Where the price of a sale is stipulated payable by stated instalments without interest, interest will nevertheless accrue on each overdue instalment. *Arpin* vs. *Lamoureux*, S. C. 1875, 7 R. L. 196; and see *Rice* vs. *Ahern*, Q. B. 1862, 12 L. C. R. 280, 6 L. C. J. 201; *Dumont* vs. *Sevigny*, C. R. 1886, 12 Q. L. R. 76 in same sense and see *infra*.

6. A clause in an obligation, to the effect that the payment of the capital shall be made at a fixed term, without interest, until such term, or that the payment shall be made at such fixed term, on pain of damages, etc., is equivalent to a stipulation to pay interest from

the expiration of such term. *Montchamps et al.* vs. *Perras*, S. C. 1880, 24 L. C. J. 231, 3 L. N. 339.

7. In a commercial case, where interest has been charged in accounts current rendered from time to time and unobjected to, the Court will allow the interest without any proof of express promise to pay it. *Greenshields* vs. *Wyman*, S. C. 1876, 21 L. C. J. 40, ; *Boisvert* vs. *Saurette*, S. C. 1890, 19 R. L. 2.

8. Plaintiff, a merchant, having a deposit account with the defendants, claimed the sum of $168·98, as the balance due him, including interest at a stipulated rate of six per cent. The question arose as to the interest on $15,134, amount of two cheques, one for $10,000, presented August 7th, and the other for $5,134, presented August 8th, and certified good by the bank, but not paid until October 8th following. Plaintiff contended that he was entitled to interest until payment, while the bank said the interest stopped at the time the cheques were presented and certified—*Held*, that the plaintiff had no right to interest after the certification of the cheque. *Wilson* vs. *La Banque Ville Marie*, S. C. 1880, 3 L. N. 71.

9. The purchaser owes the vendor interest on the price of sale where the object sold is of a nature to produce fruits or other revenues, and such interest accrues from the taking possession of the property. *Atlantic & N. W. Ry. Co.* vs. *Prudhomme*, 1885, M. L. R., 2 S. C. 21.

10. A railway company, which takes possession of lands during expropriation proceedings, owes interest on the price awarded, from the time the proprietor was dispossessed. (*Ib*)

11. In the case of an obligation for the payment of money, the damages resulting from the debtor's default are restricted by article 1077, C. C., to interest on the sum, either at the rate stipulated, or, in the absence of an agreement, at the rate fixed by law; and the stipulation of a fixed sum, in addition to the interest, for costs of collection, is illegal. *Leduc* vs. *Gourdine*, S. C. 1887, 10 L. N. 161.

12. The covenant, in a deed of sale of an immoveable, that the price shall be payable by instalments, without interest, cannot be construed to extend beyond the delay granted for the payment of each instalment, or to deny to the vendor any right to interest until he has put his debtor legally in default to pay. The words "without interest" in such a deed, mean only without interest up to the maturity of each instalment, and that after such date, legal interest will run. *Hogan* vs. *Clancy*, Q. B. 1888, 15 Q. L. R. 53., and see *supra* *Arpin* vs. *Lamoureux*; *Montchamp* vs. *Perras*.

XII. USURIOUS. (See *supra* "Loans by Corporations."

Any excess of interest above 6 per centum is usurious and illegal. Such excess of interest can be claimed from the creditor by the debtor, by way of exception to the action. *Nye* vs. *Malo*, Q. B. 1857, 2 L. C. J. 13, 7 L. C. R. 405, 6 R. J. R. Q. 334.

XIII. WHEN IT ACCRUES. (See also "Right to."

1. Service of process for a partnership debt on one of the co partners is a demand as to all. If, therefore, process is served at different times on two or more, interest is due from the first service. *Rogerson* vs. *Thomas*, K. B. 1818, 2 Rev. de Leg. 439.

2. Where a legatee claimed by opposition the amount of a legacy out of the proceeds of the sale of a farm which had belonged to the testator—*Held*, that no interest could accrue on such legacy before a judicial demand had been made. *Bonacina* vs. *Bonacina*, S. C. 1859, 10 L. C. R. 79.

3. Action was brought to recover damages by reason of mills leased to the plaintiffs and the property contained in them having been destroyed by fire, which was caused by a mob. The question which arose was, whether interest should be allowed from date of judgment as in ordinary actions of damages, or whether it should run from date of protest—*Held*, that interest would be allowed from date of protest, such action being different from an ordinary action of damages. *Douglass* vs. *The Mayor of Montreal*, S. C. 1862, 13 L. C. R. 71.

4. Where action is brought for the recovery of money paid in error, and the defendant is proved to have been in good faith, interest will be allowed only from date of service of process. *Brunelle* vs. *Buckley*, C. R. 1872, 3 R. L. 695.

5. In an action to recover money paid under an illegal assessment roll, interest will be allowed only from the date of the institution of the action and not from the date of payment. *Baylis* vs. *City of Montreal*, Q. B. 1879, 23 L. C. J. 301, 2. L. N. 340; *Wilson* vs.

City of Montreal, Q. B. 1880, 24 L. C. J. 222, 3 L. N. 282.

6. Where a hypothecary creditor sues the *tiers détenteur* hypothecarily, he can only claim interest on his debt for two years and the current year where the *tiers détenteur* is a holder in good faith. *Bricault* vs. *Bricault*, S. C. 1881, 11 R. L. 165.

7. Interest on coupons runs only from the institution of action thereon. *MacDougall* vs. *The Montreal Warehousing Co*, S. C. 1880, 3 L. N. 64.

8. Interest may be collected on a mercantile account from the expiration of the term, where a term has been clearly stipulated, without further putting *en demure*. *Rowan* vs. *Massé*, 1884, M. L. R., 1 S. C. 177.

9. Judgment was rendered in February, 1889, in favor of plaintiff in the Superior Court, costs reserved. Upon appeal to the Court of Queen's Bench, the judgment was reversed in November, 1889, and the action was dismissed with costs of both Courts in favour of defendants. Upon taxation of the bill, defendants pretended that under Arts. 3598 and 5904, Rev. Stat., Quebec, interest was due on the Superior Court costs from the date of the judgment of the Superior Court, on the ground that the Queen's Bench judgment reversing was the judgment which the Superior Court ought to have rendered and should be taken *nunc pro tunc—Held*, that interest was due on the Superior Court costs only from the date of the judgment of the Court of Queen's Bench. *Fraser* vs. *McTavish*, 1890, M. L. R., 6 S. C. 436.

10. In the absence of an agreement to the contrary the lender of money can claim interest only from the date of putting the borrower in default. *Daly* vs. *Daly*, S. C. 1892, 1 Que. 457.

11. The holder of a note, who has obtained judgment thereon against the maker and first indorser, is entitled, in an action subsequently instituted against the other indorsers, to interest from date of service on the amount of the first judgment, which included interest on the note up to date of judgment. *Thibaudeau* vs. *Pauzé*, S. C. 1892, 2 Que. 470.

INTERLOCUTORY JUDGMENTS

(See "APPEAL.")

INTERNATIONAL LAW (Private). (1)

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(1) Bibliography. Lafleur on Conflict of Laws, Montreal.

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I. FOREIGN LAW AND ITS PROOF.

1. "Foreign Law"— Meaning of.— Where a testator before and after making his will in New York State, was domiciled in the city of Quebec, it was held in an action on the will that the application of foreign law means and includes the rule as to the choice of law (or the rule of Private International Law) which the foreign country would apply to the particular case. *Ross* vs. *Ross*, Supreme Court, 1895, 25 Can. S. C. R. 307 (Fournier and Taschereau, dissenting), confirming the unanimous judgment of the Q. B. 1893, 2 Que. 413.

2. Proof of Foreign Law. — When foreign law is relied on by any party to a case in this province, such law must be specially pleaded and must be established by evidence.

Thus where a transaction had taken place in England, and the defendant pleaded that the consideration was tainted with usury, it was held that this plea was bad, inasmuch as there was not in that pleading an averment stating what was the law of England in relation to this matter, which was essential. *Hart vs. Phillips*, Q. B. 1851, 1 L. C. R. 90.

3. —— Where a defendant pleaded the Statute of Limitations of the State of New York as a bar to the claim sued upon, but made no proof of such statute, it was held that the statute of a foreign state cannot be judicially noticed but must be proved as a fact before our courts can decide upon its nature and effect. *Addams* vs. *Worden*, Q. B. 1836, 6 L. C. R. 237.

4. —— In the absence of allegation and proof of the foreign law, the Court will assume that there is no difference between the foreign law and our own. *Parker* vs. *Cochrane*, S. C. 1854, Montreal Condensed Reports, 65; *Brodie* vs. *Cowan*, S. C. 1852, 7 L. C. J. 96.

5. A marriage contract was executed in 1859, in the Red River Settlement (now Manitoba). The parties expressly admitted that at the time of the marriage contract the laws of England were in force in the Red River Settlement, but did not admit what that law was. It was held that the foreign law must, under these circumstances, be presumed to be the same as the law of this province. *Bank of Montreal vs. Hopkins*, S. C. 1882, 5 L. N. 162.

6. *Held*, that in the case submitted, the action was rightly brought, although one of the plaintiffs, who sued in her quality of executrix in virtue of a will made in Ireland, did not allege in the declaration, that by the law of Ireland an action accrued to her as such executrix (1). *Grainger* vs. *Parke*, Q. B. 1860, 10 L. C. R. 350.

7. —— *Held*, (Reversing the judgment of Taschereau J., M. L. R., 1 S. C. 166). Where an action was brought in the Province of Quebec by the plaintiff as receiver to a corpora-

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(1) Some of the judges in this case appear to have held views at variance with the doctrine supported by the rest of our jurisprudence. The action was brought by a foreign executrix and other plaintiffs, and the defendants demurred on the ground that the declaration did not show what were the rights of the executrix under the foreign (Irish) law, or what was the effect of such foreign law, in vesting her with the estate and rights of the deceased. The demurrer was maintained by the Superior Court, but the judgment was reversed by a majority of the appellate Court. Sir L. H. Lafontaine, C.J., and Duval, J., dissenting, held, that the promise to pay alleged to have been made by the defendant to the executrix was invalid, because it was not shown by the declaration that by the law of Ireland the executrix had power to receive such promise. The three judges who constituted the majority did not rest their opinions on the same reasons, Badgley, J., thought that the rights of an executrix under a will are recognized the world over; Mondelet, J., was of opinion that the allegation of a promise to pay was enough to defeat the demurrer; and Aylwyn, J., appears to be the only one who applied the principle that in the absence of proof of the law of a foreign country, the Court must apply its own law.

tion in liquidation domiciled in Ontario, and it was proved by the production of the Ontario Statute that the plaintiff, as receiver, was duly authorized to represent the corporation in judicial proceedings, he may also appear in his quality of receiver in judicial proceedings before the Courts of the Province of Quebec. *Giles* vs. *Jacques*, Q. B. 1887, M. L. R., 7 Q. B. 456, 31 L. C. J. 266.

8. —— *Contra* where the Ontario Statute was not filed. *Primeau* vs. *Giles*, Q. B. 1887, M. L. R., 7 Q. B. 467, 31 L. C. J. 271.

9. —— But the necessity of making such proof no longer exists when the statement of the foreign law by one party is not contradicted by the other. The Court is then bound to accept the law in the very terms of the allegations and without modification. *Voght* vs. *Richer*, S. C. 1891, 21 R. L. 481.

10. —— Who are competent to make the proof.—In an action for wages by foreign seamen against the master of their vessel, a foreign ship, the evidence of the master, as to the validity of the ship's articles and the nature of the law under which they were made, will be admitted. (1) *Patez* vs. *Klein*, C. Ct. 1863, 13 L. C. R. 433.

11. —— Statutory Law.—Our courts will not take judicial cognizance of the statutes of other Provinces, and consequently they must be proved by the production in the case of copies printed by authority. *Giles* vs. *Garicpy*, S. C. 1885, 29 L. C. J. 207; *Primeau* vs. *Giles*, M. L. R., 7 Q. B. 467; 31 L. C. J. 271; *Pacaud* vs. *Tourigny*, 10 Q. L. R. 54.

12. —— Imperial Act for ascertaining law in British Dominions.—For an example of a reference by the Court of Chancery in Ontario to our Superior Court under the Imperial Act for ascertaining the law in British Colonies. (22 and 23 Vict., Cap. 63.) See *Noad* vs. *Noad*, S. C. 1871, 21 L. C. J. 312.

II. STATUS.

1. Aliens cannot be appointed tutors to minors, or curators to interdicts. *Driscoll* vs. *O'Rourke*, S. C. 1883, M. L. R. 1, S. C. 311.

2. Our courts will refuse to admit the effect of a sentence of a Criminal Court rendered in a foreign State. *Adams* vs. *Worden*, Q. B. 1836, 6 L. C. R. 237.

3. By the change of sovereignty consequent upon the cession of Canada, the law of England determined who are aliens or not; but when the fact of alienage is once established, the civil consequences of alienage are determinable by the local, that is, the Canadian law. *Donegani* vs. *Donegani*, P. C. 3 Knapp 63.

III. DOMICILE.—(See also under title "DOMICILE.")

1. No person can, at any time, be without a domicile, and no person can have at the same time more than one domicile. It may often be difficult to determine where that domicile is, but the law will, from the circumstances of the case, or by presumption, assign a domicile to every person. *Wadsworth* vs. *McCord*, Supreme Court 1866, 12 Can. S. C. R. 178, affirmed in P. C. *sub. nom. McMullen* vs. *Wadsworth*, 14 App. Cas. 631.

2. In order to lose a domicile of origin and acquire another, there must be a residence and the intention of making the residence a permanent home and not a residence for a mere special or temporary purpose. (*Ib.*)

3. The onus of proof of change of domicile is on the party alleging it, and every presumption is to be made in favor of the original domicile. (*Ib.*)

4. The defendant came to Montreal as a single man in 1825 in order to look after the interest of his uncle, who was a resident of the State of New York and had a claim against a commercial firm in Montreal. The defendant at the time was domiciled in the State of New York, and came to Montreal for a temporary purpose. In 1827 he married a lady residing in Troy, in the State of New York, and brought her with him to Montreal, where he continued to live until 1834. In that year he returned to the State of New York and remained there until 1839, when he came back to Montreal and made that city his permanent home—*Held*, that at the time of his marriage there was no proof of intention to settle in Canada, and that his domicile in the State of New York had not then been abandoned. *Converse* vs. *Converse*, S. C. 1882, 5 L. N. 69.

5. A very prolonged residence is insufficient to establish a domicile if the intention of remaining is wanting. *Connolly* vs. *Woolrich*, S. C. 1867, 11 L. C. J. 197, 1 R. L. 253, confirmed in appeal.

(1) This is probably an exceptional case. (See Lafleur, Conflict of Laws, p. 30.)

IV. MARRIAGE.

1. Formal validity of.—A marriage contracted in the United States between two parties having their domicile in Lower Canada, though one of them (the wife) was a minor and had not the consent of her tutor, is valid in law, and under such marriage community of property is created. *Languedoc* vs. *Laviolette*, Q. B. 1858, 8 L. C. R. 257, 1 L. C. J. 210.

2. Celebrated in uncivilized countries.—A marriage contracted according to the usages of the Cree Indians between a domiciled Lower Canadian and an Indian women at Rat River, in the Indian country, where there were no priests or magistrates, no civil or religious authority and no registers, will be declared valid. *Connolly* vs. *Woolrich*, S. C. 1867, 11 L. C. J. 197, 1 R. L. 253, confirmed in appeal.

3 —— But *held* later in the case of an Indian marriage of the same character as the above, contracted by a Lower Canadian with an Indian women in the North-West Territories, that such marriage was not valid where the union does not, according to Quebec customs, possess the essential characteristics of a Christian marriage, namely the idea of a permanent union with one woman to the exclusion of all others. *Fraser* vs. *Pouliot*, Q. B. 1885, 13 R. L. 520, 8 L. N. 178; Supreme Court, 12 Q. L. R. 327.

4. Effect of change of Domicile.—Change of domicile does not free the wife from the disability created by the law of the original matrimonial domicile; this follows her into the new domicile (1) *Laviolette* vs. *Martin*, Q. B. 1862, 5 L. C. J. 211, 11 L. C. R. 254, reversing, S. C. 1861, 2 L. C. J. 61.

5. —— The marital power of the husband and the capacity of the wife depend, not on the situation of the property, but on the actual domicile of the consorts at the time of the execution of the contract in question. *McNamee* vs. *McNamee*, S. C. 1885, 14 R. L. 30.

6. —— A married woman, after acquiring a domicile in this Province, must be authorized by her husband to institute proceedings before our courts, although no such authorization was required by the law of the original matrimonial domicile of the consorts. *Stevens* vs. *Fisk*, Q. B. 1883, 27 L. C. J. 228. Reversed in Supreme Court on the ground that the consorts were validly divorced at the time the proceedings were instituted. Cassel's Digest p. 235.

7. Suretyship by Married Woman.—A husband had become insolvent and had induced his wife to transfer a policy in her favour to his trustee for the benefit of his creditors. The widow alleged in an action by her against the insurance company, in the Province of Quebec, and against the trustee of her late husband's insolvent estate, that the policy having been issued in Montreal, could not by the laws of this Province be so transferred, because the wife cannot bind herself for her husband or transfer her property to secure his liabilities. On the merits the Court held that the plaintiff's claim was not tenable because the property transferred was not moveable, and because, by the second paragraph of Art. 6 of the Civil Code, moveable property is governed by the law of the domicile of its owner. *Parent* vs. *Shearer*, S. C. 1879, 23 L. C. J. 42.

V. DIVORCE AND SEPARATION

1. The plaintiff and defendant were married in New York in 1871, without ante-nuptial contract, both being at the same time domiciled in that city. By the laws of the State of New York no community of property was created by such marriage, the wife retaining her private fortune free from marital control like a *femme sole*. Shortly after the marriage, the appellant entrusted the respondent with the whole of her private fortune consisting of personalty to the amount of over $200,000, and respondent administered this until 1876. The consorts lived in New York until 1872, when they removed to Montreal, where the respondent has ever since resided and carried on business, but appellant left him shortly after to take up her residence alternatively in Paris and New York. In 1880, when respondent was still in Montreal, the appellant, then in New York, instituted proceedings against him for divorce, before the Supreme Court of New York, on the ground of adultery. The action was served on respondent personally at Montreal, and he appeared in the suit, but did not contest, and appellant obtained a decree of divorce absolute in her favor in December, 1880. In 1881, appellant taking the quality of a divorced woman, and without obtaining judicial authorization, instituted an action against the respondent in the Superior Court in Montreal for an account of his administration of her property. The respondent pleaded that the alleged divorce was null and void for

(1) For incorrectness of reporter's head note in this case, see Lafleur Conflict of Laws, p. 70 note.

want of jurisdiction of the Supreme Court of New York, that the appellant in consequence was still his wife, and that she should have obtained the authorization of the court to institute the present action—*Held*, reversing the decision of the Queen's Bench (6 L. N. 329 and 27 L. C. J. 228), restoring that of the Superior Court (5 L. N. 29), that the Supreme Court of New York had jurisdiction to pronounce the divorce and the divorce was entitled to recognition in the courts of the Province of Quebec. *Stevens* vs. *Fisk*, Supreme Ct. 1885, Cassel's Dig. 2nd Edit., p. 235, 8 L. N. 42. (Compare *Lemesurier* vs. *Lemesurier*, 1895, App. Cas. 517; Lafleur, Conflict of Laws, p. 82.)

2. And that the Supreme Court of New York, having under the statute law of New York jurisdiction over the subject matter in the suit for divorce, the appearance of the defendant in the suit absolutely and without protesting against the jurisdiction stopped him from invoking the want of jurisdiction of the said court in the present action. (*Ib.*)

3. And that the plaintiff had at the institution of the action for divorce a sufficient residence in New York to entitle her to sue there. (*Ib.*)

4. A married woman suing for separation of property described herself as being of the Province of Quebec and her husband as being of the same place but then of the State of New York. The court found that in fact both consorts had abandoned their domicile in this province ten years before the institution of the action for separation, and had lived together during those years in the State of New York. Under these circumstances a judgment of separation as to property pronounced by the court of their former domicile was held to be absolutely null and void. *Molleur* vs. *Déjadon*, S. C. 1874, 6 R. L. 105.

5. Although there is no community of property between persons married in Upper Canada, their then domicile, without any antenuptial contract, yet an action for separation of property will be maintained in favor of the wife, by reason of the insolvency of the husband, since their removal to Lower Canada. *Sweetapple* vs. *Gwilt*, S. C. 1862, 7 L. C. J. 106.

6. *Held*, that an action for separation as to property could not be maintained by a wife in this province if the consorts were married under a law which did not create community of property between them. *Wiggins* vs. *Morgan*, S. C. 1879, 9 R. L. 546; *Dalton* vs. *King*, S. C. 1879, 9 R. L. 548.

VI. MINORITY AND TUTORSHIP.

Minors domiciled in England and alleged to be "under the jurisdiction, authority and guardianship of the Lord High Chancellor of Great Britain," may nevertheless be provided with a tutor appointed in this province in the ordinary way when they have property therein. *Brooke* vs. *Bloomfield*, Q. B. 1871, 6 R. L. 533.

VII. CORPORATIONS.

1. **Contracts by Foreign Corporations.**—Foreign corporations may enter into contracts in this province, and sue and be sued thereon. *Laroque* vs. *Franklin County Bank*, Q. B. 1858, 8 L. C. R. 328; *Connecticut & Passumpsic R. R. Co.* vs. *Comstock*, Q. B. 1870, 1 R. L. 589.

2. —— But the powers of a foreign corporation may be restricted by the laws governing its own constitution. Thus where an insurance company incorporated under the laws of the State of New York was prohibited by its charter from making insurance contracts outside of New York, it was held that a contract of insurance made by an agent of the company in Montreal with a person domiciled there could not be enforced against the company. *Redpath* vs. *Sun Mutual Ins. Co.*, S. C. 1869, 14 L. C. J. 90.

3. **Mortmains.**—A mining company incorporated under the laws of the State of Massachusetts for the purpose of carrying on business there and in this province, could not validly acquire lands here without the license of the Crown, and consequently could not maintain an action for damages for eviction against the vendor of their vendor. (1) *Chaudiere Gold Mining Co.* vs. *Desbarats*, P. C. 1873, L. R. 5 P. C. 277.

VIII. PROPERTY, OWNERSHIP, ETC.

1. *Held*, that where the usufruct of an immoveable in this province had been sold by a private writing executed in the State of Michigan, and not proved according to the requirements of our registry laws, the registration was void and inoperative. (2) *Bélanger* vs. *Mann & Simard*, S. C. 1885, 11 Q. L. R. 71.

2. A court in this province has no authority to name experts for the purpose of establish-

(1) See now sec. 1762 R. S. Q.
(2) See remarks as to head note of this case, Lafleur, Conflict of Laws, p. 117.

ing a boundary line in Ontario. *Skead* vs. *McDonell*, Q. B. 1872, 3 R. C. 42.

3. The court will not entertain an action against defendants residing in this province for the cancellation of a lease of real estate in the Province of Ontario. *Senauer* vs. *Porter*, S. C. 1862, 7 L. C. J. 42.

4. The Superior Court had declared a will void as to immoveables situated in Ontario, New Brunswick, British Columbia and the United States; the Supreme Court held that this portion of the judgment should be struck out, inasmuch as there was no jurisdiction in the Quebec Courts to deal with such immoveables, the question of the validity or invalidity of wills as to immoveable property being one exclusively for the *forum rei sitæ*. *Ross* vs. *Ross*, 25 Can. S. C. R. 307.

IX. AB INTESTATE SUCCESSION.

1. Letters of administration from a Court of Probate in Michigan, produced in the cause, as well from the terms thereof as from the principles of international law, did not extend beyond the limits of the state wherein the administration was granted. *Coté* vs. *Morrison*, Q. B. 1859, 9 L. C. R. 424.

2. When a succession opens in a foreign country, an administrator duly appointed under the laws of that country will be allowed to administer the succession in this province, and the heirs-at-law have no right, adversely to him, to obtain payment of any sums due to the deceased in this province. *Breault* vs. *Wadleigh*, C. R. 1894, 6 Que. 79.

3. Deceased was domiciled and died intestate in this province, and the representative of a creditor here sued the insurance company to recover the amount of an insurance policy on the life of the deceased. The company pleaded that they had paid the amount to the administrator duly appointed to the estate of the deceased under the laws of New York, in compliance with a judgment of the Superior Court of that state ordering the payment. This plea was overruled by the court of first instance. The majority of the Court of Appeal reversed this judgment and maintained the plea. *Equitable Life Assurance Co.* vs. *Perrault*, Q. B. 1862, 26 L. C. J. 382.

4. When a person domiciled abroad dies leaving property in this province, and no one appears to claim the succession and the heirs are unknown, the succession will be deemed vacant, and a curator to such vacant succession will be appointed by our courts on the demand of a creditor. *Déchesne* vs. *Beaulieu*, S. C. 1894, 6 Que. 8.

X. WILLS AND GIFTS. (See also "Foreign Law and its Proof.")

1. A will had been made in the English language in Lower Canada by a person there domiciled, and the question was as to whether the word "children" used by the testatrix might be interpreted to include grandchildren and even more remote descendants, according to the extensive signification given to the word *enfants* in the old French law. Upon the construction of the will taken as a whole, their Lordships of the Privy Council held that the testatrix was referring to her own children only. *Martin* vs. *Lee*, P. C. 1860, 14 Moore P. C. 142.

2. A will executed in the Province of Quebec by a person domiciled therein, with reference to a portion of an estate situate in the province, must be interpreted according to the laws of the province, and not according to the English law, though the will be in the English language and be couched in English legal phraseology. *McGibbon* vs. *Abbott*, P. C. 1885, 10 App. Cas. 653, 8 L. N. 267.

XI. CONTRACTS. (See also "Foreign Law and its Proof.")

1. **Formal Validity of Contracts.**—*Held*, that a contract of partnership entered into at Bordeaux, France, between two persons domiciled in this province, is null and void for non-compliance with the formalities of the French law in regard to the formation of such contracts, and an action *pro socio* brought here by one of the alleged partners against the other was dismissed. *Furniss* vs. *Laroque*, 1886, M. L. R., 2 S. C. 405.

2. **Effects of Contracts.**—A bill of lading, made in England, by the master of an English ship, is a contract to be governed and determined by English law. *Jones* vs. *Harris*, P. C. 1876, 1 App. Cas. 229, 1 R. 147.

3. —— A bond signed in this province in favor of a foreign insurance company must be interpreted according to the law of the province, and a power contained in the bond to cancel an insurance policy guaranteed by it must, under our law, be exercised before a tender is made. *Vernor* vs. *Life Association of Scotland*, Q. B. 1886, 30 L. C. J. 303.

4. —— Goods had been ordered by a Quebec firm from an English firm, and had been shipped by the latter by one of the defendant company's steamers from Liverpool to Quebec. The court regarded this as a contract to be governed by the law of England, carrying with it the remedy of stoppage *in transitu*. *Rogers* vs. *Mississippi & Dominion SS. Co.*, S. C. 1888, 11 Q. L. R. 99.

5. —— Where a sale and delivery of two locomotives had been made in the State of Rhode Island, and the vendor took out an attachment in revendication in this province, where the locomotives then were, asking that the sale be dissolved for non-payment of the price, the proceedings were dismissed by the court, on the ground that the *lex loci contractus* (the law of Rhode Island) did not give the vendor any such remedy as that of attachment in revendication or the privilege of annulling the sale if the price were not paid. *Rhode Island Locomotive Works* vs. *South Eastern Ry. Co.*, Q. B. 1886, 31 L. C. J. 86.

6. —— A contract made with an advocate of this province for his professional services is dependent on the law of his professional domicile, and not on the law of the place where the contract is made or where the services are to be given. *Regina* vs. *Doutre*, P. C. 1884, 9 App. Cas. 745, 28 L. C. J. 269.

7. **Imputation of Payments.**—When a contract is made in one country and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, is the law of the country where the performance is to take place. *Regina* vs. *Ogilvie*, 6 Exch. Ct. Rep. 21.

8. **Express reference to a particular Law or Custom.**—Question as to the validity of a clause in a contract of marriage stipulating that the marriage rights of the parties should be governed by the laws and customs of Great Britain, and whether such stipulation be not too vague, general and indefinite to construct a contract of marriage. *Wilson* vs. *Wilson*, Q. B. 1846, 2 R. de L. 431.

9. **Essential Validity of Contracts.**—Where a contract of surety-ship had been entered into in Vermont without consideration, and it was proved that by the law of that State it was absolutely necessary to the validity of a guarantee that there should be a consideration, the contract could not be enforced here. *Jessup* vs. *Baxter*, C. R. 1866, 1 L. C. L. J. 117.

10. **Agreement as to Jurisdiction.**—Where a contract of hire of personal services executed at Bordeaux, France, contained the following clause: "Dans le cas de dulicultè pour l'exécution des présentes, elles devront être réglées par les tribunaux de Bordeaux, à l'exclusion de toutes autres juridictions," it was held that this stipulation could not affect the competency of our tribunals. *Judey* vs. *Société Française de Phosphates du Canada*, S. C. 1888, 11 L. N. 106.

11. **Actio Pauliana.**—Where a policy of insurance had been issued and made payable in New York, and had been assigned in this province in fraud of the creditors of the assured, the rights of the creditors to obtain the avoidance of this transfer must be governed by our law and not by the law of New York. *Prentice* vs. *Steele*, C. R. 1889, M. L. R., 5 S. C. 294; confirming M. L. R., 4 S. C. 319.

XII. MARRIAGE COVENANTS. (See also "Contracts.")

1. **Presumed Intention in the absence of Express Contract.**—There is no community of property, according to the custom of Paris, between parties married in England, their then domicile, without any antenuptial contract, who have afterwards changed their domicile and settled and died in Lower Canada. *Rogers* vs. *Rogers*, Q. B. 1843, 3 L. C. J. 64, 3 R. de L. 255.

2. A marriage was celebrated in New York between parties domiciled in this province, the wife being a minor and not having obtained her tutor's consent. The ceremony, which was performed before a justice of the peace, was not preceded by any marriage covenants. After the marriage the consorts returned to their domicile, and about a month later were again united in marriage, this time before the priest of their parish and with the tutor's sanction. This second marriage was preceded by a contract stipulating separation as to property. Inasmuch as the litigation was between the consorts and the wife's tutor, and the tutor was supporting the validity of the first marriage, the court held that the consorts could not attack it, and consequently community of property existed between them under the laws of their domicile. *Longpré* vs. *Lacielotte*, Q. B. 1858, 8 L. C. R. 257.

3. According to the well established jurisprudence of the Parliament of Paris no community of property existed between persons, who, having married without contract in a place where community did not exist, afterwards established their domicile and acquired property in a country where the law of community did exist; and according to the same jurisprudence the law of community was considered rather as a *statut personnel* than as a *statut réel*. *Astill* vs. *Hallé*, C. R. 1877, 4 Q. L. R. 120.

4. Community does not exist between consorts married out of Lower Canada and whose matrimonial domicile was in the State of New York, where the law of community is not in force. *Converse* vs. *Converse*, S. C. 1882, 5 L. N. 69.

5. In the absence of marriage settlement the mutual rights of the husband and wife to each other's moveables, whether possessed at the time of the marriage or afterwards, are determinable by the law of the husband's actual domicile at the time of the marriage, without reference to the law of the country where the marriage is celebrated or where the wife was domiciled before marriage. *Wadsworth* vs. *McCord*, Supreme Ct. 1886, 12 Can. S. C. R. 466, and see *Young* vs. *Déguise*, Q. B. 1884, 29 L. C. J. 194.

6. Dower.—The right to customary dower does not depend upon the law of the domicile of the husband at the time of the marriage, but accrues in regard to immoveables in this province, although it would not accrue under the law of the matrimonial domicile. *Erichsen* vs. *Cuvillier*, Q. B. 1880, 25 L. C. J. 80, 3 L. N. 285.

XIII. BILLS AND NOTES. (See under title "Bills and Notes.")

Interpretation.—See Bills of Exchange Act, 1890, sec. 71.

XIV. MERCHANT SHIPPING AND AFFREIGHTMENT.

1. Where seamen brought action in Quebec against the captain of a Russian ship for wages and the defendant pleaded a subsisting contract by which the plaintiffs were not entitled to their discharge until they arrived in England, at the port at which they had shipped, the Court held that the question must be decided according to Russian law, for although the articles were signed within British jurisdiction, they were Russian articles, and were signed on board a Russian ship under the Russian flag, and the contract entered into by the parties must be held to be a Russian contract. *Patez* vs. *Klein*, C. Ct. 1863, 13 L. C. R. 433.

2. The court will entertain suits for wages by foreign seamen against the master of their vessel lying here, and will notice the *lex loci* to ascertain whether there is a legal and subsisting contract to prevent the mariner from enforcing payment of what is earned. *Carroll* vs. *Ballard*, C. Ct. 1861, 12 L. C. R. 247.

3. As between a British ship and a foreign ship within Canadian waters, the act regulating the Canadian waters must be the rule of the Court; the duty and the right of both parties is to be determined by it. *The Aurora* V. A. C. 1861, 10 L. C. R. 445.

4. A bill of lading made in England by the master of an English ship, must be regarded as an English contract governed by the law of England as to its incidents. *Moore* vs. *Harris*, P. C. 1876, 2 Q.L. R. 147.

XV. DELICTS AND QUASI-DELICTS.

1. Delicts committed abroad.—In an action of damages against a railway company for setting fire to a barn by sparks emitted from the smoke stack of a locomotive, the proof established that the barn was situate in the Province of Ontario, and the Court held that the responsibility of the defendant was governed by the law of Ontario. *Glasgow and London Ins. Co.* vs. *Can. Pac. Ry. Co.*, S. C. 1888, 34 L. C. J. 1.

XVI. PRESCRIPTION. (1)

(See also under title "Prescription.")

1. An action was instituted on 7th December, 1872, in Montreal against the defendant, who was then domiciled there, upon a promissory note made by him in the city of New York on the 18th July, 1866, and payable there on the 21st January, 1867. At the time the note became due the defendant was domiciled in New York, and he continued to have his domicile there until the 15 March, 1869, from which date he was domiciled in Montreal. The defendant pleaded the prescription of five years under Art. 2260 of the Civil Code, and the plaintiff answered that by the laws of the State of New York, which governed the case, such a note was only prescribed by the lapse of six years. Mackay, J., held that the prescription of five years under Art. 2260 C. C. had been

(1) See Arts. 2189, 2190, 2191 C. Code.

acquired and dismissed the action. (1) *Hillsburg* vs. *Mayer*, S. C. 1873, 18 L. C. J. 69.

2. Action on a claim for board and lodging furnished at Manchester, State of New Hampshire, in 1871 and 1872. Towards the end of the year 1872 the defendant came to live in the Province of Quebec and was there domiciled from that date until the institution of the action more than ten years later—*Held*, that under § 2 of Art. 2190 C. C. prescription had been entirely acquired under our law since the defendant had acquired a domicile here. (2) *Lafaille* vs. *Lafaille*, C. Ct. 1886, 14 R. L. 466.

3. No action can be maintained in the Province of Quebec upon a promissory note made and payable in a foreign country, after the expiration of five years from the time when the defendant established his domicile openly and without any concealment in the Province of Quebec, whatever may be the time required to prescribe such note in the country where it was made. *Cross* vs. *Snow*, C. Ct. 1886, 9 L. N. 196.

XVII. PROCEDURE.

1. **Evidence.**—Action was for the value of the use and occupation of an immoveable situated in Upper Canada, and the plaintiff also alleged an express promise to pay. Proof was made that by the law of Upper Canada the evidence of a single uncontradicted witness was sufficient to establish a claim of this kind. The Court held that inasmuch as the cause of action had originated in Upper Canada, the sufficiency of the evidence must depend on the law of that province. *Watson* vs. *Lyon*, S. C. 1859, 4 L. C. J. 17.

2. —— Where an advocate proceeded by petition of right against the government of Canada upon an agreement entered into in the Province of Ontario for professional services as counsel before the Fisheries Commission sitting in the Province of Nova Scotia, the Exchequer Court of Canada held that the rules of evidence in force in the Province of Ontario were applicable, and the suppliant's evidence in his own behalf was therefore admissible. *Doutre* vs. *The Queen*, 4 L. N. 34. (Confirmed in Supreme Ct., 1 Ex. C. R. 355 and P. C. 9 App. Cas. 745, but no ruling given on this point.)

3. —— **Proof of Writings executed out of the Province.**—A power of attorney given before a notary in New York, and authenticated before a judge of the Supreme Court of that place, and deposited with a notary in Hull, Quebec, is valid in accordance with Art 1220 C. C., and of the same effect as a regular authentic act made before a notary in this province. *Marston* vs. *Pelletier*, C. R. 1885, 29 L. C. J. 337; 14 R. L. 251.

4. —— **Imperial Statute applying to British Courts.**—Under the Imperial Statute 22 Vict., ch. 20 for the taking of evidence in suits pending before tribunals in Her Majesty's dominions only, a commission had been issued from the Court of Queen's Bench, Manitoba, for the examination of a witness in this province. Objection was taken to the production of certain books called for by the plaintiffs and the commissioner having decided in favor of this production, his ruling was submitted for revision to a judge of the Superior Court at Montreal. Jetté, J., in virtue of the powers conferred upon him by the above statute, confirmed the decision of the Commissioner. *Crawford* vs. *Morton Dairy Farming Co.*, S. C. 1883, 6 L. N. 188.

5. **Canadian Act respecting the taking of Evidence relating to Proceedings in Courts out of Canada.**—Application was made under the Dominion Act 31 Vict., cap. 76, to compel the attendance of a witness to be examined under a rogatory commission issued out of a foreign Court. The witness objected that this legislation was *ultra vires* of the Dominion Parliament, inasmuch as it has reference to a matter of procedure, which is within the jurisdiction of the Quebec Legislature—*Held*, that as it was a matter of international obligation under the Act which the Dominion Parliament might very well pass, inasmuch as matters of international comity are more under the control of the Legislature of Quebec. *Smith* vs. *Hempstead*, S. C. 1872, 16 L. C. J. 140.

Execution (See "CONTRACTS" *supra.*)

6. **Capias.**—The provision of our Code of Procedure, allowing of a capias in the case of secretion, can have effect against a debtor resident in Ontario, but who is found in Quebec. *Gault* vs. *Robertson*, C. R. 1877, 21 L. C. J. 281.

XVIII. BANKRUPTCY AND INSOLVENCY.

1. **Proceedings should be at Domicile of Debtor.**—No judge in the Province

(1) (2) See Lafleur, Conflict of Laws, p. 206, et head notes to these cases.

of Quebec has a right to interfere with insolvency matters originated in the Province of Ontario, where the insolvent has his domicile, even though the assignee reside in the Province of Quebec and the affairs of the estate be conducted in Montreal. *McDonnell* vs. *Tyre & Kenny*, S. C. 1876, 15 L. C. J. 145.

2. Auxiliary Proceedings.—The Winding-up Act R.S. C. ch. 129, which by its terms applies to incorporated companies doing business in Canada, wheresoever incorporated, is *intra vires* of the Parliament of Canada. So in the matter of a Scotch company incorporated under the Imperial Acts (1862-6) having its head office in Glasgow, and having debts and doing business in Canada, a winding-up order made by a Canadian Court on the petition of a Canadian creditor with the consent of the Scotch liquidator, as auxiliary to the winding-up proceedings in Scotland, is a valid order. *Allen* vs. *Hanson*, Supreme Ct. 1890, 18 Can. S. C. R. 667, confirming Q. B. 16 Q. L. R. 79.

3. Conflict of Interest between Foreign Receiver and Local Creditor.—A receiver appointed under the Statutes of New York to an insolvent insurance company (whose powers and functions are the same as those of a foreign assignee) cannot intervene in a case in the Superior Court here, wherein moneys belonging to the company have been attached before judgment, on the ground of insolvency and secretion of estate, and claim to be paid the moneys so attached (less plaintiff's costs) for distribution in New York, the legal domicile of the company. *Osgoode* vs. *Steele*, Q. B. 1871, 16 L. C. J. 111, and see *Canadian Inland Steam Navigation Co.* vs. *Columbian Ins. Co.*, C. R. 1869, 1 R. L. 190.

4. —— The liquidator appointed in the course of the voluntary winding-up of a company formed in England under the Joint Stock Company's Acts, 1862 83, has no right to the possession of moneys of the company in this province, previously attached by process under a judgment rendered against it, and an intervention by him to quash the attachment was held to have been properly dismissed on demurrer. *Powis* vs. *Quebec Bank*, Q. B. 1883, 2 Que. 566, confirming S. C. 3 Que. 122, and see *Pacaud* vs. *Tourigny*, 10 Q. L. R. 54.

XIX. FOREIGN JUDGMENTS.

1. International Competency of Foreign Court.—A foreign judgment to have extra-territorial force and effect, must be for a definite sum, it must be final, and must have been pronounced by a court having competency according to the rules of private international law. *Stacey* vs. *Beaudin*, S. C. 1886, 9 L. N. 363.

2. —— According to the rules of private international law, international jurisdiction is founded either upon the defendant's domicile or presence in the territory of the foreign tribunal, or on his possession of property within such territory. Therefore where the exemplification of judgment filed did not on its face show the international competency of the foreign court, and there was no evidence to establish the existence of any of the cases which would have conferred such international competency, the action was dismissed. (*Ib.*) and see *Kerr* vs. *Lanthier*, 19 R. L. 170, *May* vs. *Ritchie*, 16 L. C. J. 81; 3 R. L. 440.

3. Proof of Foreign Judgment.—By article 209 of the Code of Civil Procedure, the denial of any document specified in Art. 1220 C. C. must be accompanied with the giving of security for the costs of the commission required to obtain the proof of such document, and a denial unaccompanied by such security would be without any legal effect. *Dunbar* vs. *Almour*, 1887, M. L. R., 3 S. C. 142.

4. —— Where, however, the defendant does not deny the truth of the contents of the document, but merely denies that he is the person against whom the foreign judgment was rendered, the above articles do not apply; and the burden of proof is on the plaintiff to establish the identity of the defendant with the person against whom the foreign judgment was obtained. *Bentley* vs. *Stoch*, C. R. 1888, M. L. R., 4 S. C. 383; *Marquette* vs. *Smith*, S. C. 1891, 5 Que. 376.

5. Formal Requisites.—If the copy or exemplification of the foreign judgment does not reveal the cause of indebtedness, the plaintiff may be ordered to file an account, and proceedings will be stayed until he does so. *Holme* vs. *Cassils*, S. C. 1877, 21 L. C. J. 28.

6. —— Even in a default case the court will require the plaintiff to prove the cause of action *Chapman* vs. *Gordon*, S. C. 1864, 8 L. C. J. 196.

7. —— When the plaintiff has been ordered to file a detailed account or bill of particulars showing the nature of the claim upon which the foreign judgment is based, and fails to do so, the defendant may move to have a further delay to file such particulars, and ask to have the action dismissed if they are not produced

within the additional delay. *Hoppock* vs. *Demers*, S. C. 1867, 13 L. C. J. 224.

8. Defence available.—Under 40 Vict., ch. 14 (Q.), the defendant who is sued in this province on a judgment rendered by a provincial Court in any other province of the Dominion, must have been personally served within such other province, in order to be estopped from setting up a defence which might have been set up in the original suit. *Bates* vs. *Lauzon*, C. R. 1879, 2 L. N. 117.

9. —— Held also under the same statute that its dispositions could not be pleaded by an answer in law, but that the question must be determined at the trial on the merits. *Green* vs. *Brooks* 1888, M. L. R., 4 S. C. 475.

10 —— The pendency of an appeal to the Privy Council from a judgment rendered in Upper Canada, when security had been given for the costs only, is no defence to a suit brought upon such judgment in Lower Canada. *Northern Ry. Co.* vs. *Patton*, S. C. 1867, 17 L. C. R. 71.

11. Foreign Judgments Interrupt Prescription A judgment obtained in a foreign country will have the effect of interrupting the prescription of the debt, and the only prescription which can be opposed to a foreign judgment is that of thirty years. *Monmour* vs. *Harris*, 1881, M. L. R., 2 Q. B. 439, 5 L. N. 376; *Dunbar* vs. *Monmour*, 1887, M. L. R., 3 S. C. 142, 10 L. N. 301; *King* vs. *Demers*, C. R. 1870, 15 L. C. J. 129.

12. Penal Action —Judgments in penal actions are regarded as strictly territorial and not entitled to judicial recognition beyond the jurisdiction of the Court which pronounced them. *Addams* vs. *Worden*, Q. B. 1836, 6 L. C. R. 237.

13. Lis Pendens.—The pendency of proceedings in a foreign country between the same parties and for the same causes, has been held not to be a good defence to an action in this province. *Russell* vs. *Field*, Q. B. 1833, Stuart's Rep. 558. *Howard* vs. *Guernsey Mfg. Co.*, S. C. 1894, 5 Que. 182.

INTERPRETATION OF LAW.

In deciding a doubtful question of law, great weight is to be given to a uniform previous construction covering a considerable period. *Exchange Bank* vs. *The Queen*, P. C. 1886, 30 L. C. J. 194.

INTERROGATORIES.

See PROCEDURE.

INTERVENTION.

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See also "APPEAL" "COSTS."

I. AFFIDAVIT.

An intervention may, in the discretion of the court, be allowed, without being supported by an affidavit. *Coates* vs. *Glen Brick Co.*, S. C. 1869, 14 L. C. J. 112.

II. CONTESTATION.

1. Notwithstanding Art. 158, C. P. C., an intervention may be contested after the eight days following its service, where no demand of plea has been filed and no foreclosure has been granted by the prothonotary. *Jérome* vs. *Robitaille*, Q. B. 1881, 8 Q. L. R. 60.

2. A party is not bound to contest an intervention until the grounds of intervention have been filed. Even when the intervention itself contains grounds, the intervenant is bound to file new grounds, or at least declare that he has no other grounds except those set forth in his intervention. *Lusignan* vs. *Rielle*, C. R. 1888, M. L. R. 4 S. C. 465.

III. FILING.

1. A motion was made in the Superior Court to be allowed to file an intervention, which was granted, and on the fourth day afterwards, the intervention not having been filed or served, the plaintiffs obtained a certificate from the prothonotary and filed it in court, whereupon the intervening party moved, without notice upon affidavit for a further delay to file grounds of intervention, and obtained delay up to the first of January—*Held*, in review, that the further delay should not have been granted, and the judgment allowing the same was reversed with costs. *Beaudet* vs. *Martel*, C. R. 1865, 15 L. C. R. 457 and 1 L. C. L. J. 29.

2. A petition in intervention was filed after the case had been heard and taken *en délibéré* and question whether it should be allowed. *Per Curiam.*—After consultation with my brother judges and seeing the precise terms of the Article of the Code as to interventions, I think there is no doubt that an intervention may be put in at any time before judgment. Intervention allowed to be filed and *délibéré* discharged. *Bæcker* vs. *Foreman*, S. C. 1881, 4 L. N. 263.

3. An intervention filed without the allowance of the court in term will not be summarily rejected from the record on motion. *Miller* vs. *Bourgeois*, S. C. 1872, 16 L. C. J. 335.

4. *Held*, where the intervening party, within three days after allowance of the intervention, fails to have it served upon the parties in the case, and to file a certificate of such service, it is held not to have been filed, and a motion to dismiss a second intervention by the same party on the ground that the first is still in the record, will not be granted. (Art. 157 C. C. P.) *Goldie* vs. *Rasconi*, Q. B. 1892, 1 Que. 385, confirming M. L. R., 6 S. C. 495.

IV. GROUNDS OF, AND INTEREST IN SUIT.

1. Under Art. 158, C. C. P., an intervenant is bound, within eight days from the admission of his intervention, either to furnish any further grounds he may have to set up in the principal suit, or to notify the parties that he has no further grounds to offer. Without proof of the allegations of his intervention he cannot obtain the conclusions thereof. *McGreevy* vs. *Gingras*, C. R. 1876, 4 Q. L. R. 203.

2. The petition to intervene should state the intervenant's interest in the suit and the grounds upon which such interest is based. *Grenier* vs. *Gauvreau*, C. R. 1888, 14 Q. L. R. 111 and see *Carter* vs. *Molson*, P. C. 1885, 8 L. N. 281.

V. IN.

1. **Appeal.**—An intervention will be allowed in appeal for sufficient cause. *Mechanics Bank* vs. *St. Jean*, Q. B. 1879, 2 L. N. 315, 9 R. L. 659.

2. **Insolvency.**—An intervention in insolvency, filed without application to be admitted, rejected *sauf recours*. *Marion* vs. *Ouimet*, S. C. 1879, 2 L. N. 346.

VI. NATURE AND EFFECT OF.

1. During the pendency of an action on a bill of exchange the plaintiffs received from the bankrupt estate of the acceptor of the bill of exchange a portion of the sum demanded by the action. The defendant thereupon filed a proceeding called an intervention, and the plaintiffs, after filing a *retraxit* for the amount received, moved to reject the intervention on the ground that the proceeding was really not an intervention, but simply an application to replead—*Held*, that there was no matter for intervention, but for a supplementary plea, which in England is known as a plea *puis darrein continuance*. *Lyman* vs. *Perkins*, S. C. 1852, 2 L. C. R. 304, 3 R. J. R. Q. 198.

2. The respondent by writ of attachment before judgment seized a vessel in the possession of his debtor on the stocks in his ship yard, and the appellant claimed the vessel seized as his property, and the respondent joined issue. Subsequently the respondent

recovered judgment against his debtor for the amount he claimed, and, as the legality of the writ of attachment was contested, as soon as the delay had expired, seized the vessel under a writ of execution. To this seizure the appellant filed an opposition which was dismissed—*Held*, reversing the judgment of the court below, that, until the intervention was disposed of, the respondent could not cause the vessel to be sold by the sheriff, and that the opposition, therefore, should have been maintained. *Michon* vs. *Gravereau*, Q. B. 1872, 3 R. C. 44.

3. An intervention once allowed has the effect of suspending the principal action until issue be joined on the intervention, and such issue should be passed upon at the same time as the action of which it forms but an incident. *Stein* vs. *Bourassa*, S. C. 1890, 18 R. L. 485.

4. An intervention merely an incident of the principal action and where the principal action is dismissed for an irregularity in bringing it, the intervention must likewise be dismissed, whatever may be the grounds on which it is based. *Atlantic & North West Railway Co.* vs. *Turcotte*, Q. B. 1892, 2 Que. 305. This case was affirmed in appeal to the Privy Council. *Sub nom. Casgrain* vs. *Atlantic & North West. Ry. Co.*, 11 The Reports 449.

5. But held in an earlier case where by the principal demand a vessel was seized by attachment before judgment, and an intervention was filed by third parties who claimed ownership in the vessel, and the principal demand having been withdrawn — *Held*, that the withdrawal of the principal demand did not put an end to the intervention, which could be continued for the purpose of establishing the rights of the parties intervening. *Mulholland* vs. *Benning*, Q. B. 1864, 15 L. C. R. 284. And *held*, also, that the intervening parties having failed to establish their title would be condemned. (*Ib.*)

VII. PREMATURE.

1. An intervention allowed, filed and served between the service and entry of the principal action, is not premature, the principal action being *pending* within the meaning of Article 154 C. C. P., from the moment of the *service* of the writ and declaration constituting the demand. *Rees* vs. *Morgan*, S. C. 1878, 4 Q. L. R. 184.

2. A party who has obtained leave to intervene in a suit, is justified, after the lapse of eight days from service of his petition, in considering his intervention as admitted (C. C. P. 158), and may thereafter produce his grounds of intervention, without demanding from the other parties a production. The premature production of such grounds would, in any case, constitute merely an irregularity, to be attacked by motion, and not by exception to the form. *Ross* vs. *Ross*, S. C. 1892, 2 Que. 115.

VIII. RAISING QUESTIONS OF JURISDICTION.

1. A person who intervenes in an action of revendication (the defendant making default), in order to contest the seizure, may raise the question of jurisdiction by his intervention, without having filed a declinatory exception within four days from the allowance of his intervention. *Goldie* vs. *Rasconi*, Q. B. 1892, 1 Que. 385, confirming S. C., M. L. R. 6 S. C. 495.

2. The intervening party, in such case, is not deemed by a consent to the jurisdiction, proved to have been given by the defendant, before the institution of the action. (*Ib.*)

IX. RIGHT OF INTERVENANT.

When allowed, the party intervening may plead to the action, and this, notwithstanding that the plaintiff may have pleaded to the intervention. *Beaudry* vs. *Lafamme*, S. C. 1859, 3 L. C. J. 253.

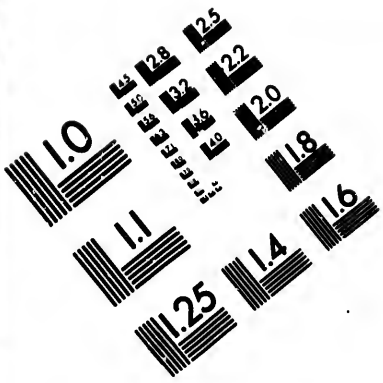
X. SERVICE.

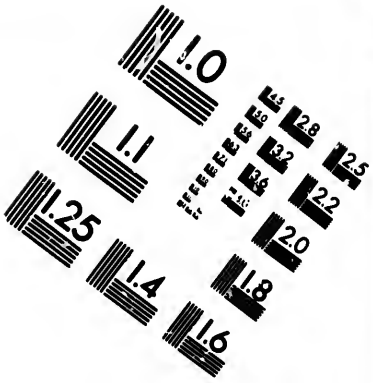
1. The petition in intervention must be served upon all the parties to the action, even those who have defaulted. The Court may extend the delay of three days for serving. The grounds of intervention should be served upon the plaintiff and the defendant. *Fraser* vs. *Pouliot*, S. C. 1871, 3 R. L. 446.

2. A petition in intervention must be served within the three days allowed for its reception. *Cournoyer* vs. *Tranchemontagne*, C. R. 1874, 5 R. L. 327, 18 L. C. J. 335.

XI. WHO MAY INTERVENE.

1. Assignee of Debt.—The assignee of a debt has a right to intervene in a suit instituted, with his consent, by the assignors, and cause all further proceedings to be suspended, but he must bear all costs to the time he so intervenes. *Berthelet* vs. *Guy*, Q. B. 1858, 2 L. C. J. 209.





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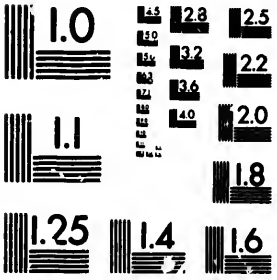

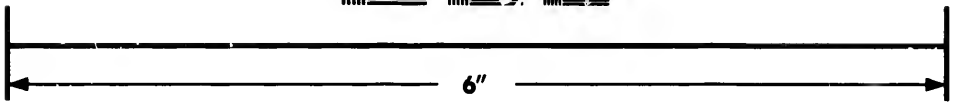

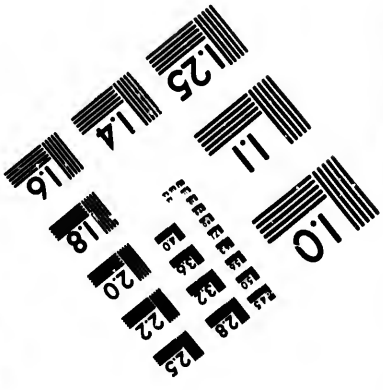

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2. Creditor.—A creditor has a right to intervene in a suit brought by a third party against his debtor, for the purpose of contesting the claim of such third party, when the action is brought by collusion between the plaintiff and defendant, and with the view of enabling the plaintiff to obtain a judgment for a sum not really due by the defendant, and thus to prejudice the rights of the creditor. *Adams* vs. *Hartford Mining and Smelting Co.*, C. R. 1872, 16 L. C. J. 95.

3. —— A creditor has not the right to intervene in a suit brought by his debtor against a third party unless he prove fraudulent collusion. *Marcotte* vs. *Moodie*, S. C. 1882 11 R. L. 460.

4. Defendant in Warranty.—The defendant in warranty, who is also intervenant in the principal suit, has an interest and right to remain in the suit and have a decision on the merits of his intervention and the costs incurred thereon, even after the action in warranty has been dismissed. *Seguin* vs. *Cité de Quebec*, S. C. 1893, 3 Que. 53.

5. In Suit by Attorney-General under Art. 997 C. C. P.—It is doubtful whether, in a suit brought by the Attorney General under Art. 997 of the Code of Civil Procedure, any other party is entitled to appear and prosecute as an intervener; it is still more doubtful whether such party has a right to prosecute a claim for damages which was not within the conclusions of the original writ. *Casgrain* vs. *Atlantic & Northwest Railway*, P. C. 1895, 11 The Reports 449.

6. Married Women.—The demand of intervention by the intervenant in this case, a married woman, was rejected because she had not published *en temps utile* the declaration required of wives separated as to property, and because she failed to prove that the effects seized were hers. *Goudron* vs. *Lemonier* S. C. 1883, M. L. R, 1 S. C. 160.

7. Municipal Corporation.—A municipal corporation can intervene in an action brought by the Attorney-General against a railway company in order to compel it to reopen a public street which it had illegally closed. *Turcotte* vs. *Cie du Ch. de Fer l'At.*, S. C., 1889, 18 R. L. 628. (But see this case in the Privy Council, *Supra*, No. 5.)

8. Minor per Tutor.—Minors can intervene in a suit in which their parents are interested, through the medium of a tutor *ad hoc*, the latter having the right to intervene even where the minors have no tutor. *Larue* vs. *Rattray*, Q. B. 1886, 14 R. L. 614.

9. Partner.—A party claimed to intervene in a suit, representing that he was a partner of the plaintiffs, who were about to compromise their claim against the defendant, without his consent—*Held*, that his intervention was properly received. *Rutherford* vs *Ferres*, Q. B., 1867, 3 L. C. L. J. 83.

10. Person disclosing no Interest.—Where an intervention does not disclose on its face any right or interest in the intervening party the court will dismiss it from the record on motion, and in such case a new inscription is unnecessary, where the case has been already inscribed, and has not lost its place on the *rôle*. *Seymour* vs. *St. Julien*, S. C. 1852, 2 L. C. R. 321, 3 R. J. R. Q. 208.

11. Person interested in a Contestation between Defendant and a Guardian *mis en cause*.—An intervention by a party interested in a contestation between the defendant and a guardian *mis en cause* after determination of the principal suit is regular. *Miller* vs. *Bourgeois*, S. C. 1872, 16 L. C. J. 335.

12. Person in another quality.—An assignee being a defendant in his quality of assignee to an insolvent estate, can intervene in the case as assignee of another insolvent estate. *Ste. Marie* vs. *Brown*, C. R. 1872, 4 R. L. 527.

13. Person who is Real Owner of Claim sued on.—Where the plaintiff in a case is not entitled to the conclusions of his demand, the party who is entitled to the claim sued on can intervene and obtain judgment against the defendant, and such intervention constitutes a separate action. *Moreau* vs. *Dorion*, S. C. 1883, 12 R. L. 380.

14. Person complaining of Libellous Pleading.—A person complaining of a statement contained in a pleading in the cause, to which he is not a party, as false and calumnious, has no right to intervene for the purpose of having the passage complained of struck from the record. *Hibbard* vs. *Barsalou*, S. C. 1867, 2 L. C. L. J. 64.

15. Person claiming Lands under Seizure.—A party claiming lands under seizure cannot do so by means of an intervention, during the pendency of proceedings on an opposition to withdraw filed by another party, and an intervention filed under such circumstances, on a provisional order of a

judge, will be rejected on a motion made to that effect. *Bethune* vs. *Chapleau*, C. R. 1872, 17 L. C. J. 33.

16. Possessory Action.—A third person cannot intervene in a possessory action on the ground that he is proprietor of the soil to which the action refers. *Pulze* vs. *Miville*, K. B. 1813, 3 Rev. de Lég. 200.

17. Purchaser of debt due Insolvent.—The purchaser of the book debts of an insolvent desiring to intervene in an action previously instituted by the insolvent for the recovery of one of the said debts, should do so by a petition to intervene and not by petition to take up the proceedings. *Guilbault* vs. *Desmarais*, S. C. 1889, 18 R. L. 516.

18. Substitutes.—Substitutes have a sufficient interest to intervene in suits affecting the substitution. *Larue* vs. *Rattray*, Q. B. 1886, 14 R. L. 614.

19. —— But only where a final judgment may possibly be obtained in the suit, which will enable the party who obtains it to possess himself of their estate, or otherwise impair their legal rights. *Carter* vs. *Molson*, P. C. 1885, 10 App. Cas. 664.

20. Tax Payer.—Where a party taxed in a valuation roll takes an action to void the roll, another party also taxed in said roll can intervene to safeguard his rights. *Banque Molson* vs. *Cité de Montréal*, S. C. 1881, 11 R. L. 542.

21. —— Such an action is in the nature of a popular action. (*Ib.*)

22. —— Where an action has been brought by one of several persons assessed for the cost of a special improvement, to set aside the assessment roll, any other person assessed for the cost of the same improvement has an interest which entitles him to intervene if the original plaintiff abandons the case. *Hubert* vs. *City of Montreal*, 1884, M. L. R., 1 Q. B. 237.

23. —— Where an action was instituted before the expiration of the delay fixed by a statute for contesting assessment rolls, the right of an intervenant taking the same conclusions as those of the original action was not barred, though the delay had expired before the intervention was filed. (*Ib.*)

INTOXICATING LIQUORS.

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I. ACTION OF DAMAGES AGAINST SALOON-KEEPER FOR SELLING INTOXICATING LIQUORS TO INEBRIATE AFTER NOTICE.

1. In an action under sections 95-97 of the Quebec License Act of 1878 (41 Vict., c. 3), it is sufficient to prove that a notice in writing was delivered to the tavern-keeper, and that he knew that the person named in such notice was the person to whom he sold liquor. The inability of the tavern-keeper to read will not relieve him from responsibility under the circumstances. *Quære* as to amount of damages in actions of this kind. *Cayionnette* vs. *Girard*, 1885, M. L. R., 1 S. C. 182, 28 L. C. J. 177.

2. And in the same case a point was raised by demurrer, that by the statute this action only lies against "any person licensed to sell intoxicating liquors, or who habitually sells such liquors," and that it was not alleged the defendant was either the one or the other; but this point was overruled on the ground that the defendant, being designated as an *hôtellier*, and taking no exception to that designation, and the first section of the Act providing what is the business carried on by an *hôtellier*, brought him sufficiently within the class of persons liable to this sort of action. (*Ib.*) M. L. R., 1 S. C. 117.

3. The action under R. S. Q. 929, against a saloon-keeper who, after notification, sells intoxicating liquor to a person who has the habit of drinking intoxicating liquor to excess, must be brought in the Superior or Circuit Court; the summary jurisdiction of two justices of the peace, the judge of sessions, and the recorder is restricted to actions not exceeding $200, taken for penalties, fines or fees due under the Act. (R. S. Q. 1031). *Tremblay Exparte*, 1890, M. L. R., 7 S. C. 17.

4. The remedy provided by Art. 929 R. S. Q., against an hotel-keeper who sells intoxicating liquor to a person after being notified not to do so, is neither in the nature of a fine or a penalty, but is an ordinary civil remedy for damages recoverable before the ordinary courts. *Willett* vs. *Viens*, S. C. 1892, 2 Que. 514; *Sauvage* vs. *Trouillet*, 1887, M. L. R., 3 S. C. 276.

5. The fact that the plaintiff in such an action alleged that the defendant had acted contrary to the Statute of Quebec, 41 Vict., ch. 3, sec. 96, instead of Art. 929 R. S. Q. which replaced that statute, is not a fatal error, seeing that the plaintiff had alleged that the defendant had violated the law. *Willett* vs. *Viens*. (*Ib.*)

6. Where there is no proof made as to the damage the plaintiff has suffered, the sum of $10—that is to say, the minimum provided by the statute—will be considered sufficient damages. *Sauvage* vs. *Trouillet*, 1887, M. L. R., 3 S. C. 276.

II. ACTION FOR PRICE OF LIQUOR SOLD.

1. The value of spirituous liquors sold to travellers sojourning in a hotel is recoverable at law. *Mercier* vs. *Brillon*, C. Ct. 1861, 5 L. C. J. 337.

2. The price of liquor sold to constitute part of a meal may be recovered. *Philippe* vs. *Desmarais*, S. C. 1872, 28 L. C. J. 291.

3. No action will lie on behalf of saloon-keepers for liquors sold to be drank on the premises, to others than travellers, even where the debtor acknowledges the debt. *Bergeron* vs. *Fleury*, C. Ct. 1874, 7 R. L. 183.

4. A person who furnishes a room in a hotel and lives there during two months, cannot be considered a "traveller," and therefore the innkeepeer has no action for intoxicating liquors furnished to him. *Ferguson* vs. *Riendeau*, C. R. 1886, M. L. R. 2 S. C. 136.

5. When a traveller, lodging in a hotel, has spent the evening drinking in the bar-room with a number of the inhabitants of the locality, and has ordered intoxicating liquors, in his turn as his treats, the exception contained in article 1481 of the Civil Code does not apply to such traveller, and the tavern-keeper has no action against him for the price of such liquors. *Lapierre* vs. *Brière*, C. Ct. 1887, 10 L. N. 387.

III. CERTIORARI.—(See also under title "CERTIORARI.")

1. Where a conviction was had against a person for selling liquor without a license under C. S. L. C. cap. 6—*Held*, that such conviction could not be brought before the Superior Court by *certiorari*. *Vaillancourt exp. & The Municipal Council of St. Roch de Québec*, S. C. 1866, 16 L. C. R. 227.

2. An applicant for a writ of *certiorari* to remove a conviction for violation of the Act is required to make the deposit provided for by s. 195 of the 34th Vict. ch. 2, before he can

make the application. *Ex parte McCambridge*, S. C. 1877, 21 L. C. J. 181.

3. The deposit required by Art. 1074 R. S. Q., upon the issue of a writ of *certiorari* against a conviction is compulsory, and its absence will cause the action to be dismissed. *Benoit* vs. *Desnoyers*, S. C. 1892, 2 Que. 311.

4. Failure to make this deposit may be pleaded by exception to the form. (*Ib.*)

IV. COMPLAINT.—(See "CONVICTION.")

1. **What it must allege.**—*Held*, that certainty and precision are required in the statement and description of an offence under a penal statute, and that an information charging several offences in the disjunctive is bad, and that the confession of a defendant would not cure these defects. *Hogue exp.*, S. C. 1852, 3 L. C R. 94.

2. —— In a prosecution for selling fermented liquors without a license, it is not necessary to negative the averment that the defendant is not a distiller within the provisions of the 1st section of chapter 6 of the Consolidated Statutes of Lower Canada. *Ex parte John Moley*, S. C. 1862, 7 L. C. J. 1.

3. —— The allegation that the defendant sold by retail at one time fermented liquor in a less quantity than three gallons, to wit, three glasses of beer, is sufficient and legal, and such an allegation of an offence committed on a certain day, and at divers times before and after, does not include several offences, it being conformable to the form of declaration given in chap. 6 of the Cons. Stat. of L. C. (*Ib.*)

4. —— A complaint against a hotelkeeper "for having illegally opened, and not having closed *after midnight*, the premises in which he was licensed to sell intoxicating liquors, etc.," does not show a punishable offence, and a justice of the peace cannot take cognizance thereof. And a conviction which states that the defendant was found guilty of "having illegally opened and not having closed *after midnight until five o'clock in the morning*, the premises, etc.," will not remedy the defective complaint. *Nadeau* vs. *Corporation de Levis*, S. C. 1890, 16 Q. L. R. 210.

5. —— The complainant in a proceeding for violation of the License Act is not bound to allege the exceptions set forth in Art. 1111 R. S. Q. *McKeown* vs. *Lambe*, S. C. 1890, 20 R. L. 232.

6. —— *Held*, in a prosecution before justices of the peace "for selling intoxicating liquors in quantity less than two gallons, in contravention of the defendant's license" the omission, in the complaint, of a description of such license and of a statement of the quantity actually sold, is at most, a mere irregularity which may be cured by amendment in the original court, or remedied, if it result in failure of justice, in the Superior Court by means of *certiorari*. It affords no ground for prohibition. *Laliberté* vs. *Fortin*, Q. B. 1893, 2 Que. 573, reversing C. R. 3 Que. 385.

7. **Signature of.**—The Deputy Revenue Inspector can validly sign the complaint or information in a prosecution for selling liquors without a license. *Reynolds & Durnford*, Qr. Sess., 1857, 7 L. C. J. 228.

8. **Oath.**—In a prosecution for selling liquors without a license, the information need not be under oath. *Ex parte Cousine*, S. C. 1863, 7 L. C. J. 112.

V. CONSTITUTIONALITY OF ACTS.—(See also under title "CONSTITUTIONAL LAW.")

1. The provincial legislature cannot grant to municipal corporations the right to prohibit the sale of intoxicating liquors, and a by-law to that effect will be quashed. *St. Aubin* vs. *Lafrance*, C. Ct. 1882, 8 Q. L. R. 190.

2. Art. 561 of the Municipal Code, as amended, is not *ultra vires* of the provincial legislature, and a by-law prohibiting the sale of intoxicating liquors in quantities less than two gallons, is lawful. *Corp. of Huntingdon* vs. *Moir*, Q. B. 1891, 20 R. L. 684. This case was appealed to the Supreme Court, but as the by-law had in the meanwhile been quashed, the only matter which remained in dispute was a mere question of costs, and the Supreme Court would not entertain the appeal. 19 Can. S. C. R. 363.

3. A municipal by-law prohibiting the sale of intoxicating liquors in a municipality passed while the Temperance Act of 1864 was in force, cannot be repealed by the Quebec Legislature. *Corp. de Compton* vs. *Simoneau*, Mag. Ct. 1891, 21 R. L. 265.

VI. CONVICTION AND COMMITMENT.

1. The tribunal constituted under the Act being that of *two* justices of the peace, a conviction by *three* such justices is illegal. *Paige* vs. *Griffith*, S. C. 1874, 18 L. C. J. 119;

Beaulieu vs. *Lebel*, S. C. 1885, 11 Q. L. R. 281; 14 R. L. 24; *Arseneault* vs. *de St. Charles*, S. C. 1886, 13 Q. L. R. 35.

2. A conviction under the license law for retailing spirituous liquors, and not alleging it to have been done without a license, discloses no offence, and cannot be maintained. *Woodhouse exp.* vs. *Hogue exp.*, S. C. 1852, 3 L. C. R. 93, 3 R. J. R. Q. 442.

3. A conviction will lie against any one partner, upon an information of selling liquors without a license. *Mullins & Bellmare*, Qr. Sess. 1857, 7 L. C. J. 228.

4. *Held*, that the conviction must be for the offence charged and not for a different offence or for several offences in the conjunctive which have been charged in the disjunctive. *Exp. Hogue*, S. C. 1852, 3 L. C. R. 94.

5. And a conviction adjudging a defendant to be guilty of several offences, and condemning him "for his said offence" to pay one penalty is bad. (*Ib.*)

6. By ch. 6 of the Con. Stat. of L. C., the convicting magistrate has a discretionary power of giving any one of three judgments mentioned in sec. 32, subsection 2, sections 38, 39, 40. *Ex parte John Moley*, S. C. 1862, 7 L. C. J. 1.

7. Warrants of commitment must show with certainty that a specific offence has been committed for which imprisonment can been awarded or imposed, and therefore, where a commitment under the License Act rested on a conviction for "selling three glasses of whiskey and receiving payment therefor, contrary to the disposition of the statute in such cases made and provided," without stating that the liquor was sold by retail—*Held*, that it was insufficient, and that the conviction must be quashed. *Hébert exp.*, S. C. 1873, 18 L. C. J. 156, 5 R. L. 189.

8. And *held*, also, that the commitment should show the place of sale, and that the prosecutor had made option of imprisonment in preference to a warrant of distress. (*Ib.*)

9. A conviction for selling liquor in the house of another is null. *Paige* vs. *Griffiths*, S. C. 1874, 18 L. C. J. 119.

10. The conviction should be separate from the complaint. (*Ib.*)

11. A warrant of commitment for violation of the License Act of Quebec, must show on its face a legal conviction, as also the procedure by which it was arrived at, in order to subject the defendant to imprisonment. Commitment quashed. *Cadieux, Exp.*, S. C. 1877, 9 R. L. 39.

12. A conviction based on the License Act 1870, which ordered that in default of moveables to pay the fine, or in case of their insufficiency, defendant would be imprisoned for the costs of the seizure and sale, held bad. *Rodrique Exp. & Paquin*, S. C. 1878, 8 R. L. 315.

13. In a conviction under the Quebec License Act of 1878, it is not necessary to declare that the village of St. Jean Baptiste is organized as a municipality. *Archambault, Exp.*, Q. B. 1880, 10 R. L. 211, 3 L. N. 50.

14. A Justice of the Peace cannot under the existing law condemn the defendant to costs of arrest, commitment and conveying the prisoner to gaol. (*Ib.*)

15. A conviction by a district magistrate sentencing a person to a penalty of $75, and in default of payment, to imprisonment for three months, is legal. *Coté* vs. *Paradis*, Q. B. 1881, 11 R. L. 1.

16. *Held*, that not only the License Law, but also the Common Law, entail imprisonment in cases of non-payment of fines imposed.

That in order to maintain a conviction for a third offence, under sec. 94 of the Quebec License Law, as amended by 50 Vict., ch. 3, sec 11 (now art. 926 R. S. of Q.), the previous convictions need not be under the same license, nor during the same license year, but may be under a license granted for a previous license year. *Vervais* vs. *Desnoyers*, S. C. 1888, 34 L. C. J. 225.

17. Under the Indian Act.—1. The sections of the Summary Convictions Act, 2 R. S. c. 178, relating to appeals, are applicable to convictions under the Indian Act, 1 R. S., c. 43. 2. Except as to objections upon the face of the record, the respondent ought to begin. 3. An exception contained in the clause enacting the offence ought to be negatived, but if it be in a subsequent clause or section it is matter for defence and need not be negatived; but this would not necessarily make the conviction illegal (2 R. S., c. 108, sec. 88). 4. In the circumstances of this case, Montour, (the Indian to whom liquor was supplied) was a witness other than the informer or prosecutor. *Ex parte Lefort*, M. L. R., 3 S. C. 298.

VII. DEPOSITIONS OF WITNESSES.

The depositions of witnesses, in actions for penalties for offences against the License Act, need not be taken in writing, unless there be a demand by one of the parties (R. S. Q. 1046). *Crépeau* vs. *Lafortune*, C. R. 1889, M. L. R., 6 S. C. 422.

VIII.—FORMALITIES FOR PUTTING ACTS AND BY-LAWS INTO FORCE.

1. A municipal by-law prohibiting the sale of intoxicating liquors under the Temperance Act of 1864, will not be annulled by the Court because there was no poll in one of the municipalities of the county, and the mayor of that municipality had declared the by-law adopted in view of the absence of opposition. *Exparte Covey*, C. Ct. 1877, 9 R. L. 289.

2. The proceedings necessary for putting the Temperance Act in force cannot be attacked for irregularities after the delay which is required for attacking election proceedings. *Desroches* vs. *Coté*, Q. B. 1888, 19 R. L. 386.

IX. JURISDICTION.

1. The defendant was convicted of selling liquor without a license. In the absence of the judge of session the police magistrate presided. The usual form of words in a summons requiring the defendant to be and appear before C. J. C., Esq., and stating under what authority had been struck out, and the words Mr. B., P. M., substituted—*Held*, that this summons did not give him authority, and that the plea to the jurisdiction should be maintained as the letters P. M. did not shew any authority, and that the plea to the merits which had been filed was not a waiver of the plea to the jurisdiction, and the conviction was accordingly quashed. *Durnford* vs. *Favreau*, S. C. 1867, 3 L. C. L. J. 19.

2. Prosecutions under the License Act of 1870 should be brought before a Recorder and not the Recorder's Court. *Exp. Massa*, S. C. 1872, 4 R. L. 517.

3. A prosecution under the Quebec License Act may be brought in any district if the offence has been committed on board of a steamboat or other vessel. *McWilliams*, *Exp.*, S. C. 1878, 1 L. N. 66.

4. And such prosecution may be brought before a district magistrate at places within his district other than those where a Magistrate's Court has been established. (*Ib.*)

5. Under the Act of 1875 (Que. 39 Vic. cap. 6, secs. 20 and 21) the penalty for retailing spirituous liquors without a license is $75. (*Ib.*)

6. The jurisdiction of a judge of the sessions under the Quebec License Act of 1878 is limited only by the amount claimed in action for violating the Act. Therefore, by virtue of this Act as well as of the Common Law, several distinct offences can be cumulated in one complaint and one conviction. *Coté* vs. *Chauveau*, S. C. 1880, 7 Q. L. R. 258, confirmed in appeal, 8th Sept., 1881, 1 Dorion 376.

7. Where the complaint contains statements as to the sale at the same time and in the same place of nine different kinds of drinks, this constitutes an allegation of only one sale, and even where the complaint alleged several distinct sales, yet the demand for a condemnation to a single penalty not exceeding $100 would not deprive a judge of the sessions of his jurisdiction. (*Ib.*)

8. R., a drayman in the employ of J. R. M. & Bros., duly licensed brewers under 43 Vic. ch. 19 (Q.) was charged before the Court of Special Sessions of the Peace at Montreal, with having sold beer outside of the business premises of J. R. M & Bros., but within the revenue district of Montreal, in contravention to the Quebec License Act, 41 Vic. ch. 3. On a writ of prohibition issued by the Superior Court at the instance of appellants claiming *inter alia* that being licensed brewers under the Dominion Statute they had the right of selling beer by and through their employees and draymen without a provincial license, and that the Quebec License Law of 1878 and its amendments were unconstitutional, and if constitutional did not authorize the complaint and prosecution against R.—*Held*, reversing the first holding of the Court below, that the Court of Special Sessions was the proper tribunal to take cognizance of the alleged offence of R., and therefore a writ of prohibition did not lie in the present case *Molson* vs. *Lambe*, Supreme Ct. 1887, 15 Can. S.C.R. 253, 11 L. N. 151.

9. In a proceeding against the petitioner before the Recorder, under the Quebec License Law, the revocation of petitioner's license as hotel keeper was asked for—*Held*, that even if the license law did not sustain the demand for revocation of license, the Recorder, nevertheless, has jurisdiction to try the case and the defendant's remedy was by

certiorari. *Hogan, Exp.*, S. C. 1883, 6 L. N. 317.

10. The district magistrate has jurisdiction to hear and decide prosecutions under the Scott Act. The Court will not, upon a demand of prohibition, enquire into the observance or inobservance of formalities prescribed by the Act prior to its promulgation by proclamation. *Desroches* vs. *Rioux*, Q. B. 1887, 14 Q. L. R. 75.

11. A writ of prohibition only lies and can issue when the inferior court has no jurisdiction over the matter in controversy, and irregularities existing in the proceedings before the two Justices of the Peaces do not deprive them of their jurisdiction. *Laliberté* vs. *Fortin*, Q. B. 1893, 2 Que. 573, reversing C. R., 3 Que. 385.

X. LICENSE.

1. Fraud inducing to believe a License has been obtained.—Where a party, having obtained the preceding year a license to sell spirituous liquors, takes out a license for a temperance hotel and leaves on the front of the building a sign bearing the words "North California Hotel, Joseph Loiseau," but takes away the sign indicating that he is licensed to sell intoxicating liquors, does not thereby violate sec. 78, of the Quebec License Act of 1878. Statutory enactments creating penalties must be strictly construed. *Crépeau* vs. *Loiseau*, C. Ct. 1882, 12 R. L. 139.

2. In Cities — Meaning of Word "City."—The respondent in two cases, arising on writs of *mandamus*, having in May, 1880, required the appellant, inspector of licenses at Three Rivers, to grant him a license for a tavern in Three Rivers for a year on payment of $100, for the costs of the license and on furnishing two securities which the inspector refused to do—*Held*, that the appellant was not bound to grant a license to the respondent, except on receipt of the sum of $70 in virtue of sub. sec. D. sec. 63, of 41 Vic., cap. 3. *Lasalle* vs. *Bergeron*, Q. B. 1881, and *Lasalle* vs. *Riendeau*, 1 Dorion's Q. B. R. 257. Confirmed in Supreme Ct., 29 March, 1882, Cassel's Digest, 2nd Edit., p. 497.

3. Inspector of Licenses.—Duties of.—The inspector of licenses is bound to issue a restaurant license for a house bearing the number of the street, even where the certificate of the voters required by the act applies to two houses bearing two numbers of the street, including the number in question, provided that the certificate as regards such latter number is approved by the judges of the Sessions of the Peace at Montreal, and the Recorder. *Currie* vs. *Lamb*, S. C. 1882, 17 R. L. 251.

4. Inspector of Mining Division.—Where a municipality has passed a prohibitory by-law under the Temperance Act or the Municipal Code, the inspector of a mining division no longer has the power to grant licenses therein. *Corp. de Compton* vs. *Simoneau*, Mag. Ct. 1891, 21 R. L. 265, 14 L. N. 347.

5. Opposition to Granting — Withdrawal of Opposition.—Persons who sign an opposition to the granting of a license, have the right to desist from such opposition at any time previous to the day fixed for the consideration of the application. *Wiseman* vs. *Dugas*, 1890, M. L. R. 6 S. C. 133.

6. Powers of Commissioners and Municipal Corporations.—Petition for a writ of *mandamus* to compel the corporation of the Village of Hochelaga to accede to the wish of petitioner for a confirmation of his certificate and for a license to sell liquor. The petitioner alleged that he had furnished the requisite certificate signed by 25 electors, resident within the limits of the municipality, that he had a license up to May, 1881 (last part), and that the council refused to confirm his certificate and renew his license. *Per Curiam.*—I have looked to see whether the law has been changed since the case of *Privett* vs. *Sexton*, in 1871 (18 L. C. J. 192). It was there held that the then license commissioners at Montreal were not bound, under 37 Vic., cap. 3, to confirm the certificate of 25 electors but had a discretion, and the application for *mandamus* was rejected. The law does not seem to be changed in this respect, and I am of opinion that the council has a discretion to refuse to confirm the certificate if it sees fit. *Smart* vs. *Corp. of the Village of Hochelaga*, S. C. 1881, 4 L. N. 255.

7. —— But this discretion must be duly exercised and not abused. *Tremblay* vs. *Corp. du Village Pointe-au-Pic*, S. C. 1890, 13 L. N. 386, and see *Edson* vs. *Corp. of Hatley*, S. C. 1883, 27 L. C. J. 312; but see *Geoffrey* vs. *Corp. de St. Félix*, S. C. 1891, 14 L. N. 297.

8. —— A municipal council can, in its discretion, refuse to confirm the certificate required to obtain a license to sell intoxicating liquors even where there is no by-law limiting or pro-

hibiting the sale of such liquors. *Roy* vs. *Cp. de la Paroisse de St. Paschal*, S. C. 1886, 9 L. N. 273.

9. —— A by-law providing that "the collector of inland revenue for the division of Kamouraska, may not dispense more than two licenses for the sale of intoxicating liquors until revocation of the existing licenses," is valid, although it does not distinguish between the different classes of licenses. (*Ib.*)

10. —— When a certificate under the Quebec License Act (1878) has been legally confirmed by the Municipal Council, the confirmation cannot be revoked by the council. *Normandin* vs. *Hurteau*, S. C. 1886, M. L. R. 2 S. C. 260.

11. —— The certificate to obtain a license for the sale of intoxicating liquors must be signed by twenty-five electors qualified at the time of signing the certificate. *Wiseman* vs. *Corp. de St. Laurent*, S. C. 1887, M. L. R. 3 S. C. 108.

12. —— A municipal council may refuse to confirm a certificate when several of those who signed it, though their names appear on the voters' list, are disqualified by the fact that they have not paid their municipal or school taxes. (*Ib.*)

13. —— The enactment contained in 1 R. S. Q., Art. 843, sec. 13, that the decision of the license commissioners, either granting or refusing the confirmation of a license certificate, is final, does not preclude the reconsideration by them of an application, or the consideration by them of a new application, by the same person, in the current license year. The decision of the commissioners is "final" only in the judicial sense that it is not subject to appeal or to review. *Exparte Citizens' League of Montreal*, 1889, M. L. R., 5 S. C. 160.

14. —— The granting or refusal of a license for the sale of intoxicating liquors, is entirely discretionary with a municipal council. *St. Amour* vs. *Corp. de St. François de Sales*, S. C. 1892, 1 Que. 463 and see *supra* No. 8. *Roy* vs. *Corp. de St. Faschal.*

15. Revocation.—The Recorder has power under section 102 of the License Act to revoke the certificate of a tavern keeper. *Richler exp.* vs. *Judah*, S. C. 1878, 1 L. N. 591.

16. —— On a *certiorari* from a conviction by the police magistrate for selling liquor without license and revoking the certificate of the petitioner—*Held*, that the magistrate was within his powers in so doing. *Molinari exp.*, S. C. 1883, 6 L. N. 395.

17. Valuation of Premises.—*Held*, the rent or annual value of a dwelling house, occupied by the keeper of a restaurant, and which is entirely separate and distinct from the adjacent premises occupied and used as a restaurant, is not to be included in determining the sum payable for the license. *Foster* vs. *Lambe*, S. C. 1893, 3 Que. 328.

18. —— *Held*, the rent or annual value, fixing the r . license, must be taken from the valuation roll for municipal purposes then in force, *i. e.*, at the time the certificate of valuation is signed, and not from the roll prepared for the ensuing year, but which has not yet come into force. *Marcotte* vs. *Lambe*, S. C. 1893, 4 Que. 2.

XI. MANDAMUS (See *supra* "LICENSE.")

1. The court can interfere by *mandamus* where a municipal corporation abuses the discretion given it in confirming certificates for licenses, or wrongly interprets the law. *Tremblay* vs. *Corp. du Point-au-Pic*, S. C. 1890, 13 L. N. 386.

2. The petitioner in such a case is not bound to allege that it is in the public interest that his certificate should be confirmed. (*Ib.*)

3. A prohibitory by-law, a copy of which has not been forwarded to the collector of revenues, as required by Art. 562 Mun. Code is invalid. (*Ib.*)

XII. PENALTIES.

1. Who Liable for.—The bartender who sells liquor in an unlicensed saloon for his employer is personally liable for the penalty imposed by the statute. *Lambe* vs. *Jobin*, Police Court, 1889, 12 L. N. 407.

2. Whom Payable to.—Under the Quebec License Law, the penalty and costs should be paid to the Collector of Provincial Revenue, whether the suit be taken by an *informant* or by a municipal corporation. *Corporation of the Village of Lauzon* vs. *McKibbin*, C. Ct. 1883, 9 Q. L. R. 383.

XIII. POWERS OF COUNTY COUNCILS.

County councils have the power to prohibit the sale of intoxicating liquors. *Hart* vs. *Corp. du Comté de Missisquoi*, C. Ct. 1876, 3 Q. L. R. 170.

XIV. SALARIES OF LICENSE INSPECTORS.

On a claim brought by the Board of License Commissioners appointed under the Liquor License Act 1883, for moneys paid out by them to license inspectors with the approval of the Department of Inland Revenue, but which were found to be afterwards in excess of the salaries which two years later were fixed by order in council under sec. 6 of the said Liquor License Act, 1883—*Held*, affirming the judgment of the Exchequer Court, that the crown could not be held liable for any sum in excess of the salary fixed and approved of by the Governor-General in Council. *Burroughs* vs. *The Queen*, Supreme Ct., 1891, 20 Can. S. C. R. 420.

XV. SALE OF LIQUORS TO MINORS, ETC. (1)

In a prosecution under the Act of the Quebec Legislature against selling liquor to minors it was held by the Police Magistrate before whom the prosecution was brought that the burden of proof was on the prosecution to show that the saloon-keeper knew that the boys in question were under age, and where the boys in question were so nearly of age that their appearance did not indicate whether they were under or over, the defendant was discharged. *Carson* vs. *Devault*, Police Court, 1889, 12 L. N. 20.

XVI. STATUTORY PROVISIONS.

1. Act of 1864.—The Quebec License Act 34 Vict., ch. 2, and Quebec Municipal Code did not repeal the Temperance Act of 1864. *Covey* vs. *Corporation of Brome*, C. Ct. 1877, 9 R. L. 289; 21 L. C. J. 182.

2. —— The first ten sections of 27 and 28 Vict., cap. 18 (the Temperance Act of 1864) were not repealed by Art. 1086 of the Municipal Code. *Hart* vs. *Corporation du Comté du Missisquoi*, C. Ct. 1876, 3 Q. L. R. 170.

3. —— *Held*, that the Temperance Act of 1864 was kept in force by the B. N. A. Act sec. 129, which enacted: "Except as otherwise provided by the Act, all laws in force "in Canada, Nova Scotia or New Brunswick, "at the Union, shall continue in Ontario, "Quebec, Nova Scotia and New Brunswick, "respectively as if the Union had not been "made." Further that the Parliament of Canada in passing the Temperance Act of 1878 (41 Vict., cap. 16), specially recognized the Validity of the Temperance Act of 1864. *Noel* vs. *Corp. of Co. of Richmond*, Q. B. 1881, 4 L. N. 124, & 1 Dorion's Q. B. R. 333.

4. Act of 1878.—The provisions of the Liquor License Act of 1878 (Quebec), are *intra vires* of the powers of the Legislature of the Province of Quebec. And the power of section 37 excepts the by-law made 7th April, 1877, from the provision of section 36, and the power which the Corporation of Three Rivers has to impose license fees on the sale of intoxicating liquors in virtue of 21 Vict., ch. 107 and 38 Vict., ch. 76, have not been repealed by the Liquor License Act, 1878. *Suite* vs. *The Corporation of the City of Three Rivers*, Supreme Court 1885, 8 L. N. 28, 11 Can. S. C. R. 25.

5. Mining Act.—The Mining Act and the Temperance Act do not conflict. *Corp de Compton* vs. *Simoneau*, Mag. Ct. 1891, 21 R. L. 265.

XVII. VIOLATION OF LICENSE ACT.—

(See also "LICENSE.")

Where a license to retail spirituous liquors was granted to a person who merely sold liquor as bar-keeper for another—*Held*, that there was not a violation of the License Act, and that the owner might oppose the seizure of his goods when taken in ejectment under a judgment against the license. *Citizens' Insurance Co.* vs. *Warner*, S. C. 1883, 6 L. N. 54.

XVIII. VOTING UNDER DUNKIN ACT.

In a vote of the ratepayers under the Dunkin Act, the failure to keep one of the polls open during the day of voting is a fatal irregularity. *Covey* vs. *Corporation of County of Brome*, Q. B. 1878, 1 L. N. 519.

XIX. WHAT IS AN INTOXICATING LIQUOR.

Cider.—Petitioner was convicted of selling liquor without license. It was pretended that the liquor sold was a mere imitation of cider free from any intoxicating principle. Cider is enumerated in the License Act among intoxicating liquors, and the preparation in question did, in fact, contain over two per cent. of alcohol. Conviction held good. *Noel Exp.* S. C. 1883, 6 L. N. 150.

(1) See article in 5 Themis 104 on this subject.

XX. WHO MAY PROSECUTE.

1. In a prosecution for selling liquor without license under the Consolidated Statutes of Lower Canada, cap. 6—*Held*, that such prosecution may be brought in the name of the municipal council, and that such council was qualified to prosecute in virtue of 24 Vict., cap. 29, sec. 4. *Vaillancourt vs. The Municipal Council of the Parish of St. Roch's of Quebec*, S. C. 1866, 16 L. C. R. 227.

2. Under the License Amendment Act of 1874 (37 Vic., cap. 3, sec. 11), actions or prosecutions for offenses committed against the license law may be brought by any private individual, and a conviction at the suit of A. B., deputy revenue officer, is good, as the prosecution was by and in the name of a private individual. *Ochslaryer Exp.*, 1 Dorion's Q. B. R. 99, Q. B. 1880.

3. And it is not necessary by the conviction to condemn the defendant to pay the costs of the warrant of commitment, nor those for conveying defendant to gaol, as this is ordered by C. S. C., cap. 103, ss. 62 and 69. (*Ib.*)

XXI. WRIT OF PROHIBITION.

1. In a prosecution before the Judge of Sessions for the infringement of a License Act, a prohibition will lie when there is a question of fact in the case which would not come up on certiorari. *Molson* vs. *Lambe*, Q. B. 1886, 31 L. C. J. 59.

2. A writ of prohibition only lies where the inferior Court has no jurisdiction over the matter in controversy, and irregularities existing in the proceedings before the two Justices of the Peace do not deprive them of their jurisdiction. *Laliberté* vs. *Fortin*, Q. B. 1893, 2 Que. 573, reversing C. R. 3 Que. 385.

INVENTORY.—(See Successions.)

1. Errors and Informalities in.—A defendant who omits to insert therein two debts due by himself will be condemned to add them to the inventory, but will not be condemned to forfeit his interest therein (as one of the heirs of the deceased) in the absence of proof of fraud. *Shaw* vs. *Cooper*, S. C. 1861, 6 L. C. J. 38, and see *Evé* vs. *Evé*, Perrault's Prevosté p. 58.

2. —— The inventory of a succession is not null for want of having been judicially closed, nor by reason of errors or omissions, when there is no fraud nor dishonesty of any kind. *Gingras* vs. *Gingras*, S. C. 1881, 7 Q. L. R. 204.

3. —— It does not follow that because some of the formalities have not been observed, that the inventory is not to be considered legal, if the person making it acted in good faith, and that these omitted formalities do not in any way affect the rights of the party complaining. *Archambault* vs. *Citizens' Insurance Co.*, S. C. 1880, 24 L. C. J. 293.

4. Where an inventory erroneously drawn up, has been signed by parties ignorant of the defect, the party adversely affected can demand the nullity of the same. *Foucrault* vs. *Foucrault*, C. R. 1887, 31 L. C. J. 97.

5. Valuation of Effects.—The parties to an inventory, who consider that the valuation of some of the effects enumerated therein by experts appointed by such parties, is excessive, and whose protests have been inserted in the inventory, cannot, by action, demand the revision of the inventory in respect of such valuation. *Gadoua* vs. *Remillard*, C. R. 1888, 19 R. L. 193.