DIGEST

OF

NEW BRUNSWICK CASE LAW

Being a Digest of such Cases as are included in Volumes 34-44, inclusive, of the New Brunswick Reports, in Trueman's Equity Cases, in the four Volumes of New Brunswick Equity Reports together with the cases in Volume 33 N. B. R. from page 593 onward which were not included in the 3rd edition of Judge Stevens' Digest.

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PREFACE

In submitting this Digest to the consideration of my fellow practitioners I do so in the hope that it will fill a much needed want. It has been my endeavour to cite each case under as many heads as possible, and in one or two cases I have intentionally placed cases under headings where they do not rightfully belong, in order that they might appear in conjunction with other cases somewhat similar but rightfully coming under such heading. No one who has ever attempted a Digest can fail to appreciate the liability to error or omission; I can only hope that I have not exceeded the average, and will at any time be glad to receive criticisms or suggestions regarding the work comprised in this Volume.

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St. John, N. B.,
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TABLE OF CASES

A

Abbott, Ex parte. R. v. City of Saint John, 38, p. 421 (40 S. C. R. 597)—52, 133, 133, 244.
Abell v. Anderson, 2 Eq., p. 136—628.
Abel, Ex parte, 34, p. 121—30, 451.
Abell, In re, 2 Eq., p. 271—37, 557.
Adams v. Alcroft, et al, 37, p. 332. (38 S. C. R. 365)—27, 138, 167.
Adams, Lloyd v., 37, p. 590—325, 728.
Adams, Ross v., 34, p. 158—319, 327, 343, 693.
Adams, Stout v., 35, p. 118—323, 578, 488, 775.
Adney, Amherst Pianos Limited v., 44 p. 7—675, 732.
Adney et al, Chute et al v., 39, p. 93, 113—269, 270, 276, 299, 527.
Agricultural Society, District No. 34, Peters v., 3 Eq., p. 127—159, 649.
Ahearn v. Ahearn, et al, 1 Eq., p. 53—271.
Aiton v. McDonald, 2 Eq., p. 324—179, 193, 193, 194, 346, 346.
Akerley, Ex parte, R. v. Carleton, 37, p. 13—44, 44.
Akerley et al, Wood et al v., Eq. Cas., p. 305—294, 597.
Albapare, Ex parte, R. v. Kay, 38, p. 498—220, 233, 431, 437, 437, 475, 480.
Albert, Ouclette v., 42, p. 254—99, 372.
Alcroft et al, Adams v., 37, p. 332, (38 S. C. R. 365)—27, 138, 167.
Alexander v. McAllister, 34, p. 163—15, 304, 638, 678, 768.
Alexander, McGregor v., 2 Eq., p. 54—161, 166, 241, 752.
Alexander, R. v., Ex parte Monahan, 39, p. 430—207, 231, 233, 433, 442.
Allain, Ex parte, 35, p. 107—16, 677.
Allan v. Rowe, 1 Eq., p. 41—360, 404.
Allen, Edmondson v., 40, p. 299—50, 252, 727, 732.
Allen, Ex parte, R. v. Kay, 38, p. 536—234, 565.
Allen, Hallett v., 38, p. 349—210.
Allen, R. v., Ex parte Gorman, 40, p. 459—430, 700.
Allen, R. v., 41, p. 516—218, 223.
Allen Exec. v. Sheyn, 35, p. 635—104, 147, 165.
Allingham, R. v., Ex parte Keefe, 41, p. 558—456.
Allis-Chalmers-Bullock, Ltd., v. Hutchings et al, 41, p. 444—264, 622, 689.
Alward et al v. Killam, Eq. Cas., p. 360—384, 596, 630.
American Bobbin Spool & Shuttle Co. et al., Burpee et al v., Eq. Cas., p. 484—284.
Amherst Boot & Shoe Mfg Co. Ltd. v. Sheyn, 2 Eq., p. 236—66, 132, 266, 373, 639, 799.
Amherst Pianos Limited v. Adney, 44, p. 7—675, 732.
Anderson, Abell v. 2 Eq., p. 136—628.
Anderson v. Anderson, 37, p. 432—325, 488, 501, 533, 758, 758.
Anderson et al, Mutual Life Assurance Company of New York v., 1 Eq., p. 466—164, 366, 366, 424, 424, 427.
Anderson et al, Ogden v., Eq. Cas., p. 395—307, 597, 631.
Anderson v. Shaw, 35, p. 280—188, 702.
Anderson et al, The Saint John & Quebec Railway Co., v., 43, p. 31—39, 663.
Anderson Furniture Co. Ltd., In re, 39, p. 139—149, 266, 530.
Andrews, Ex parte, 34, p. 315—214, 699.
Anning, In re Estate Geo. W., 34, p. 308—350.
Antinori Fishing Club, Ex parte, R. v. McLatchey, 44, p. 402—95, 96, 210, 476.
Appleby, Ex parte: Hall v. Slipp, 1 Eq., p. 37—670.
Appleby et al, Robertson v., Eq. Cas., p. 509—104, 598.
Arbuthnot v. The Coldbrook Rolling Mills Company, Eq. Cas., p. 51—179, 635.
Armstrong an Infant, In re, 1 Eq., p. 208—321, 396.
Armstrong v. Raynes, et al, Eq. Cas., p. 144—720.
Armstrong v. Robertson et al, Eq. Cas., p. 249—5, 199.
Arsineau, Cormier v., 38, p. 44—66, 293, 363, 392.
Assessors for the City of Fredericton. See "Board of Assessors, etc."
Atkinson v. Bourgeois, 1 Eq., p. 641—67, 373.
Atlantic Trust Co, Consolidated Electric Co. v. The, 34, p. 35, 334—178, 178, 196.
Attorney-General, Ex parte The, In re Goodspeed, 36, p. 91—132, 238, 512.
Attorney General of New Brunswick and the Right Rev. John Sweeney, Roman Catholic Bishop of Saint John, v. Corporation of the Brothers of the Christian Schools, Eq. Cas., p. 103—200, 409.
Attorney-General v. Miller, 2 Eq., p. 28—409, 659, 698.
Attorney-General for the Province of New Brunswick v. Honorable John Henry Pope, Acting Minister of Railways and Canals, the Minister of Justice for Canada and Jabez B. Snowball, Eq. Cas., p. 272—408, 590, 662, 774.
Ault & Wiborg Company of Canada, Limited, Ex parte, 42, p. 548—92, 124, 210, 321.
Ayer v. Estabrooks, 2 Eq., p. 392—777, 777, 781.
Ayer, Executor etc, Kelley v., 41, p. 489—20, 23, 82, 324, 347, 592, 612, 620.
Ayer v. Murray, 39, p. 170—82, 317, 767.
Aylward, Ex parte, R. v. Dugas, 43, p. 443—221, 228.
Ayoup, R. v., 39, p. 598—215, 237.

B

Babang v. Bank of Montreal, Casp., Eq" 524—7, 399, 638, 641.
Babineau v. LaForest, 37, p. 77, 156, (37 S. C. R. 521)—81, 627, 633.
Bailey, Morehouse v., 1 Eq., p. 393—251, 404.
Baird and Peters v. W. Clark Ltd., 44, p. 413—484, 647.
Baird, Ex parte, 34, p. 213—113, 440, 518.
Baird, Hutchinson, v., 1 Eq., p. 624—784
Baird, Nicholson v., Eq. Cas., p. 195—8, 70, 213, 213.

Baird v. Slipp, 3 Eq., p. 258—372, 658.
Balmain et al v. Neil, 41, p. 429—23, 24, 465, 621, 682.
Banfil, Humphrey et al v., Eq. Cas., p. 243—347, 407, 496, 592, 597.
Bank of Montreal, Babang v., Eq. Cas., p. 524—7, 399, 638, 641.
Bank of Montreal et al, Busby v. Eq. Cas., p. 62—72, 401, 627, 631.
Bank of Montreal v. Dunlop, 2 Eq. Cas., p. 388—531.
Bank of Montreal et al, Robertson v., Eq., Cas., p. 541—70, 364, 405, 415, 415, 637.
Bank of Montreal v. The Maritime Sulphite Fibre Co. Ltd., 2 Eq., p. 328—117, 126, 130, 466, 670.
Bank of New Brunswick, Boyd v., Eq. Cas., p. 546—75, 76, 354, 400.
Bank of New Brunswick, Mackintosh et al v., 42 p. 152—73, 75, 313, 648.
Bank of Nova Scotia v. Duncan, Eq. Cas., p. 513—Addenda.
Bank of Nova Scotia v. Fish, 33, p. 604—190, 197.
Bank of Nova Scotia, Johnston v., 35, p. 492—22, 25, 27, 80, 383, 631.
Barclay v. McAvity (No. 1), Eq. Cas., p. 468—184, 631.
Barclay v. McAvity, (No. 2), 1 Eq., p. 1, 59, 146—183, 256, 465, 465, 609.
Barker, The City of Saint John v., 3 Eq., p. 358—260, 559, 769, 770.
Barnaby v. Munroe et al, 1 Eq., p. 94—176, 176, 196, 533, 593, 595, 617, 617, 617.
Barnhill v. The Hampton and Saint Martins Rwy Co., 3 Eq., p. 371—529, 663.
Barter v. Sprague's Falls Mfg Co., 38, p. 207—42, 198, 722, 735, 740, 741.
Barthelotte v. Melanson, 35, p. 652—85.
Bartlett, Brown v., 42, p. 222—15, 333.
Bassett, R. v., Ex parte Davidson 39, p. 271—196, 196, 455.
Bateman, In re Petition of W. G.; Chute et al v. Gratten, et al, Eq. Cas., p. 538—387, 470, 533, 674.
Bathurst Electric and W. P. Co. Ltd., Brown v. 3 Eq., p. 543—261, 504, 770.
Bathurst Lumber Company Ltd., The, Brown v., 43, p. 527—520.
Bathurst Lumber Company Ltd., The, Landry v., 44, p. 374—315, 508, 651.
Bathurst Lumber Company Ltd., The, v. The Nepisiquit Lumber Co. Ltd., 41, p. 41—83, 127, 714.
Batson, Ex parte Owen A., R. v. Byron, 37, p. 83, 383—431, 445, 446, 475.
Batson, Ex parte Price, R. v. Byron, 37, p. 386—226.
Baxter v. Kennedy, 35, p. 179—316, 715, 707, 801.
Beal, Ex parte, R. v. Peck, 40, p. 320—431, 435, 479.
Beal v. The Eastern Trust Company, 43, p. 23—788, 802.
Beamish v. Lawlor, 43, p. 426—7, 750, 755.
Beaton v. Wilbur, 3 Eq., p. 309—268, 540.
Belanger, Ex parte, R. v. Town of Campbellton, 39, p. 593—16, 460.
Belanger et al., Guimond et al v., 33, p. 589, —716.
Bell v. Bell, 34, p. 615—340, 343, 385.
Bell, Miles Bros. Inc. v., 40, p. 158—317, 619, 729.
Belle-Isle v. Boucher, 41, p. 509—519.
Belliveau, Ex parte, R. v. Matheson, 40, p. 368—227, 233.
Belyea, Trustee v. Conroy, 1 Eq., p. 227—190, 594.
Belyea, Ex parte, R. v. Marsh, 39, p. 119—238, 440, 441, 441, 800, 801.
Belyea, R. v., 43, p. 375—50.
Benner, R. v., 35, p. 632—212, 475.
Bennett v. Cody, 35, p. 277—196, 616, 618.
Berryman et al., Young v., Eq. Cas., p. 110—188, 589, 605.
Berthelot, Adm etc. v. Salesses, 39, p. 144—577, 731.
Bertin, Ex parte, R. v. Melanson, 36, p. 577—92, 381, 460.
Berton v. The Mayor etc., of the City of Saint John, Eq. Cas., p. 150—402, 566.
Biggar, R. v., Ex parte McEwen, 37, p. 372—431, 476.
Birmingham et al, E. N. Henry Co. Ltd. v., 39, p. 336—122, 429, 657, 686.
Bishop of Fredericton et al, Morrison v., 4 Eq., p. 162—334, 782, 782, 789.
Bishop of Fredericton v. The Union Assurance Company et al., 4 Eq., p. 408—417.
Black, Ex parte, 34, p. 638—375, 376.
Black v. Moore, 2 Eq., p. 98—131, 319, 370, 370, 376, 670.
Blaine, Ex parte, R. v. Ritchie, 37, p. 213—238, 457, 800.
Blaine et al, Commissioners etc., Jamieson v., 38, p. 508—453.
Blair, Jeffries v., 1 Eq., p. 420—464, 536, 749.
Blair, Ex parte, R. v. Holyoke, 41, p. 223—438.
Blanchard v. Poirier, 1 Eq., p. 332, 605—16, 137, 360, 399, 404.
Bliss v. Rector, etc., of Christ Church, Fredericton, Eq. Cas., p. 314—105, 273, 750.
Blue v. Miller et al, 43 p. 307—614, 711, 731
Board of Assessors, Fredericton, R. v., Ex parte Howe, 41, p. 564—15, 16, 54, 562, 693, 802.
Board of Assessors, Fredericton, R. v., Ex parte Maxwell, 44, p. 563—55, 90, 562.
Board of Assessors, Fredericton, R. v., Ex parte Timmins, 41, p. 577—54, 562, 592.
Bodington, Adm. etc. v. Donaldson et al., 44, p. 290—331, 339, 342, 588, 588, 697.
Boggs v. Scott, 34, p. 110—26, 28.
Bonnell, Jack v., 35, p. 323—57, 197, 205, 210, 309, 468, 799.
Borden, R. v., Ex parte Kinnie, 42, p. 641, 43, p. 299—16, 16, 48, 94, 186, 198, 653, 701, 702.
Bouchard, Ex parte, 38, p. 346—38, 663.
Boucher v. Belle-Isle, 41, p. 509—519.
Boudreau, Cormier v., 35, p. 645—252, 734.
Boudreau, Cormier v., 36, p. 6—29, 50, 193.
Bourgeois, Atkinson v., 1 Eq., p. 641—67, 373.
Bourque v. Chappell, 2 Eq., p. 187—273, 674.
Bourque v. Record Foundry & Machine Co., 38, p. 239—190, 195, 747.
Bowes, Ex parte, 34, p. 76—92, 195, 309, 376, 803.
Bowmaster, Patterson v., 37, p. 4—167, 391, 717.

Boyd v. Bank of New Brunswick, Eq. Cas., p. 546—75, 76, 354, 400.
Boyne v. Boyne, 4 Eq., p. 48—428, 791, 797.
Boyne v. Robinson, 3 Eq., p. 57—182, 537, 638.
Bradshaw v. The Foreign Mission Board of The Baptist Convention of the Maritime Provinces, 1 Eq., p. 346—320, 379, 733.
Braithwaite In re., R. v. Wilson, Ex parte, Fairley, 39, p. 555—95, 96, 209, 235, 375.
Bramhall, Ex parte, R. v. Forbes, 36, p. 333—95, 208, 386, 649.
Branson v. Goodwin, 43, p. 449—716, 716.
Breau, Sonier v., 41, p. 177—133, 281, 281, 282, 282, 633, 729, 730.
Brenan v. Hopkins et al., 39, p. 236—25, 679.
Breton, Savage v., 37, p. 240—510, 512.
Brewer, Jones v., 1 Eq., p. 630—102, 156, 627.
Brewster, Calhoun v., 1 Eq., p. 529—159, 200, 324, 761, 761, 763.
Brewster v. The Foreign Mission Board of the Baptist Convention of the Maritime Provinces 2 Eq., p. 172—793.
Briggs, Chase v., Eq. Cas., p. 53, 80—192, 285, 725.
Britt, Gould v., 2 Eq., p. 453—194.
Brock v. Forster, 34, p. 262—487, 540.
Brock & Paterson Ltd., Tooke Brothers Ltd., v. 3 Eq., p. 496—65, 98, 592.
Brook's Estate, In re Isabella, Eq. Cas., p. 269—349.
Brown v. Bartlett, 42, p. 222—15, 333.
Brown v. Bathurst Electric & Water-Power Co. Ltd., 3 Eq., p. 543—261, 504, 770.
Brown v. The Bathurst Lumber Company Limited, 43, p. 527—520.
Brown, Cluff v., 41, p. 280—464, 635.
Brown, Finn v., 35, p. 335—25, 326, 688.
Brown v. Garson, 42, p. 354—247, 254, 486, 572, 572.
Brown, Ingram v., 38, p. 256—250, 272, 332, 340, 724, 728, 729, 740.
Brown, Lang v., 34, p. 492—59, 248.
Brown, MacRae, v., 36, p. 353—22, 176.
Brown & New Brunswick Rwy Co. v. Kelly, Eq. Cas., p. 442—11.
Brown & New Brunswick Railway Company v. Kelly, 1 Eq., p. 156—178, 181, 184.
Brown, Porter v., 36, p. 585—302, 748.
Brown v. Sumner, 2 Eq., p. 126—194,
Bruce, Pugsley v., (4 Eq. 327), 40, p. 515—599.
Buchanan v. Harvie, 3 Eq., p. 1, 61—194, 528.
Budd, Ex parte, 39, p. 602—233, 437, 480.
Budd v. Johnston, 42, p. 485—297, 312, 772.
Bull, Saint John & Quebec Railway Company v., 42, p. 212—31, 664.
Bulley v. Bulley, Eq. Cas., p. 450—166, 388, 544.
Burden v. Howard, 2 Eq., p. 461, 531—137, 403, 409, 606.
Burgess et al., Jones et al. v., 43, p. 126—143.
Burgess (James) & Sons, Ltd., Jones et al, v. 39, p. 603—110, 164, 321, 618.
Burke, Ex parte, 34, p. 200—52, 133, 243.
Burkhardt v. VanWart Ex parte VanWart, In re 35, p. 78—17, 46, 479, 658.
Burns, Ex parte, R. v. Wilson, 37, p. 650 94, 208, 209, 679.
Burpee et al. v. The American Bobbin Spool and Shuttle Co. et al. Eq. Cas., p. 484—284.
Burt, True v., 2 Eq., p. 497—323, 531, 612.
Busby v. Bank of Montreal et al., Eq. Cas., p. 62—72, 401, 627, 631.
Bustin, W. H. Thorne & Co. Ltd. v., 37, p. 163 (37 S. C. R. 532)—20, 657, 729, 742, 743.
Buttimer et al, Exec., Receiver General of N. B. v., 39, p. 312—704, 705.
Byrne, Henrietta B. v. The Mayor et al Chatham, 44, p. 271—56, 315, 389.
Byron, R. v., Ex parte Owen A. Batson, 37, p. 83, 383—431, 445, 446, 475.
Byron, R. v., Ex parte Price Batson, 37, p. 386—226.

C

C. F. an Infant, In re, 1 Eq., p. 313—394.
Cahill, R. v., Ex parte Mitton, Ex parte Trenholm, 35, p. 240—88, 439, 444, 655.
Cahill, R. v., Ex parte Tait, 37, p. 18—447, 474.
Cairns v. Horsman, 35, p. 436—273, 338, 350, 501, 674.
Calhoun v. Brewster, 1 Eq., p. 529—159, 200, 324, 761, 761, 763.
Calhoun, Lodge v., 3, Eq., p. 100—284.
Calnan, Johnson v., 38, p. 52—272, 272, 318, 324, 350.
Campbell v. Donaldson et al., 40, p. 525—519, 588.
Campbell, Ex parte, 40, p. 350—393, 444.
Campbell, MacMonagle v., 35, p. 625—55, 640, 676.
Campbell, MacMonagle, v., 36, p. 468—628, 677.
Campbell v. Pond et al., 44, p. 357—11, 771, 775, 775.
Campbell v. Walsh, 40, p. 186—226, 246, 326, 476, 511.
Campbellton, Town of. See Town of Campbellton.
Campbellton Water Supply Company, The, McDougall, v., 34, p. 467—14, 264, 488, 488, 559, 615, 724.
Canadian Bank of Commerce v. C. P. R. and Frank McDonald, 44, p. 130—76, 599, 652, 669, 670.
Canadian Fairbanks Company Limited v. Edgett, 40, p. 411—162, 766.
Canadian Fairbanks Company Limited, Moore et al. v., 41, p. 485—29, 615, 687.
Canadian Iron Corporation Limited, Nepisiquit Real Estate and Fishing Company Limited v. 42, p. 387—240, 360, 409, 524, 770.
Canadian Laundry, etc., Co. Limited v. Ungar's Laundry, etc., Ltd, 44, p. 423—10, 202, 202, 614.
Canadian (The) Pacific Railway Company, Carr et al. v., 41, p. 225 (15 D. L. R. 295, on appeal)—341, 504, 667, 723.
Canadian (The) Pacific Railway Company, Day v., 36, p. 323—584, 587.
Canadian (The) Pacific Railway Company, Dennison v., 36, p. 250—510, 585, 650, 661.

Canadian (The) Pacific Rwy. Co, Dixon v., 39, p. 305—19, 583.
Canadian (The) Pacific Railway Company, Grant v., 36, p. 528—133, 358, 581, 583, 713.
Canadian (The) Pacific Railway Company, Kirkpatrick, v., 35, p. 598—259, 659.
Canadian (The) Pacific Railway Company, Meagher v., 42, p. 46—177, 464, 500, 659, 669.
Canadian (The) Pacific Railway Company and Frank McDonald, The Canadian Bank of Commerce v., 44, p. 130—76, 599, 652, 669, 670.
Canadian (The) Pacific Railway Company v. Nason, 3 Eq., p. 476—400, 430.
Canadian (The) Pacific Railway Company v. O'Regan, 41, p. 347—26, 340, 587, 588.
Canadian (The) Pacific Railway Company, Stewart v., 35, p. 115—22, 639.
Canadian (The) Pacific Railway Company, Tobique Valley Railway Company v., 2 Eq., p. 195—155, 406, 663.
Card, Ex parte, 34, p. 11—430, 726.
Carleton, R. v., Ex parte Akerley, 37, p. 13—44, 44.
Carleton, R. v., Ex parte De Long, 44, p. 578—93, 212.
Carleton, R. v., Ex parte Grundy, 37, p. 389—234, 474.
Carleton, R. v., Ex parte McCrea, 38, p. 42—460.
Carleton Woolen Co. Limited v. Town of Woodstock, (3 Eq., p. 138), 37, p. 545. (38 S. C. R. 411)—54, 548, 623.
Carman v. Smith, 3 Eq., p. 44—277, 524, 526.
Carnwath, Ex parte, R. v. Wedderburn, 40, p. 285—210.
Carr et al. v. Canadian Pacific Railway Co., 41, p. 225—341, 504, 667, 723.
Carritte, McIntosh v., Eq. Cas., p. 406—407, 591, 591.
Carroll v. Rogers, 2 Eq., p. 159—277, 674, 703, 765.
Carter v. Lowerison and others, 4 Eq., p. 10—290.
Carter v. The Standard Limited, 44, p. 1—121, 280, 616, 643, 801.
Cartwright, Fillmore v., 33, p. 621—621.
Case et al, Kennedy v., Eq. Cas., p. 242—394, 635.
Casey, Travers v., (2 Eq., 372), 36, p. 229 (34 S. C. R. 419)—783, 789.
Cassidy v. Cassidy et al, Eq. Cas., p. 480—185, 307.
Casson, Ex parte, 34, p. 331—433.
Central Telephone Company Limited, New Cumberland Telephone Co. Limited v., 3 Eq., p. 385—119, 153, 707.
Chaisson, R. v., Ex parte Savoy, 39, p. 591—133, 357.
Chamberlain, Ex parte, R. v. O'Brien, 38, p. 381, 385—290, 453, 453, 461, 462.
Chapman v. Gilfillan, Ex parte Welch, 2 Eq., p. 129—534, 652.
Chappell, Bourque v., 2 Eq., p. 187—273, 674.
Charest, R. v., Ex parte Daigle, 37, p. 492—212, 453, 455, 460, 477, 477.
Charlton Executor, etc., Lemon v., 44, p. 476—333, 795, 795.
Chase v. Briggs, Eq., Cas., p. 53, 80—192, 285, 725.
Chatham, Town of. See Town of Chatham.
Cheesman v. Corey et al., 42, p. 409—368, 611, 619, 653, 702.
Chesley et al, Merritt v., Eq. Cas., p. 324—407, 563, 600, 600, 752.
Chestnut, Ex parte, R. v. Forbes, 37, p. 402—18, 201, 231.
Chestnut R. & Sons Ltd., McMannamin v., 44, p. 571—803.
Chittick v. The City of Saint John, 38, p. 249—254, 560, 707.
Chute et al v. Adney et al, 39, p. 93, 113—269, 270, 276, 299, 527.
Chute v. Gratten, et al., In re Petition of Wm. G. Bateman, Eq. Cas., p. 538—387, 470, 533, 674.
City of Fredericton v. Municipality of York, 1 Eq., p. 556—272, 554, 591.
City of Moncton, Cruise v., 35, p. 249—521, 564, 629.
City of Moncton, Ex parte The, 39, p. 326—97, 563.
City of Moncton, Gallagher v. Ex parte Sweeney, 2 Eq., p. 269—187, 195, 642.
City of Moncton, The, Gallagher v., 2 Eq., p. 360—642.
City of Moncton, Kay v., 36, p. 202, 377—155, 162, 313, 473, 481, 481, 549, 563, 625.
City of Moncton, Lirette v., 36, p. 475—263, 263, 558, 558, 579.
City of Moncton, McCleave v., 35, p. 296—(32 S. C. R. 106)—442, 586, 651, 652.
City of Moncton, Steeves et al. v., 42, p. 465—406, 553, 569, 599.
City of Saint John v. Barker, 3 Eq., p. 358—260, 559, 769, 770.
City of Saint John, Mayor etc. of, Berton v. Eq. Cas., p. 150—402, 566.
City of Saint John, Chittick v., 38, p. 249 254, 560, 707.
City of Saint John, Collins v., 38 p. 86—572, 575, 729, 737.
City of Saint John, Connolly v., 36, p. 411; (35 S. C. R. 186)—150, 550, 654, 734.
City of Saint John, Crawford v., 34, p. 560—306, 361, 586.
City of Saint John, Dooley v., 38, p. 455—256, 586, 588.
City of Saint John, Mayor etc. of, v. Ganong et al., Eq. Cas., p. 17—87, 567.
City of Saint John, Gordon v., 38, p. 542, 39, p. 56—39, 250, 251, 489, 489, 799, 799, 800.
City of Saint John v. Gordon, 40, p. 541 (46 S. C. R. 101)—489.
City of Saint John, Howard v., 43, p. 521—52, 416, 553.
City of Saint John, McCrea, v., 36, p. 144—550, 568, 582.
City of Saint John, McKay, v., 38, p. 393—263, 558.
City of Saint John v. Quinlan et al., 40, p. 541 (46 S. C. R. 101)—489.
City of Saint John, R. v., Ex parte Abbott, 38, p. 421 (40 S. C. R. 597)— 133, 244.
City of Saint John, Rolsten v., 36, p. 574—581, 627, 773.

City of Saint John, Rose v., 37, p. 58—13, 245, 560, 630.
City of Saint John, Mayor etc. of, Sears v., Eq. Cas. p. 555—Addenda.
City of Saint John, Sleeth v., 38, p. 542—799.
City of Saint John, Sleeth et al v. The, 39, p. 56—39, 250, 251, 489, 489, 799, 800.
City of Saint John, The Saint John Railway Co. v., 43, p. 417, 498—20, 31, 399, 399, 569, 704.
City of Saint John v. Wilson, 2 Eq., p. 398—359, 567.
City of Saint John, Mayor etc. of v. Yeats, Eq. Cas., p. 25—249, 482, 774.
Clair v. Temiscouata Ry. Co., 37, p. 608 (38 S. C. R. 230)—505, 668, 721, 723 768.
Clark Limited W., Baird & Peters v., 44, p. 413—484, 647.
Clark v. Clark et al. Executors, 4 Eq., p. 237,—376, 379, 778.
Clark et al. v. Green et al, 37, p. 525—101, 249, 288, 289, 365, 495.
Clark et al, Hopper v., 40, p. 568—47, 48, 49, 222, 246.
Clark v. Miller, 35, p. 42—629.
Clarke, R. v., 38, p. 11—215, 216, 217, 217, 219, 220, 225.
Clark v. The Saint Croix Paper Company, 43, p. 225—727, 727.
Clark et al, Wilson et al v., 38, p. 69—150 319.
Clarkson, R. v., Ex parte Hayes, 40, p. 363—207, 216, 228, 434, 443, 445, 569.
Close v. Close et al., Eq. Cas., p. 414—293, 308, 597.
Clowes, Crawford v., 43, p. 199—488, 724, 739.
Cluff v. Brown, 41, p. 280—464, 635.
Clyde, Ex parte, R. v. Wilkinson, 35, p. 538—55, 94, 651, 678.
Cochrane v. Lloyd, 42, p. 112—358, 580, 713, 738.
Cody, Bennett v., 35, p. 277—196, 616, 618.
Coffon, Ex parte, R. v. Mills, 37, p. 122—234, 236, 449, 449.
Coldbrook Rolling Mills Company, Arbuthnot v. The, Eq. Cas., p. 51—179, 635.
Collins, R. v., 38, p. 218—224, 231, 737.
Collins Adm. v. The City of Saint John, 38, p. 86—572, 575, 729, 737.
Colonial Bleaching and Printing Company v. Maritime Wrapper Co., 35, p. 676—16, 29, 67, 466, 469.
Colonial Investment & Loan Co. v. Demerchant et al, 38, p. 431—300, 324, 534.
Colonial Investment & Loan Co, Patchell v., (3 Eq. 429), 38, p. 339—29, 468, 541, 546.
Colpitts, McKean v., 39, p. 256—22, 435, 675.
Colwell E. C. Candy Co. Ltd., In liquidation, In re, 35, p. 613—125, 288.
Comeau, R. v., 43, p. 177—226, 231.
Commercial Union Insurance Co., LeBlanc v. The, 35, p. 665—419, 767, 801
Conant, Ex parte, In re Charles W. Starkey, 34, p. 195—44.
Conant, Ex parte, In re James W. Starkey, 34, p. 198—45.
Confederation Life Association, Wood v., (2 Eq. p. 217), 35, p. 512—312, 426.
Connell et al., Executors etc. v. Shaw, 39, p. 267—80, 223, 314.
Connely et al., The Trustees of School Distrist No. 8 of the Parish of Havelock in the County of Kings v., 41, p. 374—56, 515, 520, 690.
Connolly, Mayes v., 35, p. 701—151, 428.
Connolly v. The City of Saint John, 36, p. 411, (35 S. C. R. 186),—150, 550, 654, 734.
Conroy, Belyea Trustee v., 1 Eq., p. 227—190, 594.
Consolidated Electric Co., The, v. The Atlantic Trust Co., 34, p. 35, 334—178, 178, 196.
Consolidated Electric Co., The, Pratt v., 34, p. 23, 35, 334—116, 178, 178, 196.
Continental Trusts Co., Mineral Products Co. v., (3 Eq., p. 28), 37, p. 140—119, 131, 344, 345, 524, 529, 531, 546.
Cool v. Cool, 3 Eq., p. 11—529, 792.
Copp, Ex parte, R. v. Murray, 40, p. 289—227, 440, 767.
Copp, Gorman v., 39, p. 309—82, 265, 730.
Corbett, O'Brien v., 41, p. 284—28, 581, 772
Corbett, Turnbull v. 41, p. 284—28, 581, 772.
Corbett et al., West v., 41, p. 420—241, 502, 661, 799.
Corey et al, Cheesman v., 42, p. 409—368 611, 619, 653, 702.
Cormier v. Arsineau, 38, p. 44—66, 293, 363, 392.
Cormier v. Boudreau, 35, p. 645—252, 734.
Cormier v. Boudreau, 36, p. 6—29, 50, 193.
Cormier v. The Dominion Atlantic Rwy. Co., 36, p. 10—89, 580.
Cormier, Ex parte, R. v. Kay, 37, p. 72—218, 437.
Cormier, Ex parte Henry, R. v. Kay, 38, p. 3, 231—443, 718.
Cormier, Ex parte, R. v. Steeves, 39, p. 435—432, 441, 478, 563, 798.
Cormier, Ex parte, R. v. Sweeney, 38, p. 6—94, 434.
Cormier, Ex parte, R. v. The Town of Campbellton, 39, p. 593—16, 460.
Cormier et al, Ward v., 39, p. 567—60, 172, 688.
Cormier, Ex parte, R. v. Wilkinson, 37, p. 53—457.
Cornwall v. Halifax Banking Co'y, 35, p. 398, (32 S. C. R. 442)—353, 378, 413.
Corporation of the Brothers of the Christian Schools, Attorney-General of New Brunswick and The Right Rev. John Sweeney, Roman Catholic Bishop of St. John v., Eq. Cas., p. 103—200, 409.
Coster, Simonds v., 3 Eq., p. 329—186, 186, 429, 654.
Covenant Mutual Benefit Association (The) LeBlanc v., 34, p. 444—132, 425, 622.
Cowan, Ex parte, R. v. Delegarde, 36, p. 503—90, 91, 363, 481.
Crandall, Day et al v., 39, p. 289—718.
Crane, Sullivan v., 39, p. 438—728, 731.
Crawford v. Clowes, 43, p. 199—488, 724, 739.
Crawford et al v. Domville, Eq. Cas., p. 122—399.
Crawford, Poirier v., 39, p. 444—12, 556, 748.

Crawford v. Sipprell, 35, p. 344—78, 318, 425.
Crawford v. The City of Saint John, 34, p. 560—306, 361, 586.
Creaghan, Potter v., 35, p. 465—78, 80, 362.
Crocker v. Storey, 43, p. 69—328, 508, 700.
Crockett, James v., 34, p. 540—258, 323, 522.
Crocket, Milligan v., 36, p. 351—741.
Crockett v.The Town of Campbellton 39, p. 160—250, 741, 746.
Crockett v. The Town of Campbellton, 39, p. 573, (40 S. C. R. 606)—559, 748.
Cronkhite et al, Ex. parte, R. v. Wilson, 44, p. 69—177, 103, 229, 230, 231.
Cronkhite v. Miller, 2 Eq., p. 51, 203—268, 296, 384, 596.
Cronkhite, Pinder v., 34, p. 498—41, 82, 733.
Crosby v. Taylor, 2 Eq., p. 511—184, 283.
"Crown Cases". See after "Y."
Cruise v. The City of Moncton, 35, p. 249—521, 564, 629.
Crystal Stream Steamship Co. Ltd., The St. John River Steamship Co. Ltd. v. The, 41, p. 333, 398—28, 185.
Crystal, Warman v., 35, p. 562—178, 200.
Culbert v. The McCall Company, 40, p. 385—123, 160, 364, 618.
Culligan v. The Graphic Ltd. 44, p. 481—254, 279, 280, 280, 328.
Cumberland (The) Ry. & Coal Co. v. The Saint John Pilot Commissioners, 37, p. 406 (38 S. C. R. 169)—697, 700.
Cummings v. Gibson et al., 4 Eq., p. 55—347, 595, 626.
Cunard et al, Kerr v., 42, p. 454—10, 526, 762, 763.
Cunningham v. Moore, 1 Eq., p. 116—85, 155, 757.
Curless v. Town of Grand Falls, 37, p. 227—263, 558, 558.
Currey v. Currey, 39, p. 440—384.
Currey v. Currey, 40, p. 96—28, 384.
Currey v. Municipality of Victoria, 35, p. 605—247, 357, 362, 549.
Currey et al., Nixon v., 4 Eq., p. 153—323, 531, 541, 610.
Currie v. The Saint John Railway Company, 36, p. 194—251, 741, 749.
Cushing, The Cushing Sulphite Fibre Co. Ltd v.; See The Cushing Sulphite Fibre Co. Ltd. v. Cushing—post.
Cushing's Estate, In re, Ex parte Berthia J. Cushing 1 Eq., p. 102—294, 602.
Cushing, In re, 1 Eq., p. 163—292.
Cushing, Jones et al v., 39, p. 244—151, 687.
Cushing v. McLeod, 2 Eq., p. 63—411, 694, 696, 696, 696.
Cushing, Partington v. 3 Eq., p. 322—176, 636.
Cushing Sulphite Fibre Co. Ltd. v. Cushing, (No. 1), 2 Eq., p. 458—285.
Cushing Sulphite Fibre Co. Ltd. v. Cushing, (No. 2), 2 Eq., p. 466—287.
Cushing Sulphite Fibre Co. Ltd. v. Cushing. (No. 3), 2 Eq., p. 469—286.
Cushing Sulphite Fibre Co. Ltd. v. Cushing, (No. 4), 2 Eq., p. 472—287.
Cushing Sulphite Fibre Co. Ltd. (The) v. Cushing, (2 Eq., p. 539) 37, p. 313—114, 180, 199, 363, 571.
Cushing Sulphite Fibre Co. Limited, The Eastern Trust Co. v. The, 3 Eq., p. 378, 392—428, 529, 537, 802.
Cushing Sulphite Fibre Co. Ltd., In re The, 3 Eq., p. 231—31, 120, 467, 525.
Cushing Sulphite Fibre Co. Ltd., In re The, 37, p. 254—125, 125, 126, 129, 129, 132, 537.
Cushing Sulphite Fibre Co. Ltd., In re The, 38, p. 581—126, 127, 129, 534.
Cyr v. DeRosier, 40, p. 373—21, 329, 340, 342.

D

Daigle, Ex parte, R. v. Charest, 37, p. 492—212, 453, 455, 460, 477, 477.
Daigle v. Temiscouata Ry. Co., 37, p. 219—19, 583, 801.
Daley, R. v., 39, p. 411—216, 226.
Dalhousie Lumber Co. Ltd., McKean v. 40, p. 218—28, 112, 150, 154, 616.
Dalhousie Lumber Co. Ltd., The, v. Walker, 44, p. 81—16, 121, 674.
Dalhousie Lumber Co. Ltd. v. Walker, 44, p. 455—36, 144, 248, 599.
Dalling, Winslow v., 1 Eq., p. 608—590, 773, 773, 775.
Dalton, Seeley v., 36, p. 442—163, 223.
Daly Paul, In re estate of, 37, p. 483 (39 S. C. R., 122)—32, 353, 376, 379, 792.
Damboise, Ex parte, R. v. Murray, 39, p. 265—90, 452.
Darrah, McCutcheon v., 37, p. 1—32, 636.
Davidson, Ex parte, 39, p. 124—434.
Davidson, Ex parte, R. v. Bassett, 39, p. 271—196, 196, 455.
Davis, Mitchell v., 39, p. 486—675, 675.
Davis, R. v., Ex parte Miranda, 42, p. 338—456.
Davis, R. v., Ex parte Vanbuskirk, 38, p. 335, 526—192, 451, 454, 454, 454, 454, 456, 477.
Davis, William John, deceased, In the matter of the Estate of, 40, p. 23—180, 191, 369, 526, 778, 796, 796.
Day v. The Canadian Pacific Railway Co'y 36, p. 323—584, 587.
Day et al v. Crandall, 39, p. 289—718.
Deacon, Clifford B., In re, 36, p. 3—677, 703.
Dean Arbitration, In re 2 Eq., p. 120—41.
Dean, Ex parte, R. v. Forbes, 36, p. 580—21, 47, 91, 327, 678.
DeBury v. DeBury, (2 Eq. p., 278, 348) 36, p. 57—377, 387, 387, 388, 392, 487, 522, 753.
DeForest et al, Tilley Assignee of DeForest v., 4 Eq., p. 343—63, 157, 720.
DeGrace, Sweeney v., 42, p. 344—340, 496.
Delegarde, R. v., Ex parte Cowan, 36, p. 503—90, 91, 363, 481.
DeLong, Ex parte, R. v. Carleton, 44, p. 578—93, 212.
Demerchant et al, The Colonial Investment and Loan Co. v., 38, p. 431—300, 324, 534.
Demmings, Ex parte, In re License Commissioners Victoria County, 37, p. 586—458, 459, 516.
Dennison v. Canadian Pacific Railway Co., 36, p. 250—510, 585, 650, 661.

DeRosier, Cyr v. 40, p. 373—21, 329, 340, 342.
Deschene, Trafton v., 44, p. 552—281, 282, 331, 738.
Despres, Ex parte, 36, p. 13—17, 27, 30, 371.
Desrosiers, Ex parte, In re License Commissioners Madawaska, 41 p. 395—458, 458.
Dewar, Ex parte, 39, p. 143—434, 435, 436.
Dewar et al, Ex parte, R. v. Limerick, 44, p. 233—15, 236, 445, 446, 480.
Dibblee v. Fry et al., 35, p. 109—58, 616, 617, 623.
Dibblee v. Fry, 35, p. 282—58, 206, 207, 309, 658, 719.
Dibblee, R. v., Ex parte Kavanagh, 34, p. 1—Addenda.
Dibblee, R. v., Ex parte McIntyre, 39 p. 361—113, 438, 47, 448.
Dibblee, R. v., Ex parte O'Regan, 39, p. 378—448.
Dibblee, R. v., Ex parte Smith, 38, p. 350—135, 463, 547.
Dickie, Re, Ex parte Williams, 38, p. 156—305, 442.
Dimock, R. v., 44, p. 124—548.
Diocesan Synod of Fredericton et al, Van-Wart et al Executors v., 42, p. 1—106, 376, 377, 392, 795.
D'Israeli Asbestos Co. v. Isaacs et al., 40, p. 431—17, 195, 464.
Dixon et al, Ex parte, 41, p. 133—514, 559.
Dixon, Ex parte, R. v. Fraser, 36, p. 109—359, 359.
Dixon v. The Canadian Pacific Railway Company, 39 p. 305—19, 583,
Doak, Elliot v., 36, p. 328—18, 629.
Doherty, Ex parte, 35, p. 43—49, 382, 444.
Doherty v. Hogan, 1 Eq., p. 113—536.
Dolan, Ex parte, R. v. Kay, 41, p. 95—447, 634.
Dominion Atlantic Railway Company, Cormier v. The, 36, p. 10—89, 580.
Dominion Cotton Mills Co. v. Maritime Wrapper Co., 35, p. 676—16, 29, 67, 466, 469.
Dominion Cotton Mills Co., Re Petition of, Re Maritime Wrapper Co. Ltd., 35, p. 682—129, 718.
Dominion Express Company, Trenholm v., 43, p. 98—89, 152, 330, 343.
Dominion of Canada Accident Insurance Co., Smith v. The, 36, p. 300—414, 740.
Domville v. Crawford et al., Eq. Cas., p. 122—399.
Donald v. Fulton, 39, p. 9—26, 173.
Donald v. McManus et al., 4 Eq., p. 390—158, 363, 754.
Donaldson et al., Bodington Administratrix etc. v., 44, p. 290—331, 339, 342, 588, 588, 697.
Donaldson et al, Campbell v. 40, p. 525—519, 588.
Donovan v. The Excelsior Life Insurance Co., 43, p. 325, 580 (31 D. L. R. 113)—423, 423, 427.
Dooley v. The City of Saint John, 38, p. 455—256, 586, 588.
Doucet, Ex parte, R. v. O'Brien, 43, p. 361—232.
Douglas v. Sansom, 1 Eq., p. 122—63, 71, 98, 276, 526.
Dowd v. Dowd, Eq. Cas., p. 388—284, 285, 725.
Doyle, Ex parte, 41, p. 138—89, 452.
Doyle, Ex parte, R. v. Lawlor, 44, p. 244—435, 438, 439, 444.
Doyle, Gooden v., 42, p. 435—268, 338, 497, 503, 721.
Driscoll v. Fisher, Eq. Cas., p. 89—68, 596.
Dryden et al., Steeves v., 35 p. 555—203, 728.
Dube v. Pond, 37, p. 138—263, 625.
Duckett v. Likely, 44, p. 12—696, 696, 696,
Duffus et al v. Gilbert, Eq. Cas., p. 423—751.
Duffy v. Duffy, 43, p. 555—5, 5, 429, 642, 642.
Duffy v. Reid, 44, p. 407—728, 733.
Dugal v. People's Bank of Halifax, 34, p. 581—87, 577, 587.
Dugas, R. v., Ex parte Aylward, 43, p. 443—221, 228.
Dugas, R. v., Ex parte Legere, 43, p. 357—227, 234.
Dugas, R. v., Ex parte McLeary, 43, p. 65—220, 455.
Dugas, R. v., Ex parte Paulin, 43, p. 58—454.
Dugay, Ex parte, R. v. Wilkinson, 37, p. 90—458.
Dugay, Gunns Ltd. v., (No. 1), 41, p. 401—59, Addenda.
Dugay, Gunns Ltd. v., (No. 2), 41, p. 402—14, 47, 59, 638.
Duguay v. Lanteigne, 3 Eq., p. 132—85, 269.
Dugay v. Myles, 42, p. 265—507, 729, 729.
Dunbar Co., The, Lombard v., 4 Eq., p. 271—609.
Dunbar, Rogers v., 37, p. 33—203, 614, 639, 640.
Duncan, In re, R. v. Wilson, Ex parte Fairley, 39, p. 555—95, 96, 209, 235, 375.
Duncan v. The Bank of Nova Scotia, Eq., Cas., p. 513—Addenda.
Duncan v. The Town of Campbellton, 3 Eq., p. 224—38, 410, 410.
Dundas, Murphy v., 38, p. 563—51, 247, 325, 730.
Dunham v. Saint Croix Soap Mfg. Co. Ltd., 34, p. 243—148, 159, 623.
Dunlop, Bank of Montreal v., 2 Eq., p. 388—531.
Dunlop v. Dunlop, 1 Eq., p. 72—351, 484, 501, 593, 631, 803.
Durick, Ex parte, R. v. Hennessy et al., 38, p. 103—15, 94, 440.
Dyer v. McGuire et al., 4 Eq., p. 203—374.
Dykeman, Ex parte, 40, p. 379—227, 434.
Dykeman, Orchard v., 43, p. 181—6, 166, 518, 604.

E

Earle v. Harrison et al., 4 Eq., p. 196—539, 642.
Earle Trustee etc., of Lawton v. Lawton et al., 4 Eq., p. 86, 92—780, 783.
Eastern Steamship Co., McBeath v. The, 39, p. 77—88, 582.
Eastern (The) Trust Company, Beal v., 43, p. 23—788, 802.
Eastern (The) Trust Company v. The Cushing Sulphite Fibre Co. Limited, 3 Eq., p. 378, 392—428, 529, 537, 802.

Eastern (The) Trust Company v. Jackson 3 Eq. p. 180—325, 376, 391, 778.
Eaton's Estate, In re Aaron, 1 Eq., p. 527—751, 797.
Ebbett, R. v., Ex parte Smith, 38, p. 559—30, 92, 364.
Edgecombe v. McLellan, 4 Eq., p. 1—177, 760.
Edgett, Canadian Fairbanks Company Limited v., 40, p. 411—162, 766.
Edgett, Ex parte, 36, p. 224—515, 558.
Edgett v. Steeves, 3 Eq., p. 404—67.
Edmondson v. Allen, 40, p. 299—50, 252, 727, 732.
Edwards, Pick v., 3 Eq., p. 410—484, 505, 750.
Edwards et al, Pick v., 4 Eq., p. 151—184, 284.
Elliott v. Doak, 36, p. 328—18, 629.
Emack et al v. Woods et al., 39, p. 111—247, 680, 746.
Emmerson v. Maddison, 36, p. 260, (1906 A. C., 569)—240, 496.
Empire Coal and Tramway Co. Limited, Patrick v., 3 Eq., p. 571—114, 119.
Empire (The) Cream Separator Co. Ltd., v The Maritime Dairy Co. Ltd., 38, p. 309—123, 618, 641, 655, 687.
Equity (The) Fire Insurance Company, Payson, v., 38, p. 436—160, 418, 419.
Estabrooks, Ayer v., 2 Eq., p. 392—777, 777, 781.
Estabrooks and McAlary, Robinson v., 4 Eq., p. 168—364, 492.
Estey, People's Bank of Halifax v., 36, p. 169, (34 S. C. R., 429)—73, 313, 650, 683.
Evans v. Evans, 3 Eq., p. 216—377, 392.
Evans, McMennamin v., 41, p. 481—71, 82, 648, 708.
Everett v. Everett, 38, p. 390—302, 341, 388, 544.
Excelsior (The) Life Insurance Co., Donovan v., 43, p. 325, 580, (31 D. L. R. 113)—423, 423, 427.
E. C. Colwell Candy Co. Ltd., (In liquidation) In re, 35, p. 613—125, 288.

F

F. an Infant, In re, 1 Eq., p. 313—394.
Fairley Estate, In re, 1 Eq., p. 91—761, 792.
Fairley, Ex parte, R. v. Wilson, In re Braithwaite, In re Duncan, 39, p. 555—95, 96, 209, 235, 375.
Fairweather v. Lloyd, 36, p. 548—26, 297, 772, 776.
Fairweather, Lloyd et al v., 37, p. 497—32, 470.
Fairweather v. Robertson, 2 Eq., p. 412, (36, p. 548)—26, 297, 772, 776.
Fairweather v. Robertson, 3 Eq., p 276—21, 186.
Farrell, Ex parte, 42, p. 478—305, 513.
Farrell, Hunter v., 42, p. 323—336, 761, 799, 801.
Farrell v. Portland Rolling Mills Co. Limited et al, (3 Eq., p. 508), 38, p. 364; (40 S. C. R., 339),—111, 113, 343, 367, 483, 648.
Farris, Ex parte, R. v. Lebell, 39, p. 468—135, 231, 463, 555.
Fawcett v. Hatfield et al., 44, p. 339—150, 733.
Federal Life Assurance Co. of Canada, Seery et al. v., 38, p. 96—423, 423, 738, 745.
Fenety et al v. Johnson, 4 Eq., p. 101, 216—283, 284, 756, 764, 787.
Ferguson et al, McGaffigan et al. v., 4, Eq., p. 12—147, 275, 545.
Ferguson v. The Swedish Canadian Lumber Co. Ltd., 41, p. 217—181, 700, 700, 747.
Ferguson et al., Wathen v., 41, p. 448—308, 597, 724.
Fidelity-Phenix Fire Insurance Co, Guimond et al v., 41, p. 145, (47 S. C. R. 216) 74, 102, 325, 418, 419, 422, 654, 732, 767, 802.
Fillmore v. Cartwright, 33, p. 621—621.
Finn v. Brown, 35, p. 335—25, 326, 688.
Fish, Bank of Nova Scotia v., 33, p. 604—190, 197.
Fish v. Fish Executor etc. of Fish, 44, p. 617—29, 82, 340, 349.
Fisher, Driscoll v., Eq. Cas., p. 89—68, 596.
Fisher v. The Town of Woodstock, 39, p. 192—173, 314, 680.
Fisher Trusts, In re, 3 Eq., p. 536—789.
Fisk, McGaw v., 38, p. 354—172, 395, 398, 507, 624, 686.
Fisk, McGaw v., 39, p. 1—Addenda.
Flanagan, Ex parte, 34, p. 577—134, 207, 219, 431, 432, 472, 519.
Flannagan, Ex parte, 34 p. 326—196, 219, 452, 454, 456, 476, 477.
Fleetwood Assignee etc. v. Welton, 44, p. 318—62, 67, 603.
Fleming v. Harding, 1 Eq., p. 515—639.
Fleming v. McLeod, 37, p. 630, (39 S. C. R. 290)—80, 82.
Flewelling (The) G. & G. Manufacturing Co. Ltd., Johnston v., 36, p. 397—80, 426.
Floyd v. Hanson, 43, p. 339—190, 333, 500, 762, 766.
Foley, Sisk v., R. v. Sisk, 35, p. 560—640, 703.
Folkins, R. v., Ex parte McAdam, 43, p. 538—224, 238.
Foo, Ying v., 42, p. 315—24, 32.
Forbes, R. v., Ex parte Bramhall, 36, p. 333—95, 208, 386, 649.
Forbes, R. v., Ex parte Chestnut, 37, p. 402—18, 201, 231—
Forbes, R. v., Ex parte Dean, 36, p. 580—21, 47, 91, 327, 678.
Forbes, R. v., Ex parte Selig, 39, p. 592—96, 237.
Ford v. Stewart, 35, p. 568—8, 70, 213, 213.
Foreign (The) Mission Board of The Baptist Convention of the Maritime Provinces, Bradshaw v., 1 Eq., p. 346—320, 379, 733.
Foreign (The) Mission Board of the Baptist Convention of the Maritime Provinces, Brewster v., 2 Eq., p. 172—793.
Foreman v. Seeley, 2 Eq., p. 341—532, 652, 653, 701, 701.
Forester, Vesta E., In re Estate of, 37, p. 209—341, 341, 348.
Forster, Brock v., 34, p. 262—487, 540.

Forster, William D., deceased, In the matter of the Estate of, 39, p. 526—204, 354, 781, 784.
Fowler and Pope et al, Pugsley v., 4 Eq., p. 122—2, 140, 152, 156, 483, 607.
Foxwell's Estate, In re Martha A., 1 Eq., p. 196—200, 750.
Franke et al, McGrath v., Eq. Cas., p. 97—34.
Fraser, Hannay v., 37, p. 39—102, 171, 265, 311.
Fraser v. MacPherson, 34, p. 417—101, 174, 391.
Fraser et al, Murchie et al v., 36, p. 161—37, 369, 693, 716.
Fraser, R. v., Ex parte Dixon 36, p. 109—359, 359.
Fraser et al, Roy v., 36, p. 113—25, 578, 714, 769, 775.
Fraser Limited, The Saint John and Quebec Railway Company v., 43, p. 388—31, 37, 38, 40, 254, 666.
Frederick v. Gibson, 36, p. 364—678, 726.
Frederick v. Gibson et al., 37, p. 126—12, 171, 290, 347, 495, 632, 745.
Fredericton and Grand Lake Coal and Railway Company v. Harding et al., 42, p. 363—760.
Freeman v. Stewart, (2 Eq., p. 365, 408, 451), 36, p. 465—153, 299, 630, 708, 757, 759.
Freeze, Re Gladys Julia, 3 Eq., p. 172—393, 395.
French, Mabel P., In re, 37, p. 359—704, 801.
French et al., Moses et al v., 43, p. 1—166, 637, 763.
Fry et al, Dibblee v., 35, p. 109—58, 616, 617, 623.
Fry, Dibblee v., 35, p. 282—58, 206, 207, 309, 658, 719.
Frye v. Frye, 34, p. 569—144, 166, 170, 170, 517.
Fryers, In re, Ex parte Gallagher, 41, p. 545—194, 560, 658.
Fulton, Donald v., 39, p. 9—26, 173.
Furlotte et al v. Lapoint, 38, p. 140—300, 394, 618.

G

Gallagher, Ex parte, 34, p. 329—211, 244, 441, 472.
Gallagher, Ex parte, In re Fryers, 41, p. 545—194, 560, 658.
Gallagher, Ex parte, R. v. Kay, 38, p. 228, 325, 498—93, 219, 220, 233, 431, 435, 437, 437, 440, 443, 443, 475, 480.
Gallagher, Ex parte, R. v. Steeves, 39, p. 4—318, 432, 441, 478, 556.
Gallagher, Hannah, Ex parte, 34, p. 413—475.
Gallagher, McCormack v., 44, p. 630—318, 386, 649.
Gallagher v. McQueen, 35, p. 198—161, 288, 494.
Gallagher v. O'Neill, 34, p. 194—188, 281.
Gallagher v. The City of Moncton, 2 Eq., p. 360—642.
Gallagher v. The City of Moncton, Ex parte Sweeney, 2 Eq., p. 269—187, 195, 642.
Gallagher v. Wilson, 35, p. 238—188, 632, 643.
Gallant, Ex parte, R. v. Kay, 37, p. 72—218, 437.
Gallant v. O'Leary, 38, p. 395—21, 251.
Gallant v. The Lounsbury Co. Ltd., 44, p. 225—32, 369, 653, 688.
Gamblin v. Myers, 42, p. 280—614.
Ganong et al, The Mayor, Alderman and Commonalty of the City og Saint John v., Eq., Cas., p. 17—87, 567.
Garland, Ex parte, R. v. Leahy, 35, p. 509—90, 224.
Garland, Prescott v., 34, p. 291—83, 683.
Garson, Brown v., 42, p. 354—247, 254, 486, 572, 572.
Gaskin v. Peck et al., Eq. Cas., p. 40—387.
Gault (The) Bros Co. Ltd., v. Morrell, 3 Eq., p. 123, 173, 453—62, 65, 99, 410, 466, 467, 598, 684.
Geldert, Ex parte, 34, p. 612—45.
Gerow, R. v., Ex parte Gross et al., 43, p. 352—34, 189, 193, 702.
Giberson, Ex parte, 34, p. 538—451, 555.
Giberson, Ex parte, R. v. McQuarrie, 39, p. 367, 371—232, 235, 236, 453, 462.
Giberson, Ex parte, R. v. McQuarrie, 40, p. 1—231, 231, 473, 479.
Giberson v. The Toronto Construction Company, Ltd., 40, p. 307, 309—14, 314, 654, 727, 732.
Giberson, Warner v., 1 Eq., p. 65—131, 350.
Gibson et al, Cummings v., 4 Eq., p. 55—347, 595, 626.
Gibson, Frederick v., 36, p. 364—678, 726.
Gibson et al., Frederick v., 37, p. 126—12, 171, 290, 347, 495, 632, 745.
Gibson, McLeod v., 35, p. 376—179, 303.
Gilbert v. Duffus et al., Eq. Cas., p. 423—751.
Gilbert, Ex parte, 36, p. 492—180, 359, 514.
Gilbert v. Gilbert, 42, p. 288—786.
Gilbert, Mary B., deceased, In the matter of the estate of, 39, p. 285—33, 778, 796.
Gilbert and Saint John Horticultural Association, In re, 1 Eq., p. 432—37, 38, 42, 250, 355.
Gilbert v. Union Mutual Life Insurance Company, Eq. Cas., p. 266 (25 N. B. R. 221)—283.
Gilfillan, Chapman v., Ex parte Welch, 2 Eq., p. 129—534, 652.
Gillis et al, Lloyd v., 37, p. 190—293, 408, 503.
Girvan et al, Lloyd v., Eq. Cas., p. 164—636.
Girvan, Thomas v., 1 Eq., p. 257, 314—29, 182, 527, 538, 541.
Glasier v. MacPherson, (1 Eq., p. 649—, 34, p. 206—192, 399, 493, 704.
Gloucester, Municipality of, Grimmer v. 35, p. 255, (32 S. C. R., 305)—117, 311, 514, 552.
Godard v. Godard, 4 Eq., p. 268—412, 723.
Godefroi v. Paulin, 1 Eq., p. 568—636.
Gogan, Ex parte, R. v. Steeves, 43, p. 285—449.
Goggin, Ex parte R. v., McDougall, 44, p. 369—50, 228, 456.
Goggin v. Whittaker, 38, p. 378, 415—103, 288, 488, 493, 629.
Goggin, Whittaker v., 39, p. 403—3, 24, 332, 496, 619, 722.
Goguen, Ex parte, R. v. McDougall, 44, p. 369—50, 228, 456.

Golden and wife v. McGivery and others, 4 Eq., p. 42—186, 283, 284.
Goldie (The) and McCulloch Co. Ltd. v. Hewson, 35, p. 349—11, 361, 539, 685.
Good et al v. The Nepisiquit Lumber Company Limited, 41, p. 57—127, 127, 672, 717.
Gooden v. Doyle, 42, p. 435—268, 338, 497, 503, 721.
Goods of Price, In re the, Eq. Cas., p. 429—790.
Goodspeed, In re, Ex parte The Attorney General, 36, p. 91—132, 238, 512.
Goodwin, Branson v., 43, p. 449—716, 716.
Goodwin, Olsen v., 43, p. 449—716, 716.
Gordon v. Sime, 44, p. 535—184, 288, 493.
Gordon v. The City of Saint John, 38, p. 542—38, p. 56—39, 250, 251, 489, 489, 799, 799, 800.
Gordon v. The City of Saint John, 40, p. 541, (46, S. C. R. 101)—489.
Gorman v. Copp, 39, p. 309—82, 265, 730.
Gorman et al, Ex parte, 34, p. 397—433, 436, 478.
Gorman, Ex parte, R. v. Allen, 40, p. 459—430, 700.
Gorman, Ex parte, R. v. McLatchey, 39, p. 374—376, 754.
Gorman v. Urquhart, (2 Eq., p. 42) 34, p. 322—281, 282, 372.
Gould v. Britt, 2 Eq., p. 453—194.
Government Railways Managing Board v. Williams, 41, p. 108—59, 87, 202, 584, 660, 662.
Grand Falls, Town of, Curless v., 37, p. 227—263, 558, 558.
Grand Falls, Town of v. Petit, 34, p. 355—302, 560, 601.
Grand Falls, Town of, R. v., Ex parte Grand Falls Co. Ltd., 42, p. 122—56, 56, 90, 389.
Grant v. The Canadian Pacific Rwy Company 36, p. 528—133, 358, 581, 583, 713.
Grant, Ex parte, 35, p. 45—206, 513, 564.
Graphic Ltd. The, Culligan v., 44, p. 481—254, 279, 280, 280, 328.
Gratten, Chute et al v., In re Petition of Wm. G. Bateman, Eq. Cas., p. 538—387, 470, 533, 674.
Graves, Ex parte, 35, p. 587—209, 381, 456.
Gray v. Steeves, 42, p. 676—20, 60, 573, 577
Green et al, Clark et al v., 37, p. 525—101, 249, 288, 289, 365, 495.
Green, Ex parte, 35, p. 137—136, 706.
Green, McLean v., 37, p. 204—631, 677.
Gregory v. Williams et al, 44, p. 204—166, 256, 588.
Gremley v. Stubbs, 39, p. 21—20, 60, 323, 578.
Grey, Ex parte, R. v. O'Brien, 37, p. 604—91, 92, 178, 232.
Grimmer v. Municipality of Gloucester, 35, p. 253, (32 S. C. R., 305)—117, 311, 514, 552.
Grimmer, R. v., Ex parte Shaw, 39, p. 477—93, 244, 523.
Gross et al, Ex parte, R. v. Gerow, 43, p. 352—34, 189, 193, 702.
Grosweiner et al, Sellick et al v., 38, p. 73—27, 69, 158, 656.
Groundwater v. Waterman, 42, p. 396—772.
Grundy, Ex parte, R. v. Carleton, 37, p. 389—234, 474.
Guerette, Lame v., 1 Eq., p. 199—179, 403, 635, 686.
Guimond et al v. Belanger et al., 33, p. 589—716.
Guimond, Ex parte, R. v. Matheson, 41, p. 581—225, 459, 459.
Guimond et al v. Fidelity Phenix Fire Insurance Company, 41, p. 145 (47, S. C. R., 216)—74, 102, 325, 418, 419, 422, 654, 732, 767, 802.
Gunns Ltd. v. Dugay (No. 1), 41, p. 401—59, Addenda.
Gunns Ltd. v. Dugay (No. 2), 41, p. 402—14, 47, 59, 638.
Gunter, Miller v., 36, p. 330—23, 510, 643.
Gunter v. Williams et al, 1 Eq., p. 401, 315, 365, 392, 422.
Guptill v. Ingersoll, 2 Eq., p. 252—308, 360, 604.

H

Haines et al., R. v., Ex parte McCorquindale, 39, p. 49—36, 96, 234.
Haines, Trustees School District No. 9 v., 36, p. 167—337, 692.
Hale v. Leighton, 36, p. 256—339, 732.
Hale v. Leighton, (3 Eq. p. 68), 37, p. 545—147, 602, 753.
Hale v. The People's Bank of Halifax, 2 Eq., p. 433—75, 607, 714.
Hale, The Royal Bank of Canada v., 36, p. 471—726, 766.
Hale, The Royal Bank of Canada v., 37, p. 47—84, 334, 729.
Hale v. Tobique Manufacturing Co. Ltd., 36, p. 360—25, 130, 726
Hale, Tompkins v., 41, p. 269—22, 23, 327, 618, 688.
Haley et al, Robinson by Next Friend v., 42, p. 657—317, 571, 634, 736, 738.
Halifax Banking Company, Cornwall v., 35, p. 398 (32 S. C. R. 442)—353, 378, 413.
Halifax Banking Company, Smith v., 1 Eq., p. 17—294, 309, 544, 612, 619, 629.
Halifax Banking Company, Smith v., 1 Eq., p. 115—176, 632.
Hall v. Slipp, Ex parte Appleby, 1 Eq., p. 37—670.
Hall, Ward et al. v., 34, p. 600—490.
Hallett v. Allen, 38, p. 349—210.
Hallett, Simonds v., 34, p. 216—201, 206, 639, 703.
Hamm, White v., 2 Eq., p. 575—243, 373, 399, 410.
Hamm, White v., 36, p. 237—12, 506, 727.
Hampstead Steamship Co. Ltd. v. The Vaughan Electric Co. Ltd., 38, p. 418—27, 29.
Hampton and Saint Martin's Railway Co., Barnhill v., 3 Eq., p. 371—529, 663.
Hand v. Warner et al., 44, p. 215, 331—368, 757.
Hanford v. Howard, 1 Eq., p. 241—86, 468, 522, 535, 538.
Hanington et al. Liquidators, Keyes v., 42, p. 190—127.
Hannaghan v. Hannaghan, 1 Eq., p. 302, 395—282, 294, 308, 597.

Hannay v. Fraser, 37, p. 39—102, 171, 265, 311.
Hanson, Floyd v., 43, p. 339—190, 333, 500, 762, 766.
Hanson, Penery v., 2 Eq., p. 233—199, 608, 694.
Hanson v. Ross, 42, p. 650—327, 747.
Harding, Fleming v., 1 Eq., p. 515—639.
Harding et al., Fredericton and Grand Lake Coal and Railway Company v., 42, p. 363—760.
Harquail Co. Ltd., Roy v., 41, p. 255—167.
Harrington, Ex parte, R. v. Wilson, 40, p. 383, 384—439, 447.
Harris, Administratrix etc. v. Jamieson, 39, p. 177—740.
Harris, Sayre v., Eq. Cas., p. 94—179, 636.
Harris et al., Stewart v., Eq. Cas., p. 143—193.
Harris et al v. Sumner et al, (4 Eq. 58), 39, p. 204, 456—36, 108, 111, 112, 113, 114, 197, 348, 598, 599, 703.
Harrison et al, Earle v., 4 Eq., p. 196—539, 642.
Harrison, Salesses v., 41, p. 103—496, 800.
Harrison, Trustee etc. v. The Nepisiguit Lumber Co. Ltd. et al., 41, p. 1—68, 68, 115, 118, 123, 127, 127, 129, 686.
Harvie, Buchanan v., 3 Eq., p. 1, 61—194, 528.
Hatfield, An Infant, In re Annie E., 1 Eq., p. 142—321, 395.
Hatfield et al, Fawcett v., 44, p. 339—150, 733.
Hatfield v. Worden, 41, p. 552—3, 78.
Hawthorne v. Sterling, 2 Eq., p. 503—6, 7, 287, 518.
Hayes, Ex parte, R. v. Clarkson, 40, p. 363—207, 216, 228, 434, 443, 445, 569.
Hayward, Receiver-General of New Brunswick v., 35, p. 453—705.
Hazen Administratrix etc., Johnston et al v., 43, p. 154—131, 342, 393.
Hazen, Johnson v., 3 Eq. p. 147—322, 329, 397.
Hazen, Johnson v., Re Woodford Claim, 3 Eq., p. 341—78, 149, 377.
Health, Re Local Board of: Ex parte Municipality of York, 37, p. 546—114, 198, 565.
Hebert, Ex parte, 34, p. 455—219, 452, 452, 455, 475, 477, 480.
Hebert, Ex parte, R. v. Kay, 38, p. 1—442.
Hebert, Ex parte, R. v. Kay, 38, p. 498—220, 233, 431, 437, 437, 475, 480.
Hebert, Ex parte, R. v. Kay, 39, p. 67—434.
Hebert, In re, Ex parte Kay, 39, p. 54—94, 678.
Hebert et al, Ringuette v., 37, p. 68—289, 330, 493, 495.
Hegan v. Montgomery, 1 Eq., p. 247—285, 286.
Heney & Company Limited, E. N. v. Birmingham et al., 39, p. 336—122, 429, 657, 686.
Heney, Purtle v., 33, p. 607—172, 686, 688.
Hennessey, R. v., Ex parte Pallen et al, 38, p. 103—15, 94, 440.
Henry v. Malcolm, 39, p. 74—264, 670, 802, 803, 804.
Hesse v. Saint John Railway Company, 35, p. 1 (30 S. C. R. 218)—258, 259, 334, 334, 575, 735, 736.
Hewson, Goldie & McCulloch Company v., 35, p. 349—11, 361, 539, 685.
Heywood, Ex parte, 34, p. 8—45.
Hibbard Co. Ltd. et al, Saint John & Quebec Railway Company v., 43, p. 508—670.
Hicks v. Ogden, 35, p. 361—36, 178, 633, 726.
Hicks, The Pacific Coast Fire Insurance Co. v., 42, p. 294—11, 124, 422.
Hicks, Sears v , 3 Eq., p. 281—145, 291, 355.
Higgins, R. v., 36, p. 18—217, 224, 737.
Hill, Kenen v., 38, p. 342—17, 703.
Hodge, Ex parte, R. v. Kay, 39, p 129—437, 440.
Hogan, Doherty v., 1 Eq., p. 113—536.
Hogan, In re, Ex parte Kay, 39, p. 54—94, 678.
Hollins, Ex parte, R. v. Wilkinson, 35, p. 538—55, 94, 651, 678.
Holyoke, R. v., Ex parte Blair, 41, p. 223—438.
Holyoke, R. v., Ex parte McIntyre, 42, p. 135—91, 432, 432, 438, 444, 476, 483, 518.
Home Circle et al., Loasby v., Eq. Cas., p. 533—200, 395, 396, 425, 593.
Honourable John Henry Pope, Acting Minister of Railways and Canals The Minister of Justice for Canada, and Jabez B. Snowball, Attorney-General for the Province of New Brunswick v., Eq. Cas., p. 272—408, 590, 662, 774.
Hopkins et al, Brenan v., 39, p. 236—25, 679.
Hopper v. Clark et al., 40, p. 568—47, 48, 49, 222, 246.
Hopper Infants, In re, 1 Eq., p. 245—398, 722.
Hopper et al v. Steeves, 34, p. 591—396, 722.
Horn et al v. Kennedy et al, Eq. Cas., p. 311—181, 266, 307, 536, 536, 595.
Hornbrook, R. v., Ex parte Madden et al, 38, p. 358—233, 234, 236, 236, 449.
Hornbrook, R. v., Ex parte Morrison, 39, p. 289—438.
Horsman, Cairns v., 35, p. 436—273, 338, 350, 501, 674.
Horsman, Ex parte, R. v. Kay, 39, p. 129—437, 440.
Howard, Burden v., 2 Eq., p. 461, 531—137, 403, 409, 606.
Howard, Hanford v., 1 Eq., p. 241—86, 468, 522, 535, 538.
Howard v. The City of Saint John, 43, p. 521—52, 416, 553.
Howe, Ex parte, R. v. Board of Assessors, Fredericton, 41, p. 564—15, 16, 54, 562, 693, 802.
Howe et al, Lawton v., Eq. Cas., p. 191—531, 671.
Howe, R. v., 42, p. 378—215, 237, 237.
Howe, Roberts v., 1 Eq., p. 139—178, 616.
Howlett, Rideout v., 42, p. 200—29, 775.
Hubbard, R. v., Ex parte Monahan, 42, p. 524—439.
Hubbard v. Young et al, 34, p. 641—640, 677.
Humphrey et al v. Banfil, Eq. Cas., p. 243—347, 407, 496, 592, 597.

Humphrey, Jackson v., 1 Eq., p. 341—536, 643.
Humphreys, Trites v., 2 Eq., p. 1—184, 204, 371, 399, 484, 595, 613, 629.
Hunt, Mayberry v., 34, p. 628—160, 610.
Hunter v. Farrell, 42, p. 323—336, 761, 799, 801.
Hunter, Jones v., 1 Eq., p. 250—274, 295, 485.
Hutchings et al, Allis-Chalmers-Bullock Ltd. v., 41, p. 444—264, 622, 689.
Hutchinson v. Baird, 1 Eq., p. 624—784.

I

Imperial Fire Insurance Company, Torrop v., 34, p. 113 (26 S. C. R. 585)—102, 416, 650, 767.
Imperial Trusts Company, Shaughnessey v., 3 Eq., p. 5—118, 191, 467, 593, 597
Industrial Disputes Act, In re, 42, p. 434—720.
Ingersoll, Guptill v., 2 Eq., p. 252—308, 360, 604.
Ingraham, Temperance and General Life Assurance Company v., 35, p. 510—208.
Ingraham, Temperance and General Life Assurance Company v., 35, p. 558—193, 205, 208, 726.
Ingram v. Brown, 38, p. 256—250, 272, 332, 340, 724, 728, 729, 740.
Irvine v. Overseers of Parish of Stanley, 37, p. 572—114, 522, 564, 651, 745.
Irving, Ex parte, R. v. Wilson, 35, p. 461—201, 209, 381, 456.
Irving v. McWilliams, 1 Eq., p. 217—161, 162, 241.
Isaacs et al, D'Israeli Asbestos Co. v., 40, p. 431—17, 195, 464.
Isaacson, Ex parte, MacAulay v. Jacobson, 37, p. 537—58.
Isnor, Ex parte, R. v .Kay, 38, p. 332—227, 432, 433, 443, 443.

J

Jack v. Bonnell, 35, p. 323—57, 197, 205, 210, 309, 468, 799.
Jack, Ex parte, R. v. Ritchie, 35, p. 581—565.
Jack et al, Johnston v., 35, p. 492—22, 25, 27, 80, 383, 631.
Jack v. Kearney et al (4 Eq., p. 415), 41, p. 293—99, 356, 356, 372, 374, 398.
Jack, Nealis v., Eq. Cas., p. 426—389, 779.
Jackson, The Eastern Trust Company v., 3 Eq., p. 180—325, 376, 391, 778.
Jackson v. Humphrey, 1 Eq., p. 341—536, 643.
Jackson v. Richardson, (1 Eq., p. 325), 34, p. 301—86, 536, 538.
Jacobson, MacAuley v., Ex parte Isaacson, 37, p. 537—58.
Jalbert, Ouellet v., 43, p. 599—239, 241, 500, 500, 721.
Jamer, McCatherin v., 41, p. 367—382, 506.
Jamer, Rolston v., 41, p. 367—382, 506.
James v. Crockett, 34, p. 540—258, 323, 522.
Jamieson v. Blaine et al, Commissioners etc., 38, p. 508—453.
Jamieson, Harris Adm. v., 39, p. 177—740.
Jardine et al v. The Prescott Lumber Co. Ltd., 44, p. 505—169, 327, 647.
Jardine et al v. Simon, Eq. Cas., p. 1—261, 271.
Jeffers, Stevens v., 38, p. 233—301, 505, 755.
Jeffries v. Blair et al, 1 Eq., p. 420—464, 536, 749.
Jewett and Sutton Arbitration, In re, 1 Eq., p. 568—41, 559.
Johnson v. Bank of Nova Scotia, 35, p. 492—22, 25, 27, 80, 383, 631.
Johnston, Budd v., 42, p. 485—297, 312, 772.
Johnson v. Calnan, 38, p. 52—272, 272, 318, 324, 350.
Johnson, Ex parte, 39, p. 73—444, 654.
Johnson, Ex parte, 44, p. 353—447.
Johnston, Fenety et al v., 4 Eq., p. 101, 216—283, 284, 756, 764, 787.
Johnson v. The G. & G. Flewelling Manufacturing Co. Ltd., 36, p. 397—80, 426.
Johnston et al v. Hazen Administrator etc., 43, p. 154—131, 342, 393.
Johnston v. Hazen, 3 Eq., p. 147—322, 329, 397.
Johnston v. Hazen, Re Woodford Claim, 3 Eq., p. 341—78, 149, 377.
Johnson v. Jack et al, 35, p. 492—22, 25, 27, 80, 383, 631.
Johnston v. Johnston, 1 Eq., p. 164—307, 389, 404.
Johnson, McAllister v., 40, p. 73—49, 319, 506, 511, 660, 749.
Johnson v. Scribner et al., Eq. Cas., p. 363—154, 166, 189, 619.
Johnson, Simpson v., 2 Eq., p. 333—191, 198, 349, 782, 790.
Joiens, Ex parte, 39, p. 589—91, 469.
Joiens v. Lockhart, 40, p. 455—21.
Jonah, R. v., Ex parte Pugsley, 43, p. 166—210, 211, 643.
Jonah et al, Mutual Life Assurance Company of New York v., 1 Eq., p. 482—326, 365, 424.
Jones v. Brewer, 1 Eq., p. 630—102, 156, 627.
Jones et al v. James Burgess & Sons Ltd., 39, p. 603—110, 164, 321, 618.
Jones et al v. Burgess, 43, p. 126—143.
Jones et al v. Cushing, 39, p. 244—151, 687.
Jones, Ex parte, 35, p. 108—190, 197, 470.
Jones v. Hunter, 1 Eq., p. 250—274, 295, 485
Jones v. Miller, 37, p. 585—190, 726.
Jones v. McKear, 34, p. 44—3, 187.
Jones et al v. Russell, 1 Eq., p. 232—152, 608.
Jones Executor of Catherine Murdoch v. St. Stephen's Church et al., 4 Eq., p. 316,—191, 794, 794.
Jones et al v. Sullivan et al., 43, p. 208—239, 500, 581, 723.
Jordan et al v. Leonard et al, 36, p. 518—689.

K

Kay v. City of Moncton, 36, p. 202, 377—155, 162, 313, 473, 481, 481, 549, 563, 625.
Kay, Ex parte, In re Hogan et al, 39, p. 54—94, 678.
Kay, R. v.—See R. v. Kay.
Kay, Kerrison v., 2 Eq., p. 455—779.
Kearney, In re, 2 Eq., p. 264—292, 641.

Kearney et al, Jack v., 4 Eq., p. 415, (41, p. 293)—99, 356, 356, 372, 374, 398.
Keefe, Ex parte, R. v. Allingham, 41, p. 558—456.
Keerson, Ex parte, In re Merritt v. Keerson, 35, p. 233—43, 201.
Keerson, Ex parte, In re McClaskey v. Keerson, 35, p. 233—203.
Keith, King v., 1 Eq., p. 538—187, 273, 277, 530, 537, 538, 546.
Kelley v. Ayer, Executor etc., 41, p. 489—20, 23, 82, 324, 347, 592, 612, 620.
Kelley v. New Brunswick Railway Co., and Brown (No. 1), Eq. Cas., p. 442—11.
Kelly v. New Brunswick Railway Co., and Brown (No. 2), Eq. Cas., p. 442—11.
Kelly v New Brunswick Railway Co. and Brown, 1 Eq., p. 156—178, 181, 184.
Kelly v. Thompson et al., 35, p. 718—58, 205, 205.
Kenen v. Hill, 38, p. 342—17, 703.
Kennedy, Baxter v., 35, p. 179—316, 715, 707, 801.
Kennedy v. Cave et al., Eq. Cas., p. 242—394, 635.
Kennedy et al, Horn et al v., Eq. Cas., p. 311—181, 266, 307, 536, 536, 595.
Kennedy et al, Laine et al v., 43, p. 173—149, 336, 668, 802.
Kennedy, Lunt v., 37, p. 639—17, 208, 211, 484.
Kennedy v Nealis et al., 1 Eq., p. 455—187, 265, 546, 697.
Kennedy Administrator v. Slater, Administrator, 4 Eq., p. 339—198, 203, 640.
Kennedy Company v Vaughan, 37, p. 112—13, 83, 104, 638.
Kenredy David, In the matter of the estate of, 40, p. 437—291, 799.
Kennedy Island Mill Company v. McInerney, 36, p. 642—618, 742.
Kennedy Island Mill Company Limited v. Saint John Lumber Company, 38, p. 292—160, 616, 715.
Kenny v. Kenny et al, Eq. Cas., p. 301—351, 535.
Kerr v. Cunard et al, 42, p. 454—10, 526, 762, 763.
Kerr, Re, Ex parte Murchie, 42, p. 475—306, 516, 548.
Kerr et al, Seeley v., (4 Eq., p. 184, 261) 40, p. 8 (44 S. C. R., 623)—25, 411, 486, 567, 769, 771.
Kerrison v Kaye, 2 Eq., p 455—779
Keyes v Harington et al. Liquidators, 42, p. 190—127
Kierstead, Ex parte, Re Robertson an attorney, 38, p. 463—637, 703.
Killam, Alward et al v., Eq. Cas., p 360—384, 596, 630
Killam, Ex parte, 34, p 530—46, 243.
Kilpatrick, Smith v, 42, p 103—4, 764.
King (The) v.—See "Crown Cases."
King v Keith, 1 Eq., p 538—187, 273, 277, 530, 537, 538, 546
Kings, Municipality of—See "Municipality of Kings"
Kinnear et al, Mitchell et al v, 1 Eq, p. 427—187, 189, 539, 546
Kinnie, Ex parte, R v Borden, 42, p 641—43, p 299—16, 16, 48, 94, 186, 198, 653, 701, 702.
Kirkpatrick v Canadian Pacific Railway Co, 35, p. 598—259, 659.
Knowles, McLaughlin v., 41, p. 548—203, 495, 594, 596.

L

LaBelle v. McMillan, 34, p. 488—326, 478, 511.
LaForest, Babineau v., 37, p. 77, 156 (37 S. C. R. 521)—81, 627, 633.
Laine et al v. Kennedy et al., 43, p. 173—149, 336, 668, 802.
Lambert et al, Leveque v., 42, p. 336—285.
Lame v. Guerette et al., 1 Eq., p. 199—179, 403, 635, 686.
Landry v. Bathurst Lumber Co. Ltd., 44, p. 374—315, 508, 651.
Landry, Ex parte, R. v. Kay, 38, p. 332—227, 432, 433, 443, 443.
Landry, Ex parte, R. v. McQueen, 38, p. 48—211, 443, 472.
Landry Assignee etc. v. Sivret et al, 39, p. 356—259, 675, 741.
Lang v. Brown, 34, p 492—59, 248.
Lanteigne, Duguay v, 3 Eq., p 132—85, 269.
Lapoint, Furlotte et al v., 38, p. 140—300, 394, 618.
LaPorte Martin & Company v. LeBlanc, 40, p. 468—331, 460.
Larsen, Patterson v., 36, p. 4—8, 22, 156, 716.
Larsen, Patterson v., 37, p. 28—23, 201, 710.
Laughlan et al v. Prescott, 1 Eq., p. 342, 406—161, 241, 243, 282, 672.
LaVigne, Melanson v., 37, p. 539—246, 479, 506, 510.
Law, Ritchie v., 37, p. 36—173, 345, 603, 739.
Lawlor, Beamish v., 43, p. 426—7, 750, 755.
Lawlor, R. v., Ex parte Doyle, 44, p. 244—435, 438, 439, 444.
Lawlor, R. v., Ex parte Willis, 44, p. 347—445, 706.
Lawrence v. Lawrence, 42, p. 260—793.
Lawton Company Limited v. The Maritime Combination Rack Co. Ltd., 36, p. 604—9, 145, 742.
Lawton et al, Earle Trustee etc., of Lawton v., 4 Eq., p. 86, 92—780, 783.
Lawton v. Howe et al, Eq. Cas., p. 191—531, 671.
Lawton Infants, In re, 3 Eq., p. 279—396.
Lawton Saw Company Limited v. Machum, 2 Eq., p. 112, 191—184, 602, 607, 641.
Leahy, R. v., Ex parte Garland, 35, p. 509—90, 224.
LeBel, Ouillette v., 3 Eq., p. 205—85, 144, 319.
LeBell, R. v., Ex parte Farris, 39, p. 468—135, 231, 463, 555.
LeBell v. The Norwich Union Fire Insurance Society, 34, p. 515, (29 S. C. R. 470)—365, 415, 650, 654.
LeBlanc, Ex parte, 34, p. 88—218, 305, 437, 512,
LeBlanc, Ex parte, R. v. Kay, 38, p. 498—220, 233, 431, 437, 437, 475, 480.
LeBlanc, Ex parte, R. v. Kay, 39, p. 278—134, 548, 799.
LeBlanc, Ex parte, R. v. Kay, 41, p. 99—96, 447, 447.

LeBlanc v. LaPorte Martin Co., 40, p. 468—331, 460.
LeBlanc v. Lutz et al, 44, p. 398—77, 330, 612, 620.
LeBlanc v. Smith, 1 Eq., p. 57—178.
LeBlanc v. The Commercial Union Insurance Company, 35, p. 665—419, 767, 801.
LeBlanc v. The Covenant Mutual Benefit Association, 34, p. 444—132, 425, 622.
LeBlanc, Thibideau v., 3 Eq., p. 436—29, 61, 594, 642.
LeBlanc, Wood v., 2 Eq., p. 427—331, 412, 497.
LeBlanc, Wood v., 3 Eq., p. 146—404.
LeBlanc, Wood v., 36, p. 47—25, 30, 317, 317, 729, 731.
Legere, Ex parte, 34, p. 397—433, 436, 478.
Legere, Ex parte, R. v. Dugas, 43, p. 357—227, 234.
Legere, Ex parte, R. v. Kay, 37, p. 72—218, 437.
Legere, Ex parte, R. v. Kay, 38, p. 1—442.
Legere, Ex parte, R. v. Kay, 39, p. 129—437, 440.
Legere, Ex parte, R. v. McQueen, 38, p. 48—211, 443, 472.
Legere, In re, Ex parte Kay, 39, p. 54—94, 678.
Leighton, Ex parte, 33, p. 606—95, 644.
Leighton, Hale v., 36, p. 256—339, 732.
Leighton v. Hale, (3 Eq. 68), 37, p. 545—147, 602, 753.
Lemon v. Charlton Executor etc., 44, p. 476—333, 795, 795.
Lennon, Ex parte, R. v. Fraser, 36, p. 109—359, 359.
Leonard et al, Jordan et al v., 36, p. 518—689.
Leonard v. Leonard, 1 Eq., p. 576—293, 389, 392, 427, 796.
Levesque v. Lambert et al, 42, p. 336—285.
Levesque, Re, Ex parte Murchie, 42, p. 541—13, 659.
Lewin, Ex parte, R. v. Sharp, 35, p. 470—51, 565.
Lewin v. Lewin, 2 Eq., p. 477—777, 793.
Lewin v. Lewin, 36, p. 365—291, 393.
Lewin v. Wilson et al., Eq. Cas., p. 167 (11 A. C. 639)—84, 503, 527.
Lewis v. Lovely, 36, p. 345—458.
License Commissioners Madawaska, In re, Ex parte Desrosiers, 41, p. 395—458, 458.
License Commissioners Victoria County, In re, Ex parte Demmings, 37, p. 586—458, 459, 516.
Light, In re Harriet, 2 Eq., p. 96—635.
Light, In re Harriett, Eq. Cas., p. 392—766.
Likely, Duckett v., 44, p. 12—696, 696, 696.
Lilley et al, Nevers v., 4 Eq., p. 104—13, 257, 272, 408, 486, 590, 591, 801.
Limerick, R. v., Ex parte Dewar et al, 44, p. 233—15, 236, 445, 446, 480.
Lindsay, Ex parte, R. v. Marsh, 39, p. 119—238, 440, 441, 441, 800, 801.
Lirette v. The City of Moncton, 36, p. 475—263, 263, 558, 558, 579.
Liverpool and London and Globe Insurance Company, The, Perry v., 34, p. 380—414, 530.
Lizotte v. Temiscouata Ry. Co., 37, p. 397—19, 246, 252, 583.
Lloyd v. Adams, 37, p. 590—325, 728.
Lloyd, Cochran v., 42, p., 112—358, 580, 713, 738.
Lloyd, Fairweather v., 36, p. 548—26, 297, 772, 776.
Lloyd v. Fairweather, 37, p. 497—32, 470.
Lloyd v. Gillis, 37, p. 190—293, 498, 503.
Lloyd v. Girvan et al., Eq. Cas. p. 164—636.
Loasby v. The Home Circle et al., Eq. Cas p. 533—200, 395, 396, 425, 593.
Lockhart, Joiens v., 40, p. 455—21.
Lodge v. Calhoun, 3 Eq., p. 100—284.
Logan, Trustees of Calvin Church v., Eq. Cas., p. 221—107, 109, 109.
Loggie et al v. Montgomery (3 Eq. p. 238), 38, p. 112—276, 277, 296. 502.
Lombard v. The Dunbar Company, 4 Eq., p. 271—609.
Long v. Long, 44, p. 599—8, 214, 320.
Long v. The Phoenix Insurance Co., 34, p. 223—417, 421, 616.
Losier v. Mallay, 43, p. 364—83, 369, 621, 682.
Lounsbury (The) Co. Ltd., Gallant v., 44, p. 225—32, 369, 653, 688.
Lovely, Ex parte, 37, p. 589—457, 516.
Lovely, Lewis v., 36, p 345—458.
Lovitt, R. v., 37, p. 558 (1912 A. C. 212)—75, 705.
Lowerison et al., Carter v., 4 Eq., p. 10—290.
Lund, McCain Produce Co., v., 44, p. 243—79, 312.
Lunt v. Kennedy, 37, p. 639—17, 208, 211, 484.
Lunt v. Perley, 44, p. 439—6, 645, 656, 656, 657, 756.
Lutz et al, LeBlanc v., 44, p. 398—77, 330, 612, 620.
Lynch, The Southwest River Driving Co. v., 38, p. 242—157, 161, 362.
Lynch v. William Richards Co. Ltd., 37, p. 549—104, 104, 119, 623.
Lynch v. William Richards Co. Ltd., 38, p. 160—110, 157, 160, 362, 600.

Mac. & Mc.

MacAulay v. Johnson, Ex parte Isaacson, 37, p. 537—58.
MacDonald et al, MacRae v., Eq. Cas. p. 498, 531—636, 636, 636.
Machum, Lawton Saw Co. Ltd. v., 2 Eq., p. 112, 191—184, 602, 607, 641.
Mackintosh et al v. Bank of New Brunswick, 42, p. 152—73, 75, 313, 648.
MacLellan, Marsters v., Eq. Cas., p. 372—64, 278, 528.
MacMonagle v. Campbell, 35, p. 625—55, 640, 676.
MacMonagle v. Campbell, 36, p. 468—628, 677.
MacPherson, Fraser v., 34, p. 417—101, 174, 391.
MacPherson, Glasier et al v., 34, p. 206—399, 493.
MacPherson v. McLean et al, 34, p. 361—84, 147, 199, 366.
MacPherson v. Samet, 34, p. 559—48, 178, 202.

MacPherson, Wilmot v., 36, p. 327—32.
MacRae v. Brown, 36, p. 353—22, 176
MacRae v MacDonald et al, Eq Cas, p. 498, 531—636, 636, 636.
McAdam, Ex parte, R. v. Folkins, 43, p. 538—224, 238.
McAfee, In re Margaret, Eq. Cas., p. 438—292, 501.
McAlary et al., Robinson v., 4 Eq., 168—364, 492.
McAlister, The Norwich Union Fire Insurance Society v., 35, p. 691—367, 420, 571, 629.
McAllister, Alexander v., 34, p. 163—15, 304, 638, 678, 768.
McAllister v. Reid, 35, p. 390—303.
McAllister v. Johnson, 40, p. 73—49, 319 506, 511, 660, 749.
McAvity, Barclay v., (No. 1), Eq. Cas., p. 468—184, 631.
McAvity, Barclay v., (No. 2), 1 Eq., p. 1, 59, 146—183, 256, 465, 465, 609.
McBeath v. The Eastern Steamship Co., 39, p. 77—88, 582.
McCain Produce Company v. Lund, 44, p. 243—79, 312.
McCall Co. The, Culbert v., 40, p. 385—123, 160, 364, 618.
McCarthy, R. v., 38, p. 41—133, 568, 677.
McCatherin v. Jamer, 41, p. 367—382, 506.
McClaskey v. Keerson, In re 35, p. 233—43, 201.
McCleave, Ex parte, 35, p. 100—434, 435, 435, 436, 436.
McCleave, Ex parte, R. v. Kay, 38, p. 504—12, 233, 475.
McCleave v. The City of Moncton, 35, p. 296 (32 S. C. R. 106)—442, 586, 651, 652.
McCormack v. Gallagher, 44, p. 630—318, 386, 649.
McCormick, Ex parte, R. v. Hornbrook, 38, p. 358—233, 234, 236, 236, 449.
McCormick v. McCoskery, Eq. Cas., p. 332—363, 720.
McCorquindale, Ex parte, R. v. Haines et al, 39, p. 49—36, 96, 234.
McCoskery, McCormick v., Eq. Cas. p. 332—363, 722.
McCoy, Ex parte, 33, p. 605—432, 436, 438, 476.
McCoy, Ex parte, R. v. Marsh, 36, p. 186—448.
McCrea, Ex parte, R. v. Carleton, 38, p. 42—460.
McCrea v. The City of Saint John, 36, p. 144—550, 568, 582.
McCrea v. Watson, 37, p. 623—30, 380, 380, 450, 457.
McCutcheon v. Darrah, 37, p. 1—32, 636.
McDermott v. Oliver, 43, p. 533—320, 400.
McDonald, Aiton v., 2 Eq., p. 324—179, 193, 193, 194, 346, 346.
McDonald, Frank, and The Canadian Pacific Railway Co., The Canadian Bank of Commerce v., 44, p. 130—76, 599, 652, 669, 670.
McDonald et al v. Pinder, 42, p. 227—466.
McDonald, The Tobique Salmon Club v., 36, p. 589—268, 268, 299, 473, 672, 742.
McDonough v. The Telegraph Publishing Company of Saint John, 39, p. 515—507, 621.
McDougall v. The Campbellton Water Supply Co., 34, p. 467—14, 264, 488, 488, 559, 615, 724.
McDougal, Ex parte, R. v. Kay, 38, p. 1—442.
McDougall R. v., 39, p. 388—220, 222, 230, 279.
McDougall, R. v., Ex parte Goguen, 44, p. 369—50, 228, 451.
McEwen, Ex parte, R. v. Biggar et al, 37, p. 372—431, 476.
McGaffigan et al v. Ferguson et al., 4 Eq., p. 12—147, 275, 545.
McGaffigan v. The Willet Fruit Co. et al., 4 Eq., p. 353—275, 298, 388, 397.
McGaw by next friend v. Fisk, 38, p. 354—172, 395, 398, 507, 624, 686.
McGaw v. Fisk, 39, p. 1—Addenda.
McGivery et al., Golden et ux v., 4 Eq., p. 42—186, 283, 284.
McGivery, a Lunatic, In re, 3 Eq., p. 327—543.
McGivney, Read v., 36, p. 513—24, 203, 357, 585, 730.
McGoldrick, Ex parte, R. v. Wilson, 36, p. 339—95, 208, 209.
McGowan, Administratrix etc. v. Warner, 41, p. 524—327, 330, 573, 746.
McGrath v. Franke et al., Eq. Cas., p. 97—34.
McGregor v. Alexander, 2 Eq., p. 54—161, 166, 241, 752.
McGuire et al., Dyer v., 4 Eq., p. 203—374.
McGuire, Priest v., 43, p. 469—507.
McGuire, R. v., 34, p. 430—175, 209, 230, 693.
McGuire, R. v., 36, p. 609—215, 215.
McInerney, The Kennedy Island Mill Co. v., 36, p. 612—618, 742.
McIntosh v. Carritte, Eq. Cas., p. 406—407, 591, 591.
McIntosh v. Poirier et al., 44, p. 355—33.
McIntosh, Tozer v., 39, p. 550—24, 323, 522.
McIntyre, Ex parte, R. v. Dibblee, 39, p. 361—113, 438, 438, 448.
McIntyre, Ex parte, R. v. Holyoke, 42, p. 135—91, 432, 432, 438, 444, 476, 483, 518.
McIntyre v. White, 40, p. 591—314, 721.
McKane v. O'Brien, 40, p. 392—59, 430, 693, 751.
McKay v. The City of St. John, 38, p. 393—263, 558.
McKay, Winslowe v., (3 Eq. p. 84), 37, p. 213—274, 379.
McKean v. Colpitts, 39, p. 256—22, 435, 675.
McKean v. Dalhousie Lumber Co. Ltd., 40, p. 218—28, 112, 150, 154, 616.
McKean, Jones v., 34, p. 44—3, 187.
McKean v. Randolph et al., 39, p. 37—64, 710.
McKenzie v. McLeod et al., (4 Eq. p. 72), 39, p. 230—177, 179, 182, 195, 467, 538, 542, 543, 708.
McKinnon v. The McLaughlin Carriage Co. Ltd., 37, p. 3—380, 510.
McLatchy, R. v., Ex parte Antinori Fishing Club, 44, p. 402—95, 96, 210, 476.

McLatchy, R. v., Ex parte Gorman, 39, p. 374—376, 754.
McLaughlin v. Knowles, 41, p. 548—203, 495, 594, 596.
McLaughlin, Port Wardens of St. John v., 3 Eq., p. 175—568, 700.
McLaughlin v. Westell, 41, p. 193—23, 319.
McLaughlin (The) Carriage Co. Ltd., McKinnon v., 37, p. 3—380, 510.
McLaughlin v. Tompkins, 44, p. 249—157, 267, 268, 316, 543, 676, 708, 712.
McLaughlin (The) Carriage Co. Ltd. v. Quigg, 37, p. 86—120, 632.
McLean v. Green, 37, p. 204—631, 677.
McLean et al, MacPherson v., 34, p. 361—84, 147, 199, 366.
McLean, Shearer v., 36, p. 284—470, 625.
McLeary, Ex parte, R. v. Dugas, 43, p. 65—220, 455.
McLellan, Edgecombe v., 4 Eq., p. 1—177, 760.
McLeod, Cushing v., 2 Eq., p. 63—411, 694, 696, 696, 696.
McLeod, Ex parte, 34, p. 530—46, 243.
McLeod, Fleming v., 37, p. 630, (39 S. C. R. 200)—80, 82.
McLeod v. Gibson, 35, p. 376—179, 303.
McLeod et al., McKenzie v., (4 Eq., p. 72), 39, p. 230—177, 179, 182, 195, 467, 538, 542, 543, 708.
McLeod v. Municipality of Kings, 35, p. 163—133, 186, 229, 561.
McLeod et al. Trustees of Taylor, Taylor v., 4 Eq., p. 262—191, 203, 352, 792.
McLeod, Assignee of the Petitcodiac Lumber Co. v. Vroom et al., Eq. Cas., p. 131—68, 74, 98, 132.
McLeod v. Weldon, 1 Eq., p. 181—70, 335, 528, 540, 592.
McLeod v. White, 39, p. 32—748.
McManus, Walsh v., Eq. Cas., p. 86—193.
McManus et al., Donald v., 4 Eq., p. 390—158, 363, 754.
McMannamin v. R. Chestnut & Sons Ltd., 44, p. 571—803.
McMennamin v. Evans, 41, p. 481—71, 82, 648, 708.
McMillan, LaBelle v., 34, p. 488—326, 478, 511.
McNaughton, Ex parte, 34, p. 397—433, 436, 478.
McNaughton, Van Buskirk v., 34, p. 125—162.
McNeil et al., Rundle v., 38, p. 406—299, 498.
McNichol v. Ryan (1 Eq., 487), 34, p. 391—163, 491, 521, 768.
McPherson v. Glasier, 1 Eq., p. 649—192, 704
McPherson v. Moody, 35, p. 51—103, 139, 744.
McQuarrie, R. v., Ex parte Giberson, 39, p. 367, 371—232, 235, 236, 453, 462.
McQuarrie, R. v., Ex parte Giberson, 40, p. 1—231, 231, 473, 479.
McQuarrie, R. v., Ex parte Rogers, 36, p. 39—235, 459, 459.
McQuarrie, R. v., Ex parte Rogers, 37, p. 374—461, 519, 802.
McQueen, Gallagher v., 35, p. 198—161, 288, 494.
McQueen, R. v., Ex parte Landry, Ex parte Legere, 38, p. 48—211, 443, 472.
McRae v. Crawford, 39, p. 454—See Poirier v. Crawford.
McSweeney, Ex parte, 34, p. 397—433, 436, 478.
McWilliams, Irving v., 1 Eq., p. 217—161, 162, 241.
McVey et al., Rainsford v., 40, p. 381—195.

M

Madder, Ex parte, R. v. Hornbrook, 38, p. 358—233, 234, 236, 236, 449.
Maddison, Emmerson v., 36, p. 260 (1906 A. C. 569)—240, 496.
Mail (The) Publishing Co. Ltd., Murchie v., 42, p. 36,—153, 186, 317.
Malcolm, Henry v., 39, p. 74—264, 670, 802, 803, 804.
Malcolm, Maxwell v., 33, p. 595—182.
Malcolm, Simpson v., 43, p. 79—320, 321, 325, 333, 334, 634, 738.
Mallay, Lozier v., 43, p. 364—83, 369, 621, 682.
Malone, Renehan v., 1 Eq., p. 506—788.
Manchester, R. v., 38, p. 424—491, 554.
Manchester et al. v. White et al., Eq. Cas. p. 59—179, 634.
Mann v. The St. Croix Paper Co., 41, p. 199—338, 429, 710.
Manzer, In re estate of Benjamin B., deceased, 42, p. 251—33, 349.
Manzer, Moores v., 36, p. 205—3, 288, 289, 493, 495.
March, R. v., Ex parte Washington, 41, p. 419—135, 223, 494.
Maritime Combination Rack Co. Ltd., The Lawton Co. Ltd. v., 36, p. 604—9, 145, 742.
Maritime (The) Dairy Co. Ltd., The Empire Cream Separator Co. Ltd. v., 38, p. 309—123, 618, 641, 655, 687.
Maritime (The) Sulphite Fibre Co. Ltd., Bank of Montreal v., 2 Eq., p. 328—117, 126, 130, 466, 670.
Maritime (The) Wrapper Co. Ltd., Colonial Bleaching and Printing Co. Ltd. v., 35, p. 676—16, 29, 67, 466, 469.
Maritime (The) Wrapper Co. Limited, Dominion Cotton Mills Company Ltd. v., 35, p. 676—16, 29, 67, 466, 469.
Maritime Wrapper Co., In the matter of, 35, p. 682—129, 718.
Markey v. Sloat et al., 41, p. 235—12, 53, 246, 510, 512, 555, 738.
Marsh, R. v., Ex parte Belyea, Ex parte Lindsay, 39, p. 119—238, 440, 441, 441, 880, 801.
Marsh, R. v., Ex parte McCoy, 36, p. 186—448.
Marsh, R. v., Ex parte Walker, 39, p. 329—243, 435.
Marsters v. MacLellan et al., Eq. Cas., p. 372—64, 278, 528.
Martin, Ex parte, 34, p. 142—51.
Martin, Ex parte, R. v. Matheson, 41, p. 187—461.
Martin v. Martin, 1 Eq., p. 515—606.
Martin, R. v., 36, p. 448—135, 696.
Martin, Violette v., 35, p. 74—195.
Massey-Harris Co. Ltd. v. Merrithew, 39, p. 544—323, 329, 612, 654, 740.

Massey-Harris Co. v. Stairs, 34, p. 595—194, 207.
Massey-Harris Co. v. Young, 37, p. 107—287, 495, 533.
Masters v. Masters, 2 Eq., p. 486—180, 185.
Matheson, R. v., Ex parte Belliveau, 40, p. 368—227, 233.
Matheson, R. v., Ex parte Guimond, 41, p. 581—225, 459, 459.
Matheson, R. v., Ex parte Martin, 41, p. 187—461.
Matheson, R. v., Ex parte Shilala, 41, p. 286—232, 453, 461.
Maxwell, Ex parte, R. v. The Assessors for the City of Fredericton, 44, p. 563—55, 90, 562.
Maxwell v. Malcolm, 33, p. 595—182.
May v. Sievewright, Eq. Cas. p. 499—69, 267, 525, 532.
Mayberry et al. v. Hunt et al., 34, p. 628—160, 610.
Mayes v. Connolly, 35, p. 701—151, 428.
Mayor et al. of Chatham, Henrietta B. Byrne v., 44, p. 271—56, 315, 389.
Mayor, Aldermen and Commonalty of the City of St. John—*See* "City of St. John".
Meagher v. The Canadian Pacific Rwy. Co., 42, p. 46—177, 464, 500, 659, 669.
Melanson, Barthelotte v., 35, p. 652—85.
Melanson, Ex parte, 39, p. 8—14, 95, 678.
Melanson, Ex parte, R. v. Kay, 38, p. 362, 498—96, 220, 233, 431, 437, 437, 447, 475, 480.
Melanson v. LaVigne, 37, p. 539—246, 479, 506, 510.
Melanson, R. v., Ex parte Bertin, 36, p. 577—92, 381, 460.
Mellon v. Municipality of Kings, 35, p. 153, 291—509, 585.
Merrithew, Massey Harris Co. Ltd. v., 39, p. 544—323, 329, 612, 654. 740.
Merritt v. Chesley et al., Eq. Cas., p. 324—407, 563, 600, 600, 752.
Merritt, In re, v. Keerson, 35, p. 233—203.
Merritt, In re, v. St. John Ry. Co., 42, p. 667—37, 679, 804.
Merritt's Trusts, In re Charles, 1 Eq., p. 425—190, 752.
Mersereau v. Swim, 42, p. 497—239, 311, 497, 498, 501.
Michaud, Ex parte, 34, p. 123—451, 477.
Michaud, R. v., 39, p. 418—217, 225.
Miles Bros. Inc. v. Bell, 40, p. 158—317, 619, 729.
Miles v. Rogers, 36, p. 345—458.
Miller, Attorney-General v., 2 Eq. p. 28—409, 659, 698.
Miller et al., Blue v., 43, p. 307—614, 711, 731.
Miller, Clark v., 35, p. 42—629.
Miller v. Cronkhite, 2 Eq., p. 51, 203—268, 296, 384, 596.
Miller, Ex parte, 34, p. 5—44, 344.
Miller, Ex parte, 34, p. 318—515, 690, 802.
Miller v. Gunter, 36, p. 330—23, 510, 643.
Miller, Jones v., 37, p. 585—190, 726.
Miller, Robertson v., 2 Eq., p. 494—183, 466, 466, 466, 469.
Miller, Robertson v., 3 Eq., p. 78—24, 262.
Miller, Robertson v., 35, p. 686—25, 298, 497.
Miller et al. v. Rundle et al., 41, p. 591—272, 747.
Milligan v. Crockett, 36, p. 351—741.
Mills v. Pallin, 1 Eq., p. 601—70, 191, 351.
Mills, R. v., Ex parte Coffon, 37, p. 122—234, 236, 449, 449.
Milmore v. The Town of Woodstock, 38 p. 133—271, 324, 722, 728.
Mineral (The) Products Company et al. v. The Continental Trusts Co. (3 Eq., p. 28), 37, p. 140—119, 131, 344, 345, 524, 529, 531, 546.
Miramichi Pulp and Paper Co. Ltd., Murray et al Exec. v., 39, p. 44—572, 625.
Miranda, Ex parte, R. v., Davis, 42, p. 338—456.
Mitchell v. Davis, 39, p. 486—675, 675.
Mitchell, Ex parte, R. v. Nickerson, 39, p. 316—450.
Mitchell et al. v. Kinnear et al., 1 Eq., p. 427—187, 189, 539, 546.
Mitten, Ex parte, R. v. Cahill, 35, p. 240—88, 439, 444, 655.
Mitten v. Wright et al. (1 Eq. 171), 34, p. 14—260, 260. 315, 386, 502, 771.
Moekler et al., Turner v., 36, p. 245—183, 561, 600.
Monahan, Ex parte, R. v. Alexander 39, p. 430—207, 231, 233, 433, 442.
Monahan, Ex parte, R. v. Hubbard, 42, p. 524—439.
Moncton—*See* "City of Moncton"
Moncton Hospital et al., Murphy v., 44, p 464, 585—108, 112.
Montgomery, Hegan v., 1 Eq., p. 247—285, 286.
Montgomery, Loggie v. (3 Eq. p. 238), 38, p. 112—276, 277, 296, 502.
Montgomery et al., Phillips v., 43, p. 229—240, 342, 721, 736.
Montreal, Bank of—*See* "Bank of Montreal"
Moody, McPherson v., 35, p. 51—103, 139, 744.
Mooers v. Manzer, 36, p. 205—3, 288, 289, 493, 495.
Moore, Black v., 2 Eq., p. 98—131, 319, 370, 370, 376, 670.
Moore et al. v. The Canadian Fairbanks Co. Ltd., 41, p. 485—29, 615, 687.
Moore v. Cunningham, 1 Eq., p. 116—85, 155, 757.
Moore v. Moore, 1 Eq., p. 204—342, 397, 753.
Moore et al., Woodstock Woolen Mills Co. Ltd. v., 34, p. 475 (29 S. C. R. 627)—311, 339, 487, 771, 772.
Moran v. O'Regan, 38, p. 189, 399—278, 280, 281, 328, 624, 728.
Morehouse v. Bailey, 1 Eq., p. 393—251, 404.
Morneault, Ex parte, R. v. Plant, 37, p. 500—134, 455, 457, 457, 472, 477.
Morrell, The Gault Bros. Co. Ltd. v., 3 Eq., p. 123, 173, 453—62, 65, 99, 410, 466, 467, 598, 684.
Morrisey et al., Potter v., 35, p. 465—78, 80, 362.
Morrison v. Bishop of Fredericton et al., 4 Eq., p. 162—334, 782, 782, 789.
Morrison, Ex parte, R. v. Hornbrook, 39, p. 298—438.

Morrison et al. v. Municipality of Kings, 35, p. 163—133, 186, 229, 561.
Morrow et al., The Peoples Bank v., Eq. Cas., p. 257—354, 354, 594.
Moses et al. v. French et al., 43, p. 1—166, 637, 763.
Municipality of Gloucester, Grimmer v., 35, p. 255 (32 S. CR. 305)—117, 311, 514, 552.
Municipality of Kings, McLeod et al. v., 35, p. 163—133, 186, 229, 561.
Municipality of Kings, Mellon v., 35, p. 153, 291—509, 585.
Municipality of Kings, Morrison et al. v., 35, p. 163—133, 186, 229, 561.
Municipality of Restigouche, R. v., Ex parte Archibald Murchie, 42, p. 540—565.
Municipality of Restigouche, R. v., Ex parte Murchie, 42, p. 529—93, 459, 561.
Municipality of Restigouche, R. v., Ex parte Murchie, 43, p. 115—555.
Municipality of The City and County of St. John v. The Board of Valuators for The City and County of St. John, 43, p. 369—52, 679.
Municipality of Victoria, Currey v., 35, p. 605—247, 357, 362, 549.
Municipality of York, Ex parte, Re Local Board of Health, 37, p. 546—114, 198, 565.
Municipality of York, City of Fredericton v., 1 Eq., p. 556—272, 554, 591.
Munroe et al, Barnaby v., 1 Eq., p. 94—176, 176, 196, 533, 593, 595, 617, 617, 647.
Murchie, Ex parte, Re Kerr, 42, p. 475—306, 516, 548.
Murchie, Ex parte, Re Levesque, 42, p. 541—13, 659.
Murchie, Ex parte, R. v. The Municipality of Restigouche, 42, p. 529—93, 459, 561.
Murchie, Ex parte, R. v. Municipality of Restigouche, 43, p. 115—555.
Murchie, Ex parte Archibald, R. v. Municipality of Restigouche, 42, p. 540—565.
Murchie et al. v. Fraser et al., 36, p. 161—37, 369, 693, 716.
Murchie v. The Mail Publishing Co. Ltd., 42, p. 36—153, 186, 317.
Murchie v. Theriault, 1 Eq., p. 588—131, 385, 538, 543, 672, 673.
Murphy v. Dundas, 38, p. 563—51, 247, 325, 730.
Murphy v. Moncton Hospital et al., 44, p. 464, 585—108, 112.
Murray, Ayer v., 39 p. 170—82, 317, 767.
Murray et al, Exec. etc. v. Miramichi Pulp and Paper Co. Ltd., 39, p. 44—572, 625.
Murray, R. v., Ex parte Copp, 40, p. 289—227, 440, 767.
Murray, R. v., Ex parte Damboise, 39, p. 265—90, 452.
Mutual (The) Life Assurance Company of New York v. Anderson et al., 1 Eq., p. 466—164, 366, 366, 424, 424, 427.
Mutual (The) Life Assurance Company of New York v. Jonah et al., 1 Eq., p. 482—326, 365, 424.
Myers, Gamblin v., 42, p. 280—614.
Myles, Dugay v., 42, p. 265—507, 729, 729.
Myshrall, R. v., 35, p. 507—219, 237, 732.

N

Nadeau, Ex parte, 42, p. 473—548, 659.
Nadeau v. Theriault, 37, p. 498—728, 729.
Nason, The Canadian Pacific Railway Company v., 3 Eq., p. 476—400, 430.
Nason v. Wilmot, 35, p. 457—303.
National Transcontinental Railway, In re, Ex parte Bouchard, 38, p. 346—38, 663.
Nealis v. Jack, Eq., Cas., p. 426—389, 779.
Nealis et al, Kennedy, v. 1 Eq., p. 455—187, 265, 546, 697.
Neil, Balmain et al. v., 41, p. 429—23, 24, 465, 621, 682.
Nepisiguit Lumber Co. Ltd., Good et al. v., 41, p. 57—127, 127, 672, 717.
Nepisiguit Lumber Co. Ltd., Harrison Trustee etc., v., 41, p. 1—68, 68, 115, 118, 123, 127, 127, 129, 686.
Nepisiguit Lumber Co. Ltd., The Bathurst Lumber Company v., 41, p. 41—83, 127, 714.
Nepisiguit Real Estate and Fishing Co. Ltd., 42, p. 387—240, 360, 409, 524, 770.
Nevers v. Lilley et al, 4 Eq., p. 104—13, 257, 272, 408, 486, 590, 591, 801.
New Brunswick and P. E. I. Railway Co., Wentzell Adm v. The, 43, p. 475—11, 331, 572, 576, 583, 587, 804.
New Brunswick Coal and Railway Company et al., Pugsley v., (4 Eq., p. 327), 40, p. 515—5, 121, 655.
New Brunswick Construction Company, Ross v., 43, p. 291—389, 610
New Brunswick Railway Act, In re, 43, p. 188—666.
New Brunswick Railway Co. & Brown v. Kelly, Eq. Cas., p. 442—11.
New Brunswick Railway Co. & Brown, v. Kelly, 1 Eq., p. 156—178, 181, 184.
New Brunswick Railway Company, Canadian Pacific Railway Company, and Saint John and Maine Railway Company, Western Union Telegraph Company v., Eq. Cas., p. 338 (17 S. C. R. 152)—124, 136, 158, 163, 707.
New Cumberland Telephone Company Limited v. Central Telephone Co. Limited, 3 Eq., p. 385—119, 153, 707.
Nicholson v. Baird, Eq. Cas., p. 195—8, 70, 213, 213.
Nicholson v. Reid, 1 Eq., p. 607—181, 266, 536.
Nickerson, R. v., Ex parte Mitchell, 39, p. 316—450.
Nickerson, R. v., Ex parte O'Regan, 39, p. 428—438.
Nickerson, R. v., Ex parte Weston, 40, p. 382—445.
Nixon v. Currey et al., 4 Eq., p. 153—323, 531, 541, 610.
Norton, Robertson v., 44, p. 49—79, 680, 689, 689, 739.
Norwich Union Fire Insurance Society (The), LeBell v., 34, p. 515 (29 S. C. R. 470) 365, 415, 650, 654.
Norwich Union Fire Insurance Society (The) v. McAlister, 35, p. 691—367, 420, 571, 629.

Nova Scotia, Bank of—*See* "Bank of Nova Scotia."

Nugent, Ex parte, R. v. Kay, 39, p. 135—436, 433.

Nugent v. Welsh, 1 Eq., p. 240, 335—352, 383, 596, 613, 641, 645, 719.

Nugent, Winslow v., 36, p. 356—302, 312, 758.

O

O'Brien v. Corbett, 41, p. 284—28, 581, 772.

O'Brien, McKane v., 40, p. 392—59, 430, 693, 751.

O'Brien, R. v., Ex parte Doucet, 43, p. 361—232.

O'Brien, R. v., Ex parte Grey, 37, p. 604—91, 92, 178, 232.

O'Brien, R. v., Ex parte Roy, 38, p. 109—91, 97, 499, 772.

O'Connell, Porter v., 43, p. 458, 611—35, 571, 578, 584, 588, 637, 733, 736.

Ogden v. Anderson et al., Eq. Cas., p. 395—307, 597, 631.

Ogden, Hicks v., 35, p. 361—36, 178, 633, 726.

Olcott, Ex parte, R. v. Wilkinson, 35, p. 538—55, 94, 651, 678.

O'Leary, Gallant v., 38, p. 395—21, 251.

Oliver, McDermott v., 43, p. 533—320, 400.

Oliver, Vernon v., Eq. Cas., p. 179 (23 N. B. R. 392; 11 S. C. R. 156)—592, 613, 639.

Olsen v. Goodwin, 43, p. 449—716, 716.

O'Neil, Ex parte, R. v. Peck, 40, p. 339—431, 435, 450, 479.

O'Neill, Gallagher v., 34, p. 194—188, 281.

Orchard v. Dykeman, 43, p. 181—6, 166, 518, 604.

O'Regan, Ex parte, R. v. Dibblee, 39, p. 378—148.

O'Regan, Ex parte, R. v. Nickerson, 39, p. 428—438.

O'Regan, Moran v., 38, p. 189, 399—278, 280, 281, 328, 624, 728.

O'Regan v. The Canadian Pacific Railway Co., 41, p. 347—26, 340, 587, 588.

Ouelette v. Albert, 42, p. 254—99, 372.

Ouellet v. Jalbert, 43, p. 599—239, 241, 500, 500, 721.

Ouillette v. LeBel, 3 Eq., p. 205—85, 144, 319.

Ouillette, Souci v., 37, p. 393—179, 299, 731, 758.

Overseers Parish of Stanley, Irvine v., 37, p. 572—114, 522, 564, 651, 745.

Owens v. Upham, 39, p. 198, 281, 344—195, 195, 303, 304, 304, 467, 644, 718, 718, 800, 800.

P

Pacific (The) Coast Fire Insurance Company v. Hicks, 42, p. 294—11, 124, 422.

Pallen, Ex parte, R. v. Hennessy et al., 38, p. 103—15, 94, 440.

Pallin, Mills v., 1 Eq., p. 601—70, 191, 351.

Palmer v. Palmer, 42, p. 23—321, 327, 393, 753.

Pankhurst v. Smith, 44, p. 279—37, 574, 804.

Papageorgiouv v. Turner, 37, p. 449—18, 27, 28, 132, 135, 213, 320, 430, 507.

Parker, Vaughan v., 43, p. 442—293.

Parks v. Parks et al., Eq. Cas., p. 382—205, 346, 788, 798.

Parks (Wm.) & Sons Ltd. et al., Weldon et al v., Eq. Cas., p. 418, 433—29, 34, 118, 121.

Partington v. Cushing 3 Eq., p. 322—176, 636.

Patchell, Ex parte, 34, p. 258—42, 441, 523.

Patchell v. The Colonial Investment and Loan Co., 3 Eq., p. 429—29, 546.

Patchell v. The Colonial Investment and Loan Co., 38, p. 339—468, 541.

Patterson v. Bowmaster, 37, p. 4—167, 391, 717.

Patterson, Ex parte, R. v. Straton, 37, p. 376—17, 43, 44, 45, 48, 643.

Patterson v. Larsen, 36, p. 4—8, 22, 156, 716.

Patterson v. Larsen, 37, p. 28—23, 201, 710.

Patterson v. Patterson, 3 Eq., p. 106—185, 307, 504.

Patterson, Watson v., 2 Eq., p. 488—181, 262, 412, 715, 769.

Patrick v. Empire Coal & Tramway Co., 3 Eq., p. 571—114, 119.

Paulin, Ex parte, R. v. Dugas, 43, p. 58—454.

Paulin, Godefroi v., 1 Eq., p. 568—636.

Payson v. The Equity Fire Insurance Co., 38, p. 436—160, 418, 419.

Peck, Ex parte, 33, p. 623—104, 304, 375.

Peck, Ex parte, 39, p. 274—221, 472, 515.

Peck, Ex parte, In re Stuart, 39, p. 131—476, 515.

Peck et al., Gaskin v., Eq. Cas., p. 40—387.

Peck v. Peck et al., 35, p. 484—328, 507, 510, 511, 511, 728.

Peck, R. v., Ex parte Beal, 40, p. 320—431, 435, 479.

Peck, R. v., Ex parte O'Neill, 40, p. 339—431, 435, 450, 479.

Pelletier, Poitras v., 38, p. 63—374.

Penery v. Hanson, 2 Eq., p. 233—199, 608, 694.

Peoples Bank of Halifax, Dugal v., 34, p. 581—87, 577, 587.

Peoples Bank of Halifax v. Estey, 36, p. 169 (34 S. C. R. 429)—73, 313, 650, 683.

Peoples (The) Bank of Halifax, Hale v., 2 Eq., p. 433—75, 607, 714.

Peoples (The) Bank v. Morrow et al., Eq. Cas., p. 257—354, 354, 594.

Perley, Lunt v., 44, p. 439—6, 645, 656, 656, 657, 756.

Perry v. The Liverpool & London & Globe Ins. Co'y, 34, p 380—414, 530.

Perry, Thorne v., (2 Eq. 146), 35, p. 398—378.

Perry, Thorne v., 2 Eq., p. 276—7, 47, 49, 136, 637.

Peters v. Agricultural Society, District No. 34, 3 Eq., p. 127—159, 649.

Petit, The Town of Grand Falls v., 34, p. 355—302, 560, 601.

Petropolous v. F. E. Williams Co. Ltd. et al., (3 Eq. 267, 346), 38, p. 146—10, 48, 49, 98, 198, 201, 265, 294, 638, 689.

Phillips v. Montgomery et al., 43, p. 229—240, 342, 721, 736.

Phillips v. Phillips, 34, p. 312—251, 309, 357, 500, 594.

Phillips v. Phillips et al, 4 Eq., p. 115—222, 292, 386.
Phillips, R. v., 35, p. 393—383, 553.
Phoenix (The) Insurance Company, Long v., 34, p. 223—417, 421, 616.
Pick v. Edwards, 3 Eq., p. 410—484, 505, 750.
Pick v. Edwards et al., 4 Eq., p. 151—184, 284.
Pinder v. Cronkhite, 34, p. 498—41, 82, 733.
Pinder, McDonald et al. v., 42, p. 227—466.
Plant, R. v., Ex parte Morneault, Ex parte Tardiff, 37, p. 500—134, 455, 457, 457, 472, 477.
Poirier v. Blanchard, 1 Eq., p. 322, 605—16, 137, 360, 399, 404.
Poirier v. Crawford, 39, p. 444—12, 556, 748.
Poirier et al., McIntosh v., 44, p. 355—33
Poitras v. Pelletier, 38, p. 63—374
Poitras v. R., on the information of Wilson, 39, p. 323—457.
Pond et al, Campbell v., 44, p. 357—11, 771, 775, 775.
Pond, Duke v., 37, p. 138—203, 625.
Pope et al, Attorney General of N. B., v., Eq. Cas. p. 272—408, 590, 662, 774.
Pope et al, Pugsley v., 4 Eq., p. 122—2, 140, 152, 156, 483, 607.
Port Wardens of Saint John v. McLaughlin, 3 Eq., p. 175—568, 700.
Porter v. Brown, 36, p. 585—302, 748.
Porter, Ex parte, R. v. Straton, 36, p. 388—43.
Porter v. O'Connell, 43, p. 458, 611—35, 571, 578, 584, 588, 637, 733, 736.
Porter, Purdy v., 38, p. 465 (41 S. C. R. 471)—38, 301, 490, 618
Porter, Rogers v., 37, p 235—206, 294, 313, 363
Porter v Rogers, 42, p. 82—189, 335, 762, 763.
Porter et al. v. Tibbits, 37, p. 25—251, 742.
Portland Rolling Mills Co. Limited et al. v. Farrell, (3 Eq., p. 508), 38, p. 364 (40 S. C. R. 339)—111, 113, 343, 367, 483, 648.
Potter et al. v. Creaghan et al., 35, p. 465—78, 80, 362.
Potts, Ring v., 36, p. 42—57, 364, 645.
Pratt v. The Consolidated Electric Co'y, 34, p. 23, 35, 334—116, 178, 178, 196.
Prescott v. Garland, 34, p. 291—83, 683.
Prescott et al., Laughlan et al. v., 1 Eq., p. 342, 406—161, 241, 243, 282, 672.
Prescott (The) Lumber Co'y Ltd., Jardine et al. v., 44, p. 505—169, 327, 647.
Price, Re Goods of, Eq. Cas., p. 429—790.
Price v. Wright, 35, p. 26—20, 250, 734.
Priest v. McGuire, 43, p. 469—507.
Pugsley v. Bruce, (4 Eq. 327) 40, p. 515—599.
Pugsley, Ex parte, R. v. Jonah, 43, p. 166—210, 211, 643.
Pugsley v. Fowler and Pope et al., 4 Eq., p. 122—2, 140, 152, 156, 483, 607.
Pugsley v. The New Brunswick Coal and Railway Company et al., (4 Eq., p. 327) 40, p. 515—5, 121, 655.
Purdy v. Porter, 38, p. 465 (41 S. C. R. 471)—38, 301, 490, 618.
Purtle v. Heney, 33, p. 607—172, 686, 688.

Q

Queen v.—See "Crown Cases" after "Y."
Quigg, The McLaughlin Carriage Co. Ltd. v., 37, p. 86—120, 632.
Quigley, Shields v., 1 Eq., p. 154'178, 185, 307.
Quinlan et al. v. The City of Saint John, 40, p. 541 (46 S. C. R. 101)—489.

R

Rainsford v. McVey et al., 40, p. 381—195
Ramsey v. Ramsey, 2 Eq., p. 179—308, 504.
Randolph v. Randolph, (3 Eq., p. 576) 39, p. 37—61, 64, 66, 75, 421, 492, 710.
Rawlins et al., Worden et al. v., 1 Eq., p. 450—188, 702.
Raynes et al., Armstrong v., Eq. Cas., p. 144—720.
Rayworth, Ex parte, 34, p. 74—177, 434.
Read v. McGivney, 36, p. 513—24, 203, 357, 585, 730.
Ready, Underfeed Stoker Co. Ltd. v., 37, p. 505—10, 178, 614, 632, 683, 745, 768.
Reardon, In re, v. Saint John & Quebec Railway Co., Ex parte Shea, 42, p. 244—528, 665.
Receiver General of New Brunswick, The, v. Buttimer et al., Executors etc., 39, p. 312—704, 705.
Receiver General of New Brunswick v. Hayward, 35, p. 453—705.
Receiver General of the Province of New Brunswick v. Rosborough etc. of Walker, 43, p. 258—135, 705, 705, 706.
Receiver General of New Brunswick v. Schofield et al., 35, p. 67—342, 706.
Record Foundry and Machine Co., Bourque v., 38, p. 239—190, 195, 747.
Rector, Church Wardens and Vestry of Christ Church in the Parish of Fredericton, Bliss v., Eq. Cas., p. 314—105, 273, 750.
Reid, Duffy v., 44, p. 407—728, 733.
Reid, Ex parte, 34, p. 133—76.
Reid, McAllister v., 35, p. 390—303.
Reid, Nicholson v., 1 Eq., p. 607—181, 266, 536.
Rex (or Regina) v.—See "Crown Cases" after "Y."
Renehan v. Malone, 1 Eq., p. 506—788.
Restigouche Salmon Club, Ex parte, R. v. Wilkinson, 35, p. 538—55, 94, 651, 678.
Rhodes Curry Co. Ltd., F. E. Sayre Co. Ltd. v., 39, p. 150—28, 681, 709.
Richard, Ex parte, R. v. Steeves, 42, p. 596—192, 382, 433, 434, 442.
Richards Co. Ltd., William, Lynch v., 37, p. 549—104, 104, 119, 623.
Richards Co. Ltd. W., Lynch v., 38, p. 160—110, 157, 160, 362, 600.
Richards Company Limited, William, v. Saunders, 2 Eq., p. 303—199, 260, 262, 405, 406, 406, 597, 769.
Richards Company Limited, William, v. Winslow, 3 Eq., p. 481—165, 165, 756.
Richardson v. Jackson (1 Eq., p. 325), 34, p. 301—86, 536, 538.
Ricker v. Gross et al., R. v. Gerow, 43, p. 352—34, 189, 193, 702.
Rideout v. Howlett, 42, p. 200—20, 775.

Rideout v. Tibbits, 36, p. 281—172, 264, 344.
Ring v. Potts, 36 p. 42—57, 364, 645.
Ringuette v. Hebert et al, 37, p. 68—289, 330, 493, 495.
Ritchie v. Law, 37, p. 36—173, 345, 603, 739.
Ritchie, R. v., Ex parte Blaine, 37, p. 213—238, 457, 800.
Ritchie, R. v., Ex parte Jack, 35, p. 581—565.
Ritchie, R. v.. Ex parte Sandall, 37, p. 206—95, 96, 232, 678.
Roach, Underwood v., 39, p. 27—279.
Roberts v. Howe, 1 Eq., p. 139—178, 616.
Robertson v. Appleby et al., Eq. Cas., p. 502—104, 558.
Robertson et al., Armstrong v., Eq. Cas., p. 249—5, 199.
Robertson v. Bank of Montreal et al., Eq. Cas., p. 541—70, 364, 405, 415, 415, 637.
Robertson, Fairweather v., 2 Eq., p. 412 (36, p. 548)—26, 297, 772, 776.
Robertson et al. v. Fairweather, 37, p. 497—32, 470.
Robertson v. Miller, 2 Eq., p. 494—183, 466, 466, 466, 469.
Robertson v. Miller, 3 Eq., p. 78—24, 262.
Robertson v. Miller, 35, p. 686—25, 298, 497.
Robertson v. Norton, 44, p. 49—79, 680, 689, 689, 739.
Robertson et al, Smith et al. Trustees of Robertson v., 4 Eq., p. 139, 252—756, 780, 786, 800, 801.
Robertson v. The Saint John City Railway and John B. Zebley, Eq. Cas., p. 462, 476—14, 35, 124, 286, 286.
Robertson v. Thorpe et al., Eq. Cas., p. 541—70, 364, 405, 415, 415, 637.
Robertson v. Trustees of School District No. 2 Parish of Durham, 34, p. 103—119, 141, 692.
Robertson, Re, an Attorney, Ex parte Kierstead, 38, p. 463—637, 703.
Robin Collas & Co. Limited v. Theriault, 3 Eq., p 14—241, 673, 673, 674.
Robinson, Boyne v., 3 Eq., p. 57—182, 537, 638.
Robinson v. Estabrooks and McAulay, 4 Eq., p. 168—364, 492
Robinson, by Next Friend v. Haley et al, 42, p. 657—317, 571, 634, 736, 738..
Robinson et al., Shaw, et al. v., (4 Eq., p. 286) 40, p. 473—28, 276, 523, 754.
Robinson v. The Board of School Trustees of Saint John, 34, p. 503—115, 552, 588, 690.
Rogers, Carroll v., 2 Eq., p. 159—277, 674, 703, 765.
Rogers v. Dunbar, 37, p. 33—203, 614, 639, 640.
Rogers, Ex parte, R. v., McQuarrie, 36, p. 39—235, 459, 459.
Rogers, Ex parte, R. v. McQuarrie, 37, p. 374—461, 519, 802.
Rogers, Ex parte, R. v. Wilkinson, 35, p. 538—55, 94, 651, 678.
Rogers, Miles v., 36, p. 345—458.
Rogers v. Porter, 37, p. 235—206, 294, 313, 363.
Rogers, Porter v., 42, p. 82—189, 335, 762, 763.
Rogers, R. v., 36, p. 1—219, 231, 310.
Rogers v. Trustees of School District No. 2 of Bathurst, 1 Eq., p. 266—600, 600, 691.
Rolsten v. The City of Saint John, 36, p. 574—581, 627, 773.
Rolston v. Jamer, 41, p. 367—382, 506.
Roman Catholic Bishop of St. John et al v. Corporation of Brothers of the Christian Schools, Eq. Cas., p. 103—200, 409.
Roman Catholic Bishop of Saint John, Travers v., (2 Eq., p. 372), 36, p. 229, (34 S. C. R., 419)—783, 789.
Rosborough et al v. Trustees of St. Andrews Church et al, 44, p. 153—791, 798.
Rosborough Executor etc., The Receiver General of N. B. v., 43, p. 258—135, 705, 705, 706.
Rose v. The City of Saint John, 37, p. 58—13, 245, 560, 630.
Rose v. Saint George Pulp and Paper Co. Ltd., 37, p. 247 (37 S. C. R. 687)—715.
Ross v. Adams, 34, p. 158—319, 327, 343, 693
Ross, Hanson v., 42, p. 650—327, 747.
Ross v. The New Brunswick Construction Co., 43, p. 291—389, 610.
Rourke v. Tompkins, 40, p. 288—176, 726
Rowe, Allan v., 1 Eq., p. 41—360, 404.
Roy v. Fraser et al., 36, p. 113—25, 578, 714, 769, 775.
Roy, Ex parte, R. v. O'Brien, 38, p. 109—91, 97, 499, 772.
Roy v. Harquail Co. Ltd., 41, p. 255—167.
Roy v. Saint John Lumber Co., 44 p. 88—34, 644.
Royal, The, Bank of Canada v. Hale, 36, p. 471—726, 766.
Royal, The, Bank of Canada v. Hale, 37, p. 47—84, 334, 729.
Runciman v. Star Line S. S. Co. Ltd., 35, p. 123—255, 576.
Rundle et al v. McNeil et al., 38, p. 406—299, 498.
Rundle et al, Miller et al. v., 41, p. 591—272, 747.
Rundle et al, Windsor Lumber Co. v., 40, p. 522—766.
Russell, Jones, v., 1 Eq., p. 232—152, 608.
Ryan v. McNichol v., (1 Eq., p. 487), 34, p. 391—163, 491, 521, 768.
Ryder, Administratrix v. Saint John Railway Company, 42 p. 89—573, 749.

S

Sage v. The Shore Line Railway Company, 2 Eq., p. 321—536, 666, 671.
Saint Croix (The) Paper Co., Clark v., 43, p. 225—727, 727.
Saint Croix (The) Paper Co., Mann v., 41, p. 199—338, 429, 710.
Saint Croix Soap Manufacturing Company Ltd., Dunham v., 34, p. 243—148, 159, 623.
Saint George Pulp and Paper Co. Ltd., Rose v., 37, p. 247 (37 S. C. R. 687)—715.
Saint John Board of School Trustees, Robinson v., 34, p. 503—115. 552, 588, 690.
Saint John City. See "City of Saint John."
Saint John City Railway and John B. Zebley, Robertson v., Eq. Cas., p. 462, 476—14, 35, 124, 286, 286.

St. John City Railway Co. The, Smith, v., 34, p. 35, 334—178, 178, 196.
Saint John Horticultural Association, In re, Gilbert and 1 Eq., p. 432—37, 38, 42, 250, 355.
Saint John Lumber Co., Kennedy Island Mill Co. Ltd. v., 38, p. 292—160, 616, 715.
Saint John Lumber Co., Roy v., 44, p. 88—34, 644.
Saint John (The) Pilot Commissioners, The Cumberland Ry. & Coal Co. v., 37, p. 406 (38 S. C. R.169)—697, 700.
Saint John (The) Pilot Commissioners, Spears v., 39, p. 495—557, 698, 798.
Saint John (The) Railway Company, Currie v., 36, p. 194—251, 741, 749.
Saint John (The) Railway Company, Hesse v., 35, p. 1(30 S. C R. 218)—258, 259, 334, 334, 575, 735, 736.
Saint John (The) Railway Company, In re Merritt v., 42, p. 667—37, 679, 804.
Saint John (The) Railway Company, Ryder Administratrix v., 42, p. 89—573, 749.
Saint John (The) Railway Company v. The City of Saint John 43, p. 417, 498—20, 31, 399, 399, 569, 704.
Saint John River Steamship Co. Ltd. v. The Crystal Stream Steamship Co. et al, 41, p. 333—28.
Saint John River Steamship Co. Ltd. v. The Crystal Stream Steamship Co. et al 41, p. 398—185.
Saint John River Steamship Co. Ltd. v. The Star Line Steamship Company, 40 p. 405—141, 163, 694, 733.
Saint John & Quebec Ry. Co. v. Anderson et al, 43, p. 31—39, 663.
Saint John & Quebec Railway Co. v. Bull, 42, p. 212—31, 664.
Saint John & Quebec Railway Co v. Fraser Ltd., 43, p. 388—31, 37, 38, 40, 254, 666.
Saint John & Quebec Railway Co., In re Reardon v., Ex parte Shea, 42, p. 244—528, 665.
Saint John & Quebec Railway Co., Turney v., 42, p. 557—17, 41, 310, 465, 664, 768.
Saint John & Quebec Railway Co. v. The Hibbard Co. Ltd. et al, 43, p. 503—670.
Saint John & Quebec Railway Co., Whitecombe v., 43, p. 42—253, 269, 667, 759.
Saint Onge Jr., Ex parte Beloui, 43, p. 517—90, 208.
Saint Stephen's Church et al, Jones Executor of Catherine Murdoch v., 4 Eq., p. 316—191, 794, 794.
Salesses, Berthelot Adm. v., 39, p. 144—577, 731.
Salesses v. Harrison, 41 p. 103—496, 800.
Samet, MacPherson v., 34, p. 559—48, 178, 202.
Sandall, Ex parte, R. v. Ritchie, 37, p. 206—95, 96, 232, 678.
Sanford Manufacturing Co. Ltd. v. Stockton 40, p. 423—122, 347, 468, 618.
Sansom, Douglas v., 1 Eq., p. 122—63, 71, 98, 276, 526.
Saunders v. William Richards Co. Limited, 2 Eq., p. 303—199, 260, 262, 405, 406, 406, 597, 769.
Savage v. Breton, 37, p. 240—510, 512.
Savoy, Ex parte R. v. Chaisson, 39, p. 591—133, 357.
Sayre v. Harris, Eq. Cas., p. 94—179, 636.
Sayre & Co. Ltd. et al., F. E., v. Rhodes Curry Co. Ltd., 39, p. 150—28, 681, 709.
Schofield et al., Receiver General of New Brunswick v., 35, p. 67—342, 706.
Schofield v. Vassie, 1 Eq., p. 637—397, 783, 784.
Scott, Boggs v., 34, p. 110—26, 28.
Scott v. Sproul, 2 Eq., p. 81—282, 283.
Scott, Thibaudeau, v., 1 Eq., p. 505—194.
Scribner et al., Johnson v., Eq. Cas., p. 363—154, 166, 189, 619.
Sears v. Hicks, 3 Eq., p. 281—145, 291, 355.
Sears v. Mayor, Aldermen and Commonalty of the City of Saint John, Eq. Cas., p. 555—Addenda.
Seeley v. Dalton, 36, p. 442—163, 223.
Seeley, Ex parte, R. v. Warden Dorchester. Penitentiary, 38, p. 517—234, 381, 474.
Seeley, Foreman v., 2 Eq., p. 341—532, 652, 653, 701, 701.
Seeley v. Kerr Co. Ltd., (4 Eq. p. 184, 251) 40, p. 8 (44 S. C. R. 629)—25, 411, 486, 567, 769, 771.
Seery et al v. Federal Life Assurance Co. of Canada, 38, p. 96—423, 423, 738, 745.
Segee et al, Turnbull Real Estate Co. v., (4 Eq., p. 372) 42, p. 551, 625—14, 16, 136, 137, 137, 137, 137, 403, 499, 500, 635, 643, 644, 677, 703.
Sellick et al v. Grosweiner et al, 38, p. 73—27, 69, 158, 656.
Selig, Ex parte, R. v. Forbes, 39, p. 592—96, 237.
Seriesky, Ex parte, 41, p. 475—77, 90, 380, 473.
Sharp, R. v., Ex parte Lewin, 35, p. 470—51, 565.
Sharp, R. v., Ex parte Turnbull, 35, p. 477—51, 565.
Sharp v. Trustees of School District No. 6 Woodstock, 35, p. 243—183, 465.
Shaughnessy v. The Imperial Trusts Company, 3 Eq., p. 5—118, 191, 467, 593, 597.
Shaw, Anderson v., 35, p. 280—188, 702.
Shaw, Connell et al Exec. etc. v., 39, p. 267—80, 223, 314.
Shaw, Ex parte, R. v. Grimmer, 39, p. 477—93, 244, 523.
Shaw et al v. Robinson et al, (4 Eq., p. 286) 40, p. 473—28, 276, 523, 754.
Shaw et al v. Stairs, 37, p. 593—337, 712, 729.
Shearer v. McLean, 36, p. 284—470, 625.
Shediac Boot and Shoe Co., In re The, 37, p. 98—74, 126, 417.
Sheyn, Allen Exec. v., 35, p. 635—104, 147, 165.
Sheyn, Amherst Boot & Shoe Mfg. Co. Ltd., v., 2 Eq., p. 236—66, 132, 266, 373, 639, 799.
Shields v. Quigley, 1 Eq., p. 154—178, 185, 307.
Shilala, Ex parte, R. v. Matheson, 41, p. 386—232, 453, 461.

Shore Line Railway Co. v. Sage, 2 Eq., p. 321—536, 666, 671.
Sievewright, May v., Eq. Cas., p. 499—69, 267, 525, 532.
Sime, Gordon v., 44, p. 535—184, 288, 493.
Simon, Jardine et al v., Eq. Cas., p. 1—261, 271.
Simonds v. Coster, 3 Eq., p. 329—186, 186, 429, 654.
Simonds v. Hallett, 34, p. 216—201, 206, 639, 703.
Simpson v. Johnson, 2 Eq., p. 333—191, 198, 349, 782, 790.
Simpson v. Malcolm, 43, p. 79—320, 321, 325, 333, 334, 634, 738.
Sipprell, Crawford v., 35, p. 344—78, 318, 425.
Sisk, R. v., Sisk v. Foley, 35, p. 560—640, 703.
Sivert v. Young, 38, p. 571—312, 487, 494, 631.
Sivewright, R. v., 34, p. 144—239, 671.
Sivret et al., Landry Assignee v., 39, p. 356—259, 675, 741.
Slater, Administrator, Kennedy Administrator v., 4 Eq., p. 339—198, 203, 640.
Slavin, R. v., 35, p. 388—225, 739.
Sleeth et al v., City of Saint John, 38, p. 542; 39, p. 56—39, 250, 251, 489, 489, 799, 799, 800.
Slipp, Baird v., 3 Eq., p. 258—372, 658.
Slipp, Hall v., Ex parte Appleby, 1 Eq., p. 37—670.
Sloat et al, Markey v., 41, p. 235—12, 53, 246, 510, 512, 555, 738.
Smith, Carman v., 3 Eq., p. 44—277, 524, 526.
Smith, Ex parte, R. v. Dibblee, 38 p. 350—135, 463, 547.
Smith, Ex parte R. v. Ebbett, 38, p. 559—30, 92, 364.
Smith v. Kilpatrick, 42, p. 103—4, 764.
Smith, LeBlanc v., 1 Eq., p. 57—178.
Smith, Pankhurst v., 44, p. 279—37, 574, 804.
Smith et al Trustees of Robertson v. Robertson et al, 4 Eq., p. 139, 252—756, 780, 786, 800, 801.
Smith v. Smith et al., 1 Eq., p. 320—307.
Smith v. Smith, 37 p. 7—342, 615, 724.
Smith ,Stocker v., 43, p. 37—4, 152, 603.
Smith v. The Dominion of Canada Accident Insurance Company, 36, p. 300—414, 746.
Smith v. The Saint John City Railway Co. 34, p. 35, 334—178, 178, 196.
Smith v. The Halifax Banking Company, 1 Eq., p. 17—294, 309, 544, 612, 619, 629.
Smith v. The Halifax Banking Company, 1 Eq., p. 115—176, 632.
Smith v. Wright, 2 Eq., p. 528—371.
Snowball et al., Attorney General of N. B., v., Eq. Cas., p. 272—408, 590, 662, 774.
Snowball v. Sullivan, 42, p. 318—403, 405, 700.
Sonier v. Breau, 41, p. 177—133, 281, 281, 282, 282, 633, 729, 730.
Sonier, Ex parte, 34, p. 84—439, 440.
Souci v. Ouillette, 37, p. 393—179, 299, 731, 758.
South West (The) River Driving Co. v. Lynch, 38, p. 242—157, 161, 362.
Sovereign Bank of Canada in Liquidation, In re, 43, p. 519—130, 471.
Spears v. The Saint John Pilot Commissioners, 39, p. 495—557, 698, 798.
Sperdakes, R. v., 40, p. 428—237.
Sprague, Ex parte, R. v. Wedderburn, 36, p. 213—94, 678.
Spragues Falls Mfg. Co., Barter v., 38, p. 237—42, 198, 722, 735. 740, 741.
Sproul, Scott v., 2 Eq., p. 81—282, 283.
Stackhouse, a drunkard, In re, 2 Eq., p. 91—463, 463.
Stairs, Massey-Harris Co. Ltd. v., 34, p. 595—194, 207.
Stairs, Shaw et al v., 37, p. 593—337, 712, 729.
Standard Bank of Canada v. Vaughan, 37, p. 112—13, 83, 104, 638.
Standard Limited, Carter v. The, 44, p. 1—121, 280, 616, 643, 801.
Staples, Ex parte, 40, p. 378—449.
Star (The) Line Steamship Company, Runciman v., 35, p. 123—255, 576.
Star (The) Line Steamship Co., Saint John River Steamship Company Limited v., 40, p. 405—141, 163, 694, 733.
Starkey, In re Charles W., Ex parte Conant, 34, p. 195—44.
Starkey, In re James W., Ex parte Conant, 34, p. 198—45.
Stavert, Ex parte, 39, p. 6, 239—460, 460, 515, 569.
Steen's Estate, In Re, 1 Eq., p. 261—398, 754.
Steeves, Edgett v., 3 Eq., p. 404—67.
Steeves v. Dryden et al., 35, p. 555—203, 728.
Steeves, Hopper v., 34, p. 591—396, 722.
Steeves et al v. The City of Moncton, 42, p. 465—406, 553, 569, 599.
Steeves, Ex parte, R. v. Kay, 39, p. 2—94, 217, 220, 678.
Steeves, Gray v., 42, p. 676—20, 60, 573, 577.
Steeves, R. v., Ex parte Cormier, 39, p. 435—432, 441, 478, 563, 798.
Steeves, R. v., Ex parte Gallagher, 39, p. 4—318, 432, 441, 478, 556.
Steeves, R. v., Ex parte Gogan, 43, p. 285—449.
Steeves, R. v., Ex parte Richard, 42, p. 596—192, 382, 433, 434, 442.
Sterling v. Hawthorne, 2 Eq., p. 503—6, 7, 287, 518.
Stevens v. Jeffers, 38, p. 233—301, 505, 755.
Stewart v. Canadian Pacific Railway Company, 35, p. 115—22, 639.
Stewart, Freeman v., (2 Eq., p. 365, 408, 451), 36, p. 465—153, 299, 630, 708, 757, 759.
Stewart, Ford v., 35, p. 568—8, 70, 213, 213.
Stewart v. Harris et al, Eq. Cas., p. 143—193.
Stocker v. Smith, 43, p. 37—4, 152, 603.
Stockton, Sanford Manufacturing Co. Ltd. v., 40, p. 423—122, 347, 468, 468.
Storey, Crocker v., 43, p. 69—328, 508, 700.
Stout v. Adams, 35, p. 118—323, 578, 588, 775.

Straton, R. v., Ex parte Patterson, 37, p. 376—17, 43, 44, 45, 48, 643.
Straton, R. v., Ex parte Porter, 36, p. 388—43.
Strong, R. v., 43, p. 190—215, 216, 220.
Stuart, In re, Ex parte Peck, 39, p. 131—476, 515.
Stubbs, Gremley v., 39, p. 21—20, 60, 323, 578.
Sullivan v. Crane, 39, p. 438—728, 731.
Sullivan et al, Jones et al v., 43, p. 208—239, 500, 581, 723.
Sullivan, Snowball v., 42, p. 318—403, 405, 700.
Sumner, Brown v. 2 Eq., p. 126—194.
Sumner et al, Harris et al v., (4 Eq., p. 58), 39, p. 204, 456—36, 108, 111, 112, 113, 114, 197, 348, 598, 599, 703.
Sutton and Jewett Arbitration, In re, 1 Eq., p. 568—41, 559.
Swedish Canadian Lumber Co. Ltd., Ferguson v., 41, p. 217—181, 700, 700, 747.
Sweeney v. DeGrace, 42, p. 344—340, 496.
Sweeney, Ex parte, Gallagher v. City of Moncton, 2 Eq., p. 269—187, 195, 642.
Swim, Mersereau v., 42, p. 497—239, 311, 497, 498, 501.

T

Tait, Ex parte, R. v. Cahill, 37, p. 18—447, 474.
Tardiff, Ex parte, R. v., Plant, 37, p. 500—134 455, 457, 457, 472, 477.
Taylor, Crosby v., 2 Eq., p. 511—184, 283.
Taylor, an, Infant, In re, 1 Eq., p. 461—397, 397, 780.
Taylor v. McLeod et al Trustees of Taylor, 4 Eq., p. 262—191, 203, 352, 792.
Teed, Ex parte, 41, p. 555—454.
Telegraph Pub. Co. of St. John, McDonough v., 39, p. 515—507, 621.
Temiscouata Ry. Co., Clair v., 37, p. 608 (38 S. C. R. 230)—505, 668, 721, 723, 768.
Temiscouata Ry. Co., Daigle v., 37, p. 219—19, 583, 801.
Temiscouata Ry. Co., Lizotte v., 37, p. 397—19, 246, 252, 583
Temperance and General Life Assurance Co. v. Ingraham, 35, p. 510—208.
Temperance and General Life Assurance Co. v. Ingraham, 35, p. 558—193, 205, 208, 726.
Temple v. The Western Assurance Company, 35, p. 171 (31 S. C. R. 373)—414, 422, 499, 617, 802.
The—indexed by next word.
Theriault v. Murchie, 1 Eq., p. 588—131, 385, 538, 543, 672, 673.
Theriault, Nadeau v., 37, p. 498—728, 729.
Theriault, Robin Collas & Co. Limited v., 3 Eq., p. 14—241, 673, 673, 674.
Thibaudeau v. Scott, 1 Eq., p. 505—194.
Thibideau, Ex parte, 34, p. 397—433, 436, 478.
Thibideau v. LeBlanc, 3 Eq., p. 436—29, 61, 594, 642.
Thomas v. Girvan, 1 Eq., p. 257, 314—29, 182, 527, 538, 541.
Thompson et al., Kelly v., 35, p. 718—58, 205, 205
Thorne & Co. (W. H.) Ltd. v. Bustin, 37, p. 163 (37 S. C. R. 532)—20, 657, 729, 742, 743.
Thorne v. Perry, 2 Eq., p. 146 (35 p. 398)—378.
Thorne v. Perry, 2 Eq., p. 276—7, 47, 49, 136, 637.
Thorpe et al, Robertson v., Eq. Cas., p. 541—70, 364, 405, 415, 415, 637.
Tibbits, Porter et al v., 37, p. 25—251, 742.
Tibbits, Rideout v., 36, p. 281—172, 264, 344.
Tighe, Ex parte, R. v., Kay, 38, p. 332—227, 432, 433, 443, 443.
Tilley Assignee of DeForest v. DeForest et al., 4 Eq., p. 343—63, 157, 720.
Timmins, Ex parte, R. v. Board of Assessors, Fredericton, 41, p. 577—54, 562, 592.
Tobique Manufacturing Co. Ltd., Hale v., 36, p. 360—25, 130, 726.
Tobique (The) Salmon Club v. McDonald, 36, p. 589—268, 268, 299, 473, 672, 742.
Tobique Valley Railway Company v. The Canadian Pacific Railway Co., 2 Eq., p. 195—155, 406, 663.
Tompkins, Ex parte, 37, p. 534—226, 461, 461, 718.
Tompkins v. Hale, 41, p. 269—22, 23, 327, 618, 688
Tompkins, McLaughlin v., 44, p. 249—157, 267, 268, 316, 543, 676, 708, 712.
Tompkins, Rourke v., 40, p. 288—176, 726.
Tooke Brothers Limited v. Brock and Patterson Limited, 3 Eq., p. 496—65, 98, 592.
Toronto Construction Co. Limited, Giberson v., 40, p. 307, 309—14, 314, 654, 727, 732.
Torrop v. Imperial Fire Insurance Company, 34, p. 113, (26 S. C. R. 585)—102, 416, 650, 767.
Town of Campbellton, Crockett v. The, 39, p. 160—250, 741, 746.
Town of Campbellton, Crockett v. The, 39, p. 573, (40 S. C. R., 606)—559, 748.
Town of Campbellton, Duncan v., 3, Eq., p. 224—38, 410, 410.
Town of Campbellton, R. v., Ex parte Belanger, Ex parte Cormier, 39, p. 593—16, 460.
Town of Chatham, Byrne v. Mayor, etc., 44, p. 271—56, 315, 389.
Town of Chatham, Woodforde v., 37, p. 21—509, 586, 651, 652.
Town of Grand Falls, Curless v., 37, p. 227—263, 558, 558.
Town of Grand Falls v. Petit, 34, p. 355—302, 560, 601.
Town of Grand Falls, R. v., Ex parte The Grand Falls Company Limited, 42, p. 122—56, 56, 90, 389.
Town of Woodstock, Carleton Woolen Co. Limited v., (3 Eq., p. 138,) 37, p. 545, (38 S. C. R. 411)—54, 548, 623.
Town of Woodstock, Fisher v., 39, p. 192—173, 314, 680
Town of Woodstock, Milmore v., 38, p. 133—271, 324, 722, 728.
Tozer v. McIntosh, 39, p. 550—24, 323, 522.
Trafton v. Deschene, 44, p. 552—281, 282, 331, 738.
Travers v. Casey, The Roman Catholic Bishop of Saint John (2 Eq., p. 372), 36, p. 229, (34 S. C. R. 419)—783, 789.

Trenholm, Ex parte, R. v. Cahill, 35, p. 240—88, 439, 444, 655.
Trenholm v. The Dominion Express Co., 43, p. 98—89, 152, 330, 343.
Trites v. Humphreys, 2 Eq., p. 1—184, 204, 371, 399, 484, 595, 613, 629.
Troop Sailing Ship Co, Ex parte The, 34, p. 449—331, 339, 699.
True v. Burt, 2 Eq., p. 497—323, 531, 612.
Trueman v. Woodworth et al., 1 Eq., p. 83—64, 344, 344, 471, 673, 766.
Trustees of Calvin Church v. Logan, Eq., Cas., p. 221—107, 109, 109.
Trustees School District No. 9 v. Haines, 36, p. 617—337, 692.
Trustees of School District No. 2 of Bathurst, Rogers v., 1 Eq., p. 266—600, 600, 691.
Trustees School District No. 6, Woodstock, Sharp v., 35, p. 243—183, 465.
Trustees of School District No. 7½ Parish of Bright York County v. Yerxa, 40, p. 351—120, 168, 692.
Trustees of School District No. 2 of Durham, Robertson v., 34, p. 103—119, 141, 692.
Trustees of School District No. 8 of the Parish of Havelock in the County of Kings, v. Connely et al, 41, p. 374—56, 515, 520, 690.
Trustees (The) of Saint Andrews Church et al, Rosborough et al v., 44, p. 153—791, 798.
Turnbull v. Corbett, 41, p. 284—28, 581, 772.
Turnbull, Ex parte, R. v. Sharp, 35, p. 477—51, 565.
Turnbull Real Estate Co v. Segee, et al., (4 Eq., p. 372), 42, p. 551, 625—14, 16, 136, 137, 137, 137, 137, 403, 499, 500, 635, 643, 644, 677, 703.
Turner an Infant, in re, 2 Eq., p. 318—396, 642.
Turner v. Meckler et al., 36 p. 245—183, 561, 600
Turner, Papageorgiouv v., 37, p. 449—18, 27, 28, 132, 135, 213, 320, 430, 507
Turner v Turner, 2 Eq., p. 535—324, 798.
Turney v. Saint John & Quebec Railway Co. 42, p. 557—17, 41, 310, 465, 664, 768.

U

Underfeed Stoker Co. Ltd. v. Ready, 37, p. 505—10, 178, 614, 632, 683, 745, 768.
Underwood v. Roach, 39, p. 27—279.
Ungar's Laundry etc., Ltd., Canadian Laundry etc., Ltd. v., 44, p. 423—10, 202, 202, 614.
Union Assurance Company et al, Bishop of Fredericton v., 4 Eq., p. 408—417.
Union Mutual Life Insurance Company, Gilbert v., Eq. Cas., p. 266 (25 N. B. R. 221)—283.
Upham, Owens v., 39, p. 198, 281, 344—195, 195, 303, 304, 304, 467, 644, 718, 718, 800, 800.
Urquhart v. Gorman, (2 Eq., p. 42) 34, p. 322—281, 282, 372.

V

Vanbuskirk, Ex parte, R. v. Davis, N. B. R., 38, p. 335, 526—192, 451, 454, 454, 454, 454, 456, 477.
Vanbuskirk, Ex parte, R. v. Wathen, 38, p. 529—235, 454, 462, 480.
Vanbuskirk v. McNaughton, 34, p. 125—162.
Vanbuskirk v. Vanwart, 36, p. 422—141, 148, 175, 201, 500, 701, 765.
Vancini, Ex parte, 36, p. 456, (34 S. C. R. 621)—134, 135, 207, 463, 472, 473.
Vanderbilt, Ex parte, R. v. Wilkinson, 35, p. 538—55, 94, 651, 678.
VanWart, Burkhardt v., Ex parte VanWart, In re, 35, p. 78—17, 46, 479, 658.
VanWart et al Executors v. Diocesan Synod of Fredericton et al, 42, p. 1—106, 376, 377, 392, 795.
VanWart, In re, 2 Eq., p. 320—64, 751.
VanWart, Vanbuskirk v., 36, p. 422—141, 148, 175, 201, 500, 741, 765.
Vassie, Schofield v., 1 Eq., p. 637—397, 783, 784.
Vaughan, Kennedy Co. v. 37, p. 112—13, 83, 104, 638.
Vaughan v. Parker, 43, p. 442—293.
Vaughan, Standard Bank of Canada v., 37, p. 112—13, 83, 104, 638.
Vaughan Electric Co. Ltd., Hampstead Steamship Co. Ltd. v., 38, p. 418—27, 29.
Vernon v. Oliver, Eq. Cas., p. 179 (23 N. B. R. 392, 11 S. C. R. 156)—592, 613, 639.
Victoria, Municipality of, Currey v., 35, p. 605—247, 357, 362, 549.
Violette v. Martin, 35, p. 74—195
Vroom et al, McLeod, Assignee of the Petitcodiac Lumber Company v., Eq. Cas., p. 131—68, 74, 98, 132.

W

Waters v. Waters, 1 Eq., p. 167—168, 394.
Wathen v. Ferguson et al, 41, p. 448—308, 597, 724.
Wathen, R. v., Ex parte Vanbuskirk, 38, p. 529—235, 454, 462, 480.
Watson, McCrea v., 37, p. 623—30, 380, 380, 450, 457.
Watson v. Patterson, 2 Eq., p. 488—181, 262, 412, 715, 769.
Wedderburn, R v, Ex parte Carnwath, 40, p 285—210.
Wedderburn, R v, Ex parte Sprague, 36, p. 213—94, 678.
Welch, Ex parte, Chapman v. Gilfillan, 2 Eq., p. 129—534, 652.
Welch, William F., In re the Estate of, 36, p. 628—32, 204, 348, 352, 469.
Weldon, McLeod v. 1 Eq., p. 181—70, 335, 528, 540, 592
Weldon et al v William Parks & Son Ltd. (No. 1), Eq. Cas., p. 418—118, 121.
Weldon et al v. William Parks & Sons Ltd., (No 2), Eq Cas., p 433—29, 34.
Welton, Fleetwood Assignee etc. v., 44, p. 318—62, 67, 603.
Welsh v Nugent (No 1), 1 Eq., p 240—645
Welsh v Nugent, (No 2), 1 Eq., p 335—352, 383, 596, 613, 641, 719.
Wentzell, Admini-tratrix etc. v. The N B and P E I Ry, 43, p. 475—11, 331, 572, 576, 583, 587, 804.
West v. Corbett et al, 41, p. 420—241, 502, 661, 799.

Westell, McLaughlin v., 41, p. 193—23, 319.
Western Assurance Company, Temple v. The, 35, p. 171 (31 S. C. R. 373)—414, 422, 499, 617, 802.
Western Union Telegraph Company v. New Brunswick Railway Company, Canadian Pacific Railway Company and Saint John and Maine Railway Company, Eq. Cas., p. 338 (17 S. C. R. 152)—124, 136, 158, 163, 707.
Weston, Ex parte, 40, p. 379—227, 434.
Weston, Ex parte, R. v. Nickerson, 40, p. 382—445.
Whitcombe v. The Saint John and Quebec Railway Company, 43, p. 42—253, 269, 667, 759.
White, Ex parte, 34, p. 333—439.
White v. Hamm, 2 Eq., p. 575—243, 373, 399, 410.
White v. Hamm, 36, p. 237—12, 506, 727.
White et al, Manchester et al v., Eq. Cas., p. 59—179, 634.
White, McIntyre v., 40, p. 591—314, 721.
White, McLeod v., 39, p. 32—748.
Whittaker v. Goggin, 38, p. 378—288, 493, 629.
Whittaker, Goggin v., 38, p. 415—103, 488.
Whittaker v. Goggin, 39, p. 403—3, 24, 332, 496, 619, 722.
Wiggin's Estate, In re, 2 Eq., p. 123—751.
Wilbur, Beaton v., 3 Eq., p. 309—268, 540.
Wiley v. Waite, (No. 1), 1 Eq., p. 31—373, 613, 628.
Wiley v. Waite, (No. 2), 1 Eq., p. 150—285.
Wilkins, Ex parte, 34, p. 530—46, 243.
Wilkins, In re Bessie B., 41, p. 141—37, 483, 556.
Wilkins v. Wallace, 38, p. 80—161, 444, 655.
Wilkinson, R. v., Ex parte Cormier, 37, p. 53—457.
Wilkinson, R. v., Ex parte Dugay, 37, p. 90—458.
Wilkinson, R. v., Ex parte Restigouche Salmon Club et al, 35, p. 538—55, 94, 651, 678.
Willett Fruit Company et al, McGaffigan v., 4 Eq., p. 353—275, 298, 388, 397.
William Richards Co. Ltd.—See Richards Co. Ltd., William.
Williams, Ex parte, Re Dickie, 38, p. 156—305, 442.
Williams et al, Gregory v., 44, p. 204—166, 256, 588.
Williams v. Gunter, 1 Eq., p. 401—315, 365, 392, 422.
Williams Co. Ltd., F. E., et al, Petropolous et al v., (3 Eq. 267, 346), 38, p. 146—10, 48, 49, 98, 198, 201, 265, 294, 638, 689.
Williams v. The Government Railways Managing Board, 41, p. 108—59, 87, 202, 584, 660, 662.
Willis Ex parte, R. v. Lawlor, 44, p. 347—445, 706.
Wilmot v. MacPherson, 36, p. 327—32.
Wilmot, Nason v., 35, p. 457—303.
Wilson, City of Saint John v., 2 Eq., p. 398—359, 567.
Wilson et al v. Clark et al, 38, p. 69—150, 319.
Wilson, Ex parte, R. v., Kay, 38, p. 498, 503—220, 233, 431, 437, 437, 439, 475, 480, 719.
Wilson, Ex parte, R. v. Kay, 39, p. 124—216, 431, 441, 445, 477, 556, 556.
Wilson, Gallagher v., 35, p. 238—188, 632, 643.
Wilson, In re, Ex parte Kay, 39, p. 54—94, 678.
Wilson et al, Lewin v., Eq. Cas., p. 167 (11 A. C. 639)—84, 503, 527.
Wilson, R. v., Ex parte Burns, 37, p. 650—94, 208, 209, 679.
Wilson, R. v., Ex parte Cronkhite et al, 44, p. 69—177, 193, 229, 230, 231.
Wilson, R. v., Ex parte Fairley, 39, p. 555—95, 96, 209, 235, 375.
Wilson, R. v., Ex parte Harrington, 40, p. 383—447.
Wilson, R. v., Ex parte Harrington et al, 40, p. 384—439.
Wilson, R. v., Ex parte Irving, 35, p. 461—201, 209, 381, 456.
Wilson, R. v., Ex parte McGoldrick, 36, p. 339—95, 208, 209.
Windsor Lumber Co. v. Rundle et al, 40, p. 522—766.
Windsor v. Young, 43, p. 313—3, 201, 614, 620, 621, 621.
Winslow v. Dalling, 1 Eq., p. 608—590, 773, 773, 775.
Winslowe v. McKay, (3 Eq., p. 84), 37, p. 213—274, 379.
Winslow v. Nugent, 36, p. 356—302, 312, 758.
Winslow v. William Richards Co. Limited, 3 Eq., p. 481—165, 165, 756.
Wood et al v. Akerley et al, Eq. Cas., p. 305—294, 597.
Wood v. Confederation Life Ins. Co., 2 Eq., p. 217 (35, p. 512)—312, 426.
Wood v. LeBlanc, 2 Eq., p. 427—331, 412, 497.
Wood v. LeBlanc, 3 Eq., p. 116—404.
Wood v. LeBlanc, 36, p. 47—25, 30, 317, 317, 729, 731.
Woods et al, Emack et al v., 39, p. 111—247, 680, 746.
Woodforde v. The Town of Chatham, 37, p. 21—509, 586, 651, 652.
Woodford Claim, Re, Johnston v. Hazen, 3 Eq., p. 341—78, 149, 377.
Woodstock Electric Co. Ltd., Ex parte The, 34, p. 460—122, 233, 801.
Woodstock, Town of—See "Town of Woodstock."
Woodstock Woollen Mills Co. Ltd., v. Moore et al, 34, p. 475 (29 S. C. R. 627)—311, 339, 487, 771, 772.
Woodworth et al, Trueman v., 1 Eq., p. 83—64, 344, 344, 471, 673, 766.
Worden, Hatfield v., 41, p. 552—3, 78.
Worden v. Rawlins et al, 1 Eq., p. 450—188, 702.
Wright, Ex parte, 34, p. 127—134, 200, 225, 380.
Wright v. Mitten (1 Eq., 171), 34, p. 14—260, 260, 315, 386, 502, 771.
Wright, Price v., 35, p. 26—20, 250, 734.
Wright, Smith v., 2 Eq., p. 528—371.

Wright v. Wright, Eq. Cas., p. 496—185, 468.
Wyman, Ex parte, 34, p. 608—450.

Y

Yeats v. Mayor, Aldermen and Commonalty of the City of Saint John, Eq. Cas., p. 25—249, 482, 774
Yerxa v Trustees of School District No 7½ Parish of Bright York County, 40, p 351—120.
Yerxa v. Trustees of School District No. 7½ Parish of Bright York County, 40, p. 351—120, 168, 692.
Ying v. Foo, 42, p. 315—24, 32.
Young v. Berryman et al, Eq Cas., p. 110—188, 589, 605.
Young et al, Hubbard v., 34, p. 641—340, 677
Young, Massey-Harris Co. v., 37, p. 107—287, 495, 533.
Young, Sivert v, 38, p. 571—312, 487, 494, 631.
Young, Windsor v., 43, p. 313—3, 201, 614, 620, 621, 621.

Crown Cases.

R. v. Alexander, Ex parte Monahan, 39, p. 430—207, 231, 233, 433, 442.
R. v. Allen, 41, p. 516—218, 223.
R. v. Allen, Ex parte Gorman, 40, p. 459—430, 700.
R. v. Allingham, Ex parte Keefe, 41, p. 558—456.
R. v. Assessors of Fredericton, Ex parte Maxwell, 44, p. 563—55, 90, 562.
R. v. Ayoup, 39, p. 598—215, 237.
R. v. Bassett, Ex parte Davidson, 39, p. 271—196, 196, 455.
R. v. Belyea, 43, p. 375—50.
R. v. Benner, 35, p. 632—212, 475.
R. v. Biggar et al., Ex parte McEwen, 37, p. 372—431, 476.
R. v. Board of Assessors Fredericton, Ex parte Howe, 41, p. 564—15, 16, 54, 562, 693, 802.
R. v. Board of Assessors Fredericton, Ex parte Maxwell, 44, p. 563—55, 90, 562.
R. v. Board of Assessors Fredericton, Ex parte Timmins, 41, p. 577—54, 562, 692.
R. v. Borden, Ex parte Kinnie, 42, p. 641, 43, p. 299—16, 16, 48, 94, 186, 198, 653, 701, 702.
R. v. Byron, Ex parte Owen A. Batson, 37, p. 83, 383—431, 445, 446, 475.
R. v. Byron, Ex parte Price Batson, 37, p. 386—226.
R. v. Cahill, Ex parte Mitton, Ex parte Trenholm, 35, p. 240—88, 439, 444, 655.
R. v. Cahill, Ex parte Tait, 37, p. 18—447, 474.
R. v. Campbellton, The Town of, Ex parte Belanger, Ex parte Cormier, 39, p. 593—16, 460.
R. v. Carleton, Ex parte Akerley, 37, p. 13—44, 44.
R. v. Carleton, Ex parte DeLong, 44, p. 578—93, 212.
R. v. Carleton, Ex parte Grundy, 37, p. 389—234, 474.
R. v. Carleton, Ex parte McCrea, 38, p. 42—460.
R. v. Chaisson, Ex parte Savoy, 39, p. 591—133, 357.
R. v. Charest, Ex parte Daigle, 37, p. 492—212, 453, 455, 460, 477, 477.
R. v. City of Saint John, Ex parte Abbott, 38, p. 421, (40 S. C. R. 597)—52, 133, 133, 244.
R. v. Clarke, 38, p. 11—215, 216, 217, 217, 219, 220, 225.
R. v. Clarkson, Ex parte Hayes, 40, p. 363—207, 216, 228, 434, 443, 445, 569.
R. v. Collins, 38, p. 218—224, 231, 737.
R. v. Comeau, 43, p. 177—226, 231.
R. v. Daley, 39, p. 411—216, 226.
R. v. Davis, Ex parte Miranda, 42, p. 338—456.
R. v. Davis, Ex parte Vanbuskirk, 38, p. 335, 526—192, 451, 454, 454, 454, 454, 456, 477
R. v. Delegarde, Ex parte Cowan, 36, p. 503—90, 91, 363, 481.
R. v. Dibblee, Ex parte Kavanagh, 34, p. 1—Addenda.
R. v. Dibblee, Ex parte McIntyre, 39, p. 361—113, 438, 438, 448.
R. v. Dibblee, Ex parte O'Regan, 39, p. 378—448.
R. v. Dibblee, Ex parte Smith, 38, p. 350—135, 463, 547.
R. v. Dimock, 44, p. 124—548.
R. v. Dugas, Ex parte Aylward, 43, p. 443—221, 228.
R. v. Dugas, Ex parte Legere, 43, p. 357—227, 234.
R. v. Dugas, Ex parte McLeary, 43, p. 65—220, 455.
R. v. Dugas, Ex parte Paulin, 43, p. 58—454.
R. v. Ebbett, Ex parte Smith, 38, p. 559—30, 92, 364.
R. v. Folkins, Ex parte McAdam, 43, p. 538—224, 238.
R. v. Forbes, Ex parte Bramhall, 36, p. 333—95, 208, 386, 649.
R. v. Forbes, Ex parte Chestnut, 37, p. 402—18, 201, 231.
R. v. Forbes, Ex parte Dean, 36, p. 580—21, 47, 91, 327, 678.
R. v. Forbes, Ex parte Selig, 39, p. 592—96, 237.
R. v. Fraser, Ex parte Dixon, 36, p. 109—359, 359.
R. v. Gerow, Ex parte Gross, et al., 43, p. 352,—34, 189, 193, 702.
R. v. Grimmer, Ex parte Shaw, 39, p. 477—93, 244, 523.
R. v. Haines et al, Ex parte McCorquindale 39, p. 49—36, 96, 234.
R. v. Hennessey et al, Ex parte Durick, Ex parte Pallen, 38, p. 103—15, 94, 440.
R. v. Higgins, 36, p. 18—217, 224, 737.
R. v. Holyoke, Ex parte Blair, 41, p. 223—438.
R. v. Holyoke, Ex parte McIntyre, 42, p. 135—91, 432, 432, 438, 444, 476, 483, 518.
R. v. Hornbrook, Ex parte Madden, Ex parte McCormick, 38, p. 358—233, 234, 236, 236, 449.

R. v. Hornbrook, Ex parte Morrison, 39, p. 289—438.
R. v. Howe, 42, p. 378—215, 237, 237.
R. v. Hubbard, Ex parte Monahan, 42, p. 524—439.
R. v. Jonah, Ex parte Pugsley, 43, p. 166—210, 211, 643.
R. v. Kay, Ex parte Albapare, 38, p. 498—220, 233, 431, 437, 437, 475, 480
R. v. Kay, Ex parte Allen, 38, p. 536—234, 565.
R. v. Kay, Ex parte Henry Cormier, 38, p. 3, 231—443, 718.
R. v. Kay, Ex parte Dolan, 41, p. 95—447, 634.
R. v. Kay, Ex parte Gallagher, 38, p. 228, 325, 498—93, 219, 220, 233, 431, 435, 437, 437, 440, 443, 443, 475, 480.
R. v. Kay, Ex parte Gallant, Ex parte Legere, Ex parte Cormier, 37, p. 72—218, 437.
R. v. Kay, Ex parte Hebert, 38, p. 1, 498—220, 233, 431, 437, 437, 442, 475, 480.
R. v. Kay, Ex parte Hebert, 39, p. 67—434.
R. v. Kay, Ex parte Hodge, Ex parte Horsman, 39, p. 129—437, 440.
R. v. Kay, Ex parte Isnor, Ex parte Landry, 38 p. 332—227, 432, 433, 443, 443.
R. v. Kay, Ex parte LeBlanc, 38, p. 498—220, 233, 431, 437, 437, 475, 480.
R. v. Kay, Ex parte LeBlanc, 39, p. 278—134, 548, 799.
R. v. Kay, Ex parte LeBlanc, 41, p. 99—96, 447, 447.
R. v. Kay, Ex parte Legere, 38, p. 1—442.
R. v. Kay, Ex parte Legere, 39, p. 129—437, 440.
R. v. Kay, Ex parte McCleave, 38, p. 504—12, 233, 475.
R. v. Kay, Ex parte McDougal, 38, p. 1—442.
R. v. Kay, Ex parte Melanson, 38, p. 362, 498—96, 220, 233, 431, 437, 437, 475, 480.
R. v. Kay, Ex parte Nugent, 39, p. 135—436, 443.
R. v. Kay, Ex parte Steeves, 39, p. 2—94, 217, 220, 678.
R. v. Kay, Ex parte Tighe, 38, p. 332—227, 432, 433, 443, 443.
R. v. Kay, Ex parte Wilson, 38, p. 498, 503—220, 233, 431, 437, 437, 439, 475, 480, 719.
R. v. Kay, Ex parte Wilson, 39, p. 124—216, 431, 441, 445, 477, 556, 556.
R. v. Lawlor, Ex parte Doyle, 44, p. 244—435, 438, 439, 444.
R. v. Lawlor, Ex parte Willis, 44, p. 347—445, 706.
R. v. Leahy, Ex parte Garland, 35, p. 509—90, 224.
R. v. LeBell, Ex parte Farris, 39, p. 468—135, 231, 463, 555.
R. v. Limerick, Ex parte Edw. Dewar et al. 44, p. 233—15, 236, 445, 446, 480.
R. v. Lovitt, 37, p. 558 (1912 A. C. 212)—75, 705.
R. v. McCarthy, 38, p. 41—133, 568, 677.
R. v. McDougall, Ex parte Goguen, 44, p. 369,—50, 228, 451.
R. v. McDougall, 39, p. 388—220, 222, 230, 279.
R. v. McGuire, 34, p. 430—175, 209, 230, 693.
R. v. McGuire, 36, p. 609—215, 215.
R. v. McLatchy, Ex parte Antimori Fishing Club, 44, p. 402—95, 96, 210, 476.
R. v. McLatchy, Ex parte Gorman, 39, p. 374—376, 754.
R. v. McQuarrie, Ex parte Gilberson, 39, p., 367, 371—232, 235, 236, 453, 462.
R. v. McQuarrie, Ex parte Gilberson, 40, p. 1—231, 231, 473, 479.
R. v. McQuarrie, Ex parte Rogers, 36, p., 39—235, 459, 459.
R. v. McQuarrie, Ex parte Rogers, 37, p. 374—461, 519, 802.
R. v. McQueen, Ex parte Landry, Ex parte Legere, 38, p. 48—211, 443, 472.
R. v. Manchester, 38, p. 424—491, 554.
R. v. March, Ex parte Washington, 41, p. 419—135, 223, 494.
R. v. Marsh, Ex parte Belyea, Ex parte Lindsay, 39, p. 119—238, 440, 441, 441, 800, 801.
R. v. Marsh, Ex parte McCoy, 36, p. 186—448.
R. v. Marsh, Ex parte Walker, 39, p. 329—243, 435.
R. v. Martin, 36, p. 448—135, 696.
R. v. Matheson, Ex parte Belliveau, 40, p. 368—227, 233.
R. v. Matheson, Ex parte Guimond, 41, p. 581—225, 459, 459.
R. v. Matheson, Ex parte Martin, 41, p. 187—461.
R. v. Matheson, Ex parte Shilala, 41, p. 386—232, 453, 461.
R. v. Melanson, ex parte Bertin, 36, p. 577—92, 381, 460.
R. v. Michaud, 39, p. 418—217, 225.
R. v. Mills, Ex parte Coffon, 37, p. 122—234, 236, 449, 449.
R. v. Municipality of Restigouche, Ex parte Archibald Murchie, 42, p. 540—565.
R. v. Municipality of Restigouche, Ex parte Murchie, 42, p. 529—93, 459, 561.
R. v. Municipality of Restigouche, Ex parte Murchie, 43, p. 115—555.
R. v. Murray, Ex parte Copp, 40, p. 289—227, 440, 767.
R. v. Murray, Ex parte Damboise, 39, p. 265—90, 452.
R. v. Myshrall, 35, p. 507—219, 237, 732.
R. v. Nickerson, Ex parte Mitchell, 39, p. 316—450.
R. v. Nickerson, Ex parte O'Regan, 39, p. 428—438.
R. v. Nickerson, Ex parte Weston, 40, p. 382—445.
R. v. O'Brien, Ex parte Chamberlain, 38, p. 381, 385—290, 453, 453, 461, 462.
R. v. O'Brien, Ex parte Doucet, 43, p. 351—232.
R. v. O'Brien, Ex parte Grey, 37, p. 604—91, 92, 178, 232.
R. v. O'Brien, Ex parte Roy, 38, p. 109—91, 97, 499, 772.
R. v. Peck, Ex parte Beal, 40, p. 320—431, 435, 479.
R. v. Peck, Ex parte O'Neill, 40, p. 339—431, 435, 450, 479.

R. v. Phillips, 35, p. 393—383, 553.
R. v. Plant, Ex parte Morneault, Ex parte Tardiff, 37, p. 509—134, 455, 457, 457, 477, 472.
R. Poitras v., 39, p. 323—457.
R. v. Ritchie, Ex parte Blaine, 37, p. 213—238, 457, 800.
R. v. Ritchie, Ex parte Jack, 35, p. 581—565.
R. v. Ritchie, Ex parte Sandall, 37, p. 206—95, 96, 232, 678.
R. v. Rogers, 36, p. 1—219, 231, 310.
R. v. Sharp, Ex parte Lewin, 35, p. 470—51, 565.
R. v. Sharp, Ex parte Turnbull, 35, p. 477—51, 565.
R. v. Sisk, Sisk v. Foley, 35, p. 560—640, 703.
R. v. Sivewright, 34, p. 144—239, 671.
R. v. Slavin, 35, p. 388—225, 739.
R. v. Sperdakes, 40, p. 428—237.
R. v. Steeves, Ex parte Cormier, 39, p. 435—432, 441, 478, 563, 798.
R. v. Steeves, Ex parte Gallagher, 39, p. 4—318, 432, 441, 478, 556.
R. v. Steeves, Ex parte Gogan, 43, p. 285—449.
R. v. Steeves, Ex parte Richard Ex parte Richard, 42, p. 596—192, 382, 433, 434, 442.
R. v. Straton, Ex parte Patterson, 37, p. 376—17, 43, 44, 45, 48, 643.
R. v. Straton, Ex parte Porter, 36, p. 388—43.
R. v. Strong, 43, p. 190—215, 216, 220.
R. v. Sweeney et al, Ex parte Cormier, 38, p. 6—94, 434.
R. v. Town of Grand Falls, Ex parte Grand Falls Co. Ltd., 42, p. 122—56, 56, 90, 389.
R. v. Warden Dorchester Penitentiary, Ex. parte Seeley, 38, p. 517—234, 381, 474.
R. v. Wathen, Ex parte Vanbuskirk, 38, p. 529—235, 454, 462, 480.
R. v. Wedderburn, Ex parte Carnwath, 40 p. 285—210.
R. v. Wedderburn, Ex parte Sprague, 36, p. 213—94, 678.
R. v. Wilkinson, Ex parte Cormier, 37, p. 53—457.
R. v. Wilkinson, Ex parte Dugay, 37, p. 90—458.
R. v. Wilkinson, Ex parte Restigouche Salmon Club, 35, p. 538—55, 94, 651, 678.
R. v. Wilson, Ex parte Burns, 37, p. 650—94, 208, 209, 679.
R. v. Wilson, Ex parte Cronkhite et al, 44, p. 69—177, 193, 229, 230, 231.
R. v. Wilson, Ex parte Fairley, In re Braitwaite, In re Duncan 39, p. 555—95, 96, 209, 235, 375.
R. v. Wilson, Ex parte Harrington, 40, p. 383—447.
R. v. Wilson, Ex parte Harrington et al., 40, p. 384—439.
R. v. Wilson, Ex parte Irving, 35, p. 461—201, 209, 381, 456.
R. v. Wilson, Ex parte McGoldrick, 36, p. 339—95, 208, 209.

ERRATA

Column	As Printed	Should Read
16	R. v. Borden, 40, p. 299	43, p. 299
20	Price v. Wright, 35, p. 6	p. 26
30	R. v. Ebbett, Ex parte Smith, 28, p. 559	38, p. 559
30	Moore et al. v. Canadian Fairbanks Co. Ltd. 42, p. 485	41, p. 485
80	Johnson v. Jack et al, 35, p. 19	p. 492
151	Mayes v. Connolly, 35, p. 710	p. 701
184	Crosby v. Taylor, Eq., p. 511	2 Eq.
187	King v. Keith, 1 Eq., p. 138	p. 538
212	R. v. Carleton, Ex parte DeLong, 44, p. 518	p. 578
313	Peoples Bank of Halifax v. Estey, 31 S. C. R., p. 429	34 S. C. R. 429
326	Finn v. Brown, 35, p. 355	p. 335
333	Floyd v. Hanson, 43, p. 399, C. D.	p. 339
333	Lemon v. Charlton, 44, p. 776	p. 476
354	Peoples Bank v. Morrow, Eq. Cas., p. 247	p. 257
454	R. v. Davis, Ex parte Vanbuskirk, 38, p. 336	p. 335
463	R. v. LeBell, Ex parte Farris, 39, p. 368	p. 468
467	In re The Cushing Sulphite Fibre Co. Ltd., 3 Eq., p. 231	p. 281
471	In re The Winding up Act, 43, p. 59	p. 519
492	Randolph v. Randolph, 3 Eq., p. 596	p. 576
499	Temple v. Western Assurance Co., 35, S. C. R., p. 373	31 S. C. R., p. 373
507	McDonough v. Telegraph Pub. Co., 39, p. 575	p. 515
614	Windsor v. Young, 43, p. 323	p. 313
631	Johnson v. Jack et al, 135, p. 492	35, p. 492
657	E. N. Heney & Co. Ltd. v. Birmingham et al, 39, p. 36	p. 336
728	Milmore v. Town of Woodstock, 33, p. 133	38, p. 133
729	W. H. Thorne & Co. Ltd. v. Bustin, 36, p. 163	37, p. 163
746	McGowan v. Warner, 41, p. 534	p. 524
750	In re M. A. Foxwell,s Estate, 1 Eq., p. 195	p. 196

See also Addenda, folios 805, 806.

Digest of New Brunswick Case Law

(Including Volumes 34-44 N. B. R., part of Vol. 33 and all the Equity Volumes)

ABANDONMENT.

Interest in real estate transaction—In November 1902, the plaintiff and the defendant F., with a number of others, formed a syndicate for the purpose of acquiring options and purchasing land with a view to sale.—The transaction was a large one involving the purchase of some 200,000 acres of land in the Northwest Territories, and before the land was finally disposed of the syndicate was compelled to pay to the owners the sum of $60,000.—The agreement between the plaintiff and F. was verbal, and at the time it was made the plaintiff paid the sum of $200.—On the 30th of March, 1903, the defendant F. wrote to the plaintiff to hold himself in readiness to raise $2,000 "to hold your corner of the deal" and that if they had to call upon him it would be at short notice.—The plaintiff took no notice of this letter and made no preparation for securing the money.—On the 14th of April, 1903, F. telegraphed the plaintiff as follows: "Three thousand dollars absolutely necessary to hold your interest in the land deal.—Will I draw?—Wire."—To this the plaintiff sent no reply.—In 1903, the plaintiff learned that the speculation had been successful and that large profits had been made, but it was not until 1907 that this suit was brought.—*Held*, that in view of the special nature of the transaction the plaintiff's refusal to contribute his share of the money required to complete the purchase, and his refusal to answer or take any notice of both letter and telegram, justified the defendants in acting on the assumption and belief that he had entirely abandoned the contract and his interest in the purchase, and that he did not intend being any longer bound by it.—*Held* also, that the plaintiff's delay in commencing a suit until long after he knew that a large profit had been made by a re-sale of the land was, in the absence of any satisfactory explanation, evidence that his failure to pay the money, and his refusal to answer either the letter or telegram, were in fact intended at the time as an abandonment of all interest in the transaction. *Pugsley* v. *Fowler et al*, 4 Eq., p. 122.

Interest in Suit—C., being the holder of two insurance policies, one in the Providence-Washington Insurance Company, and the other in the Delaware Mutual, on which actions were pending, assigned the policies to M. as security for advances, and authorized him to proceed with the actions and collect the monies payable by the insurance companies thereunder. By a subsequent assignment, J. became entitled to the balance of said insurance monies after M.'s claim was paid. The action against the Providence-Washington resulted in the payment of the claim in full to the solicitor of M., but for a defect in the Delaware Mutual policy, the Plaintiff C. was nonsuited. In 1886, M. wrote J. informing him that a suit in equity had been commenced against the Delaware Mutual and its agent for reformation of their policy and for recovery of the sum insured, and requesting him to give security for costs in said suit, pursuant to a Judge's order therefor. J. replied that as he had not been consulted in the matter and considered the success of the suit problematical, he would not give security, and forbade M. employing the trust funds in its prosecution. M. wrote again saying, "As I understand it, as far as you are concerned, you are satisfied to abide by the judgment in the suit at law, and decline any responsibility and abandon any interest in the equity proceedings" to which J. made no reply. The solicitor of M. provided the security and proceeded with the suit, which was finally compromised on payment by the company of less than half of the amount claimed. Before the above letters

were written, J. had brought suit against M. for an account of the funds received under the assignment; and in 1887, more than a year after they had been written, a decree was made in said suit referring it to a referee to take an account of the trust funds received by M., or which might have been received with reasonable diligence, and of all claims and charges thereon prior to the assignment to J. and the acceptance thereof, which decree was affirmed by the full Court (29 N. B. R. 340) and by the Supreme Court of Canada (19 S. C. R. 489). On the taking of said account, M. contended that all claim on the Delaware Mutual policy had been abandoned by J. in the above correspondence, and objected to admission of any evidence relating thereto. The referee took the evidence and charged M. with the amount received, but on exceptions by M. to his report, it was disallowed.—*Held*, on appeal, per Hanington and Van Wart JJ., Landry J. dissenting, that the sum paid by the Delaware Mutual was improperly allowed by the referee; that the abandonment by J. of all interest in the suit against the company to recover the same was fully established by the correspondence between M. and J.; and that the money paid by the company must be held to have been received by the solicitor, not as solicitor of M. but of the original holder C. *Jones* v. *McKean*, 34, p. 44.

Landlord and tenant—Illegal distress—See *Moores* v. *Manzer*, 36, p. 205.

Landlord and tenant—Lease. Abandonment by tenant—Repossession—See *Whittaker* v. *Goggin*, 39, p. 403.

Reducing claim to jurisdiction of Court—See *Windsor* v. *Young*, 43, p. 313.

ACCIDENT.

See NEGLIGENCE.

ACCORD AND SATISFACTION.

Promissory Note of Third Party—Where a creditor, upon maturity of a loan, accepts a promissory note of another, endorsed by the debtor, for the amount of the loan, the time for payment is postponed, but the original debt is not cancelled unless it is proved that the note was given and accepted as an accord and satisfaction. The fact that such note is not presented for payment at maturity and no notice of dishonour given to the debtor as an indorser, will not prevent the creditor suing the debtor upon the original debt, unless it is shown that there was money at the place of payment ready to pay such note at its maturity. *Hatfield* v. *Worden*, 41, p. 552.

ACCOUNTS.

Agreement of Sale and Purchase—In 1902, the defendant, being in possession of a farm property under a parol agreement for purchase, made another parol agreement with Mrs. M., the plaintiff's predecessor in title, whereby the defendant was to receive a conveyance of the property on paying Mrs. M. a certain sum of money and conveying to her another property, known as the Ryder lot. Subsequently the defendant carried on lumbering operations for Mrs. M. on adjacent lands and purchased his supplies from her, it being agreed that the amount due the defendant for his services after deduction therefrom of the amount owing by him for supplies, should be credited on account of the purchase money of the farm property, and in this way the defendant became entitled to some credits, but the accounts between the parties to the agreement were in dispute. In 1904 the defendant demanded a conveyance but was informed that he could not have it, until he paid the balance of the purchase money and conveyed to Mrs. M. the Ryder lot. As a matter of fact, the defendant, shortly after the agreement to convey to Mrs. M. the Ryder lot, had conveyed it to a third party. Accounts between the defendant and Mrs. M. remained in dispute, and in 1911, Mrs. M. sold the property to the plaintiff, who had notice of the defendant's claims. *Held* in an action for a declaration of rights and title, that the plaintiff was entitled to possession, and that the defendant, as between himself and the plaintiff, was not entitled to an accounting as to what was due under the lumbering agreements, because after conveying away the Ryder lot, he was not in a position to carry out his part of the contract of sale. *Smith* v. *Kilpatrick*, 42, p. 103, C. D.

Agreement of sale—Who may be compelled to account—By an agreement entered into between the plaintiff and the defendant, the defendant agreed to sell the plaintiff the profits of twenty shares of dredging stock for $2,000. This agreement further provided that on the winding up or the selling out of the company, the plaintiff was to share in its profits or losses on a basis of twenty shares. After carrying on the business for a season, the company sold its plant. At the time of the sale, the plaintiff had paid $1,500. on account of the purchase price. After the sale was concluded the defendant paid the plaintiff $1,500. which he claimed was all the latter was entitled to, as he had failed to pay the full amount of the purchase price although frequently asked to do so. On an action for an accounting, *held*, that the plaintiff was entitled to an account of the profits of twenty shares of the stock of the company, and also for an account of the money received by the defendant for the twenty shares on the sale of the plant. *Stocker* v. *Smith*, 43, p. 37 C. D.

Directors of Company—A director of a company cannot file a bill against the company and his co-directors for an accounting of moneys received by the company unless special circumstances are shown. The report of a Royal Commission, whose duties were inquisitorial and not judicial, finding that a sum of money received by the company is unaccounted for; and the fact that the complaining director was the Attorney-General of the Province, and as such an ex-officio director of the company by the Act of Incorporation, are not such special circumstances as would support a bill for such an accounting. *Pugsley* v. *The New Brunswick Coal & Railway Company et al*, 4 Eq., 327; 40 N. B. R. 515.

Interest, Allowing — On an appeal from a judgment allowing interest on an amount found due the plaintiff on an account taken between the parties for money paid by the plaintiff for the defendant, and for work done and materials supplied by the plaintiff for the defendant, in the erection of a house owned in common by the plaintiff and defendant.—*Held*, that interest may be allowed when authorized by statute or when payable by contract and such contract may be inferred from trade or mercantile usage, or from a course of dealing between the parties; but (varying the judgment of Barry J. appealed from), it cannot be allowed by way of damages merely because of long delay under vexatious and oppressive circumstances, or because the money has been used and interest earned thereon (except in the case of trust moneys) nor because the debt had been wrongfully withheld by the plaintiff after the defendant has endeavoured to obtain it.—*Raymond* v. *Hay* (1840), 2 N. B. R., 99 considered and distinguished. *Duffy* v. *Duffy*, 43, p. 555.

Jurisdiction — Courts of Equity — A Court of Equity has jurisdiction in accounts where there are various interests involved, and accounts between different parties to be taken, so that the matter cannot be completely dealt with by a Court of Law in one action. *Armstrong* v. *Robertson et al*, Eq. Cas., p. 249.

Jurisdiction. K. B. D.—In an action in the Kings Bench Division, the presiding judge has, under section 18 of "The Judicature Act, 1909" all the power and may exercise all the jurisdiction and apply all the procedure of the Chancery Division necessary to afford every kind of equitable relief claimed or appearing incidently in the course of the proceeding, but if a defendant raises an equitable defence, he is bound by the equitable principles applicable to the circumstances of the case in their entirety. Per Barry J. in King's Bench Division. *Duffy* v. *Duffy*, 43, p. 555

A Judge has power to take an account without ordering a reference to a Master. *Id.*

Method—Where parties have for a long time adopted a method of accounting among themselves, the Court will adopt the same though it be at variance with their original agreement. *Hawthorne* v. *Sterling*, 2 Eq., p. 503.

Partners or master and servant receiving share in profits—On an application for an accounting, the plaintiff alleged that under an agreement he and the defendant had entered into, he was to manage a business carried on in their joint names, be paid twelve dollars per week and receive one-quarter of the net profits at the end of the year. The defendant denied the plaintiff was to receive one-quarter of the net profits, and alleged that the agreement was that the plaintiff was to be paid twelve dollars per week and have the right to buy a one-quarter interest at the end of the year.—*Held*, that the facts shewed that the contract made was as alleged by the plaintiff and that he was entitled to an accounting. *Orchard* v. *Dykeman*, 43, p. 181, C. D.

Principal and Agent—An agent for sale being in a position of trust, cannot himself purchase from his principal without first communicating to his employer all facts within his knowledge which he should reasonably expect would influence his principal, if aware of them, in either deciding not to sell to the agent, or in determining the price at which he would sell. Defendant was acting as plaintiff's agent for the sale of certain timber. Defendant withheld from plaintiff an offer of $350.00, which he had received for the timber. Plaintiff offered to sell the timber to defendant for $225.00. Defendant made counter offer of $200.00, stating that this was the best offer he had had in the past for it. Plaintiff then accepted defendant's offer. Defendant resold the lumber some three years afterwards for $500.00.—*Held*, that the defendant was bound to account to the plaintiff for difference between the amount paid for the lumbr and the amount for which it was sold, on the ground that the agent had not disclosed to his principal all the facts within his knowledge that might have influenced the principal in selling. *Lunt* v. *Perley*, 44, p. 439, C. D.

Trustee—Injunction was granted preventing a bank from paying to the defendant money deposited by her, as plaintiff alleged that the money so deposited was part of $5,500 that had been entrusted for safe keeping by plaintiff to defendant and that the latter had appropriated it to her own use. The defendant denied that she held the money in trust for plaintiff and claimed it as her own.—*Held*, that the evidence showed that plaintiff had given the money to defendant for safe keeping and the latter was ordered to account for it.—Plaintiff alleged that defendant had purchased with part of $12,083.04 that had been entrusted for safekeeping by plaintiff to her, a freehold

property, and that at the time of the purchase defendant had assured plaintiff that she had purchased the property for plaintiff. Plaintiff asked that the property so purchased be conveyed to her; she also asked for an accounting.—Defendant admitted having received the money from plaintiff for safekeeping, but claimed that it was with the plaintiff's consent that she had used part of it to pay for the property and that she had given plaintiff a mortgage on the property as security.—Plaintiff had this mortgage among her papers and collected interest on it for two and one half years.—*Held*, that the defendant must account to the plaintiff for the $12,083.04 but that no order would be made conveying the property to plaintiff and credit should be given for the amount of the mortgage. *Beamish* v. *Lawler*, 43, p. 426, C. D.

When ordered—Sheriff and Deputy—In a suit for account, plaintiff stated that he was appointed Deputy Sheriff by the defendant, under an agreement that he was to have half of the net receipts of the Sheriff's office. The defendant stated the agreement to be that the plaintiff was to have one half of the fees from writs and executions only.—On the probabilities of the evidence the Court found in favor of the defendant's version of the agreement.—Of the receipts in which under this finding the plaintiff might be entitled on discovery to share, the fees in one case, amounting to $33.00, alone remained undivided.—Held, that the bill should not be dismissed.—Reference ordered and costs reserved. *Hawthorne* v. *Sterling*, 2 Eq. 503.

See also ABANDONMENT.

ACTION.

Abuse of process—The defendant was the holder of forty-eight promissory notes indorsed by the plaintiff, and had obtained judgment in the City Court of Moncton on thirteen of them in separate actions brought when all the notes were due.—Some of the notes were of such an amount that two of them could have been included in one action. —The plaintiff was arrested twice on executions on two of the judgments and was discharged on disclosure.—Immediately after his second discharge he was arrested on a third judgment, and was discharged by habeas corpus.—In a suit for an injunction to restrain the defendant from using the process of the City Court of Moncton for malicious or vexatious purposes.—*Semble*, that the injunction should go if it appeared that the defendant intended to further arrest the plaintiff for the malicious purpose of harassing and punishing him, and endangering his health, and not for the purpose of obtaining payment of the debt. *Babang* v. *The Bank of Montreal*, Eq. Cas., p. 524.

See also *Thorne* v. *Perry*, 2 Eq., p. 276.

Bankruptcy—A plea that the defendants were adjudged bankrupt and a certificate of discharge granted in England under "The Bankruptcy Act, 1883" is a good answer to an action for a debt provable against the defendants in bankruptcy brought in this Province by the subject of a foreign state who had never resided or been domiciled within British Dominions.—*Nicholson* v. *Baird*, N. B. Eq. Cas., 195, considered. *Ford* v. *Stewart et al*, 35, p. 568.

Condition precedent—An agreement for the sale of logs contained a condition that the logs were to be surveyed by any surveyor the vendee might have in his employ and that such survey was to be final.—*Held*, that proof of such a survey was, in the absence of any charge of fraud or incompetency on the part of the vendee's surveyor, a condition precedent to the plaintiff's right to recover the price of the logs. *Patterson* v. *Larsen*, 36, p. 4.

Condition precedent—The plaintiff and defendant, both residents of this province, applied to the government of the Province of Quebec and were allotted lots 31 and 32 in Robinson settlement in the county of Temiscouata, Quebec.—Neither lot was granted to the parties but each took possession of the lot applied for and engaged in cutting pulp-wood and logs on their respective locations, the plaintiff on 31 and the defendant on 32.—The dividing line between the lots had never been run.—The parties spotted trees for about five rods along the supposed line and each party agreed to be guided in his operation by this spotted line and its projection until they could get a surveyor to run a proper line, and on such line being run, if it were found that either party had cut over on the other, "he would return the wood."—No proper line was ever run.—*Held*, in an action claiming damages for the conversion by the defendant of the plaintiff's pulp-wood and logs, that the action necessarily involved the determination of the proper location of the line between lots 31 and 32 and therefore was premature. *Long* v. *Long*, 44, p. 599.

Condition precedent—The plaintiffs agreed to build for the defendants in a specified time two hundred racks according to specifications furnished, and subject to the approval of the inspector of the defendants. —At the time the plaintiffs made the offer to build the racks they asked that in the event of their offer being accepted they be furnished with a sample rack, which the defendants accordingly did.—After considerable delay on the part of the plaintiffs, and urging on the part of the defendants, the plaintiffs notified the defendants that they had forty-eight racks completed, and all the materials ready to put the remaining one hundred and fifty-two together.—Defendant's inspector condemned all the racks manufactured and in process of manufacture as not in accordance with the specifications. —In an action for damages for breach of

the contract the jury found, in answer to questions submitted by the judge, that the racks were not in accordance with the contract and specifications, but were in accordance with the sample rack furnished; they also found that the defendants employed a competent inspector and he acted in good faith, and they assessed the damages at $831.70, for which amount a verdict was entered for the plaintiffs.—*Held*, on a motion to set aside the verdict and enter a verdict for the defendants, that in view of the findings that the inspector acted in good faith, and that the racks were not manufactured according to the contract and specifications, there must be a new trial. *Lawton Company Limited* v. *The Maritime Combination Rack Co. Ltd.*, 36, p. 604.

Condition precedent—During negotiations for the sale of two standard stokers for use in the defendant's brewery, warranted to give certain results in the saving of fuel, etc., a contract was submitted to the defendant in which a particular test called the evaporation test was specified to be applied to determine whether the stokers would produce the guaranteed results. The defendant refused to be bound by the specified test, and the proviso was struck out and the contract signed, making a proviso for the test as follows: "To determine that these guarantees are lived up to and the same quality of coal is used and the same load is being carried, tests are to be made under ordinary running conditions on hand and stoker fired boilers".—The stokers were installed and defendant refused to pay for them, alleging that they did not fulfil the guarantee.—Plaintiffs brought this action declaring on the common counts for goods sold and delivered, etc.—The pleas were never indebted, and a special plea that the stokers did not fulfil the guarantees.—Defendant made two tests without reference to the plaintiffs and the result according to these was that no such economy in fuel was effected as the contract required.—He refused to allow the plaintiffs to make the evaporation test, claiming that test was excluded from the contract.—In answer to questions the jury found that the defendant's tests were not fair and proper under the contract, and that the tests that the plaintiffs apply were better tests than the defendant's, and that no proper tests were ever made.—In answer to other questions they say they are unable to answer whether the test spoken of in the contract was to be by evaporation, as claimed by the plaintiffs, or by weighing the coal, as claimed by the defendant.—*Held*, per Tuck C. J., Landry and Barker JJ., that the verdict was improperly entered; that while all the findings are in favor of the plaintiffs no verdict can be entered for them on the pleadings, as there is no allegation of waiver or proof that the conditions precedent to payment had been performed, and there must be a new trial.—Per Hanington J.: that under the contract as executed it was open to the parties to apply any efficient test, and the proper question for the jury was "was the test which the plaintiffs intended to apply an efficient test to determine the results guaranteed," and, as this question was not left, the case was not fully tried, and it should be sent down for another trial.—Per McLeod J.: that the conditions precedent were not shown to have been performed, and no waiver of performance having been alleged that plaintiffs could not recover on the pleadings and the verdict should stand.—If the plaintiffs were allowed to amend and add a count for waiver a new trial should only be granted on payment of costs. *Unierfeed Stoker Co. Ltd.* v. *Ready*, 37, p. 505.

Counterclaim—A counterclaim is a cross action. *Canadian Laundry Etc. Co. Ltd.* v. *Ungar's Laundry Etc. Ltd.*, 44, p. 423.

Form of action—Specific performance or damages—Since the passing of the Judicature Act, 1909, damages may be awarded for the breach of an agreement, where the court finds the plaintiff is not entitled to specific performance. *Kerr* v. *Cunard et al*, 42, p. 454, C. D.

Form of action—Fraud or Redemption—A bill to set aside a mortgage on the ground of fraud cannot very well be turned into a bill to redeem the mortgage and the court will not usually entertain a suit involving such an accounting where it is sought to offset damages against the debt. *Petropolous* v. *F. E. Williams Company, Limited*, 3 Eq. 346.

Injunction refused—Summons not issued—No suit in Court—An application under section 24 of the Supreme Court in Equity Act, 1890 (53 Vict., c. 4) upon bill and affidavits for an injunction order, was refused with costs.—The bill and affidavits were not filed and a summons was not issued in the suit.—The costs of the application were taxed and paid.—The defendant filed an appearance, and applied to dismiss the bill for want of prosecution.—*Held*, that there being no summons in the suit, the suit was not in Court, and that the plaintiffs could not be compelled to issue the summons and proceed with the suit, or be dismissed, and that the application should be refused. —*Goslin* v. *Goslin*, 27 N. B. R. 221 distinguished—Quaere: whether a defendant who has appeared before summons issued can apply to dismiss the suit for want of prosecution if a summons is not issued.—An application in June 1890 upon bill and affidavits for an injunction order stood over until the 15th of August, 1891, when it was refused.—Notice of appeal was given on the 10th of October following, and on the same day the summons in the suit issued.—On the 16th the defendants filed an appearance, and gave notice of application to dismiss the bill for want of prosecution, on the ground that the summons should have been issued immediately after the refusal of the injunction order.—*Held*, that the plaintiffs were

not in default, and also that they were not compellable to issue the summons in the suit pending the appeal, and that the application should be refused. *New Brunswick Rwy. Co.* v. *Brown & Kelly* (2) Eq. Cas., p. 442.

Lis Pendens—Quaere:—Whether a suit of foreclosure is not still pending, even though the sale has been made, if the referee's report is still unconfirmed.—(Per Tuck C. J.) *The Goldie & McCulloch Co. Ltd.* v. *Hewson*, 35, p. 349.

Money had and received—Where money is received in good faith, an action for money had and received is not maintainable until a demand has been first made. *The Pacific Coast Fire Insurance Co.* v. *Hicks*, 42, p. 294.

Negligence causing death of employee, Damages for—In an action for compensation for the death of the intestate of the plaintiff caused by the wrongful act or default or neglect of the defendant, the plaintiff is not bound to elect at the trial whether he will proceed under the Workmen's Compensation Act or under the Act Respecting Compensation to Relatives of Persons Killed by Wrongful Act, Neglect or Default, C. S. 1903, c. 79, but the action can be brought and proceeded with under both acts and the damages assessed under either act as the evidence may warrant. *Wentzell* v. *The New Brunswick and Prince Edward Island Railway Co.*, 43, p. 475.

Notice of action—Form—A notice of action which reads "Notice is hereby given that I will, after the expiration of thirty days from the date of service of this notice, enter an action, etc. etc." and which was served more than a month before action brought, is a sufficient notice of action against an official for an official act under clause (2) of s. 97 of 8 Edw. VII, c. 34, providing that no such action shall be brought until after one month's notice. *Campbell* v. *Pond et al*, 44, p. 357 (K.B.D.)

Notice of action, joint—Form of—The plaintiff was arrested under an illegal warrant for dog taxes issued by the town treasurer of Marysville and executed by a provincial constable.—The plaintiff gave notice of action under 49 Vict., c. 25, s. 84, directed to the defendants jointly, describing one as town treasurer of Marysville and the other simply as constable, and setting out specifically the acts complained of on the part of each.—Plaintiff then sued defendants jointly for false imprisonment.—*Held*, (1) The notice of action should be construed liberally and is sufficient if it substantially informs the defendants of the ground of complaint.—(2) In the absence of express statutory requirement, it is not necessary to state the address and addition of the parties notified.—(3) The joint notice here was sufficient because it set out the specific acts complained of on the part of each defendant and it was not necessary to state whether the action was to be joint or several. —The arrest and imprisonment of the plaintiff was the joint act of both officers.—The notice was subscribed by the plaintiff's solicitor describing himself as "of the city of F." and giving his place of business and address for service but was not endorsed. —*Held*, sufficient under s. 84 of the Act requiring that the name and place of abode of the attorney shall be endorsed on the notice.—*Baxter* v. *Hallet*, 10 N. B. R. 544 followed. *Markey* v. *Sloat et al*, 41, p. 235.

Notice of action—Peace officer—In an action for false imprisonment, the defendant, acting as a peace officer under the criminal code, is entitled to notice of action under section 976, if he honestly believed the plaintiff had committed a felony.—The *bona fides* of the defendant's belief is a question of fact, and must be submitted to the jury, if any facts exist, which could give rise to an honest belief—The reasonableness of the belief is not material.—Per Hanington, Landry, Barker and McLeod JJ., Tuck C. J. dissenting. *White* v. *Hamm*, 36, p. 237.

Notice of action, time of—An action was brought against a police officer appointed under the Campbellton Incorporation Act, 51 Vict., c. 81, by s. 4 of which he was entitled to notice of action for anything done by virtue of his office.—The first count contained an allegation that the acts were done by the defendant as a police officer.—Notice of action was given after the time limited by the act.—*Held*, that a verdict should be entered for the defendant on the first count. *Poirier* v. *Crawford*, 39, p. 444.

Personal action—Where one converts to his own use and sells the goods of the plaintiff and dies after writ issued, but before declaration, the action may be continued against his executors, and they are liable on a count for money had and received. *Frederick* v. *Gibson*, 37, p. 126.

Personal action, survival of—Quaere:—If an action commenced by the husband survives to the wife as administratrix?—And if so and is proceeded with, has she such an interest as will disqualify a justice on the ground of bias from trying a case against her personally. *R.* v. *Kay*, ex *parte McCleave*, 38, p. 504.

Quia Timet action—The defendant L. holds certain premises under a lease granted by the plaintiff N. to one W. and assigned by W. to L.—The lease contains express covenants, but nothing in reference to its assignment, or to the use of the premises, with the exception of the word "office" used in the description, which is as follows: "All that certain office situate etc."—W. is an attorney and occupied the premises as an office.—L. is a retail meat and fish delaer, and proposes to carry on this business in the premises.—*Held*, that there was no implied covenant in the lease restricting

the lessee to the use of the premises as an office, as it was not necessary to carry out any obvious intention of the parties; and that the word "office" in the lease was used merely as a means of identifying the premises included in the demise.—*Held*, that as no actual damage had been shown, the action was in the nature of a *quia timet* action; and that as the defendant was carrying on a legitimate business, and there was no probability of any immediate or irreparable damage to the plaintiff arising, the application for an injunction must be dismissed. *Nevers* v. *Lilley et al*, 4 Eq., 104.

Quo Warranto—An information in the nature of a *quo warranto* at the instance of a private relator is an "action" within the meaning of O LII, of "The Judicature Act, 1909" and a motion for a rule must be made to the Court on previous notice to the parties affected thereby, and not by an *ex parte* application for a rule *nisi*. *Ex parte Murchie, re Levesque*, 42, p. 541.

Remedy specially provided by statute—The plaintiff, in the first count of his declaration, alleged that he was in possession of a lot of land adjoining Ludgate Lake in the parish of Lancaster, and that the defendants penned back the waters of the lake, thereby overflowing and flooding his land, destroying the trees and herbage on it, and otherwise injuring it and depriving him of its use.—By act of assembly, 59 Vic., c. 64, the defendants were authorized to utilize the water of the lake for the benefit, not only of the residents of Carleton, but for the use of the residents of Lancaster, and by act of assembly, 61 Vic., c. 52, the defendants were given additional powers in reference to this water supply to meet certain public requirements.—The second and third counts of the declaration allege, as causes of action, damages resulting from acts alleged to have been done under and by virtue of certain acts of the legislature which entitle the plaintiff to compensation from the defendants. —*Held*, on demurrer, that these counts were bad, as the damage for which compensation is claimed arose from lawful acts done by defendants by virtue of legislative authority, for the recovery of which recourse must be had to the special remedy provided by statute. *Ross* v. *City of Saint John* (two cases) 37, p. 58.

Stay of proceedings—An action by the transferee of an overdue bill, upon which an action has been already brought by the transferor, wherein an offer to suffer judgment has been made and accepted, was stayed on an application to the equitable jurisdiction of the court, the transferee having knowledge of the pendency of the first action. *Kennedy Company* v. *Vaughan*; *Standard Bank of Canada* v. *Vaughan*, 37, p. 112.

Where a party obtains a "Stay of Proceedings" in order that he may move the court in accordance with leave reserved, the stay does not apply to his right to so move. *Giberson* v. *The Toronto Construction Company Limited*, 40, p. 307.

Stay of proceedings—Appeal pending—*See* APPEAL.

Stay of proceedings, Condition of—Upon an order for discovery by the defendants, the court made it a condition of staying proceedings pending an appeal, that the defendants put in security to indemnify the plaintiff from any loss arising from the delay; the court having no judicial doubt as to the correctness of its order, and considering that greater injury would fall upon the plaintiff by a delay than to the defendants by a refusal to stay proceedings. *Robertson* v. *The St. John City Railway et al*, Eq. Cas., p. 476.

Stay of proceedings—Practice—Quaere whether the stay of proceedings in the form of order given by R. C. Mich. Term, 1899 for a certiorari expires on the return of the rule *nisi* to quash. *Ex parte Melanson*, 39, p. 8.

Steps—See *Gunns, Limited* v. *Dugay* (2), 41, p. 402; also *Turnbull R. E. Co.* v. *Segee*, 42, p. 625.

Trespass—Where the declaration is in trespass and the plaintiff on the trial relies upon and directs all his evidence to proving injury to his possession, the attention of the trial judge not being in any way called to the fact that he was proceeding for injury to the reversion, he cannot afterwards, upon a motion to set aside a nonsuit and enter a verdict for himself, claim the right under 60 Vict., c. 24, s. 95, to have a verdict entered for him in case as if he had declared for and proved damages to his reversionary interest. *McDougall* v. *Campbellton Water Supply Co.*, 34, p. 467.

Limitation of Action. *See* LIMITATION OF ACTION.

Parties to Action. *See* PARTIES.

Partnership Action. *See* PARTNERSHIP

ADMINISTRATION OF ASSETS.

See COMPANY LAW — EXECUTORS AND ADMINISTRATORS.

ADMINISTRATION OF ESTATES OF DISEASED PERSONS.

See EXECUTORS AND ADMINISTRATORS.

AFFIDAVITS.

Affidavits, Contents of — Affidavits should not contain statements of law or conclusions involving law and fact, which are for the court to determine. *R.* v. *Board of Assessors, Fredericton, ex parte Howe*, 41, p. 564.

Certiorari—Quaere:—If affidavits can be read on the return of a rule *nisi* to quash a conviction removed by certiorari, to establish facts necessary to jurisdiction but not appearing on the face of the proceedings. *R.* v. *Hennessy et al, Ex parte Pallen*, 38, p. 103.

Court Stenographer—Section 25 of the Criminal Code Amendment Act, 1913, c. 13, repealing and re-enacting s. 683 of the Criminal Code, 1906, authorizing the depositions taken by a justice on a preliminary inquiry to be taken in shorthand by a stenographer, who before acting shall, unless he is a duly sworn official court stenographer, make oath that he will truly and faithfully report the evidence, made applicable to the trial of complaints under summary conviction proceedings by subs. 3 of s. 27 of the Criminal Code, 1906, is imperative and a conviction made for an offence against the Canada Temperance Act on evidence taken in shorthand by a stenographer who was not sworn to truly and faithfully report the evidence, and was not a duly sworn official court stenographer, was quashed on certiorari as having been made without jurisdiction.—The defect is not cured by an affidavit of the stenographer made subsequent to the trial and conviction, stating that the evidence had been truly and faithfully reported, even if such an affidavit could be produced and read on the return of the rule *nisi* to quash. *R.* v. *Limerick, Ex parte Dewar et al*, 44, p. 233.

Defective affidavit—Deponent's description omitted—It is within the discretion of a judge, under Order 38, r. 14, to hear an affidavit, in one paragraph of which deponent states he is one of the plaintiffs, but which does not contain deponent's description. *Brown* v. *Barlett*, 42, p. 222.

Election petition—In the matter of an election petition under the Dominion Controverted Elections Act, *held*, that the affidavit of the petitioner was sufficient notwithstanding that it did not set out the reasons for deponent's belief as to the facts sworn to therein; also that the petitioner's affidavit, not having been read over to him and he not being acquainted with its contents, it was in fact no affidavit.—*Also*, that as the affidavit was false and untrue, it was an abuse of the process of the court, and the petition was dismissed.—VanWart J. dissented. *Alexander, Petitioner and McAllister, Respondent*, 34, p. 163.

Entitled wrongly—On an application for an attachment for non-payment of costs pursuant to a rule, the papers should be entitled the same as the rule but the court allowed an affidavit to be read which was entitled in the court and cause, though not entitled the same as the rule. *R.* v. *Borden, ex parte Kinnie*, 40, p. 299.

Injunction ex parte—It is not a ground for the dissolution of an *ex parte* injunction that the plaintiff suppressed facts relating to the subject-matter of the suit, which, though material as between the plaintiff and a person not a party to the suit, are not material to the suit with the defendant. *Poirier* v. *Blanchard*, 1 Eq., p. 322.

Joint stock company. On behalf of—In an action for the recovery of personal property, an affidavit made by the manager of an incorporated company under O. 63, r. 1, as amended by 3 Geo. V., c. 23, s. 15, under which the sheriff seized the property, which stated that he had personal knowledge of the facts deposed to, is sufficient without stating his means of knowledge. (*Halifax Banking Company* v. *Smith* 25 N. B. R. 610 followed.)—The omission of the word "limited" in the body of the affidavit which was properly entitled in the Court and cause is an irregularity only and is cured by failure to take advantage of promptly after knowledge of its existence.—(*Muirhead* v. *Arbo* 16 N. B. R. 283 distinguished.) *Dalhousie Lumber Co. Ltd.* v. *Walker*, 44, p. 81.

Judgment. Application to set aside—A judgment will not be set aside on the ground of collusion and undue preference where the affidavit in proof of the collusion is founded on information and belief only, and does not state the origin of the information, and no circumstances are assigned for deponent's belief. *Dominion Cotton Mills Co.* v. *Maritime Wrapper Co.*, 35, p. 676.

Liquor License Act—A petition to have a vote taken under the Liquor License Act was received by the town clerk of Campbellton, with a solemn declaration made under the Canada Evidence Act, 1893, instead of under R. S. C., 1906, c. 145. *Held* good. *R.* v. *The Town of Campbellton, ex parte Cormier*, 39, p. 593.

Marksman—In the jurat of an affidavit of a marksman, upon which a rule had been obtained, instead of the words "he (or who) seemed perfectly to understand the same," were the following, "seemed fully to understand the same."—*Held*, sufficient. *Ex parte Allain*, 35, p. 107.

Practice—Right of Court to refer to files—Quaere: If the Court had the right to refer to affidavits on file in the registrar's office in support of a judgment on a motion to commit for contempt when such affidavits were not referred to by counsel on the hearing and of the intention to use which no notice had been given. *Turnbull Real Estate Co.* v. *Segee et al*, 42, p. 625.

See also *R.* v. *Board of Assessors Fredericton, Ex parte Howe*, 41, p. 574.

Prolix, Order 38, r. 23—It is within the discretion of a judge sitting in chambers to act upon an affidavit to which exhibits have been annexed, contrary to O. 38, r. 23, but the party offering such affidavit may be deprived of costs, under O. 38, r. 3, or O. 65, r. 27 (20). *D'Israeli Asbestos Company* v. *Isaacs et al*, 40, p. 431.

Railway Act, by whom oath may be taken—In an award for the value of land expropriated pursuant to the Railway Act, C. S. 1903, c. 91, it was objected that the award was bad because the arbitrators had not been sworn by a justice of the peace for the county in which the lands lie as required by s. 17 (7) of the Act.—They had been sworn by a person, who was not in fact a justice, but was a commissioner for taking affidavits.—*Held*, per White J. that under s. 8 (28) of C. S. 1903, c. 1, it is sufficient if the oath required by the Railway Act is administered by any of the persons authorized by that sub-section.—*Held*, per Barry J. that as the Legislature has expressly or by clear inference provided that the oath should be administered by a designated person, no other person has authority to administer it. *Turney* v. *Saint John and Quebec Railway Company*, 42, p. 557.

Review, Affidavit taken out of N. B.—An affidavit taken out of the province by a notary public may be read on an application for review under C. Stat., 1903, cap. 122, sec. 6. *Lunt* v. *Kennedy*, 37, p. 639.

Review, entitling—Affidavits on review should not be entitled in any court, but if entitled in a court the entitling may be treated as surplusage. *Id.*

Service of copy dispensed with—Where a rule *nisi* to quash was not endorsed with the name of any attorney as clerk in court, an affidavit produced by the party showing cause was allowed to be read, although it had not been served. *R.* v. *Straton, ex parte Patterson*, 37, p. 376.

Swearing to affidavit before professional partner of attorney—An affidavit may be sworn before the business and professional partner of the attorney on the record if he is personally not interested in the suit.—*Per* Tuck C. J. *Ex parte Vanwart*, 35, p. 78.
(Cf. Order 38, r. 17. Ed.)

Unsigned but sworn to—Quaere:—Whether an affidavit unsigned but sworn to is good.—See judg. Landry J. in *Kenen* v. *Hill*, 38, p. 342.

Rule nisi, Application for—On an application for a rule *nisi* to rescind a judge's order imprisoning a judgment debtor, the applicant cannot show by affidavit what took place before the judge to whom the application was made; the stenographer's return of the evidence must be produced. *Ex parte Despres*; *In re O'Leary* v. *Despres*, 36, p. 13.

AGENCY.

See PRINCIPAL AND AGENT.

ALIENS.

Jurisdiction of County Court Judge—The judge of a county court has no jurisdiction to convict for an offence under the act to restrict the importation and employment of aliens (60-61 Vic., c. 11), and the act in amendment thereof (1 Edw. 7, c. 13), for an offence not committed within his territorial jurisdiction. *R.* v. *Forbes, ex parte Chestnut*, 37, p. 402.

Wrong committed abroad—The civil liability arising out of a wrong derives its birth from the law of the place and its character is determined by that law.—Therefore the plaintiff, an alien, being unlawfully within the United States territory in violation of an act of Congress, and a person liable to be deported, has no right of action in this court against an officer of the United States government for his arrest in, and deportation from, that country. —By international law, and apart from any civil enactment, a sovereign state has the right at its pleasure to exclude or deport any alien from its dominions; therefore no action will lie in a British court against an official exercising that right at the command and on behalf of the state of which he is the servant. *Papageorgiouw* v. *Turner*, 37, p. 449.

ANIMALS.

Cattle—Damage by, pleading—In an action of trespass for an injury to the plaintiff's horse by the defendant's cow, the declaration is bad on demurrer if it allege neither negligence or a scienter of viciousness. *Elliott* v. *Doak*, 36, p. 328.

Cattle—Railway act—Cattle being pastured in common by the occupiers of improved lands bordering on the defendant's railway, found their way to the track, and were killed by a passing train of the defendant.—It was proved that the defendant's fence along the common pasture was defective, that the company had notice of the defect and neglected to repair it, but there was no evidence as to how the cattle got on the track.—*Held*, that under the Railway act it might be inferred that the cattle found their way to the track through the defendant's defective fence, and a verdict for the plaintiff should have been sustained.—Sub-section 4 of section 237 of the act provides that when any cattle or other animals at large upon the highway or "otherwise" get upon the property of the company and are killed or injured by a train, the owner shall be entitled to recover for the loss or injury from the company, unless they show the negligence or wilful act or omission of the owner.—

Held, that the word "otherwise" means "otherwise at large," and not otherwise at large in a place of *eiusdem generis* with a highway. *Daigle* v. *Temiscouta Railway Company*, 37, p. 219.

A railway company is liable for damages for killing a cow which was at large on the highway with the knowledge of the owner contrary to the Railway act, 1903, and which strayed from the highway to the land of D., and from there to the railway track through a defective fence which the defendant company were obliged to maintain.—The company are liable for damage done to the land of an adjoining owner by cattle of a neighbor trespassing by reason of a defective fence which it was the duty of the company to maintain. (Per Landry J., Tuck C. J., and Hanington J. *hesitante*.) *Lizotte* v. *Temiscouata Railway Company*, 37, p. 397.

In an action for damages against a railway company for killing a calf by the company's train, the jury found that the plaintiff allowed his cattle to run at large upon the highway, and that the calf got upon the railway track from land adjoining the plaintiff's at a place where there was no fence along the track.—*Held*, reversing the verdict entered in the county court, that the findings established that the calf got at large through the negligence or wilful act or omission of the plaintiff and therefore under s. 294, subs. 4 of the Railway Act, R. S. C. 1906, c. 37, he could not recover. *Dixon* v. *Canadian Pacific Rwy. Co.*, 39, p. 305.

Damages—Dog, vicious.—In an action brought to recover damages from the owner of a dog, which had bitten the plaintiff, a child a little over five years of age, the jury, in answer to questions put by the learned trial judge, found that the dog had attempted to bite one G. B. and the defendant had knowledge of this before the plaintiff was bitten; that the dog had never, before the injury to the plaintiff, evinced a cross, savage or vicious disposition to the knowledge of the defendant; that the dog was in the habit of jumping upon or against people, and in such acts scratching them, and the defendant knew this before the plaintiff was injured; that one of the acts of jumping on or against people referred to one W. B. that the defendant knew of it before the plaintiff was injured, and that the dog did not do it playfully; that they considered that if G. B. had left the dog alone he would not have attempted to bit him.—Upon an application by the defendant to have a verdict entered for him, *held* (per Tuck C. J., Landry, Barker, VanWart and McLeod JJ., Hanington J. dissenting) that, as the answers established that the defendant had kept the dog after he had knowledge that he was apt to do injury to mankind, the application should be refused.—The learned judge, in charging the jury, told them that if they were thought the scar on the plaintiff's face, caused by the bite, was likely to be permanent, and that such lasting disfigurement might affect her prospects of making a good marriage, they might consider such possible loss of marriage in assessing the damages.—*Held*, *per totiam curiam*, misdirection, as such damages were too speculative and remote.—The jury were further directed that in assessing the damages they might take into consideration the financial position of the defendant and the condition in life of the plaintiff. —*Held*, as before, misdirection. *Price* v. *Wright*, 35, p. 6.

Horses—Negligence—The jury having found that it was negligence for the hirer of a horse to allow it to stand harnessed but unbridled in an open place near the shafts of the wagon while he went to the wagon to get the bridle, in consequence of which the horse escaped from his control into a ploughed field where it lay down and rolled and in getting up cut itself in the foreleg, the court will not disturb the verdict.—The defendant's act in allowing the horse to stand harnessed but unbridled in an open space was the proximate cause of the injury and the action of the horse in rolling was not an independent intervening cause.—The keeper of a livery stable who hires a horse to another is bound to give notice to the bailee of any dangerous quality in the animal hired of which he has or should have knowledge, and failure to give such notice, while it may not be accurately designated contributory negligence, may in an action against the bailee for an injury resulting from neglect to exercise proper caution go directly to the question of the bailee's negligence and liability. *Gray* v. *Steeves*, 42, p. 676.

A bailee for hire who returns the property bailed in a damaged condition, and who, being the only person with full knowledge of the circumstances causing the damage, fails to give any explanation of the same, is presumed to have been negligent. This applies to the hirer of a horse and carriage from a livery stable keeper. *Gremley* v. *Stubbs*, 39, p. 21.

APPEAL.

Applicant in contempt—The rule that a defendant in contempt for failure to obey a mandatory injunction cannot be heard in a voluntary application, has many exceptions and the circumstances of each particular case should be inquired into. —Per Barry J. *Saint John Railway Company* v. *City of Saint John*, 43, p. 498 @ 502.

Bias of trial judge—See *W. H. Thorne and Company Limited* v. *Bustin*, 37 N. B. R., p. 163; 37 S. C. R. 532.

Charge to jury—Record—A verdict will not be disturbed where the record on appeal does not sustain an objection that the jury was erroneously instructed on a certain point. *Kelley* v. *Ayer*, 41, p. 489.

Commitment of debtor—Appeal or certiorari—The judge of the County Court of Saint John made an order under 59 Vict., c. 28 as amended by 61 Vict., c. 28, committing the applicant to prison for three months, because, after his arrest in a civil suit in the Saint John City Court, he had made an appropriation of property in payment of another debt without paying the debt sued for.—The judge based the order upon evidence given in a former proceeding against the debtor, and not upon the hearing of any application for the order in question. The order did not show on its face the grounds upon which it was issued.—By 61 Vict., c. 28, s. 8, amending 59 Vict., c. 28, an appeal is given to the Supreme Court from any order for imprisonment made under ss. 46, 48, 49, 51 and 53 respectively of 59 Vict., c. 28.—*Held*, that the fact that the right to appeal is given by statute does not deprive the party of his right to a certiorari, and this court will grant the writ, if, in their opinion and discretion, the circumstances warrant it. *R.* v. *Forbes ex parte Dean*, 36, p. 580.

Costs of suit reversed on appeal by one defendant only—In a suit against L. and R. the bill was dismissed by the Equity court with costs.—An appeal to the Supreme court was allowed with costs.—On appeal by R. to the Judicial Committee of the Privy Council it was ordered that the decree of the Supreme Court should be discharged as against the appellant with costs, and that the decree of the Equity Court should be restored.—*Held*, that costs under the original decree should be taxed to L. *Fairweather* v. *Robertson*, 3 Eq., p. 276.

County Court—Action of trespass, Verdict against evidence—In an action of trespass and trover in the county court the jury found for the plaintiff for part of his claim on evidence, that while contradictory as to part of the claim, was strongly in favor of the plaintiff's whole claim.—The judge of the county court made an order setting aside the verdict and granted a new trial on the ground that the damages were insufficient and the verdict against the weight of evidence.—*Held*, on appeal, that the judge had power to make the order, and the appeal was dismissed. *Gallant* v. *O'Leary*, 38, p. 395.

County Court—Amending pleadings—If a verdict given in a county court is right, but the pleadings should be amended, then in case of an appeal, the Supreme Court *en banc* will order an amendment. *Cyr* v. *DesRosier*, 40, p. 373.

County Court—Allowing defence—An order of a county court judge setting aside a judgment and allowing the defendant to come in and defend on terms is not a decision upon a point of law and there is no appeal from such an order under s. 80 of the County Courts Act, C. S. 1903, c. 116. *Ex parte McCulley*, 20 N. B. R. 87 followed. *Joiens* v. *Lockhart*, 40 N. B. R., p. 455.

County Court—Appeal direct to Supreme Court—Where questions of fact, which have not been passed upon by the judge below, are not involved, an appeal will lie directly to the Supreme Court from a decision of a county court judge. *Patterson* v. *Larsen*, 36, p. 4.

Semble, an appeal lies direct to the Supreme Court from the judgment of a County Court judge on a claim of property under C. S. 1906, c. 111, s. 361. *McKeen* v. *Colpitts*, 39, p. 256.

County Court—Appeal, grounds of—Upon an appeal from a County Court, the Court will not consider grounds which, though mentioned in the summons for a new trial heard by the County Court judge, were not mentioned before him and upon which he gave no decision.—Per Barry J.: The Court will not interfere with the decision of a County Court judge refusing a rule for a new trial on the ground of the verdict being against evidence. *Tompkins* v. *Hale*, 41, p. 269.

County Court—When appeal lies—*Semble*, that an appeal will lie from the decision of a County Court judge on a point of law even though the same does not arise at or out of the trial of an action. *Stewart* v. *Canadian Pacific Railway*, 35, p. 115.

County Court—Costs—A new trial was granted by a judge of the County Court on payment of costs on the ground that the verdict was against the weight of evidence.—An appeal on the ground only that costs should not have been imposed, was dismissed. *MacRae* v. *Brown*, 36, p. 353.

County Court—Findings of fact by trial judge—On all cases of appeal from the County Court, the judge should furnish a clear statement of his finding on the facts.—Where the judge in the Court below has tried the cause without a jury and entered a judgment for the respondent and the return does not contain a statement of his findings on the facts, it will be assumed by the appellate court that he found the facts in favor of the respondent, and the judgment will not be disturbed if there is evidence to justify such finding. *Johnson* v. *Jack et al*, 35, p. 492.

County Courts—Leave to defend—Upon an application for summary judgment in the County Court under C. S. 1903, c. 116, ss. 49 and 50, the defendant is entitled to leave to defend if the facts submitted by him, which he alleges he can prove, raise a defence which ought to be tried.—This is a question of law and the decision of the County Court judge may be appealed from under s. 80 of the County Courts Act. —*Canadian Fairbanks Co.* v. *Edgett*, 40 N. B. R. 411 distinguished.—Upon such an application it is within the discretion of the judge to allow the plaintiff to read affidavits in reply to defendant's affidavits.—In an

action for goods sold and delivered a breach of warranty may be set up by way of counter-claim or given in evidence under the general issue in reduction of damages.—*Balmain* v. *Neil*, 41, p. 429.

County Court—New trial—On appeal where, by reason of misdirection or an erroneous application of the law, a verdict is wrongfully entered, the court will not order a verdict to be entered against the finding, though they should be of the opinion that it should be so entered on the evidence but will order a new trial. *Patterson* v. *Larsen*, 37, p. 28.

County Courts—New trial—Order 39, r. 6 applicable—Order 39, r. 6 providing that a new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence unless some substantial wrong or miscarriage has been thereby occasioned, is applicable to County Court appeals.—*Shapcott* v. *Chappell*, 12 Q. B. D. 58 followed. *McLaughlin* v. *Westell*, 41, p. 193.

County Court—New trial—Order 39, r. 6—In an action in a County Court for a breach of warranty of the soundness of a horse, tried with a jury, upon a plea of the general issue, the trial judge rejected evidence of one witness tending to show that the horse was sound prior to the time of the sale.—After verdict for the plaintiff, the County Court judge refused a new trial.—On appeal, *held*, the evidence was admissible but there was no substantial wrong under Order 39, r. 6, where the defendant admitted that when he sold the horse he knew it was subject to the attacks which eventually caused its death, though he did not believe them to be serious.—Upon such an appeal the Court will not consider grounds which, though mentioned in the summons for a new trial heard by the County Court judge, were not mentioned before him and upon which he gave no decision.—Per Barry J.: The Court will not interfere with the decision of a County Court judge refusing a rule for new trial on the ground of the verdict being against evidence. *Tompkins* v. *Hale*, 41, p. 269.

County Court appeal—Practice—The Supreme Court Act, s. 366, does not apply to County Courts so on a motion against a verdict in the County Court, it is not necessary to serve the grounds of the motion and the authorities relied upon.—The Supreme Court may order a nonsuit to be entered on an appeal from the County Court, though no leave has been reserved at the trial. *Miller* v. *Gunter*, 36, p. 330.

Under an appeal from the County Court, the whole case is before the Court of Appeal which is authorized by statute to make such order touching the judgment to be given in the matter as the law requires. *Id* per Barker J. and approved *Kelley* v. *Ayer*, 41, p. 508.

No useful purpose can be served by a County Court judge being compelled to hear and determine a motion which he has already heard and determined but where a County Court judge tries a case without a jury and enters a verdict for the plaintiff, reserving leave to move for a nonsuit, it may fairly be said that until that right is abandoned or acted upon, there is no final judgment by the judge on the question before him, and therefore the defendant may move the judge of the County Court to enter a nonsuit and then appeal to the Supreme Court from his judgment on the motion. *Tozer* v. *McIntosh*, 39, p. 550.

County Court—Summary judgment—Appeal against judge's decision—Upon an application for summary judgment in the County Court under C. S. 1903, c. 116, ss. 49 and 50, the defendant is entitled to leave to defend if the facts submitted by him, which he alleges he can prove, raise a defence which ought to be tried.—This is a question of law and the decision of the County Court judge may be appealed from under s. 80 of the County Courts Act.—*Canadian Fairbanks Co.* v. *Edgett*, 40 N. B. R. 411 distinguished.—Upon such an application it is within the discretion of the judge to allow the plaintiff to read affidavits in reply to defendant's affidavits.—In an action for goods sold and delivered a breach of warranty may be set up by way of counter-claim or given in evidence under the general issue in reduction of damages. *Neil* v. *Balmain*, 41, p. 429.

County Courts—Time extended for serving notice of appeal—The time for serving the notice of an appeal from the County Court may be extended by either a judge of the Supreme Court or the judge of the County Court appealed from—Order 59, r. 12. *Ying* v. *Foo*, 42, p. 315.

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

Damages, nominal—Trespass, action for—In an action of trespass to land the Court will not grant a new trial to enable the plaintiff to recover nominal damages. *Whittaker* v. *Goggin*, 39, p.403.

Decree reversed—Compensation for goods sold—Where goods of the defendant were sold under a decree subsequently reversed for error, not for irregularity, he was held to be entitled to the sum the goods sold for, and not to their value or to damages. *Robertson* v. *Miller*, 3 Eq. 78.

Discretion of judge re terms of postponement—If a trial judge refuse, except

upon unusual and onerous terms, to postpone a trial on the ground of the absence of a material witness the court will review the exercise of his discretion and grant a new trial.—Per Tuck C. J., Hanington, Barker, McLeod and Gregory JJ., Landry J. dissenting. *Hale* v. *Tobique Manufacturing Co.*, 36, p. 360. (Appeal to S. C. of C. dismissed by consent.)

Equity Court—On appeal from a decree of the Equity Court, the appellant may rely on grounds not taken in the Court below.—*Miller* v. *Robertson*, 35 S. C. R. 80 followed. *Kerr Company Limited* v. *Seely*, 40, p. 9.

Evidence, rejected—A judgment will not be reversed on appeal on the ground that evidence was improperly rejected if the record shows that the party offering the evidence could not have been prejudiced by the rejection. *Johnson* v. *Jack et al*, 35, p. 492.

Findings by jury—A court of appeal will not disturb the finding of a jury on a question of fraudulent representations, where there is any evidence upon which the verdict may reasonably be supported. *Finn* v. *Brown*, 35, p. 335.

Where each party is seeking to make a title for himself by possession, the Court will not interfere with the findings of the jury unless the verdict was one which, the whole of the evidence being reasonably viewed, could not properly have been found. —(*Per* Tuck C. J., Barker, McLeod and Gregory JJ.) *Wood* v. *LeBlanc*, 36, p. 47.

Where a verdict had been given for the plaintiff and the clear weight of evidence was against the plaintiff's claim, and important questions involved had not received due consideration on the trial, the case should be sent down for a new trial.—(*Per* Tuck C. J., McLeod and Gregory JJ.), as there was evidence to justify the jury in finding for the plaintiff on the material point in dispute, the verdict should not be disturbed even though the case was not tried out with due regard to other important points. (*Per* Hanington, Landry and Barker JJ.), *Roy* v. *Fraser et al*, 36, p. 113.

Where disputed questions of fact are left to the jury, and the judge's charge distinctly leaves the matter to them to find for the plaintiff if they believe his evidence, and for the defendant if they believe the defendant's evidence, and there is evidence to support a finding either way, the verdict will not be disturbed on appeal. *Brenan* v. *Hopkins et al*, 39, p. 236.

Plaintiff was a member of a Longshoremen's Union and, with others, entered into a written agreement with defendant to work at a fixed rate of wages, defendant agreeing to employ these men in loading and unloading its steamers.—When men were required the defendant notified a Union foremen, who selected certain men from amongst those who signed the agreement.—Defendant could not dismiss the men, but could dismiss the foreman, and had entire control of the work and paid the men individually.—While plaintiff was proceeding up a gangway to defendant's steamship on his way to assist in unloading, the gangway fell and he was thrown on the deck and seriously injured.—The accident was caused by the negligence of one of the ship's officers in fastening the gangway insecurely.—The jury found that plaintiff was not a fellow servant of the defendant's officer and not engaged with him in a common employment, and verdict was entered for the plaintiff.—*Held*, reversing the verdict, that plaintiff was a fellow servant of the defendant's officer, and assumed the risk of such negligence as an implied condition of his employment.—*Hatfield* v. *The Saint John Gas Light Co.*, 32 N. B. R., 100 distinguished.—Where a statement of the contents of a written document is made by counsel and accepted by both sides as a correct version, although there is no evidence of its loss or destruction, the Court must construe its meaning in the same manner as if it had been produced. *O'Regan* v. *The Canadian Pacific Railway Company*, 41, p. 347.

Where the facts are practically all admitted, and liability is to be determined from the construction of a written document, the Court of Appeal will disregard the findings of a jury. *Id.*

Finding by judge in equity—In an equity appeal where the judge in equity in the opinion of the Appellate Court disregarded, or did not give due weight to, evidence of witnesses taken under commission, the Court on appeal may review his finding on the facts as well as the law. *Fairweather* v. *Lloyd*, 36, p. 548.

Findings by trial judge—Evidence undisputed—Where a cause is tried by a judge without a jury, and the facts in evidence are not disputed, the court may reconsider the evidence in the case and overrule the judgment of the trial judge, if they think it wrong.—*Here*, in the opinion of the majority of the Court, the evidence did not prove any intent on the part of the defendant to convert the goods in dispute and the finding of the trial judge that there had been a conversion was reversed.—Per Barker C. J., McLeod, Gregory and White JJ., Landry J. dissenting. *Donald* v. *Fulton*, 39, p. 9.

Findings by trial judge.—Where a cause is tried without a jury it is the duty of the Court, on an application for a new trial, to disregard the trial judge's finding, if the Court is of the opinion that he was wrong in his conclusions.—The onus of showing that the judge below was wrong is on the party moving. *Boggs* v. *Scott*, 34, p. 110.

On an appeal where the judge in the Court below has tried the cause without a jury

and entered a judgment for the respondent and the return does not contain a statement of his findings on the facts, it will be assumed by the Appellate Court that he found the facts in favor of the respondent, and the judgment will not be disturbed if there is evidence to justify such finding.—A judgment will not be reversed on appeal on the ground that evidence was improperly rejected if the record shows that the party offering the evidence could not have been prejudiced by the rejection. *Johnson* v. *Jack et al*, 35, p. 492.

The Court will not set aside an order committing a judgment debtor to prison on the ground of his having made a fraudulent disposition of his property whereby the judgment creditor is materially prejudiced in obtaining satisfaction of his judgment, unless it appears that the judge making the order has taken some manifestly mistaken view of the law or the facts.—As such judge has had the opportunity of hearing the witnesses give their testimony *viva voce*, and of observing their demeanour, his decision on questions of fact must be taken to have the same weight as the verdict of a jury.—Per Tuck C. J., Hanington, Landry Landry and Gregory JJ. *Ex parte Despres*; *In re O'Leary* v. *Despres*, 36, p. 13.

Where a cause is tried without a jury and the judge finds facts on contradictory evidence the onus of proving the judge was wrong is on the party moving, and if he fails to satisfy the Court of this, his motion must fail.—In such a case the appeal Court has the same jurisdiction as the trial judge, and where the facts found are largely based on written evidence they should disregard his finding if, in their opinion, it is against the weight of evidence. *Adams* v. *Alcroft et al*, 37, p. 332.

The Court on appeal will not disregard the finding of a judge who tries a question of fact without a jury on *viva voce* evidence and substitute for it a finding which they may think should have been made, unless they are satisfied the judge was wrong, and the onus of showing that is on the party moving.—If the question is left in doubt the presumption that the judge was right is not displaced. *Papageorgiow* v. *Turner*, 37, p. 449.

On appeal of a case tried without a jury the Court will not disturb the decision of the judge below on the facts unless there has been manifest error. *Sellick* v. *Grosweiner*, 38, p. 73.

Where, on a trial without a jury, the judge makes no distinct finding on certain disputed facts, but orders a verdict to be entered for the plaintiff which involves the finding of those facts in the plaintiff's favor, the Court on appeal will assume they have been so found if the evidence justifies a finding to support the verdict. *Hampstead S. S. Co. Ltd.* v. *Vaughin Electric Co. Ltd.*, 38, p. 418.

Findings on facts made by a trial judge will not be set aside unless the Court is clearly of opinion that he was wrong. *F. E. Sayre & Co. Ltd.* v. *Rhodes Curry & Co. Ltd.*, 39, p. 150; *McKean* v. *Dalhousie Lumber Co.* 40, p. 247.

The Court will not reverse the findings of fact made by a trial judge unless it clearly appears he was wrong. *Shaw* v. *Robinson*, 40, p. 473.

In a suit for divorce *a mensa et thoro* on the ground of cruelty, the trial was begun before Gregory J. and, after his resignation, continued before McKeown J. who delivered judgment dismissing the plaintiff's libel with costs, on the ground that there was not sufficient evidence of cruelty.—The judge assumed, for the purposes of his judgment that the plaintiff's testimony was correct, but made no findings on the other evidence, which was very contradictory.—A considerable portion of the evidence was read to McKeown J. from the stenographer's notes. —On appeal, *held*, per Landry, Barry, McKeown JJ. that the appeal should be dismissed with costs.—Per Barker C. J., McLeod and White JJ. that the appeal should be allowed with costs, on the grounds (1) that the rule that findings of fact by a trial judge should not be set aside unless clearly wrong does not apply where the judge did not see and hear the witnesses during a large portion of the testimony, and (2) that there was a sufficient evidence of cruelty to entitle the plaintiff to a divorce *a mensa et thoro*. *Currey* v. *Currey*, 40, p. 98.

In an action for damages caused by negligence, tried before a judge without a jury, the judge found the defendant guilty of negligence in leaving a pile of bricks on a highway insufficiently lighted whereby plaintiff drove into the bricks and sustained injuries to himself and carriage.—He also found there was no contributory negligence and entered a verdict for the plaintiff. —Appeal having been taken on the ground that the verdict was against evidence the Court upheld the findings of the trial judge, and dismissed the appeal, approving the rule laid down in *Boggs* v. *Scott*, 34 N. B. R. 110, and *Papageorgiow* v. *Turner*, 37 N. B. R. 449, governing appeals of this nature. *Turnbull* v. *Corbett*, 41, p. 284.

The Court refused to set aside the findings of fact made by a trial judge, the evidence being contradictory and the witnesses examined in the presence of the judge, who had to determine on their credibility very largely from their manner and demeanor under examination. *St. John River S. S. Co. Ltd.* v. *Crystal Stream S. S. Co. Ltd.*, 41, p. 333.

The Court refused to set aside the findings of the trial judge in an action of trespass to land to the effect that public money had been spent on a road over plaintiff's lands under circumstances which created it a public

highway, under the provisions of "The Highway Act," 1904, 4 Edw. VII, c. 6, s. 3. *Rideout* v. *Howlett*, 42, p. 200.

Any point can be taken on appeal to sustain the verdict of a judge (*per* Landry J.). *Id.*

The Court on appeal will not set aside a finding by a trial judge merely because the judges hearing the appeal would, had they been trying the case, have reached a different conclusion; the finding must be clearly wrong as contrary to or unsupported by the evidence. *Fish* v. *Fish*, 44, p. 617.

Finding of fact by referee—The findings of a referee on questions of fact where they may depend upon the credibility of witnesses will not be disturbed though the evidence is contradictory and might warrant different findings. *Thomas* v. *Girvan*, 1 Eq., p. 257; *Patchell* v. *Colonial Investment and Loan Co.*, 3 Eq., p. 429.

The finding of a referee upon questions of fact depending upon evidence taken *viva voce* before him will not be disregarded except in case of manifest error. *Thibideau* v. *LeBlanc*, 3 Eq., p. 436.

General verdict, effect of—A general finding by trial judge must be taken as a finding of all things necessary to uphold the verdict. *Hampstead S. S. Co. Ltd.* v. *Vaughan Electric Co. Ltd.*, 38, p. 418; *Moore et al* v. *The Canadian Fairbanks Co. Ltd.*, 42, p. 485.

Interlocutory proceedings—See *Weldon et al* v. *Wm. Parks & Sons Ltd.* No. 2, Eq. Cas., p. 433.

Judge's certificate re Supreme Court costs—The Court has jurisdiction to review the discretion exercised by a judge in certifying under the act 60 Vict., c. 28, s. 74, that there was good cause for bringing the action in the Supreme Court. *Cormier* v. *Boudreau*, 36, p. 6.

Judgment by collusion.—A judgment will not be set aside on the ground of collusion and undue preference where the affidavit in proof of the collusion is founded on information and belief only, and does not state the origin of the information, and no circumstances are assigned for deponent's belief. *Dominion Cotton Mills Co.* v. *Maritime Wrapper Co.*, 35, p. 676.

Judgment debtor, commitment of—The Court will not set aside an order committing a judgment debtor to prison on the ground of his having made a fraudulent disposition of his property whereby the judgment creditor is materially prejudiced in obtaining satisfaction of his judgment, unless it appears that the judge making the order has taken some manifestly mistaken view of the law or the facts.—As such judge has had the opportunity of hearing the witnesses give their testimony *viva voce*, and of observing their demeanour, his decision on questions of fact must be taken to have the same weight as the verdict of a jury.—Per Tuck C. J., Hanington, Landry and Gregory JJ., McLeod J. dissenting on the ground that no evidence of fraud had been disclosed, and that a court of equity would have compelled the judgment debtor to do just what he had done.—On an application for a rule *nisi* to rescind a judge's order imprisoning a judgment debtor, the applicant cannot show by affidavit what took place before the judge to whom the application was made; the stenographer's return of the evidence must be produced. *Ex parte Despres*; *In re O'Leary* v. *Despres*, 36, p. 13.

Judgment debtor, disclosure by—In disclosure proceedings the questions whether the debtor has transferred any property intending to defraud the plaintiff, or since his arrest given any preference to any other creditor, are for the officer taking the examination, and the Court will not interfere with his discretion merely because the circumstances of the transfer are suspicious. *R.* v. *Ebbett ex parte Smith*, 28, p. 559.

Jury tampered with—Where one of the grounds in support of a motion for a new trial was that some of the jury had been tampered with, and the charge included the defendant's attorney, an officer of the Court, and a number of affidavits very contradictory and of an entirely irreconcilable nature were read; under the special circumstances of the case an order was made that the deponents should appear before the Court to be examined *viva voce* touching the matters in question. *Wood* v. *LeBlanc*, 36, p. 47.

Liquor License Act, 1887, Review of evidence—On an appeal to a judge of the County Court from a conviction for selling liquor contrary to the provisions of the Liquor License Act, 1887, 50 Vict., c. 4, the appellate judge has power to adjudicate on the evidence taken before the convicting magistrate; or he may hear the evidence of witnesses other than those examined below, or the further evidence of the witnesses already examined. *Ex parte Abel*, 34, p. 121.

Liquor License Act, C. S. 1903, c. 2?—Where a party prosecuting an appeal under the Liquor License Act, C. S. 1903, c. 22, unable to get the proceedings certified by the clerk of the County Court as provided by section 105, had them returned under a writ of certiorari, the Court heard the matter as an appeal under the section.—No appeal lies from a decision of a judge of a County Court, under section 105, from an order made under habeas corpus proceedings discharging a prisoner in custody for default of payment of fines imposed for offences against the Liquor License Act. *McCrea* v. *Watson*, 37, p. 623.

Mandatory injunction made ex parte—An appeal from an *ex parte* order made at chambers granting a mandatory injunction on the ground that the judge acted without jurisdiction was refused, because the appellant had not, before taking his appeal, applied to the judge to vary or rescind his order, and it was held that the necessity for such an application was not obviated by O. 58, r. 3, of the Judicature Act, 1903, giving an appeal on notice from any judgment final or interlocutory, and providing that: "Every judgment or decision made by a judge in court or in chambers, except orders made in the exercise of such discretion as by law belongs to him, may be set aside or discharged upon notice, by the Court." *Bell* v. *Moffat*, 18 N. B. R. 151, and *Jackson* v. *McLellan*, 19 N. B. R. 494, considered and not followed. *The Saint John Railway Co.* v. *City of Saint John*, 43, p. 498.

Motion to vary order rightly expressing judge's intention dismissed—A company, against which a winding-up order had been made, obtained at the instance of the large majority of its shareholders and holders of its bonds an order in an action by it against C., granting leave to appeal to the Supreme Court of Canada from a judgment of the Supreme Court of this Province confirming a judgment in Equity, and entrusting the conduct of the appeal to the company's solicitors.—Subsequently the liquidators of the company moved to vary the order by adding a direction that the case on appeal should not be settled until an appeal to the Supreme Court of Canada from the judgment of the Supreme Court of this Province refusing to set aside the winding-up order was determined, and that the company's solicitors on the appeal in the action against C. should act therein only on instructions of the liquidators or their solicitor.—*Held*, that as there was no error or omission in the order resulting from mistake or inadvertence, and the order expressed the intention of the judge who made it, the motion should be refused.—Principles upon which applications by shareholders of a company in liquidation for leave to appeal are to be dealt with, considered. *In re The Cushing Sulphite Fibre Co. Ltd.*, 3 Eq., 231.

N. B. Railway Act, C. S. 1903, c. 91—There is no appeal from a decision of a judge sitting on appeal from an award under s. 17, (20) of the New Brunswick Railway Act, C. S. 1903, c. 91. *Saint John & Quebec Railway Co.* v. *Bull*, 42, p. 212.

N. B. Railway Act, award—The Court on an appeal from an award will not hear the reasons or principles by which the arbitrators were guided or governed in making the award where the award contained no reasons and none were deposited with the award or given to the parties at the time it was signed or delivered. *Saint John & Quebec Railway Co.* v. *Fraser Ltd.*, 43, p. 388.

N. B. RailwayAct—Extending time for appeal—The time allowed for appealing from an award under 4 Geo. V, c. 32 (an Act to amend the New Brunswick Railway Act, C. S. 1903, c. 91) may be enlarged on an application made after the expiration of the time allowed by the Act, under O. 64, r. 7, but such application should be on notice under O. 52, r. 3, and not *ex parte*. *In re The New Brunswick Railway Act*, 43, p. 188.

Notice of appeal over five folios—The Court will not hear a motion where the notice required by 60 Vict., c. 24, s. 366 exceeds five folios and is typewritten. *Wilmot* v. *McPherson*, 36, p. 327.

Notice of appeal, enlargement of time for—An application for enlargement of the time for giving notice of motion against a verdict, etc., under C. S. 1903, c. 111, s. 372, on the ground that the transcript of the stenographic report of the trial had not been filed, should be supported by an affidavit showing that the transcript is necessary to enable counsel to prepare the notice. *McCutcheon* v. *Darrah*, 37, p. 1.

Notice of appeal, extending time for—The time for serving the notice of an appeal from the County Court may be extended by either a judge of the Supreme Court or the judge of the County Court appealed from; Order 59, r. 12. *Ying* v. *Foo*, 42, p. 315.

Principal and agent, warranty—An agent of an incorporated company employed to sell farm machinery, carriages and harness, who, during the term of his agency, a period of about two and a half years, sold two or three horses for his principal, is not authorized on a sale of a horse for his principal to give a warranty, and a verdict founded on an implied authority to give the alleged warranty was set aside—A verdict for damages for breach of a warranty cannot be sustained on the ground that the jury might have assessed the like damage on the evidence adduced in an action of deceit. *Gallant* v. *The Lounsbury Co. Ltd.*, 44, p. 225.

Privy Council appeal, practice—It is the proper practice to move to have a judgment of the Privy Council entered as a judgment of this Court in a case appealed from this Court. *Robertson et al* v. *Fairweather*, 37, p. 497.

Probate Court—Quaere:—Whether the Court will hear an appeal from a probate Court when the decree of the judge below is not before it. *Re Estate of Paul Daly*, 37, p. 483.

Probate Court—Appeal by party who did not appear—A party aggrieved by a decree of a judge of probate may appeal therefrom, although he did not appear in the Court below. An order extending the time for appeal made *ex parte* is not a nullity, and if not set aside, the Court will hear an appeal taken under it. *In re Estate Wm. F. Welch*, 36, p. 628.

Probate Court—Finding by judge—Where there was evidence that the contents of a will had been misrepresented to the testatrix by the solicitor who drew the same, and that the executor therein named had procured this solicitor to draw the will, and was present at the giving of instructions and took a benefit thereunder; and evidence on the other hand that the will fully expressed the wishes of the testatrix and that there had been no fraud or misrepresentation.—*Held*, on all the evidence that the decree of the judge of probate upholding the will should not be disturbed.—*Semble*, Allegations are not restricted to the grounds set forth in the caveat. *In re Estate of Mary B. Gilbert*, 39, p. 285.

Probate Court—Commission allowed executors—Part of a testator's estate consisted of a dry goods business, which was carried on by his two executors for nearly a year before it was sold *en bloc*, one executor doing practically all the work.—Upon passing the accounts, the probate judge allowed a commission of four and one-half per cent. upon the whose estate to the executor who carried on the business and a commission of one-sixth per cent. to the other. No commission was allowed upon sales made in carrying on the business.—Upon appeal, the Court refused to interfere with the Judge's discretion in apportioning the commission. *In re Estate of Benjamin B. Manzer*, 42, p. 251.

Procedure when appeal not entered after notice—If, after a notice of appeal, the appeal is not entered for hearing, the respondent should demand his costs, and if not paid he should make an original motion on notice to discharge the notice of appeal, and for his costs.—The former practice of moving for leave to enter the appeal in order that the respondent may move to dismiss it with costs when reached in the ordinary course will not be followed under "The Judicature Act, 1909" and the rules thereunder. *Duncan* v. *Reynolds* (1870), 13 N. B. R. 187 and *Smith et al* v. *The Halifax Banking Company* (1895), 33 N. B. R. 1 considered. *McIntosh* v. *Poirier et al*, 44, p. 355.

Security for costs of appeal—An application for security for costs of an appeal on the ground that the appellant would not be able to pay the costs, if the appeal should be dismissed with costs, must be made promptly.—Where notice of appeal was served on the seventh of May and notice of an application for security was served on the second day of June in time for the first session of the Appeal Court. after the making of the order appealed from, it was refused on the ground of delay, although a demand of security had been served on the eleventh of May and security had been refused.—An order for costs against a solicitor personally will not be made (in the absence of proof of misconduct, on the ground that nothing was involved in the appeal except costs of the appeal. *R.* v. *Gerow ex parte Gross et al*, 43, p. 352.

Service out of the jurisdiction—Discretion of judge final—On appeal from an order authorizing service abroad under clause (h) of O. 11, r. 1 of the Judicature Act, 1909, in an action against a foreign corporation for a breach in the state of Maine of a contract made in this province.—*Held*, per White and Grimmer JJ. affirming the order of Barry J., Crocket J. dissenting, that the act in its scope and purpose is intended to affect procedure only, and sub-s. 2 of s. 55, enacting that the repeal effected thereby should not affect any jurisdiction, established or confirmed by or under any act repealed thereby, the words "for any other matter" in clause (h) of O. 11, r. 1 must be construed to include any matter not covered by the preceding clauses of the rule in which the Court had jurisdiction at the passing of the Act and as by C. S. 1903, c. 111, ss. 52 and 53, service abroad might have been authorized in an action such as the one in question the judge had jurisdiction to make the order and the appeal should be dismissed., Per Crocket J. that notwithstanding the provision of sub-s. 2 of s. 55 the words "for any other matter" in clause (h) must be construed as any other matter within the territorial jurisdiction of the Court and not provided for in the preceding clauses of O. 11, r. 1 and as the plaintiff's alleged cause of action did not arise within the territorial jurisdiction the judge had no jurisdiction to make the order and the appeal should be allowed. —*Per curiam*, where under clause (h) a judge in the exercise of his discretion on the facts decides that it is in the interest of justice that jurisdiction should be exercised and service abroad authorized, the Court on appeal will not interfere with the exercise of such discretion. *Roy* v. *The Saint John Lumber Co.*, 44, p. 88.

Stay of proceedings pending appeal—Upon a judgment overruling the defendants' demurrer, the Court refused to stay proceedings pending an appeal, considering that greater injury would result to the plaintiff by a delay than to the defendant by a refusal to stay proceedings, but the plaintiff was required to accept an undertaking for the payment of the costs occasioned by the demurrer in case the appeal was dismissed, and to give an undertaking to forego them in case the appeal was allowed. *McGrath* v. *Franks et al*, Eq. Cas., p. 97.

Where a party is exercising an undoubted right of appeal, the Court will stay proceedings under the judgment appealed from, where necessary to prevent the appeal if successful from being nugatory. Observations upon appeals in interlocutory proceedings. *Weldon et al* v. *William Parks & Sons Ltd* No. 2, Eq. Cas., p. 433.

Upon an order for discovery by the defendants, the Court made it a condition of staying proceedings pending an appeal, that the defendants put in security to indemnify the plaintiff for any loss arising from the delay; the Court having no judicial doubt as to the correctness of its order, and considering that greater injury would fall upon the plaintiff by a delay than to the defendants by a refusal to stay proceedings. *Robertson* v. *The St. John City Rwy. et al,*. Eq. Cas., p. 476.

On an application for a stay of proceedings on a verdict pending an appeal, the stay was refused except on terms of payment of the amount of the verdict to the successful party and the taxed costs to his solicitor, the former giving security for repayment in case of the appeal being successful, or consenting that the amount be paid into Court, and the latter giving an undertaking to repay the costs if so ordered by the Appeal Court. *Porter* v. *O'Connell*, 43, p. 611.

Statement of claim amended at trial, defendant prejudiced — Declaration for work and labour and on an account stated. —Pleas, payment and set-off, the particulars of which showed a considerable sum due defendants over and above what was claimed by the plaintiff's particulars, which were confined to the count for work and labor.—At the trial, where a verdict passed for the plaintiff, the set-off being entirely rejected, an application was made to amend the plaintiff's particulars by making a large addition to the time of the alleged work and labor and by giving particulars of the account stated.—The amendment was allowed without terms, although the defendants produced affidavits of one of themselves and their attorney and counsel, stating that they were unprepared to make their defence at the then circuit to the claim for work and labor as set out in the amended particulars; that had the original particulars been served as amended they might have offered to suffer judgment and would have done so had they found plaintiff's claim was correct, that as no particulars had been served applicable to the count for an account stated, the said count had not been regarded as *bona fide*, and in preparing for trial no consideration had been given to it, that if the amendment was allowed defendants would be taken by surprise and were not prepared to make their defence, and great injustice would be done to them.—On a motion for a new trial on the ground that the amendment should not have been allowed except on terms of postponment of the trial etc., *held*, per Tuck C. J., Hanington, Landry and VanWart JJ., Barker and McLeod JJ. dissenting, that the defendants' affidavits showed that the amendment was of a character to materially prejudice the defendants, and should not have been allowed without such terms as would, as near as may be, place the defendants in the position they occupied when the original particulars were served.—Per Barker and McLeod JJ., that the judge, in the exercise of a judicial discretion, having allowed the amendment, his discretion should not be reversed by the Court *en banc* unless he was manifestly wrong and it appeared affirmatively that injustice had been done to the defendants. *Hicks* v *Odgen et al*, 35, p. 361.

Summary conviction—Appeal—Certiorari—The defendant, on May 15, 1908, gave notice of appeal to the County Court from a summary conviction.—An order for certiorari was taken out and served May 20 and on May 27 the defendant served a notice of his grounds of appeal.—*Held*, that under section s. 1122 of the Criminal Code, certiorari would not be allowed after appeal taken.—*In re Kelly*, 27 N. B. R. 553 followed. *R.* v. *Haines*, 39, p. 49.

Supreme Court of Canada—Delay due to death of party—Upon the death of one of several defendants to a suit in the Supreme Court of Equity, the plaintiff may continue the suit by applying for administration *ad litem* or by application to the Equity Court under s. 116 or s. 119 of the Supreme Court in Equity Act, C. S. 1903, c. 112, and therefore where one of several defendants died after judgment of the Supreme Court *en banc*, confirming a decree of the Equity Court dismissing the plaintiff's bill with costs, and the plaintiff delayed his appeal to the Supreme Court of Canada for eight months thereafter on the ground that no administration had been taken out, *held*, this was no excuse for the delay and the judgment of McLeod J. refusing to allow the appeal under s. 71 of the Supreme Court Act, R. S. C. 1906, c. 139, was confirmed. —*Held*, *also*, that the mistake of the schicitor as to the procedure on defendant's death, even though supported by opinion of counsel, was not a sufficient excuse.—*Held* (*per* McLeod J.), the plaintiff (appellant) could have filed a suggestion and proceeded under s. 85 of the Supreme Court Act, R. S. C. 1906, c. 139. *Harris et al* v. *Sumner et al*, 39, p. 456.

Trial in nature of arbitration—On the trial of an action for the wrongful detention of a quantity of logs in which action the rights of a third party under a contract between the defendant and the third party were involved, it was agreed by counsel on the trial that the third party should be added as a party plaintiff, that the pleadings should be amended in all necessary particulars, that the case should be withdrawn from the jury and the presiding judge should determine the rights of all parties.—The Court on appeal refused to disturb the findings where the judge had acted within the scope of the agreement and was not manifestly in error. *Dalhousie Lumber Co. Ltd.* v. *Walker*, 44, p. 455.

Woodmen's Lien Act—In proceedings under The Woodmen's Lien Act 1894, the point that the lien was not filed in time is

open on appeal even though not taken in the Court below as it goes to the jurisdiction. —(*Per* Tuck C. J.) *Murchie et al* v. *Fraser et al*, 36, p. 161.

Workmen's compensation act—In an action under "The Workmen's Compensation for Injuries Act," 4 Geo. V., c. 34, the trial judge found that the plaintiff, while working at a circular saw edger in the defendant's mills, lost all the fingers of his left hand by reason of the saw not being guarded as by law required, and assessed the full compensation allowed by clause (b) of sub-s. 2 of s. 6 of the Act, for the loss of a hand.—*Held*, on appeal, that the fair intendment to be made in favor of the judgment is that the trial judge found that the plaintiff lost his hand and that the compensation allowed was not greater than the amount provided for by the Act, and the appeal was dismissed with costs. *Pankhurst* v. *Smith*, 44, p. 279.

No motion by way of appeal or application to the equitable jurisdiction of the Court to correct an error in a matter before a judge acting within his jurisdiction under the Workmen's Compensation for Injuries Act will be entertained, except where the amount allowed the claimant is greater than is provided by the Act. *In re Merritt* v. *The St. John Street Rwy. Co.*, 42, p. 667.

ARBITRATION AND AWARD.

Damages for land expropriated—Regard should be had to its prospective capabilities. *In re Gilbert and St. John Horticultural Association*, 1 Eq. 432. See also *St. John and Quebec Rwy. Co.* v. *Fraser Ltd.*, 43, p. 388.

Disqualification of alderman—An alderman of the City of Saint John is disqualified from acting as an arbitrator appointed by the city to determine with other arbitrators the value of property expropriated by the city under Act 61, Vict., c. 52. *In re Abell*, 2 Eq., p. 271.

Disqualification, ratepayer, waiver—A ratepayer of the city of Moncton is disqualified on the ground of pecuniary interest from acting as an arbitrator to determine the value of lands taken by the city for the purposes of the water department, under 56 Vict., c. 45.—Where objection to the qualification of an arbitrator was taken at the commencement of the arbitration proceedings, subsequent appearance under protest and taking part in the proceedings will not operate as a waiver of the objection. *In re Bessie B. Wilkins*, 41, p. 141.

Evidence—Rule considered as to when evidence of an arbitrator will be admitted in explanation of the award. *In re Gilbert and Saint John Horticultural Association*, 1 Eq., p. 432. See also *St. John & Quebec Rwy Co.* v. *Fraser Ltd.*, 43, p. 388.

Expropriation under Statute 3 Ed. VII., c. 71—The commissioners acting under the National Transcontinental Railway Act (3 Ed. VII, c. 71) are entitled to apply for and obtain under the Expropriation Act (R. S. C. 1906, c. 143, s. 21) a warrant for the possession of land expropriated for the purposes of the railway,irrespective of whether the damages have been paid or not. *In re National Transcontinental Rwy, ex parte Bouchard*, 38, p. 346.

Faulty award—Ejectment—A lease in renewal of a former lease of the same premises contained a covenant to renew at the end of the term or pay for improvements "heretofore erected, or which may hereafter be erected or made by the said (Lessee) the improvements to be valued by two disinterested persons to be chosen by the parties who, in case of disagreement, were to choose a third, the appraisement of whom or any two of whom to be conclusive as to the value." The lessor having determined not to renew, appraisers were appointed by the parties, and they failing to agree appointed a third.—The three met, and the appraiser of the lessor and the third chosen agreed on the sum of $2,550 as the value of the improvements, which sum the plaintiff tendered and the defendant refused to accept and also refused on demand to give up possession, and the plaintiff brought ejectment.—In addition to denying the lessor's title the lessee, by plea, asserted the right to hold possession on equitable grounds, asked to have the award set aside, and a renewal lease decreed to be executed.—At the trial, without a jury, the judge found that improvements for which the defendant was entitled to compensation had not been considered by the appraisers and the appraisement was not full and complete, but entered a verdict for the lessor.—*Held*, that the lease neither expressly or impliedly gives the lessee the right of possession claimed, and the facts did not entitle her on equitable grounds to retain possession, or on this application involving merely the right of possession to have the award set aside or other relief asked for. *Purdy* v. *Porter*, 38 N. B. R. 465; 41 S. C. R. 471.

Injunction to restrain futile arbitration refused—An injunction will not be granted to restrain a party from proceeding with an arbitration where the result of the arbitration will be merely futile and of no injury to the party seeking the injunction.—An injunction to restrain an arbitration to determine the value of land of the plaintiff taken by the defendants, on the ground that condition precedent to the taking of the land had not been complied with, refused. *Duncan* v. *The Town of Campbellton*, 3 Eq., p. 224.

Landlord and tenant—Leases covenanting to pay for any buildings or erec-

tions for manufacturing purposes—Where the city of Saint John expropriated land under lease from it consisting mostly of mud flats, to be used for manufacturing purposes only, and the lease contained a covenant to pay at the end of the term for the "buildings and erections that shall or may then be on the demised premises" piling fastened with stringers necessary to make it available for buildings may be a subject of damages for which the city would be bound to pay on expropriation under 6 Vict., c. 59, and should not be excluded from consideration on an assessment of damages.—(*Per* Barker C. J., Hanington and Landry JJ., McLeod J. dissenting.) *Sleeth et al* v. *The City of Saint John*, 38, p. 542.

On expropriation under 63 Vict., c. 59 of lands under a lease, containing a covenant to pay at the end of the term for "any buildings or erections for manufacturing purposes" which should or might then be on the demised premises, *held*, that damages should be assessed for the value at the time of expropriation of all piling and filling in intended for and forming a necessary part of the foundation of such buildings.—(*Per* Barker C. J., Hanington, Landry, Gregory and White JJ., McLeod J. dissenting. *Sleeth et al* v. *The City of Saint John*, 39, p. 56.

N. B. Railway Act—Appointment of sole arbitrator—A judge of the County Court alone has jurisdiction to appoint a sole arbitrator to determine the value of lands taken or required under the provisions of the New Brunswick Railway Act, except when he is personally interested in the lands, in which case a judge of the Supreme Court has such jurisdiction.—When an owner of land omits to name an arbitrator in expropriation proceedings after notice is served on him as required by the New Brunswick Railway Act, a sole arbitrator cannot be appointed by any judge until notice of the intended application for such appointment has first been given to the land owner. *St. John & Quebec Rwy. Co.* v. *Anderson*, 43, p. 31, C. D.

N. B. Railway Act—Measure of Damages—On an appeal from an award made under the N. B. Ry. Act, C. S. 1903, c. 91, as amended by 4 Geo. V., c. 32 (1914), awarding the respondent $16,500 for land taken for appellant's right of way through respondent's property, known as the Victoria Mill property, in the city of Fredericton, and as compensation for damages.—The appellate company in January, 1912, located its right of way through the property, and in the latter part of June, or early in July of that year, began work and filed its plans and book of reference and published the notice required by the Act.—At this time and for a number of years prior thereto the Scott Lumber Company, subject to a lien of the Bank of Nova Scotia, was the owner of the property.—The milling business upon the property had been suspended or discontinued and the lumber company and the bank were seeking to sell the property to satisfy the bank's claim.—On July 17th, 1912, the respondent obtained an option on the property and ultimately on December 12th of the same year purchased it with knowledge of the expropriation.—In 1913 the respondent made substantial changes in the mill, discarding much of the machinery, and erected practically a new mill with a different equipment, increasing its capacity from ten million feet to fifteen million feet per season and greatly improved and enhanced the value of the property in other respects.—The appellant gave evidence before the arbitrators, placing the market value of the mill property and site at the time of the purchase by respondent at $10,000.—The respondent gave no evidence of the value of the property before or at the time of the purchase, but claimed and gave evidence of the value of the land taken and damages for the injury suffered amounting to $77,000.—The arbitrators in their award gave no reasons for their award and did not show how the amount awarded was arrived at.—*Held*, that the principle upon which the compensation and damage should have been awarded would be the market value, including the practical potential value of the land taken, to the Scott Lumber Company at the time of the filing of the plans and book of reference and reasonable compensation for damage caused, without taking into consideration, as the arbitrators must have done, values and elements of compensation to the owners incident to the property at the time of the award: and the award must be reduced to $5,500. *St. John & Quebec Rwy Co.* v. *Fraser Ltd.*, 43, p. 388.

N. B. Railway Act, C. S. 1903, c. 91—Legality of award—In an application under O. XIV of the Judicature Act for leave to enter final judgment in an action on an award for the value of land expropriated by a railway company pursuant to the Railway Act, C. S. 1903, c. 91, it was objected that the award was bad, because the arbitrators had not been sworn by a justice of the peace for the county in which the lands lie as required by s. 17 (7) of the Act.—They had been sworn by a person, who was not in fact a justice, but was a commissioner for taking affidavits.—At the commencement of the proceedings before the arbitrators, it was stated in good faith that the arbitrators had been properly sworn before a justice for the county, and that statement was dictated by the counsel for the company to the stenographer, and with the consent of the counsel for the other side entered on the record.—*Held*, per White and Crockett JJ., that the statutory provision requiring the arbitrators to be sworn might be waived and the defendant company is estopped or precluded from objecting on that ground by what took place before the arbitrators.—*Held*, per Barry J., that the statutory provision requiring the arbitrators to be sworn is a condition precedent to their jurisdiction, and want of jurisdiction

can not be waived by admission, nor can jurisdiction be conferred by estoppel.—*Held*, per White J., an appeal having been taken from the award and the parties on the hearing having agreed that if the judge on appeal should come to the conclusion that the award ought to be set aside he should make a new award on the evidence before him, that an award made on this agreement is binding even though the award of the arbitrators is a nullity.—*Held*, per Barry J., that the original award, having been made by a tribunal without jurisdiction, there was no legal evidence upon which the judge on appeal could base an award. —*Held*, per White J., that under s. 8 (28) of C. S. 1903, c. 1, it is sufficient if the oath required by the Railway Act is administered by any of the persons authorized by that sub-section.—*Held*, per Barry J., that as the Legislature has expressly or by clear inference provided that the oath should be administered by a designated person, no other person has authority to administer it. *Turney* v. *St. John & Quebec Rwy. Co.*, 42, p. 557.

Remuneration of arbitrators—An arbitrator will not be allowed to fix his fees upon the basis of the value of his services in his own business or profession.—What fees he should receive depends upon the particular circumstances of the case.—The expert or professional man, who has been selected as arbitrator because the matters in controversy are such as his special training and education enable him the more intelligently to determine, is not to be rated the same as one who has no exceptional qualification.—In determining as to the reasonableness of his fees, regard must also be had to the nature and importance of the question in dispute, the amount of money involved, and the time necessarily occupied.—Where arbitrators charged for each of their services $25 a day, for 21 days of 4½ hours each, a review judge reduced the charge to $20 per day of 6 hours each. *In re Sutton and Jewett Arbitration*, 1 Eq., p. 568.

Where each of three arbitrators under 61 Vic., c. 52, charged $5 for each of a number of attendances at meetings which were adjourned without any business being despatched, owing to causes for which the arbitrators were not responsible, a review judge held the charge not to be unreasonable. —Where arbitrators each charged $10 for each of their sittings at which evidence was taken, or the matter of the arbitration was proceeded with, a review judge refused to reduce the charge. *In re Dean Arbitration*, 2 Eq., p. 120.

Where there is evidence of an express promise to pay an arbitrator for his services as such, founded on good consideration, it is misdirection to withdraw the same from the consideration of the jury. *Pinder* v. *Cronkhite*, 34, p. 498.

Saint John Horticultural Association—By Act 57 Vict., c. 74, providing for the expropriation of lands by the Saint John Horticultural Association by arbitration, it is enacted that "any party to the arbitration may within one month after receiving a written notice from one of the arbitrators of the making of the award, appeal therefrom upon any question of law or fact to a judge of the Supreme Court, and upon the hearing of the appeal, the judge 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.—The judge, upon such appeal, shall have the right to hear additional evidence and decide the question upon the original as well as the new evidence."—On an appeal from an award made under the Act, *held*, that the judge appealed to was not to disregard the award and the reasoning in support of it, and deal with the evidence *de novo*, but that he was to examine into the justice of the award on its merits, both upon the facts and the law, and whether a reasonable estimate of the evidence had been made in accordance with the principles of compensation.—In assessing damages upon the expropriation of land, regard should be had to its prospective capabilities.—Rule considered as to when evidence of an arbitrator will be admitted in explanation of the award. *In re Gilbert and St. John Horticultural Association.* 1 Eq., p. 432.

Statutory provision for vs. Action for damage—An arbitration clause in a private act of parliament will not oust the jurisdiction of the Court, and an action for damages will lie, unless the necessary steps are taken under the act, to vest the power to exercise the rights, or to do the thing for which compensation would be due under the act. *Barter* v. *Sprague Falls Mfg. Co.*, 38, p. 207.

ARMY AND NAVY.

Canteen at infantry school—*Held* that the infantry school corps at Fredericton has the right to establish and maintain a canteen to be conducted in accordance with the Queen's Regulations; and that, inasmuch as the active militia is subject to these orders and regulations, every officer and man of the militia from the time of being called out for active service, and also during the period of annual drill or training, has an equal right with the members of the infantry school corps, to purchase ale and other articles for sale at the canteen. *Ex parte Patchell*, 34, p. 258.

ARREST.

1. Judgment Debtor.

2. Miscellaneous Cases.

Bail.—*See* BAIL.

Criminal Arrest.—*See* CRIMINAL LAW.

False Arrest.—*See* MALICIOUS PROSECUTION.

1. Judgment Debtor.

Discharge of debtors, Form of order—An order of discharge made by the clerk of the peace for the county of Victoria under 59 Vict., c. 28, s. 32, which states that the party discharged had been in custody in the county of Victoria by virtue of an order of render made by the police magistrate of the district of Andover and Perth Civil Court, that due notice of disclosure had been given, and that the hearing took place at the time and place mentioned in the notice, which order is signed by the clerk of the peace of the county of Victoria, is a sufficient statement on the face of the order of the territorial jurisdiction of the officer making the same, and will not be quashed on certiorari.—Per Tuck C. J., Hanington, Landry and McLeod JJ., Barker and Gregory JJ., dissenting. *R.* v. *Straton ex parte Porter*, 36, p. 388.

Discharge of debtors—If there is evidence from which the officer making the order for discharge might be satisfied that a full disclosure had been made, the Court will not set aside the order, even though they are not satisfied that the disclosure is a full one, or of the *bona fides* of it. *Id.*

Discharge, Form of order—An order for discharge will not be quashed on the ground that the notice of the application to disclose was not entitled in the cause, or that the proceedings and order were entitled in the wrong cause if it sufficiently appear in the body of the notice, proceedings and order, in what proceeding the application and order were made. *R. v. Straton ex parte Patterson*, 37, p. 376.

Discharge of debtor, Order in lieu of mandamus—The order provided for by 60 Vict., c. 28, s. 15, County Court Act, is a substitute for the remedy by writ of mandamus, and it will therefore be granted only in cases where mandamus will lie.—In discharging or refusing to discharge a debtor who has made a disclosure under 59 Vict., c. 28, s. 7, the judge or other officer is acting judicially and not ministerially therefore the Court *en banc* refused to make an order under the said section 15 commanding the judge of the County Court of S. to discharge a debtor who had made a disclosure before him. *Ex parte Keerson*, 35, p. 233.

Disclosure—On the hearing before a clerk of the peace, of a debtor's application for his discharge from custody, *held*, (1) that the non-production of his books, which were not called for or inquired after, is no bar to his discharge; (2) that, the debtor having sworn he had no real or personal property, and had not paid any debts since his arrest or given any preferences, the question "Have you at any time transferred any property intending to defraud the plaintiff?" and the answer "I have not," were immaterial and unnecessary; (3) that the debtor could not be refused his discharge because previous to his arrest he had sold a horse, as he was not examined as to the disposition of the proceeds of the sale; (4) that the value of a debt due the debtor was a question of fact to be determined by the examining officer; (5) that the answer "No one in particular" given to a question as to the persons from whom he expected to get two notes he had promised to give creditor's agent, was sufficient. *Ex parte Conant*, 34, p. 195.

Disclosure—Assignment of assets—If a disclosure reveals a debt due to the party making the disclosure a definite demand for the assignment of the debt must be made and an opportunity given to the applicant for discharge to show cause, if any, why the debt should not be assigned; also in cases where judgment has not already been obtained against the party making the disclosure, opportunity must be afforded him to ask for security from the plaintiff for the re-assignment of the debt in event of the plaintiff failing to recover judgment.—Quaere:—Whether the provisions of section 28 of the said act relating to the assignment of debts due the defendant as a condition of his discharge have any application in cases where the defendant is not in actual custody. *R. v. Carleton ex parte Akerley*, 37, p. 13.

Disclosure — Assignment of assets — Discharge of debtor—The officer taking the examination has authority to order an equitable interest in personal property to be held for the benefit of the creditor, and the disclosure of such an interest is no bar to a discharge.—If a debtor makes such a disclosure of his affairs as fulfils the requirements of the act, a creditor who allows the proceedings to go by default can not object that the disclosure was not a full one. *R.* v. *Straton ex parte Patterson*, 37, p. 376.

Disclosure by defendant in breach of promise suit—The provisions of the act 59 Vict., c. 28, s. 7, allowing a debtor to make a disclosure of his affairs and authorizing his discharge under certain circumstances are applicable in the case of a defendant held to bail by judge's order in an action of breach of promise of marriage. *R.* v. *Carleton ex parte Akerley*, 37, p. 13.

Disclosure—Equitable interest in personal property—An equitable interest in personal property cannot be sold under an execution.—A defendant at the time of his arrest and examination had personal property subject to a chattel mortgage: *held*, that such property was not liable to be taken under an execution, and the defendant was not entitled to his discharge.—*Semble*, that the judge had no right to make a conditional order for discharge. *Ex parte Miller*, 34, p. 5.

Disclosure—Interest in growing crops—A judgment debtor, having made application to be discharged from custody under an execution issued out of a justice's court,

in the course of his examination disclosed that he and his wife resided upon land of which his wife had the fee,and that there were growing crops upon it created by his labour.—*Held*, that as this disclosed an interest in real property that could not be taken under an execution issued out of a justice's Court the debtor could not be discharged.—The husband's estate of courtesy exists during the life-time of the wife. *Ex parte Geldert*, 34, p. 612.

Disclosure, Jurisdiction for—To give the clerk of the peace jurisdiction to grant an order for discharge from arrest, under C. S., c. 38, it must appear that the defendant is in custody.—It is also imperative that he should sign as to the truth of all his answers. *Ex parte Heywood*, 34, p. 8.

Disclosure, Notice of—A notice of disclosure purporting to be signed by the applicant is sufficient without proof of the signature.—Service of the notice of disclosure on the wife at the husband's place of abode, he then being within the province, is good, and no order perfecting the service is required. *R.* v. *Straton ex parte Patterson*, 37, p. 376.

Disclosure of real estate—On the hearing of a debtor's application for examination and discharge from custody, under the provisions of 59 Vict., c. 28, s. 7, where debtor disclosed real estate, *held*, that the making of a memorandum to be filed in the office of the Registrar of Deeds as provided by s. 11 of the said act, when not asked for is not a condition precedent to debtor's discharge nor does any duty devolve on the debtor to see that it is made. *Ex parte Conant et al*; *In re James W. Starkey*, 34, p. 198.

Disclosure—Payment ordered by instalments out of income as government employee—K. M. and W. were officers of the Government of Canada and were in receipt of annual salaries amounting to $1,800, $400, and $700 respectively.—K., upon being examined before the County Court of W. was, under the provisions of 59 Vict., c. 28, s. 53, ordered to pay the amount of the judgment against him by instalments at the rate of five dollars per month.—M. and W., being examined before the judge of the County Court of S. were, under the same section, ordered to pay the amounts of the judgments against them by instalments at the rate of five and ten dollars per month respectively.—Orders *nisi* having been obtained to bring up the three orders for the purpose of quashing them, upon the return thereof, it was *held* (per Tuck C. J., Hanington, VanWart and McLeod JJ., Landry J. dissenting), (1) that the provisions of 59 Vict., c. 28, s. 53, authorizing the judge or other officer before whom the examination is held, upon it being made to appear to him that the judgment debtor is unable to pay the whole of the debt in one sum, but is able to pay the same by instalments, to make an order that the debtor shall pay the amount of the judgment debt by instalments, in so far as it is sought to apply the same to salary or income derived from office or employment under the government of Canada is *ultra vires* of the Provincial Legislature, and, therefore, that the orders against K., M. and W. should be quashed; (2) that in the cases of M. and W., there being no evidence or charge of fraudulent conduct on their parts, the circumstances showed such an improper exercise of discretion on the part of the judge of the County Court of S. that the orders made by him should be quashed on that ground as well. *Ex parte Killam*; *Ex parte McLeod*; *Ex parte Wilkins*, 34, p. 530.

When the debtor is honest and has been guilty of no fraudulent act, and has neither real or personal estate and only a moderate income, I think it an unwise and wrongful discretion on the part of a judge to compel such a debtor to pay by instalments—Per Tuck C. J. *Id.*

Examination of debtors—Privilege—The proceedings for the oral examination of a judgment debtor under sec. 36 of 59 Vic., c. 28 should be by summons and order; and not by an *ex parte* order in the first instance.—Per Hanington, Landry, Barker and McLeod JJ., Tuck C. J. dissenting.—A judge of the Supreme Court has no privilege against an attachment for any contempt which is of a criminal and not of a civil kind.—The process of attachment which may be issued under the provisions of sec. 36 of 59 Vict., c. 28, against a judgment debtor for contempt of an order calling upon him to appear and be examined orally as to any and what property he has which by law is liable to be taken in execution, is punitive or criminal in its nature; therefore a judge of the Supreme Court can not protect himself by his privilege against an attachment issued against him for refusing to obey such an order.—Per Tuck C. J., Landry and Barker JJ. *Ex parte VanWart*, 35, p. 78.

Judgment debtor, Commitment of—The judge of the County Court of Saint John made an order under 59 Vict., c. 28, as amended by 61 Vict., c. 28, committing the applicant to prison for three months because, after his arrest in a civil court in the Saint John City Court, he had made an appropriation of property in payment of another debt without paying the debt sued for.—The judge based the order upon evidence given in a former proceeding against the debtor, and not upon the hearing of any application for the order in question.—The order did not show on its face the grounds upon which it was issued.—By 61 Vict., c. 28, s. 8, amending 59 Vict., c. 28, an appeal is given to the Supreme Court from any order for imprisonment made under ss. 46, 48, 49, 51 and 53 respectively of 59 Vict., c. 28.—*Held*, that the fact that the right to appeal is given by statute does not deprive the party of his right to a certiorari,

and the Court will grant the writ, if, in their opinion and discretion, the circumstances warrant it.—That an order for imprisonment made by a County Court judge on the ground that the debtor, since his arrest, has divested himself of the means of paying the debt for which he is sued is bad if it does not show on its face the grounds upon which it was issued.—That the mere payment of a *bona fide* debt, after he is sued, is not such a divesting of property as will render the debtor liable to imprisonment under the act.—That an order based upon evidence given in a former proceeding against the debtor, and not re-proved upon the hearing of the application for the order in question is bad. *R.* v. *Forbes ex parte Dean*, 36, p. 580.

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2. Miscellaneous.

Arrest (civil) not an appearance in court—Defendant was arrested out of the Supreme Court, King's Bench Division, on a bailable writ and gave bail to the sheriff but did not put in special bail.—The plaintiff signed judgment by default and issued a *fi. fa.* upon the judgment.—Upon an application to set aside the judgment, *held*, defendant is not in Court until he puts in special bail and the judgment should be set aside.—The plaintiff's remedy in such a case is against the sheriff or on the bail bond.—An application by the defendant, after arrest and giving bail to the sheriff, to set aside a writ of capias for irregularity and discharge the bail is not a fresh step in the action.—Such an application must be made within a reasonable time and a delay of over two months after the arrest, is an unreasonable delay. *Gunns Ltd.* v. *Dugay* (1912), 41, p. 402. (But see Acts 1913, c. 23.—Ed.)

Arrest, Justifying—In order to justify an arrest under 11 Vict., c. 12, s. 7, it is not sufficient that defendant has an honest belief of the existence of a state of facts, which, if true, would have justified the arrest, but such belief must be based upon reasonable grounds. *Hopper* v. *Clark et al*, 40, p. 568.

Arrest under execution—Where defendant made default in paying to the plaintiff under the decree of the Court a sum of money received by the defendant as a *donatio mortis causa* in favor of the plaintiff, an order was granted under Act 53 Vict., c. 4, s. 114, as amended by Act 58 Vict., c. 18, s. 2, for an execution against his body.—An order made under the above act for an execution against the body of a party making default to a decree of the Court for payment of a sum of money will not be granted where the Court is satisfied that the party in default has no means, and has not made a fraudulent disposition of his property, and that his arrest is sought for a vindictive purpose, or to bring pressure upon his friends to come to his assistance. *Thorne* v. *Perry*, No. 2, 2 Eq., p. 276.

Arrest, What constitutes—To constitute an arrest, it must appear that plaintiff was reasonably led to believe by either the language or conduct of the defendants or both, that plaintiff was deprived of her liberty of movement. *Hopper* v. *Clark et al*, 40, p. 568.

Attachment, Writ of—Supreme Court costs—A person in custody under a writ of attachment issued out of the Supreme Court for contempt in not obeying an order to pay costs is entitled to relief under chapter 130 of the C. S. 1903, respecting arrest, imprisonment and examination of debtors. *R.* v. *Straton ex parte Patterson*, 37, p. 376.

Attachment, Writ of—Costs in Equity Court—An arrest under an execution against the body issued under an order of the Equity Court for enforcement of its decree directing payment of taxed costs on dismissing the plaintiff's bill, operates as a satisfaction, and an execution issued against the goods of the plaintiffs for the same demand will be set aside.—Per Hanington, Landry, Barker and McLeod JJ., Tuck C. J. dissenting, and Gregory J. no part.—A County Court judge has no jurisdiction under the act "Respecting Arrest, Imprisonment and Examination of Debtors" (C. S. 1903, c. 130) to discharge persons in custody under such executions. *Petropolous et al* v. *Williams Co. Ltd. et al*, 38, p. 146.

Attachment for costs—Practice—On an application for an attachment for non-payment of costs pursuant to a rule, the Court allowed an affidavit to be read which was entitled in the court and cause, but was not entitled the same as the rule.—The provisions of Order 41, r. 5, are inapplicable to a rule to pay costs, therefore it is not necessary in an application for attachment for nonpayment that the rule served should bear the indorsement mentioned in Order 41, r. 5.—The Court refused to grant an attachment for non-payment of costs ordered on an appeal from a judge's order on review from a magistrate's court where the demand was made by the attorney acting for the party entitled, without a power of attorney authorizing him to demand and receive the costs.—An attachment will not be granted if satisfaction might have been obtained by execution against the goods of the person liable, or unless it be shown that the party liable was able to pay and refused or deprived himself of the ability to pay. *R.* v. *Borden ex parte Kinnie*, 43, p. 299.

County Court appeal, Attachment for costs of—The Supreme Court will not as a general rule grant an attachment to enforce the payment of the costs of a County Court appeal.—The costs should be certified and application made to the Court below. *MacPherson* v. *Samet*, 34, p. 559.

Damages for wrongful arrest—To entitle a plaintiff to exemplary damages in an action it must be proved that defendants

acted maliciously or with unnecessary harshness, or with wilful or grossly negligent disregard of plaintiff's rights in arresting her, and failure to so direct the jury is ground for a new trial. *Hopper* v. *Clark et al*, 40, p. 568.

Equity Court, Execution against body out of—An arrest under an execution, issued under an order of the Equity Court against the body for enforcement of its decree directing payment of taxed costs on dismissing the plaintiff's bill, operates as a satisfaction, and an execution issued against the goods of the plaintiffs for the same demand will be set aside.—Per Hanington, Landry, Barker and McLeod JJ., Tuck C. J. dissenting, and Gregory J. no part.,—A County Court judge has no jurisdiction under the act "Respecting Arrest, Imprisonment and Examination of Debtors" (C. S. 1903, c. 130) to discharge persons in custody under such executions. *Petropolous et al* v. *Williams Co. Ltd. et al*, 38, p. 146.

See also *Thorne* v. *Perry*, 2 Eq., p. 276, supra, folio 47.

Handcuffing—Canadian Government Railways—In order to justify a conductor under Rule 136 of the "Rules and Regulations for Government Railways" in arresting a passenger, there must be evidence that he was annoying other passengers and abusive language to the conductor is not in itself evidence of such annoyance.—The circumstances of this case did not justify the defendant handcuffing the plaintiff.—Per Barry and McKeown JJ: A conductor may handcuff only when a prisoner has attempted to escape, or it is necessary in order to prevent him doing so.—Per Barker C. J., Landry and White JJ.: A conductor might be justified in using handcuffs for the protection of passengers. *McAllister* v. *Johnson*, 40, p. 73.

Re-arrest on same warrant—The prisoner, who had been arrested under a warrant to serve a sentence of imprisonment for an offence against the Canada Temperance Act, was, upon his own request, suffered to go at large for a time by the officer who had the execution of the warrant.—Shortly after he was again arrested upon the same warrant and conveyed to the county gaol to serve his term of imprisonment.—Upon an application for an order in the nature of a habeas corpus, *held* (per Tuck C. J., Hanington, Landry, Barker and McLeod JJ., VanWart J. dissenting), that the second arrest upon the same warrant was legal, and that the order should be refused. *Ex parte Doherty*, 35, p. 43.

Warrant, Arresting without—C. C., sec. 30—Section 30 of the Criminal Code provides that: "Every peace officer who on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not."—*Held*, that as an officer arresting without warrant might be called upon to decide whether or not there was reasonable and probable grounds for the arrest, the section did not apply to an officer arresting for an offence when he is himself the victim and the offence had been already committed and the offender is not being freshly pursued. *R.* v. *Belyea*, 43, p. 375.

Warrant, Arrest without—Liquor License Act, 1915—See *R.* v. *McDougall ex parte Goguen*, 44, p. 369.

ASSAULT.

Costs—The Court has jurisdiction to review the discretion exercised by a judge in certifying under the act 60 Vict., c. 28, s. 74, that there was good cause for bringing the action in the Supreme Court.—Where an action for assault and battery was brought in the Supreme Court and the jury found a verdict for the plaintiff for $35.00, but the learned judge who tried the cause granted a certificate under the above section on the ground that the plaintiff's attorney had reasonable grounds for thinking that the title to land would be brought into question, *held* (*per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ., Gregory J. hesitante) that a sufficient case had not been made out to induce the Court to interfere. *Cormier* v. *Boudreau*, 36, p. 6.

Damages—Misdirection—In an action for assault the judge misdirected the jury in favor of the plaintiff on matters which might affect the question of damages, and a verdict was rendered for the plaintiff for $135.00.—On appeal upon the grounds of misdirection and excessive damages *held*, that although the damages were not excessive yet the misdirection caused a substantial wrong or miscarriage entitling defendant to a new trial, inasmuch as the jury might have been influenced by it in assessing damages. *Edmondson* v. *Allen*, 40, p. 299.

Damages, No—Verdict for defendant—Costs—In an action for an assault the jury found the defendant guilty, and that the plaintiff had not suffered any damage and returned a verdict for the defendant.—A subsequent application to the judge of the County Court who had tried the cause to set aside the verdict and grant a new trial, or failing that, to enter a verdict for the plaintiff for nominal damages was refused.—*Held*, on appeal (*per* Tuck C. J., Hanington, Landry and Gregory JJ., McLeod J. dissenting), that the Court had no power to set aside the verdict for the defendant and enter a verdict for the plaintiff, and that a new trial will not be granted merely for the

purpose of enabling a plaintiff to obtain nominal damages, where no right is affected except a question of costs. *Murphy* v. *Dundas*, 38, p. 563.

Damage, Evidence in mitigation of— That evidence of provocation by words spoken three days before the assault by the plaintiff to the defendant was properly admitted in mitigation of damages. *Id.*

See CRIMINAL LAW.

ASSESSMENT AND TAXES.

Certiorari—Assessor himself in arrears for previous year—The Court refused a writ of certiorari to quash an assessment of rates and taxes because one of the assessors himself had not paid the rates of the year previous, his acts being those of a *de facto* officer. *Ex parte Martin*, 34, p. 142.

Certiorari—Applicant not interested— The municipality of the county of Westmorland having issued a warrant of assessment to the city of Moncton under the provisions of the Act respecting Rates and Taxes, C. S. 1903, c. 170, s. 34, before the same was delivered to the city assessors or any assessment made thereunder, the city of Moncton applied for a certiorari to remove the warrant alleging that part of the amount to be assessed under it was not properly chargeable to the city.—There was no evidence that the city itself was liable to be taxed as a rate payer.—*Held*, that there was no ground for the application, there being no assessment for the Court to act upon and the city as such having no interest in the assessment. *Ex parte City of Moncton*, 39, p. 326.

City of Saint John, 52 Vict., c. 27— The whole of an estate of a deceased person liable to be assessed in the city of Saint John, may be rated in the names of the resident trustees under 52 Vict., c. 27, s. 135, though one of the three trustees, in whom it is vested, is resident abroad.—Railway bonds, secured by a mortgage, are not mortgages within the meaning of section 121 as amended by 63 Vict., c. 43, and are not exempt from taxation. *R.* v. *Sharp, Ex parte Lewin*, 35, p. 470.

City of Saint John, 63 Vic., c. 43— Book-debts are assessable in the City of Saint John under s. 121 of 52 Vict., c. 27, as amended by 63 Vict., c. 43.—Railway bonds secured by a mortgage are not exempt under the said acts. *R.* v. *Sharp Ex parte Turnbull*, 35, p. 477.

City and County of Saint John, 3 Geo. V., c. 21—The valuation to be made by the board of valuators for the city and county of Saint John under the provisions of the Rates and Taxes Act, 3 George V., c. 21, for securing a common standard of valuation for general county purposes, of property the value of which has been fixed by special Acts for assessment purposes, is the value so fixed and not its full value as provided by s. 4 of the Act.—Buildings used exclusively as places of worship and sites with grounds surrounding the same upon which no other buildings are erected in the City of Saint John, are within the meaning of sub-s. 12 of s. 3 of the Act, and are not to be included in the valuation made by the valuators. *Municipality of the City and County of Saint John* v. *The Board of Valuators for the City and County of Saint John*, 43, p. 369.

City of Saint John—Insurance companies—The plaintiff, agent of the National Insurance Company of Hartford, Connecticut, carrying on the company's business in the city of Saint John, issued policies with the heading "Atlantic Fire Underwriters' Agency."—The policies continued, "by this policy the National Fire Insurance Company of Hartford, Connecticut, in consideration," etc. "does insure" etc.—The policies are signed by the president and secretary of the National and are the policies of that company.—There is no association of underwriters known as the Atlantic Fire Underwriters' Agency, it being merely a name adopted by the National in issuing its policies.—Under the act of 5 Geo. V., c. 94 (1915), amending 3 Geo. V., c. 55 (1913), by adding to s. 2, sub-s. (g), providing that every agent who issues a policy of any company and causes or permits to be represented thereupon the name of any other insurance company or association whether the same be connected with responsibility under the policy or not shall pay a fee of $100. for each company or association which he represents.—The agent of the National paid under protest to the city of Saint John, in addition to the fee for that company payable under 3 Geo. V. c. 55 a fee of $100. for the Atlantic Fire Underwriters' Agency.—*Held*, that the name Atlantic Fire Underwriters Agency not being the name of any other insurance company, insurance association, underwriters' agency or other mode of association of underwriters, the plaintiff was not liable for the payment of the additional fee. *Howard* v. *City of Saint John*, 43, p. 521.

Civil servant—Liability to taxation— A provincial legislature has no power to impose a tax upon the official income of an employee of the Dominion government, nor to confer such a power on the municipalities. *Ex parte Timothy Burke*, 34, p. 200.

The salary of a civil servant of the Dominion government resident in the city of Saint John is liable to taxation in the city for municipal purposes.—*Ex parte Owen*, 20 N. B. R. 487; *Ackman* v. *Town of Moncton*, 24 N. B. R. 103; *Coates* v. *Town of Moncton*, 25 N. B. R. 605 overruled. *R.* v. *The City of Saint John ex parte Abbott*, 38, N. B. R. 421. *Abbott* v. *City of St. John*, 40 S. C. R., 597.

Dog tax—Illegal arrest—The plaintiff was arrested under an illegal warrant for dog taxes issued by the town treasurer of Marysville and executed by a provincial constable.—The plaintiff gave notice of action under 49 Vict., c. 25, s. 84, directed to the defendants jointly, describing one as town treasurer of Marysville and the other simply as constable, and setting out specifically the acts complained of on the part of each.—Plaintiff then sued defendants jointly for false imprisonment.—*Held*, (1) the notice of action should be construed liberally and is sufficient if it substantially informs the defendants of the ground of complaint.—(2) In the absence of express statutory requirement it is not necessary to state the address and addition of the parties notified.—(3) The joint notice here was sufficient because it set out the specific acts complained of on the part of each defendant and it was not necessary to state whether the action was to be joint or several.—The arrest and imprisonment of the plaintiff was the joint act of both officers.—The notice was subscribed by the plaintiff's solicitor describing himself as "of the city of F." and giving his place of business and address for service but was not endorsed.—*Held*, sufficient under s. 84 of the act requiring that the name and place of abode of the attorney shall be endorsed on the notice. —*Baxter* v. *Hallet*, 10 N. B. R. 544 followed.—A defence by statute that the defendant "lawfully acted by virtue of his office" is sustainable only where the act in question was done "lawfully" so far as the other party is concerned.—The act respecting Protection of Constables, C. S. 1903, c. 64, does not apply here because the town treasurer had no authority by law to issue the warrant under which the constable acted.—In an action for false imprisonment where the person or character of the plaintiff are injured, a new trial will not be granted on the ground of excessive damages unless the verdict is so large as to satisfy the Court that it was perverse and the result of gross error, or unless it can be shown that the jury acted from undue motives or misconception.—In considering the amount of the damages in such an action the jury may take into consideration the plaintiff's loss of time and interruption of business, bodily and mental suffering, indignity, circumstances of family, condition of the gaol, costs of obtaining release for which the plaintiff is liable although not actually paid, and in addition and distinct from the foregoing the illegal restraint of plaintiff's personal liberty. *Markey* v. *Sloat et al*, 41, p. 235.

Exemption of incorporated company, by-law ultra vires—By Act, the council of the town of Woodstock are empowered to give encouragement to manufacturing enterprises within the town by exempting the property thereof from taxation for a period of not more than ten years.—*Held*, that a by-law of the council exempting from taxation for a period of ten years any company establishing a woolen mill in the town was *ultra vires*, being a discrimination in favor of a company as against private persons engaged in the same business.—A bill alleging that plaintiffs were entitled to exemption from taxation under a by-law passed by the defendants, held sufficient on demurrer without alleging that the by-law was authored by statute. *The Carleton Woolen Co. Ltd.* v. *Town of Woodstock*, 3 Eq. 138. Confirmed 37 N. B. R. 545 and 38 S. C. R. 411.

Fredericton, City of—Sheriff—"Resident"—Sheriffs are required by law to reside in the shiretown of their county unless otherwise permitted under C. S. 1903, c. 60, s. 8.—The sheriff of York County has an office in the city of Fredericton, the shiretown, where he spends a considerable portion of his time in the discharge of his duties, boarding at the county gaol when there.—His wife and family reside at his farm in the parish of S. where the sheriff also spends a large part of his time.—He pays taxes in the parish of S., including poll tax, and swore that his residence and domicile were there.—For two years he paid without objection taxes levied on him as a resident in the city of Fredericton, and in his affidavits of service he described himself as "of the city of Fredericton."—Upon an application to quash an assessment of the city of Fredericton against the sheriff, on the ground that he was a non-resident, *held*, that the sheriff was in fact a resident of the city of Fredericton and liable to be assessed as such under "The City of Fredericton Assessment Act, 1907."—*Held, also*, that the sheriff, if a non-resident, does not come within the exemption of s. 3 (11) of "The City of Fredericton Assessment Act, 1907," extended to non-residents, "employed in the city of Fredericton in government or county offices whose duties are necessarily performed in Fredericton." *R.* v. *Assessors Fredericton ex parte Howe*, 41, p. 564.

The deputy sheriff of York county is also county gaoler, and as such occupies apartments with his wife in the county gaol at Fredericton.—He made affidavit that he had been for thirty years and still was an inhabitant and resident of the parish of Q., where he owns a farm and pays taxes, including a poll tax, and that he was in Fredericton only to discharge his duties.—Upon an application to quash an assessment of the city of Fredericton against the deputy sheriff on the ground that he was a non-resident, *held*, he was in fact a resident of the city of Fredericton and liable to be assessed as such under "The City of Fredericton Assessment Act, 1907." *R.* v. *Assessors Fredericton ex parte Timmins*, 41, p. 577.

Fredericton, City of—Government employee—A non-resident carrying on business in the city of Fredericton within the meaning of s. 34 of Fredericton Assessment Act, 1907, is liable to assessment in the city in respect to his personal property and income, notwithstanding the provisions of s. 30 of 3

Geo. V., c. 21 (Rates and Taxes Act, 1913), but if the non-resident be employed in a government office and his duties thereunder are necessarily performed in Fredericton, he is exempt under sub-s. 11 of s. 3 of said Fredericton Assessment Act. *R.* v. *Assessors of Fredericton ex parte Maxwell*, 44, p. 563 (Chambers).

Petition for relief, 44 Vic., c. 9—In a petition for relief by a non-resident ratepayer under 44 Vict. (1881), c. 9, it is sufficient evidence of authority to warrant the judge in acting, that the party petitioning describes himself as the agent of the person aggrieved in the matter of the assessment, and swears to the truth of the statements in the petition. —The time within which the petition must be presented under the act does not begin to run until after the assessment complained of has been made up from the corrected list and filed with the county secretary, and then within one month, either from notice of the assessment from the county officer charged with the duty of giving notice, or from the time the person assessed first heard or knew of such assessment. (*Per* Hanington, Landry, Barker, McLeod and Gregory JJ., Tuck C. J. dissenting.)—It is no objection to an application under the act that objection to the valuation of the property was made to the assessors under Consolidated Statutes, c. 100, s. 59 and that the objection might have been further prosecuted before the valuators under section 68.—Where one of the objections under the act is that the property of residents had been greatly undervalued, the effect of which was to increase the rate of non-residents, it is not necessary that the residents, the valuation of whose property is attacked, should have notice of the application. (*Per totam curiam*) —The right to apply for relief from general county taxes is not waived by payment of the school tax.—The petition under the act must contain facts from which it can be collected that the petitioner is aggrieved, or must state the fact. The specific grounds upon which a certiorari is granted must, under rule 7 Mich. 1899, be stated, and a general statement *i. e.* "also all other grounds taken at the hearing in the Court below" is objectionable. (*Per* Hanington, Landry, Barker, McLeod and Gregory JJ.) *R.* v. *Wilkinson ex parte Restigouche Salmon Club*, 35, p. 538.

Replevin, Writ of—Custodia legis—A writ of replevin brought to try the legality of an assessment for taxes, and the execution issued thereon, both of which were claimed to be void for want of jurisdiction, will not be set aside on a summary application on the ground that at the time the goods were replevied they were in the custody of the law, unless the proof is satisfactory that all the conditions necessary to give jurisdiction have been fulfilled. *MacMonagle* v. *Campbell*, 35, p. 625.

Schools, assessment under Mechanics Lien Act—Property held by trustees for school purposes under the provisions of the Schools' Act, C. S. 1903, c. 50, is not Crown property and therefore not exempt from the operation of the Mechanics' Lien Act; but such property is not liable to be sold under execution.—An order for the payment of money under the Mechanic's Lien Act can be enforced in the same way as a judgment, by compelling the school trustees to make an assessment. *Trustees School District No. 8, Havelock* v. *Connelly* 41, p. 374.

Validity—Assessment against one not the owner—An assessment in respect of land, under 53 Vict., c. 73, incorporating the town of Grand Falls, against one who was not the owner at the time assessment was made, is void and will be quashed on certiorari, notwithstanding he subsequently acquired title to the land with knowledge of such assessment.—Section 69 of this Act, prohibiting the issue of certiorari to review a tax assessment until after appeal to the town council, does not apply where the assessment is made without jurisdiction. *R.* v. *Town of Grand Falls*, 42, p. 122.

Validity—Assessment against owner's husband—An assessment under 3 Geo. V., c. 21 in respect of land owned by plaintiff made against plaintiff's husband, with her knowledge and without objection by her, she having from time to time paid former taxes so assessed, is valid, and plaintiff is estopped from contending that the property is improperly assessed.—*R.* v. *The Town of Grand Falls* distinguished. *Byrne* v. *Town of Chatham et al*, 44, p. 271, C. D.

ASSIGNMENT.

See BANKRUPTCY AND INSOLVENCY —CHOSE IN ACTION—LANDLORD AND TENANT.

ATTORNEY.

See SOLICITOR.

POWER OF. *See* PRINCIPAL AND AGENT.

ATTORNMENT.

See LANDLORD AND TENANT—MORTGAGE.

AUCTIONEERS.

Auctioneer—An action of deceit will lie against an auctioneer, who being employed to effect the sale of a piece of property, concealed from his principal a material fact, by reason of which concealment the latter

sold the property for a smaller sum than he could have obtained if he had been in possession of all the facts.—Such failure of duty on the part of the auctioneer towards his principal deprives him of any right to the compensation agreed to be paid to him upon the sale being effected. *Ring* v. *Potts*, 36, p. 42.

BAIL.

Action against bail—The Supreme Court has jurisdiction to try an action against bail given in a cause originating in an inferior Court, and has power to give such relief to the bail as justice may require.—The former practice of the King's Bench in England of refusing to try such actions and of compelling them to be brought in the inferior court has never been followed in this province.—The judgment of an inferior Court is not conclusive as between the parties and their privies upon the question of jurisdiction; therefore, where an action was brought in the Supreme Court against bail given in a cause which had been commenced and tried in the City Court of Saint John, and the defendant by plea denied the jurisdiction of the said Court, and at the trial gave evidence in support of his plea.—*Held*, (*per* Hanington, Landry, Barker, McLeod and Gregory JJ)., that the defendant was not estopped by the judgment of the City Court from offering such proof.—The fact that the judgment had been affirmed upon review by a County Court judge made no difference. *Jack* v. *Bonnell*, 35, p. 323.

Action on limit bond—Pleading—To a declaration for a breach of a limit bond given in a case wherein one of the defendants had been arrested upon an execution issued upon a judgment obtained in the City Court of Saint John, the defendants pleaded a fifth plea negativing the jurisdiction of the said Court by reason of the cause having been tried and the judgment entered on a day upon which the Court was not authorized by law to sit, of which trial and entry of judgment the defendant had no notice.—The point sought to be put in issue by the said plea being whether or not the Court should have sat on a day proclaimed by the Governor General in Council as a day for a general public thanksgiving, it being provided by statute that the Court should be held on Thursday in every week, provided that when Christmas Day or New Year's Day, or any other legal holiday, should fall on Thursday, the Court should be held on Friday in such week.—This plea having been struck out as embarrassing by order of a judge in chambers, upon motion to rescind such order, it was *held*, that the order should be rescinded and the plea stand.—If the plea were bad in substance, the plaintiff should have demurred.—To the same declaration the defendants on equitable grounds pleaded a seventh plea, alleging that the note upon which the original action was brought in the City Court of Saint John had been paid; that the plaintiff, notwithstanding such payment, retained the note in his possession, and fraudulently, surreptitiously and illegally, in the absence of the defendant, W. H. F., and without summons or proper notice obtained a judgment thereon in the said City Court, that the defendant, W. H. F., was an official stenographer to the Courts of the province, and was privileged from arrest on civil process while in the performance of his duties as such official stenographer, yet the plaintiff caused the said W.H.F. to be arrested upon the judgment so fraudulently obtained while he was engaged in performing his official duties at the Equity Court in Saint John; that the said W. H. F. only went beyond the limits of the gaol of the city and county of Saint John when he was compelled so to do in order to perform his duties as such court stenographer, and the defendants, by reason of the premises, claimed relief etc.—This plea being also struck out by order upon the like motion, it was *held*, that the plea was bad as being both embarassing and double.—*Semble*: That bail cannot by plea take advantage of matters forming grounds for equitable relief, but should apply to the Court by motion. *Dibblee* v. *Fry et al*, 35, p. 109.

Action on limit bond—The arrest of a person, having privilege by reason of his being an officer of a Superior Court, under an execution issuing out of the City Court of S. is not void, nor does such privilege afford any defence in an action on a limit bond entered into by such officer in order to obtain his discharge.—If two things are done upon the same day, it will be assumed that that which ought to have been first done was so done, therefore in an action upon a limt bond by the assignee of the sheriff, it was held, in the absence of proof to the contrary, that, though the assignment and the writ commencing the action were dated upon the same day, the bond was assigned before the writ was issued.—*Further held*, that the assignment by the sheriff, being a mere formality only going to show that the assignee was satisfied with the security the date thereof was immaterial. *Dibblee* v. *Fry*, 35, p. 282.

The giving by the plaintiff to the original defendant of time to arrange payment after breach of a limit bond is no defence to an action for such breach *per* Barker J. *Kelly* v. *Thompson et al*, 35, p. 718.

Bail, Deposit in lieu of—The defendant was arrested on a capias, and the amount endorsed for bail and $40 for costs was deposited with the sheriff by a friend out of her own money, the sheriff giving a receipt as follows: "Received from Ida Isaacson $540 in lieu of bail in the case of MacAulay Bros. & Co. v. Hyman Jacobson."—*Held*, that an application for an order that the sheriff accept bail, or in lieu thereof that the defendants be committed to gaol, and that the deposit be returned, should be refused. *MacAulay et al* v. *Jacobson ex parte Isaacson*, 37, p. 537.

Money paid to a sheriff by the defendant upon arrest for debt under the provisions of C. S. 1903, c. 30, s. 5, is held by the sheriff as a statutory trustee and the interest, if any, upon such money must be accounted for by him in the same way as the principal. *Mc Kane* v. *O'Brien*, 40, p. 392.

Bail not an appearance to suit—Defendant was arrested out of the Supreme Court, King's Bench Division, on a bailable writ and gave bail to the sheriff but did not put in special bail.—The plaintiff signed judgment by default and issued a writ of *fi. fa.* upon the judgment.—Upon an application to set aside the judgment, *held*, defendant is not in court until he puts in special bail and the judgment should be set aside.—The plaintiff's remedy in such a case is against the sheriff or on the bail bond.—An application by the defendant, after arrest and giving bail to the sheriff, to set aside a writ of capias for irregularity and discharge the bail is not a fresh step in the action.—Such an application must be made within a reasonable time and a delay of over two months after the arrest, is an unreasonable delay. *Gunns Ltd.* v. *Dugay* (1912) 41, p. 402. But see Acts 1913 C. 23 (Ed.)

Filing affidavit to hold to bail—A judge has power to extend the time for filing the affidavit to hold to bail. *Id.*

BAILMENT.

Canadian Government Railways — Freight—In delivering the goods bailed to a person other than the bailor, unless under compulsion, the bailee assumes the burden of establishing in the party to whom he makes such delivery, a title paramount to that of his bailor, in case suit is brought.—(*Per* McKeown J.). *Govt. Rwys. Managing Board* v. *Williams*, 41, p. 108.

Hire of chattels—Damages—In an action upon a contract for the hire of chattels the plaintiff is entitled to recover damages for the improper use of or injury to the chattels or for a conversion of them.—Therefore when a plaintiff sued in *assumpsit* for the hire of blocks and gear for hoisting and also added a count in trespass for the improper use, and injury to the same and a count in trover for a conversion of a part thereof, and the learned judge who tried the cause found that a sum of money paid by the defendant to the plaintiff before action was an ample compensation for the plaintiff's claim on the count for hiring.—*Held*, that this amounted to a finding in favor of the defendant on the pleas of not guilty, pleaded to the counts in tort. *Lang* v. *Brown*, 34, p. 492.

Hire of horse and carriage—Damages—Negligence—A bailee for hire who returns the property bailed in a damaged condition, and who, being the only person with full knowledge of the circumstances causing the damage, fails to give any explanation of the same, is presumed to have been negligent.—This applies to the hirer of a horse and carriage from a livery stable keeper. *Gremley* v. *Stubbs*, 39, p. 21.

Hire of horse—Negligence—The jury having found that it was negligence for the hirer of a horse to allow it to stand harnessed but unbridled in an open place near the shafts of the wagon while he went to the wagon to get the bridle, in consequence of which the horse escaped from his control into a ploughed field where it lay down and rolled and in getting up cut itself in the foreleg, the Court will not disturb the verdict.—The defendant's act in allowing the horse to stand harnessed but unbridled in an open space was the proximate cause of the injury and the action of the horse in rolling was not an independent intervening cause.—The keeper of a livery stable who hires a horse to another is bound to give notice to the bailee of any dangerous quality in the animal hired of which he has or should have knowledge, and failure to give such notice, while it may not be accurately designated contributory negligence, may in an action against the bailee for an injury resulting from the neglect to exercise proper caution go directly to the question of the bailee's negligence and liability. *Gray* v. *Steeves*, 42, p. 676.

Hiring or sale—Agreement in writing—W. delivered a horse to P. receiving in exchange the following agreement in writing signed by P.:—"January 8th, 1909.—Twenty five days after date I promise to pay to the order of W. the sum of $55.00 for value received or return with $5.00 hire."—P kept the horse until February 15th following, when he assigned it with other property to secure a loan of $600.00 repayable in one year.—In an action by W. against the assignee for conversion, *held*, (1) that this was not a hiring but the title to the horse passed on delivery to P. with an option in him to return at the expiry of twenty-five days. *Ward* v. *Cormier*, 39, p. 567.

BANKRUPTCY AND INSOLVENCY.

1. **Assignment for Benefit of Creditors.**
2. **Preference.**
3. **Miscellaneous Cases.**

1. Assignment for Benefit of Creditors.

Balance—Book debts—A trustee under a deed of assignment for the benefit of creditors ordered to pay to the debtor balance of estate in his hands, where eighteen years had elapsed from the time of the assignment, though but two creditors had executed the

deed, it not appearing that other creditors, if there were any, had ever shown an intention of assenting to the deed and the Court being of opinion that they would now be precluded from doing so.—A trustee under a deed for the benefit of creditors may employ an attorney to collect debts due the estate.—Where an attorney employed for the purpose by a trustee under an assignment for the benefit of creditors collected $211.38 of $1,028.45 book debts due the estate, and it appeared that mostly all of them were for small amounts, many being for less than a dollar, and that one of the reasons for making the assignment was the difficulty experienced by the assignor in collecting even good debts, it was held that the trustee should not be charged with a sum as for debts that he should have got in. *Thibideau* v. *LeBlanc*, 3 Eq., p. 436.

Insurance on property assigned—Unexpired lease—Covenants—A lessee covenanted for himself and assigns that buildings of the lessor on the premises at the date of the lease would be left on the premises in as good repair as they then were; also that machinery of the lessee would not be removed from the premises during the term without the lessor's consent, but the same should be held by the lessor as a lien for the performance of the lessee's covenants and for any damage from their breach.—Under a deed of assignment for the benefit of the lessee's creditors the lease became vested in the trustees.—A fire subsequently occurring, which destroyed the buildings and machinery, insurance on the latter was paid to the trustees.—The lessor demanded of the trustees that the insurance be applied to re-instating the buildings or the machinery. By Act 14 Geo. III, c. 78, s. 83, insurance companies are authorized and required, upon request of a person interested in or entitled unto a house or other buildings which may be burnt down or damaged by fire, to cause the insurance money to be laid out and expended towards rebuilding, re-instating or repairing such house or buildings.—*Held*, (1) without deciding whether the Act was in force in this province or not, that the lessor was not entitled to the benefit of it, the Act not applying to machinery belonging to a lessee, and the lessor not having made a request upon the insurance company as provided by the Act; (2) that even had the insurance been upon the buildings, the lessor would have had no equity to it, there being no covenant by the lessee to insure for the former's benefit (3) that the lessor was not entitled to prove for damages against the estate with respect to the covenant to leave the premises in repair, the term not having expired. *Randolph* v. *Randolph*, 39, p. 37.

Partners' separate assignments—Unjust preference—Evidence—Defendant endorsed a firm's note at three months for $500. which fell due August 10, 1915.—On July 21st, 1915, defendant obtained goods from firm's store to the amount of $511.75, computed at retail price.—Defendant gave his cheque for $500.00 bearing date July 21, 1915, to one of the partners, with which cheque the partner paid at the bank the note on which defendant was endorser—One of the partners executed a deed of assignment for the benefit of his creditors to the plaintiff of all his individual and partnership property on August 4, 1915.—The other partner executed a deed of assignment for the benefit of his creditors of all his individual and partnership property on August 14, 1915.—*Held*, in an action brought by the assignee to set aside the transfer or conveyance of the goods to the defendant, that the plaintiff, by virtue of the assignments to him by each partner of his individual and partnership property had sufficient interest and status to maintain this suit.—Query: whether individual assignments can be deemed to be an assignment of the debtor firm within the meaning of sub-s. 4 of s. 2 of the Assignments and Preferences Act, C. S. 1903, chapter 141.—*Held, also*, that transfer to the defendant was made when the firm was in insolvent circumstances or on the eve of insolvency and was made with intent to give the defendant an unjust preference over the other creditors and is void under the act respecting assignments and preferences by insolvent persons, C. S. 1903, c. 141.—*Held*, amount of the claims proved according to the Statute C. S. 1903, c. 141 and filed with the assignee, relevant and admissible testimony as to the solvency or insolvency of the firm. *Fleetwood Assignee etc.* v. *Welton*, 44, p. 318, C. D.

Parties to suit — Assignee added — Debtor struck out—Where after a suit was brought for a declaration that stock-in-trade in possession of defendants belonged to plaintiffs, the defendants made an assignment for the benefit of their creditors, and their assets were insufficient to pay their liabilities, the names of the defendants were ordered to be struck out and that of the assignee added. *The Gault Bros. Co. Ltd.* v. *Morrell*, 3 Eq., p. 173.

Trade mark—"Personal property connected with the business"—In March, 1894, the firm of G. S. DeF. & S., consisting of the defendant, H. W. DeF., and his brother, C. W. DeF., registered a trade mark for a certain blend of tea known as "Union Blend," which was prepared under a formula made by the defendant.—In May, 1901, C. W. DeF. assigned his interest in the trade mark to the defendant and shortly after seems to have retired from the business.—In May, 1908, the business was put into a joint stock company in which the defendant was by far the largest stock holder, he paying for his stock by assigning to the company all his interest in the business, which he valued at $50,000.—This assignment, dated June 29th, 1908, after particularly setting out the real estate and chattels personal, contained the following, "and all personal property of whatsoever nature and description owned by the said H. W. DeF. in

connection with the business of the said H. W. DeF."—There was also a covenant in the assignment that the defendant would execute and deliver all papers necessary to give a perfect title to the property.—The trade mark itself was not specifically mentioned in the assignment.—The defendant was elected president of this company and for two years this trade mark was used and the business carried on, chiefly under his management.—In May, 1910, the company, being insolvent, assigned to the plaintiff under Chapter 141, C. S. 1903.—On investigation the plaintiff found that there was no specific assignment of the trade mark to the company which could be used for registry under the Trade Mark Act.—*Held*, that the words used in the assignment are amply comprehensive to pass the trade mark, and that the defendant is bound to execute a specific assignment of it to the plaintiff as assignee of the company. *Tilley, Assignee of deForest* v. *DeForest et al*, 4 Eq. p. 343.

Trust deed—A voluntary assignment in good faith by a debtor for the benefit of his creditors is valid though it defeats the expected judgment of a particular creditor.—Quaere whether an assignment of goods and chattels for the benefit of creditors is within The Bills of Sale Act, 1893 (56 Vic., c. 5).—A trust deed for the benefit of creditors is irrevocable if it has been communicated to a creditor, and acted upon by him so as to alter his position, though he has not executed it.—Whether a creditor may execute or accede to a creditor's deed after the expiration of the stipulated time for its execution depends upon the circumstances of each case. *Douglas* v. *Sansom*, 1 Eq., p. 122.

Trust deed, Construction of—The plaintiff deposited with the defendants, a banking firm, a sum of money at interest, and received as security 275 shares owned by the defendants in the M. bank which were transferred to the plaintiff's name.—The plaintiff gave to the defendants an acknowledgment, stating that he held the shares in trust and as collateral security for the due payment of moneys deposited with the defendants, on the payment of which he would re-transfer the shares to them.—On a redistribution by the bank of the shares, they were reduced to 99.—The dividends on the shares were always paid by the bank to the defendants, who treated the shares as their own in their office books.—The bank went into liquidation and the plaintiff was obliged to pay $9,900.00 double liability on the shares.—The defendants made an assignment for the benefit of their creditors and the deed of trust contained the following clause: "In the next place in full, or so far as the proceeds of the said joint property will extend, to pay all persons, by and in whose name the stock of the bank belonging to the said M. and B. (the defendants) whether in the name of M. and Company (the defendants) or the said M. or B., or any other person or persons, firm or corporation, before transferred to such persons, is or has been held as security for money loaned by any person or persons to the said M. and B., all claims they may have against the said M. and B. by reason of any double liability they may incur, or moneys they shall be obliged to pay for double liability on such shares under section 20 of chapter 120 of the Revised Statutes or other statute or statutes of the Dominion of Canada, on account of the said shares, standing in the name of the said persons, or having so stood."—*Held* (1) that the plaintiff and defendants stood in the relation of mortgagee and mortgagor in respect of the shares, and not of trustee and *cestui qui trust*, and the defendants were not liable under such relation to indemnify the plaintiff; (2) that the plaintiff was a beneficiary under the trust deed, in respect of the amount he had paid as double liability, and that his right to be such was not intended to depend upon his having an enforceable right to be so indemnified. *Marsters* v. *MacLellan et al*, Eq. Cas., p. 372.

Trust Deed, Form of—A resulting trust in favor of the debtor, after all his creditors have been paid in full, contained in a creditor's deed does not render it fraudulent and void *Trueman* v. *Woodworth*, 1 Eq., p. 83.

Trustee passing accounts—Commission—A trustee under an assignment for the benefit of creditors is not entitled upon his own application to have his accounts passed by the Equity Court.—Trustee allowed a commission of 5 per cent. on receipts. *In re VanWart*, 2 Eq., p. 320.

General—See also *McKean* v. *Randolph*, 39, p. 37.

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2. Preference.

Agreement in writing—Conditional sale—License to enter into possession—Plaintiffs in 1898 agreed to supply M. & S., dry goods dealers, with goods under an agreement in writing that such goods should remain the plaintiff's property, and that should the plaintiffs at any time consider that the business of M. & S. was not being conducted in a proper way or to the plaintiffs' satisfaction, plaintiffs should be "at liberty to take possession of our stock, book debts and other assets, and dispose of the same, and after payment in full of any amount then owing to you by us, whether due or to become due, the balance of the proceeds shall be handed to us."—The agreement was not filed under the Bills of Sale Act.—Goods were supplied from time to time under the agreement.—On February 17, 1905, the business not being conducted to the plaintiffs' satisfaction, and M. & S. being insolvent, plaintiffs entered the store of M. & S. by force and took possession of all the stock and effects on the premises, and of the books of account.—The stock seized was made up of goods supplied by the

plaintiffs of the value of $5,000, and of goods supplied by other unpaid creditors of the value of upwards of $10,000.—The account books showed debts due M. & S. of the estimated value of $2,000.—Later on the same day M. & S. made an assignment for the general benefit of their creditors.—*Held*, (1) that plaintiffs were not limited to taking possession of goods supplied by themselves; (2) that as to goods supplied by the plaintiffs, as the property therein did not pass to M. & S. the agreement was not within the Bills of Sale Act; and that as to goods not supplied by plaintiffs, as the agreement was not intended to operate as a mortgage but as a license to take possession, the Act did not apply; (3) that while the license in the agreement to take possession of the book debts did not amount to an assignment, and that powers given by it had not been exercised by notice to the debtors, plaintiffs were nevertheless entitled to them as against M. & S.'s assignees. *The Gault Brothers Co. Ltd.* v. *Morrell*, 3 Eq., p. 453.

Bill of sale and possession pursuant to promise made years previously—A trader when in insolvent circumstances to the knowledge of himself and the defendants executed to them a bill of sale of his stock in trade, pursuant to an agreement made with them nearly four years previously to give it whenever required, they advancing to him upon the faith of the agreement a sum of money for use in his business and giving him a line of credit.—Shortly after executing the bill of sale he made an assignment for the benefit of his creditors under chap. 141, C. S. 1903 (Assignments and Preferences Act).—*Held*, in a suit by the assignee, that the giving and filing of the bill of sale having been postponed until the debtor's insolvency in order to prevent the destruction of his credit, the agreement was a fraud upon the other creditors, and that the bill of sale should be set aside.—*Held, also*, that the delivery of the stock in trade by the trader to the defendants, subsequently to the execution of the bill of sale, did not assist their title, s. 2 of c. 141, C. S. 1903 applying.—A preferential transaction falling within the provisions of chap. 141, C. S. 1903, may be impeached at the instance of creditors, where the debtor has not made an assignment.—Where, after the commencement of a suit by creditors to set aside a bill of sale, as constituting a fraudulent preference under chap. 141, C. S. 1903, the grantor made an assignment for the benefit of his creditors, the assignee was added as a plaintiff. *Tooke Brothers Ltd.* v. *Brock & Patterson Ltd*, 3 Eq., p. 496.

Husband and wife—Payment in release of dower—Money paid to a wife by her husband to secure her execution of a mortgage of lands of which she is dowable under an agreement that she was to receive half of the money advanced is not money received by the wife from her husband during coverture within the meaning of the qualifying part of sub-section 2 of section 4 of chapter 78, C. S. 1903, and if an honest and *bona fide* transaction, entered into in good faith, can not be impeached as a fraud against the husband's creditors. *Cormier* v. *Arsineau*, 38, p. 44.

Lien on lumber—By agreement E. agreed to sell a specified quantity of lumber to be manufactured by him, to M.; it was provided that the latter should have a lien thereon, and upon the logs for the same, for all advances on account made by him.—Advances were made under the agreement, when E. assigned for the benefit of his creditors.—None of the lumber had then been manufactured, and while E. had in stream or in booms his season's cut of logs, none had been set apart in order to carry out the agreement.—*Held*, that there was nothing against which M. could enforce a lien. *Randolph* v. *Randolph et al*, 3 Eq., p. 576, Confirmed 39 N. B. R., p. 37.

Preference under pressure—The defendant in consideration of a promise by a trader to pay to the defendant a sum of money on account of his indebtedness within a given time or to give security, and believing the trader to be solvent, gave him on credit a further supply of goods.—Subsequently the trader becoming insolvent announced the fact to his creditors.—The defendant thereupon reminded the trader of his promise to him, and urged and induced him to give a confession of judgment for the amount of his indebtedness to the defendant, and to execute an assignment of his book debts to him.—*Held*, that the confession of judgment having been obtained by pressure and without collusion, was not within s. 1 of Act 58 Vict., c. 6, and that the assignment of book debts having been obtained by pressure, was not within s. 2 of the Act.—The presumption created by sect. 2 (a) of the Act does not arise where the sixty days therein mentioned have expired at the date the writ of summons in the suit is sent to the sheriff for service, though the sixty days had not expired at the date of the teste of the writ. *Amherst Boot and Shoe Mfg. Co. Ltd.* v. *Sheyn*, 2 Eq., p. 236.

Retransfer of land received for maintenance—An insolvent debtor being in expectation that his property would be seized under execution conveyed to his father, who had a knowledge of his son's insolvency, land previously conveyed by the father to the son in consideration of the son's bond to support and maintain him and his wife for their lives.—After the conveyance to the father the latter conveyed the land to the son's wife in consideration of her paying off a mortgage upon the land and agreeing to support the father and his wife.—*Held*, that the conveyance from the son to the father, having been made

bona fide and for valuable consideration, and not for the purpose of retaining a benefit to the son, was good within the statute 13 Eliz., c. 5, though made for the purpose of preferring the father as against other creditors. *Atkinson* v. *Bourgeois*, 1 Eq., p. 641.

Sale of goods to endorser of bankrupt's notes—Defendant endorsed a firm's note at three months for $500.00, which fell due August 10, 1915.—On July 21st, 1915, defendant obtained goods from firm's store to the amount of $511.75, computed at retail price.—Defendant gave his cheque for $500.00 bearing date July 21, 1915 to one of the partners, with which cheque the partner paid at the bank the note on which defendant was endorser.—One of the partners executed a deed of assignment for the benefit of his creditors to the plaintiff of all his individual and partnership property on August 4, 1915.—The other partner executed a deed of assignment for the benefit of his creditors of all his individual and partnership property on August 14, 1915.—*Held*, in an action brought by the assignee to set aside the transfer or conveyance of the goods to the defendant, that transfer to the defendant was made when the firm was in insolvent circumstances or on the eve of insolvency and was made with intent to give the defendant an unjust preference over the other creditors and is void under the act respecting assignments and preferences by insolvent persons, C. S. 1903, chapter 141.—*Held*, amount of the claims proved according to the Statute C. S. 1903, c. 141 and filed with the assignee, relevant and admissible testimony as to the solvency or insolvency of the firm. *Fleetwood Assignee etc.* v. *Welton*, 44, p. 318, C. D.

Setting aside judgment—Affidavit re collusion—A judgment will not be set aside on the ground of collusion and undue preference where the affidavit in proof of the collusion is founded on information and belief only, and does not state the origin of the information, and no circumstances are assigned for deponent's belief. *Dominion Cotton Mills Co.* v. *Maritime Wrapper Co.*, 35, p. 676.

Suit to set aside transfer—Sect. 2 (3) of the Assignments and Preferences Act, c. 141, C. S. 1903, provides that in a suit brought within sixty days from the making of a transfer of property, to have it set aside, it shall be presumed that it was made with intent to give the preferred creditor an unjust preference, and to be such, whether made voluntarily or under pressure; *held*, that the presumption is rebuttable, but that evidence of pressure is not admissible for the purpose. *Edgett* v. *Steeves*, 3 Eq., p. 404.

Suit setting aside conveyance — Parties — An insolvent and wife should not be joined in a suit brought by the insolvent's assignee under the Insolvency Act, 1875 (38 Vict., c. 16) to set aside a conveyance executed by the insolvent and wife prior to his insolvency, with the intent to defraud his creditors. *Driscoll* v. *Fisher*, Eq. Cas., p. 89.

Trust mortgage—The N. Company, an incorporated company with head office in New Brunswick, issued bonds secured by a mortgage to a foreign trust company that was not licensed to do business in New Brunswick.—Subsequently the trust company resigned the trust and an inhabitant of New Brunswick was appointed trustee with the consent of the bondholders, the trust company assigning its interest to the new trustee and the N. Company executing another mortgage to him covering the same property.—Within thirty days thereafter the N. Company went into liquidation, —*Held*, that the latter mortgage was not invalid as a fraudulent preference under the Winding-up Act because the bondholders obtained no further security thereby. *Harrison, Trustee* v. *Nepisiquit Lumber Co. Ltd.*, 41, p. 1.

The N. Company also borrowed $34,000.00 for which they agreed to issue bonds secured by a mortgage on a certain property, which agreement was set out in the interim receipts issued in this connection.—Subsequently and within thirty days of its winding-up the company executed a mortgage to a trustee to secure the loans as agreed, but the mortgage covered not only the property specified in the interim receipt but all other property of the company real and personal then owned or thereafter to be acquired.—This mortgage was neither registered nor filed as a bill of sale.—After winding-up, *held*, the holders of interim receipts were entitled to the specific security mentioned in the certificates, but the mortgage was invalid as an unjust preference under the winding-up act in so far as it purported to convey other property. *Id.*

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3. Miscellaneous.

Constitutional law, chap. 75 "Bills of Sale Act"—That part of section 1 of the Bills of Sale Act, chapter 75, C. S., providing that a bill of sale as against the assignee of the grantor under any law relating to insolvency, or insolvent, absconding or absent debtors, or an assignee for the general benefit of the creditors of the maker, shall only take effect from the time of filing thereof, is not *ultra vires* of the Legislature of New Brunswick as legislation dealing with bankruptcy and insolvency within the meaning of the British North America Act, 1867, section 91, s-s. 21. *McLeod, Assignee* v. *Vroom et al*, Eq. Cas., p. 131.

Composition deed—Varying claim—The plaintiff's creditors, under a composition deed, sought to recover from the sureties of the compounding debtor an instalment based on the debt signed for, which was

greater than the debt they were entitled to rank for according to the schedule of creditors attached to the composition deed. —*Held*, that the plaintiffs were not precluded from recovering on the ground that there had been a variation of the contract. *Sellick et al* v. *Groswiener*, 38, p. 73.

Deed of assignment to secured creditor —Effect—Construction—M. executed and delivered to the defendant a leasehold mortgage and a bill of sale of personal property to secure the payment of $500 and $1,500, respectively.—Subsequently, M. executed and delivered to the defendant as party of the second part a deed of assignment for the benefit of her creditors, being parties of the third part.—A condition in the deed stipulated that the parties of the second and third parts in consideration of the sum of one dollar to each of them paid "did severally remise, release and discharge the party of the first part of, from and against all debts, dues, claims and demands, actions, suits, damages, and causes and rights of action, which they then had or might thereafter have against the party of the first part, for or by reason of any other matter or thing from the beginning of the world up to that date."—The defendant and other creditors executed the deed.—The assignor was indebted to the defendant in no other amount than that secured by the mortgage and bill of sale.—In a suit by the plaintiff, a creditor of M., to have the defendant enter a discharge and satisfaction upon the records of the mortgage, and to discharge the bill of sale, and to have the same declared null and void.—*Held*, that the defendant had released the mortgage and bill of sale, and that it was immaterial that he had no intention of releasing them, or that he was ignorant of the legal effect of his act. *May* v. *Sievewright*, Eq. Cas., p. 499.

English Bankruptcy Act, Application to N. B.—In 1873, Gilbert, James, Gorham and Walter Steeves carried on business as partners under the firm name of Steeves Bros. at St. John.—Each of them was born and had always resided in New Brunswick.—In or about 1874, Gilbert Steeves removed to Liverpool, Engl., and commenced a shipping business under the name of Steeves Bros. & Co., the firm having the same members as the St. John house.—Prior to 1882, Walter retired from both firms.—Gorham and James never resided in England, or ceased to retain their New Brunswick domicile.—In 1882 the firm at Liverpool became insolvent and Gorham and James cabled from St. John to Gilbert to file a bankruptcy petition of the firm under the English Bankruptcy Act, 1869.—The petition was filed July 4th, 1882 and the partners were adjudged bankrupts, and the plaintiff was appointed trustee.—On June 27th, 1882, James and Gorham executed at St. John an assignment to the defendant of all their property, both real and personal, in New Brunswick for the benefit of their N. B. creditors.—This assignment not being recorded, a new assignment was executed and recorded on July 15th.—On August 15th the plaintiff recorded in the Registry Office at St. John a certificate of his appointment. —In a suit by the plaintiff for a declaration of his title to the real and personal property in New Brunswick of James and Gorham Steeves.—*Held*, (1) that the English Bankruptcy Act, 1869 (32 and 33 Vict., c. 71) does not apply to Canada so as to vest in a trustee appointed by the English Bankruptcy Court either the real estate situate in Canada or the personal property of a person residing and domiciled in Canada, though he is a member of an English firm which has traded and contracted debts in England, and has authorized that he be joined in a bankruptcy petition to the Court with the other members of the firm, (2) that the English Bankruptcy Court has no jurisdiction under the Act to make an adjudication of bankruptcy against such a person. *Nicholson* v. *Baird*, Eq. Cas., p. 195. (Discussed in *Ford* v. *Stewart* 35, N. B. R., at 572.)

English Bankruptcy Act—Certificate of discharge—A plea that the defendants were adjudged bankrupt and a certificate of discharge granted in England under "The Bankruptcy Act, 1883" is a good answer to an action for a debt provable against the defendants in bankruptcy brought in this Province by the subject of a foreign state who had never resided or been domiciled within British Dominions.—*Nicholson* v. *Baird* considered. *Ford* v. *Stewart et al*, 35, p. 568.

Insolvent executor—Disputed claim—An insolvent executor and trustee disputed a creditor's claim, and the creditor filed a bill for the appointment of a receiver and the payment of his debt.—The appointment of a receiver was opposed by all other parties interested in the estate.—Pending the suit the creditor brought an action at law upon his debt and recovered much less than the amount originally demanded of the executor. —The debt was then paid.—*Held*, that the bill should be dismissed with costs. *Mills* v. *Pallin*, 1 Eq., p. 601.

Suit by assignee of insolvent—An assignee of a policy of fire insurance is entitled to sue thereon in equity where the assignor is insolvent, without a refusal by him to allow an action at law in his name. *Robertson* v. *Bank of Montreal*, Eq. Cas, p. 541.

Suit by assignor after assignment—Where an assignor requests his assignees to bring a suit and they decline to do so, he can file a bill in his own name and join the assignees as defendants. *McLeod* v. *Weldon*, 1 Eq., 181.

Suit to set aside trust deed—A suit was brought by a judgment creditor to set aside a trust deed for the benefit of creditors, or to subject it to a charge in his favor and for other relief at the expense of the trust

property.—The trustee and the debtor were the only defendants, and the former allowed the bill to be taken against him *pro confesso*. —It did not appear whether any of the creditors had acted upon the trust deed before the plaintiff issued execution upon his judgment.—*Held*, that if they had, their rights should be protected, and an inquiry was directed to that end.—*Whitman* v *The Union Bank of Halifax*, 16 S. C. R., 410, commented on. *Douglas* v. *Sansom et al*, 1 Eq., p. 122.

BANKS AND BANKING.

Agency for customer, Scope of—A payee of a promissory note discounted it at a bank where he was a customer and, the note having been dishonoured, paid it the day after maturity.—Later, on the same day, the maker deposited the amount of the note in the bank and the money was placed to the credit of the payee.—Without knowledge of this payment the payee issued a writ and, after receiving notice of the payment from the bank, signed judgment for the full amount of the note with costs.—*Held*, the payee was entitled to judgment, the bank having no authority to place the money to his credit after the note had been retired. *McMennamin* v. *Evans*, 41, p. 481.

Annual meeting—Injunction at suit of one shareholder—The plaintiff, a shareholder of the Maritime Bank, by his bill set out that on the 14th of February, 1873, the directors of the Maritime Bank passed a by-law fixing the first Tuesday in June in each year thereafter, as the day of the annual meeting of the shareholders for the election of directors; that on the 26th of April, 1880, the directors passed another by-law fixing Friday, the 4th day of June next, for the then next annual meeting; that the Bank of Montreal was the owner of 1,070 shares of the Maritime Bank, upon all of which there were unpaid calls, and had appointed defendant B., its attorney, to attend and vote at the annual meeting of the Maritime Bank shareholders, called for the 4th of June.—The bill prayed for an injunction to restrain the Bank of Montreal and its attorney from voting at such annual meeting on the grounds: (1) that there were unpaid calls upon their shares; (2) that by Act 42 Vict., c. 45, s. 2 (D) one bank cannot hold stock in another bank; (3) that the bank of Montreal could only vote by its own officer and not by an attorney; also to restrain the Maritime Bank from permitting the bank of Montreal and its attorney to vote at the meeting, and to restrain the Maritime Bank from holding the meeting on the ground that the powers to pass a by-law fixing a day for the annual meeting of the shareholders is vested in the shareholders.—The Maritime Bank was incorporated by Act 35 Vict., c. 58 (D).—No provision is made in the Act as to by-laws.—By section 6 it incorporates into its provisions the Bank and Banking Act 34 Vict., c. 5 (D).—The 33rd section of the latter Act enacts "That directors etc. shall have power to make such by-laws and regulations (not repugnant to the act or the laws of the Dominion of Canada) as to them shall appear needful and proper touching the management and disposition of the stock, property, estate and effects of the bank, and touching the duties and conduct of the officers, clerks and servants employed therein, and all such matters as appertain to the business of a bank. . . Provided always, that all by-laws of the bank lawfully made before the passing of this Act as to any matter respecting which the directors can make by-laws under this section . . . shall remain in full force until repealed or altered under this Act."—By the 30th section it is enacted that the directors shall be "elected on such day in each year as may be or may have been appointed by the charter, or by any by-law of the bank, and at such time of the day, and at such place where the head of the bank is situate, as a majority of the directors for the time being shall appoint.—The 28th section enacts "That the shareholders in the bank shall have power to regulate by by-law the following matters *inter alia* incident to the management and administration of the affairs of the bank, viz. the qualification and number of directors . . . the method of filling up vacancies in the board of directors whenever the same may occur during the year; and the time and proceedings for the election of directors, in case of a failure of any election on the day appointed for it."—On an application by the defendants to dissolve an *ex parte* injunction obtained by the plaintiff, *held*, that no power was vested in the directors to pass the by-law in question and that it therefore was *ultra vires*, but that the injunction should be dissolved on the ground: (1) that the plaintiff could not maintain a bill in his own name alone respecting an injury common to all the shareholders; (2) that the bill was multifarious by the joinder of grounds of complaint against the Maritime Bank and the Bank of Montreal and B. that were independent and distinct.—Though the objection of multifariousness in a bill has not been taken by demurrer, the objection may be taken by the Court.—Where a company was restrained by *ex parte* injunction from holding its annual meeting on the date fixed therefor, it is no ground for refusing a motion to dissolve the injunction that the purpose for which it was granted has been served. *Busby* v. *The Bank of Montreal et al*, Eq. Cas., p. 62.

Branch manager—Scope of agency—C., the manager of a branch of the defendant bank, was engaged in stock speculating, having an account with the plaintiffs, a firm of stock brokers, in his own name, and also an account in the name of himself and another.—There was evidence that he had no interest in the joint account, but handled it merely as an agent—In connection

with the joint account C. delivered to the plaintiffs certain bonds as collateral together with an agreement which he signed on behalf of the defendant bank, agreeing "to redeem them at eighty any time you may wish to call them" and also gave the plaintiffs the cheque of a third party on C's branch certified "good" by C.—At the time the cheque was certified the drawer thereof had a large overdrawn account.—The learned trial judge found that C. had an interest in the joint account, to the knowledge of the plaintiffs, and gave judgment for the defendant.—On appeal, *held*, affirming the judgment of the trial judge, that C., the branch bank manager, had no apparent authority to act for any one other than the bank in a matter in which the bank was interested, and the plaintiffs having knowledge that he was acting either for himself or someone other than the bank in his dealings with them, were put on enquiry as to his actual authority to sign the agreement to redeem the bonds and to certify the cheque, and that C. had no such authority. *Mackintosh* v. *Bank of New Brunswick*, 42, p. 152.

Conditional sale by bank—Estoppel—The plaintiffs who were the owners of a quantity of logs, upon being asked by the defendant if they were for sale replied in the negative, adding that they had already been sold to one M.—The defendant thereupon bought a portion of said logs from M., who was in possession and had all the indicia of title to the same, and paid M. in cash for them.—As a matter of fact the sale to M. was subject to the condition that no property in the logs was to vest in M. until they were paid for, of which condition the defendant had no knowledge.—In an action of trover brought to recover the value of the logs so purchased from M. by the defendant.—*Held*, (*per* Tuck C. J., Hanington and Barker JJ., Landry J. dissenting,) that the plaintiffs were estopped by their declaration as to the sale to M. from setting up that the title was not in him, and that a verdict ought, therefore, to be entered for the defendant.—*Held* (*per* McLeod J.,) that the evidence showed an intention on the part of the plaintiff to abandon the conditional element of their contract with M. and that he was clothed by the plaintiffs with authority to sell the logs accounting to them for the proceeds.—*Held* (*per* Gregory J.), that the circumstances were such that the defendant could not reasonably have had any doubt as to the right of M. to sell, and as the plaintiffs had put M. in a position to practise a fraud on the defendant, they must suffer the loss.—Further, it being apparent from the evidence that the plaintiffs intended that M. should dispose of the logs in the usual course of his business, he of necessity had an implied authority to sell and pass the title. *People's Bank of Halifax* v. *Estey*, 36 N. B. R., p. 169; 34 S. C. R., p. 429.

Equitable lien on goods represented by bill of exchange—The S. Boot and Shoe Co. had an understanding with its bankers that it would draw on its customers as goods sold were being forwarded and these drafts would be discounted by the bank.—Under this arrangement a draft was made on M. for certain goods that had been shipped to him at N.—M. refused to accept the goods and the draft was returned dishonored.—It was then agreed between the bank and the company that the manager of the company should proceed to N. to take possession of the goods for the bank, and endeavour to get M. to accept them.—It did not appear what the manager did at N. but he did not induce M. to accept the goods, and they remained at the railway station at N. until the S. company went into liquidation.—It was then agreed between the bank and the liquidator of the company that the latter should take possession and dispose of the goods and hold the proceeds subject to the order of the Court.—*Held*, that the bank had at least an equitable lien if not positive title to the goods and was entitled to the proceeds of the sale. *In re Shediac Boot and Shoe Co. Ltd.*, 38, p. 8.
cf. *McLeod Assignee* v. *Vroom*, Eq. Cas., 131.

Insurance policies assigned as security—Where a company is being wound up under the New Brunswick Winding-up Act, a bank is entitled to an order for the payment to it of the proceeds of policies of fire insurance effected by the company on their property, and made payable, in case of loss, to the bank, as interest may appear, under a verbal agreement between the bank and the company that the policies should be so effected as security for advances which the bank from time to time might make, the bank having no interest in the property insured.—Such a transaction is not prohibited by section 64 of the Banking Act, 1890 (53 Vict., c. 31). *In re Shediac Boot and Shoe Co. Ltd.*, 37, p. 98.

Insurance policy—Hypothecation of goods insured—An insurance policy contained conditions making the policy void "if the subject of insurance be personal property and be or become encumbered by a chattel mortgage," and "if any change other than by the death of an insured take place in the interest, title or possession of the subject of insurance."—After the policy issued, the plaintiffs, in pursuance of an agreement with a bank, transferred the lumber insured to the bank as security for indebtedness by transfer under the Bank Act.—*Held*, this transfer was a breach of the above conditions. *Guimond* v. *Fidelity Phenix Fire Ins. Co.*, 41, p. 145.

Lumber operator—Void security—A bank made advances to a lumber operator upon the security of an agreement between him and a trustee for the bank that he should cut and deliver a specified quantity of logs to the trustee, who should have the property therein as from the stump and who should upon delivery pay for the same, by, *inter alia*, paying the bank the amount

of its loans.—*Held*, that the security was void under sect. 76 of the Bank Act, c. 29, R. S. C. 1906. *Randolph* v. *Randolph*, 3 Eq., p. 576.

Proceeds of lumber hypothecated—A firm of lumber operators hypothecated under the Bank Act their season's cut of lumber to a bank to secure future advances.—A member of the firm, without the knowledge of his co-partner, sold the lumber and applied part of the proceeds in paying a past indebtedness of the firm to the bank, and with the consent of the bank, applied a portion of the remainder in paying other debts of the firm.—*Held*, that he had power to do so, though the partnership had then been dissolved, and that his co-partner was not entitled to have the money so appropriated charged in reduction of the secured indebtedness to the bank. *Hale* v. *People's Bank of Halifax*, 2 Eq. p. 433.

Redeeming bonds—An agreement by a bank to redeem bonds is not business such as appertains to the business of banking, and is therefore *ultra vires* a bank incorporated under the Bank Act, R. S. C., 1906, c. 29. *Mac Kintosh* v. *Bank of New Brunswick*, 42, p. 152.

Succession duty on bank deposits—By New Brunswick Succession Duty Act, 1896, s. 1 (5), all property situate within the province is liable to succession duty whether the deceased was domiciled there or not, such duty being assimilated by other provisions of the same Act to a probate duty payable for local administration.—The testator, resident and domiciled in the province of Nova Scotia, at the date of his death was possessed of $90,351, deposited in the St. John, N. B., branch of the Bank of British North America, the head office of which is in London; the amount was paid to his executors after they had obtained ancillary probate in New Brunswick. Privy Council *held* that the executors were liable to pay succession duty.—The property consisted of simple contract debts, the obligation to pay being primarily confined to the New Brunswick branch of the bank, and these debts for the purpose of legal representation, of collection, and of administration as distinguished from distribution are governed by the law of New Brunswick, where they were locally situated.—Judgment of Supreme Court of Canada, 43 S. C. R. 106, reversed; Judgment of Supreme Court of New Brunswick, 37 N. B. R. 558, restored. *R.* v. *Lovitt*, (1912), A. C., p. 212.

Transfer of shares by executor—Specific bequest—Under "The Bank Act", chapter 120, R. S. C., a bank cannot refuse to register a transfer by an executor to a purchaser of shares in the bank standing in the name of the testator, though by the testator's will the shares are specifically bequeathed. *Boyd* v. *Bank of New Brunswick*, Eq. Cas., p. 546.

A bank is not bound to take notice of the representative capacity and see that the proceeds of the sale are applied according to law. *Id.*

Warehouse receipt—Unauthorized deliveries—The appellant allowed shippers over its road to store freight intended for shipment in its warehouse at St. Andrews free of charge, in transit, or pending sale and distribution.—McDonald, a packer of fish, had stored in the warehouse a large number of cases of sardines and clams for which he received negotiable warehouse receipts from the company's station agent. —These receipts McDonald, with the knowledge of the agent, hypothecated to the Canadian Bank of Commerce to secure advances.—It was arranged between the bank and the agent that none of the goods covered by these receipts should be shipped out without the release of the bank.—The agent, however, at the instance of McDonald, allowed a large number of these cases to be shipped out without the knowledge or release of the bank.—In an action by the bank against the railway company (in which McDonald had been added as a third party on the application of the company) for the shortage of the goods warehoused, *held* (*per curiam*), affirming the judgment of McKeown J., that the issue of the negotiable warehouse receipts was *intra vires* the railway company in the conduct of its business and that the station agent was acting within the scope of his apparent authority in giving them.—That the railway company was entitled to claim against McDonald for contribution to the amount recovered by the bank against it for the value of any goods shipped out at the request of McDonald warehoused subject to the receipts endorsed to the bank by McDonald. *Canadian Pacific Rwy. Co.* v. *Canadian Bank of Commerce*, 44, p. 130.

BASTARDY.

Entry of trial of alleged father—R., having been arrested by warran ont an information charging him with being the father of a bastard child likely to become a charge on the parish, denied his guilt and entered into the recognizance required by C. S., c. 103, s. 7.—The cause was not entered for trial at the term of the County Court next ensuing the birth of the child, but was entered at the next following term.—On an application for a writ of prohibition to restrain the judge of the County Court from trying the information, *held* (*per* Tuck C. J., Hanington and McLeod JJ.), that the defendant could be properly tried at the last mentioned Court and the writ of prohibition should be refused. —*Held* (*per* Barker, Landry and VanWart JJ.), that the provisions of C. S., c. 103, s. 7, limited the time within which the defendant could be legally tried, and the writ of prohibition should issue.—The Court being evenly divided the matter dropped. *Ex parte Reid*, 34, p. 133.

Habeas corpus—Certiorari—Jurisdiction—Defendant was arrested upon a warrant under the Bastardy Act, C. S. 1903, c. 182, and after examination of the complainant was released, under s. 8 of the Act, upon his recognizance to stand trial at the next term of the County Court.—*Held*, defendant was not entitled to a writ of habeas corpus *cum causa*, such process being intended to give relief only to persons in actual custody.—The Court, in its discretion, refused a writ of certiorari to remove the proceedings into this Court on the ground that the rule could not be returned and heard until after the next sitting of the County Court, and a stay might prejudice the enforcement or renewal of defendant's recognizance, while if the magistrate acted without jurisdiction, the defendant would have his remedy upon the trial.—A stipendiary magistrate, designated as such in the proceedings, has jurisdiction to hold a preliminary examination under the Bastardy Act, because he is *ex officio* a justice of the peace, under C. S. 1903, c. 119, s. 1 (2). *Ex parte Seriesky* 41, p. 475.

BIGAMY.

See CRIMINAL LAW.

BILLS AND NOTES.

Accommodation note, Payment of by endorser—Defendants had a contract for the erection of a school house.—They subcontracted with the plaintiff for a portion of the concrete, stone and brick-work.—On the completion of the sub-contract, disputes having arisen, the plaintiff brought this action for extra work, claiming $1,464.20. —The defendants pleaded payment and set-off, claiming thereunder to recover a balance from the plaintiff, but omitted to deliver particulars of their set-off.—On the trial without a jury, the judge found that the defendants had overpaid the plaintiff the contract price by $288.11; that the plaintiff was entitled to extras to the amount of $695.50, and ordered a verdict for the plaintiff for the difference, refusing to allow evidence of the payment of an accommodation note for $265.00 which the defendants had endorsed for the plaintiff during the pendency of the contract and had paid at maturity, on the ground that under the pleadings it must be considered in the nature of a set-off and therefore not admissible as no particulars had been given, neither was it admissible under the plea of payment as a payment to the plaintiff.—*Held*, on appeal, that as the accommodati on was obtained in view of the contract, that the defendants were entitled to prove the note and payment thereof under the plea of payment and the verdict should be reduced by the amount thereof. *LeBlanc* v. *Lutz et al*, 44, p. 398.

Accommodation note, Payment of by estate—*Semble*, that where the payee (deceased) on endorsing a promissory note for the accommodation of the maker promises without consideration to pay it, and the holder compels payment by the payee's estate, an action for the recovery of the amount lies by the estate against the maker. *Johnston* v. *Hazen*, 3 Eq., 341.

Action unauthorized but ratified—A promissory note was delivered by McG. the holder, to P., whose name McG. wished to use in the collection of the note, and subsequently and before the note was due, McG. got it from P. telling him that he was going to place it with a banker and he had better direct him to collect it.—P. never gave any direction to collect it, and did not, before commencement, authorize the action, but he subsequently ratified it, stating he would have authorized it in the first instance if he had been asked to do so.—*Held*, in action on the note in the name of P. that he was entitled to recover as holder. *Potter* v. *Morrisey and Creaghan*, 35, p. 465.

Collateral for loan—Notice of dishonor—Where a creditor, upon maturity of a loan, accepts a promissory note of another endorsed by the debtor for the amount of the loan, the time for payment is postponed, but the original debt is not cancelled unless it is proved that the note was given and accepted as an accord and satisfaction.—The fact that such note is not presented for payment at maturity and no notice of dishonour given to the debtor as an indorser, will not prevent the creditor suing the debtor upon the original debt, unless it is shown that there was money at the place of payment ready to pay such note at its maturity. *Hatfield* v. *Worden*, 41, p. 552.

Consideration — Where a promissory note was given to the agent of an insurance company in payment of a first premium on a policy; and a policy was issued and sent to the insured and retained by him, containing provisions to the effect that the insurance should not take effect or be binding until the first premium had been paid to the company or a duly authorized agent, also that if a promissory note or obligation were given for the premium and should not be paid at maturity, the policy should not be in force while the default continued, but the party should be liable on the note.—The Court refused to set aside a verdict for the agent of the company on the note on the ground that there was no consideration, holding that the defendant (appellant) was bound to show affirmatively that the verdict was wrong. *Crawford* v. *Sipprell*, 35, p. 344.

Consideration—Accommodation note—The defendant at the request of a third party, without the knowledge of the plaintiff, made a promissory note in favor of the plaintiff for the third party's accommodation.—The plaintiff credited the third party with

the face value of the note and made some cash advances thereon.—The note was subsequently renewed on several occasions, and on one renewal the defendant personally paid the interest to the plaintiff.—*Held*, in an action on the last renewal that the objection that there was no consideration moving from the plaintiff was not an answer to the action. *McCain Produce Co.* v. *Lund*, 44, p. 242.

Consideration—Warranty—In consideration that O. would sell to L. N. certain machinery, L. N. agreed to pay the plaintiff the price agreed upon and for the like consideration J. N. agreed to become guarantor and surety to the plaintiff for the payment.—Settlement was partly made by a document in the form of a promissory note endorsed by J. N.—In an action on the document or note it was pleaded in defence that the warranties and conditions of the sale had not been performed by O.—*Held*, that L. N. did not place himself in any worse position by giving the note to the plaintiff than he would have occupied if he had given it direct to the seller O., and no agreement in the nature of a novation was created nor did the plaintiff stand in relation to the defendant L. N. as an innocent indorsee for value and therefore the question of failure of consideration for the note should have been left to the jury. *Robertson* v. *Norton*, 44, p. 49.

Consideration, Failure of—The defendant signed an application to the Mutual Life Insurance Company of New York for insurance on the lives of S. F., R. F., E. F. and G. H. W., members and directors of the defendant company.—When the application was given the plaintiff, the agent of the company took from the defendant its note payable to his own order for the amount of the premium, and gave the defendants a receipt on one of the company's forms which contained this provision: "The insurance so applied for shall be in force from this date provided that the said application shall be accepted and approved by the said company at its head office in the city of New York, and a policy thereon duly issued.—In case the application is not so accepted and approved and no policy is issued, or should the applicant receive no notification from the company within thirty days from the date of this receipt of any application, then in every such case no insurance shall be effected, and it shall be understood and agreed that the company declines the risk, whereupon all moneys paid hereunder shall be returned on the delivery of this receipt."—The plaintiff discounted the note and placed the amount to his own credit, and paid the amount of the premiums, less his commission, to his principals.—After the note was discounted, but before the application was accepted, the defendant notified the plaintiff and his principal at its head office in New York, that it withdrew the application.—*Held*, in an action on the note by the agent, that the application was a mere proposal for insurance and might be withdrawn at any time before acceptance; that the consideration for the note having failed, defendant was not liable in an action by the payee. *Johnson* v. *The G. & G. Flewelling Mfg. Co. Ltd.*, 36, p. 397.

Consideration — Money lent used illegally—Where money loaned on a promissory note was to be used for an illegal purpose but the lender was unaware of the fact, the note was held to be binding and the consideration not illegal. *Potter* v. *Morrisey and Creaghan*, 35, p. 465.

Defence of illegality of consideration—The suspicious fact that a bill of exchange was drawn by a liquor merchant on a party residing where the Canada Temperance Act was in force, will not constitute a defence on the ground of illegal consideration to an action brought by one who in fact discounted the said bill of exchange without knowledge or suspicion that it represented an illegal sale. *Johnson* v. *Jack et al*, 35, p. 19 .

Extension of time—The maker of the notes gave evidence of an offer to the holders to settle his indebtedness on certain terms and at a time some two or three years later than the maturity of the last note, and that the same was agreed to by the holders.—The latter in their evidence denied such agreement, and testified that in all the negotiations they had informed the maker that they would do nothing whatever in any way to release the endorser.—*Held*, that the evidence did not shew that there was any agreement by the holders to give time to the maker, and the endorser was not discharged.—If the exisence of an agreement, could be gathered from the evidence, it was without consideration and the creditor's rights against the sureties were reserved.—*Held* (*per* Idington and Duff JJ.) that a demand note given in renewal of a time note and accepted by the holders is not a giving of time to the maker by which the endorser is discharged.—Judgment of the Supreme Court of New Brunswick, 37 N. B. R., 630, reversed. *Fleming* v. *McLeod*, 39 S. C. R., 290.

Forgery—Estoppel—On July 15th, 1907, defendant received notice of dishonor of a note purporting to be endorsed by him and on October 7, this action was begun against him on the note.—On November 26th defendant notified the plaintiff that his endorsement was forged by G. the maker.—G. died on December 12 following.—There was a genuine endorsement on the note by W. Co. and W. Co. was solvent.—*Held*, reversing the judgment of the County Court judge, that the defendant was not estopped from denying his signature as the plaintiff had his remedy against W. Co. and against G's estate, and the loss of costs in this action was not such damage as would ground an estoppel.—*Ewing* v. *Dominion Bank*, 35, S. C. R. 133 distinguished. *Connell et al* v. *Shaw*, 39, p. 267.

Form of—Demand of payment—A writing, signed by the defendant, admitting the receipt of a sum of money, and agreeing to be responsible for the same with interest at the rate of seven per cent. per annum upon production of the receipt and after three month's notice, may be recovered upon as a promissory note.—A demand for immediate payment made more than three months before the commencement of the action is sufficient proof of the notice called for by the receipt. *Babineau* v. *LaForest*, 37 N. B. R., p. 156; 37 S. C. R., 521.

Life insurance, Note taken for premium—A condition in a policy of life insurance provided that if any premium, or note given therefor, was not paid when due the policy should be void.—A note given, payable with interest, in payment of a premium provided that if it were not paid at maturity the policy should forthwith become void.—On the maturity of the note it was partly paid and an extension was granted, and on a part payment being again made a further extension was granted.—The last extension was overdue and balance on note was unpaid at the death of assured.—A receipt by the company, given at the time of taking the note, was of the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note in terms thereof."—While the note was running the policy was assigned for value, with the assent of the company, to the plaintiff to whom the receipt was delivered by the assured.—*Held*, that no estoppel was created by the receipt; that there was no duty upon the company to have afforded the plaintiff an opportunity of paying the premium; and that the policy was void. *Wood* v. *Confederation Life Insurance Co.*, 2 Eq., p. 217.

(Reversed 35 N. B. R. 512, but upheld S. C. of C., File 2115.)

Notice of dishonour—Notes made in Saint John, N. B., were protested in London, England, where they were payable.—The endorser lived at Richibucto, N. B.—Notice of dishonour of the first note was mailed to the endorser at Richibucto, and, at the same time the protest was sent by the holders to an agent at Halifax, N. S., instructing him to take the necessary steps to obtain payment.—The agent on the same day that he received the protest and instructions sent notice of the dishonour by post to the endorser at Richibucto.—As the other notes, fell due the holders sent them and the protests by the first packet from London to Canada to the said agent at Halifax, by whom the notices of dishonour were forwarded to the endorser at Richibucto.—*Held* (Idington and Duff JJ. dissenting), that the sending of the notice of dishonour of the first note direct from London to Richibucto with the precaution of also sending it through the agent, was indication that the holders were not aware of the correct address of the endorser, and the fact that they used the proper address was not conclusive of their knowledge, or sufficient to compel an inference imputing such knowledge to them.—Therefore the notices in respect to the other notes sent through the agent were sufficient.—*Held* (*per* Idington and Duff JJ., dissenting) that the holders had failed to shew that they had adopted the most expeditious mode of having the notices of dishonour given to the endorser *Fleming* v. *McLeod*, 39 S. C. R., 290.

Payment per contra, account—When goods are sold and delivered by the maker of a promissory note to the holder thereof and their value credited by the latter, the transaction amounts in law to a payment *pro tanto*. (*Per* Tuck C. J.). *Pinder* v. *Cronkhite*, 34, p. 498.

Payment—Funds deposited in bank to payee's credit—A payee of a promissory note discounted it at a bank where he was a customer and, the note having been dishonoured, paid it the day after maturity.—Later, on the same day, the maker deposited the amount of the note in the bank and the money was placed to the credit of payee.—Without knowledge of this payment the payee issued a writ and, after receiving notice of the payment from the bank, signed judgment for the full amount of the note with costs.—*Held*, the payee was entitled to judgment, the bank having no authority to place the money to his credit after the note had been retired. *McMennamin* v. *Evans*, 41, p. 481.

Payment out of collateral—The M. Company owed the plaintiff $4,000 for which he held as collateral security the defendant's note for $3,000, made for the accommodation of the company, and some other collateral.—After action brought on the note the plaintiff received a dividend from the company, which had gone into liquidation, and realized on some of the other collateral, but these facts were not pleaded.—Verdict having been entered for the full amount of the note, *held*, that the plaintiff was entitled to judgment for the full amount of the note, but the amount realized upon the collateral should be credited upon the execution. *Gorman* v. *Copp*, 39, p. 309.

Payment, Plea of—Payee dead—A plea of payment by the maker of a promissory note where the payee is dead must be established beyond all reasonable doubt. *Kelley* v. *Ayer Executor etc.*, 41 p. 489;

See also *Fish* v. *Fish*, 44, p. 617.

Presentment, Waiver of—An offer made after its maturity by an endorser of a promissory note to pay the amount of the same by installments will not operate as a waiver of presentment in the absence of evidence that at the time he knew there had been default in presentment.—*Ayer* v. *Murray*, 39, p. 170.

Promissory note — Consideration — Warranty—In an action in the County Court

on a promissory note given by the defendant to the plaintiff for the balance of the purchase money for a boat sold by the plaintiff to the defendant, the defendant pleaded the general issue and gave notice of two defences: (a) no consideration; (b) fraud and misrepresentation.—At the trial without a jury the judge found there was misrepresentation as to the age of the boat but that there was no fraud as defendant had protected himself by a warranty and did not rely upon the plaintiff's statement in respect to the boat's age, and *held* that under the pleadings the defendant could not avail himself of the breach of warranty in answer to the action on the note.—*Held*, that the trial judge having found that there was no fraud, the verdict on the pleadings was right for the amount of the note and interest, and defendant's remedy was by cross action. *Losier* v. *Mallay*, 43, p. 364.

Promissory note dishonored—No lien on goods—Under a contract by which the plaintiff was to manufacture laths, etc., out of defendant's lumber at a certain price per 1,000 feet, it was provided that the plaintiff was to deliver the laths, etc., as fast as defendant could take them "and settlements to be made the tenth day of each month for the preceeding month's saw bill."—*Held*, defendant was entitled to delivery of the laths before payment therefor; that this agreement was inconsistent with a right of lien for the price of sawing and the plaintiff was therefore not entitled to a lien.—The fact that the defendant gave a note in part payment, which was dishonoured, while some of the laths were in the possession of the plaintiff did not entitle the plaintiff to a lien upon such laths. *Bathurst Lumber Co. Ltd.* v. *Nepisiquit Lumber Co. Ltd.*, 41, p. 41.

Special agreement not a promissory note—A writing in the form of a promissory note, but which had the conditions attached that it was to become payable forthwith if promisor disposed of his land or personal property, and that the title of the goods, for which the note was given as security, should remain in the payee until the note was paid and that the goods in the meantime were only on hire, etc., was held to be a special agreement and not a promissory note. *Prescott* v. *Garland*, 34, p. 291.

Transfer of past due bill during suit—An action by the transferee of an overdue bill, upon which an action has been already brought by the transferor wherein an offer to suffer judgment has been made and accepted, was stayed on an application to the equitable jurisdiction of the Court, the transferee having knowledge of the pendency of the first action.—An application to compel the plaintiffs to sign judgment on their acceptance of the defendant's offer to suffer judgment in the first action was refused. *Kennedy Co.* v. *Vaughan*; *Standard Bank of Canada* v. *Vaughan*, 37, p. 112.

Usury—In an action brought to recover the amounts due on three several promissory notes the defendants pleaded an equitable plea.—The Court being of the opinion that the facts set up thereby disclosed such an inadequacy of consideration, accompanied by other circumstances, as would justify a jury in finding that there was fraud in the transaction and that it was unconscionable, gave judgment for the defendants on demurrer.—*Held* (*per* Barker J.), while parties competent to contract may render themselves liable to pay any rate of interest which they agree to pay, Courts of Equity have held that the repeal of the Usury Laws has not interfered with their jurisdiction to relieve those who have been led into making improvident bargains unconscionable in their nature and entered into under circumstances of fraud or oppression. *MacPherson* v. *McLean et al*, 34, p. 361.

See also *The Royal Bank of Canada* v. *Hale*, 37, p. 47.

BILLS OF SALE.

See CHATTEL MORTGAGES.

BOND.

Joint and several bond—Statute of Limitations—On September 27th, 1850, H. and W. gave their joint and several bond to C. to secure the payment of £1,000 on September 27th, 1855, with interest thereon quarterly in the meantime.—As between H. and W. the latter was surety, though they were both principal debtors by the bond.—On the same day H. and W. executed to C. separate mortgages on separate pieces of property owned by each to secure the payment on September 27th, 1855, of the amount of the bond, neither party executing or being a party to the mortgage of the other.—The mortgage from W. was upon the condition that if he and H. or either of them, their or either of their heirs, etc. paid to C. £1,000 and interest, according to the condition of the bond by H. and W., it should be void.—The mortgage given by H. contained a similar provision.—The interest on the debt was paid regularly by H. up to the 27th of March, 1879, after which his payments ceased.—W. and his successors in title were never out of possession of the land mortgaged by him from the date of the mortgage and never made any payment nor gave any acknowledgment.—On January 20th, 1881, C's representatives commenced this suit for foreclosure and sale of both mortgaged premises.—*Held*, that the mortgage given by W. was extinguished under the Statute of Limitations, c. 84, C. S. N. B., ss. 29 and 30. *Lewin* v. *Wilson et al*, Eq. Cas., p. 167. (Reversed, 11 A. C., 639.)

Maintenance bond, Breach of—Damages, quantum of—In an action on a bond conditioned for maintenance where the breach assigned is refusal to maintain, the plaintiff may recover the whole penalty as damages.—In assessing the damages the jury are not limited to those suffered up to the time of the issue of the writ; but they may take into consideration the damages up to the time of the trial, and that there has been a complete breach of the condition. (*Per* Tuck C.J., McLeod and Gregory JJ.)—Judgment may be entered for the penalty upon which subsequent breaches may be assigned under 8 and 9 Wm. III, c. 11, but damages can only be assessed on the breaches assigned up to the commencement of the action. (*Per* Hanington, Landry and Barker JJ.)—(Court being equally divided, no principle is established.) *Barthelotte* v. *Melanson*, 35, p. 652.

Maintenance bond, Breach of—Onus of proof—In a suit to enforce a lien upon land conveyed to the defendant by the plaintiffs, husband and wife, in consideration of an agreement by defendant to support them, the onus of proving a breach of the agreement is upon the plaintiffs. *Ouilette* v. *LeBel*, 3 Eq., p. 205.

Maintenance Bond — Lien — Specific performance—A farm was conveyed by an aged couple to their daughter, and on the same day she and her husband entered into a written agreement with the vendors to board them on the farm and to pay them an annuity in consideration of the conveyance.—*Held*, (1) that the vendors had a lien on the land for the performance of the agreement; (2) that the Court could not decree specific performance of the agreement. *Cunningham* v. *Moore*, 1 Eq., p. 116.

Maintenance bond—Lien on consideration for performance of—Where land was conveyed in consideration of a bond by the grantee to maintain the grantor and his wife for life, but the consideration was not expressed in the deed, a decree was made charging the land with a lien for the performance of the agreement in the bond. *Duguay* v. *Lanteigne*, 3 Eq., p. 132.

Mortgage bond—Merger in judgment—Rate of interest—The assignee of the equity of redemption in a mortgage on May 31st, 1884, executed his bond to the mortgagee conditioned to pay him $2,200 (this being the balance due on the mortgage) in one year and "in the meantime and until the said sum is fully paid and satisfied, pay interest thereon or upon such part thereof as shall remain unpaid, such interest to be calculated from the first day of June, 1884, at the rate of seven per centum per annum."—In a suit for foreclosure of the mortgage, *held*, that as the mortgagor had recovered judgment against the defendant on the bond, the bond was merged in the judgment and the defendant thereafter could only be charged with the statutory rate of interest on judgment debts, and consequently no higher rate from then could be charged against him in the foreclosure suit. *Hanford* v. *Howard*, 1 Eq., p. 241.

Mortgage to secure bond—New bond at increased rate of interest—A. and his wife gave a mortgage bearing date January 25th, 1867, on land belonging to the former to secure the payment of £332, 16s. with lawful interest on June 1st, 1867, accompanied with A's bond in the same terms.—In 1875, the mortgage and bond became vested in the plaintiff.—On June 12th, 1880 A. executed a bond to the plaintiff, reciting that there was due on the original bond on December 31st, 1879, for principal and interest $1,971.90 and providing that, in consideration of time for its payment, annual interest thereon should be paid at seven per cent, and that the annual interest as it accrued due, if it were not paid, should become principal and bear interest as such. —In 1867 and 1873 A. acknowledged by memoranda indorsed on the mortgage, the amount due thereon, and in both instances the amount was computed by charging compound interest at six per cent. with yearly rests.—On August 18th, 1887, the balance due December 31st, 1886, was struck by charging compound interest at seven per cent. with yearly rests from December 31st, 1879, to the time when the balance stated in the second bond was struck, and an acknowledgment stating the amount due on the mortgage was signed by A. upon the mortgage.—In a suit for foreclosure after A's death in 1895 against his widow, to whom the equity of redemption had nominally been assigned by A, *held*, that there was evidence of an agreement by A. from the acknowledgments indorsed on the mortgage, to charge the land with the payment of compound interest at six per cent. with yearly rests up to December 31st, 1886, and that the land was so charged; but that the agreement in the second bond only created a personal liability, and that the mortgage bore simple interest at six per cent. from December 31st, 1886.—On appeal by defendant (34 N. B. R. 301) judgment affirmed that acknowledgment of Aug. 18th, 1887, bound the land.—*Semble*, Tuck C. J., whether if plaintiff had appealed, the mortgaged premises would not have been held bound for whole amount due on R's bonds, the bonds and mortgage being inseparable, and there being an implication of law that the purchaser of mortgaged premises is under personal obligation to pay the mortgagor. *Jackson* v. *Richardson*, 1 Eq., p. 325.; 34, p. 301.

BRIDGES.

See WAY.

BROKERS.

See PRINCIPAL AND AGENT.

BUILDINGS.

Building law—City of Saint John—By Act 35 Vict., c. 56, intituled "An Act for the Better Prevention of Conflagrations in the City of St. John," all dwelling houses, store houses, and other buildings to be erected in the city of Saint John, on the eastern side of the harbour, within certain limits, must be made and constructed of stone, brick, iron, or other non-combustible material, with "party or fire walls" rising at least twelve inches above the roof, and the roof must be covered on the outside with tile, slate, gravel, or other safe materials against fire.—The defendants were erecting a building resting on stone foundation walls, and consisting of a wooden frame with brick filling four inches thick between the studding, and the whole encased with brick four inches thick.—In a suit by the corporation of the city of St. John for an injunction to restrain the defendants from erecting the building as being in violation of the Act, *held*, that the building was in violation of the Act and an injunction should be granted. *The Mayor, etc. City of St. John* v. *Ganong et al*, Eq. Cas., p. 17.

Buildings, Style of—Danger to public—In erecting a building the owner may adopt any style of architecture he pleases, provided he does not create a nuisance or violate any law or municipal ordinance; therefore the construction of a roof with projecting eaves, which caused an accumulation of ice and snow thereon, is not *per se* evidence of negligence on the part of the owner, although it may impose upon him a greater degree of watchfulness and care in order to prevent accidents. *Dugal* v. *Peoples Bank of Halifax*, 34, p. 581.

CANCELLATION OF INSTRUMENTS.

See BANKRUPTCY, FRAUD.

CARRIERS.

Action against—Actions against common carriers may be framed either upon the contract or upon the duty imposed by law. *Williams* v. *The Government Railways Managing Board*, 41, p. 108.

Breach of contract to carry safely—The plaintiff, who was the agent of an express company and travelled in the defendant's steamer in charge of the company's express parcels, by direction of the steamer's officers went down on a twin freight elevator to look for some missing parcels in the steamer hold.—The elevator stopped at the "between decks" and the plaintiff stepped off into the other elevator shaft and was injured.—He was not warned of the danger, the light was bad, and though he was given a ship's lantern it did not cast any light at his feet.—The jury found that he fell as a result of the defendant's negligence in not properly protecting the elevator, and that he was not guilty of contributory negligence.—*Held*, that the plaintiff was entitled to require that the defendant's premises should be rendered reasonably safe for him, and that the verdict for the plaintiff should stand.—*Indermaur* v. *Dames*, L. R. 2 C. P., 311 followed. *McBeath* v. *The Eastern Steamship Co.*, 39, p. 77.

Express company—Canada Temperance Act—The agent of an express company in the county of W., where the Canada Temperance Act was in force, in the ordinary course of business delivered a parcel containing intoxicating liquor to the person to whom it was addressed, and collected from him the price thereof, the liquor, by the buyer's instructions, having been sent to him by express C.O.D.—The sale of the liquor was effected at a place outside of the county of W.—*Held* (*per* Tuck C. J., Hanington, Barker and McLeod JJ., Landry J. *dubitante*), that the agent could not be convicted of selling intoxicating liquor contrary to the provisions of the said Act. *R.* v. *Cahill, ex parte Trenholm*, 35, p. 240.

Express company—Carriage of Animals—In an action to recover the value of two black fox pups and one crosspup, part of a lot of nine shipped at Dryden, Ont., to be delivered to the plaintiffs at Sackville, N. B., on the ground that the three foxes died of suffocation on the journey through the negligence of the employees of the defendant, the defendant, to establish its defence that the foxes died from natural causes and not from its negligence, called a veterinary surgeon who stated that the conditions that he found in the lungs on a post mortem examination showed that the foxes died of pneumonia and not from suffocation, and gave his reasons for his conclusion; the plaintiff in answer or rebuttal called another veterinary who on the evidence of the defendant's veterinary being read to him stated that the symptoms described would not necessarily show that death resulted from pneumonia, and were quite consistent with the supposition that it resulted from suffocation.—*Held*, that the evidence in answer or rebuttal was properly received.—Separate boxes of foxes were shipped under a contract containing a clause providing that in case of car load shipments, if the owner or attendant travel accompanying the animals, free transportation will be furnished the attendant, and the animals during the transportation in charge of the attendant, will be at owner's risk.—On the back of the contract was an attendant's contract, signed by the shipper, providing that if free transportation was furnished by the company it would not be liable for any injury or loss occurring to the owner or attendant.—One of the owners travelled

on the same train as the foxes, but not in the same car, the foxes being in the express car with the other express parcels.—No free transportation was furnished.—*Held*, that the attendant's contract only applied in case of car load shipments, and the learned trial judge was right in directing the jury that it did not apply to the shipment in question, and the company was liable if the foxes died during transportation through its negligence. *Trenholm* v. *Dominion Express Co.*, 43, p. 98.

Passenger vessel—Damage to passenger—The plaintiff, a boy of four years of age, with his parents was being carried as a passenger on a steam-boat of the defendants.—The child and his mother were in a house on the boat's deck, leading from which out on to the deck were doors fitted with appliances intended to keep them fastened back, when they should happen to be flung wide open.—While the plaintiff was in the act of passing through one of the doorways to get out on the deck to his father, the door swung to and jammed his fingers, so that the tips of some of them had to be amputated.—The plaintiff's father and elder brother swore that the fastening of the door was out of order, and would not hold it back.—There was evidence to show that the doors of the house were frequently being opened and shut by passengers and others, and that a very few minutes before the accident a passenger had gone through the door-way in question, leaving the door on the swing.—It was also proved that the fastenings had been put on the doors in order to hold them open in warm weather for the purposes of ventilation.—In an action on the case for negligence brought on the part of the plaintiff by his father as his next friend against the company to recover damages for the injury above mentioned, *held*, that there was no duty cast upon the defendant company to provide the doors with the appliances mentioned or to maintain them in good working order; and, even if there were, the evidence went to show that the proximate cause of the accident was the act of the passenger in leaving the door on the swing, for which the company could not be held liable. *Cormier* v. *Dominion Atlantic Railway Co.*, 36, p. 10

CERTIORARI.

Act not judicial—A vote having been taken of the rate-payers in a parish under s. 20 of the Liquor License Act, C. S. 1903 c. 22, as amended by 9 Edw. VII., c. 16, s. 21 a writ of certiorari was applied for to remove and quash the order of the county council directing the vote to be taken and the proceedings upon which the order was based on the ground of irregularities in the petition for the election.—*Held* certiorari did not lie, the acts complained of not being judicial. *Ex parte Doyle*, 41, p. 138.

Appeal or certiorari—A certiorari will not be granted with a view of quashing a judgment of an inferior Court for want of jurisdiction in the trial justice, in the absence of a satisfactory explanation of why the remedy by review was not taken. *Ex parte Beloni St. Onge Jr.*, 43, p. 517.

Appeal or certiorari, C. C. s. 887—See *R.* v. *Delegarde*, 36 p. 503 (post col. 91.)

Appeal or review, Existence of right to—Where a right of appeal or review to a County Court judge exists certiorari will be granted only under exceptional circumstances.—This applies to convictions under The Liquor License Act, C. S. 1903, c. 22, —*Ex parte Price*, 23 N. B. R. 85 followed. *R.* v. *Murray ex parte Lamboise*, 39, p. 265.

Assessment of taxes against non-owner—An assessment in respect of land, under 53 Vict., c. 73, incorporating the town of Grand Falls against one who was not the owner at the time assessment was made is void and will be quashed on certiorari, notwithstanding he subsequently acquired title to the land with knowledge of such assessment.—Section 69 of this Act, prohibiting the issue of certiorari to review a tax assessment until after appeal to the town council does not apply where the assessment is made without jurisdiction. *R.* v. *Town of Grand Falls* 42 p. 122.

Assessment for taxes—City of Fredericton — Resident or non resident Government officer—See *R.* v. *Assessors of Fredericton, ex parte Maxwell*, 44, p. 563.

Bastardy proceedings—Discretion of Court—Defendant was arrested upon a warrant under the Bastardy Act, C. S. 1903, c. 182, and after examination of the complainant was released, under s. 8 of the Act, upon his recognizance to stand trial at the next term of the County Court.—The Supreme Court in its discretion refused a writ of certiorari to remove the proceedings, on the ground that the rule could not be returned and heard until after the next sitting of the County Court, and a stay might prejudice the enforcement or renewal of defendant's recognizance while if the magistrate had acted without jurisdiction, the defendant would have his remedy upon the trial. *Ex parte Seriesky*, 41, p. 475.

Canada Temperance Act—*See* INTOXICATING LIQUORS.

Commitment for resisting a peace officer—A certiorari will not go to remove a commitment made by a justice of the peace on a charge of resisting a peace-officer. *R.* v. *Leahy, ex parte Garland*, 35, p. 509.

Commitment of Debtor—The judge of the County Court of Saint John made an order under 59 Vict., c. 28, as amended by 61 Vict., c. 28, committing the applicant

to prison for three months, because, after his arrest in a civil cause in the Saint John City Court, he had made an appropriation of property in payment of another debt without paying the debt sued for.—The judge based the order upon evidence given in a former proceeding against the debtor, and not upon the hearing of any application for the order in question.—The order did not show on its face the grounds upon which it was issued.—By 61 Vict., c. 28, s. 8, amending 59 Vict., c. 28, an appeal is given to the Supreme Court from any order for imprisonment made under ss. 46, 48, 49, 51 and 53 respectively of 59 Vict., c. 28. *Held*, that the fact that the right to appeal is given by statute does not deprive the party of his right to a certiorari, and this Court will grant the writ, if, in their opinion and discretion, the circumstances warrant it. *R.* v. *Forbes ex parte Dean*, 36, p. 580.

Costs, Payment of—A conviction will not be quashed because the costs are ordered to be paid to the party aggrieved instead of the nominal prosecutor. *R.* v. *O'Brien ex parte Grey*, 37, p. 604.

County Court, Order by Judge—Certiorari will not be granted to remove an order of a county court judge setting aside a judgment obtained in such County Court and letting the defendant in to defend. *Ex parte Joiens*, 39, p. 589.

Criminal Code, sec. 887—Conviction by partizan justice—Section 887 of the Criminal Code which enacts that "no writ of certiorari shall be allowed to remove any conviction or order had or made before any justice of the peace if the defendant has appealed from such conviction or order to any Court to which an appeal from such conviction or order is authorized by law or shall be allowed to remove any conviction or order made upon such appeal" does not deprive the Court of the right to quash a conviction on certiorari, where the convicting justice acted as a partisan in collusion with the prosecutor and without jurisdiction, even though an appeal had been taken which has failed by reason of the refusal of the justice to make the return required by law.—Landry J. dissenting.—In *re Kelly*, 27 N. B. R. 553 discussed. *R.* v. *Delegarde, ex parte Cowan*, 36, p. 503.

See also *Ex parte Roy*, 38, p. 109, "Title to Land" (post col. 96).

Delay in applying for certiorari—The Court refused to interfere with the discretion of a judge in granting a certiorari on the ground of want of jurisdiction, although two terms had gone by before the application.—(*Per* Landry, White and Barry JJ., McLeod J. dissenting). *R.* v. *Holyoke*, 42, p. 135.

Disclosure proceedings—In disclosure proceedings the questions whether the debtor has transferred any property intending to defraud the plaintiff, or since his arrest given any preference to any other creditor, are for the officer taking the examination, and the Court will not interfere with his discretion merely because the circumstances of the transfer are suspicious. *R.* v. *Ebbett ex parte Smith*, 38, p. 559.

Garnishee order—Taxing costs—It is no ground for certiorari that the County Court judge ordered the costs of a garnishee order and application therefor to be taxed by the clerk of the Supreme Court instead of taxing them himself. *Ex parte Bowes*, 34, p. 76.

Habeas corpus or certiorari—Where a person is in custody under a warrant of commitment, founded on a good conviction, the Court will not quash the commitment on certiorari, even if it is illegal.—The proper procedure is by way of habeas corpus. *R.* v. *Melanson ex parte Bertin*, 36, p. 577.

Incorporation of company—Review—In an action in the magistrate's Court by a foreign corporation the only evidence of the incorporation was supplementary letters of incorporation increasing the capital stock. —This evidence was received by the magistrate without objection and a judgment entered for the plaintiff.—On review before a County Court judge the judgment was set aside on the ground that there was no evidence of incorporation.—*Held*, on motion for a certiorari to quash the order of review, that whether or not there is such evidence is a question of law and the County Court judge had jurisdiction, notwithstanding the amount involved was under $40.00. *Ex parte Ault & Wiborg Co. of Canada Ltd.*, 42, p. 548.

Liquor License Acts—*See* INTOXICATING LIQUORS.

Magistrate's power to amend conviction.—In the return to a writ of certiorari to remove two convictions for killing two dogs with a view to quashing the same on the grounds that they did not follow the minute of adjudication, and were made on an information and summons for a single offence; the convicting magistrate returned the original convictions and an amended conviction in which the objections were cured.—*Held*, the magistrate had power to amend, and the rule *nisi* to quash should be discharged. *R.* v. *O'Brien ex parte Grey*, 37, p. 604.

Magistrate's return to writ incomplete—Practice—To a writ of certiorari to remove a conviction, the magistrate certified that he had sent "the transcript of the proceedings against P. G. whereof in the same writ mention is made with all things touching the same to our Lord the King" etc. and he annexed the certificate, the original proceedings and the conviction to the writ.—*Held* (*per* Barker, McLeod and Gregory JJ, Tuck C. J. and Landry J. dissenting,) that the return was

incomplete, as the certificate did not authenticate the proceedings returned to be the original proceedings and conviction commanded by the writ.—If the magistrate, through ignorance or error, and with no intention of disobeying the writ, makes an incomplete or improper return the practice is to move that the proceedings be sent back for correction and not to move for an attachment for contempt in not obeying the writ.—*R.* v. *Kay ex parte Gallagher*, 38, p. 228.

Mining licenses cancelled by Surveyor General—One R. assigned certain applications for licenses to work under The General Mining Act (C. S. 1903, c. 30) to "C" Co. and licenses to work were issued to "C" Co.—R. claimed that these applications were assigned to "C" Co. on certain trusts and on refusal of the "C" Co. to carry out such trusts he applied to the Surveyor General to cancel his assignment and the licenses issued to "C" Co.—On April 8, 1909, after an *ex parte* inquiry, the Surveyor General made an order cancelling the assignment and the licenses, and ordering new licenses to issue to R.—On May 27, 1909, upon application of the "C" Co. the Surveyor General held a rehearing at which both parties were present, and after the hearing confirmed his first order.—On September 13 an order for certiorari was granted.—*Held*, (1) certiorari would lie to remove these orders; (2) the fact that the orders were void was no objection to their being removed and quashed on certiorari; (3) the delay of one term in applying for certiorari was not fatal, the orders having been made without jurisdiction. *R.* v. *Grimmer ex parte Shaw*, 39, p. 477.

Police magistrate, Civil jurisdiction of—A stipendiary or police magistrate appointed under chapter 119 of the Consolidated Statutes, 1903, as amended by the Act, 5 Geo. V., c. 22, repealing 1 Geo. V., c. 38, has no civil jurisdiction where both parties to the action reside within the county but outside the parish in which the magistrate resides. *R.* v. *Carleton ex parte DeLong*, 44, p. 578.

(Note: Certiorari granted in view of importance of question, but case not to be a precedent for establishing the principle that the Court will review, by way of certiorari, an order of a County Court judge made on review.)

Practice—Adding new grounds—The granting of leave on the return of an order *nisi* for a certiorari to add new grounds is discretionary with the Court, and in a case where the party applying had an opportunity to furnish the grounds to the opposite party and give notice of his intention to apply for leave to add them, but failed to do so, leave was refused. *R.* v. *Municipality of Restigouche ex parte Murchie*, 42, p. 529.

Practice—Failure to show cause—A rule *nisi* to quash a conviction will be made absolute as a matter of course on proof of due service and on production of the writ of certiorari with a proper return thereto, if no one appears to show cause.—(*Per* Tuck C. J., Hanington and Landry JJ., McLeod and Gregory JJ. dissenting.) *R.* v. *Sweeney et al, ex parte Cormier*, 38, p. 6.

Practice—Form of Rule nisi—The Court refused to discharge a rule *nisi* to quash an order for review removed by certiorari granted in term on objection that it did not as required under the rules of Michaelmas term, 1899, direct within what time and upon whom the rule and affidavits upon which it was granted should be served.—McLeod J. dissenting. *R.* v. *Wilson ex parte Burns*, 37, p. 650.

Practice—Grounds of certiorari—Rule of Court 7, M. T., 1899—The specific grounds upon which a certiorari is granted must, under rule 7 Mich. 1899, be stated, and a general statement, i. e. "also all other grounds taken at the hearing in the Court below" is objectionable.—(*Per* Hanington, Landry, Barker, McLeod and Gregory JJ.) *R.* v. *Wilkinson ex parte Restigouche Salmon Club*, 35, p. 538.

Under the rule of Michaelmas term, 1899, the grounds for certiorari must be stated specifically so that the other party may know the exact points relied on.—(*Per* Barker C. J.) *R.* v. *Kay ex parte Stevens*, 39, p. 2.

Practice—Grounds of certiorari—The Court may allow new grounds to be added on showing cause against an order *nisi* to quash an order dismissing an appeal from a conviction under the Criminal Code granted under the Rule of Court of Michaelmas Term, 1899, although the rule requires the ground to be stated in the order. *R.* v. *Wedderburn ex parte Sprague*, 36, p. 213

Practice—Jurisdiction of single judge, Order 62, r. 1-3—A judge of the King's Bench Division has jurisdiction under O. 62, rr. 1-3 of the Judicature Act, 1909, in certiorari proceedings, and the jurisdiction there given is not limited by the Act, 3 Geo. V., c. 23 (1913) to the Appeal Division or a judge thereof. *R.* v. *Borden ex parte Kinnie*, 42, p. 641.

Practice—Proving jurisdiction—Quaere: —If affidavits can be read on the return of a rule *nisi* to quash a conviction removed by certiorari to establish facts necessary to jurisdiction not appearing on the face of the proceedings. *R.* v. *Hennessy et al ex parte Pallen*, 38, p. 103.

Practice—Return of writ—An order for certiorari granted under Rule of Court No. 7, Michaelmas Term, 1899, must make the writ returnable at the term of the Court next following the date of the order. *Ex parte Kay; In re Hogan et al*, 39, p. 54.

Practice—Rules of Court, 7 M. T., 1899—An order *nisi* granted by a single judge

under rule 7 of the General Rules of Michaelmas term, 1899, if not entered to show cause will on proof of service be made absolute, and the Court will not consider and determine the sufficiency of the grounds on which the order was granted. *R.* v. *Ritchie ex parte Sandall*, 37, p. 206.

Practice—Quaere:—Whether the stay of proceedings in the form of order given by Rule 7, Mich. Term, 1899, for a certiorari expires on the return of the rule *nisi* to quash. *Ex parte Melanson*, 39, p. 8.

Practice—Service of affidavit under Rule H. T. 1894—See *Ex parte Leighton*, 33, p. 606,

Review—Bias of reviewing magistrate—If a state of facts exist which causes a reasonable apprehension of bias, that is sufficient to prevent an adjudication upon the matter in controversy being upheld, if it be impeached by a party who either had no knowledge at the trial of the existence of that state of facts or knowing of it objected to the magistrate acting. *R.* v. *McLatchy ex parte Antinori Fishing Club*, 44, p. 402.

Review by County Court judge—If an order of review made by a County Court judge is manifestly wrong it will be set aside on certiorari, notwithstanding the judge has jurisdiction.—(*Per* Tuck C. J., Landry, Barker and McLeod JJ., Hanington and Gregory JJ. taking no part.) *R.* v. *Forbes ex parte Bramhall*, 36, p. 333.

Review by Supreme or County Court Judges—The judges of the Supreme and County courts are of co-ordinate jurisdiction in matters of review under Consolidated Statutes, c. 60, and orders made within their authority are final.—(*Per* Hanington and Gregory JJ., Tuck C. J., Landry and McLeod JJ., reserving judgment on this point.) *R.* v. *Wilson ex parte McGoldrick*, 36, p. 339.

Review by County Court judge—Where there is no want or excess of jurisdiction the judgment of a County Court judge on review should not be disturbed. (*Per* Barker C. J., Barry and McKeown JJ.)—The Supreme Court in the exercise of its inherent jurisdiction to supervise the proceedings of inferior tribunals may set aside the order of a County Court judge on review in order to prevent a gross miscarriage of justice. (*Per* Landry, McLeod and White JJ.) *R.* v. *Wilson ex parte Fairley*, 39, p. 555.

Review by County Court judge—Point of law—A certiorari will not be granted to remove an order of review made by a judge of a County Court with a view to quashing the same on the ground that he has erred in point of law if he has not acted without or in excess of his jurisdiction or unless there has been such a gross miscarriage of justice as would warrant the interference of the Appellate Court.—*R.* v. *Wilson ex parte Fairley re Braithwaite*, 39 N. B. R. 555 followed. *R.* v. *McLatchy ex parte Antinori Fishing Club*, 44, p. 402.

Speedy Trials Act—Correcting order—S. purchased for $66.00 a portion of some metal stolen by two boys from E.—After trial and conviction of the boys under the Speedy Trials Act, the trial judge ordered the purchase money and the metal sold to S. to be given to E., but on certiorari that part of the order in regard to the money was quashed. *R.* v. *Forbes ex parte Selig*, 39, p. 592.

Summary Convictions Act—Dismissal—An order dismissing a complaint under the Summary Convictions Act may be quashed on certiorari. *R.* v. *Ritchie ex parte Sandall*, 37, p. 206.

Summary conviction—Appeal taken—The defendant, on May 15, 1908, gave notice of appeal to the County Court from a summary conviction.—The conviction was signed by two justices, but on the day fixed for delivering judgment one justice read the conviction, the other not attending.—An order for certiorari was taken out and served May 20 and on May 27 the defendant served a notice of his grounds of appeal. —*Held*, that under section 1122 of the Criminal Code certiorari would not be allowed after appeal taken.—*In re Kelly*, 27 N. B. R. 553 followed. *R.* v. *Haines et al*, 39, p. 49.

Summons inconsistent with information—On an information for keeping intoxicating liquor for sale contrary to the Canada Temperance Act, the accused was summoned to answer a charge of selling; he did not appear and a conviction was made for keeping for sale.—*Held*, that as the accused had not been summoned to answer the information laid, the magistrate had never acquired jurisdiction over the person and the conviction was bad. *R.* v. *Kay ex parte Melanson*, 38, p. 362.

Summons invalid on face—No appearance—A summons under the Canada Temperance Act stated that the information upon which it was issued was laid more than three months after the offence.—The information was in fact laid within three months.—The defendant did not appear, and a conviction was entered.—*Held*, the summons was bad on its face and was not cured by ss. 723, 724 of the Criminal Code, or s. 146 of the Canada Temperance Act, and the conviction should be quashed. *R.* v. *Kay ex parte LeBlanc*, 41, p. 99.

Title to land involved—Conviction by justice—The right of the Court to grant a certiorari is not taken away by section 887 of the Criminal Code in the matter of a conviction under the code for destroying a part of a line fence, made by a justice acting without jurisdiction by reason that

the title to land was in dispute, from which conviction an appeal had been taken to the County Court under section 879 of the code, and dismissed, without consideration of the merits, on the ground that the appeal had not been perfected.—The title to land being in dispute, the County Court would have no jurisdiction to rehear the case. *R. v. O'Brien ex parte Roy*, 38, p. 109.

Want of locus standi—The municipality of the county of Westmorland having issued a warrant of assessment to the city of Moncton under the provisions of the Act respecting Rates and Taxes, C. S. 1903, c. 170, s. 34, before the same was delivered to the city assessors or any assessment made thereunder the city of Moncton applied for a certiorari to remove the warrant alleging that part of the amount to be assessed under it was not properly chargeable to the city. —There was no evidence that the city itself was liable to be taxed as a ratepayer.—*Held*, that there was no ground for the application there being no assessment for the Court to act upon and the city as such having no interest in the assessment. *Ex parte The City of Moncton*, 39, p. 326.

CHATTEL MORTGAGES AND BILLS OF SALE.

1. **Bills of Sale.**
2. **Chattel Mortgages.**
3. **Lease of Chattels.**
4. **Lien Notes.**

1. Bills of Sale.

Agreement to give bill of sale held a fraud on other creditors—A trader when in insolvent circumstances to the knowledge of himself and the defendants executed to them a bill of sale of his stock in trade, pursuant to an agreement made with them nearly four years previously to give it whenever required, they advancing to him upon the faith of the agreement a sum of money for use in his business and giving him a line of credit.—Shortly after executing the bill of sale he made an assignment for the benefit of his creditors under chap. 141, C. S. 1903 (Assignments and Preferences Act).—*Held*, in a suit by the assignee, that the giving and filing of the bill of sale having been postponed until the debtor's insolvency in order to prevent the destruction of his credit, the agreement was a fraud upon the other creditors, and that the bill of sale should be set aside.—*Held, also*, that the delivery of the stock in trade by the trader to the defendants, subsequently to the execution of the bill of sale, did not assist their title; sect. 2 of chap. 141, C. S. 1903 applying.—A preferential transaction falling within the provisions of chap. 141, C. S. 1903, may be impeached at the instance of creditors where the debtor has not made an assignment. *Tooke Bros. Ltd. v. Brock & Patterson Ltd.*, 3 Eq., p. 496.

Bill of Sale Act—Constitutionality of C. S., c. 75.—That part of section 1 of the Bills of Sale Act, chapter 75, C. S. N. B., providing that a bill of sale as against the assignee of the grantor under any law relating to insolvency, or insolvent, absconding or absent debtors, or an assignee for the general benefit of the creditors of the maker, shall only take effect from the time of filing thereof, is not *ultra vires* of the Legislature of New Brunswick as legislation dealing with bankruptcy and insolvency within the meaning of the British North America Act, section 91, s.-s. 21. *McLeod Assignee v. Vroom et al*, Eq. Cas., p. 131.

Bill of Sale Act, Scope of—Quaere:—Whether an assignment of goods and chattels for the benefit of creditors is within the Bill of Sale Act, 1893 (56 Vict., c. 5). *Douglas v. Sansom*, 1 Eq., p. 122.

Bill of sale as collateral security—Restraining sale by mortgagee—In a suit by the mortgagor to set aside a bill of sale, an interim injunction order to restrain a sale by the mortgagee was granted upon condition of the mortgagor paying into Court the amount due the mortgagee.—The bill of sale was collateral security for promissory notes, some of which had been indorsed over for value.—*Held*, that the amount to be paid into Court should not be reduced by the amount of such notes. *Petropolous v. F. E. Williams Co. Ltd.*, 3 Eq., p. 267.

Conditional sale under agreement made in 1898—Plaintiffs in 1898 agreed to supply M. & S., dry goods dealers, with goods under an agreement in writing that such goods should remain the plaintiffs' property, and that should the plaintiffs at any time consider that the business of M. & S. was not being conducted in a proper way or to the plaintiffs' satisfaction, plaintiffs should be "at liberty to take possession of our stock, book debts and other assets, and dispose of the same, and after payment in full of any amount then owing to you by us, whether due or to become due, the balance of the proceeds shall be handed to us."—The agreement was not filed under the Bills of Sale Act, chap. 142, C. S. 1903—Goods were supplied from time to time under the agreement.—On February 17, 1905, the business not being conducted to the plaintiff's satisfaction, and M. & S. being insolvent, plaintiffs entered the store of M. & S. by force and took possession of all the stock and effects on the premises, and of the books of account.—The stock seized was made up of goods supplied by the plaintiffs of the value of $5,000, and

of goods supplied by other unpaid creditors of the value of upwards of $10,000.—The account books showed debts due M. & S. of the estimated value of $2,000.—Later on the same day M. & S. made an assignment for the general benefit of their creditors.—*Held*, (1) that plaintiffs were not limited to taking possession of goods supplied by themselves.; (2) that as to goods supplied by the plaintiffs as the property therein did not pass to M. & S., the agreement was not within the Bills of Sale Act, and that as to goods not supplied by plaintiffs as the agreement was not intended to operate as a mortgage but as a license to take possession, the Act did not apply; (3) that while the license in the agreement to take possession of the book debts did not amount to an assignment, and the powers given by it had not been exercised by notice to the debtors, plaintiffs were nevertheless entitled to them as against M. & S.'s assignees. *The Gault Brothers Co. Ltd.* v. *Morrell*, 3 Eq., p. 453.

Consideration, Lack of—Subsequent transfer—In an action for conversion the plaintiff claimed title under a registered bill of sale which the jury found was made without consideration, and in fraud of creditors; the defendant justified the taking under an unregistered lien note given subsequent to the bill of sale.—*Held*, on appeal, reversing the judgment of Carleton J., that the verdict was properly entered for the defendant. *Pelletier* v. *Poitras*, 38, p. 63.

Voluntary transfer void as against creditor—A bill of sale, absolute in form, of all the property of the vendor, in which the consideration was stated to be one thousand dollars, was drawn up and filed in conformity with the provisions of cap. 142, C. S. 1903, respecting Bills of Sale.—The consideration in reality was the support of the vendor and his wife for life.—*Held*, that the transfer was void as against the plaintiff, who was a creditor of the vendor at the time of the transfer.—*Jack* v. *Kearney*, 4 D. L. R. 836 followed. *Ouelette* v. *Albert*, 42, p. 254, C. D.

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2. Chattel Mortgages.

Construction—After acquired property—Husband and wife—J. E. F., who was the husband of the plaintiff and a livery stable keeper, being indebted to C., in December, 1895, gave him a chattel mortgage of his stock, which was in the terms following: "All and singular the goods, chattels and property mentioned and set out in the schedule hereunto annexed marked A, which is to be read in connection with these presents and form a part thereof, and also any and all the property that may hereafter during the continuance of these presents be brought to keep up the same in lieu thereof and in addition thereto, either by exchange or purchase, which so soon as obtained, and in actual or constructive possession of the said party of the first part shall be subject to all the provisions of this Indenture."—The schedule was as follows: "Eight horses and harnesses now in livery stable owned by said J. E. F.; six waggons in store house; four pungs, coach harness, buffaloes and robes now in said stable."—In March, 1896, J. E. F., being indebted to the plaintiff, his wife, to the extent of six hundred dollars and upwards, gave her a chattel mortgage in which the property conveyed was described in almost the same words as were used in the mortgage to C.; but the schedule thereto, after enumerating specifically a number of articles, concluded as follows: "Also all other goods, furnishings and articles and materials now or hereafter during the continuance of these presents used in connection with the livery stable now owned by the said J. E. F. and all property hereafter acquired therein."—In July, 1896, C. assigned to the defendant his mortgage, which had been reduced to two hundred and seventy-two dollars for a consideration of two hundred and fifty dollars, but the assignment was silent as to after-acquired property.—In September 1896, J. E. F. gave a further chattel mortgage to defendant, which covered all the property he had formerly mortgaged to plaintiff, and shortly after handed him a delivery order authorizing defendant to take possession of everything connected with the livery stable business, which defendant did.—Plaintiff had also given to her husband one hundred dollars with which he was to buy for her a phaeton buggy.—He, without her knowledge, bought a buggy on credit for one hundred and forty dollars, which he delivered to his wife, and which was accepted by her.—This buggy, though not mentioned in any of the mortgages, was seized by defendant when he took possession under the delivery order.—The mortgage from J. E. F. to plaintiff was first drawn to secure the sum of five hundred dollars, but afterwards and before execution, the sum secured was changed to six hundred dollars in every place except in the recital where the word "five" was inadvertently left in the place of a six.—In an action of trover for the conversion of the phaeton buggy and all the property conveyed to secure the plaintiff's debt, except such as was covered by the mortgage to C., *held*, (1) that the mortgage was not invalid by reason of its having been made by the husband directly to the wife; (2) that there was no evidence that it was made to delay or hinder creditors; (3) that it contained a sufficient description of the mortgaged property to satisfy the Bills of Sale Act (1893) and that there was no such untrue statement in the affidavit attached to the mortgage as would invalidate it, the evidence affording a satisfactory explanation of the mistake in the recital; (4) that it was sufficient to cover after acquired property; (5) that it was not bad under the Act 58 Vict., c. 6, Assignments and Preferences Act; (6) that the mortgage to C. and the assignment thereof to defendant were insufficient to cover after-acquired property; (7) that the circumstances under which the

phaeton buggy was purchased made it the separate property of plaintiff, and as such not liable to seizure by defendant. *Fraser* v. *MacPherson*, 34, p. 417.

Damages for illegal distress of goods subject to chattel mortgage—In an action for an illegal distress the plaintiffs are entitled to recover the value of the goods sold, although they are subject to a bill of sale by way of mortgage to secure a compromise which the plaintiffs have made with their creditors.—*Semble* (*per* Barker J.), an unlawful sale of defendant's goods by plaintiffs, which goods defendants were using in a particular way, give defendants the right to demand the value of the goods by way of damages. *Clark et al* v. *Green et al*, 37, p. 525.

Equitable lien on chattels—The S. Boot and Shoe Co. had an understanding with a bank that they would draw on their customers as goods sold were being forwarded and these drafts would be discounted by the bank. Under this arrangement a draft was made on M. for certain goods that had been shipped to him at N.—M. refused to accept the goods and the draft was returned dishonored.—It was then agreed between the bank and the company that the manager of the company should proceed to N. to take possession of the goods for the bank, and endeavour to get M. to accept them.—It did not appear what the manager did at N. but he did not induce M. to accept the goods, and they remained at the railway station at N. until the S. Co. went into liquidation.—It was then agreed between the bank and the liquidator of the company that the latter should take possession and dispose of the goods and hold the proceeds subject to the order of the Court. —*Held*, that the bank had an equitable lien, if not a positive title, and was entitled to the proceeds of the sale. *In re The Shediac Boot and Shoe Co. Ltd.*, 38, p. 8.

Estoppel—Bill of sale obtained by pressure—F. claimed to be the owner of a horse that S. had given her in payment of board.—S., being indebted to H., left the province and H. seized the horse as the property of S. under an absconding debtor's warrant.—While the horse was in the possession of the sheriff under the warrant, negotiations were had with H. by persons professing to be acting for F., and a bill of sale of the horse was given to H. and the horse was returned to F.—The amount secured by the bill of sale not having been paid, H. seized the horse under the bill of sale, and F. brought an action in the Kent County Court against H. for a conversion of the horse.—On the trial the judge told the jury that the only question was, who was the owner of the horse at the time it was taken by the sheriff, and that the plaintiff was not estopped by the bill of sale from recovering in the action.—*Held*, on appeal from a judgment affirming a verdict entered on a finding on this direction, that the direction was right (Landry J. dissenting). *Fraser* v. *Hannay*, 37, p. 39.

Fire insurance—Change of interest—A policy of fire insurance on a factory and machinery contained a condition making it void if the said property was sold or conveyed or the interest of the parties therein changed. *Held*, that by a chattel mortgage given by the assured on said property his interest therein was changed and the policy forfeited under said condition. *Torrop* v. *Imperial Fire Ins. Co.*, 34 N. B. R. 113; 26 S. C. R. 585.

An insurance policy contained conditions making the policy void "if the subject of insurance be personal property and be or become encumbered by a chattel mortgage" and "if any change other than by the death of an insured take place in the interest, title or possession of the subject of insurance."—After the policy issued, the plaintiffs, in pursuance of an agreement with a bank, transferred the lumber insured to the bank as security for indebtedness, by transfer under the Bank Act.—*Held*, this transfer was a breach of the above conditions. *Guimond et al* v. *Fidelity-Phenix Fire Insurance Co.*, 41, p. 145.

Specific performance of agreement to give bill of sale—Specific performance will be decreed of an agreement to give a bill of sale upon ascertained furniture sold and delivered upon credit in reliance upon such agreement. *Jones* v. *Brewer*, 1 Eq., p. 630.

Substituting similar property in course of business—The defendant, a farmer, executed a chattel mortgage to one M. whereby he assigned to M. all the goods, chattels, and property mentioned in a schedule thereto annexed, and also any and all the property that might thereafter be brought to keep up the same, in lieu thereof and in addition thereto either by exchange or purchase.—The instrument also contained a proviso that the defendant should remain in possession of the mortgaged property until default with power to use the same in the ordinary way while so in possession, but with full power, right and authority to M. to enter and take possession of the property in case of default of payment, or on the death of the defendant, or in the event of the seizure of the property at the suit of any creditor, or in the event of the defendant disposing of or attempting to dispose of or make away with said property or any part thereof without the written consent of M.—Included in the property mortgaged was a stallion "Prince Albert" which a few months after the execution of the mortgage and before any default of the part of the defendant, but without the written consent of M., he exchanged with the plaintiff for a horse belonging to him. —After the exchange, the plaintiff, having discovered that the stallion was covered by the mortgage, attempted to avoid the transaction, sending the stallion back to the

defendant and demanding the return of his own horse, which the defendant refused to deliver up.—The plaintiff thereupon replevied his horse; a claim of property having been put in by the defendant, the same was decided in his favor by the County Court judge, who relied upon a verbal license that had been given to the defendant before the execution of the mortgage by the agent of M., whereby the defendant was authorized in general terms to use the mortgaged property in the way he had.—Upon an appeal being taken from this decision, it was *held*, (*per* Landry, Barker and VanWart JJ., Tuck C. J. and Hannington J. dissenting), that, as the mortgage must be taken to contain the whole contract entered into between the defendant and M., the judge of the Court below was in error in giving any effect to a mere verbal license, which preceded the mortgage and which was not in harmony with many of its provisions; and further—*Held* (*per* Landry, Barker, VanWart and McLeod JJ., Tuck C. J. and Hanington J. dissenting) that it was clearly a condition of the mortgage and the intention of the parties thereto that the defendant should be allowed to sell or exchange the mortgaged property, provided such sale or exchange was in the ordinary course of the defendant's business, and as whether this exchange had been in the ordinary course of the defendant's business or not was a question of fact, which had not been passed upon by the Court below, there should be a new trial in order to have that point determined. *McPherson* v. *Moody*, 35, p. 51.

3. Lease of Chattels.

Assignee—Liability for breach of covenant by original lessee—The assignee of a lease of a store and premises and of certain personal property enumerated in a schedule annexed to the lease containing covenants not to assign without the consent of the lessor and at the expiration of the term to yield up the premises and return the articles mentioned in the schedule, who got the lessor to sign an assent to the assignment containing a proviso that it was subject to the payment of the rent and the performances of the covenants in the lease reserved is not liable in an action on the covenant to return the goods for a breach committed by the original lessee. *Goggin* v. *Whittaker*, 38, p. 415.

See also BAILMENT.

CHOSE IN ACTION.

Assignment—Right of action—S., in consideration of B.'s giving him a confession of judgment and other security for debt due by B. to S. gave B. a verbal promise to pay two promissory notes of B. in favor of A.—B. assigned his right of action against S. to the plaintiff, the executrix of A.—*Held*, that the assignment was good under the Supreme Court Act, 1897, section 150, and the plaintiff might bring an action without notice of the assignment before action brought. *Allen, Executrix* v. *Sheyn*, 35, p. 635.

Assignment by incorporated company—Resolution of directors—In an action for tolls for driving lumber by the assignee of a river driving company, an allegation in the declaration that the company did by resolution of its board of directors, recorded upon the minutes of the company, containing apt words in that behalf, assign and transfer to the plaintiff a certain debt and chose in action arising therefrom is not a sufficient allegation of the assignment to satisfy the requirements of sec. 155 of c. 111 of the Consolidated Statutes, 1903, which provides that "every debt and any chose in action arising out of contract shall be assignable at law by any form of writing which contains apt words in that behalf," and is bad on demurrer. *Lynch* v. *William Richards Co. Ltd.*, 37, p. 549.

An assignment to be complete would have to be signed by the assignor.—A resolution recorded on the minutes does not meet this requirement. *Id.*

Equitable Assignment of Debt, Requisites for.—*See Ex parte Peck*, 33, p. 623.

Practice—Assignment after suit commenced—After the bill was filed in a suit brought by a married woman by her next friend, she died and her executors assigned the cause of action.—*Held*, that under sections 96 and 97 of the Supreme Court in Equity Act, 1890 (53 Vict., c. 4), an application to continue the suit in the name of the assignee could be made *ex parte*, subject to the order being varied or set aside if the defendants were prejudiced in their security for costs. *Robertson* v. *Appleby et al*, Eq. Cas., p. 509.

Practice—An action by the transferee of an overdue bill, upon which an action has been already brought by the transferor, wherein an offer to suffer judgment has been made and accepted, was stayed on an application to the equitable jurisdiction of the Court, the transferee having knowledge of the pendency of the first action.—An application to compel the plaintiffs to sign judgment on their acceptance of the defendant's offer to suffer judgment in the first action was refused. *Kennedy Co.* v. *Vaughan*; *Standard Bank of Canada* v. *Vaughan*, 37, p. 112.

CHURCH.

Anglican Church—Deed to corporation—Adherence to doctrines—In 1810 the Crown granted to the rector, church wardens and vestry of Christ Church in the parish

of Fredericton, and their successors, a lot of land "for the use and benefit of the said church forever, and to and for none other use, interest or purpose whatever."—The church was organized on the formation of the province of New Brunswick under authority from the parent Church of England in England, to certain persons in New Brunswick to establish churches in New Brunswick in connection with and to be a part of the Church of England in England, and under its ecclesiastical authority.—*Held*, that the grant was to Christ Church as it existed at the time of the grant and while it remained in connection with the Church of England and adhered to its faith, creed, doctrines, forms of worship and discipline as then established. *Bliss* v. *The Rector, etc. of Christ Church, Fredericton*, Eq. Cas., p. 314.

Bequests to churches wrongly designated held good—A bequest will not fail for uncertainty, if the Court can arrive at a reasonable degree of certainty as to the person intended to be benefitted.—Following this principle, where money was bequeathed to the "Episcopal Denomination of Queens County . . . to be used by them for Home and Foreign Missions" and it appeared that the Diocesan Synod of Fredericton managed and carried on the home and foreign missionary work of the Church of England in the province of New Brunswick, it was *held* that the testator meant the Church of England, and it was ordered that the money be paid to its representative, the Diocesan Synod of Fredericton.—And likewise, where money was bequeathed to the "Methodist Denomination of Queens County . . . to be used by them for Home and Foreign Missions" and it appeared that the various Methodist Churches throughout Canada had been incorporated into one Church called the Methodist Church, which body controlled all missionary funds and made an allotment therefrom for Queens County, it was *held* that the testator meant the Methodist Church, and it was ordered that the money be paid to the corporate body of that name.—Where money was bequeathed to a religious body "to be used by them for Home and Foreign Missions in Queens County as seems best to them," and it was claimed that as there were no foreign missions in Queens County the bequest must fail, it was *held*, that the testator meant the money to be used for home or foreign missions.—Where money was bequeathed to the Free Baptist General Conference of New Brunswick, and it appeared that after the making of the will and before the death of the testator, the Baptist churches in the province, forming constituent parts of the Eastern, Southern and Western Baptist Associations respectively, and the Free Baptist General Conference of New Brunswick were incorporated by 6 Edw. VII., c. 77, under the name of The Association of the United Baptist Churches of New Brunswick, and by section 13 of the said chapter, it was provided "Every donation, legacy or bequest of money or lands, or other real or personal property, before or after the passing of this act, made to any Baptist or Free Baptist Church shall vest in such United Baptist Church, as shall include the church to which the said donation legacy or bequest is made" it was held that the Free Baptist General Conference had not ceased to exist, and it was ordered that the money be paid to The Association of the United Baptist Churches of New Brunswick. *VanWart et al, Executors* v. *The Diocesan Synod of Fredericton et al*, 42, p. 1.

Presbyterian Church—Failure to comply with incorporating statute—Not incorporated—By Act 22, Vict., c. 6, entitled an Act for incorporating the synod of the Church known as the Presbyterian Church of New Brunswick and the several congregations connected therewith, it is recited that the Presbyterian Church of New Brunswick, constituted of several congregations of Christians holding the Westminster Confession of Faith, is under the ecclesiastical control of a governing body composed of ministers and elders of the church and known as the Synod of the Presbyterian Church of New Brunswick, and that the said church desire an Act of Incorporation to enable the said Synod to hold and manage lands and properties for ecclesiastical purposes, and also to enable the respective congregations in connection with the said church to hold lands for grave yards, the erection of churches and other congregational purposes.—Section 1 enacts the incorporation of the Synod and section 2 enacts that the first meeting of the Synod shall be held at a certain date, when it shall be deemed organized as a corporation.—Section 3 enacts that the trustees of the several and respective congregations so in connection with the said Synod, and their successors, shall be forever a body politic and corporate in deed and name, and shall have succession forever, by the name of the said several respective churches, and by that name shall be entitled to sue and be sued etc.—By section 4 it is directed that on the first Wednesday in July in each year a meeting of the congregation shall be held in each of the churches for the purpose of electing trustees.—Section 5 enacts that when any congregation in connection with the Synod shall elect trustees under the provisions of the Act, the trustees as a corporation shall be known and recognized by the name of the trustees of such named church owned by said congregation, and that the name by which the church is known and by which the corporation is recognized shall be enrolled in a book in which the proceedings of the congregation and of the trustees shall be recorded, and that the trustees of the respective churches when so named and enrolled shall, when elected, chosen and appointed in manner and form as in the Act directed be bodies politic and corporate in deed and name and shall have succession forever by the name of the trustees of the so named church by which they are

respectively elected.—The Synod held a meeting in pursuance of section 2 at which and subsequent meetings the minister and elders of Calvin Church in the city of Saint John were present, but no meeting of the congregation of the Calvin Church under ss. 4 and 5 and complying with their provisions was held.—In a suit by the trustees of Calvin Church they alleged their incorporation under the above Act.—*Held*, that section 3 was to be read with ss. 4 and 5, and that the plaintiffs were not incorporated in the absence of compliance with the requirements of ss. 4 and 5, and that the suit should be dismissed. *Trustees of Calvin Church* v. *Logan*, Eq. Cas., p. 221.

COMPANY.

1. Formation and Powers.
2. Prospectus.
3. Capital.
4. Management.
5. Debentures and Mortgages.
6. Contracts.
7. Actions by and against.
8. Foreign Companies.
9. Winding-up.

1. Formation and Powers.

Charitable corporation—Moncton Hospital—Powers for particular purpose—When an Act of Parliament creates a corporation for a particular purpose and gives it powers for that particular purpose, what it does not expressly or impliedly authorize is taken to be prohibited, and neither the King's Charter nor any by-law can introduce an alteration in rules which have been prescribed to the corporation by such act.—The Act of Incorporation of the Moncton Hospital, 58 Vic., c. 61 and amending acts, provides that the city council, the municipal council, etc., shall each appoint a certain number of trustees, to hold office for a certain number of years, who, with their successors shall constitute the "trustees" of the hospital in whom the management and control shall be vested.—And further provides that the trustees may make necessary by-laws for the annual election or appointment of trustees to succeed retiring trustees.—The trustees passed a by-law entitling any person to vote at the annual election of trustees, who had previously contributed the sum of not less than $1.00 to the funds of the hospital.—The plaintiff was elected a trustee at the annual meeting of the hospital, at which a large number of persons voted whose only qualification was the fact that they were contributors to the amount of $1.00.—At an adjourned meeting a resolution was passed declaring the election of the trustees elected at the annual meeting rescinded and annulled.—The meeting thereupon elected trustees to fill the vacancy thus created.—The plaintiff was not elected.—None but trustees were permitted to vote.—*Held*, that the appointment for the election of trustees was in the corporation only, which had no authority under the incorporating act to increase its membership nor to fix a qualification for voters outside of the corporation, nor to sanction persons taking part in the business of the hospital who were not members of the body corporate, and that the by-law making the contributors eligible to vote at the annual election of trustees was void, as being beyond the powers conferred upon the trustees by statute, and repugnant to the provisions of the Act, and that no amount of user or ratification by the corporation could make it good. *Murphy* v. *The Moncton Hospital et al*, 44, p. 464 C. D.; confirmed 44, p. 585.

Exhibition Association — Objects of company—At a meeting of the directors of The Moncton Exhibition Association Limited, an incorporated company, they allotted all the unissued shares, being 40 per cent. of the capital stock, to the secretary of the company at par, he having subscribed for them; and immediately afterwards he disposed of a number of these shares at par to the directors individually.—No shares had been sold for three years previously, and in the meantime the company's real estate had greatly increased in value, and the plaintiff had recently purchased a large number of shares, nearly all at a premium, and some at a premium of 150 per cent.—*Held*, that this transaction by the directors was not illegal, as the shares were allotted *bona fide* to the secretary with intent to further the company's interests and without intent on the part of the directors to profit personally thereby; that the directors were acting within their powers when they exercised their discretion and sold shares at par which might have brought a premium, and that they were not obliged to offer the unissued shares to all shareholders *pro rata* or put them up at auction before disposing of them to one shareholder at par.—Plaintiff had presumably in mind the subdividing of the property into lots, and thereby indirectly defeating the objects of incorporation of the company.—*Held*, that the director's action was a *bona fide* exercise of their discretion as to what was in the company's interest. *Harris et al* v. *Sumner et al*, 39, p. 204.

Failure to comply with law—Not incorporated—By Act 22 Vict., c. 6 entitled an Act for incorporating the Synod of the Church known as the Presbyterian Church of New Brunswick and the several congregations connected therewith, it is recited that the Presbyterian Church of New Brunswick, constituted of several congregations of Christians holding the Westminster Confession of Faith, is under the ecclesiastical control of a governing body composed of ministers and elders of the church, and known as the Synod of the Presbyterian Church of

New Brunswick, and that the said church desire an Act of Incorporation to enable the said Synod to hold and manage lands and property for ecclesiastical purposes, and also to enable the respective congregations in connection with the said church to hold lands for grave yards, the erection of churches, and other congregational purposes.—Section 1 enacts the incorporation of the Synod and section 2 enacts that the first meeting of the Synod shall be held at a certain date, when it shall be deemed organized as a corporation. —Section 3 enacts that the trustees of the several and respective congregations so in connection with the said Synod, and their successors, shall be forever a body politic and corporate in deed and name, and shall have succession forever, by the name of the said several respective churches; and by that name shall be entitled to sue and be sued etc.—By section 4 it is directed that on the first Wednesday in July in each year a meeting of the congregation shall be held in each of the churches for the purpose of electing trustees.—Section 5 enacts that when any congregation in connection with the Synod shall elect trustees under the provisions of the Act, the trustees as a corporation shall be known and recognized by the name of the trustees of such named church owned by said congregation, and that the name by which the church is known, and by which the corporation is recognized shall be enrolled in a book in which the proceedings of the congregation and of the trustees shall be recorded, and that the trustees of the respective churches when so named and enrolled, shall, when elected chosen and appointed in manner and form as in the Act directed be bodies politic and corporate in deed and name and shall have succession forever by the name of the trustees of the so named church by which they are respectively elected. —The Synod held a meeting in pursuance of section 2 at which and subsequent meetings the minister and elders of Calvin Church in the city of Saint John were present, but no meeting of the congregation of the Calvin Church under ss. 4 and 5 and complying with their provisions was held.—In a suit by the trustees of Calvin Church they alleged their incorporation under the above Act.—*Held*, that section 3 was to be read with ss. 4 and 5, and that the plaintiffs were not incorporated in the absence of compliance with the requirements of ss. 4 and 5, and that the suit should be dismissed. *Trustees of Calvin Church* v. *Logan*, Eq. Cas., p. 221.

The mere grant of a charter is not sufficient to create a corporation; it is necessary that it should be accepted in order to give it full force and effect, for persons cannot be incorporated without their consent. *Id.*

River driving company—Power to delegate or transfer rights—The South-west River Driving Company and the Upper South-west Miramichi Log Driving Company, incorporated companies having the exclusive right within certain limits to drive the lumber cut on the South-west Miramichi and collect the tolls fixed by statutory authority therefor, made an arrangement with the plaintiff to do the driving for the season of 1904, and to receive as compensation the tolls allowed the corporations by law.—In an action by the plaintiff against the defendant company for tolls for driving its lumber the trial judge ruled that there was no liability from the defendants to the plaintiff.—*Held* (*Per* Tuck C. J., Barker and McLeod JJ., Hanington and Landry JJ. dissenting) ,that the ruling was right; that the powers conferred and duties imposed by the legislature on the driving companies could not be delegated or transferred, and no action could be maintained on a contract based on such transfer. —*Held* (*per* Hanington and Landry JJ.), that the arrangement between the driving corporations and the plaintiff was a reasonable and proper method of carrying on the work which by their acts of incorporation the companies were bound to perform, and, having been made with the knowledge and consent of the defendant company, it is liable to the plaintiff on an expressed or implied contract to pay the amount agreed upon. *Lynch* v. *William Richards Co. Ltd.*, 38, p. 160.

Objects of company—Whether carried into effect—The fact that a company is incorporated by Letters Patent stating it to be one of the objects of the company to take over a business and property used in connection therewith, and that the company does take over and continue such business as before is not sufficient to establish an agreement on the part of the company to assume the liabilities and contracts of such business. *Jones et al* v. *James Burgess & Sons Ltd.*, 39, p. 603.

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2. Prospectus.

Prospectus untrue—Rescission of subscription—F., in June, 1903, purchased paid-up shares in the capital stock of an industrial company on the faith of statements in a prospectus prepared by a broker employed to sell them.—In January, 1904, he attended a meeting of shareholders and from something he heard there suspected that some of said statements were untrue.—After investigation he demanded back his money from the broker and wrote to the president and secretary of the company repudiating his purchase.—At subsequent meetings of shareholders he repeated such repudiation and demand for re-payment and in December, 1904, brought suit for rescission.—*Held*, that his delay from January to December, 1904, in bringing suit was not a bar and he was entitled to recover against the company. —*Held, also*, that he could not recover against the directors who had instructed the broker to sell the shares as they were not responsible for the misrepresentations in the prospectus.—Judgment of the Supreme Court of New Brunswick (38 N. B. R. 364)

affirming 3 Eq., 508, reversed. *Farrell* v. *The Portland Rolling Mills Co. Ltd.*, 40 S. C. R. 339.

3. Capital.

Sale of treasury stock below market value—At a meeting of the directors of an exhibition association, a large number of shares of the original capital stock of the company were allotted to the secretary of the company at par, he having subscribed for them; and immediately afterwards he disposed of a number of these shares at par to the directors themselves individually, in varying amounts.—It was established in evidence that the transaction was for the purpose of retaining control of the company, in order that it might be carried on for the purpose for which it was organized.—It was also established that the plaintiff had previously purchased a large number of shares, for many of which he had paid a premium. —*Held*, that this allotment of shares by the directors was not illegal, as the transaction was *bona fide*, and not *ultra vires* of the corporation itself; that the directors were acting within their powers when they exercised their discretion, and in the interest of the whole body of shareholders sold shares at par which might have brought a premium. —*Held*, that as no fraud had been shown, and relief was sought only for the company, the bill should have been filed in the name of the company itself. *Harris et al* v. *Sumner et al*, 4 Eq., 58 39, N. B. R. p. 204.

4. Management, Directors, etc.

Action of directors, Ratifying—At a meeting of the directors of an exhibition association, a large number of shares of the original capital stock of the company were alloted to the secretary of the company at par, he having subscribed for them; and immediately afterwards he disposed of a number of these shares at par to the directors themselves individually, in varying amounts. —It was established in evidence that the transaction was for the purpose of retaining control of the company, in order that it might be carried on for the purpose for which it was organized.—It was also established that the plaintiff had previously purchased a large number of shares, for many of which he had paid a premium.—*Held*, that this allotment of shares by the directors was not illegal, as the transaction was *bona fide*, and not *ultra vires* of the corporation itself; that the directors were acting within their powers when they exercised their discretion, and in the interest of the whole body of shareholders sold shares at par which might have brought a premium.—Even if the directors were guilty of improper conduct, their act would only be voidable, not void, and the company by majority vote could ratify the act, and in such a case the minority of the shareholders must yield to the majority. —*Held*, that as no fraud had been shown, and relief was sought only for the company, the bill should have been filed in the name of the company itself. *Harris et al* v. *Sumner et al*, 4 Eq., 58; 39 N. B. R., 204.

By-laws ultra vires when inconsistent with charter—When an Act of Parliament creates a corporation for a particular purpose and gives it powers for that particular purpose, what it does not expressly or impliedly authorize is taken to be prohibited, and neither the King's Charter nor any by-law can introduce an alteration in rules which have been prescribed to the corporation by such Act.—The Act of Incorporation of the Moncton Hospital, 58 Vic., c. 61 and amending Acts, provides that the city council, the municipal council etc., shall each appoint a number of trustees, to hold office for a certain number of years, who, with their successors shall constitute the "trustees" of the hospital in whom the management and control shall be vested.—And further provides that the trustees may make necessary by-laws for the annual election or appointment of trustees to succeed retiring trustees.—The trustees passed a by-law entitling any person to vote at the annual election of trustees, who had previously contributed the sum of not less than $1.00 to the funds of the hospital. —The plaintiff was elected a trustee at the annual meeting of the hospital at which a large number of persons voted whose only qualification was the fact that they were contributors to the amount of $1.00.—At an adjourned meeting a resolution was passed declaring the election of the trustees elected at the annual meeting rescinded and annulled.—The meeting thereupon elected trustees to fill the vacancy thus created.—The plaintiff was not elected.—None but trustees were permitted to vote.—*Held*, that the appointment for the election of trustees was in the corporation only, which had no authority under the incorporating act to increase its membership nor to fix a qualification for voters outside of the corporation, nor to sanction persons taking part in the business of the hospital who were not members of the body corporate, and that the by-law making the contributors eligible to vote at the annual election of trustees was void, as being beyond the powers conferred upon the trustees by statute, and repugnant to the provisions of the Act, and that no amount of user or ratification by the corporation could make it good. *Murphy* v. *The Moncton Hospital et al*, 44, p. 585.

Director, Contract with—Interpretation—A director present at a meeting and taking part in the passing of a resolution authorizing a contract with himself must be bound by what the directors intended the resolution to mean. *Mc Kean* v. *Dalhousie Lumber Co.*, 40. p. 218.

Directors—Liability for broker's misrepresentation—Directors who adopt a

resolution to employ a broker to sell shares of the company are not personally responsible in damages to a purchaser of shares for misrepresentations made in a prospectus issued by the broker as the agent of the company without their authority. *Farrell* v. *Portland Rolling Mills Co. Ltd. et al*, 38 N. B. R. p. 364; 40 S. C. R., 339.

Directors, Powers of—At a meeting of the directors of the Moncton Exhibition Association Ltd., an incorporated company, they allotted all the unissued shares, being 40 per cent. of the capital stock, to the secretary of the company at par, he having subscribed for them; and immediately afterwards he disposed of a number of these shares at par to the directors individually. —No shares had been sold for three years previously, and in the meantime the company's real estate had greatly increased in value, and the plaintiff had recently purchased a large number of shares, nearly at all a premium, and some at a premium of 150 per cent.—*Held*, that this transaction by the directors was not illegal, as the shares were allotted *bona fide* to the secretary with intent to further the company's interests, and without intent on the part of the directors to profit personally thereby; that the directors were acting within their powers when they exercised their discretion and sold shares at par which might have brought a premium, and that they were not obliged to offer the unissued shares to all shareholders pro rata or put them up at auction before disposing of them to one shareholder at par.—Plaintiff had presumably in mind the subdividing of the property into lots, and thereby indirectly defeating the objects of incorporation of the company.—*Held*, that the directors' action was a *bona fide* exercise of their discretion as to what was in the company's interest. *Harris et al* v. *Sumner et al*, 39, p. 204.

Liability of president for illegal act—The president of an incorporated company, who hired the clerks and had the entire management of the business, was convicted of selling liquor, contrary to the provisions of the second part of the Canada Temperance Act, where the sale had been made by a clerk under general directions received by him from the president.—The act being illegal, the corporation could not authorize it and therefore the individual must be personally responsible.—Conviction affirmed, VanWart J., dissenting. *Ex parte Baird*, 34, p. 213.

See also *Ex parte McIntyre*, 39, p. 361.

Local board of health, Corporate action by—A judge of the Supreme Court has no jurisdiction under section 73 of the Public Health Act (C. S. 1903, c. 53) to order a county council to pay an amount assessed for the expenses of a local board under section 72 of the Act on the application of the chairman without the authority of the board.—The board must act as a board and not as individuals.—(*Per* Hanington and McLeod JJ., Tuck C. J. dissenting.) *Ex parte The Municipality of York re Local Board of Health for District No.* 3, 37, p. 546.

Majority rule—Sale of assets—The holders of the majority of the shares in the capital stock of a company authorized the selling of its property in order to pay its debts.—*Held*, that the sale should not be enjoined at the instance of a dissentient shareholder. *Patrick* v. *The Empire Coal and Tramway Co. Ltd.*, 3 Eq., p. 571.

Managing director, Negligence of—The managing director of a company, without the authority but with the knowledge of all his company's directors except one, erected, at a cost of $17,000 a fuel house for the storage of mill wood and a conveyor for the purpose of moving the mill wood from his mill to the company's pulp mill to be used for fuel and pulp.—The fuel house and conveyor became of no use to the company by reason of the discontinuance of the use of mill wood.—*Held* (*per* Tuck C. J., Barker, McLeod and Gregory JJ., Hanington and Landry JJ. dissenting,) that there was no such gross negligence on the part of the managing director as made him liable for the expense of erecting the fuel house and conveyor. *The Cushing Sulphite Fibre Co. Ltd.* v. *Cushing*, 37, p. 313.

Overseers of the poor—Authority of individual overseer—The overseers of the poor of each parish are a corporate body by statute but the very nature of the duties devolving on the overseers is sufficient to infer an agency in each overseer which will give him power to bind the corporation in case of emergency, such as prompt surgical aid necessary to save life. *Irving* v. *Overseers, Parish of Stanley*, 37, p. 584.

Shareholder, Rights of—A shareholder's interest is not an interest in the real or personal property of the company, but merely a right to have a share of the profits when realized and divided among the members or shareholders, a right to vote on the shares he holds and to participate pro rata in the property and business of the company and in the assets in the case of a winding up. *Harris et al* v. *Sumner et al*, 39 p. 204.

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5. Debentures and Mortgages.

Agreement to issue bonds secured by mortgage—Preference—The N. Co. borrowed $34,000 for which they agreed to issue bonds secured by a mortgage on the A. property, then owned by the company, which agreement was set out in certain certificates of indebtedness or interim receipts. —Subsequently and within thirty days of its winding up, the N. Co. executed a mortgage to the plaintiff covering the A. property and all other property of the company, real and personal then owned or thereafter to

be acquired, to secure the bonds as agreed. —This mortgage was not registered under the Registry Act, C. S. 1903, c. 151, nor filed as a bill of sale under the Bills of Sale Act, C. S. 1903, c. 142.—After winding up, *held*, the certificate holders were entitled to security on the A. property by reason of the agreement in the certificates.—The fact that the mortgage was not registered nor filed did not render it invalid as against the liquidators, but the mortgage was invalid as an unjust preference under s. 98 of the Winding Up Act in so far as it purported to convey property other than the A. property. *Harrison* v. *Nepisiquit Lumber Co. in Liq.*, 41, p. 1.

Bond fraudulently issued—Negligence —Holder for value—A debenture of the defendants, payable to bearer, sealed with their corporate seal and signed by their chairman and secretary, was allowed to get into circulation without the authority or knowledge of the defendants, and without their receiving any value therefor.—It was finally purchased by the plaintiff before maturity, who took it in good faith and gave full market value for it.—In an action brought upon two of the interest coupons attached to the debenture, the learned judge who tried the cause asked the jury the two following questions *inter alia* which were answered in the affirmative: "Did the bond come into the hands of the plaintiff as an innocent holder for value through the carelessness and neglect of the defendants, or those of their officers whose duty it was to have the bonds properly executed and issued, and in whose hands or custody the bonds should be detained until delivered to *bona fide* purchasers?—Do you find that the Board of School Trustees, or their officers, were guilty of such negligence in connection with the bond that in your opinion it would be inequitable and unjust that the defendants should be permitted as against the plaintiff to set up a defence that the bond was not duly executed, or the issue thereof authorized by the Board?"—A verdict was thereupon entered for the plaintiff.—*Held*, rightly so entered. *Robinson* v. *Board of School Trustees of Saint John*, 34, p. 503.

Consolidated issue subject to bonds outstanding—The defendant electric company by agreement took over the property of three other companies subject to certain outstanding bonds.—The bonds of the defendant company were issued to retire the bonds of the other companies, and by this means all the outstanding bonds were retired except $26,000 and $6,000 of two of the companies respectively.—The holders of these bonds contended that the bonds retired by the defendant company had been paid and cancelled by such retirement, and that these bonds should be paid in full out of the fund in Court; but *held*, that the redemption of the bonds by the Consolidated Electric Company by the issue and substitution therefor of bonds of its own, did not operate as a payment of the bonds so redeemed but that the bonds so redeemed continued to be subsisting securities and entitled to share in the fund in Court proportionately with the bonds not so redeemed, namely, the $26,000 and $6,000. *Pratt* v. *Consolidated Electric et al*, 34, p. 23.

Debentures issued by a municipal council on behalf of a parish—By Act of Assembly 41 Vict., c. 102, it was provided *inter alia* that the municipality of G., on the joint recommendation of the councillors of the Parish of B. should appoint three commissioners for purchasing or leasing a farm and lands and for erecting thereon a proper building for an alms and work-house for the said Parish of B. and for supporting and managing the same; that the cost thereof which was not to exceed three thousand dollars was to be assessed by the said county council on the said Parish of B. , that the said county council might cause bonds to be issued by the municipality intituled "Alms-house bonds, Parish of B." which should be wholly chargeable on the said parish, and be signed by the warden and secretary-treasurer and have the corporate seal affixed thereto, and be placed in the hands of the secretary-treasurer to be disposed of for the purposes of the act; and that the proceeds of such bonds should be placed to the credit of the said commissioners and be paid out on their order for the purposes of the act; that the said county council should make and levy upon the said Parish of B. a sum sufficient to pay the principal and interest of the said bonds as and when the same might become due, and that the said sums, when collected, should be held and paid by the secretary-treasurer for the purposes of the Act.—Under the provisions of this act the following instrument was issued, which was purchased by the intestate from the secretary-treasurer of the municipality of G.: "$1,000—No. 1—Alms-house Bonds, Parish of Bathurst.—This certifies that the Parish of Bathurst, in the County of Gloucester, Province of New Brunswick, is indebted to George S. Grimmer in the sum of One Thousand Dollars, current money of the Province of New Brunswick, which is payable to George S. Grimmer or order on or before the tenth day of April, one thousand eight hundred and eighty-four, together with interest at the rate of seven per centum per annum payable half-yearly at the Bank of New Brunswick, St. John, on the presentation of the proper coupons for the same, as hereunto annexed, pursuant to an act of assembly made and passed in the forty-first year of the reign of Her Majesty Queen Victoria intituled 'An Act to provide for the erection of an alms-house and work-house in the Parish of Bathurst, Gloucester County.'—In witness whereof, the county council, at the instance of the alms-house commissioners of the Parish of Bathurst, have caused the seal of the municipality of Gloucester to be affixed hereunto under the hand of the warden and the secretary-treasurer this tenth day of April, one thousand eight hundred and seventy-

mine.—L. S., John Sivewright, secretary-treasurer; John Young, warden."—In an action brought against the municipality of G. by the administrators of the purchaser to recover the amount of the principal and interest due by virtue of the above bond or certificate of indebtedness.—*Held* (*per* Tuck C. J., Hanington, Landry, Barker, McLeod and Gregory JJ), (1) that as the instrument sued on amounted to nothing more than a certificate by the municipality of G. that the Parish of B. was indebted to the intestate in the sum of $1,000.00 with interest, and that as the Act 41, Vict., c. 102, did not impose upon the municipality any liability for moneys borrowed under its provisions for the purposes of the almshouse commissioners, the defendants were not liable on a count framed upon the instrument itself; neither were they liable upon the common counts, as the evidence did not show that moneys to pay the above bond or certificate of indebtedness had been collected by taxation levied upon the parish of B., and paid over to the defendants for that purpose; and (2) that the plaintiff could not recover under the act 62 Vict., c. 67, as that act only authorized bonds to be issued for an indebtedness of the county then existing, and was not passed for the purpose of creating any new liability.—*Held*, further (*per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ., Gregory J. dissenting), that by the act in question the municipality was not authorized to issue any instrument which would create an indebtedness between it and the person advancing money upon such instrument.—*Semble* (*per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ.) that the plaintiff's remedy was by motion for a mandamus to compel the municipality to assess the Parish of B. for the amount of the loan and interest.—(Reversed on appeal 32 S. C. R., 305.) *Grimmer* v. *Municipality of Gloucester*, 35, p. 255.

Enforcing security — Receiver — Where debenture holders in a suit against a company to enforce their mortgage security obtained the appointment of a receiver before, but subsequently to an application for, an order to wind up the company, and there was a dispute between the receiver and the liquidator in the winding-up as to what property was conveyed by the mortgage, and the liquidator obtained liberty to dispute in the suit the validity of the mortgage, the Court declined to discharge the receiver, or to appoint the liquidator receiver in his place.—Order appointing receiver in a debenture holders' suit varied by limiting property to be received by him to property conveyed by their mortgage security. *Bank of Montreal* v. *The Maritime Sulphite Fibre Co. Ltd.*, 2 Eq., p. 328.

Enforcing trust mortgage—Decree—A suit to enforce a trust mortgage to secure debentures may be brought in the name of the debenture holders, the trustee being made a defendant.—In a suit by the holder of debentures to enforce a trust mortgage, the trustees made defendants in the suit were disallowed costs of a part of their answer setting up that the suit should have been brought in their name.—Form of decree adopted in suit to foreclose debenture mortgage. *Shaugnessy* v. *The Imperial Trusts Company*, 3 Eq., p. 5.

Proceeds improperly applied—A company was authorized by Act to issue debentures for the purpose of redeeming mortgages against a property it was acquiring.—In a suit to foreclose a mortgage given by the company to secure the debentures a shareholder applied to be allowed to defend the suit on the ground that the proceeds of the debentures had been applied to a purpose not authorized by the Act; that the holders of them took with notice thereof, and that the directors of the company refused to defend the suit.—*Held*, that upon evidence of the applicant's allegations, the application should be granted. *Weldon et al* v. *William Parks & Son Ltd. et al*, Eq. Cas., p. 418.

Trustee unlicensed in N. B.—The N. Co. issued bonds stating on their face that they were secured by a mortgage to the U. Trust Co., an unlicensed extra provincial corporation, upon all its real and personal property then owned or thereafter to be acquired.—Subsequently and within 30 days of the winding up of the N. Co. under R. S. C. 1906, c. 144, the U. Trust Co. resigned and the plaintiff was appointed trustee with consent of bondholders, and the U. Trust Co. assigned its interest to the plaintiff. —The N. Co. also executed another mortgage to the plaintiff covering the same property to secure the said bonds.—*Held*, the bondholders were entitled in equity to security on the property described in the mortgage to the U. Trust Co. by reason of the agreement in the bonds, although the Trustee Co. was incapable of holding property in this Province.—The mortgage to the plaintiff was not invalid as a fraudulent preference under the Winding Up Act, because the bondholders obtained no further security thereby. *Harrison* v. *Nepisquit Lumber Co. Ltd. in Liq.*, 41, p. 1.

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6. Contracts.

Amalgamation of companies — Contract in force with one of them.—By agreement, which was to be in force for ten years, the Cumberland Telephone Co. and the Central Telephone Co. were to have the use of each other's lines and of any connections either then had or might thereafter acquire over the lines of any other company.—Shortly after the making of the agreement, the Central Co. sold its property to the New Brunswick Telephone Co. —By its charter the Central Co. had power to amalgamate with any other company, and the Act of incorporation of the New Brunswick Co. empowers it to acquire other telephone lines.—The agreement of sale provided that the Cumberland Co. should

have, by virtue of its agreement with the Central Co., the use of so much of the New Brunswick Co.'s lines as were acquired from the Central Co.—The Cumberland Co. sought to restrain the sale unless provision were made in the agreement of sale that it should have the use of the whole system of the New Brunswick Co.—*Held*, that the bill should be dismissed.—*Held, also*, that the sale and purchase being within the powers of the companies could not be objected to, and even if it were *ultra vires*, that the plaintiffs had no status entitling them to raise the question.—*Semble*, that the sale should not have been enjoined even if the New Brunswick Co. had not assumed the contract of the Central with the Cumberland Co. *New Cumberland Telephone Co. Ltd.* v. *Central Telephone Co. Ltd.*, 3 Eq., p. 385.

Resolution of directors only—A resolution of the directors duly recorded on the minutes and authorizing the assignment of a chose in action is not an actual assignment of the debt and will not satisfy the requirements of section 155 of chapter 111 C. S. 1903, which provides that "Every debt and any chose in action arising out of contracts shall be assignable at law by any form of writing which contains apt words in that behalf."—Directors may control the company's business and direct its affairs but they do not own its property and the company itself must be the contracting party, and execute the transfer. *Lynch* v. *William Richards Co. Ltd.*, 37, p. 549.

Resolution to mortgage more than owned due to misconception—See *The Continental Trusts Co.* v. *The Mineral Products Co.*, 3 Eq. 28; 37 N. B. R., p. 140.

Sale of assets—Dissentient shareholder—The holders of the majority of the shares in the capital stock of a company authorized the selling of its property in order to pay its debts.—*Held*, that the sale should not be enjoined at the instance of a dissentient shareholder. *Patrick* v. *The Empire Coal and Tramway Co. Ltd.*, 3 Eq., p. 571.

School trustees, Corporate action by—School trustees appointed under the provisions of C. S. N. B., c. 65, are a corporate body and must act together as a board; therefore, a notice of dismissal signed by two out of three of them dismissing a teacher engaged under a written contract, which notice was not the result of deliberation in their corporate capacity, was held insufficient. *Robertson* v. *School Trustees of Durham*, 34, p. 103.

School trustees—Contract with unlicensed teacher—Ultra vires—The plaintiff, an unlicensed teacher, was employed to teach in a school district for one term, under a written contract purporting to be made by the defendants, who are school trustees, incorporated under the Schools' Act, C. S. 1903, c. 50.—The contract was signed by two out of the three trustees but the corporate seal was not affixed to it and no meeting of the trustees was held to authorize the contract.—Under this contract the plaintiff taught for one full term.—In an action to recover the amount agreed to be paid to her, *held*, (1) that the contract was made by the school trustees as a corporation and not as individuals.; (2) the contract is unenforceable because under the Schools' Act, C. S. 1903, c. 50, it is *ultra vires* of the school trustees to employ an unlicensed teacher; (3) the defendants are not liable on a *quantum meruit* for the services of the plaintiff because (a) the employment of the plaintiff was *ultra vires* and (b) there was no completed work which the trustees could accept or reject. *Yerxa* v. *Trustees School District No.* 7½, 40, p. 351.

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7. Actions by and against Companies.

Action by company in liquidation—A company, against which a winding-up order had been made, obtained at the instance of the large majority of its shareholders and holders of its bonds an order in an action by it against C., granting leave to appeal to the Supreme Court of Canada from a judgment of the Supreme Court of this province confirming a judgment of the Supreme Court in Equity, and entrusting the conduct of the appeal to the company's solicitors.—Subsequently the liquidators of the company moved to vary the order by adding a direction that the case on appeal should not be settled until an appeal to the Supreme Court of Canada from the judgment of the Supreme Court of this province refusing to set aside the winding-up order was determined, and that the company's solicitors on the appeal in the action against C. should act therein only on instructions of the liquidators or their solicitor.—*Held*, that as there was no error or omission in the order resulting from mistake or inadvertence, and the order expressed the intention of the judge who made it, the motion should be refused.—Principles upon which applications by shareholders of a company in liquidation for leave to appeal are to be dealt with, considered. *In re The Cushing Sulphite Fibre Co. Ltd.*, 3 Eq., p. 231.

Action by company—Setting out mode of incorporation—In an action in the County Court by a company, it was held sufficient to describe the plaintiff as an incorporated company, without stating the mode of incorporation.—*Waterous Engine Works Co.* v. *Campbell* (22 N. B. R. 503) distinguished. *McLaughlin Carriage Co. Ltd.*, v. *Quigg*, 37, p. 86.

Affidavits by manager on behalf of company—In an action for the recovery of personal property, the affidavit made by the manager of an incorporated company under O. 63, r. 1, as amended by 3 Geo. V., c. 23, s. 15 (Acts 1913) under which the

sheriff seized the property, which stated that he had personal knowledge of the facts deposed to, is sufficient without stating his means of knowledge.—*The Halifax Banking Co.* v. *Smith* (1886) 25 N. B. R. 610 followed.—The omission of the word "limited" in the body of the affidavit which was properly entitled in the Court and cause is an irregularity only and is cured by failure to take advantage of it promptly after knowledge of its existence.—*Muirhead* v. *Arbo* (1876) 16 N. B. R. 283 distinguished. *The Dalhousie Lumber Co. Ltd.* v. *Walker*, 44, p. 81.

Directors, Action by for accounting—A director of a company cannot file a bill against the company and his co-directors for an accounting of moneys received by the company unless special circumstances are shown.—The report of a Royal Commission, whose duties were inquisitorial and not judicial, finding that a sum of money received by the company is unaccounted for; and the fact that the complaining director was the Attorney-General of the province, and as such an *ex officio* director of the company by the Act of Incorporation, are not such special circumstances as would support a bill for such an accounting. *Pugsley* v. *The New Brunswick Coal & Railway Co. et al*, 4 Eq. 327; 40 N. B. R., 515.

Service on corporation—Order 9, r. 6—In an action against a newspaper corporation for libel, notice of the intended action served on a reporter on the staff of the paper in a room on the fourth floor of a building occupied by the defendant and used by it as a library, the third floor being occupied by persons employed in mechanical work connected with the issue of the paper and the second floor by the manager and office staff, is not a good service within the meaning of O. 9, r. 6 of the Judicature Act, 1909, providing that service may be made on the officers or agent of the corporation, or within the meaning of s. 80 of the New Brunswick Joint Stock Companies Act, C. S. 1903, c. 85, providing that service may be made by leaving it at the office of the company with any grown person in its employ. *Carter* v. *The Standard Ltd.*, 44, p. 1 (Chambers).

Shareholder's right to defend when directors refuse—A company was authorized by Act to issue debentures for the purpose of redeeming mortgages against a property it was acquiring.—In a suit to foreclose a mortgage given by the company to secure the debentures, a shareholder applied to be allowed to defend the suit on the ground that the proceeds of the debentures had been applied to a purpose not authorized by the Act; that the holders of them took with notice thereof, and that the directors of the company refused to defend the suit.—*Held*, that upon evidence of the applicant's allegations, the application should be granted. *Weldon et al* v. *William Parks & Son Ltd. et al*, Eq. Cas., p. 418.

Summary conviction—A corporation cannot be convicted summarily.—The word "person" in the Summary Conviction Act cannot be held to include a corporation or body corporate, notwithstanding the Interpretation Act, c. 1, s. 7, sub-s. 22. *Ex parte Woodstock Electric Light Co.*, 34, p. 460.

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8. Foreign Companies.

Extra provincial corporation—Unlicensed company—Judgment obtained by not void—The plaintiff, an extra provincial corporation, sued S. in a County Court for debt. S. died and the plaintiff then recovered judgment by default against the defendant as administrator of S.—Execution was issued and returned *nulla bona*, although the administrator had assets in his hands.—The plaintiff then brought this action against the defendant personally upon the County Court judgment, relying on the judgment as evidence of assets, and the return of the execution as evidence of waste.—Judgment having been given for the plaintiff, the defendant moved to set it aside on the ground *inter alia* that the County Court judgment was void because the plaintiff had no license under C. S. 1903, c. 18.—*Held*, the County Court judgment was conclusive against the defendant and that this defence could not be set up in this action. *Sanford Mfg. Co. Ltd.* v. *Stockton*, 40, p. 423.

Extra provincial corporations, C. S. 1903, c. 18—Sale by traveller not liable to tax—The defendants wrote the plaintiff the following letter: "As the C. Co. of W., New Brunswick, desires to make purchases from you, therefore to open a line of credit with you, we declare that in consideration of your complying with their request we hereby bind and oblige ourselves, jointly and severally, as principal debtors with them towards you in the amount of $1,000 for purchases they may now make from you at any time as also for any notes given in settlement thereof by them or for any balance due thereon to the extent of the aforesaid sum of $1.000."—The plaintiff was a Dominion corporation not having any resident agent or representative, and no office or place of business in New Brunswick, but sold goods to the C. Co. by a traveller.—*Held*, that the sale and guarantee were not a violation of the Act respecting the Imposition of certain Taxes on certain Incorporated Companies and Associations, C. S. 1903, c. 18. *E. N. Heney & Co. Ltd.* v. *Birmingham et al*, 39, p. 336.

Extra provincial corporation—Trust company—Trustee for bondholders—The N. Co. issued bonds stating on their face that they were secured by a mortgage to the U. Trust Co. upon all its real and personal property then owned or thereafter to be acquired.—The U. Trust Co. was an extra-provincial corporation, not licensed under

C. S. 1903, c. 18, but the bond holders had no notice of this fact.—*Held*, the bondholders were entitled in equity to security on the property described in the mortgage to the U. Trust Co. by reason of the agreement in the bonds although the U. Trust Co. was incapable of holding property in this province. *Harrison* v. *Nepisiquit Lumber Co.*, 41, p. 1.

Extra provincial corporation—Unlicensed company, Action by—A writ of summons issued by an unlicensed extra-provincial corporation, on a contract made in part within New Brunswick, contrary to sections 12 and 18 of the act "respecting the imposition of certain taxes on certain incorporated companies and associations" (C. S. 1903, c. 18) may be set aside on summary application. (*Per* McLeod J. and Tuck C. J., Landry J. doubting, and Hanington J. dissenting.)—The plaintiff company, an unlicensed extra provincial corporation, sold absolutely to the defendant, a corporation within New Brunswick, at Bloomfield, in the state of New Jersey, two car loads of its empire cream separators to be delivered F. O. B. at Sussex and Saint John, to be paid for by promissory notes to be given on delivery.—Defendant company to have the exclusive right of sale in certain named counties and undertaking not to sell or handle any other separators in said counties. —The defendant company advertised itself in New Brunswick as the sole agent of the separators, with the consent and at the expense of the plaintiff.—*Held* (*per* McLeod J. and Tuck C. J., Landry J. doubting and Hanington J. dissenting) that the defendant was the resident agent of the plaintiff in New Brunswick and the sale was a contract made in part within the province within the meaning of sections 12 and 18 of the Act, and no action could be maintained on the notes. *The Empire Cream Separator Co. Ltd.* v. *The Maritime Dairy Co. Ltd.*, 38, p. 309.

Extra provincial corporation—Unlicensed company, Action by—Defence—Practice—The defence that an extra provincial corporation is not licensed under C. S. 1903, c. 18, is not a matter to be pleaded, but a ground for a stay of proceedings.—*The Empire Cream Separator Co.* v. *The Maritime Dairy Co.*, 38 N. B. R., 309 followed.—The plaintiff, an extra-provincial corporation, sued defendant on a contract made in New York, by which plaintiff was to ship goods at Toronto to defendant in Sussex, N. B., by freight, defendant to pay freight.—The plaintiff shipped the goods by express and prepaid the charges which were afterwards paid by the defendant.—*Held*, this was not carrying on business within New Brunswick as the title to the goods passed in Toronto. *Culbert* v. *The McCall Co.*, 40, p. 385.

Fire insurance company unlicensed under 9-10 Edw. VII., c. 32—A condition in a fire insurance policy making the policy void "if any subsequent insurance is effected with any other insurer" is not violated unless the insured can successfully maintain an action upon such policy with the other insurer.—An insurance policy issued in Canada by a company not licensed under "The Insurance Act, 1910," 9-10 Edw. VII. (Dom.), c. 32, is void and therefore does not constitute "an insurance" within the meaning of the above condition. *Hicks* v. *Pacific Coast Fire Ins. Co.*, 42, p. 294.

Foreign corporation—Discovery—Production will be ordered against a defendant foreign corporation, and it is no answer that it's books are abroad.—Application may be made for production, though the information has been refused in answer to interrogatories, and it cannot be objected that the answer should have been excepted to. *Robertson* v. *The St. John City Railway et al*, Eq. Cas. p. 462.

Foreign corporation—Evidence of incorporation—In an action in the Magistrate's Court by a foreign corporation, the only evidence of the incorporation was supplementary letters of incorporation increasing the capital stock.—This evidence was received by the magistrate without objection and a judgment entered for the plaintiff.—On review before a County Court judge, the judgment was set aside on the ground that there was no evidence of incorporation.—*Held*, on motion for a certiorari to quash the order of review, that, whether or not there is such evidence is a question of law and the County Court judge had jurisdiction, notwithstanding the amount involved was under $40.00. *Ex parte Ault & Wiborg Co. of Canada Ltd.*, 42, p. 548.

Foreign corporation—Power to contract and bring suit in New Brunswick—The E. & N. A. Railway Co. were incorporated in 1864 under the laws of the province of New Brunswick and in 1869 owned a line of railroad from Fairville, N. B., to Vanceboro, on the boundary of the state of Maine. —In that year they entered into an agreement with the plaintiffs, a company incorporated in the state of New York giving the latter the exclusive right to erect and maintain upon the land of the railroad lines of telegraph which should be the exclusive property of the plaintiffs, etc., etc.—*Held*, *inter alia*, that the plaintiffs, though incorporated in the state of New York, could validly contract with the E. and N. A. Ry. Co. and enforce the agreement by a suit brought in this country. *Western Union Telegraph Co.* v. *N. B. Railway Co. et al*, Eq. Cas., p. 338.

9. Winding Up.

Application by bondholder—A company issued bonds payable to bearer, the payment of which was secured by a trust mortgage, by which the company purported to assign certain of its property to trustees, in trust for the benefit of the bond-holders, and covenanted with the trustees for the payment

of the principal and interest of the bonds to the bondholders.—*Held* (*per* Barker, McLeod and Gregory JJ.), that the holder of some of the bonds, the interest of which was overdue, was entitled to petition for the winding-up of the company.—*Held*, (*per* Tuck C. J. and Hanington J.) that the bonds and trust mortgage must be read together, and that under the terms of the trust mortgage a bondholder was not a creditor within the meaning of the Act and was not entitled to petition for a winding-up order. *In re The Cushing Sulphite Fibre Co. Ltd.*, 37, p. 254.

Application by secured creditor—A secured creditor can make a demand under section 6, and petition for the winding-up of the company, and is not bound to value in his petition his security under section 62; Where a demand is made under section 6, and the time for payment has elapsed, and the demand has not been complied with and no reason is given why payment is not made, the company must be deemed insolvent within the meaning of the act; Where the judge has exercised his discretion under section 19 and refused to regard the request of a majority of the creditors and shareholders opposed to the petition, who did not offer or propose to continue the business, but intended to allow the trust mortgage to be foreclosed, it should not be reviewed on appeal. (*Per* Tuck C. J., Barker, McLeod and Gregory JJ.)—(*Per* Hanington J.) that a refusal to regard the wishes of all the unsecured creditors and the great majority of the secured creditors and shareholders is not a reasonable exercise of judicial discretion under section 19 and an appeal should be allowed on that ground; and that when the petitioner's claim is amply secured, he has no right to petition and force a company into liquidation. *In re The Cushing Sulphite Fibre Co. Ltd.*, 37, p. 254.

Distress for rent previous to winding-up order—A distress for rent is not avoided by proceedings taken under the Winding-up Act (2 R. S. C., c. 129) to put a company in liquidation, if the distress is made before the making of the winding-up order.—(*Per* Hanington, Landry, Barker and McLeod JJ., Tuck C. J. and Gregory J. dissenting.)—Quaere:—Whether a sale may be made under the distress without the leave of the Court. *In re F. C. Colwell Candy Co. Ltd. In Liquidation*, 35, p. 613.

Equitable lien by bank—Where a company is being wound up under the New Brunswick Winding Up Act, a bank is entitled to an order for the payment to it of the proceeds of policies of fire insurance effected by the company on their property, and made payable, in case of loss, to the bank, as interest may appear, under a verbal agreement between the bank and the company that the policies should be so effected as security for advances which the bank from time to time might make, the bank having no interest in the property insured. *In re Shediac Boot & Shoe Co. Ltd.*, 37, p. 98.

Foreclosure suit pending at time of order to wind up—Where debenture-holders in a suit against a company to enforce their mortgage security obtained the appointment of a receiver before, but subsequently to an application for, an order to wind up the company, and there was a dispute between the receiver and the liquidator in the winding-up as to what property was conveyed by the mortgage, and the liquidator obtained liberty to dispute in the suit the validity of the mortgage, the Court declined to discharge the receiver or to appoint the liquidator receiver in his place. *Bank of Montreal* v. *The Maritime Sulphite Fibre Co. Ltd.*, 2 Eq., 328.

Foreclosure after order for winding-up—The liquidators have no equity to have the conduct of the sale under foreclosure proceedings, and an order made at their instance by the judge directing the winding up proceedings, postponing the sale and directing the referee as to the advertising and fixing a subsequent date for the sale, is bad. (*Per* Tuck C. J., Hanington, Barker and Gregory JJ.)—That the order, though wrong in point of form, was in substance an order for leave to proceed under section 16 and should not be interfered with on appeal. (*Per* McLeod J.)—*In re Cushing Sulphite Fibre Co. Ltd.*, 38, p. 581.

Form of order—An order made under the Winding-up Act (2 R. S. C., c. 129) directing the winding-up of a company instead of the business of a company is good. *In re Cushing Sulphite Co. Ltd.*, 37, p. 254.

Lien under Woodmen's Lien Act—Filing after winding-up order—Plaintiffs were woodmen employed by contractors who were engaged in cutting and getting out lumber for the defendant company.—The defendant having gone into liquidation under the Winding-up Act, R. S. C., 1906, c. 144, the plaintiffs, after the winding up, but before the time had expired for filing claims under the Woodmen's Lien Act, C. S. 1903, c. 148, applied for leave to file and enforce their claims against the company's logs for work done prior to the winding up. —McLeod J. held that plaintiffs were entitled to the benefit of the Woodmen's Lien Act, but that their liens did not arise until the claims were filed under s. 4 of that Act, and no lien could be created or put in force after the winding up, under ss. 23 and 84 of the Winding-up Act.—On appeal, *held*, sections 23 and 84 of the Winding-up Act apply to creditors only and do not alter the rights of the plaintiffs, who are third parties. —Under the Woodmen's Lien Act, the plaintiff's lien arose at the time the work was done and therefore existed at the time of the winding-up order and they were entitled to an order allowing them to proceed to enforce their claims. Section 23 of the Winding-up Act does not apply to the mere

filing of a claim of lien.—Section 84 of the Winding-up Act applies to the creation and not to the enforcement of a lien. *Good et al* v. *Nepisiquit Lumber Co. Ltd.*, 41, p. 57.

Semble:—Leave to file a lien against a company after a winding-up order has been issued is not necessary, but leave to enforce the lien is. *Id.*

Liquidator, Status of—The Winding-up Act is not necessarily an act relating to insolvency and a liquidator is not in the same position in reference to bills of sale as an assignee for general benefit of creditors.—(*Per* White J.) *Harrison* v. *The Nepisiquit Lumber Co. Ltd.*, 41, p. 1.

Liquidators appointed under the Winding-up Act are in no better position than the company was previous to the order being granted; they simply stand in place of the company. *Harrison* v. *Nepisiquit Lumber Co. Ltd.*, 41, p. 1; *The Bathurst Lumber Co. Ltd.*, v. *The Nepisiquit Lumber Co. Ltd.*, 41, p. 41,

Liquidators, Loan to, Priority of—A claim for money lent the liquidators of a company under a judge's order declaring that the loan should be a first charge on all the assets of the company, "subject only to any existing liens, charges or encumbrances thereon" is entitled to priority over the costs and charges of the winding-up proceeding including liquidators' and solicitors' fees and this rule is not affected by s. 92 of the Winding-up Act, R. S. C., 1906, c. 144, providing that "all costs, charges and expenses, properly incurred in a winding-up proceeding, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims".—"All other claims" means claims in existence when the winding-up order was made.—(*per* White J.), section 92 of the Winding up Act gives priority over other debts but does not create a lien. *Keyes* v. *Hanington et al*, 42, p. 190.

Mortgagee's right to leave to proceed—By section 16 of the Winding-up Act (R. S. C., c. 129) proceedings by a mortgagee under a decree of foreclosure of the company's premises is stayed, but the mortgagee has the absolute right to have leave to proceed unless special circumstances make it inequitable for him to do so.—The exercise of discretion in granting or refusing leave by the judge having charge of the winding-up proceedings may be reviewed on appeal. (*Per* Hanington, Barker and Gregory JJ.)—That the power given by section 13 to stay, and the stay provided by section 16, of any suit or action, does not apply to proceedings under a decree of foreclosure. (*Per* Tuck C. J.) *In re Cushing Sulphite Fibre Co, Ltd.*, 38, p. 581.

Preferences and priorities—The N. Co. issued bonds stating on their face that they were secured by a mortgage to the U. Trust Co. upon all its real and personal property then owned or thereafter to be acquired.—The U. Trust Co. was an extra-provincial corporation, not licensed under C. S. 1903, c. 18, but the bondholders had no notice of this fact.—Subsequently and within 30 days of the winding up of the N. Co. under the Winding-up Act, R. S. C. 1906, c. 144, the U. Trust Co. resigned and the plaintiff was appointed trustee with the consent of the bondholders, and the U. Trust Co. assigned its interest to the plaintiff.—The N. Co. also executed another mortgage to the plaintiff covering the same property to secure the said bonds.—*Held*, the bondholders are entitled to security on the property described in the mortgage to the U. Trust Co. by reason of the agreement in the bonds, although the U. Trust Co. was incapable of holding property in this province.—The mortgage to the plaintiff is not invalid as a fraudulent preference under the Winding-up Act, because the bondholders obtained no further security thereby.—The N. Co. also borrowed $34,000 for which they agreed to issue bonds secured by a mortgage on the A. property, then owned by the company, which agreement was set out in certain certificates of indebtedness or interim receipts. Subsequently and within thirty days of its winding-up the N. Co. executed a mortgage to the plaintiff covering the A. property and all other property of the company, real and personal then owned or thereafter to be acquired, to secure the bonds as agreed. This mortgage was not registered under the Registry Act nor filed as a bill of sale under the Bills of Sale Act.—After winding up, *held*, the certificate holders were entitled to security on the A. property by reason of the agreement in the certificates.—The fact that the mortgage was not registered or filed does not render it invalid as against the liquidators, but the mortgage is invalid as an unjust preference under s. 98 of the Winding-up Act in so far as it purports to convey property other than the A. property.—One M. bought from A. a saw mill and timber limits and executed a mortgage to A. to secure part of the purchase price and thereafter made a declaration of trust of the said property in favor of the N. Co. It was agreed between M. and A. that M. might tear down the mill and erect another equipped with mill machinery affixed as part of the realty, free from all liens, and N. Co. erected a mill pursuant to this agreement.—W. and C. supplied machinery for the new mill under agreements that title should remain in the vendors until full payment was made, but these agreements were not filed under the Conditional Sales Act, C. S. 1903, c. 143, and the mortgagees had no notice of them.—The machinery was installed and affixed to the realty subsequent to the execution of the mortgage to the U. Trust Co., and the mortgage to A., and the issuing of the bonds and certificates above mentioned, but prior to the execution of the mortgages to the plaintiff.—After winding up, W. and C. applied to remove their machinery.—*Held* (per Barker C. J., McLeod, Barry and

McKeown JJ., Landry J. dubitante), that A., the bondholders and certificate holders are entitled to the machinery as part of their security, because s. 8 of the Conditional Sales Act applying only when the agreements have been filed under s. 2, the machinery became part of the realty.—*Held* (*per* White J.), section 8 is not limited in its application to agreements filed under s. 2, and the machinery did not become part of the realty, but A. and the certificate holders are entitled thereto as against W. and C. because they are subsequent mortgagees under the agreement between M. and A., whereby the machinery was to be affixed to the realty and pass to the mortgagees free from all liens. *Harrison, Trustee, etc.* v. *The Nepisiquit Lumber Co. Ltd., In Liquidation, et al*, 41, p. 1.

Practice—Appeal—The Court refused to dismiss an appeal taken under section 74 of the Winding-up Act, 2 R. S. C., c. 129, where an order had been made settling and allowing the appeal, on the ground that the appellants had not complied with the practice governing in similar cases of appeal by serving or filing a notice of the grounds of appeal. *In re The Cushing Sulphite Fibre Co. Ltd.*, 37, p. 254.

Practice—Appeal from judge's ruling—Quaere:—Whether any judge but the one charged with the direction of the particular winding up has power to grant leave to appeal from a ruling of that judge, unless it be expressly delegated to him by the judge in charge. *Id.*

The appeal from the order of a judge in charge of winding up proceedings is to the Court and cannot be varied or rescinded by an order of a single judge, though made in excess of his jurisdiction under the Winding-up Act.—(*Per* Barker, McLeod and Gregory JJ.) *In re The Cushing Sulphite Fibre Co. Ltd.*, 38, p. 581.

Practice—Application by creditor—Under section 8 of the Winding-up Act (R. S. C., c. 129) which directs that a creditor may, after four days' notice of the application to the company, apply by petition for a winding-up order, a notice given on the first of the month for a hearing on the fifth is sufficient.—(*Per* Barker, McLeod, and Gregory JJ., Tuck C. J. dissenting and Hanington J. dubitante).—The facts alleged in the petition may be proved on the hearing, and the petition need not be sworn to or verified by affidavit. *In re Maritime Wrapper Co. Ltd., re Dominion Cotton Mills Co.*, 35, p. 682.

Practice—Order under Winding-up Act made in another province—The correct practice in order to enforce an order or judgment of the Court of another province made under the Winding-up Act and produced to the registrar pursuant to s. 126, is to enter such order as a judgment of this Court under the rules made under the Act by this Court in Trinity Term, 1888, without any formal motion to that effect. *In re the Winding-up Act, re The Sovereign Bank of Canada in liquidation*, 43, p. 519.

Practice—Receiver for bondholders—Where debenture-holders in a suit against a company to enforce their mortgage security obtained the appointment of a receiver before, but subsequently to an application for, an order to wind up the company, and there was a dispute between the receiver and the liquidator in the winding-up as to what property was conveyed by the mortgage, and the liquidator obtained liberty to dispute in the suit the validity of the mortgage, the Court declined to discharge the receiver, or to appoint the liquidator receiver in his place. *Bank of Montreal* v. *The Maritime Sulphite Fibre Co. Ltd.*, 2 Eq., 328.

Trial, Postponement of, when company is liable to be wound up—The consideration that proceedings under the Winding-up Act may soon be taken against the defendant does not justify a trial judge in refusing, except upon unusual and onerous terms, to postpone a trial on the ground of the absence of a material witness, and the Court will review the exercise of his discretion and grant a new trial.—(*Per* Tuck, Hanington, Barker, McLeod and Gregory JJ., Landry J. dissenting.) *Hale* v. *Tobique Mfg. Co.*, 36, p. 360.

CONDITIONAL SALE.

See SALE OF GOODS.

CONFLICT OF LAWS.

Assignment by inhabitant of Massachusetts of interest payable in N. B.—A share in the annual income of an estate in Ireland payable under a will through the hands of the executor living in New Brunswick to the beneficiary living and domiciled in Massachusetts was assigned by the beneficiary by assignment executed in Massachusetts to a trustee in trust, first, to maintain the assignor and his family, and, secondly, to pay his creditors a limited sum.—In a suit in this province to set aside the assignment as fraudulent and void against a judgment creditor of the assignor, under the Statute 13 Eliz., c. 5, *held* (1) that the validity of the assignment should not be determined by the *lex domicilii* of the assignor, but by the law of New Brunswick; (2) that, assuming the validity of the assignment should be determined by the law of Massachusetts the onus of proving that the assignment was invalid by that law was upon the

defendant, and that in the absence of such proof it must be assumed that the law of Massachusetts was the same as that of New Brunswick. *Black* v. *Moore*, 2 Eq., p. 98.

Contract of marriage—The law of the country where a marriage is celebrated determines the validity of the ceremony; the personal capacity of the parties to the ceremony depends on the law of their domicile. *Johnson et al* v. *Hazen*, 43, p. 154, C. D.

Foreign law—Administration in N. B. and elsewhere—A person, deceased, died domiciled in this province, leaving personal property here and in Maine.—Administration of the estate was taken out in both countries by the same person.—The proceeds of the Maine property were brought by the administratrix to this province.—The deceased was indebted to creditors in both countries. —An administration suit was brought in this province against the administratrix by the New Brunswick creditors.—By a decree of the Maine Probate Court the Maine assets were ordered to be distributed among the creditors of the deceased in accordance with the provisions of a Maine statute.—The effect would be that the Maine creditors would be paid their share of the whole estate without contributing to the costs of the administration suit in this province.—*Held*, that the costs of the administration suit could not be charged against the Maine assets, and that their distribution must be in accordance with the Maine law. *Warner* v. *Giberson*, 1, Eq. p. 65.

Marriage contract executed in province of Quebec—See *Murchie* v. *Theriault*, 1 Eq., p. 588.

Mortgage made in state of New York —Mining rights—Mining leases of lands in this province and of the minerals therein issued by the Crown to the appellant company, subsequent to a mortgage executed by it in the state of N. to the respondent company, incorporated under the laws of the said state of N., which laws, unlike those of this province, do not reserve the minerals to the state, are subject to the mortgage. *The Mineral Products Co.* v. *Continental Trust Co.*, 37, p. 140.

Pleading—Foreign law—To the two counts of a declaration upon a policy or certificate of life insurance defendants pleaded thirty-four pleas.—The first and eighteenth were alike and were as follows: "The defendants say that no demand of the said sum of two thousand dollars was made at the Association's office in Galesburg, Illinois, and by reason thereof, and by the laws of the State of Illinois, the plaintiff cannot recover upon the said certificate."—An order was made by Landry J. in Chambers striking out these pleas as being embarassing.—Upon a motion to rescind said order, *held*, that the pleas were bad for not averring what the law of the state of Illinois was by reason of which the plaintiff could not recover. *LeBlanc* v. *Covenant Mutual Benefit Association*, 34, p. 444.

Tort—The civil liability arising out of a wrong derives its birth from the law of the place and its character is determined by that law.—Therefore the plaintiff, an alien, being unlawfully within the United States territory in violation of an act of Congress, and a person liable to be deported, has no right of action in this Court against an officer of the United States government for his arrest in, and deportation from, that country. *Papageorgiou* v. *Turner*, 37, p. 449.

CONSTITUTIONAL LAW.

Assignments and Preferences Act, 58 Vic., c. 6—Quaere:—Whether the Assignments and Preferences Acts, 58 Vic., c. 6 is *ultra vires* the Provincial Legislature as being legislation re bankruptcy and insolvency. *Amherst Boot & Shoe Mfg. Co.* v. *Sheyn*. 2 Eq. p. 236.

Bills of Sale Act, C. S., c. 75, s. 1, Validity of—That part of section 1 of the Bills of Sale Act, chapter 75, C. S. N B., providing that a bill of sale as against the assignee of the grantor under any law relating to insolvency, or insolvent, absconding or absent debtors, or an assignee for the general benefit of the creditors of the maker, shall only take effect from the time of filing thereof, is not *ultra vires* of the Legislature of New Brunswick as legislation dealing with bankruptcy and insolvency within the meaning of the British North America Act, 1867, s. 91, s.-s. 21. *McLeod Assignee* v. *Vroom*, Eq. Cas., p. 131.

Boys Industrial Home for Juvenile Offenders, 56 Vic., c. 33 (Dom.)—The Act of the Parliament of Canada, 56 Vic., c. 33 establishing the Boys' Industrial Home as a prison is not *ultra vires*. *Ex parte The Attorney General; In re Goodspeed*, 36, p. 91.

Company law—Power of Dominion to legislate for the winding-up of provincial companies—As to whether the Dominion can legislate for the winding-up of provincial companies. *In re The Cushing Sulphite Fibre Co. Ltd., and the Winding-up Act and Amending Acts*, 37, p. 254.

Criminal prosecutions, Expenses in—57 Vic., c. 19, s. 1 valid—A municipality is liable for the fees and expenses of a justice of the peace or a constable payable in relation to the prosecution of indictable offences only where they have been certified to be correct by the Attorney General, or other counsel acting for the Crown, and have been ordered to be paid by the judge presiding at the Court in which the indictment is presented.—The Act of Assembly, 57 Vict., c. 19, s. 1 whereby certain expenses in criminal prosecutions are made chargeable upon the municipalities

is not *ultra vires* of the provincial legislature. *McLeod* v. *The Municipality of Kings*, 35, p. 163.

Customs Act, Penalties under—A penalty imposed by the police magistrate of the City of Saint John for harbouring smuggled goods under section 197 of the Customs Act (R. S. C., c. 32) forms part of the consolidated revenue of Canada, and is payable to the Receiver-General, and not to the chamberlain of the City of Saint John under 52 Vict., c. 27, s. 50.—The local legislature could not deal with the matter even if they assumed to do so, which they did not. *R.* v. *McCarthy*, 38, p. 41.

Dominion government employees—Taxing income—A provincial legislature has no power to impose a tax upon the official income of an employee of the Dominion government, nor to confer such a power on the municipalities. *Ex parte Timothy Burke*, 34, p. 200.

The salary of a civil servant of the Dominion government resident in the city of Saint John is liable to taxation in the city for municipal purposes.—*Ex parte Owen*, 20 N. B. R. 487; *Ackman* v. *Town of Moncton*, 24, N. B. R. 103; *Coates* v. *The Town of Moncton*, 25 N. B. R. 605 overruled. *R.* v. *The City of Saint John*; *ex parte Abbott*, 38 N. B. R., p. 421; 40 S. C. R. p. 597.

Sub-sec. 2 of sec. 92, B. N. A. Act, 1867, giving a provincial legislature exclusive powers of legislation in respect to "direct taxation within the province, etc." is not in conflict with sub-sec. 8 of sec. 91 which provides that parliament shall have exclusive legislative authority over "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada."—Girouard J. contra.—*Held*, therefore (Girouard J. dissenting), that a civil or other officer of the Government of Canada may be lawfully taxed in respect to his income as such by the municipality in which he resides. *Francis C. Abbot* v. *City of Saint John*, 40 S. C. R., p. 597.

Ferries—R. S. C. 1906, c. 108—The Act respecting Public Ferries, R. S. C. 1906, c. 108, does not apply to a ferry running between points in the same province. *R.* v. *Chaisson ex parte Savoy*, 39, p. 591.

Fire, Destruction by—The Acts 48 Vict. c. 11, and 60 Vict., c. 9 (to prevent the destruction of forests and other property by fire) are not *ultra vires* of the local legislature. (*Per* Tuck C. J. and McLeod J.) *Grant* v. *Canadian Pacific Railway*, 36, p. 528.

Fox's Act. 32 Geo. III (Imp.), c. 60—Fox's Act, 32 Geo. III (Imp.), c. 60, is in force in New Brunswick (*per* White J.). *Sonier* v. *Breau*, 41, p. 177.

Jurisdiction, criminal, of County Courts—C. C. 1892, s. 540—Quaere:—Whether the Criminal Code, 1892, s. 540' relating to the jurisdiction of County Courts in criminal matters, is not *ultra vires*. *Ex parte Wright*, 34, p. 127.

Jurisdiction, criminal, of Parish Court Commissioners—R. S. C., c. 106, s. 103 (d)—Section 103 (d), c. 106 of R. S. C. (the Canada Temperance Act) in so far as it attempts to confer upon Parish Court commissioners jurisdiction to try offences against the Act is *ultra vires* of the Parliament of Canada. *Ex parte Flanagan*, 34, p. 577. (Overruled *In re Vancini*, 34, S. C. R. 621, Ed.)

Jurisdiction, criminal, of Police and Stipendiary Magistrates—52 Vict., c. 23, (N. B.)—An act of the Provincial Parliament which creates each and every stipendiary or police magistrate a Court with all the powers and jurisdiction which any act of the parliament of Canada has conferred, or may confer, or which any act of the said Parliament purports to confer upon any stipendiary or police magistrate within the province is not a delegation of the powers conferred exclusively on the provincial parliament by the British North America Act, and is *intra vires* the provincial parliament. *Ex parte Vancini*, 36, p. 456. Affirmed, 34 S. C. R., p. 621.

Liquor License Act, C. S. 1903, c. 22, s. 62—Section 62 of the Liquor License Act, authorizing as a penalty in default of the fine imposed for a first offence imprisonment for a period of not less than three months, is not *ultra vires*. *R.* v. *Plant ex parte Morneault*, 37, p. 500.

Municipal By-Law, 53 Vic., c. 60, s. 47 (5)—Sub-section 5 of the City of Moncton Incorporation Act, 53 Vict., c. 60, s. 47, authorizing the council of the city of Moncton to make by-laws to regulate the sale of bread is not *ultra vires* of the local legislature as such regulations can apply to the city of Moncton only. *R.* v. *Kay ex parte LeBlanc*, 39, p. 278.

Municipal by-law—7 Edw. VII., c. 91, N. B.—The act 7 Edw. VII., c. 91, authorizes the town of Woodstock to regulate the sale of beer of all kinds (not however to include any intoxicating liquor) within the town.—Under the authority conferred a by-law was made, providing in one section a retail license fee of $100 and in another that no license should be granted to any person who had been convicted of an offence against the Canada Temperance Act within one month prior to the date of application.—The defendant who had no license and had not applied for one, was convicted for selling without a license.—*Held*, on an application to quash the conviction that the section of the by-law imposing the license was not *ultra vires* as imposing such an excessive tax as to be in effect prohibitive and not merely regulative.—That while the section excluding the persons indicated

therein from the privileges of obtaining a license might be beyond the limits of the authority conferred, it was no ground for quashing the conviction against the defendant, he never having applied for a license. *R.* v. *Dibblee ex parte Smith*, 38, p. 350.

Police Act, R. S. C. 1906, c. 92 (Dom.)—The Dominion Police Act (R. S. C. 1906, c. 92) is *intra vires* of the Dominion Parliament, under s. 101 of the British North America Act.—*In re Vancini*, 34 S. C. R. 621 discussed and followed. *R.* v. *LeBell ex parte Farris*, 39, p. 468.

Seamen's Act, Validity of—R. S. C., c. 74—The Seamen's Act (R. S. C., c. 74, s. 104) is not *ultra vires* the Canadian Parliament *R.* v. *Martin*, 36, p. 448.

Sovereign State, Power of—By international law, and apart from any civil enactment, a sovereign state has the right at its pleasure to exclude or deport any alien from its dominions. *Papageorgiouv* v. *Turner*, 37, p. 449.

Succession duty—Assets outside the province—Specialty debts secured by bond and mortgage of real estate situate in the city of Halifax, in the province of Nova Scotia, the mortgagors being also domiciled in the said province, and the bonds and mortgages being in possession of the testator in this province at the time of his death are liable to duty under "The Succession Duty Act," C. S. 1903, c. 17.—Such duty is not payable on debenture stock of the city of Halifax, transferable and redeemable at the office of the city treasurer of Halifax and not elsewhere, nor on money deposited at the Halifax branch of the Royal Bank of Canada for which the testator held a deposit receipt, nor for money on deposit in the said branch bank on current account for which the testator held a pass book.—The aggregate value of the estate under clause (a) of s. 5 of the Act is all the property owned by the deceased at the time of his death, and such aggregate value and not the aggregate value of his property liable to succession duty is the basis upon which the rate of taxation is to be computed and fixed.—S. 92, sub-s. 2 only empowers the province to impose "direct taxation within the province," consequently s. 5 of The Succession Duty Act is *ultra vires* insofar as it attempts to tax property situate "elsewhere" than in the province. *Receiver General of New Brunswick* v. *Rosborough* 43, p. 258.

Sunday observance, Provincial legislation re — C. S. 1903, c. 107 — The Court set aside a conviction made against a restaurant keeper under the Act respecting the Observance of the Lord's Day, C. S. 1903, c. 107, for selling meals on Sunday, on the ground that this act was *ultra vires* of the provincial legislature.—*Attorney General for Ontario* v. *Hamilton Street Railway* (1903) A. C. 524 applied. *R.* v. *March ex parte Washington*, 41, p. 419.

Sunday observance—Provincial legislation re profanation of the Lord's day—62 Vic., c. 11 (N. B.)—Section 1 of 62, Vict., c. 11, whereby the sale of real or personal property or the exercise of any worldly business or work on Sunday is prohibited is within the authority of the legislature of New Brunswick.—Therefore, where G. was convicted under the above section before the police magistrate of S. of selling cigars on Sunday, a rule *nisi* for a certiorari to bring up the conviction in order to quash the same was discharged.—The fact that the Parliament of Canada can make the doing of such an act on Sunday a crime, and prohibit it under the general criminal law, does not necessarily show that the local legislature has no jurisdiction to deal with it under its powers to make regulations of a police or municipal nature.—A subject matter of legislation, though falling within some of the classes entrusted to the federal parliament by section 91 of the British North America Act, may likewise, when looked at from another point of view, come within some of the classes, over which, by section 92 of the same act, the provincial legislatures have exclusive jurisdiction. *Ex parte Green*, 35, p. 137.

Telegraphs—N. B. A. Act, s. 92 (10a)—See *Western Union Telegraph Co.* v. *N. B. Ry. Co. et al*, Eq. Cas., p. 338; 17 S. C. R., p. 152.

CONTEMPT OF COURT.

Commitment — Default in paying money under decree—Where defendant made default in paying to the plaintiff under the decree of the Court a sum of money received by the defendant as a *donatio mortis causa* in favor of the plaintiff, an order was granted under Act 53 Vict., c. 4, s. 114, as amended by Act 58 Vict., c. 18, c. 2, for an execution against his body.—An order made under the above Act for an execution against the body of a party making default to a decree of the Court for payment of a sum of money will not be granted where the Court is satisfied that the party in default has no means, and has not made a fraudulent disposition of his property, and that his arrest is sought for a vindictive purpose or to bring pressure upon his friends to come to his assistance. *Thorne* v. *Perry*, No. 2, 2 Eq., p. 276.

Practice—Endorsing order to commit—An order to commit for breach of an injunction will not be set aside on the ground that the copy of the decree served on which the notice of the motion for the order was based was not indorsed as is required by rule 3 of Hilary Term 1875, and as the original decree filed in the Registrar's office is indorsed. *Turnbull R. E. Co.* v. *Segee et al*, 42, p. 625.

Practice—Laches—Service of a copy of a decree over a month after breach is not

such delay as will prevent it from being sufficient upon which to base a motion to commit where the breach complained of is a continuing trespass in breach of the injunction. *Id.*

An applicant is not barred from seeking to enforce an injunction by motion to commit by reason of his having allowed two months to elapse after knowledge of the breach if the party moved against has in no way suffered by the delay. *Id.*

Practice—Motion to commit—In proceeding for contempt for breach of an injunction order restraining the doing of an act, the proper course is to move that the party in contempt stand committed, notice of the motion having been first personally served upon him, and not to move that he shall show cause why he shall not stand committed, or why an attachment shall not issue against him. *Poirier* v. *Blanchard*, No. 2, 1 Eq., p. 605.

Practice—Motion to commit—Breach of injunction—Costs—Where, in a suit for a declaration that the plaintiff and defendant were partners, the defendant, in breach of an interim injunction order, collected debts due to the alleged firm, but which, subsequently to the service of a notice of motion for his commitment, he paid to the receiver in the suit, he was ordered to pay the costs of the motion. *Burden* v. *Howard*, 2 Eq., p. 531.

Practice—Motion to commit—No provision having been made by The Judicature Act, 1909, or the rules thereunder, in regard to the practice on motions to commit for contempt, the practice under C. S. 1903, c. 112, s. 106, is still in force (O. LXXII, r. 2) and copies of affidavits on which such a motion is based must be served on the opposite party six days at least before the day of hearing. *Turnbull Real Estate Co.* v. *Segee et al*, 42, p. 551.

Practice—Notice of motion to commit—The notice of motion to commit for breach of an injunction prohibiting the defendant from trespassing on the plaintiff's property is a "Commencement of Proceedings" and not a step in the cause, and should be indorsed under O. IV., rr. 1-4, with the name and address of the solicitor, but failure to do so is an irregularity which does not necessarily render the proceedings void, and under O. LXX, r. 1, may be condoned in the discretion of the Court. *Turnbull Real Estate Co.* v. *Segee et al*, 42, p. 625.

Practice—Right of Court to refer to files—Quaere:—If the Court has the right to refer to affidavits on file in the registrar's office in support of a judgment on a motion to commit for contempt when such affidavits were not referred to by counsel on the hearing and of the intention to use which no notice had been given. *Id.*

CONTRACT.

1. Avoidance and Rescission.
2. Breach of Contract.
3. Consideration.
4. Construction of Contract.
5. Enforcement of Contract.
6. Evidence to Vary.
7. Formation of Contract.
8. Illegal Contract.
9. Novation.
10. Reformation of Contract.
11. Statute of Frauds.
12. Work, Labour and Services.

Brokerage Contracts. *See* BROKER.

Company Contracts. *See* COMPANY.

Insurance Contracts. *See* INSURANCE.

Mining Contracts. *See* MINES AND MINERALS.

Leases. *See* LANDLORD AND TENANT.

Oil and Gas Contracts. *See* MINES AND MINERALS.

Sale of Goods. *See* SALE OF GOODS.

Sale of Lands. *See* VENDOR AND PURCHASER.

Timber Contracts. *See* TIMBER.

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1. Avoidance and Rescission.

Dismissal of incompetent manager—The manager of a veneer company, having heard of the plaintiff as a man who could be usefully employed in the business wrote him a letter in which he said "What we want is a man who is a good veneer maker and who knows how to make all kinds of built-up woods that are saleable, such as panels. . . we want you to take full charge of the mill, that is the manufacturing."—In reply plaintiff said "Would say I understand fully the making of the articles you speak of, as well as numerous others with proper machines and proper men to run them," and in a subsequent letter he said "I feel from all the experience I have had I have mastered the entire principles of it (the veneer business) knowing machines required for various work and what veneer has got to be when completed."—Having been hired by the manager he was dismissed six weeks after and brought an action for wrongful dismissal.—*Held*, that he was not hired as a business manager, but as an expert in the veneer business and as the evidence established that he was not competent, he was properly discharged and could not recover. *Alcroft et al* v. *Adams*, 37 N. B. R., p. 332; 38 S. C. R., p. 365.

Horse trade—One covered by chattel mortgage—The defendant, a farmer, executed a chattel mortgage to one M. whereby he assigned to M. all the goods, chattels and property mentioned in a schedule thereto annexed, and also any and all the property that might thereafter be brought to keep up the same, in lieu thereof and in addition thereto either by exchange or purchase.—The instrument also contained a proviso that the defendant should remain in possession of the mortgaged property until default, with power to use the same in the ordinary way while so in possession, but with full power, right and authority to M. to enter and take possession of the property in case of default of payment, or on the death of the defendant, or in the event of the seizure of the property at the suit of any creditor, or in the event of the defendant disposing of or attempting to dispose of or make away with the said property or any part thereof without the written consent of M.—Included in the property mortgaged was a stallion "Prince Albert" which a few months after the execution of the mortgage and before any default of the part of the defendant, but without the written consent of M. he exchanged with the plaintiff for a horse belonging to him.—After the exchange the plaintiff, having discovered that the stallion was covered by the mortgage, attempted to avoid the transaction, sending the stallion back to the defendant and demanding the return of his own horse, which the defendant refused to deliver up—The plaintiff thereupon replevied his horse, and, a claim of property having been put in by the defendant, the same was decided in his favor by the County Court judge, who relied upon a verbal license that had been given to the defendant before the execution of the mortgage by the agent of M. whereby the defendant was authorized in general terms to use the mortgaged property in the way he had.—Upon an appeal being taken from that decision, it was *held* (*per* Landry, Barker and VanWart JJ., Tuck C. J. and Hanington J. dissenting), that, as the mortgage must be taken to contain the whole contract entered into between the defendant and M., the judge of the Court below was in error in giving any effect to a mere verbal license which preceded the mortgage and which was not in harmony with many of its provisions, and further, *held* (*per* Landry Barker, VanWart and McLeod JJ., Tuck C. J. and Hanington J. dissenting), that it was clearly a condition of the mortgage and the intention of the parties thereto that the defendant should be allowed to sell or exchange the mortgaged property, provided such sale or exchange was in the ordinary course of the defendant's business, and as whether this exchange had been in the ordinary course of the defendant's business or not was a question of fact, which had not been passed upon by the Court below, there should be a new trial in order to have that point determined. *McPherson* v. *Moody*, 35, p. 51.

Purchase of land by syndicate—Failure to pay proportion—In November, 1902, the plaintiff and the defendant F. with a number of others formed a syndicate for the purpose of acquiring options and purchasing land with a view to sale.—The transaction was a large one, involving the purchase of some 200,000 acres of land in the Northwest Territories, and before the land was finally disposed of the sydnicate was compelled to pay to the owners the sum of $60,000.—The agreement between the plaintiff and F. was verbal, and at the time it was made the plaintiff paid the sum of $200.—On the 30th of March, 1903, the defendant F. wrote to the plaintiff to hold himself in readiness to raise $2,000 "to hold your corner of the deal," and that if they had to call upon him it would be at short notice.—The plaintiff took no notice of this letter and made no preparation for securing the money.—On the 14th of April, 1903, F. telegraphed the plaintiff as follows: "Three thousand dollars absolutely necessary to hold your interest in the land deal.—Will I draw?—Wire."—To this the plaintiff sent no reply.—In 1903, the plaintiff learned that the speculation had been successful and that large profits had been made, but it was not until 1907 that this suit was brought.—*Held*, that in view of the special nature of the transaction, the plaintiff's refusal to contribute his share of the money required to complete the purchase, and his refusal to answer or take any notice of both letter and telegram, justified the defendants in acting on the assumption and belief that he had entirely abandoned the contract and his interest in the purchase, and that he did not intend being any longer bound by it. *Pugsley* v. *Fowler et al*, 4 Eq., p. 122.

Rescission—Partial failure of consideration—V., being desirous of purchasing a lot of land in the possession of F. was negotiating with him about it, but no agreement of purchase had been arrived at.—W., a dealer in cattle, went to V. and offered to purchase from him two head of cattle.—He refused to sell, stating that he wished to exchange them with F. for the land.—W. then went to F. and agreed to extinguish a debt of $79 that he had against him, if he would convey the land to V.—W. went again to V. and offered him the land in exchange for the two head of cattle and his note for $20.—This offer V. accepted.—The parties then met at an office of a justice and F. gave V. a warranty deed of the land and V. gave W. his note for $20.—W. selected the cattle, asked V. to turn them out, and said he would come again and take them away.—V. recorded the deed, but discovering that F. had no title on the records told W. he could not have the cattle.—W. afterwards went and took the cattle from V.'s pasture without his consent.—V. alleged that W. told him that F. had a good title and agreed to give him a good title, and if he did not do so the bargain was to be off.—W. denied that he told V. that F. had a good

title or that he agreed to give V. a good title. —In an action of trover in the County Court to recover the cattle and note, the judge told the jury that if they believed V's version of the transaction, the title of the cattle did not pass, and there was evidence upon which they might find for the plaintiff.—The jury found for the plaintiff.—*Held*, on appeal (*per* Landry, Barker McLeod and Gregory JJ.), that V., having accepted and registered the deed under the contract the consideration had not entirely failed and V. could not rescind the contract and sue in trover for the cattle and note without reconveying or offering to reconvey the land, and that the appeal should be allowed and a nonsuit entered.—*Held* (*per* Tuck C. J. and Hanington J.), that under the finding of the jury the consideration for the contract entirely failed, and the title to the cattle did not pass to W. and V. was entitled to recover in trover. *Vanbuskirk* v. *VanWart*, 36, p. 422.

School trustees, Cancellation by — School trustees appointed under the provisions of C. S., c. 65, are a corporate body and must act together and as a board; therefore a notice of dismissal signed by two out of three of them of a teacher engaged under a written contract, which notice was not the result of deliberation in their corporate capacity, was held insufficient. *Robertson* v. *School Trustees of Durham*, 34, p. 103.

See also 5. ENFORCEMENT OF CONTRACT.

2. Breach.

Agreement fixing freight and passenger tariffs—An agreement between steamship companies fixed rates for freight and passengers for one season.—The plaintiffs proved one breach of such a contract by the defendants and the Court directed the jury that in the absence of evidence to the contrary they might infer that other breaches had been committed.—*Held*, the direction was right inasmuch as the defendants knew and could have given evidence as to whether or not other breaches had been committed. *Saint John River S. S. Co. Ltd.* v. *The Star Line S. S. Co.*, 40, p. 405.

Contract made by trustee—Liability of cestui for breach—On and prior to September, 1901, James Burgess, the father of the defendants had been carrying on a lumber and general mercantile and milling business under the name of James Burgess & Sons.—The defendants, although engaged about the business with their father, were not partners and were only interested as employees.—James Burgess, by an indenture made in September, 1901, made between himself and his wife of the first part, his son Matthew Burgess of the second part, and his other seven children of the third part, after reciting that he, having accounted and settled with the parties of the second and third parts for the respective amounts due by him to them, which amounts were set out in the indenture, conveyed all his property, both real and personal, to the defendant Matthew Burgess in trust to pay him, the said James Burgess, during his life, and after his death to pay his wife Johanna Burgess during her life, the annual sum of $1,000; to retain for himself as compensation for the management of the business the sum of $1,200 annually, and to divide any profits that remained rateably *pari passu* among the parties of the second and third parts, according to the amounts stated in the indenture, with power during the lifetime of the donor to carry on the business theretofore carried on by him, and in the event of the death or resignation of the said trustee during the life of the donor he reserved the right to appoint a new trustee, and if, at the time either of such events happened, the donor was dead, power to appoint a new trustee was vested in the *cestuis que* trust.—James Burgess died in October, 1904, and in December, 1905, the *cestuis que* trust exercised the power vested in them by the indenture of September, 1901, and appointed Matthew Burgess their true and lawful attorney for the purpose of enabling him to continue the business he had been carrying on under the indenture of September, 1901, in the name of James Burgess & Sons, and ratified and confirmed all the dealings and transactions had by the said Matthew Burgess under the said trust indenture.—In October, 1906, Matthew Burgess resigned the trust, and the *cestuis que* trust after in part reciting the indentures of September, 1901, and December, 1905, and providing that they should be part of the indenture then being made, appointed the defendant James Burgess their true and lawful attorney for them and on their behalf to carry on the business of James Burgess & Sons.—The contract for beach of which this action was brought was made in April, 1906, between the plaintiffs and the defendant Matthew Burgess and was signed "James Burgess & Sons," "Robert Jones & Co."—The plaintiffs alleged and on the trial the jury found breaches of contract by failure to deliver the boxes contracted for during the time that each of the defendants was carrying on the business and assessed the damages at $669.89.—A verdict was entered for the plaintiff for that amount against the defendant Matthew Burgess as trustee doing business under the name and style of James Burgess & Sons, and for the defendant James Burgess against the plaintiffs.—*Held* (*per* McLeod C. J. and Grimmer J.), that the defendant Matthew Burgess in making the contract was acting as the agent of all the parties to the indenture of December, 1905, and those parties were all liable for the damages resulting from the breach; that the verdict against the defendant Matthew Burgess and the verdict in favor of the defendant James Burgess, should be set aside and a verdict entered against both of the defendants.—*Held* (*per*

Barry J.), that the contract was the personal contract of Matthew Burgess as trustee of James Burgess & Sons, and no privity between the plaintiffs and James Burgess, and no relation representative, contractual or fiduciary between the defendants was shown to exist, and the defendant James Burgess was improperly made a party to the action. —That the defendant Matthew Burgess was entitled to a new trial on the ground that he was prevented from attempting to prove his defence on cross examination of the plaintiff's witnesses; and on the ground of the improper reception of evidence of correspondence and conversations between the defendant James Burgess and the plaintiffs, after Matthew Burgess had ceased to be a trustee. —*Atkinson* v. *Smith* (1859) 9 N. B. R. 309 discussed and not followed. *Jones et al* v. *Burgess et al*, 43, N. B. R., 126.

Maintenance — Breach — Quantum Meruit—Some time previous to the year 1891, a verbal agreement was entered into between the plaintiff and the defendant, under which the plaintiff was to be employed in the care and management of the defendant's business, and in return the defendant was to afford the plaintiff support and maintenance during the defendant's lifetime, and at his death was to give to him one-half of a certain island belonging to the defendant. —The plaintiff entered upon his duties and continued to perform his side of the agreement until the month of August, 1897, when by an injunction order, issuing out of the Equity Court, made in a suit in which both the plaintiff and the defendant were parties, he was restrained from any longer interfering with the care or management of the defendant's business and was compelled to quit the island.—He accordingly handed over to one B. who was acting under a power of attorney from the defendant, all the property of the defendant in his possession and, treating the conduct of the defendant as equivalent to a recission of the agreement, in the same month of August brought an action against the defendant for the value of his services during the six years previous to the issuing of the injunction order.— The jury in answer to a question put by the learned judge who tried the case, replied that the defendant had annulled and put an end to the agreement on the 3rd of August, 1897, the day the injunction order was issued, and a verdict was found for the plaintiff.— In December, 1897, some months after the commencement of the action the defendant made a deed of the island in question to B. upon certain trusts, the nature of which did not appear in evidence.—Upon a motion for a nonsuit, pursuant to leave reserved at the trial, *held* (*per* Landry, Hanington, Barker and VanWart JJ.), that although neither the obtaining of the injunction order nor the making of the deed to B. was sufficient to sustain the finding of the jury as to the annulment of the agreement, and the plaintiff ought, therefore, in strictness to be non-suited, yet as there was a point of view of the facts which had not been presented to the jury and under which the plaintiff might be entitled to recover on a *quantum meruit*, the case should be further investigated, and there should therefore be a new trial.—*Held* (*per* Tuck C. J. and McLeod J.), that as there was no agreement proved that could be enforced during the lifetime of the defendant, and that as the obtaining of the injunction order was not sufficient to support the finding of the jury that the defendant had cancelled and put an end to the agreement, the plaintiff should be non-suited. *Frye* v. *Frye*, 34, p. 569.

Onus of proof—Maintenance bond—In a suit to enforce a lien upon land conveyed to the defendant by the plaintiffs, husband and wife, in consideration of an agreement by defendant to support them, the onus of proving a breach of the agreement is upon the plaintiffs. *Ouilette* v. *LeBel*, 3 Eq., p. 205.

Privity of contract—Defendant contracted with one of the plaintiffs, Adams & Co., to cut and deliver to it in the Restigouche river in the spring of 1915 in time to be driven with the corporation drive, a quantity of logs.—The contract, after providing how the lots should be marked and surveyed, contained the following clause: "It is also understood and agreed between the parties hereto that all logs cut or procured under this contract are cut and procured for the Dalhousie Lumber Co. Ltd. and all such logs and lumber shall be the property of the Dalhousie Lumber Co. Ltd. from the stump." —*Held*, on appeal, affirming the judgment of Crocket J., that there was no privity of contract between the defendant Walker and the plaintiff, the Dalhousie Lumber Co., and Walker having had no written notice of any assignment of the contract to the Dalhousie Lumber Co. Ltd., that company was not entitled to recover from Walker damages resulting from his failure to put the logs in the river as he had agreed with Adams & Co. *Dalhousie Lumber Co. Ltd.* v. *Walker*, 44, p. 455

Specification, Contract to manufacture up to—The plaintiffs agreed to build for the defendants in a specified time two hundred racks according to specifications furnished, and subject to the approval of the inspector of the defendants.—At the time the plaintiffs made the offer to build the racks they asked that in the event of their offer being accepted they be furnished with a sample rack, which the defendants accordingly did.—After considerable delay on the part of the plaintiffs, and urging on the part of the defendants, the plaintiffs notified the defendants that they had forty-eight racks completed, and all the materials ready to put the remaining one hundred and fifty-two together.—Defendants' inspector condemned all the racks manufactured and in process of manufacture as not in accordance with the specifications.—In an action for damages for breach of the contract, the jury found, in answer to questions

submitted by the judge, that the racks were not in accordance with the contract and specifications, but were in accordance with the sample rack furnished; they also found that the defendants employed a competent inspector and he acted in good faith, and they assessed the damages at $831.70, for which amount a verdict was entered for the plaintiffs.—*Held*, on a motion to set aside the verdict and enter a verdict for the defendants, that in view of the findings that the inspector acted in good faith, and that the racks were not manufactured according to the contract and specifications, there must be a new trial.—*Lawton Co. Ltd.* v. *The Maritime Combination Rack Co. Ltd.*, 36, p. 604.

3. Consideration.

Family agreement—Intentions of intestate—J. H. died intestate, possessed of property worth about $40,000, and survived by his widow, two sons and three daughters. —Part of his property consisted of lumber lands worth about $21,000, which it had been his intention, known to all the members of the family, to give to the sons, who were associated with him in his business as a lumberman.—A few days before his death, in discussing with his solicitor the terms of a will he intended to make, he stated he wanted his lumber lands and mill property to go to the sons, who should continue his business and pay his debts, and that he did not intend making any provision for the daughters.—At a meeting of the family held after his death, they were informed of these wishes; that performance of an outstanding contract by the deceased for the delivery of a quantity of lumber was being pressed, and that his liabilities were $15,000 or $20,000 though in fact they were $22,000. —It was agreed for the purpose of giving effect to the deceased's intentions that the sons should assume the debts; that the daughters should convey all their interest in the estate to the sons; that the sons should pay to the plaintiff $500, to another daughter $600, and should join in a conveyance to the third of land given to her by her father, but unconveyed by him.—At that time the exact condition of the estate was unknown. —Before the deed to the sons was executed, the solicitor of the deceased present at the meeting explained to the daughters their legal rights and the effect of the deed.—On the true condition of the estate being subsequently ascertained, the plaintiff sought to have the conveyance set aside.—*Held*, that the agreement as a family arrangement, entered into for the purpose of giving effect to the intentions of the deceased, without fraud or misrepresentation, should be upheld. *Sears* v. *Hicks*, 3 Eq., p. 281.

Improvident contract by aged woman —William Davidson died in 1890, leaving real estate consisting of his homestead and lot "A", all of which he left absolutely to his wife Helen Davidson, and appointed her and the defendant William Ferguson executors.—In 1898, James Davidson, son of William and Helen Davidson, being indebted to the defendants William Ferguson and Philip Arsenault, became insolvent and assigned to Arsenault.—Nearly all the creditors, including Ferguson and Arsenault, agreed to compromise at ten cents on the dollar, but James Davidson made a secret agreement with William Ferguson and Philip Arsenault that they should be paid in full. —By arrangement between James Davidson, Ferguson and Arsenault, William Ferguson for James Davidson purchased the assets from Arsenault as assignee for $1,000, and for the securing Ferguson the balance advanced and balance of his old debt against James Davidson, Helen Davidson in 1899, being then about seventy six years of age, without any independent advice, executed to William Ferguson a mortgage of lot "A" for $822.90.—Ferguson gave James Davidson a power of attorney to deal with these assets, who, in the name of William Ferguson sold and converted them into money to an amount greater than the mortgage.—In December, 1899, James Davidson arranged that his mother should sell to Philip Arsenault the said lot "A" for $600, $200 of it to go on Arsenault's old account against James Davidson, and $400 by notes made by Philip Arsenault in favour of William Ferguson, and which the latter took on his account against James Davidson.—Both the mortgage and deed were written by James Davidson, and Helen Davidson had no independent advice and had become of feeble intellect.—In March, 1900, Helen Davidson made a will leaving all her property to her son James and his family.—William Ferguson drew this will, was named in it an executor, and had full knowledge of its contents.—In December, 1902, James Davidson being indebted to William Ferguson to the amount of $1,250.97, Helen Davidson, at the request of William Ferguson and James Davidson, gave a mortgage of the homestead to Ferguson for $1,250.97 to secure that amount, which was shown by the evidence to be the total sum due from James Davidson to Ferguson at that time.—Helen Davidson lived practically all the time with James Davidson, and he had great influence over her, which fact was well known to both Ferguson and Arsenault.—*Held*, that the first mortgage to Ferguson, made in March, 1899, was discharged and must be set aside, as the amount which it had been given to secure had been paid in full.—*Held*, that the conveyance to Arsenault, made in December, 1899, must be set aside, as obtained through undue influence and pressure on the part of James Davidson, and solely for his benefit; and on the ground of the mental weakness of the grantor, and that she had no independent advice; that Arsenault, as he knew the relation which James Davidson occupied with regard to the grantor, and all the circumstances in connection with the transaction, stood in no better position than James Davidson

would stand, and was bound by, and responsible for, any acts committed by Davidson, or omitted to be done by him.—*Held*, that the second mortgage to Ferguson, made in December, 1902, must be set aside, as obtained through undue influence and pressure on the part of James Davidson and William Ferguson, and solely for their own benefit; that Ferguson had the same knowledge of all the facts as Arsenault, and was bound in the same way by the acts and omissions of James Davidson; that the grantor had no independent advice, and was so deranged mentally as to be incapable of transacting business. *McGaffigan et al* v. *Ferguson et al*, 4 Eq., p. 12.

Improvident contract — Fraud — Oppression—In an action brought to recover the amounts due on three several promissory notes the defendants pleaded an equitable plea.—The Court being of the opinion that the facts set up thereby disclosed such an inadequacy of consideration, accompanied by other circumstances, as would justify a jury in finding that there was fraud in the transaction and that it was unconscionable, gave judgment for the defendants on demurrer.—*Held* (*per* Barker J.), while parties competent to contract may render themselves liable to pay any rate of interest which they agree to pay, Courts of Equity have held that the repeal of the Usury Laws has not interfered with their jurisdiction to relieve those who have been led into making improvident bargains, unconscionable in their nature and entered into under circumstances of fraud or oppression. *MacPherson* v. *McLean et al*, 34, p. 361.

Judgment by confession etc.—S., in consideration of B. giving him a confession of judgment and other security for a debt due him by B., gave B. a verbal promise to pay two promissory notes of B. in favor of A., but did not pay them.—B. assigned his right of action against S. to the plaintiff, the executrix of A.—*Held*, that the promise by S. to pay the notes was an original promise founded on a new consideration and was not a promise to pay the debt of another within the Statute of Frauds, and need not be in writing. *Allen Executrix* v. *Sheyn*, 35, p. 635.

Nudum Pactum—Upon information supplied by the plaintiff, the defendant purchased certain property held by a bank as security for advances to the plaintiff's father, which re-sale yielded a surplus after meeting a liability the defendant had assumed for the benefit of plaintiff's father.—The defendant promised the plaintiff that in the event of there being a surplus it should belong to him.—*Held*, that the plaintiff and defendant were not partners, entitling the plaintiff to share in the profits from the re-sale of the property, and that the defendant's promise, which was not a declaration of trust was *nudum pactum*. *Leighton* v. *Hale*, 3 Eq., p. 68; 37 N. B. R., p. 545.

Open offer—Acceptance—The defendants, by public advertisements, offered a piano as a prize to the person who would guess most nearly the weight of a large block of soap, exposed for that purpose at a public exhibition.—Three persons were chosen to act as judges and determine the winner.—It was also a condition that the participants in the contest should buy and give defendants' soap a fair trial.—*Held*, on demurrer, that there was a consideration for the contract.—Where a person by public advertisement agrees, on the performance of any defined act or condition, to pay a specific sum of money, he becomes bound on notice by any one who in fact does the act or performs the condition, provided the act or condition is not illegal. *Dunham* v. *St. Croix Soap Mfg. Co.*, 34, p. 243.

Partial failure of consideration—V., desirous of purchasing a lot of land in possession of F., was negotiating with him about it, but no agreement of purchase had been arrived at.—W., a dealer in cattle, went to V. and offered to purchase from him two head of cattle.—He refused to sell, stating that he wished to exchange them with F. for the land.—W. then went to F. and agreed to extinguish a debt of $79. that he had against him, if he would convey the land to V.—W. went again to V. and offered him the land in exchange for the two head of cattle and his note for $20.—This offer V. accepted.—F. gave V. a warranty deed of the land and V. gave W. his note for $20. —W. selected the cattle, asked V. to turn them out and said he would come again and take them away.—V. recorded the deed, but discovering that F. had no title on the records, told W. he could not have the cattle. —W. afterwards went and took the cattle from V's pasture without his consent.—V. alleged that W. told him that F. had a good title and agreed to give him a good title and if he did not do so the bargain was to be off.—W. denied that he told V. that F. had a good title or that he agreed to give V. a good title.—In an action of trover in the County Court to recover the cattle and note, the judge told the jury that if they believed V's version of the transaction, the title in the cattle did not pass, and there was evidence upon which they might find for the plaintiff.—The jury found for the plaintiff.—*Held*, on appeal (*per* Landry, Barker, McLeod and Gregory JJ.), that V., having accepted and registered the deed under the contract, the consideration had not entirely failed and V. could not rescind the contract and sue in trover for the cattle and note without reconveying or offering to reconvey the land, and that the appeal should be allowed and a nonsuit entered. —*Held* (*per* Tuck C. J. and Hanington J.), that under the finding of the jury the consideration for the contract entirely failed, and the title to the cattle did not pass to W. and V. was entitled to recover in trover. *Vanbuskirk* v. *VanWart*, 36, p. 422.

Promise to pay accommodation note—Nudum pactum—*Semble*, that where the

payee (deceased) on endorsing a promissory note for the accommodation of the maker promises without consideration to pay it, and the holder compels payment by the payee's estate, an action for the recovery of the amount lies by the estate against the maker, the contract to pay being without consideration. *Johnston* v. *Hazen*, 3 Eq., p. 341.

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4. Construction of Contract.

Civic concession to industry—By agreement between A. and the town of N., A. agreed to organize a company, erect a factory in the town of N., maintain and operate the same for twenty years, and employ an average of seventy-five hands during the same period, and the town agreed to make certain concessions to the company and to lend it $20,000 repayable without interest by annual instalments of $1,000, to be secured by a mortgage on the company's property with the provision that the company might at any time repay the balance of the loan "at the then cash value figured at the rate of four per centum per annum."—The company was organized, the factory built as agreed, and a mortgage given in pursuance of and referring to the above agreement, and the factory was insured for $20,000, payable to the town "as its interest may appear."—After three years the company ceased to operate and went into liquidation, and shortly after that the factory was burned.—Two instalments had been paid and one was overdue.—*Held*, the town of N. was entitled out of the insurance money to retain the amount of the overdue instalment with interest, and the liquidator was entitled to have the mortgage discharged on the further payment to the town out of the insurance money of an amount equal to the cash value of the future instalments at the date of payment on the basis of 4 per cent. compounded annually. *In re The Anderson Furniture Co. Ltd.*, 39, p. 139.

Evidence re technical meaning—A contract in writing made for clearing the right of way of a railway contained a clause under which the plaintiff agreed "to do and complete all the right of way, clearing between stations 490 and 714 in conformity with the specifications" for thirty dollars per acre. —*Held*, that extrinsic evidence was properly admitted to show that amongst railway contractors and in railway construction work the words "right of way clearing" had acquired a special and technical meaning, and applied only to land requiring to be cleared and not to the full area of the right of way. *Laine et al* v. *Kennedy et al*, 43, p. 173.

"Hole", Rate per—Rivetting and bolting—Under a contract to "drill or punch all holes required in the iron-work on the extension of the Intercolonial Railway Station, Saint John, N. B., according to plans and specifications, at the rate of five cents per hole, which will include rivetting and bolting up," the persons doing the work are entitled to be paid for each separate hole in each separate plate required for the work, and are not restricted to the holes at the places designated upon the plans and specifications, that is, where the plates are rivetted or bolted. *Wilson et al* v. *Clark et al*, 38, p. 69.

Implied covenant—Mutual knowledge—Plaintiff contracted with the defendants for three hundred and thirty hours dredging in the harbour of Saint John with a specific dredge and appliances, and for so much longer as the city might require on giving notice at the expiration of that period, to be paid for at the rate of $400 per each eleven hours, subject to deductions and allowances agreed upon for time lost (1) when the dredge was unable to work by reason of injury to the plant or machinery, and (2) where the work could not go on by reason of stormy weather.—The water was too deep at high tides for the dredge to work, and there was, therefore, delay caused in this way.—Both parties were aware at the time the contract was made that the high tides would interfere with the work, but there was no provision for any deduction or allowance on that account.—*Held*, that a verdict for the plaintiff, ordered on a construction of the contract that there was an implied covenant that the defendant should pay for the time lost by reason of the high tides, was erroneous, and should be set aside and a new trial granted. *Connolly* v. *The City of Saint John*, 36 N. B. R., p. 411; 35 S. C. R., p. 186.

Inspection—Status of official—The acts of a person assuming to exercise the functions of an office to which he has no legal title, may be, as regards all persons except the holder of the legal title to the office, legal and binding; a new trial was ordered in an action to recover the purchase money paid for a carload of potatoes sold under a contract which required them to be inspected by an officer under "The Destructive Insect and Pest Act" (9 and 10 Edw. VII, c. 31, Dom.) where the trial judge withdrew the case from the jury and ordered judgment for the plaintiff, on the ground that the person who made the inspection while acting *de facto* as an officer under the act was not in fact a properly appointed officer under the act and therefore the buyer had a right to rescind the contract and recover back the purchase money. *Fawcett* v. *Hatfield et al*, 44, p. 339.

Intention of parties—Where the intention of the parties is known, the Courts always give effect to that intention if the language of the contract will at all permit of it. *McKean* v. *Dalhousie Lumber Co. Ltd.*, 40, p. 218.

Interest—Delay in completing contract—A contract between C., the defendant, a contractor with the department of railways

and canals of the Dominion Government, and M., the plaintiff, a sub-contractor, provided that for $145,000 to be paid to him, he was to complete certain work for the defendant, and that the payments should be made (less ten per cent.) monthly as the work progressed according to the estimate of the government engineer in charge.—The work on the principal contract was to be completed on the 30th of September, 1899.—It was not completed for more than one year after that date, but the delay was not the fault of the plaintiff.—There was no stipulation in the contract in reference to the payment of interest or any sums due but not paid.—M's claim was disputed.—On an action being brought, it was established that he was entitled substantially to what he claimed.—*Held* (*per* Hanington, Landry, Barker and McLeod JJ., Tuck C. J. and Gregory J. dissenting), that the plaintiff was not entitled to interest, his claim not being for a sum certain payable by virtue of a written instrument at a time certain within the meaning of section 175 of 60 Vict., c. 24.—*Held* (*per* Tuck C. J., Hanington and Gregory JJ.), that if the plaintiff had been entitled to interest the rate would not be restricted to five per cent. under the Statutes of Canada, 63-64 Vict., c. 29, the contract having been entered into before the passing of the act. *Mayes* v. *Connolly*, 35, p. 710.

Option, Exercising—Reasonable time—The plaintiffs and defendant on May 30th, 1902, entered into a written contract by which the defendant was to ship 20,000 box shooks from St. John, N. B. to Liverpool, England, as quickly as possible after receipt of specifications and "buyers to have the option to extend the contract for 12 monthly shipments of 20,000 to 30,000 boxes after receipt of this sample shipment."—The 20,000 shooks were shipped in two cargoes arriving at Liverpool on September 9th and October 3 and 4 respectively.—On November 8th the plaintiffs wrote asking for the twelve monthly shipments.—The defendant on November 12th replied declining to fill the order on the ground that there was an unreasonable delay on the part of the plaintiffs in exercising their option.—*Held*, reversing the judgment of Landry J., that this was an absolute contract to deliver the monthly shipments if requested to do so, and in the absence of notice or some other action by the defendant the plaintiffs were not bound to exercise the option within a reasonable time. *Jones et al* v. *Cushing*, 39, p. 244.

Patents and improvements, Assignment of—Defendant was the inventor and owner of a patented snow plough, and by an agreement with K., sold to him a one-half interest in the invention and all improvements that subsequently might be made.—The invention proving unsatisfactory, defendant constructed a new plough which was an improvement in many important respects upon the original invention, and sufficiently dissimilar to it as not to be an infringement, and had it patented as a new invention.—In a suit by K's administrators to secure to them a one-half interest in the new patent, the defendant contended that the plough was a new invention and not an improvement of the old invention.—*Held*, that it did not amount to more than an improvement within the meaning of the agreement. *Jones et al Administrators Kennedy*, v. *Russell*, 1 Eq., p. 232.

Sale of stock—By an agreement entered into between the plaintiff and the defendant, the defendant agreed to sell the plaintiff the profits of twenty shares of dredging stock for $2,000.—This agreement further provided that on the winding up or the selling out of the company, the plaintiff was to share in its profits or losses on a basis of twenty shares.—After carrying on the business for a season, the company sold its plant.—At the time of the sale the plaintiff had paid $1,500 on account of the purchase price.—After the sale was concluded, the defendant paid the plaintiff $1,500, which he claimed was all the latter was entitled to, as he had failed to pay the full amount of the purchase price although frequently asked to do so.—On an action for an accounting, *held* that the plaintiff was entitled to an account of the profits of twenty shares of the stock of the company, and also for an account of the money received by the defendant for the twenty shares on the sale of the plant. *Stocker* v. *Smith*, 43, p. 37. **For failure to pay up when called on**—see *Pugsley* v. *Fowler et al*, 4 Eq., p. 122.

Shipment by express — Attendant's contract—Separate boxes of foxes were shipped under a contract containing a clause providing that in case of car load shipments, if the owner or attendant travel accompanying the animals, free transportation will be furnished the attendant, and the animals during transportation in charge of the attendant, will be at the owner's risk.—On the back of the contract was an attendant's contract, signed by the shipper, providing that if free transportation was furnished by the company it would not be liable for any injury or loss occurring to the owner or attendant.—One of the owners travelled on the same train as the foxes, but not in the same car, the foxes being in the express car with the other express parcels.—No free transportation was furnished.—*Held*, that the attendant's contract only applied in case of car load shipments, and the learned trial judge was right in directing the jury that it did not apply to the shipment in question, and the company was liable if the foxes died during transportation through its negligence. *Trenholm* v. *The Dominion Express Company*, 43, p. 98.

Telephone company—Sale of company—By agreement, which was to be in force for ten years, The Cumberland Telephone Co. and the Central Telephone Co. were to have the use of each other's lines and of any connections either then had or might thereafter acquire over the lines of

any other company.—Shortly after the making of the agreement, the Central Co. sold its property to the New Brunswick Telephone Co.—By its charter the Central Co. had power to amalgamate with any other company, and the act of incorporation of the New Brunswick Co. empowers it to acquire other telephone lines.—The agreement of sale provided that the Cumberland Co. should have, by virtue of its agreement with the Central Co., the use of so much of the New Brunswick Co.'s lines as were acquired from the Central Co.—The Cumberland Co. sought to restrain the sale unless provision were made in the agreement of sale that it should have the use of the whole system of the New Brunswick Co.—*Held*, that the bill should be dismissed.—*Held, also*, that the sale and purchase being within the powers of the companies could not be objected to, and even if it were *ultra vires*, that plaintiffs had no status entitling them to raise the question.—*Semble*, that the sale should not have been enjoined even if the New Brunswick Co. had not assumed the contract of the Central with the Cumberland Co. *New Cumberland Telephone Co. Ltd.* v. *Central Telephone Co. Ltd.*, 3 Eq., p. 385.

Time—Essence of contract—Time is of the essence of a unilateral agreement, such as an option to purchase land. *Freeman* v. *Stewart*, 2 Eq., p. 365.

Voting contest—A newspaper held a voting contest in order to increase its circulation and offered to give a trip to the five ladies obtaining the greatest number of votes.—The terms of the contest further provided that the lady who obtained the greatest number of all the votes cast had the right to choose the chaperon of the party.—The plaintiff obtained the greatest number of votes and appointed H. chaperon. —A few days later she changed her mind and appointed M. chaperon.—The newspaper was not prejudiced by the change and the manager of the newspaper agreed to it.—Subsequently the directors of the newspaper notified the plaintiff that, having appointed H. she could not reconsider her choice.—When the tickets for the trip arrived, the newspaper tendered one to the plaintiff. —She refused to accept it, because she was not tendered one for M. as well and obtained an injunction, restraining the defendant from delivering a ticket to H.—*Held*, that the plaintiff had the right to change her mind and was entitled to receive as damages the price of the chaperon's ticket and certain expenses incurred in preparing for the trip.—*Held*, that the appointment of the chaperon was not in the nature of an execution of a power. *Murchie* v. *The Mail Pub'g Co. Ltd.*, 42, p. 36 C. D.

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5. Enforcement of Contract.

Agreement to assign leasehold interest —Where in a suit for specific performance of an alleged agreement to assign a leasehold interest in land with building thereon in consideration of an indebtedness to the plaintiff by the defendant for repairs to the building, it appeared that the plaintiff went into possession, collected the rents, and made repairs, but that these acts were consistent with the evidence of the defendant that the plaintiff was given the management of the property for the purpose of paying defendant's indebtedness to him, the Court refused to grant specific performance, but decreed that the plaintiff was entitled to a lien on the property for the amount of the debt and any money properly expended in respect of the property.—Under the above circumstances neither party was allowed costs of suit. *Johnson* v. *Scribner et al*, Eq. Cas., p. 363.

Conditions precedent—*See* Title "Action."

Impossibility of performance—See cases discussed in *McKean* v. *Dalhousie Lumber Co.*, 40, p. 218.

Lease of line of railway—By an agreement the plaintiffs were to lease their line of railway to the defendants upon the condition *inter alia* that the defendants would run a passenger train each way each day between stations A. and B.—The lease was not executed, but the defendants went into possession of and operated the line.—The plaintiffs alleged in their bill that at the time of the agreement, as was known to the defendants, they were under contract with the government of New Brunswick to run a passenger train each way each day between A. and B., but the contract was not set out in full.—In 1897 a lease was executed by the plaintiffs and defendants by which it was provided that the defendants would run a passenger train one way each day between A. and B., "and if and whenever it may be necessary to do so in order to exonerate the (plaintiffs) from its liability to the government of New Brunswick then the (defendants) will run at least one train carrying passengers each way each day."—On July 31, 1899, the Attorney-General of New Brunswick gave notice to the plaintiffs that their contract with respect to running a passenger train each way each day between A. and B. must be enforced, but no further proceedings with respect to the matter were taken by the government, though the defendants continued to run a passenger train but one way each day.—It did not appear whether the notice of the Attorney-General might not have been given at the plaintiffs' instance.—On a motion for an interlocutory mandatory injunction in this suit which was brought to compel the defendants to run a passenger train each way each day between A. and B., *held*, that no case was made out for relief by mandatory injunction, which will only be granted where necessary for the prevention of serious damage, and that the question raised was merely one of pecuniary damages between the plaintiffs and defendants, for which the defendants were well able to account to the plaintiffs,

and which by the lease of 1897 the plaintiffs had agreed to accept in event of their liability, if any, to the government and that it did not appear that such liability had arisen. *Tobique Valley Railway Co.* v. *Canadian Pacific Railway Co.*, 2 Eq., p. 195.

Maintenance for life and annuity—A farm was conveyed by an aged couple to their daughter, and on the same day she and her husband entered into a written agreement with the vendors to board them on the farm and to pay them an annuity in consideration of the conveyance.—*Held* (1) that the vendors had a lien on the land for the performance of the agreement; (2) that the Court could not decree specific performance of the agreement. *Cunningham* v. *Moore*, 1 Eq., p. 116.

Moncton Civil Court Commissioners—The declaration alleged that under Act 53 Vict., c. 60, a Court for the trial of civil causes was established in the City of M. that a commissioner of the said Court was to be appointed by the governor in council, that the salary of the said commissioner was to be fixed by the city council of the city of M. and paid out of their funds, that pursuant to the act the plaintiff was appointed commissioner and his salary was fixed by the city council at $600 per annum, that he had performed the duties of the office and was entitled to be paid the salary, but the defendant had refused to pay.—*Held*, on demurrer (*per* Hanington, Landry, Barker, McLeod and Gregory JJ.), that the declaration was good, as it alleged a statutory liability to pay the plaintiff out of the city funds. *Kay* v. *The City of Moncton*, 36, p. 202.

Partnership contract—Abandonment of interest—In November, 1902, the plaintiff and the defendant F., with a number of others formed a syndicate for the purpose of acquiring options and purchasing land with a view to sale.—The transaction was a large one, involving the purchase of some 200,000 acres of land in the Northwest Territories, and before the land was finally disposed of the syndicate was compelled to pay the owners the sum of $60,000.—The agreement between the plaintiff and F. was verbal, and at the time it was made the plaintiff paid the sum of $200.—On the 30th of March, 1903, the defendant F. wrote to the plaintiff to hold himself in readiness to raise $2,000 "to hold your corner of the deal," and that if they had to call upon him it would be at short notice.—The plaintiff took no notice of this letter and made no preparation for securing the money.—On the 14th of April, 1903, F. telegraphed the plaintiff as follows: "Three thousand dollars absolutely necessary to hold your interest in the land deal.—Will I draw?—Wire."—To this the plaintiff sent no reply.—In 1903, the plaintiff learned that the speculation had been successful and that large profits had been made, but it was not until 1907 that this suit was brought.—*Held*, that in view of the special nature of the transaction, the plaintiff's refusal to contribute his share of the money required to complete the purchase, and his refusal to answer or take any notice of both letter and telegram, justified the defendants in acting on the assumption and belief that he had entirely abandoned the contract and his interest in the purchase, and that he did not intend being any longer bound by it.—*Held, also*, that the plaintiff's delay in commencing a suit until long after he knew that a large profit had been made by a re-sale of the land, was, in the absence of any satisfactory explanation, evidence that his failure to pay the money, and his refusal to answer either the letter or telegram, were in fact intended at the time as an abandonment of all interest in the transaction *Pugsley* v. *Fowler et al*, 4 Eq., p. 122.

Resulting trust—See post, section 11 *Statute of Frauds*. Col. 165.

Sale of logs—An agreement for the sale of logs contained a condition that the logs were to be surveyed by any surveyor the vendee might have in his employ and that such survey was to be final.—*Held*, that proof of such a survey was, in the absence of any charge of fraud or incompetency on the part of the vendee's surveyor, a condition precedent to the plaintiff's right to recover the price of the logs, and that the trial judge was in error in rejecting the evidence of such surveyor on the ground that he was not proved to have been a duly sworn surveyor, appointed by the municipality and under bonds. *Patterson* v. *Larsen*, 36, p. 4.

Specific performance to give bill of sale—Specific performance will be decreed of an agreement to give a bill of sale upon ascertained furniture, sold and delivered upon credit in reliance upon such agreement. *Jones* v. *Brewer*, 1 Eq., p. 630.

Specific performance to transfer trade mark—In March, 1894, the firm of G. S. DeF. & S., consisting of the defendant, H. W. DeF., and his brother, C. W. DeF., registered a trade mark for a certain blend of tea known as "Union Blend," which was prepared under a formula made by the defendant.—In May 1901, C. W. DeF. assigned his interest in the trade mark to the defendant and shortly after seems to have retired from the business.—In May 1908, the business was put into a joint stock company in which the defendant was by far the largest stock holder, he paying for his stock by assigning to the company all his interest in the business, which he valued at $50,000.—This assignment, dated June 29th, 1908, after particularly setting out the real estate and chattels personal, contained the following, "and all personal property of whatsoever nature and description owned by the said H. W. DeF. in connection with the business of the said H. W. DeF."—There was also a covenant in the assignment that the defendant would execute and deliver all papers necessary to give a perfect title to the property.—The trade mark itself

was not specifically mentioned in the assignment.—The defendant was elected president of this company and for two years this trade mark was used and the business carried on, chiefly under his management.—In May, 1910, the company being insolvent assigned to the plaintiff under Chap. 141, Con. Stat. of N. B. (1903).—On investigation, the plaintiff found that there was no specific assignment of the trade mark to the company which could be used for registry under the Trade Mark Act.—*Held*, that the words used in the assignment were amply comprehensive to pass the trade mark, and that the defendant was bound to execute a specific assignment of it to the plaintiff as assignee of the company. *Tilley, Assignee of deForest*, v. *DeForest et al*, 4 Eq., p. 343.

Sub-let contract—See *Lynch* v. *Wm. Richards Co. Ltd.*, 38, p. 160; *South West River Driving Co.* v. *Lynch*, 38, p. 242; *McLaughlin* v. *Tompkins*, 44, p. 249.

Telegraph company—Exclusive rights—Notice of contract—The E. & N. A. Railway Co. were incorporated in 1864 under the laws of the province of New Brunswick and in 1869 owned a line of railroad from Fairville, N. B., to Vanceboro, on the boundary of the state of Maine.—In that year they entered into an agreement with the plaintiffs, a company incorporated in the state of New York, giving the latter the exclusive right to erect and maintain upon the land of the railroad, lines of telegraph which should be the exclusive property of the plaintiffs.—The E. and N. A. Rwy Co. agreed to transport *gratis* employees of the plaintiffs, and materials used by the plaintiffs in erecting and maintaining the lines, and not to transport the employees and materials of any other telegraph company at less than the usual rates.—The plaintiffs were to maintain one wire for the use of the railroad, and to furnish telegraphic facilities and supplies at a number of stations on the road.—The plaintiffs constructed lines of telegraph, and connected them with their system in the state of Maine.—In 1878 the E. & N. A. Rwy. Co.'s road was sold under a decree of the Supreme Court in Equity to the St. J. & M. Rwy. Co., by whom it was run until 1883, when it was leased to the N. B. Rwy. Co. for 999 years.—Both of these companies had notice of the agreement, and acted upon it.—In 1888 the C. P. Rwy. Co. obtained running powers from the N. B. Rwy. Co. over the line, and permission to construct a line of telegraph along the railroad. To prevent the construction of the line of telegraph, as being in breach of the agreement of the E. & N. A. Rwy. Co. with them the plaintiffs obtained an *ex parte* injunction order, which it was now sought to dissolve.—*Held*, (1), that the agreement of the E. & N. A. Rwy. Co. with the plaintiffs was not void as an agreement in restraint of trade, or as creating a monopoly, and being contrary to public policy; (2) that the agreement in respect to the transportation of employees and materials was not invalid under section 240 of 51 Vict., c. 29 (D); (3) that the plaintiffs, though incorporated in the state of New York, could validly contract with the E. & N. A. Rwy. Co. and enforce the agreement by a suit brought in this country; (4) that the agreement was not invalid under section 92, sub-section 10a of the B. N. A. Act 1867; (5) that the N. B. Rwy. Co., having leased the road with notice of the agreement, and having acquiesced in it, were bound by it. *Western Union Telegraph Co.* v. *N. B. Rwy. Co., C. P. Rwy. Co., and St. J. & Maine Rwy Co.*, Eq. Cas., p. 338.

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6. Evidence to vary.

Agreement in writing—Secret trust—On September 7th, 1907, a written agreement was entered into between the plaintiff D. D., and the defendants C. McM. and L. McM. for the sale of certain lands, the title to which was vested in the defendants, for the sum of $200.—At the time there was a verbal understanding between the parties to the agreement and S. D., the mother of the plaintiff, that the agreement was only to be used to raise money to pay the creditors of the plaintiff and S. D., and was not to be used for any purpose until the assent of R. C. D., the father of the plaintiff, had been obtained.—The agreement was never used for the purpose of paying the creditors and the assent of R. C. D. to it was never obtained.—*Held*, that the agreement was valid, although the assent of the plaintiff's father was never obtained, and that the verbal agreement not to use was only a collateral agreement, and did not affect the validity of the agreement itself.—*Held, also*, that the defendants are liable to account to the plaintiff for the moneys received by them on the sale of the property, subject to the trust that such moneys be held for the benefit of the creditors of the plaintiff and his mother. *Donald* v. *McManus et al*, 4 Eq., p. 390.

Composition deed—The plaintiff's creditors, under a composition deed, sought to recover from the sureties of the compounding debtor an instalment based on the debt signed for, which was greater than the debt they were entitled to rank for according to the schedule of creditors attached to the composition deed.—*Held*, that the plaintiffs were not precluded from recovering on the ground that there had been a variation of the contract. *Sellick et al* v. *Grosweiner*, 38, p. 73.

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7. Formation of Contract.

Advertisement, Offer by—Public competition—The defendants, by public advertisements, offered a piano as a prize to the person who would guess most nearly the weight of a large block of soap, exposed for that purpose at a public exhibition.—Three persons were chosen to act as judges

and determine the winner.—It was also a condition that the participants in the contest should buy and give defendants' soap a fair trial.—*Held*, on demurrer (1) that there was a consideration for the contract; (2) that the contest involved skill and judgment and did not come within the meaning of a lottery; (3) that the general allegation of the performance of all conditions necessary to entitle the plaintiff to recover was, on demurrer, a sufficient averment of the performance of such conditions.—Where a person by public advertisement agrees, on the performance of any defined act or condition, to pay a specific sum of money, he becomes bound on notice by anyone who in fact does the act or performs the condition provided the act or condition is not illegal. *Dunham* v. *St. Croix Soap Mfg. Co.*, 34, p. 243.

Competition at exhibition—Three proprietors of blends of tea exhibiting their teas at a public exhibition held by the defendant society allowed their teas to be judged by a committee appointed by the society, in competition for a gold medal offered by the society.—During the exhibition each of the competitors served the public gratuitously with samples of made tea, and tea was served by them to the committee in the same way that it was served to the public.—The committee having awarded the medal to the plaintiff, a competitor, *held*, that there was consideration for the offer, entitling the plaintiff to the medal.—Where the executive of the above society adopted a resolution to award medals to all displays of merit or excellence of goods on exhibition, the awards to be made by regularly appointed judges; and the general manager of the exhibition, who was vice-president of the executive, and a member of a committee of three to appoint judges, thereupon arranged the above competition and with a co-member of the committee to select judges, named the judges for the competition, it was held that the competition must be taken to have been instituted by the society. *Peters* v. *The Agricultural Society, District No.* 34, 3 Eq., p. 127.

Consensus ad idem wanting—In a suit for specific performance of an alleged parol agreement for the sale to the plaintiff by the defendant of a piece of land, the bill alleged the agreement to be that the plaintiff should take the land subject to a mortgage on payment to the defendant of $100.00. —The plaintiff's evidence proved the agreement to be that the amount payable to the defendant was to be secured to him by a second mortgage on the land.—The defendant's evidence proved that the plaintiff was to pay off the mortgage then on the land, and give the defendant a mortgage for amount payable to him.—*Held*, that there was no concluded agreement between the parties, and that the bill should be dismissed, but, under the circumstances, without costs. *Calhoun* v. *Brewster*, 1 Eq., p. 529.

Consensus ad idem—See *Kennedy Island Mill Co. Ltd.* v. *The St. John Lumber Co.*, 38, p. 292.

Locus of contract—The plaintiff, an extra-provincial corporation sued defendant on a contract made in New York, by which plaintiff was to ship goods at Toronto to defendant in Sussex, N. B., by freight, defendant to pay freight.—The plaintiff shipped the goods by express and prepaid the charges which were afterwards paid by the defendant.—*Held*, this was not carrying on business within New Brunswick as the title to the goods passed in Toronto *Culbert* v. *The McCall Co.*, 40, p. 385.

See also *Payson* v. *The Equity Fire Insurance Co.*, 38, p. 436.

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8. Illegal Contracts.

Appropriation of payments—When a debtor pays money on account to his creditor and makes no appropriation, the creditor has the right of appropriation and may exercise the right up to the last moment by action or otherwise; he may even appropriate in satisfaction of a debt for which no action would lie by reason of the illegality of the transaction out of which the debt originated. *Mayberry et al* v. *Hunt et al*, 34, p. 628.

Assignment of a franchise—The South-west River Driving Co. and the Upper South-west Miramichi Log Driving Co., incorporated companies, having the exclusive right within certain limits to drive the lumber cut on the South-west Miramichi and collect the tolls fixed by statutory authority therefor, made an arrangement with the plaintiff to do the driving for the season of 1904, and to receive as compensation the tolls allowed the corporations by law.—In an action by the plaintiff against the defendant company for tolls for driving its lumber, the trial judge ruled that there was no liability from the defendants to the plaintiff. —*Held*, (*per* Tuck C. J., Barker and McLeod JJ., Hanington and Landry JJ. dissenting), that the ruling was right that the powers conferred and duties imposed by the legislature on the driving companies could not be delegated or transferred, and no action could be maintained on a contract based on such transfer. *Held* (*per* Hanington and Landry JJ.), that the arrangement between the driving corporations and the plaintiff was a reasonable and proper method of carrying on the work which by their acts of incorporation the companies were bound to perform, and, having been made with the knowledge and consent of the defendant company, it is liable to the plaintiff on an express or implied contract to pay the amount agreed upon. *Lynch* v. *William Richards Co. Ltd.*, 38, p. 160.

Assignment of lumber driving franchise—The plaintiff, an incorporated com-

pany, with the exclusive right to drive lumber down the South-west Miramichi River within the company's limits, and of collecting tolls fixed by law therefor, contracted with the defendant, in consideration of a bonus to be paid by him to the company, to allow him to do the driving and receive the tolls. —*Held*, that the contract was against the public interest, and invalid. *The South-west River Driving Co.* v. *Lynch*, 38, p. 242.

Crown lands, Sale of—An agreement between two intending purchasers of Crown land lumber licenses to two lots, neither wanting the whole of the lots, not to bid against each other at the public sale, but that one should bid them in for their joint benefit is not illegal. *Irving* v. *McWilliams*, 1 Eq., p. 217. *Laughlan* v. *Prescott*, 1 Eq., 406 followed in *McGregor* v. *Alexander*, 2 Eq., 54.

Distress for rent due under illegal lease—Replevin will lie to recover goods distrained for rent in arrear under an illegal lease.—The maxim *in parti delicto potior est conditio possidentis* is applicable only when the possession results from the act of the parties, and not when it results from some incident attached to a legal instrument. (*per* Tuck C. J., Barker and McLeod JJ., Hanington and VanWart JJ. dissenting). —*Held* (*per* Hanington J.), an illegal contract is valid as between the parties thereto for all purposes that can be accomplished without the aid of a Court, therefore that person must fail, who is first compelled to set a Court in motion in order to obtain such aid.—*Held* (*per* VanWart J.), the Court ought not to assist any of the parties to an illegal transaction, therefore, in the above case, the parties should be restored to the position in which the writ of replevin found them, that is an order should be made to restore the goods replevied to him out of whose possession they were taken by the process of the Court. *Gallagher* v. *McQueen*, 35, p. 198.

Indemnity—Purchase of liquor to be disposed of contrary to law—The plaintiff agreed, subject to the general control and supervision of the defendant, to act as manager of defendant's hotel situate in the City of Moncton where the Canada Temperance Act is in force.—At the request of the defendant plaintiff purchased, in his own name in the city of Saint John, intoxicating liquor, to be supplied to the hotel guests and sold at the bar.—There was no proof that the vendor knew that the Canada Temperance Act was in force in Moncton.—*Held*, that having knowledge that the liquor was to be disposed of contrary to law, the plaintiff could not recover from the defendant on her promise, express or implied, to pay or indemnify him against payment for the liquor. *Wilkins* v. *Wallace*, 38, p. 80.

Lease of hotel—Violation of Canada Temperance Act—V. leased hotel premises to M. in his lifetime, in which, to the knowledge of all parties, liquor was sold contrary to the provisions of the Canada Temperance Act. —*Held*, that the lease was for an unlawful purpose and was therefore void, and plaintiff could not recover rent due. *Vanbuskirk* v. *Mc Naughton*, 34, p. 125.

Official salary, Reducing—An arrangement entered into by the plaintiff, the commissioner of the City Court of Moncton, an officer appointed by the lieutenant-governor in council, with the city council of the city of Moncton to accept a reduction of his salary, which arrangement had been assented to by both parties and acted upon for a period of five years, is binding and can not be repudiated on the ground that it is void as against public policy. *Kay* v. *The City of Moncton*, 36, p. 377.

Pleading—Though the defendant has not pleaded the illegality of an agreement by his answer, if its illegality is disclosed by the pleadings the Court will not enforce it. *Irving* v. *McWilliams*, 1 Eq., p. 217.

Public policy—Parties cannot contract themselves out of the jurisdiction of a Court. —(*Per* McLeod and Barry JJ). *Can. Fairbanks* v. *Edgett*, 40, p. 411.

Restraint of trade—Monopoly—Telegraph lines—The E. & N. A. Railway Co. were incorporated in 1864 under the laws of the province of New Brunswick and in 1869 owned a line of railroad from Fairville, N. B., to Vanceboro, on the boundary of the state of Maine.—In that year they entered into an agreement with the plaintiffs, a company incorporated in the state of New York giving the latter the exclusive right to erect and maintain upon the land of the railroad, lines of telegraph which should be the exclusive property of the plaintiffs. —The E. & N. A. Rwy. Company agreed to transport gratis employees of the plaintiffs, and materials used by the plaintiffs in erecting and maintaining the lines, and not to transport the employees and materials of any other telegraph company at less than the usual rates.—The plaintiffs were to maintain one wire for the use of the railroad, and to furnish telegraphic facilities and supplies at a number of stations on the road.—The plaintiffs constructed lines of telegraph, and connected them with their system in the state of Maine.—In 1878 the E. & N. A. Rwy. Company's road was sold under a decree of the Supreme Court in Equity to the St. J. & M. Rwy. Co., by whom it was run until 1883, when it was leased to the N. B. Rwy. Co. for 999 years.—Both of these companies had notice of the agreement and acted upon it.—In 1888 the C. P. Rwy. Co. obtained running powers from the N. B. Rwy. Co. over the line, and permission to construct a line of telegraph along the railroad.—To prevent the construction of the line of telegraph, as being in breach of

the agreement of the E. & N. A. Rwy. Co. with them, the plaintiffs obtained an *ex parte* injunction order, which it was now sought to dissolve.—*Held*, that the agreement of the E. & N. A. Rwy. Co. with the plaintiffs was not void as an agreement in restraint of trade, or as creating a monopoly and being contrary to public policy. *Western Union T. Co.* v. *N. B. Rwy. Co., C. P. Rwy. Co. et al*, Eq. Cas., p. 338.

Restraint of trade—Physicians covenant not to practice in a certain locality—The plaintiff was a physician practising at Sussex, and in receipt of a large income. —Having occasion to remove from the province, he entered into an agreement with the defendant, a physician, to lease to him a part of his (the plaintiff's) house including offices, for two years from July 1st, 1894. —An annual rental was reserved.—The defendant covenanted that at the end of the lease he would either purchase the house at a named sum, or would forthwith leave and depart from the parish of Sussex, and would not for a period of at least three years next thereafter reside in said parish, or practise thereat, either as physician or surgeon, or act directly or indirectly as partner or assistant to or with any other physician or surgeon practising in said parish or elsewhere within ten miles thereof, and that he would, at least three months before the end of the said term, give the plaintiff notice in writing whether he would so purchase or would depart from Sussex.—It was provided that if at the end of the term the plaintiff did not wish to sell he could return to Sussex and resume practising, in which case the defendant might remain and practise in Sussex.—At the end of the lease the defendant declined to purchase the property or discontinue to practise at Sussex. —In a suit for an injunction to restrain the defendant from practising and residing at Sussex, in the terms of his covenant, *held*, 1) that the agreement was not invalid as being in restraint of trade, and contrary to public policy; (2) that the defendant should be enjoined from residing at Sussex as well as from practising there. *Ryan* v. *McNichol*, 1 Eq., p. 487.; 34 N. B. R., p. 391.

Restraint of trade—An agreement between steamship companies fixing rates for freight and passengers for one season is not void as against public policy if the rates are proper and reasonable and the contract in fact beneficial to the public. *Saint John River S. S. Co. Ltd.* v. *The Star Line S. S. Co.*, 40, p. 405.

Wager—A deposit of money with a stake holder to abide the result of a foot race is not an illegal transaction under Consolidated Statutes, c. 87, s. 2, and no action will lie against the winner of the bet, who has received the money from the stakeholder after the decision of the event. *Seely* v. *Dalton*, 36, p. 442.

Wagering policy of life insurance—A policy of life insurance in the plaintiff's company was taken out by the assured after it had been represented to him by the plaintiff's agent that he could raise money upon it from the defendant by selling the policy to him, and the policy was taken out by the assured for that purpose.—At the time the assured was too poor to pay the premium and was unable to carry the policy.—Immediately upon the policy being issued it was assigned to the defendant for a small sum and the defendant paid the original and subsequent premiums.—In a suit to set aside the policy as a wager policy and void as against the plaintiffs, the assured in his evidence stated that when he assigned the policy he expected to redeem it and carry it for his own benefit. —*Held*, that the policy was not a wagering policy. *The Mutual Life Assurance Co. of New York* v. *Anderson et al*, 1 Eq., p. 466.

9. Novation.

Company incorporated to take over existing business—In order to constitute a novation there must be a new contract substituted for a contract already existing, the consideration mutually being the discharge of the old contract.—*Held* (Landry J. dissenting) that there is no novation here because (1) there is no evidence to prove that the plaintiffs discharged the old contract other than the fact that they brought suit against the defendant company and (2) no proof either that the defendant company knew the terms of the old contract and were willing to assume it, or that they knew there was a contract which they were willing to assume regardless of its terms. The fact that a company is incorporated by Letters Patent stating it to be one of the objects of the company to take over a business and property used in connection therewith, and that the company does take over and continue such business as before is not sufficient to establish an agreement on the part of the company to assume the liabilities and contracts of such business. —The plaintiffs' declaration set out a contract between the plaintiffs and a partnership, and that the defendant company was incorporated to take over the property and business of the partnership, and that it did take over such property and business, and did at the request of the partnership and with the consent of the plaintiffs duly and regularly take over, adopt and assume such contract and agreed with the plaintiffs to perform the same.—To this the defendant pleaded *non assumpsit*.—*Held*, this plea denied the adoption of the contract by the defendant as well as all other facts alleged that were necessary to constitute a novation. *Jones et al* v. *James Burgess & Sons Ltd.*, 39, p. 603.

10. Reformation of Contract.

Modification of Contract — Assignment—An option was held by R. upon

property of defendant company.—By agreement dated Aug. 7th, 1903, reciting the option and that the company had arranged through R. to execute an option to P. and C. for $640,000, it was witnessed that if the property was purchased in accordance with such option "or mutual modification of the same" the company would pay to R. or his assigns, any excess realized above the option price of $562,586.—R. immediately afterwards assigned a one-half interest in the agreement to the plaintiff.—On October 2, 1905, a sale was made to I. P. Co. for $675,000.—By agreement of the same date the defendant company agreed to pay P. and C. $100,000 for their services in connection with the sale leaving $575,000 as the net amount to the company from the sale.—Prior to the sale the company, having no notice of the assignment by R. to the plaintiff, had agreed with R. that his option should be for $580,000.—The plaintiff claimed one-half of the difference between the sum realized by the company from the sale and $562,586.—*Held*, that the company, having no notice of plaintiff's assignment, were free to deal with R. and that consequently the change made by R. in his agreement with the company was binding on the plaintiff, to whom therefore there was nothing coming. *Winslow* v. *The Wm. Richards Co. Ltd.*, 3 Eq., p. 481.

Modification of Contract—A modification of a contract means more than an extension of it.—An extension has reference to time; a modification to terms.—An option at different terms but referring to the same property may be a modification of another option between the same parties even though the two may differ as to price and although some time may have elapsed between the termination of the one and the beginning of the other. *Id.*

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11. Statute of Frauds.

Confession of judgment consideration for payment of debt of another—S., in consideration of B. giving him a confession of judgment and other security for a debt due him by B. gave B. a verbal promise to pay two promissory notes of B. in favor of A., but did not pay them.—B. assigned his right of action against S. to the plaintiff, the executrix of A.—*Held*, that the promise by S. to pay the notes was an original promise founded on a new consideration and was not a promise to pay the debt of another within the Statute of Frauds, and need not be in writing. *Allen Executrix* v. *Sheyn*, 35, p. 635.

Part performance—When a contract, resting on parol, or partly on parol, has been partly performed by the purchaser, the vendor will be precluded from setting up the Statute of Frauds, and specific performance will be decreed if the contract is proved; so where the Court found that the plaintiffs had entered into an agreement with the defendants, which was not entirely in writing, for the sale of a leasehold property, and had put them in possession and the defendants had paid part of the purchase price, made repairs to the property and collected the rents, specific performance was decreed. *Moses* v. *French et al*, 43, p. 1.

Pleading—In a suit for specific performance of an agreement for sale and purchase of a leasehold interest in land, it is not necessary that the defendant plead the Statute of Frauds in an answer denying the agreement in order to set up the defence at the hearing. *Johnson* v. *Scribner et al*, Eq. Cas., p. 363.
See also *Orchard* v. *Dykeman*, 43, p. 181 C. D.

Resulting trust—Money paid on undertaking to mortgage or convey—A married woman procured the plaintiff to make payments from time to time on account of the principal and interest of a mortgage on freehold property forming part of her separate estate, by verbally undertaking to have an assignment made of the mortgage, or to convey the mortgaged premises to the plaintiff.—*Held*, that the agreement not being in writing could not be specifically enforced, but that it was binding on the separate estate of the married woman, including the realty, and that the plaintiff should be paid out of the same, with interest. *Bulley* v. *Bulley*, Eq. Cas., p. 450.

Resulting trust—An agreement under which a Crown land lumber license was bid in at public sale at the up-set price by the defendant, in whose name the license was issued, for the plaintiff who had paid to the defendant the up-set price previous to the sale, does not relate to an interest in land within the Statute of Frauds, and if it does, as the purchase money for the license was paid by the plaintiff, and a trust thereby resulted in his favor by construction of law, it can be established by parol evidence under the Statute of Frauds, c. 76, C. S. N. B., s. 9. *McGregor* v. *Alexander*, 2 Eq., p. 54.
See also *Frye* v. *Frye*, 34, p. 569.

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12. Work, Labour and Services.

Alternative remedies for wrongful dismissal—If an employee, claiming he had been wrongfully dismissed under a contract of hiring, elects to treat the contract at an end and brings an action on the *quantum meruit* for his services, he can only recover for the time he has actually served and a subsequent action on the same contract for damages for wrongful dismissal will be stayed. *Gregory* v. *Williams et al*, 44, p. 204.

Contract—Entire or divisible—Quantum meruit—The plaintiff agreed to manufacture and deliver to defendant a quantity of crates.—When delivered they did not prove up to sample and about three-quarters were returned to plaintiff who altered and re-delivered them.—The total purchase price amounted to $700, of which the defendant

paid $500 and refused to pay more.—The plaintiff then brought action in a County Court for the balance and recovered a verdict for $100.—The only count in the declaration was for goods sold and delivered.—*Held*, (*per* Barker C. J., Landry, McLeod, White and McKeown JJ., Barry J. dissenting), that although the special contract had not been performed the plaintiff was entitled to recover the value of the crates retained by the defendant, on a *quantum meruit*.—By agreement, defendant could pay cash or in sixty days after delivery. The crates were delivered on April 25, and the altered crates were delivered after May 2.—The action was commenced on June 30.—*Held*, (*per* Barker C. J., Landry and McKeown JJ.), the period of credit does not apply to an action on a *quantum meruit* for the value of the goods retained but defendant is liable to pay for them on request.—*Held* (*per* McLeod and White), the period of credit ran from April 25, the date of the first delivery and had expired before action brought.—*Held* (*per* Barry J.), the period of credit ran from May 2 when the altered crates were delivered, and the plaintiff should be nonsuited. *Roy* v. *J. & D. Harquail Co. Ltd.*, 41, p. 255.

Employment as expert—Incompetency—Dismissal—The manager of a veneer company having heard of the plaintiff as a man who could be usefully employed in the business wrote him a letter in which he stated: "What we want is a man who is a good veneer maker and who knows how to make all kinds of built-up woods that are saleable, such as panels. . . we want you to take full charge of the mill, that is the manufacturing."—In reply plaintiff said: "Would say I understand fully the making of the articles you speak of, as well as numerous others with proper machines and proper men to run them," and in a subsequent letter he said: "I feel from all the experience I have had, I have mastered the entire principles of it (the veneer business), knowing machines required for various work and what veneer has got to be when completed."—Having been hired by the manager he was dismissed six weeks after and brought an action for wrongful dismissal.—*Held*, that he was not hired as a business manager, but as an expert in the veneer business and as the evidence established that he was not competent, he was properly discharged and could not recover. *Alcroft et al* v. *Adams*, 37 N. B. R., p. 332; 38 S. C. R., p. 365.

Husband and wife—A contract by a married woman with her husband to cook in the lumber woods for a crew of men, whom her husband had engaged to get lumber for a third person under an agreement at a fixed price per thousand off the land of the third person who was to furnish the supplies, is not a valid contract under "The Married Woman's Property Act" (C. S. 1903, c. 78), and cannot be enforced as a lien under "The Woodmen's Lien Act" (C. S. 1903, c. 148). *Patterson* v. *Bowmaster*, 37, p. 4.

Maintenance for life—Work done by grantee's brother—A farm was conveyed by an aged couple to their son in consideration of his agreement to board them on the farm. —On the death of the son in their lifetime, leaving a wife and infant daughter, his brother, the plaintiff, at the request of the widow and the parents, took possession of the farm and performed the agreement.—*Held*, that the plaintiff was entitled to a lien on the land for money expended by him in making permanent improvements thereon and in the performance of the agreement. *Waters* v. *Waters*, 1 Eq., p. 167.

School teacher, Unlicensed—The plaintiff, an unlicensed teacher, was employed to teach in a school district for one year, under a written contract purporting to be made by the defendants, who are school trustees incorporated under the Schools' Act, C. S. 1903, c. 50.—The contract was signed by two out of the three trustees but the corporate seal was not affixed to it and no meeting of the trustees was held to authorize the contract.—Under this contract the plaintiff taught for one full term.—In an action to recover the amount agreed to be paid to her or on a *quantum meruit*, *held*, the defendants are not liable on a *quantum meruit* for the services of the plaintiff because (a) the employment of the plaintiff was *ultra vires*; and (b) there was no completed work which the trustees could accept or reject, i. e., restore. *Trustees of School District No. 7½* v. *Yerxa*, 40, p. 351.

Services in bringing about sale of lumber property—In the summer of 1913 the defendant company employed the plaintiffs, brokers, to sell its lumber property at a minimum price of $110,000 and agreed to pay a commission of ten per cent. on the price obtained.—During that year, and 1914, plaintiffs were working on this proposition or modified forms thereof, for which options had been given, but failed to effect a sale.—In the summer of 1915 the selling price was reduced to $75,000.—On December 6th, 1915, one of the plaintiffs wrote the company's manager as follows: "I had a conversation with my friend today who will probably handle the sale of the Prescott property for us.—While Mr. Jardine and I are perfectly satisfied with your verbal assurance as to the price, when dealing with outside parties they want it confirmed by writing. —Would you be kind enough to write me stating the price $75,000.—If you can give us a commission of ten per cent. off this, please state it in your letter."—On December 7th, 1915, the company's manager replied: "Your favor of the sixth instant to hand regarding price for our property.—We will accept $75,000 for same, your commission must be a consideration above that amount." —On February 9th, 1916, one of the plaintiffs wrote the company's manager: "I am in communication with parties who are interested in your property, one of whom resides in this province and is willing to cruise the property as soon as snowshoeing

is good.—Your lowest price to me is $75,000 without commission.—The parties are close buyers, and in the event of the cruise being satisfactory they will probably make an offer.—In this event I want to be assured of my commission in case I may have to turn them over to you.—Please reply at your earliest convenience."—On February 12th, 1916, the company's manager replied: "Your favor of the ninth instant to hand.—In regard to your commission, I will have to consult Mr. George D. Prescott before giving you a definite answer on this.—Have already written him about it and will advise you on reply."—No further communication took place between the parties.—About March 6th, 1916, the defendant company sold to a purchaser introduced by the plaintiffs for $65,000.—*Held* (*per* White and Grimmer JJ.), in an action claiming $6,500 commission, or in the alternative damages for not permitting plaintiffs to complete the sale and earn their commission and on the *quantum meruit* that construing the letters with regard to the circumstances within the knowledge of both parties at the time they were written and the sale was made, the agency to sell was general and not special or limited and a verdict for the plaintiffs equal to ten per cent. of the purchase price would not be disturbed on the ground that the jury in considering the value of the services rendered had taken into account all the services performed and had not been confined to those rendered, subsequent to the reduction of the selling price to $75,000.—*Held* (*per* White J.), admitting that there had been as contended three successive agreements, it is clear that each of the first two was abrogated in consideration of the one that took its place.—When, therefore, the defendant company by its act of selling to a purchaser supplied by the plaintiffs, placed it beyond the power of the plaintiffs to carry out the contract as it stood at the time of the sale without allowing them a reasonable time—having regard to the relation of the parties and the character of the property—to effect a sale, the plaintiffs were entitled to recover either for damages for such breach, or upon a *quantum meruit* for all services rendered in connection with the sale.—*Held* (*per* Sir Ezekiel McLeod C. J.), that the letters of December, 1915, and February, 1916, must be taken as exclusively embodying the arrangement between the parties, yet as the defendant company had availed itself of the plaintiff's services in bringing about the sale the plaintiffs are entitled to recover on the *quantum meruit* for such services and the jury having found that ten per cent. of the purchase price was a reasonable compensation the finding should not be disturbed on appeal.—*Held* (*per curiam*), the admission of a letter written by one of the plaintiffs to the defendant company after the sale notifying it that the sale was made through the efforts of the plaintiffs and claiming a commission under an alleged verbal promise made in December, 1914, was not a ground for a new trial.—*Gilbert* v. *Campbell* (1869) 12 N. B. R. 471 distinguished. *Jardine et al* v. *The Prescott Lumber Co. Ltd.*, **44**, p. 505.

Services rendered under verbal agreement—Quantum meruit—Some time previous to the year 1891, a verbal agreement was entered into between the plaintiff and the defendant, under which the plaintiff was to be employed in the care and management of the defendant's business, and in return the defendant was to afford the plaintiff support and maintenance during the defendant's lifetime, and at his death was to give to him one-half of a certain island belonging to the defendant.—The plaintiff entered upon his duties and continued to perform his side of the agreement until the month of August, 1897, when by an injunction order, issuing out of the Equity Court, made in a suit in which both the plaintiff and the defendant were parties, he was restrained from any longer interfering with the care or management of the defendant's business and was compelled to quit the island.—He accordingly handed over to one B. who was acting under a power of attorney from the defendant, all the property of the defendant in his possession, and, treating the conduct of the defendant as equivalent to a recission of the agreement, in the same month of August brought an action against the defendant for the value of his services during the six years previous to the issuing of the injunction order.—The jury in answer to a question put by the learned judge who tried the case, replied that the defendant had annulled and put an end to the agreement on the 3rd of August, 1897, the day the injunction order was issued, and a verdict was found for the plaintiff.—In December, 1897, some months after the commencement of the action the defendant made a deed of the island in question to B. upon certain trusts, the nature of which did not appear in evidence.—Upon a motion for a nonsuit, pursuant to leave reserved at the trial, *held* (*per* Landry, Hannington, Barker and VanWart JJ.) that although neither the obtaining of the injunction order nor the making of the deed to B. was sufficient to sustain the finding of the jury as to the annulment of the agreement, and the plaintiff ought, therefore, in strictness to be nonsuited, yet as there was a point of view of the facts which had not been presented to the jury and under which the plaintiff might be entitled to recover on a *quantum meruit*, the case should be further investigated, and there should therefore be a new trial. —*Held* (*per* Tuck C. J. and McLeod J.), that as there was no agreement proved that could be enforced during the lifetime of the defendant, and that as the obtaining of the injunction order was not sufficient to support the finding of the jury that the defendant had cancelled and put an end to the agreement, the plaintiff should be nonsuited. *Frye* v. *Frye* 34, p. 569.

As the agreement related to an interest in land, the Statute of Frauds would be a bar to any action upon it, but that it would not necessarily follow that the plaintiff could not recover for the value of services actually rendered. Per Barker J. *Id.*

CONVERSION AND TROVER.

Action, Survival of—Form—Pleading—Where one converts to his own use, and sells the goods of the plaintiff and dies after writ issued, but before declaration, the action may be continued against his executors, and they are liable on a count for money had and received. — In this case the declaration was in trespass and for conversion, and upon the argument of the motion for a new trial, application was made to add a count for money had and received.—*Held* (*per* Hanington, Landry and Gregory JJ.), that as the only fact in dispute, namely, the existence of a tenancy between the parties had been passed upon by the jury in favor of the plaintiff, and as no possible injustice could be done to the defendants, the amendment should be allowed—(*per* Barker and McLeod JJ.), that as the proposed amendment introduced a new form of action to which there were on the record no suitable pleas, and upon which there was no issue joined or damages assessed, the amendment proposed was improper and should not be allowed at that stage of the case. *Frederick* v. *Gibson et al, Executors etc. of Gibson*, 37, p. 126.

Bill of sale—Estoppel—P. claimed to be the owner of a horse that S. had given her for the board of herself and child.—S., being indebted to H., left the province and H. seized the horse as the property of S. under an absconding debtor's warrant.—While the horse was in the possession of the sheriff under the warrant, negotiations were had with H. by persons professing to be acting for P., and a bill of sale of the horse was given to H. and the horse was returned to P.—The amount secured by the bill of sale not having been paid, H. seized the horse under the bill of sale, and P. brought an action in the Kent County Court against H. for a conversion of the horse.—On the trial the judge told the jury that the only question was, who was the owner of the horse at the time it was taken, and that the plaintiff was not estopped by the bill of sale from recovering in the action.—*Held*, on appeal from a judgment affirming a verdict entered on a finding on this direction, that the direction was right (Landry J.) dissenting. *Hannay* v. *Fraser*, 37, p. 39.

Conditional sale of goods—Contract completed by taking judgment—A. purchased goods from B. and gave an acceptance for the price.—Across the end of the acceptance was printed the usual lien clause reserving property in the vendor till payment.—The acceptance was not paid at maturity, and subsequent to maturity A. sold the goods to C. who purchased for value without notice.—After the sale to C., B. sued A. on his acceptance, recovered judgment and placed a *fi. fa.* in the sheriff's hands, but nothing was realized on the execution.—In an action by B. against C. for conversion, *held*, that the recovery of judgment by B. against A. on the acceptance was an election to treat the contract completed, and passed the property, and that B. could not recover against C. *Purtle* v. *Heney*, 33, p. 607.

Conditional sale to infants—An infant can not maintain trespass for taking property held by him under a contract of sale with the defendant which stipulated that the property should not pass until payment, where there had been a default in payment of part of the purchase money. *McGaw* v. *Fisk*, 38, p. 354.

Conditional sale—Title to chattel—W. delivered a horse to P. receiving in exchange the following agreement in writing signed by P.: "January 8th, 1909, Twenty-five days after date I promise to pay to the order of W. the sum of $55.00 for value received or return with $5.00 hire."—P. kept the horse until February 15th following when he assigned it with other property to secure a loan of $600.00 repayable in one year.—In an action by W. against the assignee for conversion, *held*, (1) that the title to the horse passed on delivery to P. with an option in him to return at the expiry of twenty-five days.; (2) even if the agreement was one of "sale or return" the retention of the horse beyond twenty-five days would operate to pass the title to P. and in either case W. could not recover in this action. *Ward* v. *Cormier*, 39, p. 567.

Sale by sheriff under execution—Goods seized by the sheriff under an execution at the suit of *B.* v. *R.* were claimed by E. R., the wife of R., as her property.—After a formal levy it was arranged between the sheriff and E. R. that she should hold the goods for the sheriff until they were required for sale under the execution.—After the seizure, and before sale, a suit was commenced by E. R. against the sheriff and a declaration was filed containing two counts: 1st for seizing, taking away and converting the plaintiff's goods; 2nd for detention.—Part of the goods seized were sold, and part released.—*Held*, that a verdict for the full value of the goods sold was proper, though the sale did not take place until after the commencement of the action; that, as far as the sheriff was concerned, the levy was effectual and complete. *Rideout* v. *Tibbits*, 36, p. 281.

L. and P. each carried on business in Saint John, buying and selling fruit.—P. was a licensed auctioneer.—To avoid competition between the parties it was agreed that P. was to buy all the apples handled by either in the market square, L. to furnish the money when apples were purchased.—All commissions on commission sales, and net profits on sales of apples purchased were to be equally shared.—Under this agreement P. purchased the cargo of the Schooner C., some 342 barrels.—After a part had been sold, the sheriff under an execution in the suit of *R.* v. *P.*, seized, and, without removing any of them, sold 62 barrels.—At the sale

the sheriff, in answer to a bidder, stated that he was selling P.'s interest only, and would guarantee nothing, and he did not deliver the barrels sold to the purchaser.—In an action of trover in the Saint John County Court against the sheriff for a conversion of the 62 barrels, the judge told the jury that if they found that the apples were purchased under the agreement on the joint account of L. and P. there was a conversion, and the verdict should be for the plaintiff. —*Held*, on appeal, that the direction was wrong, and there must be a new trial. *Ritchie* v. *Law*, 37, p. 36.

Sale of goods—Conversion of additional quantity—Estoppel—The plaintiff agreed to sell 40 feet of curbing stone to one P. who had a contract to place curb stones in the town of W.—Prior to this agreement, the town, with the plaintiff's knowledge, but without any authority or permission on his part except such as can be implied from the fact that he saw the town's servants taking the stone and made no protest or objection, had taken away and made use of 174 feet of plaintiff's curbing stone.—The plaintiff sent a bill for all the stone to P. and at his request the town held back P.'s payment so as to force a settlement of the bill, but P. refused to pay the plaintiff for more than 40 feet.—The town being threatened with suit by P. paid him, and the plaintiff then sued the town in trover for conversion of 174 feet of stone.—*Held*, reversing the judgment of the County Court judge, that the plaintiff's conduct did not estop him from recovering against the town and a verdict was ordered in his favor for the value of 134 feet. *Fisher* v. *Town of Woodstock*, 39, p. 192.

Storage of goods—Mere permission by the defendant to store goods in defendant's barn, with knowledge of a dispute as to the title of the goods, but without intent to exercise dominion over the same, does not constitute the defendant a tortfeasor and participant in the conversion.—Here, in the opinion of the majority of the Court the evidence did not prove any intent on the part of the defendant to convert the goods in dispute and the finding of the trial judge that there had been a conversion was reversed.—(*Per* Barker C. J., McLeod, Gregory and White JJ., Landry J. dissenting). *Donald* v. *Fulton*, 39, p. 9.

Trover—Goods covered by bill of sale—J. E. F., who was the husband of the plaintiff and a livery stable keeper, being indebted to C., in December, 1895, gave him a chattel mortgage of his stock, which was in the terms following: "All and singular the goods, chattels and property mentioned and set out in the schedule hereunto annexed marked A, which is to be read in connection with these presents and form a part thereof, and also any and all the property that may hereafter during the continuance of these presents be brought to keep up the same in lieu thereof and in addition thereto, either by exchange or purchase, which so soon as obtained, and in actual or constructive possession of the said party of the first part shall be subject to all the provisions of this indenture."—The schedule was as follows: "Eight horses and harnesses now in livery stable owned by said J. E. F.; six waggons in store house; four pungs, coach harness, buffaloes and robes now in said stable."—In March, 1896, J. E. F. being indebted to the plaintiff his wife to the extent of six hundred dollars and upwards, gave her a chattel mortgage in which the property conveyed was described in almost the same words as were used in the mortgage to C.; but the schedule thereto, after enumerating specifically a number of articles concluded as follows: "Also all other goods, furnishings, and articles and materials now or hereafter during the continuance of these presents used in connection with the livery stable now owned by the said J. E. F. and all property hereafter acquired therein."—In July, 1896, C. assigned to the defendant his mortgage, which had been reduced to $272 for a consideration of $250, but the assignment was silent as to after-acquired property.—In September, 1896, J. E. F. gave a further chattel mortgage to defendant, which covered all the property he had formerly mortgaged to plaintiff, and shortly after handed him a delivery order authorizing defendant to take possession of everything connected with the livery stable business which defendant did.—Plaintiff had also given to her husband one hundred dollars with which he was to buy for her a phaeton buggy.—He, without her knowledge, bought a buggy on credit for one hundred and forty dollars, which he delivered to his wife, and which was accepted by her.—This buggy, though not mentioned in any of the mortgages, was seized by defendant when he took possession under the delivery order.—In an action of trover for the conversion of the phaeton buggy and all the property conveyed to secure the plaintiff's debt, except such as was covered by the mortgage to C, *held*, (1) that the mortgage was not invalid by reason of its having been made by the husband directly to the wife; (2) that there was no evidence that it was made to delay or hinder creditors; (3) that it contained a sufficient description of the mortgaged property to satisfy the Bills of Sale Act (1893); (4) that it was sufficient to cover after acquired property; (5) that it was not bad under the Act 58 Vict., c. 6 (Assignments and Preferences Act); (6) that the mortgage to C. and the assignment thereof to defendant were insufficient to cover after acquired property; (7) that the circumstances under which the phaeton buggy was purchased made it the separate property of plaintiff, and as such not liable to seizure by defendant. *Fraser* v. *MacPherson*, 34, p. 417.

Trover—Sale of goods—Failure of consideration—V., desirous of purchasing a lot of land in possession of F., was negotiating with him about it, but no agreement of purchase had been arrived at.—W., a dealer

in cattle, went to V. and offered to purchase from him two head of cattle.—He refused to sell, stating that he wished to exchange them with F. for the land.—W. then went to F. and agreed to extinguish a debt of $79 that he had against him, if he would convey the land to V.—W. went again to V. and offered him the land in exchange for the two head of cattle and his note of $20. —This offer V. accepted.—F. gave V. a warranty deed of the land and V. gave W. his note for $20.—W. selected the cattle, asked V. to turn them out and said he would come again and take them away.—V. recorded the deed, but, discovering that F. had no title on the records, told W. he could not have the cattle.—W. afterwards went and took the cattle from V.'s pasture without his consent.—V. alleged that W. told him that F. had a good title and agreed to give him a good title and if he did not do so the bargain was to be off.—W. denied that he told V. that F. had a good title or that he agreed to give V. a good title.—In an action of trover in the County Court to recover the cattle and note the judge told the jury that if they believed V.'s version of the transaction, the title in the cattle did not pass, and there was evidence upon which they might find for the plaintiff.—The jury found for the plaintiff.—*Held*, on appeal (*per* Landry, Barker, McLeod and Gregory JJ.), that V. having accepted and registered the deed under the contract, the consideration had not entirely failed and V. could not rescind the contract and sue in trover for the cattle and note without reconveying or offering to reconvey the land, and that the appeal should be allowed and a nonsuit entered.—*Held* (*per* Tuck C. J. and Hanington J.), that under the finding of the jury the consideration for the contract entirely failed, and the title to the cattle did not pass to W. and V. was entitled to recover in trover. *Vanbuskirk* v. *VanWart*, 36, p. 422.

CORONER.

Acting in place of sheriff and summoning jury—See *R.* v. *McGuire* 34, p. 430.

COSTS.

1. Generally—Right to Costs and Incidence of Costs.
2. Scale of Costs.
3. Security for Costs.
4. Taxation of Costs.
5. Witness Fees.

1. Generally. Right to Costs etc.

Action by company subsequently insolvent—On a motion to dismiss, for want of prosecution, a bill by a shareholder and the company, which subsequently to the commencement of the suit went into liquidation and whose liquidators refused to proceed, costs were given against the company only to be recovered in the winding up by proving against the company. *Partington* v. *Cushing*, 3 Eq., p. 322.

Adjournment of trial—The Court refused a motion for judgment *quasi* nonsuit upon a first default where the plaintiff produced an affidavit showing absence of a material witness, although the affidavit did not state the residence of the witness or what had been done to procure his attendance, upon an understanding by the plaintiff to go down to trial at the next Circuit and upon payment by him of costs of the day and costs of the motion. *Rourke* v. *Tompkins* 40, p. 288.

Administrator of mortgagor—As a general rule the administrator of a deceased mortgagor should not be made a party to a foreclosure suit.—Where an administrator is improperly made a party to such a suit he should disclaim in order to entitle him to have the bill dismissed with costs. *Barnaby* v. *Munroe et al*, 1 Eq., p. 94.

Where an administrator improperly made a party to a foreclosure suit did not disclaim and the cause proceeded to hearing he was equitably dealt with by being allowed costs, on the dismissal of the bill, up to and including his answer.—Where the administrator of a mortgagor was improperly joined in a foreclosure suit, costs thereby incurred were not allowed to the plaintiff. *Id.*

Amendment to introduce facts occurring after commencement of suit—The costs of an application by plaintiffs, who were in no default, for leave to amend their bill to introduce facts which occurred after the commencement of the suit, were ordered to be costs in the cause. *The Halifax Banking Co.* v. *Smith*, 1 Eq., p. 115.

Appeal—Costs only affected—A new trial granted by a judge of the County Court on payment of costs on the ground that the verdict is against the weight of evidence can not be appealed from on the ground only that the costs should not have been imposed. *MacRae* v. *Brown*, 36, p. 353.

Appeal from summary conviction—Functus officio—On an appeal in the York County Court from a summary conviction made by two justices under the Criminal Code, the judge of the County Court gave judgment and made an order thereon at the April sitting that the appeal be allowed with costs, and the conviction be set aside with costs of the appeal, that the magistrates dismiss the information without costs and give the appellant a certificate of dismissal; and the Court adjourned *sine die*.—Subsequent to adjournment the judge of the County Court under s. 751 of the Code by indorse-

ment on the conviction adjourned the further hearing of the appeal until the following June sitting, and at that sitting made another order embodying the provisions of the order of April and further providing by whom and to whom the costs should be paid and in case of default directed how the payment might be enforced.—*Held*, on certiorari to quash, that the Judge of the Court appealed to having made a final order at the April sitting became *functus officio* and therefore acted without jurisdiction in subsequently adjourning the appeal and making a further order. *R.* v. *Wilson ex parte Cronkhite et al*, 44, p. 69.

Board of railway commissioners, Application to—The cost of application to the Board of Railway Commissioners, having been refused by the Board cannot be recovered in any other Court.—(*Per* Landry and Barry JJ.) *Meagher* v. *Canadian Pacific Railway Co.*, 42, p. 46.

Canada Temperance Act—Excessive costs—Jurisdiction—An allowance of costs, under a conviction for a violation of the Canada Temperance Act, beyond what is allowed by the tariff of fees under s. 871 of the Criminal Code, 1892, is not such an excess of jurisdiction on the part of the magistrate as to justify quashing the conviction. *Ex parte Ruyworth*, 34, p. 74.

Conduct of parties—Plaintiff purchased leasehold property from defendant for $340.50 and has paid $300.00 on account.—Plaintiff alleged that property was sold free of all unpaid rent and taxes, and refused to pay balance of purchase money unless defendant contributed towards unpaid rent which was due at the time of the sale.—Defendant alleged that no such agreement as to unpaid rent and taxes was made, and was willing to execute conveyance on payment of the true balance, but refused to entertain any proposition for settlement unless certain other dealings between the parties were adjusted at the same time.—*Held*, that the plaintiff was entitled to a decree for specific performance.—*Held*, also, that as the evidence failed to establish the plaintiff's contention as to the agreement for sale and the unpaid balance; and that as the defendant had acted wrongfully in attempting to make the settlement of this matter contingent upon the settlement of other dealings between the parties which are distinctly foreign, there should be no order as to costs. *Edgecombe* v. *McLellan*, 4 Eq., p. 1.

See also *Mc Kenzie* v. *McLeod*, 4 Eq., p. 72 post "Mortgagor." Col. 182.

Consolidation of suits—In Equity proceedings, where there are several suits and they have been carried on as one proceeding, and the judge in Equity so declared, although no formal order of consolidation was made or taken out.—*Held* (*per* Tuck C. J. and Landry, J., VanWart J. dissenting), that the suits must be considered as consolidated, and that the order of the Equity judge giving but one set of costs for all the suits was right. *The Consolidated Electric Co. Cases* 34, p. 334.

On appeal (28 S. C. R. 603) judgment affirmed.—"It is only when some fundamental principle of justice has been ignored or some other gross error appears that the Supreme Court of Canada will interfere with the discretion of provincial Courts in awarding or withholding costs. *Id* on appeal.

Conviction—A conviction will not be quashed because the costs are ordered to be paid to the party aggrieved instead of the nominal prosecutor. *R.* v. *O'Brien ex parte Grey*, 37, p. 604.

Costs on amendments—See Barker J. in *Hicks* v. *Ogden et al*, 35, p. 361; *Underfeed Stoker Co. Ltd.* v. *Ready*, 37, p. 505.

Counsel fee, power to allow—A suit was heard before one of the judges of the Supreme Court.—Before judgment on appeal reversing his decree was delivered, he retired from office.—After the judgment on appeal, a counsel fee on the hearing was allowed by one of the judges to the successful party; reliance for his authority was placed upon 58 Vict., c. 14, s. 3.—*Held* that there was power to allow the fee without the Act. *N. B. Railway Co. et al* v. *Kelly*, 1 Eq., p. 156.

County Court appeal—The Supreme Court will not as a general rule grant an attachment to enforce the payment of the costs of a County Court appeal.—The costs should be certified and application made to the Court below. *MacPherson* v. *Samet* 34, p. 559.

County Courts—Imp. Statute, 43 Eliz., c. 6—The Imperial Statute, 43 Eliz., c. 6, authorizing a judge to certify to deprive a plaintiff of costs, is in force in this province and is made applicable to County Courts by section 68 of the County Court Act, 1897. *Warman* v. *Crystal*, 35, p. 562.

Death of sole plaintiff—Where, on the death of a sole plaintiff, the Court, on the application of the defendant, orders that the legal representative revive the suit, or, in default, that the bill stand dismissed, such dismissal will be without costs. *LeBlanc* v. *Smith*, 1 Eq., p. 57.

Defence and disclaimer—A defence and disclaimer to whole bill cannot be put in, and where this is done defendant will not be allowed costs on bill being amended. *Roberts* v. *Howe et al*, 1 Eq., p. 139.

Defendant not appearing to support answer—Where in a partition suit one of the defendants did not appear at the hearing, and his answer was unsupported by evidence, and was assumed by the Court to be unnecessary, he was held not entitled to any costs. *Shields* v. *Quigley*, 1 Eq., p. 154.

Disclaimer after defence entered—A defendant who answered, and later on filed a disclaimer, lost costs, even though successful in having the bill dismissed as against him. *McKenzie* v. *McLeod et al*, 4 Eq., p. 72.

Disclaimer — Special circumstances — Defendant being asked by the plaintiff if he claimed any interest in certain machinery upon premises mortgaged to the defendant made use of equivocal language not amounting to a disclaimer.—Upon being made a party to a suit for the recovery of the machinery, he disclaimed.—The plaintiff did not accept the disclaimer, and the cause proceeded to hearing.—*Held*, that the bill should be dismissed as against the defendant, but without costs. *Lame* v. *Guerette et al.* 1 Eq., p. 199.

Ejectment—Equitable defence—In an action of ejectment where the defendant pleads he is entitled to possession on equitable grounds under an agreement of purchase which he is ready to carry out, and the judge trying the case without a jury finds that the plea is proved, it is proper under section 134 of cap. 111, C. S. 1903, to order a verdict for the defendant, although the legal title and right to possession is in the plaintiff, and the effect of verdict is to deprive the plaintiff of the costs of the ejectment. *Souci* v, *Ouillette*, 37, p. 393.

Election petition—Setting aside order enlarging time to serve—See *McLeod* v. *Gibson*, 35, p. 376.

Equity Court—Answering after notice of motion "pro confesso"—Where, after notice of motion under section 28 of chapter 49, C. S. N. B. to take the bill *pro confesso* for want of a plea, answer or demurrer, the defendant files and serves an answer, he must offer to pay the costs of the motion up to the time of filing the answer, or be subject to terms of payment of costs on being let in to defend. *Manchester et al* v. *White et al*, Eq. Cas., p. 59.

See also *Sayre* v. *Harris*, Eq. Cas., p. 94.

Equity Court—Appearance after notice of motion "pro confesso"—Under section 29 of chapter 49, C. S. N. B. a defendant not appearing within one month after the filing of the bill, but seeking to appear before motion is heard to take the bill *pro confesso* for want of an appearance, will only be allowed to do so on offering to pay the costs of the notice of motion and undertaking to answer within the time he would have had had he properly appeared. *Arbuthnot* v. *The Coldbrook Rolling Mills Co.*, Eq. Cas., p. 51.

Executors—An executor has to pledge his own credit for the costs of a suit against the estate; he is therefore entitled to personal security irrespective of any debt due by his testator. *Aiton* v. *McDonald*, 2 Eq., p. 324.

Fisheries Act—Section 18 of "The Fisheries Act" as amended by the Act of 1898 enacts: "Except as herein otherwise provided, every one who violates any provision of this act or of the regulations under it, shall be liable to a penalty not exceeding $100 and costs, and, in default of payment, to imprisonment for a term not exceeding three months, and any fishery officer or justice of the peace may grant a warrant of distress for such penalty and costs."—R. was convicted under this section, and fined $20.00 and costs.—Both fine and costs were remitted under sub-section 6 of section 18 which provides that "Persons aggrieved by any such conviction may appeal by petition to the minister of marine and fisheries who may remit penalties and restore forfeitures under this Act."—G., the prosecutor, applied to the convicting magistrate for a warrant of distress for the costs, claiming the minister of marine and fisheries had no power to remit the costs.—The magistrate refused to issue the warrant, and a mandamus was moved for.—*Held* (*per* Tuck C. J., Hanington and McLeod JJ.), that the minister had no power to remit the costs, and it was the duty of the magistrate to issue the warrant of distress for their recovery, and that the mandamus should go.—*Held* (*per* Barker and Gregory JJ.), that the penalty having been remitted, the magistrate had no power to proceed to collect the costs, or, at all events, his right was so doubtful that the Court, in the exercise of its discretion should refuse the mandamus.—*Held* (*per* Landry J.), that as in the section in question the term "penalties" included the costs as well as the fine, the writ ought not to issue. *Ex parte Gilbert*, 36, p. 492.

Fraud—Charges of fraud against the defendant were preferred in a number of sections of the bill for an accounting which charges were unsupported at the hearing.—*Held*, that the decree in plaintiff's favor for the balance due by the defendant on overpayment should be without costs, and that the defendant should have the costs of the sections of the bill alleging fraud. *Cushing Sulphite Fibre Co. Ltd.* v. *Cushing*, 2 Eq., p. 539; 37 N. B. R., p. 313.

Fraud—Allegations against probate of will—See *In re Estate of Wm. J. Davis*, 40, p. 23.

Guardian ad litem—Defendant of unsound mind—Unsoundness of mind of defendant in a partition suit proved by affidavit under Supreme Court in Equity Act, 53 Vict., c. 4, s. 80.—Application refused in a partition suit, that costs of appointing guardian *ad litem* of defendant, a person of unsound mind, not so found, and of proving her unsoundness of mind by affidavits, be borne by defendant's share in estate. *Masters* v. *Masters*, 2 Eq., p. 486.

Injunction—Costs of interlocutory injunction when decree dismissed on appeal—A suit was brought for an injunc-

tion and other relief, and application was made for an interlocutory injunction.—The defendant opposed the motion, which was refused with costs.—On appeal the motion was allowed.—At the hearing of the suit a decree was made in plaintiff's favour.—On appeal the decree was reversed, the bill was dismissed with costs and the injunction ordered dissolved.—*Held*, that the defendant was entitled to the costs of opposing the interlocutory application as costs in the cause. *N. B. Railway Co. et al* v. *Kelly*, 1 Eq., p. 156.

Injunction (Mandatory) interim—Obstruction removed before hearing—The defendant, the owner of a saw mill on a floatable river, erected booms in connection therewith, which, with logs of the defendant, impeded the passage of logs of the plaintiff.—The obstructions were removed before the hearing, but after notice of motion had been given for an interim mandatory injunction, which was granted.—*Held*, that the bill should be dismissed, but without costs, and with costs to the plaintiff of the taking out and service of the injunction order. *Watson* v. *Patterson*, 2 Eq., p. 488.

Judgment by default—New trial—Where plaintiff obtained judgment in an undefended action, the defendant not being present or represented at the trial on account of the mistake or misapprehension of counsel, and the merits of the defence were shown, the Court, in its discretion, ordered a new trial upon defendant paying the costs of the undefended trial and of opposing the motion for a new trial and giving security for the payment of any judgment that might be recovered upon a new trial.—*Dickenson* v. *Fisher*, 3 T. L. R., 459; *Holden* v. *Holden*, 102 L. T., 398; and *Trueman* v. *Wood*, 18 N. B. R. 219 followed. *Ferguson* v. *Swedish Canadian Lumber Co. Ltd.*, 41, p. 217.

Judgment creditor joined in foreclosure suit—A judgment creditor, who has registered a memorial of judgment, is a necessary party to a suit to foreclose a mortgage on land belonging to the wife of the judgment debtor.—A judgment creditor made a party to a foreclosure suit under the above circumstances, upon disclaiming, will not be liable nor entitled to costs, though continued in the suit after disclaimer. *Horn et al* v. *Kennedy et al*, Eq. Cas., p. 311. followed in *Nicholson* v. *Reid*, 1 Eq., p. 607.

Mortgagee's costs—Redemption suit—A mortgagee will not be deprived of his costs in a redemption suit made necessary by a dispute as to the rate of interest to which he was entitled.—A mortgagor was indebted to the mortgagee in a sum in addition to the mortgage debt.—He made several payments in money and goods to the mortgagee.—He applied by his solicitor to the mortgagee for a statement of the payments made on the mortgage and of the amount due as he wished to pay the mortgage off.—Before answering, the mortgagee gave notice of sale of the mortgaged property under a power of sale contained in the mortgage.—In his answer he stated that the whole of the principal and interest at 12 per cent. of $311.53 was due, and that no payments had been made on account of the mortgage indebtedness.—The mortgagor thereupon filed a bill to restrain the sale and for redemption.—A reference having been had to take account, the referee found that a small payment had been made on the mortgage, and allowed interest on the mortgage from its maturity at six per cent, upon a construction of a covenant in the mortgage to pay interest at twelve per cent, and his report was confirmed by the Court.—*Held*, that the mortgagee was entitled to his costs of suit. *Thomas* v. *Girvan* (No. 2), 1 Eq., p. 314.

Mortgage—Error in decree for redemption—Decree of Court below in suit for redemption varied without costs by correcting a mistake in the calculation of interest. *McKenzie* v. *McLeod et al*, 39, p. 230.

Mortgagee joined in suit against mortgagor—A mortgage sale under power yielded a surplus of $320.29, out of which the mortgagee applied to pay into Court $246.89, being amount of a judgment against the mortgagor, which the judgment creditor sought by suit to have paid out of the surplus as against the owner of the equity of redemption in the mortgage.—*Held*, that on the mortgagee paying into Court the whole surplus, less the costs of his appearance and application, his name should be struck out of the suit. *Boyne* v. *Robinson*, 3 Eq., p. 57.

Mortgagor, Unnecessary pleadings by, Tender—In a suit for redemption when the mortgagee hampered and oppressed the mortgagor, and obstructed his suit in every possible way, *held*, the mortgagee, while entitled to the general costs of suit, would lose the costs of his own unnecessary pleadings, and would be compelled to pay the costs of any such pleadings by the mortgagor as were occasioned by his procedure.—If there had been a sufficient and unconditional tender by the mortgagor before suit, the mortgagee would have been liable for the costs of the suit. *McKenzie* v. *McLeod et al*, 4 Eq., p.72; 39 N. B. R. p. 230.

New trial—Verdict against evidence—Where the Court was of the opinion that the preponderance of evidence was greatly in favor of the defendant, against whom a verdict had been rendered by the jury, and the trial judge was not satisfied with the verdict, a new trial was ordered.—*Held* (*per* Tuck, Landry and VanWart JJ.), the plaintiff's costs to be costs in the cause to the plaintiff in any event.—*Held* (*per* Barker and Hanington JJ.), the rule should be made absolute on the payment of costs. *Maxwell* v. *Malcolm et al*, 33, p. 595.

Nominal party—In a suit to restrain the sale of property by K., an auctioneer, at

the instance of M., and for a declaration of the plaintiff's title, K. appeared and jointly answered with M.—M. thereafter undertook the conduct of the suit and alone appeared at the hearing, K. holding himself to be but a nominal party.—Judgment with costs having been given against both defendants, an application by K. to have the suit reheard for the purpose of varying so much of the decree as ordered him to pay costs, was refused. *Robertson* v. *Miller*, 2 Eq., p. 494.

Nominal plaintiff by Statute—Where an appeal under the Towns Incorporation Act, 1886, from a conviction by a police magistrate, was allowed, and the conviction quashed on the ground that the magistrate had refused to hear material evidence, the Court (Hanington, Landry, Barker and McLeod JJ., Gregory J. dissenting) refused to make the order without costs against the town of Grand Falls, who took no part in the prosecution and were only parties by virtue of the act requiring the prosecution to be in their name. *Turner* v. *Mockler et al*, 36, p. 245.

Offer to suffer judgment—Where an offer to suffer judgment was not accepted in a suit involving several issues, and the plaintiff succeeded upon but one issue entitling him to damages less than the amount of the offer, he was allowed costs of whole suit up to the date of the offer. *Barclay* v. *McAvity*, 1 Eq., p. 146.

The plaintiff, notwithstanding that she had received notice of an offer to suffer judgment by default, within the ten days allowed to her by the statute for its acceptance carried the cause down to trial and obtained a verdict therein (also within the ten days) for a sum exactly equal to the amount mentioned in the offer.—On a motion to review the taxation of the plaintiff's costs, *held* (*per* Tuck C. J., Hanington, Landry and McLeod JJ., Gregory J. dissenting), that the making of the offer in no way operated as a stay of proceedings and the taking of the cause down to trial by the plaintiff was not equivalent to a rejection thereof; and that she was, therefore, entitled to have the costs of the trial allowed to her on taxation.—Quaere: (*per* Tuck C. J.) if the verdict had been for a less amount than that for which the offer to suffer judgment was made, could the plaintiff after verdict have accepted the offer and signed judgment for the larger sum? *Sharp* v. *Trustees of School District No.* 6 *Woodstock*, 35, p. 243.

Order extending time to answer—Defendant moved to have bill dismissed for want of prosecution.—Before judgment was given refusing the motion, the defendant was served with the bill.—As it would be unnecessary to answer if his motion were allowed defendant obtained time by judge's order until after judgment on the motion was given, in which to answer.—The order directed the costs of application to be costs in the cause.—The suit proceeding to hearing, defendant was successful.—*Held*, that he was entitled to the costs of his application for time to answer, as costs in the cause in accordance with the order. *New Brunswick Railway Co. and Brown* v. *Kelly*, 1, Eq., p. 156.

Partial success in exceptions—Where exceptions are allowed in part, neither party is entitled to costs.—Where some exceptions are wholly allowed, and others disallowed, the costs are set off and the balance only is payable.—Where the costs would be nearly equal no costs are given, or they are made costs in the cause. *Barclay* v. *McAvity*, Eq. Cas., p. 468.

Partial success—Demurrer—Where some of several grounds of demurrer were overruled, costs were not allowed to either side *Trites* v. *Humphreys*, 2 Eq., p. 1.

Partial success—Referee's Report—Exceptions—Where exceptions to a referee's report were allowed in part, costs were refused to either party. *Lawton Saw Co. Ltd.* v. *Machum*, 2 Eq., p. 191.

Partial success—Interrogatories—Exceptions—Where some exceptions were allowed, and others overruled, costs were allowed to each party. *Crosby* v. *Taylor* Eq., p. 511.

Where some exceptions to interrogatories were allowed and others overruled the clerk was ordered to tax the costs of both parties and deduct one sum from the other and certify the balance due. *Pick* v. *Edwards et al*, 4 Eq., p. 151.

Partial success — Separate issues — Counterclaim—The defendant, having distrained for rent in arrears, the plaintiff brought an action for damages for a breach of the covenant to repair and for illegal distress.—The defendant denied the breach of the covenant and counter claimed for the balance of rent due over the amount received as the proceeds of the sale of goods distrained.—The issue on the claim for damages for breach of the covenant to repair having been found for the plaintiff, and the issues on the illegal distress and counter-claim for rent for the defendant, the costs in the cause should be taxed and allowed the plaintiff on the issue in his favor as if it were a separate action with no counterclaim and added to the amount of his verdict; and the costs occasioned by the issues found for the defendant and the costs of the counterclaim (the latter as though they were part of the costs of a separate action) should be taxed to the defendant and added to the verdict on the counter-claim; the smaller to be deducted from the larger and the party in whose favor is the balance to have judgment for that amount.—*Atlas Metal Co.* v. *Miller* (1889) 2 Q. B. D. 500 followed. *Gordon* v. *Sime*, 44, p. 535 (K. B. D.).

Partial success—See *St. John River S. S. Co. Ltd.* v. *Crystal Stream S. S. Co. Ltd.*, 41, p. 398.

Partition sale—Refusal to partition amicably—Where a co-tenant refused to amicably partition a piece of land, and proceeded to strip it of its timber, the costs of a partition suit were ordered to be paid by him, and made a charge upon his share of the proceeds of the sale. *Cassidy* v. *Cassidy et al*, Eq. Cas., p. 480.

Partition suit—Guardian ad litem—Application refused in a partition suit, that costs of appointing guardian *ad litem* of defendant, a person of unsound mind, not so found, and of proving her unsoundness of mind by affidavits, be borne by defendant's share in estate. *Masters* v. *Masters*, 2 Eq., p. 486.

Partition suit—Set-off by vendee of costs—Where a suit for partition of lands sold previous to the commencement of the suit established the exclusive title of the vendor, and the suit was not caused by any fault of his, the vendee made a party to the suit was held not to be entitled to deduct his costs from the purchase money. *Patterson* v. *Patterson*, 3 Eq., p. 106.

Partition suit—Unnecessary pleadings—Where in a partition suit one of the defendants did not appear at the hearing, and his answer was unsupported by evidence, and was assumed by the Court to be unnecessary, he was held not entitled to any costs. *Shields* v. *Quigley*, 1 Eq., p. 154.

Practice—Order for execution for costs—Where no time is limited by a decree in a suit for payment of costs, a further order for their payment must be taken out, after which an order for execution will be made *ex parte*. *Wright* v. *Wright*, Eq. Cas., p. 496.

Practice—Attachment for non payment of costs—On an application for an attachment for non-payment of costs pursuant to a rule, the Court allowed an affidavit to be read which was entitled in the Court and cause, but was not entitled the same as the rule.—The provisions of Order 41, r. 5 are inapplicable to a rule to pay costs, therefore it is not necessary in an application for attachment for non-payment that the rule served should bear the indorsement mentioned in Order 41, r. 5.—The Court refused to grant an attachment for non-payment of costs ordered on an appeal from a judge's order on review from a magistrate's Court where the demand was made by the attorney acting for the party entitled, without a power of attorney authorizing him to demand and receive the costs.—An attachment will not be granted if satisfaction might have been obtained by execution against the goods of the person liable, or unless it be shown that the party liable was able to pay and refused or deprived himself of the ability to pay. *R.* v. *Borden ex parte Kinnie*, 43, p. 299.

Practice — Interrogatories — The plaintiffs omitted to add any foot-note to their interrogatories as provided by sec. 44 of the Supreme Court in Equity Act, C. S. (1903) Chap. 112.—On a motion to set aside an order setting exceptions to the answer down for hearing.—*Held*, that by a proper construction of the section, such an omission was equivalent to a requirement that each defendant should answer all the interrogatories subject to a right to costs should any of the interrogatories be inapplicable to that defendant. *Golden et ux.* v. *McGivery et al*, 4 Eq., p. 42.

Principal and agent—Accounting—Costs of suit against an agent for an account ordered to be paid by him where he had disregarded requests for an account, and had filed an improper account in the suit. *Simonds* v. *Coster*, 3 Eq., p. 329.

Principal and agent—Preparing receipt for securities surrendered—Costs disallowed to an estate agent of preparing a receipt containing schedule of leases and securities delivered up to the principal. *Id.*

Privy Council decree—Effect re costs—In a suit against L. and R., the bill was dismissed by this Court with costs.—An appeal to the Supreme Court was allowed with costs.—On appeal by R. only to the Judicial Committee of the Privy Council, it was ordered that the decree of the Supreme Court should be discharged as against the appellant with costs, and that the decree of this Court should be restored.—*Held*, that costs under the original decree should be taxed to L. *Fairweather* v. *Robertson*, 3 Eq., p. 276.

Proof of facts, admission of which was asked—Where notice to admit facts is given under Order 32, r. 4, it is the duty of the party receiving the notice to admit the facts, or give reasons why it is not necessary to admit them, otherwise the costs of the proof must be borne by that party. *Murchie* v. *Mail Publishing Co. Ltd.*, 42, p. 36, C. D.

Prosecution of indictable offences—A municipality is liable for the fees and expenses of a justice of the peace or a constable payable in relation to the prosecution of indictable offences only where they have been certified to be correct by the Attorney General, or other counsel acting for the Crown, and have been ordered to be paid by the judge presiding at the Court in which the indictment is presented.—The Act of Assembly, 57 Vict., c. 19, s. 1, whereby certain expenses in criminal prosecutions are made chargeable upon the municipalities is not *ultra vires* of the provincial legislature. *McLeod* v. *The Municipality of Kings*, 35, p. 163.

Rectification of deed—Rectification decreed of misdescription in conveyance of

land arising from mutual mistake of grantor and grantee, as against a subsequent purchaser with notice of mistake, but without costs. *King* v. *Keith*, 1 Eq., p. 138.

Redemption suit—Collateral security—Balance due mortgagor—The mortgagee of a vessel took possession of her and transferred her to a clerk in his employ, who immediately re-transferred her to the mortgagee.—The consideration expressed in both instances was $2,000.—The mortgagee retained the management and possession of the vessel until her loss, without making an effort to sell her, though she was not paying expenses, and was depreciating in value from age, and the market demand for vessels of her class was declining.—In a suit to redeem a mortgage on land given as collateral security with the mortgage on the vessel, *held*, that there had not been a valid exercise of the power of sale vested in the mortgagee, and that he was chargeable with the value of the vessel at the time he took possession.—In the above suit a balance was found due the mortgagor by the mortgagee.—*Held*, that the mortgagee should pay the costs of the suit. *Kennedy* v. *Nealis et al.*, 1 Eq., p. 455.

See also *Mitchell* v. *Kinnear*, 1 Eq., p. 427.

Referee's costs, Payment of—A referee having entered upon a reference is not entitled to payment of his fees from day to day as a condition of proceeding with the reference. *Ex parte Sweeney*, 2 Eq., p. 269.

Referee's report — Exceptions — Costs of suit—Costs are not to be adjudicated upon in the argument on exceptions to a referee's report, but where such argument was treated by both parties as in the nature of a final hearing and costs were refused to both parties, such refusal should not be disturbed on appeal. *Jones* v. *McKean*, 34, p. 44.

Reference re partnership accounts—In May, 1870, plaintiff and C. B. formed a partnership for manufacturing purposes under a verbal agreement to contribute equally to the capital stock and share equally in the profit and loss.—No amount was agreed upon as the capital, or when each was to contribute his proportion of it, or in what manner the business was to be managed.—In June following, J. B. was taken into partnership under the agreement that each partner should contribute a third of the capital stock and share equally in the profit and loss.—The plaintiff managed the business until August, 1871, when C. B. took over the management and forbade the plaintiff interfering with the business.—In a suit brought in October, 1872, for a dissolution of the partnership and an account, it was found on a reference to take the account that the plaintiff had contributed $4,312.97 C. B., $10,407. and J. B., $7,291.—It appeared that under the management of C. B. the business was mismanaged and neglected, that he did not keep the partnership accounts in the firm's books, or in books accessable to the plaintiff; that he repeatedly refused from the time he assumed the management to render an account to the plaintiff, or to have a settlement of their accounts.—That he gave the plaintiff false information of the assets and liabilities of the business, and withheld information asked for, and that the plaintiff had no knowledge of the amount C. B. and J. B. had contributed to the capital of the firm.—*Held* (1), that plaintiff's costs of the hearing should be paid by C. B. and that the costs of the reference should be paid out of the partnership assets after payment of the partnership debts, and if the assets proved insufficient, then by C. B.; (2), that C. B. should receive no remuneration for his services in the management of the business. *Young* v. *Berryman et al*, Eq. Cas., p. 110.

Service of papers—Failure to file—Where an application for a judgment, as in case of a non suit, was refused in a case where it appeared that the plaintiff had omitted to file a joinder of issue, though the same had been served on the defendant's attorney, the plaintiff was deprived of costs as a punishment for his carelessness. *Gallagher* v. *Wilson*, 35, p. 238.

Set-off—Solicitor's lien—A defendant is entitled to set off interlocutory costs in the same cause, payable to him by the plaintiff, against the damages and costs recovered against him in the final result of the cause; notwithstanding the objection of the plaintiff's attorney's lien which only attaches on the general result of the action. *Anderson* v. *Shaw*, 35, p. 280.

Set-off against costs—Solicitor's lien—Plaintiffs recovered a judgment in debt in the Supreme Court against R.—Two days previously R. executed a bill of sale of all his property to B. and the plaintiffs brought suit to have the bill of sale set aside as a fraudulent preference.—A settlement was made by B.—R., being in insolvent circumstances and leaving the province after the commencement of the suit, no further step after the filing of the bill was taken by the plaintiffs against him.—An application by R.'s solicitor to dismiss the suit for want of prosecution was granted with costs.—The plaintiffs now applied to set off their judgment against such costs.—*Held*, that the lien of R.'s solicitor for his costs was paramount to the equities between the parties, but under the circumstances the application should be refused without costs. *Worden et al* v. *Rawlins et al*, 1 Eq., p. 450.

Slander—Imperial Statute, 21 Jac. 1, c. 16—The Statute 21 Jac. 1, c. 16 is in force in this province, therefore a plaintiff in an action of slander, who recovered damages in an amount less than forty shillings, was not allowed costs. *Gallagher* v. *O'Neill*, 34, p. 194.

Solicitor, Costs against personally—An order for costs against a solicitor personally will not be made (in the absence of proof of misconduct) on the ground that nothing was involved in the appeal except costs of the appeal. *R.* v. *Gerow ex parte Gross et al*, 43, p. 352.

Solicitor's lien for costs — *See* SOLICITOR. Also *supra*, col. 188.

Special case—The Court has the same power to deal with the costs of a special case as in the case of a suit instituted by bill, and in awarding them will be governed by the same rules. *Mitchell et al* v. *Kinnear et al*, 1 Eq., p. 427.

Specific performance—Lien allowed—Where in a suit for specific performance of an alleged agreement to assign a leasehold interest in land with building thereon, in consideration of an indebtedness to the plaintiff by the defendant for repairs to the building, it appeared that the plaintiff went into possession, collected the rents, and made repairs, but that these acts were consistent with the evidence of the defendant that the plaintiff was given the management of the property for the purpose of paying defendant's indebtedness to him, the Court refused to grant specific performance, but decreed that the plaintiff was entitled to a lien on the property for the amount of the debt and any money properly expended in respect of the property.—Under above circumstances neither party was allowed costs of suit. *Johnson* v. *Scribner et al*, Eq. Cas., p. 363.

Specific performance — Misdescription—The defendant purchased from plaintiff at auction, a property described in the advertisement of sale as "No. 171 Chesley Street" and signed a bidding paper containing a similar description.—The defendant supposed the property fronted on Chesley street.—As a matter of fact it was distant about one hundred feet from Chesley street, had no access thereto, and fronted on an alley.—Chesley street had a civic water supply.—The alley had no water supply.—It appeared that the plaintiff's agent had represented to the auctioneer that the house was on Chesley street, and to get the number of the house thereon for the advertisement they had consulted the street directory and found that the address of a tenant on the premises was there given as "171 Chesley."—No other evidence was offered to show that the premises were known as "No. 171 Chesley Street".—In an action for specific performance, *held*, that the property did not answer the description of the property the defendant had contracted to buy, and the defendant could not be compelled to accept it.—*Held*, not a case of mutual mistake and therefore the costs must be borne by the plaintiff. *Porter* v. *Rogers*, 42, p. 82, C. D.

Stenographer's omission to file a record of the trial—No costs—Trial *de novo*.—See *Bourque* v. *Record Foundry & Machine Co.*, 38, p. 239.

Supreme Court of Canada—Appeal—Attaching for costs of—A rule *nisi* for an attachment for the non-payment of costs taxed to the plaintiff on appeal to the Supreme Court of Canada, was made absolute. *Bank of Nova Scotia* v. *Fish*, 33, p. 604.

Supreme Court of Canada—Appeal—When a judgment of the Supreme Court of Canada has been certified to the clerk of the Court, as provided by R. S. C., c. 105, s. 67, it becomes a judgment of this Court, and it is not necessary to obtain leave to issue an execution to enforce the payment of costs awarded to the applicant by the said judgment. *Ex parte Jones*, 35, p. 108.

Trial, Adjournment of—The practice on refusing a rule for judgment as in case of a nonsuit, for not proceeding to trial according to notice, on plaintiff giving a peremptory undertaking, is to impose costs of the day as a condition. *Jones* v. *Miller*, 37, p. 585.

Trial, Issue raised at—Where the defendant succeeded upon a defence raised for the first time at the trial and of which the plaintiff had no previous notice, costs were refused. *Floyd* v. *Hanson*, 43, p. 339, C. D.

Trustees—Action to recover trust property—C. wrongfully appropriated merchandise in his possession as one of the trustees of P.'s estate for the purposes of his own business.—Subsequently it came into the hands of the defendants under a general assignment to them by C. for the benefit of his creditors.—A suit having been brought by the plaintiff, as one of P.'s trustees, against C. and the defendants, for the recovery of any assets of the P. estate in their hands, the defendants offered to give up the merchandise to the plaintiff if he could identify it.—This could not be done nor could its value be determined by the plaintiff or the defendants until an enquiry was made by a referee of the Court.—*Held*, that the defendant trustees were not liable for the costs of the suit.—Where a trustee refusing to join with his co-trustee in a suit for the recovery of trust property was made a defendant to the suit, costs thereby incurred were not allowed against him. *Belyea, Trustee Estate of Daniel L. Patton* v. *Conroy et al*, 1 Eq., p. 227.

Trustees—Application for removal—Trustees applying to be removed on a ground satisfactory to the Court, and not from mere desire or caprice, will be allowed the costs of their application out of the trust estate. *In re Charles Merritt's Trusts*, 1 Eq., p. 425.

Trustees—Breach of trust—Where trustees brought a bill ostensibly for the construction of a will but actually to get an order excusing them from the result of an

unintentional breach of trust, they were refused costs, even though the order was granted. *Simpson* v. *Johnson*, 2 Eq., p. 333.

Trustees—Defendants in bondholders suit—In a suit by the holder of debentures to enforce a trust mortgage, the trustees made defendants in the suit were disallowed costs of a part of their answer setting up that the suit should have been brought in their name. *Shaughnessy* v. *The Imperial Trusts Co.*, 3 Eq., p. 5.

Trustee, Insolvent—Disputed claim—Bill for receiver—An insolvent executor and trustee disputed a creditor's claim, and the creditor filed a bill for the appointment of a receiver and the payment of his debt.—The appointment of a receiver was opposed by all other parties interested in the estate.—Pending the suit the creditor brought an action at law upon his debt and recovered much less than the amount originally demanded of the executor.—The debt was then paid. —*Held*, that the bill should be dismissed with costs. *Mills* v. *Pallin*, 1 Eq., p. 601.

Trustees—Suit to compel payment of a legacy.—Trustees who refuse to pay over a legacy when they have no reasonable doubt but that it should be paid, will not be allowed any costs in an action to compel its payment.—Quaere, in such a case are not trustees personally liable for the costs of the proceedings? *Taylor* v. *McLeod et al, Trustees*, 4 Eq., p. 262.

Will—Bequest—Suit for construction—When a testatrix gave a legacy for a certain purpose but through error wrongly designated the legatee so that there were two claimants to the legacy, the costs were ordered paid out of the residuary estate, not out of the legacy. *Jones, Executor* v. *Saint Stephen's Church et al*, 4 Eq., p. 316.

Will—Executor's costs—On proof of a will in solemn form, under C. S. 1903, c. 118, the testator's widow filed allegations alleging incapacity, and fraud and undue influence on the part of the executor and testator's sisters.—The executor gave the instructions to the solicitor for and took a remote interest under the will; one of the testator's two medical attendants pronounced him to be incapable of making a will, and the other deemed him capable; the judge of probate refused to admit the will to probate.—He also ordered that the executor should receive no costs, and should personally pay costs of the widow, including stamps.—*Held*, reversing the judgment of the judge of probate, that the will should be admitted to probate and the ordinary order made as to costs in the Probate Court.—Costs of the appeal were allowed to the widow out of the estate, to be taxed as between party and party, and to the executor to be taxed as between solicitor and client. *In re Estate William John Davis*, 40, p. 23.

2. Scale of Costs.

Equity Court—C. S., c. 119—The provision in the table of fees of the Supreme Court in Equity, c. 119, C. S., that for services not therein provided for, the fees are to be those allowed on the Common Law side of the Supreme Court, applies to the table of fees in the Supreme Court Act, 60 Vict., c. 24 (1897). *McPherson* v. *Glasier*, 1 Eq. p. 649 (A. D. 1899.)

Equity Court—Attendance on clerk—Brief—An order *nisi* to set aside with costs an order setting a cause down for hearing was made absolute.—The order absolute was drawn up by the clerk at the instance of defendant's solicitor with an appointment to settle the minutes. At the taxation of the defendant's costs the clerk allowed $1.34 for attendance on taking out the order *nisi* and $1.34 for attendance on the order absolute. By the table of fees (c. 119, C S.), solicitor attending clerk on every decretal order is allowed $1.34 and for all other services not provided for in the table the like fees as are allowed to attorneys on the common law side of the Supreme Court.—On the common law side a fee of twenty cents is allowed for every attendance on the clerk.—*Held*, that the order absolute was neither a decree nor a decretal order, but a special order, and that each attendance should be taxed at twenty cents.—The clerk on the taxation of the above costs allowed five dollars for brief, this being the fee allowed in the table of fees to attorneys on the common law side of the Supreme Court (c. 119, C. S. N. B.) and a service for which no provision being made under the table of fees of the equity side of the Court the same fees are to be allowed as on the common law side.—The table of fees of the equity side provides a fee of twenty cents per folio for drawing bill, answer, plea, demurrer, or other writing, not otherwise provided for, and ten cents per folio for copy.—*Held*, that brief should be taxed per folio as a writing not otherwise provided for.—Costs allowed of abbreviating affidavits used on the application for the above order, and of making copies of abbreviations. *Chase* v. *Briggs*, Eq. Cas., p. 80.

Excessive costs—The Court will not interfere with a conviction on the ground that the costs are excessive, where it is not shown in what particular they are excessive. *R.* v. *Davis ex parte Vanbuskirk*, 38, p. 335.

Excessive costs—Several convictions at same time—Where several convictions are made against the same person for distinct offences at the same time, the magistrate is justified in imposing the costs of conveying to gaol in each conviction.—If the costs thus imposed prove excessive the excess should by amendment be stricken out. *R.* v. *Steeves, ex parte Richard*, 42, p. 596.

Excessive costs—While costs are in the discretion of the Court appealed to, the

power to allow such costs is limited to such costs as are strictly just and reasonable. *R.* v. *Wilson ex parte Cronkhite et al*, 44, p. 69.

Supreme Court scale, Appeal against—The Court en banc has jurisdiction to review the discretion exercised by a judge in certifying under the act 60 Vict., c. 28, s. 74, that there was good cause for bringing the action in the Supreme Court. *Cormier* v. *Boudreau*, 36, p. 6.

3. Security for Costs.

Affidavit in reply to demand for security—An affidavit, by one not a party to the transaction, which simply substantiates an indebtedness due the plaintiff but gives no indication of the source of information or other suggestion that the deponent actually possesses the knowledge sworn to, is not sufficient to offset a demand for security for costs. *Aiton* v. *McDonald*, 2 Eq., p. 324.

Appeal, Costs of—An application for security for costs of an appeal on the ground that the appellant would not be able to pay the costs, if the appeal should be dismissed with costs, must be made promptly.—Where notice of appeal was served on the seventh of May and notice of an application for security was served on the second day of June in time for the first session of the Appeal Court after the making of the order appealed from, it was refused on the ground of delay, although a demand of security had been served on the eleventh of May and security had been refused. *R.* v. *Gerow ex parte Gross et al.* 43, p. 352.

Bond—Approval by a justice called in by reason of sickness—A bond for security for costs under 49 Vict., c. 53, approved of by a justice who has been called upon to continue a trial commenced before the justice who issued the first process, and who was unable by reason of illness to conclude the trial, is sufficient. *Temperance and General Life Assurance Co.* v. *Ingraham*, 35, p. 558.

Defendants, Several—But one application may be made for security for costs where there are several defendants and the bond should be for the benefit of all the defendants. *Stewart* v. *Harris et al*, Eq. Cas., p. 143.

Equity Court—The bond for security for costs in the Equity Courts, is to the clerk of the Court, and in the sum of $500.00. *Walsh* v. *McManus*, Eq. Cas., p. 86.

Executors—An executor has to pledge his own credit for the costs of a suit against the estate; he is therefore entitled to personal security irrespective of any debt due by his testator. *Alton* v. *McDonald*, 2 Eq., p. 321.

Foreclosure suit—It is not a ground for refusing an order for security for costs, where plaintiff is resident abroad, that the suit is for foreclosure of mortgage. *Buchanan* v. *Harvie*, 3 Eq., p. 1.

Foreign company with local branch—The plaintiffs, who were a company incorporated abroad but having a place of business in the province, brought an action against the defendant in a justice's Court for goods sold and delivered.—Security for costs was not demanded at the trial and none was given.—The case having been brought up on review and referred to the Court, *held* (*per* Tuck C. J., Landry, Barker and McLeod JJ., Hanington and VanWart JJ. dissenting), that the omission to give security for costs did not deprive the magistrate of jurisdiction to try the case.—*Held* (*per* Tuck C. J.), that 49 Vict., c. 53, s. 1 does not apply to companies incorporated abroad, but having a place of business within the province.—*Held* —(*per* Barker J), that the defendant by not demanding the security at the trial waived the benefit of the said Act, 49 Vict., c. 53. *Massey-Harris Co Ltd.* v. *Stairs*, 34, p. 595.

Foreign plaintiff—Claim disputed—Security for costs will be ordered against a plaintiff resident out of the jurisdiction in a suit against an administrator for the administration of his intestate's estate, where the estate is insolvent, and the plaintiff's claim against the estate is not admitted. *Aiton* v. *McDonald*, 2 Eq., p. 324.

Judgment creditor—Where a person resident out of the jurisdiction having obtained a judgment in the Supreme Court for a large amount, which was defeated by a bill of sale given by the judgment debtor, brought a suit to have the bill of sale set aside as a fraudulent preference he was required to give security for the costs of the judgment debtor made a party to the suit. *Thibaudeau* v. *Scott et al*, 1 Eq., p. 505; *Gould* v. *Britt*, 2 Eq., p. 453.

Quo warranto—Application by citizen of little or no means—See *Ex parte Gallagher*; *In re Fryers*, 41, p. 545.

Recognizance or bond—Quaere, whether security for costs of suit may be by recognizance under s. 286 of Act 53 Vict., c. 4, instead of by bond.—Security for costs of suit was ordered to be by recognizance.—Security not being given it was ordered that the bill should stand dismissed unless security for costs was put in within a limited time.—Before the expiration of the time, security was put in by bond in the usual form.—Upon an application to set the bond aside and for its removal from the files of the Court on the ground that the security should be by recognizance.—*Held*, that in view of the second order, security was properly put in by bond. *Brown* v. *Sumner*, 2 Eq., p. 126.

Referee's costs—*Semble*, where special circumstances show a probability that the

fees of a reference will not be paid, the Court will require that the referee's fees be secured to him before ordering the reference to be proceeded with. *Ex parte Sweeney*, 2 Eq., p. 269.

Temporary residence to prosecute action—A foreigner, usually residing abroad, who, before the order for security is granted, has *bona fide* come to reside temporarily within the jurisdiction for the purpose of prosecuting his action, cannot be compelled to give security for costs.—(*Per* Hannington, Landry, Barker and VanWart JJ., Tuck C. J., and McLeod J. dissenting). *Violette* v. *Martin*, 35, p. 74.

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4. Taxation of Costs.

Affidavit with exhibits annexed—O. 38, r. 3, O. 65, r. 27 (20)—It is within the discretion of a judge sitting in chambers to act upon an affidavit to which exhibits have been annexed, contrary to O. 38, r. 23, but the party offering such affidavit may be deprived of costs, under O. 38, r. 3 or O. 65, r. 27 (20). *D'Israeli Asbestos Co.* v. *Isaacs et al*, 40, p. 431.

Allocatur—An allocatur is not an order to tax but simply fixes the amount for the registrar if in his judgment it is a proper case for taxing a counsel fee. *Rainsford* v. *McVey et al*, 40, p. 381.

Certiorari—Garnishee order—It is no ground for certiorari that the County Court judge ordered the costs of a garnishee order and application to be taxed by the clerk of the Supreme Court instead of taxing them himself. *Ex parte Bowes*, 34, p. 76.

Election petition—The costs on a rule setting aside an order fixing time for hearing under The New Brunswick Controverted Elections Act, C. S. 1903, c. 4, s. 15, include the costs, if any, of the order set aside, and the application to set it aside, but not the costs of subpoenaing witnesses, etc. for the trial fixed by the order so rescinded, unless a special order be made.—The Court will not rehear or alter its order after it has been made and entered provided that it accurately expresses the intention of the Court.—*Held* (*per* McLeod J.), no costs are allowable for correcting an action of an officer of the Court. *Owens* v. *Upham*, 39, p. 281.

Error of officer of Courts—No costs are allowable for correcting an action or error of an officer of the Court. *Bourke* v. *Record Foundry & Machine Co.*, 38, p. 239; *McKenzie* v. *McLeod et al*, 39, p. 230; *Owens* v. *Upham*, 39, p. 281.

Foreclosure—Where a bill in a foreclosure suit was of unusual length from the insertion of needless recitals and repetitions contrary to the provisions of the Supreme Court in Equity Act 1890, s. 22, the clerk was directed to tax the costs of the bill on the basis of twelve folios. *Barnaby* v. *Munroe et al*, 1 Eq., p. 94.

Judge in Equity Court, Power of—A judge sitting in Equity is not authorized to fix and determine *en bloc* the amount of costs to be paid the respective solicitors in a suit; such costs must be ascertained by the proper taxing officer by taxation in the usual way. *The Consolidated Electric Co. Cases*, 34, p. 36.

Liquor License Act—The magistrate has the right under section 62 of the act to award costs of conviction. *Ex parte Flanagan*, 34, p. 326.

Liquor License Act, C. S. 1903, c. 22—Upon a conviction under the Liquor License Act, C. S. 1903, c. 22, for unlawful selling, no costs can be taxed for serving the defendant with notice of adjournment of hearing. —A conviction will not be set aside because a magistrate taxed witnesses' mileage fees, relying on his own knowledge of distances and without affidavits, there being no evidence that the mileage was incorrectly allowed, and the magistrate having sworn that he was acquainted with the witnesses and familiar with the distances they had to travel. —A constable is only entitled to five cents per day for attendance upon the trial. *R.* v. *Bassett ex parte Davidson*, 39, p. 271.

Prolixity—In an action in the County Court the fact that the special matters set out in a notice of defence could be given in evidence under the general issue is not necessarily a good ground for an application to strike the said notice out, though it might be a matter for consideration in the taxation of costs. *Bennett* v. *Cody*, 35, p. 277.

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5. Witness Fees.

Liquor License Act, C. S. 1903, c. 22—A constable is only entitled to five cents per day for attendance on the trial. *R.* v. *Bassett ex parte Davidson*, 39, p. 271.

COURTS.

1. **Supreme Court of Canada.**
2. **Supreme Court of N. B.**
3. **Equity Court.**
4. **County Courts.**
5. **Probate Courts.**
6. **Inferior Courts.**
   a. GENERALLY.
   b. REVIEW.
7. **Police Courts.**
8. **Miscellaneous.**

1. Supreme Court of Canada.

Attachment for costs of appeal to—A rule *nisi* for an attachment for the non-payment of costs taxed to the plaintiff on appeal to the Supreme Court of Canada, was made absolute. *Bank of Nova Scotia* v. *Fish*, 33, p. 604.

Death of a defendant—Delay in pursuing appeal—Upon the death of one of several defendants to a suit in the Supreme Court in Equity the plaintiff may continue the suit by applying for administration *ad litem* or by application to the Equity Court under s. 116 or s. 119 of the Supreme Court in Equity Act, C. S. 1903, c. 112, and therefore when one of several defendants died after judgment of the Supreme Court en banc confirming a decree of the Equity Court dismissing the plaintiff's bill with costs, and the plaintiff delayed his appeal to the Supreme Court of Canada for eight months thereafter on the ground that no administration had been taken out, *held*, this was no excuse for the delay and the judgment of McLeod J. refusing to allow the appeal under s. 71 of the Supreme Court Act, R. S. C. 1906, c. 139, was confirmed.—*Held*, also, that the mistake of the solicitor as to the procedure on defendant's death, even though supported by opinion of counsel, was not a sufficient excuse.—*Held* (*per* McLeod J.), the plaintiff (appellant) could have filed a suggestion and proceeded under s. 85 of the Supreme Court Act, R. S. C. 1906, c. 139. *Harris et al* v. *Sumner et al*, 39, p. 456.

Judgment—Where a judgment of the Supreme Court of Canada has been certified to the clerk of the Supreme Court of N. B., as provided by R. S. C., c. 105, s. 67, it becomes a judgment of that Court, and it is not necessary to obtain leave to issue an execution to enforce the payment of costs awarded to the applicant by the said judgment. *Ex parte Jones*, 35, p. 108.

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2. Supreme Court of N. B.

Bail bond taken in inferior court, Action on—The Supreme Court has jurisdiction to try an action against bail given in a case originating in an inferior court and has power to give such relief to the bail as justice may require.—The former practice of the King's Bench in England of refusing to try such actions and of compelling them to be brought in the inferior court has never been followed in this province. *Jack* v. *Bonnell*, 35, p. 323.

Judge—Public Health Act—A judge of the Supreme Court has no jurisdiction under section 73 of the Public Health Act (C. S. 1903, c. 53) to order a county council to pay an amount assessed for the expenses of a local board under section 72 of the Act on the application of the chairman without the authority of the board acting in its corporate capacity.—(*Per* Hanington and McLeod JJ., Tuck C. J. dissenting). *Ex parte Municipality of York, re Local Board of Health for District No. 3*, 37, p. 546.

Judge—Jurisdiction re certiorari—A judge of the King's Bench Division has jurisdiction under O. 62, rr. 1-3 of the Judicature Act, 1909, in certiorari proceedings, and the jurisdiction there given is not limited by the Act 3 Geo. V., c. 23 (1913) to the Appeal Division or a judge thereof. *R.* v. *Borden ex parte Kinnie*, 42, p. 641.

Trespass—Private Act—An arbitration clause in a private act of parliament authorizing expropriation of land will not oust the jurisdiction of the Court, and an action for damages for trespass will lie, unless the necessary steps are taken under the act to vest the power to exercise the right, or to do the thing for which compensation would be due under the act. *Barter* v. *Sprague's Falls Mfg. Co.*, 38, p. 207.

See also APPEAL, COSTS, CROWN PRACTICE.

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3. Equity Court.

Arrest under execution for costs—An arrest under an execution issued under an order of the Equity Court against the body, for enforcement of its decree directing payment of taxed costs on dismissing the plaintiffs' bill, operates as a satisfaction, and an execution issued against the goods of the plaintiffs for the same demand will be set aside. (*Per* Hanington, Landry, Barker and McLeod JJ., Tuck C. J. dissenting, and Gregory J. no part.)—A County Court judge has no jurisdiction under the act Respecting Arrest, Imprisonment and Examination of Debtors, (Con. Stat. 1903 c. 130), to discharge persons in custody under such executions. *Petropolous et al* v. *Williams Co. Ltd. et al*, 38, p. 146.

Concurrent jurisdiction in Probate Court—where a bill was brought *inter alia* to allow the accounts of executors, the Court refused to entertain this portion of the bill, as the matters could be dealt with more expeditiously and with less expense in the Probate Court. *Simpson* v. *Johnston*, 2 Eq, p. 333.

In matters where the Chancery and Probate Courts have concurrent jurisdiction the Chancery Court will not act when the question involved can be more conveniently and inexpensively disposed of in the Probate Court, unless some special reason be shown why the Probate Court should not act. *Kennedy, Adm.* v. *Slater, Adm.* 4 Eq., p. 339.

Jurisdiction of, questioned re assessing damages—A dam erected in 1858 across a natural stream upon land owned by the defendants, and used for the defendant's

purposes, was in 1891 altered in respect of its devices for carrying off surplus water by the defendants' immediate predecessors in title, contrary to the protest of the plaintiff, a riparian owner since 1880.—In 1900 a portion of the dam was carried away by a freshet, owing, it was alleged by the plaintiff, to the insufficiency of the alterations in the dam, and it was alleged that material damage was done to the plaintiff's land, but the evidence as to its precise nature and extent was slight and unsatisfactory, and the defendants denied any liability.—*Held*, that the questions involved being the liability of the defendants, and the extent of the injury sustained by the plaintiff, and the Court doubting its jurisdiction to assess the damages, the bill should be dismissed, and the plaintiff left to his remedy at law. *Saunders* v. *Wm. Richards Co. Ltd.*, 2 Eq., p. 303.

Jurisdiction re accounts—A Court of Equity has jurisdiction in accounts where there are various interests involved, and accounts between different parties to be taken, so that the matter cannot be completely dealt with by a Court of law in one action. *Armstrong* v. *Robertson et al*, Eq. Cas., p. 249.

In disputes between accounting parties, it does not necessarily follow because an action could be maintained at law, that the Courts of Equity have no jurisdiction.—It is a matter of discretion as to which tribunal has the more efficient method of determining the case. *Cushing Sulphite Fibre Co. Ltd.* v. *Cushing*, 2 Eq., p. 539.

Jurisdiction — Accounts — Co-owners —Ships—The jurisdiction of the Court in Equity in a suit for account between co-owners of a ship has not been taken away by Act 54-55 Vict., c. 29 (D), which confers a like jurisdiction upon the Exchequer Court in Admiralty; any discretion the Court of Equity may have as to the exercise of its jurisdiction must depend upon the circumstances of each suit. *Penery* v. *Hanson*, 2 Eq. p. 233.

Jurisdiction re contracts made under circumstances of fraud or oppression—While parties are competent to contract to render themselves liable to pay any rate of interest which they agree to pay, Courts of Equity have held that the repeal of the usury laws has not interfered with their jurisdiction to relieve those who have been lead into making improvident bargains unconscionable in their nature and entered into under circumstances of fraud or oppression.—By fraud in such cases is not to be understood deceit or circumvention but an unconscientious use of the power arising out of the circumstances and conditions. (*per* Barker J.). *MacPherson* v. *McLean*, 34, p. 372.

Jurisdiction re guardians — *Semble*, though the Equity Courts of this province have jurisdiction to appoint a guardian of an infant residing here but domiciled elsewhere, it will not supersede the guardian appointed by the Court of the infant's domicile unless necessary to the infant's interest. *Leasby* v. *The Home Circle et al*, Eq. Cas., p. 533.

Jurisdiction restraining legislation—Circumstances considered under which a Court of Equity will interfere by injunction in the exercise of its jurisdiction in personam to restrain an application to Parliament for a private Act. *The Corporation of the Brothers of the Christian Schools* v. *Attorney General of N. B. and the Roman Catholic Bishop of Saint John*, Eq. Cas., p. 103.

Jurisdiction re specific performance—The exercise of the jurisdiction of Equity as to enforcing specific performance of agreements is not a matter of right in the party seeking relief, but of discretion in the Court to be exercised in accordance with fixed rules and principles. *Calhoun* v. *Brewster*, 1 Eq., p. 529.

Trust fund, Competing parties for—53 Vict., c. 4, s. 212—The Court will not as a rule under section 212 of the Supreme Court in Equity Act, 1890 (53 Vict., c. 4) determine the rights of competing parties to a fund in the hands of trustees.—The section is intended to enable the Court to advise executors and trustees in matters of discretion vested in them. *In re Martha A. Foxwell's Estate*, 1 Eq., p. 195.

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4. County Courts.

Costs, Depriving plaintiff of—43 Eliz., c. 6—The Imperial Statute, 43 Eliz., c. 6, authorizing a judge to certify to deprive a plaintiff of costs, is in force in this province, and is made applicable to County Courts by section 68 of the County Court Act, 1897. *Warman* v. *Crystal*, 35, p. 562.

County Courts Jurisdiction and Constitutional law—Quaere:—Whether the Criminal Code, 1892, s. 540, relating to the jurisdiction of County Courts in criminal matters is not *ultra vires*. *Ex parte Wright*, 34, p. 127.

Courts (Not) of Oyer and Terminer—The County Courts of New Brunswick are not Courts of Oyer and Terminer and general gaol delivery; therefore the Court refused to discharge, on habeas corpus, a prisoner who had been committed for trial for an offence against the provisions of the Criminal Code, 1892, s. 270. *Ex parte Wright*, 34, p. 127.

Judge's jurisdiction re Aliens Act—The judge of a County Court has no jurisdiction to convict for an offence under the act to restrict the importation and employment of aliens (60-61 Vic., c. 11), and the act in amendment thereof (1 Edw. 7, c. 13),

for an offence not committed within his territorial jurisdiction. *R.* v. *Forbes ex parte Chestnut*, 37, p. 402.

Judge's jurisdiction re discharge of debtors—In discharging or refusing to discharge a debtor who has made a disclosure under 59 Vict., c. 28, the judge or other officer is acting judicially and not ministerially, therefore the Supreme Court en banc refused to make an order under 60 Vic., c. 28, s. 15 commanding the judge of the County Court of S. to discharge a debtor who had made a disclosure before him. *Ex parte Keerson*; *In re Merritt* v. *Keerson*, 35, p. 233.

Judge's jurisdiction re habeas corpus—A judge of a County Court has no jurisdiction to grant an order under the Habeas Corpus Act (C. S., c. 41) where the person applying is not confined within a county of which he is a judge. *R.* v. *Wilson ex parte Irving*, 35, p. 461.

Judge's jurisdiction re persons in custody under execution of Equity Court—A County Court judge has no jurisdiction under the act Respecting Arrest, Imprisonment and Examination of Debtors, (Con. Stat., 1903, c. 130) to discharge persons in custody under an execution issued by the Equity Court to enforce its decree. *Petropolous et al* v. *Williams Co. Ltd. et al*, 38, p. 146.

Jurisdiction of judge to order new trial—The power of ordering a new trial, unless the plaintiff consents to a reduction of damages is vested in the judges of the County Courts under section 68 of the County Courts Act. *Vanbuskirk* v. *VanWart*, 36, p. 422.

Jurisdiction re amount — Reducing claim—A plaintiff in an action in the County Court where the particulars show a demand beyond the jurisdiction, may bring the amount within the jurisdiction by proof of payments. *Patterson* v. *Larsen*, 37. p. 28.

Jurisdiction re amount—St. John County Court—See *Simonds* v. *Hallett*, 34, p. 216.

Jurisdiction re amount of counterclaim—To an action in the County Court on a promissory note for $300. the defendant pleaded the general issue and gave notice of set-off of a claim greatly in excess of the jurisdiction of the Court in debt or assumpsit; alleging that he had to pay the amount on certain other promissory notes outstanding between them which the plaintiff had agreed to pay; and claimed judgment for the excess of the set-off over the plaintiff's claim to the amount of $400.—*Held*, that the judge of the County Court had no jurisdiction to entertain the set-off, no abandonment of any part of the defendant's claim having been made to bring the amount within the jurisdiction of the Court. *Windsor* v. *Young*, 43, p. 313.

Jurisdiction re counterclaims—The jurisdiction in respect to counterclaims conferred upon County Courts by "The County Courts Act," C. S. 1903, c. 116, as amended by the Act 5 Geo. V., c. 25, and enlarged by "The Judicature Act, 1909" is confined to claims for an amount over which the Court would have had jurisdiction had the defendant sought to have recovered the subject matter of the counterclaim by suing therefor as plaintiff in the County Court. *Canadian Laundry etc. Co. Ltd.* v. *Ungar's Laundry etc. Co. Ltd.*, 44, p. 423.

Jurisdiction re Intercolonial Railway—W. shipped two trunks by the Intercolonial Railway and received a bill of lading in which she was named as consignee.—The railway agent delivered the trunks to another party on demand and without presentation of the bill of lading.—W. sued the Government Railways Managing Board in a County Court, under 9-10 Edw. VII, (Dom.), c. 26, for damages caused by the loss of the trunks, alleging negligence, and recovered judgment. —On appeal, *held*, there was sufficient evidence of negligence on the part of the railway agent.—The cause of action was the breach of duty by negligently misdelivering plaintiff's goods, and therefore plaintiff was entitled to sue in a County Court, under 9-10 Edw. VII (Dom.), c. 26.—While the Crown in its operation of the Intercolonial Railway is not subject to the common law in regard to carriers, it is made liable for negligence of its servants on the Intercolonial Railway, resulting in loss of goods, by the Government Railway Act, R. S. C. 1906, c. 36, and the Act 9-10 Edw. VII (Dom.), c. 19, s. 1, amending the Exchequer Court Act, R. S. C. 1906, c. 140. *Williams* v. *The Government Railways Managing Board*, 41, p. 108.

Jurisdiction to issue attachment for costs of appeal to Supreme Court—The Supreme Court will not as a general rule grant an attachment to enforce the payment of the costs of a County Court appeal. The costs should be certified and application made to the Court below. *MacPherson* v. *Samet*, 34, p. 559.

Jurisdiction re transfers to Supreme Court—The County Court can only exercise its jurisdiction to transfer a case to the Supreme Court under s. 69, c. 116, C. S. 1903 (The County Courts Act) during the progress of the trial and in an action where the "subject matter of the suit" is without the jurisdiction of the Court; that the "subject matter of the suit" for this purpose is the plaintiff's claim and does not extend to a counter claim which is beyond the jurisdiction of the Court.—(*Per* Grimmer J.) *Canadian Laundry etc. Co. Ltd.* v. *Ungar's Laundry etc. Ltd.*, 44, p. 423.

Parties—Joint indebtedness—Rent due to the plaintiff jointly with another cannot be sued for in a County Court by the plaintiff alone, and where the nonjoinder is not disclosed until trial the defendant is entitled

to a nonsuit.—*Vassie* v. *Chesley*, 33 N. B. R. 192, distinguished. *Knowles* v. *McLaughlin*, 41, p. 548.

Practice re order under s. 15—The order provided for by County Court Act 1897, s. 15 is a substitute for the remedy by writ of mandamus, and it will therefore be granted only in cases where mandamus will lie. *Ex parte Keerson*, 35, p. 233.

Submitting questions to jury—C. S. 1903, c. 111, s. 163, providing that the judge, instead of directing the jury to give either a general or special verdict may submit questions of fact and enter a verdict on the questions answered, applies to the County Courts. *Steeves* v. *Dryden*, 35, p. 555; *Read* v. *McGivney*, 36, p. 513.

Writ of summons—Irregularity—It is not necessary that a summons to set aside a writ in the County Court for irregularity should state the irregularity, nor is it necessary that the grounds should be served with the summons.—A writ of capias in the County Court will not be set aside because the words "and of the British Dominions beyond the seas" are omitted from the title of the king.—A County Court capias will not be set aside because it does not aver in the statement of the cause of action that it arose within the jurisdiction of the Court. *Rogers* v. *Dunbar*, 37, p. 33.

Writ of summons—Statement of claim—A County Court writ alleging that the defendant was indebted to the plaintiff in the sum of $400 for money payable by the defendant to the plaintiff for the use and hire of divers horses and divers carriages by the plaintiff let to hire to the defendant at his request, and containing the common counts, but which does not allege any promise to pay or conclude with the common breach, and *ad damnum* clause is good on demurrer. *Dube* v. *Pond*, 37, p. 138.

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5. Probate Courts.

Jurisdiction concurrent with Equity Court—In matters where the Chancery and Probate Courts have concurrent jurisdiction, the Chancery Court will not act when the question involved can be more conveniently and inexpensively disposed of in the Probate Court, unless some special reason be shown why the Probate Court should not act. *Kennedy Adm.*, v. *Slater, Adm.*, 4 Eq., p. 339.

Jurisdiction re passing accounts—The Equity Court gave directions but made no order re administering an estate where the Probate Court was in a position to pass the accounts. *Taylor* v. *McLeod et al*, 4 Eq., p. 262.

Jurisdiction re real estate—The Probate Court has jurisdiction to grant letters of administration where an intestate dies indebted possessed of real, but no personal estate. *Trites* v. *Humphreys*, 2 Eq., p. 1.

Jurisdiction—Judge subject to equitable principles and rules—By section 58 of the Probate Courts Act, the judge of Probate has power equal to a judge sitting in Equity and he must therefore exercise this jurisdiction upon the same principles and subject to the same rules as prevail in Courts of Equity. *In re Estate William D. Forster*, 39, p. 526.

License to sell—A judge of Probate is not warranted in granting a license to sell real estate to pay debts, unless he is judicially satisfied by proof, and finds the amount of the personalty and the amount of the debts and thus ascertains what the deficiency is.—A bald adjudication that there is a deficiency based on a list of attested accounts, and the evidence of the petitioner that they were filed against the estate is not sufficient.—(*Per* Hanington, Landry, Barker and McLeod JJ.)—*Held* (*per* Tuck C. J. dissenting), that, as in this case there was sufficient evidence of the matter of the petition to justify the judge of Probate in making the order, the appeal should be dismissed. *In re Est. Wm. F. Welch*, 36, p. 628.

Not Courts of construction—The testator P. by his will, bequeathed certain annuities and directed his executors and trustees to set apart out of the funds of the estate, stocks or securities sufficient to pay the annuities, and that if the income therefrom should not be sufficient, a portion of the principal should be applied for the purpose, and that under no circumstances whatever should there be any default or delay in paying the annuities.—The will then contained a number of devises and specific legacies and the testator devised all the residue of his estate after the payment of his debts, funeral and testamentary expenses, to his son, J. H. P.—He then appointed his wife, his son J. H. P., and three others to be executors and trustees.—Probate was granted to all of the executors.—The trustees failed to set apart funds for the payment of the annuities.—In an administration suit brought for the purposes *inter alia* of construing the will, and determining whether the trustees had distributed the estate and accounted in accordance with the will.—J. H. P. claimed that the trustees after paying the debts and settling of specific legacies, were unable to comply with the directions of the will as to appropriating funds for the payment of the annuities, and that he had expended the whole of the corpus of the estate in paving the annuities, and had passed his accounts in the Probate Court.—By the accounts passed in the Probate Court it appeared that the Judge of the Probate Court found and decreed a balance due J. H. P. of $5,020.00.—*Held*, that the Probate Court, not being a Court of construction, and having no authority to determine questions relating to the meaning of a will and whether executors and trustees

have discharged their duties in accordance therewith, the suit was not *res judicata* by reason of its decree. *Parks* v. *Parks et al*, Eq. Cas., p. 382.

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6. Inferior Courts.

(a) GENERALLY.

Application for jury—An application for a jury under C. S., c. 60, s. 31, must be made one clear day previous to the trial; and a demand made after a trial had been commenced, and adjourned at the request of the defendant before any substantial progress had been made, is too late. *Temperance & General Life Assurance Co.* v. *Ingraham*, 35, p. 558.

Bail bond, Action for breach—The giving of time to arrange payment by the plaintiff to the original defendant after breach of a limit bond is no defence to an action for such breach.—(*Per* Barker J.) *Kelly* v. *Thompson et al*, 35, p. 718.

Bail bond, Action on—The Supreme Court has jurisdiction to try an action against bail given in a case originating in an inferior Court, and has power to give such relief to the bail as justice may require.—The former practice of the King's Bench in England of refusing to try such actions and of compelling them to be brought in the inferior Court has never been followed in this province.—The judgment of an inferior Court is not conclusive as between the parties and their privies upon the question of jurisdiction; therefore, where an action was brought in the Supreme Court against bail given in a cause which had been commenced and tried in the City Court of Saint John and the defendant by plea denied the jurisdiction of the said Court, and at the trial gave evidence in support of his plea, *held* (*per* Hanington, Landry, Barker, McLeod and Gregory JJ.), that the defendant was not estopped by the judgment of the City Court from offering such proof, and that as the plaintiff had chosen to rely entirely upon the estoppel he must fail.—The fact that the judgment relied upon by the way of estoppel had been affirmed upon review by a County Court judge makes no difference. *Jack* v. *Bonnell*, 35, p. 323.

City Court of Moncton—G., having applied to the Commissioner of the City Court of M. for a summons, was refused unless he first paid the fee for the issuing thereof.—Relying upon a recommendation in a report of the finance committee of the city council of the said city, which was received and adopted by the council, G. then moved the Court for a rule *nisi* calling upon the commissioner to shew cause why a mandamus should not issue to compel him to issue the summons without the fee being paid or tendered in advance.—The recommendation was as follows: "Your committee would recommend that hereafter any and all claims within the jurisdiction of said Court may be sued and judgment therein taken without the payment of costs in advance, but that the same be retained out of the first moneys collected on the judgment."—*Held*, (1) that, as the commissioner was an appointee and servant of the Crown, and in no way responsible to the said city or under its direction or control, it could not by resolution create any duty or obligation upon the commissioner to issue the summons without the fee therefor being prepaid; and (2), that the report and its adoption amounted to nothing more than a recommendation to the commissioner, which he was at liberty to act upon or not according to his discretion. *Ex parte Grant* 35, p. 45.

City Court of Saint John—The County Court Act has the same application to the City Court of Saint John as constituted by Acts of Assembly, 52 Vict., c. 27, as it had to the Court established by Con. Stat., c. 51, and the jurisdiction of the County Court is just as limited now as it was before the passing of the first mentioned Act. *Simonds* v. *Hallett*, 34, p. 216.

Judgment by confession—A judgment of an inferior Court signed on a confession obtained by fraud is void and may be attacked collaterally.—(*Per* Tuck C. J., Hanington, Landry and Gregory JJ.)—(*Per* Gregory J.), that a confession is not such a written instrument as is contemplated by C. S. 1903, c. 121, s. 35, and judgment can not be signed on it in an inferior Court without proof of its execution. *Rogers* v. *Porter*, 37, p. 235.

Judgment by default—In a justice's Court a judgment by default was signed in an action for goods sold and delivered, the only evidence of the sale and delivery being that of the plaintiff, who swore that she sold the goods to the defendant's wife as per bill put in evidence and that she had received $5 on account.—The bill contained the dates of the sales, the articles sold, and the amounts charged.—*Held*, sufficient to warrant the signing of the judgment. *Kelly* v. *Thompson et al*, 35, p. 718.

Legal holiday—Where an inferior court was by statute bound to sit on a certain day in each week unless Christmas Day, New Years' Day, or any other legal holiday should fall upon such day, *held*, that a day proclaimed by the Governor General and the Lieutenant Governor as a holiday for a general public thanksgiving was a legal holiday within the meaning of the act, and that the Court was not bound to sit upon such a day (Landry J. dubitante). *Dibblee* v. *Fry*, 35, p. 282.

Parish Courts—Constitutional Law—C. T. Act—Section 103, c. 106 of R. S. C. (the Canada Temperance Act) in so far as it attempts to confer upon Parish Court commissioners jurisdiction to try offences

against the act is *ultra vires* of the Parliament of Canada.—(See contra *In re Vancini*, 34 S. C. R. 621, Editor). *Ex parte Flanagan*, 34 N. B. R., p. 577.

A Parish Court commissioner by the Act respecting Parish Courts, C. S. 1903, c. 120, s. 17, is given the power conferred upon two justices by the Dominion Act respecting summary convictions Part XV of the Criminal Code, and has therefore jurisdiction to try offences under the Canada Temperance Act, R. S. C. 1906, c. 152.—The refusal of the commissioner to adjourn in order to procure attendance of counsel is a matter in his discretion and does not go to his jurisdiction. *R.* v. *Alexander ex parte Monahan*, 39, p. 430.

Parish Court commissioner—A Parish Court commissioner has jurisdiction to try offences under the Canada Temperance Act. —The Act 62 Vict., c. 57, does not make the village of St. Mary's an incorporated town, and does not deprive a Parish Court commissioner of his jurisdiction in that village. *R.* v. *Clarkson ex parte Hayes*, 40, p. 363.

Privilege of officer of Superior Court—The arrest of a person, having privilege by reason of his being an officer of a superior court, under an execution issuing out of the City Court of S. is not void, nor does such privilege afford any defence in an action on a limit bond entered into by such officer to obtain his discharge. *Dibblee* v. *Fry*, 35, p. 282.

Security for costs—The plaintiffs, who were a company incorporated abroad but having a place of business in the province, brought an action against the defendant in a justice's Court for goods sold and delivered. —To prove their case they put in evidence a paper in the form of a promissory note whereby the defendant promised to pay the plaintiffs a sum certain with interest.—There were certain conditions as to the possession of the goods and the title thereto incorporated in the note or paper.—Security for costs was not demanded at the trial and none was given.—The case having been brought up on review and referred to the Court, *held* (*per* Tuck C. J., Landry, Barker and McLeod JJ., Hanington and VanWart JJ. dissenting) that *indebitatus assumpsit* would lie and that the omission to give security for costs did not deprive the magistrate of jurisdiction to try the case.—*Held* (*per* Tuck C. J.), that 49 Vict., c. 53, s. 1, does not apply to companies incorporated abroad but having a place of business within the province.—*Held* (*per* Barker J.), that the defendant by not demanding the security at the trial waived the benefit of the said Act, 49 Vict., c. 53. *Massey-Harris Co. Ltd.* v. *Stairs*, 34, p. 595.

A bond for security for costs under 49 Vict., c. 53, approved of by a justice who has been called upon to continue a trial commenced before the justice who issued the first process, and who was unable by reason of illness to conclude the trial, is sufficient. *Temperance and General Life Assurance Co.* v. *Ingraham*, 35, p. 558.

Writ of capias—A writ of capias was issued on an affidavit which omitted to state the residence of either of the parties.—*Held*, affidavit was sufficient. *Temperance and General Life Assurance Co.* v. *Ingraham*, 35, p. 510.

(b) REVIEW.

Affidavit for review—The affidavit that substantial justice has not been done, made on review proceedings from a judgment of the small debt court of Fredericton, may be made by the attorney or agent of the party reviewing under 45 Vict., c. 15, s. 1. *R.* v. *Wilson ex parte McGoldrick*, 36, p. 339.

Affidavits—An affidavit taken out of the province by a notary public may be read on an application for review under C. S. 1903, c. 122, s. 6.—Affidavits on review should not be entitled in any court, but if entitled in a Court the entitling may be treated as surplusage. *Lunt* v. *Kennedy*, 37, p. 639.

Appeal from County Court judge—If an order of review made by a County Court judge is manifestly wrong it will be set aside on certiorari, notwithstanding the judge has jurisdiction.—(*Per* Tuck C. J., Landry, Barker and McLeod JJ., Hanington and Gregory JJ. taking no part.) *R.* v. *Forbes ex parte Bramhall*, 36, p. 333.

Certiorari refused—Review proper remedy—A certiorari will not be granted with a view of quashing a judgment of an inferior Court for want of jurisdiction in the trial justice in the absence of a satisfactory explanation of why the remedy by review was not taken. *Ex parte Beloni St. Onge Jr.*, 43, p. 517.

Delay in applying—If an application for review of a judgment in a civil cause tried in an inferior Court be made more than thirty days after judgment, the reviewing judge may, in the exercise of his discretion, require an explanation of the delay, but such explanation is not essential to jurisdiction to hear the merits, and affidavits explaining the delay may be received at any time during the hearing. (*Per* Tuck C. J., Hanington, Landry and McLeod JJ., Gregory J. dissenting.)—*Held* (*per* Gregory J) that the reviewing judge has no jurisdiction to grant the order for hearing unless the delay is explained at the time the application for the order is made, and affidavits cannot be received at a later stage to support jurisdiction. *R.* v. *Wilson ex parte Burns*, 37, p. 650.

Form of order—Jurisdiction—An order on review setting aside a verdict for the plaintiff and directing that unless the plaintiff bring the cause down to another trial

within two months, the verdict entered for the plaintiff be reversed, is a proper order and within the power of the reviewing judge under the statute.—(*Per* Tuck C. J., Hannington, Landry and McLeod JJ., Gregory J. dissenting.) *R.* v. *Wilson ex parte Burns*, 37, p. 650.

Jurisdiction—There is no authority under C. S., c. 60, or amending acts, to review the finding of a justice or the jury in a question of fact where the amount involved in the suit does not exceed forty dollars in debt and eight dollars in tort.—The judges of the Supreme and County Courts are of co-ordinate jurisdiction in matters of review under C. S., c. 60, and orders made within their authority are final.—(*Per* Hanington and Gregory JJ., Tuck C. J., Landry and McLeod JJ. reserving judgment on this point.) *R.* v. *Wilson ex parte McGoldrick*, 36, p. 339.

Jurisdiction of County Court judges to review—A judge of a County Court has jurisdiction to hear a case on review from a justice's Court though the case was tried in a county for which he is not the County Court judge.—*R.* v. *Wilson ex parte Irving*, 35 N. B. R. 461, explained and commented upon. *Ex parte Graves*, 35, p. 587.

Where the County Court judge of York County quashed on review a conviction made by a magistrate of Northumberland County under the Summary Convictions Act, C. S. 1903, c. 123, for taking one caribou contrary to the provisions of the Game Act, C. S. 1903, c. 33, s. 3 (1) (a), on the ground that *mens rea* was a necessary part of such offence, and was not proved.—*Held* (1), a County Court judge has jurisdiction to review such conviction though the offence was committed and the case tried in a county for which he is not a County Court judge; (2) that under the facts the order of the County Court judge should not be disturbed.—*Held* (*per* Barker C. J., Barry and McKeown JJ.), where there is no want or excess of jurisdiction, the judgment of a County Court judge on review should not be disturbed.—*Held* (*per* Landry, McLeod and White JJ.), the Supreme Court in the exercise of its inherent jurisdiction to supervise the proceedings of inferior tribunals may set aside the order of a County Court judge on review in order to prevent a gross miscarriage of justice. *R.* v. *Wilson ex parte Fairley*, 39, p. 555.

Order by judge, Form of—A warrant or order issued by an inferior Court must show jurisdiction on its face.—It is not so as to an order granted by a judge of a superior Court.—There jurisdiction need not appear on the face of the order.—(*Per* Tuck C. J.) in *R.* v. *McGuire*, 34, p. 430.

Order on review by County Court judge—The order of a County Court judge upon review, under C. S. 1903, c. 122, is final, if within his jurisdiction. *R.* v. *Wedderburn ex parte Carnwath*, 40, p. 285.

Order for review by County Court judge—An order for review made by a judge of the County Court will be quashed on certiorari if made without jurisdiction. *R.* v. *Jonah ex parte Pugsley*, 43, p. 166.

Order of review by County Court judge—A certiorari will not be granted to remove an order of review made by a judge of a County Court with a view to quashing the same on the ground that he has erred in point of law if he has not acted without or in excess of his jurisdiction or unless there has been such a gross miscarriage of justice as would warrant the interference of the Appellate Court. *R.* v. *McLatchy ex parte Antinori Fishing Club*, 44, p. 402.

Order on review by Supreme Court judge—An order on review made by a judge of the Supreme Court under C. S. 1903, c. 122, s. 6, is final—*Smith* v. *Kennie*, 30 N. B. R. 229 followed. *Hallett* v. *Allen*, 38, p. 349.

Review does not perfect jurisdiction—The judgment of an inferior Court is not conclusive as between the parties and their privies upon the question of jurisdiction; therefore, where an action was brought in the Supreme Court against bail given in a cause which had been commenced and tried in the City Court of Saint John, and the defendant by plea denied the jurisdiction of the said Court, and at the trial gave evidence in support of his plea.—*Held* (*per* Hanington, Landry, Barker, McLeod and Gregory JJ.), that the defendant was not estopped by the judgment of the City Court from offering such proof, and that as the plaintiff had chosen to rely entirely upon the estoppel he must fail.—The fact that the judgment relied upon by way of estoppel has been affirmed upon review by a County Court judge makes no difference. *Jack* v. *Bonnell*, 35, p. 323.

Review—Question of law—Evidence—In an action in the magistrate's Court by a foreign corporation the only evidence of the incorporation was supplementary letters of incorporation increasing the capital stock.—This evidence was received by the magistrate without objection and a judgment entered for the plaintiff.—On review before a County Court judge the judgment was set aside on the ground that there was no evidence of incorporation.—*Held*, on motion for a certiorari to quash the order of review, that whether or not there is such evidence is a question of law and the County Court judge had jurisdiction, notwithstanding the amount involved was under $40.00. *Ex parte Ault & Wiborg Co. of Canada Ltd.*, 42, p. 548.

Review—Serving order out of jurisdiction—Service of an order for hearing

of a review on the opposite party out of the province is not sufficient to confer jurisdiction on the reviewing judge under C. S. 1903, c. 122, s. 6, and an order based on such a service will be quashed on certiorari. *R.* v. *Jonah ex parte Pugsley*, 43, p. 166.

Review, Time for—The order for hearing of a review need not be made within thirty days from date of the certificate of the return.—It is sufficient if the application for the order is made within thirty days from the receipt by the applicant of the copy of the proceedings.—The thirty days allowed by sec. 6, cap. 122, C. S. 1903, to apply for review of a judgment in a civil case tried in any inferior Court after obtaining a copy and minute of the proceedings, does not apply only to a copy obtained under an order of a judge of the Supreme or County Court, but to any copy applied for and furnished by the trial justice under the section. *Lunt* v. *Kennedy*, 37, p. 639.

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7. Police Courts.

Police Magistrate, Jurisdiction of—Error in Gazette—By Act 39 Vict., c. 16, provision was made for the appointment by the Lieutenant Governor in Council of a person resident in the parish of Salisbury, in the county of Westmorland, to be a district or stipendiary police magistrate for the said county.—By Act 53 Vict., c. 77, Act. 39 Vict., c. 16 was amended by inserting the word "or" between the words "stipendiary" and "police" and it was enacted that any person theretofore appointed a stipendiary and police magistrate under the words "stipendiary police magistrate" should be held and taken to be a stipendiary and police magistrate for the county of Westmorland.—The Royal Gazette containing the appointment of a person in pursuance of the Act 39 Vict., c. 16, designated him as "Police magistrate for Salisbury."—*Held*, that he was appointed for the county of Westmorland. *Ex parte Gallagher*, 34, p. 329.

Police magistrate for county, Jurisdiction of—A police magistrate appointed under 46 Vict., c. 37, for the county of Westmorland, with civil jurisdiction within the parish of Shediac, has jurisdiction to try offences against the Canada Temperance Act committed at the city of Moncton, and such jurisdiction is not restricted by the "act relating to the jurisdiction of police or stipendiary magistrates" (2 Edw. VII, c. 11) giving police or stipendiary magistrates appointed for a parish jurisdiction for the county in which such parishes are situate and providing that such magistrates shall have no jurisdiction over offences committed within the limits of any city or incorporated town. *R.* v. *McQueen ex parte Landry*, 38, p. 48.

Police magistrate, Jurisdiction of—A police or stipendiary magistrate for the county of Westmorland with jurisdiction in the city of Moncton has no authority to try summarily a person charged with an offence under part LV of the Criminal Code, s. 785, sub-sec. 2 as amended by the Criminal Code Amendment Act 1900 giving to police or stipendiary magistrates of cities and incorporated towns jurisdiction to try summarily indictable offences. *R.* v. *Benner*, 35, p. 632.

Stipendiary magistrate, Civil jurisdiction of—A stipendiary or police magistrate appointed under chapter 119 of the Consolidated Statutes, 1903, as amended by the Act, 5 Geo. V., c. 22, repealing 1 Geo. V., c. 38, has no civil jurisdiction where both the parties to the action reside within the county but outside the parish in which the magistrate resides. *R.* v. *Carleton ex parte DeLong*, 44, p. 518.

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8. Miscellaneous.

English Bankruptcy Court—Jurisdiction of in N. B.—In 1873, Gilbert, James, Gorham and Walter Steeves carried on business as partners under the firm name of Steeves Bros. at St. John, N. B.—Each of them was born and had always resided in New Brunswick.—In or about 1874, Gilbert Steeves removed to Liverpool, G. B., and commenced a shipping business under the name of Steeves Bros. & Co., the firm being composed of the same members as the St. John house.—Prior to 1882, Walter retired from both firms.—Gorham and James never resided in England, or ceased to retain their New Brunswick domicile.—In 1882 the firm at Liverpool became insolvent and Gorham and James cabled from St. John to Gilbert to file a bankruptcy petition of the firm under the English Bankruptcy Act, 1869.—The petition was filed July 4th, 1882 and the partners were adjudged bankrupts, and the plaintiff was appointed trustee.—On June 27th, 1882, James and Gorham executed at St. John an assignment to the defendant of all their property, both real and personal, in New Brunswick for the benefit of their creditors.—This assignment not being recorded, a new assignment was executed and recorded on July 15th.—On August 15th, the plaintiff recorded in the Registry Office at St. John a certificate of his appointment. —In a suit by the plaintiff for a declaration of his title to the real and personal property in New Brunswick of James and Gorham Steeves, *held*, (1) that the English Bankrupt Act, 1869 (32 and 33 Vict., c. 71), does not apply to Canada so as to vest in a trustee appointed by the English Bankruptcy Court either the real estate situate in Canada or the personal property of a person residing and domiciled in Canada, though he is a member of an English firm which has traded and contracted debts in England, and has authorized that he be joined in a bankruptcy petition to the Court with the other members of the firm; (2) that the English Bankruptcy

Court has no jurisdiction under the Act to make an adjudication of bankruptcy against such a person.—*Discussed* in *Ford* v. *Stewart*, 35 N. B. R. at 572. *Nicholson* v. *Baird*, Eq. Cas., p. 195.

English Bankruptcy Act, Jurisdiction of in N. B.—A plea that the defendants were adjudged bankrupt and a certificate of discharge granted in England under "The Bankruptcy Act 1883" is a good answer to an action for a debt provable against the defendants in bankruptcy brought in this province by the subject of a foreign state who had never resided or been domiciled within British Dominions.—*Nicholson* v. *Baird*, N. B. Eq. Cas. 195 considered. *Ford* v. *Stewart et al*, 35, p. 568.

Jurisdiction re tort committed abroad—The civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. —Therefore the plaintiff, an alien, being unlawfully within the United States territory in violation of an act of Congress, and a person liable to be deported, has no right of action in this Court against an officer of the United States government for his arrest in, and deportation from, that country.—By international law, and apart from any civil enactment, a sovereign state has the right at its pleasure to exclude or deport any alien from its dominions; therefore no action will lie in a British Court against an official exercising that right at the command and on behalf of the state of which he is the servant. *Papageorgiou* v. *Turner*, 37, p. 449.

Jurisdiction re tort committed in foreign jurisdiction—Jurisdiction re land in foreign jurisdiction—The plaintiff and defendant, both residents of this province, applied to the government of the Province of Quebec and were allotted lots 31 and 32 in Robinson settlement in the county of Temiscouata, Quebec.—Neither lot was granted to the parties but each took possession of the lot applied for and engaged in cutting pulp-wood and logs on their respective locations, the plaintiff on 31 and the defendant on 32.—The dividing line between the lots had never been run.—The parties spotted trees for about five rods along the supposed line and each party agreed to be guided in his operation by this spotted line and its projection until they could get a surveyor to run a proper line, and on such line being run, if it were found that either party had cut over on the other, "he would return the wood."—No proper line was ever run.—*Held* on appeal, reversing the judgment of Barry J. in an action claiming damages for the conversion by the defendant of the plaintiff's pulp-wood and logs, that the action necessarily involved the determination of the proper location of the line between lots 31 and 32, land in a foreign jurisdiction, and therefore could not be entertained by the Courts of this province. —The Court has no jurisdiction to try an action between parties resident in this province for a tort committed in a foreign jurisdiction unless it be alleged and proved that the tort was actionable in the latter jurisdiction. *Long* v. *Long*, 44, p. 599.

Seamen's wages—Facts necessary for jurisdiction—Under R. S. C., c. 74, s. 52, to enable a seaman to sue for and recover his wages the complaint must show all the facts and circumstances which under the statute give the Court jurisdiction and unless such complaint does disclose all things necessary to give jurisdiction it cannot be supplemented by evidence, and the judgment will be set aside. *Ex parte Andrews*, 34, p. 315.

COVENANTS

See CONTRACTS, DEEDS, LANDLORD AND TENANT, MORTGAGES, VENDOR AND PURCHASER.

CRIMINAL LAW.

1. Crown Cases Reserved.

2. Evidence.

3. Particular Offences.

4. Practice and Procedure.

1. CHARGE OR INFORMATION.
2. CONVICTION.
3. COSTS.
4. GRAND JURY.
5. INDICTMENT.
6. JUDGMENT.
7. JURY.
8. TRIAL.
9. WARRANTS.
10. MISCELLANEOUS CASES.

5. Summary Conviction.

6. Summary Trial.

7. Miscellaneous Cases.

Appeal. *See* APPEAL.

Bail. *See* BAIL.

Certiorari. *See* CERTIORARI.

Habeas Corpus. *See* HABEAS CORPUS.

Intoxicating Liquors—*See* INTOXICATING LIQUORS.

Justices of the Peace and Magistrates. *See* JUSTICES OF THE PEACE AND MAGISTRATES.

1. Crown Cases Reserved.

Adultery—Two counts tried simultaneously—A conviction for adultery on two counts of an indictment, the first charging an offence on September 16, 1913, and the second an offence on March 14th, 1914, will not be quashed on a case reserved on objection that the evidence adduced in support of the second count was not admissible in support of the first, if the accused failed to avail himself of the privilege of applying to have each count tried separately.—While a private party injured may condone an injury to himself he cannot condone a crime. *R.* v. *Strong*, 43, p. 190.

Asking for Crown Case Reserved—It is not too late after sentence has been imposed to ask to have a case reserved for the opinion of the Court. *R.* v. *McGuire*, 36, p. 609.

Conviction amended on findings by trial judge. A county court judge sitting under the Speedy Trials Act, Part 18 of the Criminal Code made certain findings of fact and entered a conviction against the defendant for an offence against s. 417 of the Code.—A case having been reserved by him, *held*, upon the findings the County Court judge should have entered a verdict of acquittal and the Court ordered a verdict to be entered accordingly. *R.* v. *Ayoup*, 39, p. 598.

Failure of accused to testify—On the trial of a prisoner indicted for stealing, the judge, in his charge to the jury, called attention to the fact that the prisoner was not called to testify on his own behalf and warned the jury that they were not to take that fact to his prejudice; but added, if he were an innocent man he could have proved that at the time of the offence he was not in the vicinity where the theft took place.—*Held*, that this was "comment" within the meaning of s. 4 (2) of the Canada Evidence Act, 1893. *R.* v. *McGuire*, 36, p. 609.

Rebuttal evidence—Whether or not the conditions required by section 701 of the Criminal Code to justify the admission of rebuttal testimony contradicting a witness who has denied making an alleged statement to a third party at variance with her testimony, have been fulfilled, is a question for the presiding judge and, if reasonably exercised, is not a ground for a new trial on a case reserved.—(*Per* Tuck C. J., Hanington, Landry and Gregory JJ., McLeod J. dissenting.) *R.* v. *Clarke*, 38, p. 11.

Reserving case—Questions of law only, are properly the subject of a Crown case reserved.—Questions depending on the weight or sufficiency of the evidence should not be reserved. *R.* v. *Howe*, 42, p. 378.

2. Evidence.

Admissibility of admission when intoxicated—After imprisonment defendant was searched by a police officer and some money found on him.—The officer said: "This looks bad J." speaking to the defendant, whereupon the defendant made some admission of theft which was evidence against him on the trial.—He was under the influence of liquor at the time he made the statement.—*Held*, the evidence was admissible. *R.* v. *Daley*, 39, p. 411.

Admissibility — Answering cross-examination—Where the victim of an attempt to commit rape on cross-examination had been asked if she had given a description of her assailant in the presence of her father, and, if in consequence of such description he had not suspected a person other than the prisoner, the Crown was properly allowed to prove by the father what the description was that his daughter had given in his presence.—(*Per* Tuck C. J., Hanington, Landry and Gregory JJ., McLeod dissenting.) *R.* v. *Clarke*, 38, p. 11.

Admissibility—Evidence from illegal search warrant—Evidence obtained by means of an illegal search warrant is admissible and a conviction based thereon was upheld. *R.* v. *Kay ex parte Wilson*, 39, p. 124; *R.* v. *Clarkson ex parte Hayes*, 40, p. 363.

Admissibility—Trial on two counts simultaneously—A conviction for adultery on two counts of an indictment, the first charging an offence on September 16, 1913, and the second an offence on March 14th, 1914, will not be quashed on a case reserved on objection that the evidence adduced in support of the second count was not admissible in support of the first, if the accused failed to avail himself of the privilege of applying to have each count tried separately. *R.* v. *Strong*, 43, p. 190.

Admission under count—"Obstructing railway"—Election—Upon an indictment containing a count "That M. at the Parish of St. H. in the county of M. on divers days and times between March 31, A. D. 1909, and May 10th, A. D. 1909, unlawfully did obstruct or interrupt, or cause to be interrupted or obstructed, the free use of the railway of the T. Ry. Co. by putting or placing or causing to be put or placed upon the said railway certain pieces of iron, iron bolts, horseshoes, rocks and other matters or things" contrary to s. 518 of the Criminal Code, R. S. C. 1906, c. 146, evidence was given that obstructions were placed on the track upon several different days, among others April 14, 15 ,17 and 30.—Counsel for defendant requested that the prosecutor should elect which offence he proceeded upon, on the ground that each count must apply to a single transaction.—The judge

refused to compel this election, and a case having been reserved.—*Held*, that the prosecutor could not be compelled to elect upon the circumstances as the count in question charged only one offence, and the evidence of the different acts of obstruction was admissible under the count.—*Held, also*, that the prosecution might treat the several acts of obstruction as successive cumulative acts, forming but one offence in law, and further, *held*, that at all events under the circumstances no substantial wrong or miscarriage had been occasioned and a new trial should be refused. *R.* v. *Michaud*, 39, p. 418.

Admission—Rebuttal—In a trial for murder the prisoner accused one of the Crown witnesses of having committed the crime.—The witness G. in the original case of the Crown swore that the murder had been committed about three o'clock in the afternoon, and that he and the prisoner were back in the city about five o'clock.—The prisoner swore that the crime was not committed until about five o'clock and that the clocks were striking six when he and G. were coming back to the city.—The Crown by permission then called a witness to contradict the prisoner as to the time of G's return to the city, and the learned judge allowed the prisoner's counsel to put on a witness to reply to that of the Crown.—*Held*, that the evidence so put in by the Crown was contradictory even though also cumulative, and further, as it was in the discretion of the presiding judge in what order he would receive evidence, and as the prisoner had had the opportunity of replying, of which he had taken advantage, that a new trial on the ground that such evidence was cumulative should be refused. *R.* v. *Higgins*, 36, p. 18.

Whether or not the conditions required by section 107 of the Criminal Code to justify the admission of rebuttal testimony contradicting a witness who has denied making an alleged statement to a third party at variance with her testimony, have been fulfilled, is a question for the presiding judge and if reasonably exercised, is not a ground for a new trial on a case reserved.—(*Per* Tuck C. J., Hanington Landry and Gregory JJ., McLeod J. dissenting.) *R.* v. *Clarke*, 38, p. 11.

Admission, Wrongful—If material evidence, which may have influenced the jury is improperly admitted, a new trial must be granted, although the Court should be of the opinion on the whole evidence that there has been no substantial wrong or miscarriage within the meaning of section 746 of the Code.—(*Per* McLeod J.) *R.* v. *Clarke*, 38, p. 11.

Affidavit contradicting record—The Court will not hear an affidavit contradicting the return of a magistrate as to what matter was put in evidence at the trial before him. *R.* v. *Kay ex parte Stevens*, 39, p. 2.

Canada Temperance Act—Election—Secondary evidence of—On an application to a County Court judge for a scrutiny of ballots in an election for the repeal of the Canada Temperance Act, *held* (Tuck C. J. dissenting) that secondary evidence of the ballots contained in lost or stolen ballot boxes was properly receivable. *Ex parte LeBlanc*, 34, p. 88.

Competency of witness—Defendant's wife—In a prosecution for obtaining money by false pretences defendant's wife is neither a competent nor a compellable witness for the Crown, and where the evidence of the wife is material and such that it may have had an influence with the jury in pronouncing their verdict, there is a substantial wrong or miscarriage entitling a defendant to new trial, although there be ample evidence otherwise to sustain a verdict against him. —*Held* (*per* Landry and McLeod JJ.), it is illegal for the Crown to call defendant's wife as a witness in such a prosecution, and doing so is ground for a new trial, whether her evidence is material or not. *R.* v. *Allen*, 41, p. 516.

Evidence from other trial—Magistrate's return—G., L. and C. were convicted for keeping liquor for sale contrary to the Canada Temperance Act.—Orders *nisi* to quash the convictions were granted on the ground that improper evidence was admitted, without which there was no evidence that the beer sold was intoxicating.—The evidence objected to was the certificate of one P., an analyst, of the percentage of absolute alcohol in the beer sold.—Affidavits of the prosecutor, his counsel, and the magistrate were read on the return of the orders stating that on the trial of a prior complaint against one T., P., a chemist and analyst, gave evidence, and it was agreed between the counsel for the prosecution and the counsel for the accused that his evidence might be used in the cases against the accused.—In affidavits in reply the accused denied the alleged agreement, and no reference was made to it in the magistrate's return.—*Held*, (*per* Tuck C. J., Barker, McLeod and Gregory JJ., Landry J. dissenting), that there being some evidence to justify the conviction the orders under the decision in *Ex parte Daley* (27 N. B. R. 129) must be discharged.—*Held* (*per* Landry J.), that the agreement having been denied, and not having been referred to in the return, the Court should treat it as not existing.—That if it existed there was nothing in the affidavits or the return to show what the evidence of analyst in the case against T. was, and therefore no evidence upon which to base the convictions against the accused, and the orders should be made absolute. *R.* v. *Kay ex parte Gallant*, 37, p. 72.

Evidence Taking, Adjourning Court to witness' house—At the trial of an indictable offence the presiding judge has the power to order the Court to be adjourned to a place in the county other than the court house

for the purpose of allowing the jury to hear the evidence of a witness, who was unable through illness to leave his house, the counsel for the prisoner having consented thereto. *R.* v. *Rogers*, 36, p. 1.

Illegal evidence—It is the duty of the judge on a criminal trial to exclude illegal evidence, and its admission is a ground for a new trial whether objected to or not on the trial. *R.* v. *Clarke*, 38, p. 11.

Magistrate called as witness—On motion for a rule to quash a conviction under The Liquor License Act 1896 on the ground that the presiding magistrate refused to give evidence when requested by the defendant it must be shown that the request was made in good faith, and that the defendant was prejudiced by the refusal.—Where it was set forth in affidavit what evidence the magistrate was expected to give, but the affidavit showed that the deponent did not have knowledge that the magistrate could give the evidence, the rule was refused. *Ex parte Flannagan*, 34, p. 326.

The defendant applied to call the magistrate as a witness, but as he declined to state in any other than in a general way what he purposed to prove by him, the magistrate refused to leave the Bench to be sworn.—In this he was sustained by the Court, notwithstanding the defendant swore that the application was made in good faith. *Ex parte Hebert*, 34, p. 455.

Onus—Alibi—Where the defence to a criminal charge is an alibi, it is misdirection to tell the jury that the onus is on the prisoner to prove it to their entire satisfaction, and to show beyond all question or reason that he could not have been present at the commission of the crime. *R.* v. *Myshrall*, 35, p. 507.

Onus—Where a person is convicted of an offence under the Canada Temperance Act committed at a time falling within the period covered by a previous information upon which he was acquitted, in order to sustain a plea of *autrefois acquit* he must show that the offence for which he was convicted and that for which he was acquitted were identical. *Ex parte Flanagan*, 34, p. 577.

Onus—Autrefois convict—Criminal—If a party charged with a criminal offence sets up as a defence a previous conviction for the same offence, the onus is on him to prove the identity of the offences. *R.* v. *Kay, ex parte Gallagher*, 38, p. 325.

Presumption—Liquor License Act—In a prosecution for selling intoxicating liquor contrary to the provisions of s. 48 (1) of the Liquor License Act, which prohibits the sale by license holders during certain hours, proof that the accused kept an hotel and sold liquor is, in the absence of any proof to the contrary, evidence that the accused was a licensed holder, and a conviction based on such evidence will not be quashed on certiorari. *R.* v. *Dugas Ex parte McLeary*, 43, p. 65.

Reading over to witnesses—Jurisdiction—The provision of section 721, subsection 3 of the Criminal Code requiring the evidence to be read over to a witness on the trial of an information or complaint is a matter of procedure and its omission does not go to the jurisdiction of the magistrate.—Ex *parte Doherty*, 32 N. B. R. 479 followed. *R.* v. *Kay ex parte Gallagher*, 38, p. 497; *R.* v. *Kay ex parte Stevens*, 39, p. 2.

Res Gesta—On the trial of an indictment for an attempt to commit rape, statements of the person assaulted and of her companion present at the beginning of the assault that they had given a description of the assailant to police officers some four hours after the assault, but not stating what the description was, and evidence of the officers that in consequence of such description they had looked for the assailant were properly received, although statement of a like character had previously been made to other persons. *R.* v. *Clarke*, 38, p. 11.

Sufficiency of evidence—Circulating obscene matter—The following articles published in a newspaper, taken in connection with evidence of the character of the paper and surrounding circumstances, was held to be sufficient to support a verdict for circulating obscene printed matter tending to corrupt morals within s. 207 (a) of the Criminal Code: "What married woman lets the young man in through the side window when her husband is attending lodge meeting?"—"Who is the married woman who went to Saint John last Saturday with an I. C. R. clerk and stopped at the hotel as clerk's wife?" *R.* v. *McDougall*, 39, p. 388.,

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3. Particular Offences.

Adultery—Adultery is a crime in this province and is punishable on indictment under the procedure provided by the criminal law of Canada applicable to indictable offences generally.—A conviction for adultery on two counts of an indictment, the first charging an offence on September 16, 1913, and the second an offence on March 14th, 1914, will not be quashed on a case reserved on objection that the evidence adduced in support of the second count was not admissible in support of the first, if the accused failed to avail himself the privilege of applying to have each count tried separately.—While a private party injured may condone an injury to himself he cannot condone a crime. *R.* v. *Strong*, 43, p. 190.

Assault—An information for assault was laid before S., justice of the peace for A. county after summons issued an order

nisi of prohibition was served on him at the instance of the defendant and no further proceedings were taken before him.—B., another justice for the county, having been requested by S. to hear the charge, took another information and issued a summons. —On the return of the summons the defendant's attorney, who was clerk of the peace, advised B. that he had no jurisdiction, and B. thereupon refused to proceed.—An information was then laid before R., another justice of the peace for A. county who was requested by S. to act after B. had declined to proceed.—An order *nisi* of prohibition having been granted against R., *held*, that the three justices had concurrent jurisdiction and as S. and B. were not *bona fide* proceeding in the matter, there was no ground for interfering with R. *Ex parte Peck*, 39, p. 274.

On an information charging that the accused unlawfully and maliciously assaulted and threatened to beat one T., a Crown land surveyor, and prevented him from performing his official duty, the magistrate found the accused guilty as charged and adjudged that he pay the sum of $20 over and above the amount of the damage done, being $13, and the costs, and in default of the payment of the said several sums and costs of conveying to gaol he be imprisoned for two months.—*Held* (*per* McLeod C. J. and White J., Grimmer J. dissenting), that as the obstructing of T. in the discharge of his official duty was not an offence over which the magistrate had jurisdiction on summary conviction and the complaint had been tried as one charge, not two, and one penalty imposed, the conviction must be quashed and could not be amended under s. 1124 of the Criminal Code.—*Held* (*per* Grimmer J.), that the allowance of the $13 for damages might be treated as surplusage and stricken out and the conviction amended under s. 1124 of the Code, and stand as a conviction for an assault with a penalty of $20 and costs. *R.* v. *Dugas ex parte Aylward*, 43, p. 443.

Bawdy house—To constitute an arrest, it must appear that plaintiff was reasonably led to believe by either the language or conduct of the defendants or both, that plaintiff was deprived of her liberty of movement.—The plaintiff was arrested on the charge of being an inmate of a bawdy house, and it appeared that she had the care and management of a hotel, some rooms of which were used as a bawdy house.—In an action for wrongful arrest, *held*, that the occupants of rooms other than those used for a bawdy house were not inmates of a bawdy-house within the meaning of s. 228 of the Criminal Code.—*Held, also*, that it must be shown that plaintiff knew or ought to have known that some portion of the hotel was used as a bawdy-house in order to constitute her a keeper of a bawdy-house; that this was a material element in estimating damages; and that the failure of the jury to find upon this question, was ground for a new trial.—*Held, also*, that to entitle the plaintiff to exemplary damages in such an action it must be proved that defendants acted maliciously or with unnecessary harshness, or with wilful or grossly negligent disregard of plaintiff's rights in arresting her, and failure to so direct the jury is ground for a new trial.—*Held, also*, that in order to justify an arrest under 11 Vict., c. 12, s. 7, it is not sufficient that defendant has an honest belief in the existence of a state of facts, which, if true, would have justified the arrest, but such belief must be based upon reasonable grounds.—After the plaintiff was taken to the police station the defendant Clark chief of police, made an entry of the arrest and entered her name on the charge sheet sent before the police magistrate, and also notified the plaintiff to appear at Court.—*Held*, setting aside the verdict of the jury that these acts did not constitute an arrest, and a verdict was entered for the defendant Clark. —Defendant S., a police officer in company with three other officers was sent to assist in the raid upon the hotel in question.—S. was directed to watch one exit of the hotel and remained there while the others entered and arrested the plaintiff and others, but S. took no further part.—*Held*, even if the arrest was unlawful, S. was not liable in an action for false arrest, inasmuch as it did not appear that the common purpose with which he and the other officers started out was unlawful, and he had no opportunity to assent to or dissent from the unlawful acts of the others. *Hopper* v. *Clark et al*, 40, p. 568.

Bigamy—Mens rea—A wife voluntarily separated from her husband after having lived with him for three years.—Nine years later she married again knowing that her first husband had married, and believing that he had obtained a divorce from her and that she was at liberty to marry.—Subsequently she learned that her second marriage was illegal, and she immediately left her second husband.—*Held*, that under the Stat. 13 Edw. I., c. 34, the dower right of the wife in the estate of her first husband was not barred by her subsequent cohabitation with another, as she acted *bona fide*, believing, on reasonable grounds, that she was legally entitled to marry again. *Phillips* v. *Phillips et al*, 4 Eq., p. 115.

Corrupting morals—Evidence to support verdict—The following article published in a newspaper, taken in connection with the character of the paper and surrounding circumstances, was held to be sufficient to support a verdict of circulating obscene printed matter tending to corrupt morals within s. 207 (a) of the Criminal Code.: "What married woman lets the young man in through the side window when her husband is attending lodge meeting?"—"Who is the married woman who went to Saint John last Saturday with an I. C. R. clerk and stopped at the hotel as clerk's wife?" *R.* v. *McDougall*, 39, p. 388.

False pretences—In a prosecution for obtaining money by false pretences defendant's wife is neither a competent nor a compellable witness for the Crown, and where the evidence of the wife is material and such that it may have had an influence with the jury in pronouncing their verdict, there is a substantial wrong or miscarriage entitling defendant to a new trial, although there be ample evidence otherwise to sustain a verdict against him.—*Held* (*per* Landry and McLeod JJ), it is illegal for the Crown to call defendant's wife as a witness in such a prosecution, and doing so is ground for a new trial, whether her evidence is material or not. *R.* v. *Allen*, 41, p. 516.

Forgery—See *Connell et al* v. *Shaw*, 39, p. 267.

Gambling—A deposit of money with a stake holder to abide the result of a foot race is not an illegal transaction under C. S., c. 87, s. 2, and no action will lie against the winner of the bet, who has received the money from the stake-holder after the decison of the event. *Seely* v. *Dalton*, 36, p. 442.

Lord's Day Act—The Court set aside a conviction made against a restaurant keeper under the Act respecting the Observance of the Lord's Day, C. S. 1903, c. 107, for selling meals on Sunday, on the ground that this act was *ultra vires* of the provincial legislature.—*Attorney General for Ontario* v. *Hamilton Street Railway* (1903) A. C. 524 applied. *R.* v. *March ex parte Washington*, 41, p. 419.

Murder—Judge's charge—The prisoner, who was tried and convicted of murder, although he had ample time and opportunity to tell all he knew concerning the crime both to the authorities and others, maintained a complete silence respecting it, with the exception of some bald assertions of his innocence, until he went upon the witness stand at the trial to give evidence on his own behalf, when he admitted being present at the doing of the deed, but charged it upon one G., a young companion, who was with him, and who before and at the trial, had alleged the prisoner's guilt.—The learned judge, in charging the jury, told them that they were entitled to take this continued silence of the prisoner into consideration, and after deciding whether or not such silence proceeded from a consciousness of guilt and a desire to spring a defence upon the Crown, which it might not be able to meet, they might therefrom draw an inference as to his guilt or innocence.—He further instructed them that this continued silence of the prisoner was an element that might assist them in determining the amount of credence that ought to be given to the story told by the prisoner in the witness box.—*Held* (*per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ., Gregory J. dissenting), that the charge was correct in both respects.—*Held* (*per* Gregory J.), in so far as the charge directed the attention of the jury to the silence of the prisoner as one of the means of testing his credibility it was correct; but when the learned judge went beyond that and instructed the jury that they were entitled to draw inferences of the prisoner's guilt or innocence from his silence, it was error.—*Held further*, (*per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ., Gregory J. dissenting), that even if the charge were erroneous in the respect complained of, as in the opinion of the Court no substantial wrong or miscarriage had been occasioned thereby, such error was cured by the proviso (f) of section 746 of the code. *R.* v. *Higgins*, 36, p. 18.

Murder—Misdirection—On a trial for murder, where the evidence is circumstantial, and some of the material facts proved are of such a character that it is possible to draw from them inferences bearing either for or against the defence set up, it is the province of the jury to draw the inferences, and it is misdirection for which a new trial will be granted for the trial judge to tell the jury that the inferences that should be drawn are those tending to establish the guilt of the prisoner. *R.* v. *Collins*, 38, p. 218.

Obstruction of police—Certiorari—A certiorari will not go to remove a commitment made by a justice of the peace on a charge of resisting a peace-officer. *R.* v. *Leahy ex parte Garland*, 35, p. 509.

Obstructing police—Mode of prosecuting for—The offence of obstructing a peace officer in the execution of his duty may be prosecuted and punished before two justices, or before any magistrate having the jurisdiction of two justices, under the procedure provided by Part XV of the Code without the consent of the accused to a summary trial, and such procedure is not controlled by the provisions of Part XVI requiring such consent.—(*Per* White and Barry JJ., Grimmer J. dissenting)—*Held* (*per* Grimmer J.), that the procedure for the summary trial of the offence is controlled by Part XVI and the accused cannot be so tried without having been first put to his election as provided by s. 778, notwithstanding the provisions of s. 169.—*Reg.* v. *Crossen* 3 Can C. C. 152; *R.* v. *Carmichael*, 7 Can C. C. 167; and *R.* v. *Van Koolberger*, 16 Can C. C. 228 considered and not followed. *R.* v. *Folkins ex parte McAdam*, 43, p. 538.

"Obstructing railroad"—Upon an indictment containing a count "That M. at the parish of St. H. in the county of M. on divers days and times between March 31st, A. D. 1909, and May 10th, A. D. 1909, unlawfully did obstruct or interrupt, or cause to be interrupted or obstructed, the free use of the railway of the T. Ry. Co. by putting or placing or causing to be put or placed upon the said railway certain pieces of iron, iron bolts, horseshoes, rocks and other matters or things" contrary to s. 518 of the Criminal Code, R. S. C. 1906,

c. 146, evidence was given that obstructions were placed on the track upon several different days among others April 14, 15, 17 and 30.—Counsel for defendant requested that the prosecutor should elect which offence he proceeded upon, on the ground that each count must apply to a single transaction.—The judge refused to compel the election, and a case having been reserved, *held*, that the prosecutor could not be compelled to elect under the circumstances as the count in question charged only one offence, and the evidence of the different acts of obstruction was admissible under the count.—*Held*, *also*, that the prosecution might treat the several acts of obstruction as successive cumulative acts, forming but one offence in law, and further, *held*, that at all events under the circumstances no substantial wrong or miscarriage had been occasioned and a new trial should be refused. *R.* v. *Michaud*, 39, p. 418.

Obstructing search—Obstruction of an officer making a search under s. 114 of the Liquor License Act may consist of words only.—Where a liquor license inspector entered to search defendant's premises on which liquor was reputed to be sold and defendant said, "I refuse you to search," and the inspector testified he believed that he would have had to use force to make a search.—*Held* (*per* Landry, McLeod and Barry JJ., White J. dissenting), that there was evidence upon which defendant might be convicted of obstructing an officer in making a search under s. 114 of the Act. *R.* v. *Matheson ex parte Guimond*, 41, p. 581.

Rape—Quaere:—Whether rape can be committed on a girl under fourteen years of age. *Ex parte Wright*, 34, p. 127.

Rape—Nondirection—Lesser offence—Failure to point out to the jury on the trial of an indictment to commit rape the only issue involved being the identity of the prisoner, that on such an indictment the law permits the finding of a lesser offence than the one charged, is not error or nondirection for which a new trial will be granted. *R.* v. *Clarke*, 38, p. 11.

Theft—The mere fact of a person converting to his own use goods found by him does not of itself, as a matter of law, make him guilty of theft.—Where, on a trial of a charge of theft the jury after retiring asked the question: "Does raising a temporary loan on anything found constitute theft?" and the judge answered "yes," *held*, that the answer was equivalent to a direction that as a matter of law the accused was guilty and was a misdirection. *R.* v. *Slavin*, 35, p. 388.

Upon an indictment for stealing from the person evidence was given upon which the defendant could have been convicted of simple theft, but the judge charged the jury that they must either convict of theft from the person, or acquit.—No objection to the charge was made at the trial.—*Held*, the jury should have been instructed that they might convict of simple theft under the indictment, and a new trial was ordered accordingly.—After imprisonment defendant was searched by a police officer and some money found on him.—The officer said "this looks bad J.," speaking to the defendant, whereupon the defendant made some admission of theft which was evidence against him on the trial.—He was under the influence of liquor at the time he made the statement.—*Held*, the evidence was admissible. *R.* v. *Daley*, 39, p. 411.

The question whether a person charged with theft of property, under section 347 of the Criminal Code, from the holder under a hire-purchase agreement, was acting without color of right, is a question for the jury and should be passed upon by them, even though the taking was by stealth and not authorized by the contract. *R.* v. *Comeau*, 43, p. 177.

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4. Practice and Procedure.

1. CHARGE OR INFORMATION.

Amending information and charge—On the trial of an offence under the Canada Temperance Act the information may be amended or altered, and any other offence under the act substituted and the trial continued to conviction without any adjournment, if the defendant is present and does not allege he is misled and ask for an adjournment. *R.* v. *Byron ex parte Price Batson*, 37, p. 386.

Amending charge—A summons charging a sale on the 24th may be amended to a charge for a sale on the 20th, and a conviction made for a sale on that day in the absence of the accused.—(McLeod J. doubting). *Ex parte Tompkins*, 37, p. 534.

Information—Jurisdiction of magistrate—A justice is not disqualified from taking an information under the Criminal Code because the informant is his second cousin.—A justice has no jurisdiction to issue a warrant under s. 653 of the Criminal Code, R. S. C. 1906, c. 146, upon an information which does not state the place where the offence was committed, or that the offence is indictable and triable in the province.—*Held* (*per* Barker and McKeown JJ.), an information under s. 653 of the Criminal Code must be signed by the informant. *Campbell* v. *Walsh*, 40, p. 186.

Information, Laying of—C. signed an information for an offence against the Canada Temperance Act leaving the date and a place for the magistrate's name in blank, and mailed it to magistrate J.—J., being ill, handed the information to magistrate M.—C. then requested magistrate M. over the telephone to take the

information and to issue a summons thereon. —Summons was issued and at the hearing, after the evidence was all in, the defendant's counsel appeared and objected to the magistrate's jurisdiction, but took no further part in the proceedings.—*Held*, that the information was improper, because not laid and signed before the magistrate and that the magistrate acted without jurisdiction. *R.* v. *Murray ex parte Copp*, 40, p. 289.

Information—Lack of particulars for jurisdiction—On an information charging that defendant did unlawfully cut, steal and carry away certain trees from the land of the complainant, the defendant was summarily convicted of an offence under s. 374 of the Criminal Code and a penalty of $25.00 for the offence, $1.00 for the damage done, and costs amounting to $7.50 were imposed. —*Held*, that as the information did not state the value of the property stolen or the amount of the damage done, it did not charge an offence within the provisions of the section, and the justice had no jurisdiction to convict. *R.* v. *Dugas ex parte Legere*, 43, p. 357.

2. CONVICTION.

Amending—A conviction under the Canada Temperance Act was erroneously drawn up in the "District of Chipman Civil Court." It was in fact made by the stipendiary magistrate for the District of Chipman.—Upon certiorari the Court amended the conviction by striking out the words "Civil Court." *Ex parte Weston*, 40, p. 379.

A conviction purported to follow Form 62 of the Criminal Code, R. S. C. 1906, c. 146, but omitted to adjudge costs of commitment and also omitted to order that the costs should be paid to the informant. —*Held*, the Court would amend the conviction by adding the parts omitted. *R.* v. *Matheson ex parte Belliveau*, 40, p. 368.

Form of conviction—A conviction which states in terms that the accused is convicted of the offence charged though not in the words of the act, is sufficient, and will not be quashed on certiorari. *R.* v. *Kay, Ex parte Landry*, 38, p. 332.

Person wrongfully arrested — The accused was arrested under s. 147, c. 8 of 5 Geo. V., "The Liquor License Act 1915," providing for the arrest without warrant by any inspector or sub-inspector under the said act or the Canada Temperance Act, or by any provincial or police constable, of any person suspected of being in personal possession of any intoxicating liquor with the intention of selling or disposing of the same contrary to law.—The accused thus under arrest was brought before a magistrate and charged with keeping intoxicating liquor for sale contrary to part II of the Canada Temperance Act.—The charge was read over to him and he pleaded not guilty. —At the hearing of the information upon which a conviction was made, the accused was represented by counsel who objected that the accused was illegally before the Court and should be discharged because the constable making the arrest had not laid any charge upon oath or given his reasons for his belief as to the guilt of the accused as required by said s. 147.—*Held*, that the magistrate, having jurisdiction over he person and offence and the accused being present, it mattered not how he was brought there, the magistrate acquired jurisdiction and the conviction would not be quashed on certiorari. *R.* v. *McDougall ex parte Goguen*, 44, p. 369.

Search warrant illegal — A conviction made upon evidence obtained by means of an illegal search warrant held good. *R.* v. *Clarkson, Ex parte Hayes*, 40, p. 363.

Two offences tried together — Jurisdiction — On an information charging that the accused unlawfully and maliciously assaulted and threatened to beat one T., a Crown land surveyor, and prevented him from performing his official duty, the magistrate found the accused guilty as charged and adjudged that he pay the sum of $20 over and above the amount of the damage done, being $13, and the costs, and in default of the payment of the said several sums and costs of conveying to gaol he be imprisoned for two months.—*Held* (*per* McLeod C. J. and White J., Grimmer J. dissenting), that as the obstructing of T. in the discharge of his official duty was not an offence over which the magistrate had jurisdiction on summary conviction and the complaint had been tried as one charge, not two, and one penalty imposed, the conviction must be quashed and could not be amended under s. 1124 of the Criminal Code.—*Held* (*per* Grimmer J.), that the allowance of the $13 for damages might be treated as surplusage and stricken out and the conviction amended under s. 1124 of the Code, and stand as a conviction for an assault with a penalty of $20 and costs. *R.* v. *Dugas ex parte Aylward*, 43, p. 443.

3. COSTS.

Appeal to County Court Judge—On an appeal in the York County Court from a summary conviction made by two justices under the Criminal Code, the judge of the County Court gave judgment and made an order thereon at the April sitting that the appeal be allowed with costs, and the conviction be set aside with costs of the appeal, that the magistrates dismiss the information without costs and give the appellant a certificate of dismissal; and the Court adjourned *sine die*.—Subsequent to adjournment the judge of the County Court under s. 751 of the Code by indorsement on the conviction adjourned the further hearing of the appeal until the following June sitting, and at that sitting made another order embodying the provisions of the order of April and further providing by whom and to whom the costs should be paid and in case of default directed

how the payment might be enforced.—*Held*, on certiorari to quash, that the judge of the Court appealed to, having made a final order at the April sitting, became *functus officio* and therefore acted without jurisdiction in subsequently adjourning the appeal and making a further order. *R.* v. *Wilson ex parte Cronkhite et al*, 44, p. 69.

Costs of prosecution—A municipality is liable for the fees and expenses of a justice of the peace or a constable payable in relation to the prosecution of indictable offences, only where they have been certified to be correct by the Attorney General or other counsel acting for the Crown and have been ordered to be paid by the judge presiding at the Court in which the indictment is presented.—The Act of Assembly 57 Vict., c. 19, s. 1, whereby certain expenses in criminal prosecutions are made chargeable upon the munciipalities is not *ultra vires* of the provincial legislature. *McLeod* v. *The Municipality of Kings*, 35, p. 163.

4. GRAND JURY.

Empanelling—The prisoner was convicted at the Circuit for the county of C., which opened on the second Tuesday in November, 1897.—When the Court first met, as there was no criminal business, the Grand Jury was discharged.—After proceeding for a time with the trial of a civil cause the Court adjourned until November 30th, before which time the prisoner was committed for trial. —The sheriff, without any order, summoned a second Grand Jury for the adjourned Court.—Objection having been taken, on an order made by the Court the sheriff summoned a third Grand Jury, which was practically the same as the second.—This Jury found a true bill and the prisoner pleaded guilty to two of the counts in the indictment.—It then appearing that the sheriff was related to the prosecutor, the Court, without formally discharging the third Jury, allowed the plea of guilty to be withdrawn and ordered a fourth Grand Jury to be summoned, the venire being addressed to a Coroner.—The order for summoning the last Grand Jury (which also directed the summoning of a Petit Jury) was brief in form and did not show on its face all the facts which necessitated its issue. —Among the Grand Jurors summoned by the Coroner were two who had been on the sheriff's third panel.—The Coroner's Grand Jury was all drawn from the parish of Woodstock.—*Held*, affirming the conviction, (1) the order to the Coroner to summon the jury need not show on its face all the facts that made its issue a necessity; (2) the facts that the sheriff's jury had not been formally discharged nor the indictment found by it in terms disposed of were immaterial, the whole proceedings being void by reason of the defect in the returning officer; (3) the power of the Court to summon Grand Juries is not exhausted by the summoning of two; (4) the disqualification of the sheriff sufficiently appeared; (5) it is not necessary that the Grand Jury should be drawn from all parts of the county; (6) the fact that some of the jurymen summoned by the coroner were also on the sheriff's panel was not material; (7) it is no objection to the order to the coroner that it directed him to summon both a Grand and a Petit Jury; (8) section 12 of c. 45 of the Consolidated Statutes applies to criminal as well as to civil matters; (9) (*per* Tuck C. J.), the doctrine held in England that all the Coroners of a county, when acting ministerially, constitute but one officer, is not applicable to this province.—(*Per* Hanington J.), the direction of a venire to a single coroner, and a return by him alone, is sufficient under section 12 of chapter 25 of the Consolidated Statutes, and if not the defect is cured by section 656 of the Criminal Code. *R.* v. *McGuire*, 34, p. 430.

5. INDICTMENT.

Libel—An indictment for defamatory libel is good which purports to set out only the tenor and effect of the alleged libel, but in fact sets out the exact words.—Such an indictment following the statutory form, Criminal Code, form 64 h, need not state that the words were likely to injure the reputations of the persons alleged to be defamed by exposing them to hatred, contempt or ridicule, or that they were designed to insult such persons. *R.* v. *McDougall*, 39, p. 388.

6. JUDGMENT.

Finality of — On an appeal in the York County Court from a summary conviction made by two justices under the Criminal Code, the judge of the County Court gave judgment and made an order thereon at the April sitting that the appeal be allowed with costs, and the conviction be set aside with the costs of the appeal, that the magistrates dismiss the information without costs and give the appellant a certificate of dismissal; and the Court adjourned *sine die*.—Subsequent to adjournment the judge of the County Court, under s. 751 of the Code by indorsement on the conviction adjourned the further hearing of the appeal until the following June sitting, and at that sitting made another order embodying the provisions of the order of April and further providing by whom and to whom the costs should be paid and in case of default directed how the payment might be enforced.—*Held*, on certiorari to quash, that the judge of the Court appealed to, having made a final order at the April sitting, became *functus officio* and therefore acted without jurisdiction in subsequently adjourning the appeal and making a further order. *R.* v. *Wilson ex parte Cronkhite et al*, 44, p. 69.

Every judgment or order when drawn up, passed or entered puts an end to the controversy with respect to which it is given, whether it be of procedure or merits, unless

and until the judgment is discharged, reversed, set aside or varied according to law. *Id.*

7. JURY.

Misdirection—Duty of jury to draw inferences of facts—On a trial for murder, where the evidence is circumstantial, and some of the material facts proved are of such a character that it is possible to draw from them inferences bearing either for or against the defence set up, it is the province of the jury to draw the inferences, and it is misdirection for which a new trial will be granted for the trial judge to tell the jury that the only inferences that should be drawn are those tending to establish the guilt of the prisoner. *R.* v. *Collins*, 38, p. 218.

Question for jury—Theft—The question whether a person charged with theft of property, under section 347 of the Criminal Code, from the holder under a hire-purchase agreement, was acting without color of right, is a question for the jury and should be passed upon by them, even though the taking was by stealth and not authorized by the contract. *R.* v. *Comeau*, 43, p. 177.

8. TRIAL.

Adjournment to home of witness—At the trial of an indictable offence the presiding judge has the power to order the Court to be adjourned to a place in the county other than the court house for the purpose of allowing the jury to hear the evidence of a witness, who was unable through illness to leave his house, the counsel for the prisoner having consented thereto. *R.* v. *Rogers*, 36, p. 1.

Adjournment—Refusal of commissioner to adjourn is a matter in his discretion and does not go to his jurisdiction. *R.* v. *Alexander ex parte Monahan*, 39, p. 430; *R.* v. *LeBel ex parte Farris*, 39, p. 468 (Dom. Act); *R.* v. *McQuarrie ex parte Giberson*, 40, p. 1.

A conviction under the Summary Convictions Act, C. S. 1903, c. 123 will not be set aside on certiorari because the trial was adjourned "to be taken up when County Court adjourns," the defendant's counsel having subsequently appeared and taken part in the trial without making objection. *R.* v. *McQuarrie ex parte Giberson*, 40, p. 1.

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5. Summary Convictions.

Aliens Act—Jurisdiction of County Court judge—A judge of a County Court has no jurisdiction to convict for an offence under the act to restrict the importation and employment of aliens (60-61 Vic., c. 11), and the act in amendment thereof (1 Edw. VII. c. 13), for an offence not committed within his territorial jurisdiction. *R.* v. *Forbes ex parte Chestnut*, 37, p. 402.

Appeal—Certiorari—Where the right of appeal from a summary conviction was not taken advantage of, and it appeared upon the return of an order *nisi* to quash the conviction removed by certiorari that there were no exceptional circumstances in the case, the Court in the exercise of its discretion discharged the order *nisi* on the ground that the writ should not have gone. *R.* v. *O'Brien ex parte Doucet*, 43, p. 361.

Certiorari—An order dismissing a complaint under the Summary Convictions Act may be quashed on certiorari. *R.* v. *Ritchie ex parte Sandall*, 37, p. 203.

Conviction amending—A conviction ordering the defendant to be imprisoned for sixty days in default of payment of a fine can not be supported under a section of the act which authorizes imprisonment for not less than three months in case of such default.—*Semble*, the Court will not amend a conviction when by so doing it has to exercise a discretion confided to the justice. *R.* v. *Charest ex parte Daigle*, 37, p. 492.

In the return to a writ of certiorari to remove two convictions with a view to quashing the same on the grounds that they did not follow the minute of adjudication, and were made on an information and summons for a single offence, the convicting magistrate returned the original convictions and an amended conviction in which the objections were cured.—*Held*, the magistrate had power to amend, and the rule *nisi* to quash should be discharged. A conviction will not be quashed because the costs are ordered to be paid to the party aggrieved instead of the nominal prosecutor. *R.* v. *O'Brien ex parte Grey*, 37, p. 604.

Conviction by wrong name—Defendant was convicted of a second offence against the Liquor License Act, C. S. 1903, c. 22, under the name of Haid Petros.—Upon certiorari he made affidavit that his name was Shilala and his surnames Haid, Petros, and Nahea.—It appeared that he had pleaded guilty to the first offence when summoned under the name of Haid Petros, and paid taxes assessed against him under the same name.—*Held*, the conviction was good. *R.* v. *Matheson ex parte Shilala*, 41, p. 386.

Conviction, Defective—Amendment—A conviction as first made was defective by reason of not stating the place of the offence but the place was stated in the information and summons and in the magistrate's minutes.—The magistrate having returned an amended conviction, upon certiorari *held* such amendment was proper since the facts appearing in the magistrate's minutes warranted the conviction in its amended form. *R.* v. *McQuarrie ex parte Giberson No.* 1, 39, p. 367.

Conviction, Quashing—A defendant, seeking to quash a conviction by setting

up that by reason of being misled as to the date of the return of the summons she was convicted in her absence, and was prevented from making her defence, should satisfy the Court that there is a meritorious defence to the charge. *R.* v. *Kay, ex parte McCleave*, 38, p. 504.

Conviction upheld though warrant bad—The information for the warrant upon which defendant was arrested stated an offence under the Indian Act, R. S. C. 1906, c. 81, s. 135.—At the hearing the informant admitted that his knowledge was based on information and belief only.—Upon certiorari, *held*, the magistrate acquired jurisdiction by the information, which was sufficient on its face, and even if the warrant was bad, the conviction would not therefore be set aside. *R.* v. *Matheson ex parte Belliveau*, 40, p. 368.

Corporation—A corporation cannot be convicted summarily.—The word "person" in the Summary Conviction Act cannot be held to include a corporation or body corporate, notwithstanding the Interpretation Act, c. 1, s. 7, sub-s. 22. *Ex parte Woodstock Electric Light Co.*, 34, p. 460.

Default, Judgment by—Where the parties charged are arrested on a warrant and give bail and a time is fixed in their presence for the hearing and they do not appear at the time so fixed, the justice may under section 722 of the Code (R. S. C. 1906, c. 146), proceed with the hearing in their absence, to judgment and sentence. *R.* v. *Hornbrook ex parte Madden*, 38, p. 358.

Dominion Act—Jurisdiction of Parish Court commissioner—A Parish Court commissioner by the Act respecting Parish Courts, C. S. 1903, c. 120, s. 17, is given the power conferred upon two justices by the Dominion Act respecting Summary Convictions, Part XV of the Criminal Code, and has therefore jurisdiction to try offences under the Canada Temperance Act, R. S. C. 1906, c. 152. *R.* v. *Alexander ex parte Monahan*, 39, p. 430.

Evidence to be signed by justice—Jurisdiction—The provision of s. 682, sub-s. 4 of the Criminal Code, R. S. C. 1906, c. 146, requiring that the depositions of witnesses should be signed by the justice, is a matter of procedure and does not go to the jurisdiction.—*Ex parte Gallagher*, 38, p. 498. *Ex parte Budd*, 39, p. 602.

Information—On an information charging that defendant did unlawfully cut, steal and carry away certain trees from the land of the complainant, the defendant was summarily convicted of an offence under s. 374 of the Criminal Code and a penalty of $25.00 for the offence, $1.00 for the damage done, and costs amounting to $7.50 were imposed.—*Held*, that as the information did not state the value of the property stolen or the amount of the damage done it did not charge an offence within the provisions of the section, and the justice had no jurisdiction to convict. *R.* v. *Dugas ex parte Legere*, 43, p. 357.

Judgment by one justice only—Defendant gave notice of appeal to the County Court from a summary conviction.—The conviction was signed by two justices, but on the day fixed for delivering judgment one justice read the conviction, the other not attending.—*Held* (*per* Gregory J). under ss. 707, 708 of the Criminal Code both justices must attend to give judgment, and it is not sufficient for one to attend and read a conviction signed by both. *R.* v. *Haines et al*, 39, p. 49.

Jurisdiction—A magistrate has no jurisdiction to issue a warrant on an information under the Dominion Summary Conviction Act without examining upon oath the complainant or his witnesses as to the facts upon which the information is based.—*Ex parte Boyce*, 24, p. 347 followed. *R.* v. *Mills ex parte Coffon*, 37, p. 122; *R.* v. *Carleton ex parte Grundy*, 37, p. 389.

Cf. *R.* v. *Hornbrook Ex parte Madden* 38, p. 358. (Col. 236.)

A prisoner arrested in the city of Halifax in the province of Nova Scotia charged with unlawfully breaking and entering a store situate at Sydney in the said province, may be tried at Halifax by a stipendiary magistrate having jurisdiction within the city of Halifax, if he consents to be tried summarily without a jury under section 785 of the Criminal Code 1892, as amended by the Criminal Code Amendment Act 1900. *R.* v. *Warden of Dorchester Penitentiary ex parte Seeley*, 38, p. 517.

Public Health Act—Error in notice—A conviction under the Public Health Act, C. S. 1903, c. 53, for failing to remove material dangerous to the public health from premises indicated in a notice given by a health officer under section 36 of the Act held bad where the notice to remove described, not the premises of the defendant on which the material complained of was deposited, but other premises; and further held that the objection was not waived or the conviction cured by the defendant not being misled by the wrong description and not raising any objection on that ground, but appearing and defending on other grounds. *R.* v. *Kay ex parte Allen*, 38, p. 536.

Review by County Court Judge—Where the County Court judge of York county quashed on review a conviction made by a magistrate of Northumberland county under the Summary Convictions Act, C. S. 1903, c. 123, for taking one caribou contrary to the provisions of the Game Act, C. S. 1903, c. 33, s. 3 (1) (a) on the ground that *mens rea* was a necessary part of such offence, and was not proved.—*Held* (1), a County Court judge has jurisdiction to review such conviction though the offence was committed and the case tried in a county

for which he is not a County Court judge—*Ex parte Graves*, 35 N. B. R. 587 followed.—(2) That under the facts, the order of the County Court judge should not be disturbed.—*Held* (*per* Barker C. J., Barry and McKeown JJ.), where there is no want or excess of jurisdiction, the judgment of a County Court judge on review should not be disturbed.—*Held* (*per* Landry, McLeod and White JJ.), the Supreme Court in the exercise of its inherent jurisdiction to supervise the proceedings of inferior tribunals may set aside the order of a County Court judge on review in order to prevent a gross miscarriage of justice. *R.* v. *Wilson ex parte Fairley*, 39, p. 555.

Sentence—Thirty days—One month—A conviction will not be quashed because the minute awarded an imprisonment of thirty days, while the section of the act under which the conviction was made limited the time of imprisonment to one month. *R.* v. *McQuarrie ex parte Rogers*, 36, p. 39.

Service, Time of—A justice has no jurisdiction to hear a complaint unless there is evidence before him to show that the defendant was served with the summons a reasonable time before the return.—A summons issued at ten o'clock in the morning, returnable the same day at one, does not allow the defendant a reasonable time to appear and defend, and a conviction in default of appearance founded on such a proceeding should be quashed on certiorari.—(*Per* Hanington J.) *R.* v. *Wathen ex parte Vanbuskirk*, 38, p. 529.

Service—Reasonable time for appearing—Where a summons to answer an offence under the Liquor License Act, C. S. 1903, c. 22, was served personally on the evening of April 14, returnable at 10 a. m., April 16, and on the return of the same the defendant appeared by counsel and procured an adjournment to April 19, the Court refused to set aside the conviction subsequently had on the ground that the defendant did not have a reasonable opportunity of appearing and defending.—The conviction as first made was defective by reason of not stating the place of the offence but the place was stated in the information and summons and in the magistrate's minutes.—The magistrate having returned an amended conviction upon certiorari, *held*, such amendment was proper since the facts appearing in the magistrate's minutes warranted the conviction in its amended form. *R.* v. *McQuarrie ex parte Giberson*, No. 1, 39, p. 367.

Stenographer, Swearing of—Section 25 of the Criminal Code Amendment Act 1913, c. 13, repealing and re-enacting s. 683 of the Criminal Code 1906, authorizing the depositions taken by a justice on a preliminary inquiry to be taken in shorthand by a stenographer, who before acting shall, unless he is a duly sworn official court stenographer, make oath that he will truly and faithfully report the evidence, made applicable to the trial of complaints under summary conviction proceedings by sub.-s. 3 of s. 27 of the Criminal Code 1906 is imperative and a conviction made for an offence against the Canada Temperance Act on evidence taken in shorthand by a stenographer who was not sworn to truly and faithfully report the evidence, and was not a duly sworn official court stenographer, was quashed on certiorari as having been made without jurisdiction.—The defect is not cured by an affidavit of the stenographer made subsequent to the trial and conviction, stating that the evidence had been truly and faithfully reported, even if such an affidavit could be produced and read on return of the rule *nisi* to quash. *R.* v. *Limerick ex parte Dewar et al*, 44, p. 233.

Summons—Clerical error in copy served—The defendant was served with a copy of a summons under the Summary Conviction Act, C. S. 1903, c. 123, to appear at a magistrate's office in the Parish of P.—In the original summons the place was stated to be in the Parish of A. and in fact the magistrate's office was in A.—The constable made affidavit that he served a true copy of the original summons.—At the trial the defendant's counsel appeared in answer to a summons for another offence returnable before the same magistrate at the same time and place.—He also had authority to defend this case but he did not appear in it or defend.—The magistrate understood that defendant's counsel appeared in both cases and granted an adjournment of both.—After conviction, *held*, that in absence of an affidavit that the defendant was misled by the mistake, the conviction would not be set aside. *R.* v. *McQuarrie ex parte Giberson* No. 2, 39, p. 371.

Warrant—Failure to serve copy—Failure to serve a copy of the warrant issued in the first instance at the time of the arrest, is no ground for setting aside a conviction under the Summary Convictions Act for an offence against the Canada Temperance Act. *R.* v. *Hornbrook ex parte Madden*, 38, p. 358.

Warrant—Issuing on sworn information—A sworn information containing a positive statement that the party charged had committed an offence triable under the Summary Convictions Act is sufficient to authorize the issue of a warrant in the first instance without an examination of the informant or his witnesses.—*R.* v. *Mills ex parte Coffon* 37 N. B. R. 122 distinguished. *Id.*

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6. Summary Trial.

Amending improper sentence—The defendant was convicted under the Speedy Trials Act, Part XVIII of the Criminal Code, of fraudulently abstracting electricity to the value of some $13.40 from the St. John Company contrary to s. 351 of the

Code, and was sentenced to two years imprisonment and to pay a fine of $1,000, one half of which was ordered to be paid to the St. John Company.—On appeal, *held*, the sentence was erroneous in law and the case was remitted to the Court below with directions to impose a sentence of six months imprisonment and a fine of $500. *R.* v. *Sperdakes*, 40, p. 428.

Commitment by justice of the peace who was also a stipendiary magistrate—It is no ground for quashing a conviction under the provisions of the Criminal Code for speedy trials that the accused was committed for trial without being given the option by the justice of the peace, who was also a stipendiary magistrate, of a summary trial.—The justice, in his capacity of a justice of the peace, took the information, issued his warrant for the arrest of the accused, held an examination and committed him for trial on a charge that as a stipendiary magistrate he might have heard and determined in a summary way. *R.* v. *Howe*, 42, p. 378.

Conviction—Erroneous on findings—A County Court judge sitting under the Speedy Trials Act, Part XVIII of the Criminal Code made certain findings of fact and entered a conviction against the defendant for an offence against s. 417 of the Code.—A case having been reserved by him, *held*, upon the findings, the County Court judge should have entered a verdict of acquittal and the Court ordered a verdict to be entered accordingly. *R.* v. *Ayoup*, 39, p. 598.

Election—A person who has been brought up for election as to the mode of his trial under the speedy trials sections of the Criminal Code, and has elected to take a speedy trial, cannot afterwards re-elect to be tried before a jury in the ordinary way. *R.* v. *Howe*, 42, p. 378.

Judgment—Part quashed by certiorari—S. purchased for $66 a portion of some metal stolen by two boys from E.—After trial and conviction of the boys under the Speedy Trials Act the trial judge ordered the purchase money and the metal sold to S. to be given to E., but on certiorari that part of the order in regard to the money was quashed. *R.* v. *Forbes ex parte Selig*, 39, p. 592.

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7. Miscellaneous.

Alibi—Where the defence to a criminal charge is an alibi, it is misdirection to tell the jury that the onus is on the prisoner to prove it to their entire satisfaction, and to show beyond all question or reason that he could not have been present at the commission of the crime. *R.* v. *Myshrall*, 35, p. 507.

Boys' Industrial Home—In an application for a mandamus to the chairman of the Boys' Industrial Home to compel him to issue his warrant to deliver to the custody of the superintendent a boy sentenced to a term of imprisonment in the home under an Act of the parliament of Canada, 56 Vict., c. 33, it appeared that s. 6 of the said act authorizes the jailer to retain the boy "until there is presented to such jailer a warrant from the chairman of the governing board (which warrant the chairman is hereby authorized to issue under his official seal) requiring the sheriff or constable or other officer to deliver such boy to the superintendent of such industrial home," and that s. 9 of the provincial act 56 Vict., c. 16, says "the said chairman may thereupon (referring to what shall precede the issuing of the warrant) issue his warrant" etc. *Held* (*per* Tuck C. J., Hanington, Landry, McLeod, and Gregory JJ.), that the words "is hereby authorized" in section 6 and "may" in section 9 are not only enabling words but imperative as well, and the chairman has no discretionary power as to the issue of the warrant; that the act of the parliament of Canada establishing the home as a prison, is not *ultra vires*; that the chairman was not justified in refusing to issue the warrant because the certificate of sentence did not contain all the items of information specified in schedule "A" of the provincial act. *Ex parte The Attorney General*; *In re Goodspeed*, 36, p. 91.

Jurisdiction—The determination whether the magistrate shall hold a preliminary inquiry under Part XIV, a summary conviction under Part XV or, subject to the consent of the accused, a summary trial under Part XVI should depend upon the gravity or trifling character of the offence and the determination of that question rests with the magistrate.—(*Per* Barry J.) *R.* v. *Folkins ex parte McAdam*, 43, p. 538.

Mens rea—*Mens rea* is not necessary to guilt in the case of a penalty.—(*Per* Hanington J.) *R.* v. *Ritchie ex parte Blaine*, 37, p. 213.

Upon a charge for unlawfully selling intoxicating liquor in violation of the Canada Temperance Act, it is not necessary to prove knowledge on the part of the defendant that the liquor sold was intoxicating. *R.* v. *Marsh ex parte Lindsay et al*, 39, p. 119.

CROWN.

Adverse possession against Crown—The period of sixty years possession is essential to establish a claimant's right against the Crown, and the evidence must show exclusive, continuous, open, visible adverse possession for the sixty year period, and when the land claimed is neither bounded by a fence or other visible boundary, nor its limits defined by deed, the doctrine of constructive possession does not apply; and the claimant can establish title by possession

to so much only of the land as he has held in actual adverse possession for the requisite statutory period.—There is no mode by which the Crown, apart from statutory authority, can convey land, otherwise than by its grant under the Great Seal, and it would not therefore be barred by acquiescence or adoption or recognition of a line to which one claims to hold adversely. *Mersereau* v. *Swim*, 42, p. 497. (Confirmed S. C. of C.)

Adverse possession of Crown land—Trespass—The plaintiff owned a milling property on the south side of the Miramichi river.—In connection therewith he and his predecessors in title had (prior to any occupation by the defendant Sullivan or his predecessors in title) actual occupation of a wharf built by certain predecessors in title of the plaintiff out into the river, which not only extended along the front of the plaintiff's property, but continued down stream across the defendant's (Sullivan's) lot or part thereof.—The wharf in question was built on land vested in the Crown.—The defendant Sullivan claimed as against the plaintiff to be entitled to the possession of that part of the wharf which fronted on his land.—*Held*, on appeal, affirming the judgment of McLeod C. J. in the Chancery Division, that the plaintiff had a possessory title good against every one but the Crown, and was entitled to recover damages against the defendants in trespass. *Jones* v. *Sullivan et al*, 43, p. 208.

Bond to the Crown—A bond given by a county secretary-treasurer to the Queen for the due performance of his duties as such officer is a first lien on all the real estate of the obligor from the date of the execution of the bond, and takes precedence of executions and mortgages issued or executed respectively at a date or dates subsequent to that of the bond.—The rights and remedies of mortgagees and execution creditors, whose mortgages, judgments or executions were executed, signed, issued or handed to the sheriff respectively after the making of or breach of said bond, are postponed until all moneys due by virtue of the bond and in consequence of a breach have been fully paid and satisfied.—The writ of extent is a proper and effectual proceeding for enforcing the rights of the Crown on such a bond.—Whenever a demand may be properly sued for in the name of the Queen, the prerogative right of the Crown attaches in all portions of the British Empire subject to English law, irrespective of the locality in which the debt arose and of the government in right of which it accrued. *R.* v. *Sivewright*, 34, p. 144.

Crown Grant—Adverse possession to Crown—The period that one adversely holds Crown lands will not enure against the grantee of the Crown; and the possessory claim of one seeking to establish title by adverse possession will not begin to run until the date of the grant to the Crown's grantee. *Ouellet* v. *Jalbert*, 43, p. 599.

Crown Grants or Leases by Lieutenant Governor in Council—The Lieutenant Governor in Council has no power to make a lease or grant that affects the rights of private individuals. *Nepisiguit Real Estate Fishing Co. Ltd.* v. *Canadian Iron Corporation*, 42, p. 387 C. D.

Crown Grant—Ejectment—Writ of Intrusion—In an action of ejectment it appeared that the land belonged to the Crown, and was in peaceable possession of its grantee, the defendant, but that the plaintiff and his predecessors in title had enjoyed uninterrupted occupation thereof for a period of 56 years down to a date about 7 years prior to date of action.—*Held*, that judgment was rightly entered for the defendant. — Occupation against the Crown for any period less than the 60 years required by the Nullum Tempus Act is of no avail against the title and legal possession of the Crown, and still less against its grantee in actual possession.—The Act 21 Jac. I, c. 14, only regulates procedure, and its effect is that if an information of intrusion is filed, and the Crown has been out of possession for 20 years, the defendant is allowed to retain possession till the Crown has established its title.—Where no information has been filed there is nothing to prevent the Crown or its grantee from making a peaceable entry and then holding possession by virtue of title.—Decisions by the Courts of New Brunswick and Nova Scotia to the effect that when the Crown has been out of actual possession for 20 years it could not make a grant until it had first established its title by information of intrusion, overruled.—Judgment in 36 N. B. R. 260 set aside: 34 S. C. R. 533 affirmed. *Emmerson* v. *Maddison* (1906) A. C. 569.

Crown grants, Evidence re—On a question as to the location of the lines of a Crown grant, it is open to the Court to refer to subsequent grants and plans of adjoining lands for the purpose of throwing light upon and assisting in the proper determination of the question in dispute. *Phillips* v. *Montgomery et al*, 43, p. 229.

Crown grant—Previous conveyance by squatter—A squatter upon Crown land, which he had partly cleared, and upon which he had built a house, gave a registered mortgage of it in 1874 for value, and in 1881 conveyed the equity of redemption by registered deed to the mortgagee, remaining in occupation of the land as tenant.—In 1898 a son of the squatter, having no knowledge of the mortgage or deed, or that his father occupied the land as a tenant, obtained a grant of the land from the Crown.—*Held*, that he should not be declared a trustee of the land for the purchaser from the father. —*Semble*, that s. 69 of the Registry Act, 57 Vict., c. 20 (C. S. 1903, c. 151, s. 66) by which it is provided that "the registration of any instrument under this Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to

such registration, does not apply to an instrument not properly on the registry, such as a conveyance of Crown land by a squatter. *Robin Collas Co. & Ltd.* v. *Theriault*, 3 Eq., p. 14.

Crown grants under 4 Geo. V., c. 36—*Semble*:—That the Act of Assembly 4 Geo. V., c. 36, coupled with the provisions of the Act 3 Edw. VII c. 19, notwithstanding any previous claims that might have existed on the part of any person or persons to the land designated in such Act 4 Geo. V., authorized and empowered the Minister of Lands and Mines to sell any part of such land, in accordance with the schedule to such Act, 4 Geo. V., and to issue to the purchaser thereof a Crown grant, which would be perfectly good and conclusive against all the world, and even a prescriptive title would not avail against such grant from the Crown under these special acts. *Ouellet* v. *Jalbert*, 43, p. 599.

Crown land license, Trust re—Statute of frauds—An agreement under which a Crown land lumber license was bid in at public sale at the up-set price by the defendant, in whose name the license was issued, for the plaintiff, who had paid to the defendant the up-set price previous to the sale, does not relate to an interest in land within the Statute of Frauds, and if it does, as the purchase money for the license was paid by the plaintiff, and a trust thereby resulted in his favor by construction of law, it can be established by parol evidence under the Statute of Frauds, c. 76. C. S. N. B., s. 9. *McGregor* v. *Alexander*, 2 Eq., p. 54.

Crown land licenses—Bidding in—An agreement between two intending purchasers of Crown land lumber licenses to two lots, neither wanting the whole of the lots, not to bid against each other at their public sale, but that one should bid them in for their joint benefit, is not illegal. *Irving* v. *McWilliams*, 1 Eq., p. 217. See also *Laughlan* v. *Prescott*, 1 Eq., p. 406.

Crown lands—Right of licensee to sue for damages—Defendants were contractors engaged in building a portion of the National Transcontinental Railway in New Brunswick.—In the course of their work a locomotive was used and sparks escaping from it set fire to the plaintiff's timber lands.—These lands were held under license from the Crown.—In an action for damage to the timber the jury found negligence on the part of the defendants in not providing proper apparatus to prevent escape of sparks. —*Held*, plaintiff, as licensee, could maintain an action for damage to the timber. *West* v. *Corbett*, 41, p. 420. Confirmed S. C. of C.

Crown land license—Subletting or assigning—In 1893, one M. purchased at a public Crown land sale a license to cut lumber on a block of land, and a license was issued to him dated September 1st 1893 to remain in force until August 1st, 1894.—By the Crown land regulations incorporated in the license, the license might be assigned by writing, the assignor to give notice thereof to the Surveyor-General and the assignment to take effect from the date at which such notice should be received at the Crown land office.—Licensees who paid their stumpage dues by August 1st in each year were entitled to annual renewals for such part of the ground held by them as might at the first day of July in each year be vacant and unapplied for, on payment of the mileage thereon on or before the first day of August; and such renewals could be for 24 years from August 1st, 1894.—Previous to the above sale, one L., being desirous of securing certain lumber privileges in a part of the area included in the license to M., entered into an agreement with him that he (M.) should buy in the block, and afterwards secure these privileges to L.—Accordingly, after the sale, they entered into a written agreement, dated August 31st, 1893, prepared by the Surveyor-General reciting that M. had agreed to sell to L. for the term for which a license should issue, and renewals, the right to cut, carry away, and appropriate to his use cedar lumber in a certain area and lumber of all kinds in another area, in consideration of $40 and witnessing that L. agreed to pay M. the renewal mileage each year on a certain number of miles during the continuance of the privilege at the rate fixed from year to year by the government, and M. agreed to renew the license.—The agreement immediately after its execution was filed in the Crown land office.—Subsequently L. assigned his rights under the agreement to the plaintiffs.—This assignment was never filed in the Crown Land office.—On November 16th, 1894, M. assigned the same license among others to the defendants, who were purchasers for value and without notice of M.'s agreement with L. and on the assignment being produced to the Crown Land office a renewal for the year beginning August 1st, 1894, was issued to them.—In August, 1895, a tender to M. and the defendants of L.'s share of the renewal mileage was refused. —In a suit for a declaration of the rights of the parties, *held* (1) that the agreement between M. and L. entered into before the sale was not illegal as being an agreement to stifle competition at a public sale; (2) that the license purchased by M. did not convey an interest in land and therefore that it could be assigned without an instrument under seal registered in the county where the land was situate; (3) That the defendants were under no duty to search at the Crown Land Office as to the title of M. to assign the license; (4) that the agreement of M. and L. was not an assignment of the license, but at most a mere sub-license, conferring no right of renewal against the Crown, and amounting only to a sale of, or an agreement to sell, rights under the license, enforceable by specific performance against M. upon the license being renewed to him, or if not renewed, giving rise to an action of law for breach of agreement, and giving to L. or his assigns no rights against the

defendants. *Laughlan* v. *Prescott*, 1 Eq., p. 406.

Crown's prerogative—Quaere:—Whether an injunction can issue restraining the payment of money on deposit in the Government Savings Bank. See *White* v. *Hamm*, 2 Eq., p. 575.

Crown's prerogative—Canadian Government Railways—The Crown, not being expressly mentioned in the Canada Temperance Act, R. S. C. 1906, c. 152, is not bound thereby, and therefore a station agent of the Intercolonial Railway, a government railway, cannot be convicted under s. 117 of the Act as amended by 7-8 Edw. VII (Dom.), c. 71, for warehousing and keeping for delivery, in the course of his duty as station agent, intoxicating liquor brought to his station by the railway. *R.* v. *Marsh ex parte Walker*, 39, p. 329.

Government officials — Garnisheeing salary—K. M. and W. were officers of the government of Canada and were in receipt of annual salaries amounting to $1,800, $400, and $700 respectively.—K., upon being examined before the County Court judge of W., was, under the provisions of 59 Vict., c. 28, s. 53, ordered to pay the amount of the judgment against him by instalments at the rate of five dollars per month.—M. and W., being examined before the judge of the County Court of S., were, under the same section, ordered to pay the amounts of the judgments against them by instalments at the rate of five and ten dollars per month respectively.—Orders *nisi* having been obtained to bring up the three orders for the purpose of quashing them, upon the return thereof, it was *held* (*per* Tuck C. J., Hanington, VanWart and McLeod JJ., Landry J. dissenting), (1) that the provisions of 59 Vict., c. 28, s. 53, authorizing the judge or other officer before whom the examination is held, upon it being made to appear to him that the judgment debtor is unable to pay the whole of the debt in one sum, but is able to pay the same by instalments, to make an order that the debtor shall pay the amount of the judgment debt by instalments, in so far as it is sought to apply the same to salary or income derived from office or employment under the government of Canada, is *ultra vires* of the provincial legislature, and, therefore, that the orders against K. M. and W. should be quashed. *Ex parte Killam, McLeod, Wilkins*, 34, p. 530.

Government officials—Taxing salary—A provincial legislature has no power to impose a tax upon the official income of an employee of the Dominion government, nor to confer such a power on the municipalities. *Ex parte Timothy Burke*, 34, p. 200.

Sub-sec. 2 of sec. 92, B. N. A. Act 1867, giving a provincial legislature exclusive powers of legislation in respect to "direct taxation within the province etc." is not in conflict with sub-sec. 8 of sec. 91 which provides that "parliament shall have exclusive legislative authority over" the fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada—(Girouard J. contra).—*Held* therefore (Girouard J. dissenting) that a civil or other officer of the government of Canada may be lawfully taxed in respect to his income as such by the municipality in which he resides. *Abbott* v. *City of Saint John*, 40 S. C. R., p. 597, affirming 38 N. B. R. 421.

Royal Gazette—Error in notice—By Act 39, Vict., c. 16, provision was made for the appointment by the Lieutenant Governor in Council of a person, resident in the parish of Salisbury, in the county of Westmorland, to be a district or stipendiary police magistrate for the said county.—By Act 53 Vict., c. 77, Act. 39 Vict., c. 16 was amended by inserting the word "or" between the words "stipendiary" and "police" and it was enacted that any person theretofore appointed a stipendiary and police magistrate under the words "stipendiary police magistrate" should be held and taken to be a stipendiary and police magistrate for the county of Westmorland.—The Royal Gazette, containing the appointment of a person in pursuance of the Act 39 Vict., c. 16, designated him as "Police magistrate for Salisbury".—*Held*, that he was appointed for the county of Westmorland. *Ex parte Gallagher*, 34, p. 329.

Surveyor General—Jurisdiction—One R assigned certain applications for licenses to work under the General Mining Act, C. S. 1903, c. 30, to "C" Co. and licenses to work were issued to "C" Co.—R. claimed that these applications were assigned to "C" Co. on certain trusts and on refusal of the "C" Co. to carry out such trusts he applied to the Surveyor General to cancel his assignments and the licenses issued to "C" Co.—On April 8, 1909, after an *ex parte* inquiry, the Surveyor General made an order cancelling the assignment and the licenses, and ordering new licenses to issue to R.—On May 27, 1909, upon application of the "C" Co. the Surveyor General held a rehearing at which both parties were present, and after the hearing confirmed his first order.—On September 13, an order for certiorari was granted.—*Held* (1) certiorari would lie to remove these orders; (2), the Surveyor General had no jurisdiction to make the orders, the dispute being between private parties, and the case not falling within the provisions of the General Mining Act authorizing the cancellation of licenses by the Surveyor General; (3) the fact that both parties submitted the case for adjudication by the Surveyor General would not confer jurisdiction upon him nor be construed as a submission to arbitration. *R.* v. *Grimmer ex parte Shaw*, 39, p. 477.

CROWN PRACTICE.

1. **Mandamus and Prohibition.** — *See* MANDAMUS AND PROHIBITION.

2. **Habeas Corpus**—*See* HABEAS CORPUS.

3. **Certiorari**—*See* CERTIORARI.

4. **Quo Warranto**—*See* QUO WARRANTO.

5. **Petition of Right**— *No Cases.*

6. **Scire Facias** — *No Cases.*

Writ of Extent / **Writ of Intrusion** } *See* "CROWN."

DAMAGES.

Alternative remedy—*See* INJUNCTION.

Fraud—*See* FRAUD AND MISREPRESENTATION.

Remoteness of—*See* NEGLIGENCE.

Liquidated damages or penalty—*See* CONTRACTS—SALE OF GOODS—VENDOR AND PURCHASER.

Negligence — *See* MASTER AND SERVANT — NEGLIGENCE — STREET RAILWAYS.

Acts done by legislative authority—Remedy—The plaintiff, in the first count of his declaration, alleged that he was in possession of a lot of land adjoining Ludgate Lake in the parish of Lancaster, and that the defendants penned back the waters of the lake, thereby overflowing and flooding his land, destroying the trees and herbage on it, and otherwise injuring it and depriving him of its use.—By act of assembly, 59 Vic., c. 64, the defendants were authorized to utilize the water of the lake for the benefit not only of the residents of Carleton, but for the use of the residents of Lancaster, and by act of assembly, 61 Vic., c. 52, the defendants were given additional powers in reference to this water supply to meet certain public requirements.—The second and third counts of the declaration allege, as causes of action, damages resulting from acts alleged to have been done under and by virtue of certain acts of the legislature which entitle the plaintiff to compensation from the defendants.—*Held*, on demurrer, that these counts were bad, as the damage for which compensation is claimed arose from lawful acts done by defendants by virtue of legislative authority for the recovery of which recourse must be had to the special remedy provided. *Rose* v. *The City of Saint John*, 37, p. 58.

Animal killed by railway—A railway company is liable for damages for killing a cow which was at large on the highway with the knowledge of the owner contrary to the Railway Act 1903, and which strayed from the highway to the land of D., and from there to the railway track through a defective fence which the defendant company were obliged to maintain. *Lizotte* v. *Temiscouata Rwy. Co.*, 37, p. 397.

Arrest, Illegal—The expense to which a party complaining may have been put by an illegal arrest is a proper element of damage. *Melanson* v. *LaVigne*, 37, p. 539.

False imprisonment by justice of the peace acting without jurisdiction. See *Campbell* v. *Walsh*, 40, p. 186.

To constitute an arrest, it must appear that plaintiff was reasonably led to believe by either the language or conduct of the defendants or both, that plaintiff was deprived of her liberty of movement.—The plaintiff was arrested on the charge of being an inmate of a bawdy house, and it appeared that she had the care and management of a hotel, some rooms of which were used as a bawdy house.—In an action for wrongful arrest, *held*, that the occupants of rooms other than those used for a bawdy house were not inmates of a bawdy house within the meaning of s. 228 of the Criminal Code—*Held, also*, that it must be shown that plaintiff knew or ought to have known that some portion of the hotel was used as a bawdy house in order to constitute her a keeper of a bawdy house; that this was a material element in estimating damages; and that the failure of the jury to find upon this question, was ground for a new trial.—*Held, also*, that to entitle the plaintiff to exemplary damages in such an action it must be proved that defendants acted maliciously or with unnecessary harshness or with wilful or grossly negligent disregard of plaintiff's rights in arresting her, and failure to so direct the jury is ground for a new trial. *Hopper* v. *Clark et al*, 40, p. 568.

In an action for false imprisonment where the person or character of the plaintiff are injured, a new trial will not be granted on the ground of excessive damages unless the verdict is so large as to satisfy the Court that it was perverse and the result of gross error, or unless it can be shown that the jury acted from undue motives or misconception.—In considering the amount of the damages in such an action the jury may take into consideration the plaintiff's loss of time and interruption of business, bodily and mental suffering, indignity, circumstances of family, condition of the gaol, costs of obtaining release for which the plaintiff is liable although not actually paid, and in addition and distinct from the foregoing the illegal restraint of plaintiff's personal liberty. *Markey* v. *Sloat et al*, 41, p. 235.

Assault—No damage proven—Verdict for defendant—In an action for an assault the jury found the defendant guilty, and that the plaintiff had not suffered any damage and returned a verdict for the defendant.—A subsequent application to the judge of the County Court who had tried the cause to set aside the verdict and

grant a new trial, or failing that to enter a verdict for the plaintiff for nominal damages was refused.—*Held*, on appeal (*per* Tuck C. J., Hanington, Landry and Gregory JJ., McLeod J. dissenting), that the Court had no power to set aside the verdict for the defendant and enter a verdict for the plaintiff, and that a new trial will not be granted merely for the purpose of enabling a plaintiff to obtain nominal damages, where no right is affected except a question of costs.—That evidence of provocation by words spoken three days before the assault by the plaintiff to the defendant wa properly admitted in mitigation of damages. *Murphy* v. *Dundas*, 38, p. 563.

Blasting, Damage from—The owner of land who uses explosives in the usual way for the purpose of excavating rock for the foundation of a house is bound to exercise all reasonable care and is responsible for damage to an adjoining occupant due to the use of extra heavy blasts. *Brown* v. *Garson* 42 p. 354.

Breach of contract—The authority conferred on a municipality to make by-laws for establishing, licensing and regulating a ferry authorizes it to provide a boat and other appliances for operating the same.—And where a ferry, so established with the boat and appliances was sold at public auction by the municipality, it is bound to put the vendee in possession, and is liable to an action of damages for a failure to do so, and to an action to recover back the purchase money. *Currey* v. *The Municipality* of *Victoria*, 35, p. 605.

E. agreed to sell to W. a complete bottling plant, consisting of machinery and a certain number of bottles for $900.00.—The machinery and a small part of the bottles were delivered and some of the machinery was affixed to W.'s building.—W. paid E. $500.00. —In an action by E. to recover the balance of the purchase price, the trial judge held that the contract was entire and failure to deliver substantially the full number of bottles would prevent E. from recovering anything.—He entered a verdict for W. but disallowed W.'s set off for breach of contract.—*Held*, E. was entitled to recover the value of the machinery and bottles delivered and W. to recover damages, if any, for non-completion of the contract, and, as there were no findings on either point, there should be a new trial. *Emack et al* v. *Woods et al*, 39, p. 111.

Breach of contract—Privity—Defendant contracted with one of the plaintiffs, Adams & Co., to cut and deliver to it in the Restigouche river in the spring of 1915, in time to be driven with the corporation drive, a quantity of logs.—The contract, after providing how the logs should be marked and surveyed contained the following clause: "It is also understood and agreed between the parties hereto that all logs cut or procured under this contract are cut and procured for the Dalhousie Lumber Co. Ltd. and all such logs and lumber shall be the property of the Dalhousie Lumber Co. Ltd. from the stump."—*Held*, on appeal affirming the judgment of Crocket J., that there was no privity of contract between the defendant Walker and the plaintiff the Dalhousie Lumber Co., and Walker, having had no written notice of any assignment of the contract to the Dalhousie Lumber Co. Ltd., that company was not entitled to recover from Walker damages resulting from his failure to put the logs in the river as he had agreed with Adams & Co.—On the trial of an action for the wrongful detention of a quantity of logs in which action the rights of a third party under a contract between the defendant and the third party were involved, it was agreed by counsel on the trial that the third party should be added as a party plaintiff, that the pleadings should be amended in all necessary particulars, that the case should be withdrawn from the jury and the presiding judge should determine the rights of all parties.—The Court on appeal refused to disturb the findings where the judge had acted within the scope of the agreement and was not manifestly in error. *Dalhousie Lumber Co. Ltd.* v. *Walker*, 44, p. 455.

Chattels bailed, Improper use of—In an action upon a contract for the hire of chattels, the plaintiff is entitled to recover damages for the improper use of or injury to the chattels or for a conversion of them. —Therefore when a plaintiff sued in *assumpsit* for the hire of blocks and gear for hoisting and also added a count in trespass for the improper use and injury to the same and a count in trover for a conversion of a part thereof, and the learned judge who tried the cause found that a sum of money paid by the defendant to the plaintiff before action was an ample compensation for the plaintiff's claim on the count for hiring.—*Held*, that this amounted to a finding in favor of the defendant on the pleas of not guilty, pleaded to the counts in tort. *Lang* v. *Brown*, 34, p. 492.

City of St. John—Alterations in street level—Injunction—By the charter of the City of St. John, the corporation were given power to establish, appoint, order and direct the making and laying out all other streets . . . heretofore made, laid out or used or hereafter to be made, laid out and used, and also the altering, amending and repairing all such streets heretofore made, laid out, or used, or hereafter to be made, laid out or used in and throughout the said City of St. John and the vicinity thereof . . . So always as such . . . streets so to be laid out do not extend to the taking away of any person's right or property without his, her or their consent, or by some known laws of the said province of New Brunswick, lor by the law of the land."—The charter is confirmed by 26 Geo. III, c. 46.—By Act 41 Vict., c. 9, intitled "An Act to widen and extend certain public streets in the City of St. John," it was provided that Dock

street should be opened to a width of sixty-two feet by taking in twelve feet on its easterly side, and carrying the north-eastwardly line twelve feet to the eastward through its entire length from Market square to Union street and that Mill street should be opened to the same width from Union street to North street by widening its eastwardly line.—The effect of widening Dock street made it necessary either that Union street should be lowered and graded to its level, or that Dock street should be graded up to its level, and that if Union street was lowered, George street, opening off it, should also be lowered.—The corporation, in January, 1878, decided to excavate and lower Union street to the extent of twelve or thirteen feet after hearing the report of the city surveyor and the petitions of citizens for and against the cutting down of Union street, and immediately thereafter entered upon the work by contractors.—The plaintiffs were owners of a lot on the corner of Union and George streets, upon which they had erected expensive business premises, and which, by the lowering of the streets, would be twelve or thirteen feet above them.—When the work of cutting down Union street was about two-thirds done, and approaching the plaintiffs' premises, and after several months had elapsed from the time it was entered upon, the plaintiffs being unable to obtain compensation from the corporation, brought this suit for an injunction to restrain the continuance of the work.—*Held* (1), that the corporation were unauthorized to cut down Union street, and that the plaintiffs were entitled to compensation for which they had a remedy at law but (2), that the injunction should be refused on the ground of delay in the application. *Yeats* v. *The Mayor etc. of St. John*, Eq. Cas., p. 25.

Note. Plaintiffs brought an action at law but judgment was given for defendants following *Pattison* v. *Mayor of St. John* Cassels Digest, p. 174 (1893 Ed.).

Distress, Illegal—In an action for an illegal distress the plaintiffs are entitled to recover the value of the goods sold, although they are subject to a bill of sale by way of mortgage to secure a compromise which the plaintiffs have made with their creditors.—*Semble* (*per* Barker J.), an unlawful sale of defendant's goods by plaintiffs, which goods defendants were using in a particular way, gives defendants the right to demand the value of the goods by way of damages. *Clark et al* v. *Green et al*, 37, p. 525.

Dog, Bite by— Quantum of damages. In an action brought to recover damages from the owner of a dog, which had bitten the plaintiff, a child a little over five years of age, the learned judge, in charging the jury, told them that if they thought the scars on the plaintiff's face, caused by the bite, were likely to be permanent, and that such lasting disfigurement might affect her prospects of making a good marriage, they might consider such possible loss of marriage in assessing the damages.—*Held*, misdirection, as such damages were too speculative and remote.—The jury were further directed that in assessing the damages they might take into consideration the financial position of the defendant and the condition in life of the plaintiff.—*Held*, as before, misdirection. *Price* v. *Wright*, 35, p. 26.

Excessive damages—Where the jury in assessing damages apparently took into consideration the plaintiff's costs of the first trial which had been set aside, this was considered sufficient grounds for setting aside the verdict. *Ingram* v. *Brown*, 38, p. 256.

In an action for breach of contract to supply water power for one year and from year to year as the plaintiff required, it was proved that the water supply was cut off in the middle of the second year, and the plaintiff proved a loss of profit, up to the termination of the second year, amounting to $660.—He also claimed future damages and special damage by reason of the terms of his lease which required that water power, which could be procured only from the town, should be used on the premises, but there was no allegation of special damage in the declaration, and an application at the trial to amend by adding such allegation was refused.—Under a direction to find damages up to the termination of the second year, the jury allowed $1,500.—*Held*, that the damages were excessive and ground for a new trial. *Crockett* v. *The Town of Campbellton*, 39, p. 160.

Expropriation of land—In assessing damages upon the expropriation of land regard should be had to its prospective capabilities. *In re Gilbert and Saint John Horticultural Association*, 1 Eq., p. 432.

Expropriation—"Erections and buildings"—Where the city of Saint John expropriated land under lease from it consisting mostly of mud flats, to be used for manufacturing purposes only, and the lease contained a covenant to pay at the end of the term for "the buildings and erections that shall or may then be on the demised premise," piling fastened with stringers necessary to make it available for buildings may be a subject of damages for which the city would be bound to pay on expropriation under 63 Vict., c. 59, and should not be excluded from consideration on an assessment of damages.—(*Per* Barker, C. J., Hanington and Landry JJ., McLeod J. dissenting.) *Sleeth et al* v. *The City of Saint John*, 38, p. 542.

Expropriation—On expropriation under 63 Vict., c. 59 of lands under a lease, containing a covenant to pay at the end of the term for "any buildings or erections for manufacturing purposes" which should or might then be on the demised premises —*Held*, that damages should be assessed for the value at the time of expropriation

of all piling and filling in intended for and forming a necessary part of the foundation of such buildings.—(*Per* Barker C. J., Hanington, Landry, Gregory and White JJ., McLeod J. dissenting.) *Sleeth et al* v. *The City of Saint John*, 39, p. 56.

Fire—Damage to sole possession of a tenant in common—The plaintiff, a tenant in common of certain lands, but in sole possession under an agreement with the other tenants in common that he was to have possession and ownership of the lands and all appertaining thereto, is entitled in his own name to sue and recover for damages arising from the negligent setting of fire by defendant on his own land and its spreading to the land in possession of plaintiff. *Phillips* v. *Phillips*, 34, p. 312.

Fraud—Quantum of damages—Quaere: —Where a miller attempts to palm off inferior wheat for that left to be ground, whether the damages are limited to the difference in value, or whether damages by way of punishment may not also be given. *Porter et al* v. *Tibbits*, 37, p. 25.

Injunction — Enforcing undertaking for damages—Where plaintiff, on usual undertaking as to damages, obtained an *ex parte* injunction which was subsequently dissolved he was allowed to have his bill dismissed with costs but without payment of damages recoverable under the undertaking.—The undertaking being distinct from the suit may be enforced at any time. *Morehouse* v. *Bailey*, 1 Eq., p. 393.

Insufficient damages—A new trial on the ground of the insufficiency of the damages will not be granted unless it appears clearly to the Court that the smallness of the damages has arisen from mistake upon the part of either the Court or jury, or from some unfair practice on the part of the defendant.—A verdict will not be set aside on the ground that it is a compromise verdict if it can be justified upon any hypothesis presented by the evidence. *Currie* v. *The St. John Rwy. Co.*, 36, p. 194.

Insufficient damages—New trial—In an action of trespass and trover in the County Court the jury found for the plaintiff for part of his claim on evidence, that while contradictory as to part of the claim, was strongly in favor of the plaintiff's whole claim.—The judge of the County Court made an order setting aside the verdict and granted a new trial on the ground that the damages were insufficient and the verdict against the weight of evidence.—*Held*, on appeal, that the judge had power to make the order, and the appeal was dismissed. *Gallant* v. *O'Leary*, 38, p. 395.

Judge's charge — Damages assessed reasonable—If, in charging a jury the judge makes a statement calculated to unnecessarily magnify the importance of the matter in dispute and suggest excessive damages, a new trial will not be granted, even though the judge was in error in making the statement, if it appears from the verdict found that the jury, in assessing the damages, were not influenced by the charge. *Cormier* v. *Boudreau*, 35, p. 645.

Judge's charge — Misdirection — New trial—In an action for assault the judge misdirected the jury in favor of the plaintiff on matters which might affect the question of damages, and a verdict was rendered for the plaintiff for $135.00.—On appeal upon the grounds of misdirection and excessive damages, *held*, that although the damages were not excessive, yet the misdirection caused a substantial wrong or miscarriage entitling defendant to a new trial inasmuch as the jury might have been influenced by it in assessing damages. *Edmondson* v. *Allen*, 40, p. 299.

Land damaged by cattle, due to defective fence on railroad—The company are liable for damage done to the land of an adjoining owner by cattle of a neighbor trespassing by reason of a defective fence which it was the duty of the company to maintain.—(*Per* Landry J., Tuck C. J. and Hanington J. hesitante.) *Lizotte* v. *Temiscouata Rwy. Co.*, 37, p. 397.

Land damages—Expropriation by railroad—A railway company started expropriation proceedings to acquire a right of way across an intervale farm owned by the plaintiffs; subsequently the parties came to a verbal agreement, that the proceedings would be abandoned and the plaintiffs would convey to the company the land required for five hundred dollars, provided it would construct a culvert in the railway embankment where it crossed the plaintiffs' intervale in order that the spring freshets might continue to freely overflow the same.—In case the company did not care to construct the culvert, the plaintiffs asked one thousand dollars more for their land.—The company's agent visited the farm and set out stakes where the plaintiffs wanted the culvert located.—Nothing was said as to the kind of culvert, except that it was to be big enough to let the water flow through, and no arrangement was made about its maintenance.—The plaintiffs executed a deed for the right of way in which the consideration was stated to be one dollar, and were paid the five hundred dollars agreed upon. —The embankment was constructed across the intervale but an opening left at the space marked for the culvert.—Later the company decided not to build the culvert but fill in this space.—On an action for specific performance, *held*, that the agreement was sufficiently certain to allow a decree to be made.—*Held*, that the defendant would be given the option of paying one thousand dollars in lieu of the performance of the contract, as this was the amount asked for by the plaintiffs if the culvert was not constructed.—After agreement was entered into between plaintiffs and defendant

for the construction of a culvert in a proposed railway embankment where it crossed the plaintiffs' farm, the plaintiffs executed a deed of the right of way which contained the following clause: "And the grantors further release the railway company from all claims and demands for severance and depreciation arising out of the taking or expropriation by the railway company of the said lands, and the construction, maintenance and operation thereon of a line of railway and other works."—The company claimed that it was released from any claim which might arise from its failure to construct the culvert by this clause in its deed. —*Held*, that the effect of this clause was to release the company from such damages only as were necessarily consequent upon the authorized severence, and that the damage complained of was unnecessary and could be avoided by the defendant carrying out its agreement for the construction of the culvert. *Whitcombe* v. *Saint John and Quebec Rwy Co.*, 43, p. 42, C. D.

On an appeal from an award made under the N. B. Ry. Act, C. S. 1903, c. 91, as amended by 4 Geo. V., c. 32 (1914), awarding the respondent $16,500 for land taken for appellant's right of way through respondent's property, known as the Victoria Mill property, in the city of Fredericton, and as compensation for damages.—The appellate company in January, 1912, located its right of way through the property, and in the latter part of June, or early in July of that year, began work and filed its plans and book of reference and published the notice required by the Act.—At this time and for a number of years prior thereto the Scott Lumber Company, subject to a lien of the Bank of Nova Scotia, was the owner of the property.—The milling business upon the property had been suspended or discontinued and the lumber company and the bank were seeking to sell the property to satisfy the bank's claim.—On July 17th, 1912, the respondent obtained an option on the property and ultimately on December 12th of the same year purchased it with knowledge of the expropriation.—In 1913 the respondent made substantial changes in the mill, discarding much of the machinery, and erected practically a new mill with a different equipment, increasing its capacity from ten million feet to fifteen million feet per season, and greatly improved and enhanced the value of the property in other respects.—The appellant gave evidence before the arbitrators, placing the market value of the mill property and site at the time of purchase by respondent at $10,000. —The respondent gave no evidence of the value of the property before or at the time of the purchase, but claimed and gave evidence of the value of the land taken and damages for the injury suffered amounting to $77,000.—The arbitrators in their award gave no reasons for their award and did not show how the amount awarded was arrived at.—*Held*, that the principle upon which the compensation and damage should have been awarded would be the market value, including the practical potential value of the land taken, to the Scott Lumber Company at the time of the filing of the plans and book of reference and reasonable compensation for damage caused without taking into consideration, as the arbitrators must have done, values and elements of compensation to the owners incident to the property at the time of the award; and the award must be reduced to $5,500. *St. John & Quebec Rwy. Co.* v. *Fraser Ltd.*, 43, p. 388.

Land damages—Statutory provisions—By act 63 Vict., c. 59, the city of St. John is empowered to take the lands, tenements, rights, property and premises of persons or corporations needed for public civic works, and provision is made for compensation. —By Act 1 Ed. VII, c. 55, the power of the city as to its right to expropriate for a water supply is extended, and the sections in 63 Vict., c. 59, providing compensation are made to apply.—By Act 5 Ed. VII, c. 59, passed for the purpose of further carrying out the provisions of the act or acts of the legislature empowering the city of Saint John to extend its water supply, the city is authorized to take by expropriation or purchase any land that may be needed for the purpose, but no provision is made for compensation, except in the case of certain riparian owners on the Mispec river, and no reference is made to the compensation sections in the other acts.—*Held*, that persons other than those specially provided for in the Act 5 Ed. VII, are entitled to compensation and for this purpose the provision in the other acts as to assessing and paying damages might be read into 5 Ed. VII; that the city might expropriate either the land and vest the title or an easement to lay and maintain its pipes, but could not expropriate an easement to erect and maintain telegraph and telephone lines upon the land. *Chittick* v. *The City of Saint John*, 38, p. 249.

Landlord and tenant—Where a landlord leases a house to several tenants, he retains such control over the premises as to render him liable for damage caused by failure to repair a leak in a sewer pipe in the apartment of a tenant in an upper flat which causes damage to the tenant of a shop on the ground floor of the premises. *Brown* v. *Garson*, 42, p. 354.

Libel—In an action for libel the assessment of damages is peculiarly the province of the jury.—(*Per* McLeod C. J.) *Culligan* v. *Graphic Ltd.*, 44, p. 481.

Lord Campbell's Act—Claim by father—In an action brought under C. S., c. 86 (Lord Campbell's Act) for the benefit of the father of the deceased, evidence was given to show that the father, who was a brass founder, and about seventy years old, had practically become unable to earn

his own livelihood, although his prospects for some years of future life were good; that the deceased, who was twenty-six years of age, had always lived with his father, and for many years had paid various sums, sometimes as much as thirty dollars per month, for his board and lodging, though there was no evidence to show what such board and lodging were worth; that for the fifteen months immediately preceding his death he had ceased to pay anything, because, having gone into business on his own account, his father wished him to keep the money to put into the business; that the son was sober, industrious, a good man of business, and affectionate to his father. —When the son went into business for himself the father advanced to him $700.—After his death the business was closed up and the stock-in-trade, etc., sold, which sale realized $1,100.—Of this $700 went to creditors other than the father, leaving only $400. to satisfy the father's claim of $700.—The learned Chief Justice, who tried the case, having left it to the jury in general terms to estimate what, if any, pecuniary damage the father had sustained by the death of his son, a verdict was found for the plaintiff for $3,500.00.—*Held* (*per* Hanington, Landry, Barker, VanWart and McLeod JJ.), that the amount of the verdict showed either the charge was too general in its terms or the jury misunderstood the principles upon which damages should be assessed in cases such as this, and, therefore, that there must be a new trial on the question of damages, and, further as the evidence of negligence on the part of the defendants was not altogether satisfactory, and the finding of the jury on the question of the damages did not entitle their opinion on the question of negligence to much weight, that there must be a new trial on this point as well.—It having been urged on behalf of the plaintiff that he was entitled to retain a verdict for $300 at least, that being the balance due the father upon his $700 loan, as the jury would have a right to infer that the son, if he had lived, would have paid the debt in full, *held*, as before, that as such claim had not been mentioned in the particulars delivered under the act, and was not referred to either in the plaintiff's opening, the judge's charge, or in any other part of the case, it was impossible to say that the jury in assessing the damages had included this item, therefore, even admitting this claim to be a proper element of damage in cases under the act, it must be submitted to the consideration of another jury.—*Further held*, as before, that outside of the debt above referred to, there was sufficient evidence to go to the jury of a pecuniary loss to the father by the death of the son.—*Held* (*per* Tuck C. J.), that as the jury had either misunderstood or wilfully disregarded the charge on the question of damages, there must be a new trial, and that the evidence of negligence should be sumitted to another jury as well. *Runciman* v. *The Star Line S. S. Co. Ltd.*, 35, p. 123.

Master and servant—Wrongful dismissal—Practice—If an employee, claiming he had been wrongfully dismissed under a contract of hiring, elects to treat the contract at an end and brings an action on the *quantum meruit* for his services, a subsequent action on the same contract for damages for wrongful dismissal will be stayed. *Gregory* v. *Williams et al*, 44, p. 204.

Municipal corporation's liability for damages—Where work is done for a municipal corporation under a contract, the corporation is not responsible for damages for the death of an employee of the contractor from the negligent manner of doing the work, though the corporation employs its own engineer to superintend the work. *Dooley, Administratrix etc.* v. *The City of Saint John*, 38, p. 455.

Patent, Infringement of—Breach of covenant re sale of invention—Plaintiff was the patentee of a lubricator, and by an agreement with the defendants gave them the exclusive right to manufacture and sell the article within a specified area, in consideration of a royalty payable upon each lubricator when sold.—The defendants agreed to manufacture the lubricator in sufficient numbers to supply the trade and to use every reasonable means to secure its sale. —The defendants duly manufactured the lubricator, kept it in stock for sale, and supplied all orders for it.—They also manufactured and sold another lubricator not under patent and not an infringement of the plaintiff's invention.—This and other lubricators in the market were sold so much cheaper than the plaintiff's could be manufactured and sold at, that the latter had a very limited sale.—The plaintiff contended that the manufacture and sale by the defendants of another lubricator was a breach of covenant by them to use every reasonable means to secure the sale of his invention. —*Held*, that there had been no breach of the agreement.—*Semble*, that if the article sold by defendants had been an infringement of plaintiff's patent his damages would be the royalty payable under the agreement. —If it were not an infringement, but its sale a breach of the agreement, the damages would be as on an ordinary breach of covenant. *Barclay* v. *McAvity*, 1 Eq., p. 1.

Personal comfort—Distinction between damages for, and damages to property—An injunction was applied for to restrain the defendants from using premises as a retail meat and fish store which had been originally used as an office and were so referred to in the lease, the grounds on which it was asked being the discomfort caused the occupants in the flat above from smell etc.—*Held*, that there was no implied covenant in the lease restricting the lessee to the use of the premises as an office, as it was not necessary to carry out any obvious intention of the parties; and that the word "office" in the lease was used merely as a means of identifying the premises

included in the demise.—Where no actual damage had been shown and the action was in the nature of a *quia timet* action; and as the defendant was carrying on a legitimate business, and there was no probability of any immediate or irreparable damage to the plaintiff arising, the application for an injunction must be dismissed. *Nevers* v. *Lilley et al*, 4 Eq., p. 104.

Personal injuries—Quantum of damages—On the trial of an action against a street railway company to recover damages for personal injuries, the vice-president of the company called on the plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel on opening to the jury having stated that the company were making large sums of money out of the road.—On cross-examination, the witness was questioned as to the disposition of the proceeds of debentures, and on re-examination the plaintiff's counsel interrogated him at length as to the selling price of the shares on the Montreal exchange, and proved that they sold at about 50 per cent. premium.—The judge in charging the jury directed them to assess the damages "upon the extent of the injury plaintiff received, independent of what these people may be, or whether they are rich or poor."—The plaintiff obtained a verdict with heavy damages.—*Held*, that on the cross-examination of the witness by defendants' counsel the door was not opened for re-examination as to the selling price of the stock; that in view of the amount of the verdict it was quite likely that the general observation of the judge in his charge did not remove its effect on the jury as to the financial ability of the company to respond well in damages.—The injury of which the plaintiff complained was the crushing of his foot and on the day of the accident the medical staff of the hospital where he had been taken held a consultation and were divided as to the necessity for amputation.—Dr. W. who thought the limb might be saved, was four days later appointed by the company, at the suggestion of the plaintiff's attorney to co-operate with the plaintiff's physician.—Eventually the foot was amputated and the plaintiff made a good recovery.—On the trial the plaintiff's physician swore to a conversation with Dr. W. four days after the first consultation and three days before the amputation, when Dr. W stated that if he could induce the plaintiff's attorney to view it from a surgeon's standpoint and not use it to work on the sympathies of the jury, he might consider more fully the question of amputation.—The judge in his charge referred to this conversation and told the jury that it seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when it should have been taken off and that he thought it very reprehensible.—*Held* (Strong C. J. and Gwynne J. dissenting), that as Dr. W. did not represent the company at the first consultation when he opposed amputation, as others of the staff took the same view, and there was no proof that amputation was delayed through his instrumentality, and as the jury would certainly consider the judge's remarks as bearing on the contention made on the plaintiff's behalf that amputation should have taken place on the very day of the accident, it must have affected the amount of the verdict.—To tell a jury to ask themselves "If I were plaintiff, how much ought I to be paid if the company did me an injury," is not a proper direction. *Hesse* v. *St. John Rwy. Co.*, 35 N. B. R., p. 1; 30 S. C. R., p. 218.

Professional services—Lack of ordinary skill and care—In an action against a surgeon for not exercising ordinary care and skill in treating the plaintiff for an injury to his arm, caused by his being accidently thrown from his sleigh, the learned judge who tried the case non-suited the plaintiff on the ground that as neither the plaintiff nor any of his witnesses was able to say that the arm was dislocated as a result of the accident, and as both the defendant and another surgeon who was called in by the defendant and examined the arm three weeks after the accident swore that it was not dislocated, and as the dislocation which was sworn to exist a year and nine months after the accident by a third surgeon whom the plaintiff consulted, and which was admitted to exist at the time of the trial more than three years after the accident, might have been the result of a disease, as was shown by the evidence of several expert witnesses, there was no evidence to leave to the jury upon which they could properly find a verdict for the plaintiff.—*Held* (*per* Tuck C. J., Landry, VanWart and McLeod JJ., Hanington J. dissenting), that the non-suit was right, and that even if the dislocation was the result of the accident the mere fact that the defendant did not discover it and treat the plaintiff accordingly was not of itself evidence of want of ordinary care and skill on the part of the defendant.—*Held* (*per* Hanington J.), that as there were symptoms of dislocation immediately after the accident, as the arm was admittedly dislocated at the time of the trial and had been so for some considerable time before, as the plaintiff's wife swore that the arm at the time of the trial exhibited very much the same appearance that it did when the defendant was treating it, as three weeks after the accident the defendant admitted that the arm might have been slightly out, and at that time adopted means to reduce the dislocation, the learned judge should have left it to the jury to find whether or not the dislocation was caused by the accident, and existed at the time the defendant was called in, and if so whether or not the defendant was negligent or showed want of ordinary care and skill in not discovering it. *James* v. *Crockett*, 34, p. 540.

Quantum of damages—On the trial of an action brought to recover damages for injuries caused to the plaintiff by the negligence of the servants of the defendants while he was being carried as a passenger upon a car of the defendant company, B. a medical witness swore that W., a surgeon who had been employed by the defendants to watch the plaintiff after he had been injured, told him that he would consent to an amputation of the plaintiff's foot if the plaintiff's attorney would not use it as a means of increasing the damages.—The learned judge commented severely upon this to the jury.—*Held* (*per* Tuck C. J., Hanington and McLeod JJ., VanWart J. dissenting), misdirection, as it was not a matter for which the defendants could be held liable.—*Held* (*per* Tuck C. J.), there should be a new trial by reason of the improper admission and rejection of evidence, and notably on account of the admission of evidence to show at what price the defendants' stock had been selling in the market.—"The wealth of this corporation and its financial standing ought not to be brought in to affect the result.—The company is liable for the damage caused by its negligence, no more and no less, no matter whether it is rich or poor.—The plaintiff is entitled to such damages as are a fair compensation for the injury he has sustained, and the amount of the defendant's property is not a question in the cause.—In a case of breach of promise of marriage the amount of the defendant's property is very material, as showing what would have been the station of the plaintiff in society if the defendant had not broken his promise.—But the same principle does not apply to an action of negligence."—*Held* (*per* Tuck C. J.), as the evidence of the plaintiff's income and earning capacity was unsatisfactory, that there should be a new trial by reason of excessive damages. *Hesse* v. *The St. John Rwy.*, 35, p. 1.

Railway accident—Shock to nervous system—A railway company is liable to an action at the suit of one injured in an accident while a passenger in the company's train for damages and pecuniary loss consequent upon a fright resulting in a shock to the nervous system causing physical injury if the fright was the result of the accident and was reasonable and natural. *Kirkpatrick* v. *The Canadian Pacific Rwy. Co.*, 35, p. 598.

Replevin bond—Suit not prosecuted—*Semble*, a new trial will not be granted to the plaintiff in an action on a replevin bond where the breach is that the replevin suit was not prosecuted with effect and without delay, since only nominal damages could be recovered. *Landry* v. *Sivret et al*, 39, p. 356.

Riparian owner — Damages from stream driving—The plaintiff in the Court below, a married woman, was the owner in fee of a lot of land through which flowed a stream too small however in the natural state for stream-driving purposes—The land had previously been owned by the plaintiff's husband who both while such owner and afterwards had assisted as a laborer in constructing a driving-dam above the plaintiff's lot.—The defendants' logs were driven by means of the driving-dams which were owned by them and such user flooded the plaintiff's intervale and injured the banks of the stream.—*Held* (Hanington J. dissenting), (1) that the plaintiff was not estopped from taking proceedings to restrain further injury to the property and from claiming damages for the injury done; (2) that the acquiescence or leave and license by which a person can be deprived of his legal rights, must be of such a nature and given under such circumstances as will make it fraudulent in him to set up these rights against another prejudiced by his acts.—Quaere: Whether the plaintiff's husband could give leave and license to the injury of her inheritance. *Wright et al* v. *Mitten*, 1 Eq., p. 171; 34, p. 14.

Gradual and increasing damage to the land of a riparian owner from log driving operations and from an overflow of water caused by defendants' driving dam extending over a number of years will not give a right, either by prescription or under the statute of Limitations, to commit further acts of additional damage. *Id.*

Riparian owner—Pollution of stream—The pollution of a river by a riparian owner will be enjoined at the instance of a riparian owner lower down without proof of actual damage. *The City of St. John* v. *Barker*, 3 Eq., p. 358.

Riparian owner — Practice — Diversion of stream—A diversion of a natural stream from its natural channel in front of the land of a riparian proprietor is actionable at his instance without proof of actual or probable damage. *Saunders* v. *William Richards Co. Ltd.*, 2 Eq., p. 303.

Riparian owner—Restricted flow—Injunction against unreasonable user—Defendants, an electric lighting company, owning lands on both sides of a river, and having power by their Act of Incorporation to build and maintain dams on the river, erected a dam thereon in connection with their power house.—Plaintiff is the owner of a water grist and carding mill, situate lower down on the same river.—Defendants ran their machinery at night time, and in the morning it was their practice, without having regard to the length of time required for the purpose, to store the water until the dam was again full.—In consequence the plaintiff was deprived of water, and his mills were forced to shut down for a long number of days at a time.—*Held* (1) that defendant's use of the water was unreasonable, and should be restrained; (2) that the statutory powers conferred upon the defend-

ants to build the dam for the purposes of their business did not authorize them to make an unreasonable use of the water to the injury of the plaintiff in the absence of proof, the onus of establishing which was upon the defendants, that their business could not be carried on except with that result; (3) that a provision in defendant's Act, that they should be liable to pay damages to any owner of property injured by the construction of their dams or works, did not apply to damages resulting from an unreasonable use of the water; that the loss sustained by the plaintiff in the enjoyment of his property was continuous and substantial, and that, under the circumstances, he was entitled to relief by injunction. *Brown* v. *Bathurst Electric Water Power Co. Ltd.*, 3 Eq., p. 543.

Riparian owners—Probability of damages—The M. creek is a tidal water emptying into the Bay of Fundy.—Previous to the erection of an aboideau across its mouth it overflowed its banks at high tide.—The aboideau was erected in the latter part of the last century by a riparian owner and was fitted with gates adjusted to open at ebb tide and close at half flood tide, with the result of preventing the creek overflowing its banks.—A considerable quantity of fresh water drains into the creek in times of freshets and heavy rains.—Above the aboideau is a natural pondage or basin, sufficiently large to hold any heavy drainage into the creek when the gates are closed at flood tide.—The creek is navigable for small boats, but ingress or egress is barred by the aboideau.—In 1837 C., a riparian proprietor, conveyed a part of the land on the westerly side of the creek adjoining the aboideau to S. and described the land as bounded by the margin or bank of the creek.—Ultimately this piece of land was conveyed to the defendant.—In 1874 the defendant placed sills and posts in the bed of the creek between high and low water mark and erected a barn thereon.—The posts were objected to by riparian owners as tending to obstruct the free course of the creek by causing the collection and deposit of floating material about their base and decreasing the area of the pondage, and eventually producing an overflow.—The bed of the creek was diverted out of the Crown by the original Crown grant of the marsh lands.—*Held*, (1) that the conveyance to the defendant's predecessor in title did not pass the soil of the creek, and that the same was reserved for the benefit of all the riparian owners; (2) that assuming the title passed in the soil *ad medium filum aquae*, it was subject to an easement in all the riparian owners to have the creek kept open for pondage purposes; (3) that the riparian owners were entitled to have the erections removed without proof of actual damage, if there was a probability of damage being done to them, and to prevent the defendant setting up a right to maintain the erections by acquiescence. *Jardine et al* v. *Simon*, Eq. Cas., p. 1.

Riparian owner—Suit in Equity—Practice—A dam erected in 1858 across a natural stream upon land owned by the defendants, and used for the defendants' purposes, was in 1891 altered in respect of its devices for carrying off surplus water by the defendants' immediate predecessors in title, contrary to the protest of the plaintiff, a riparian owner since 1880.—In 1900 a portion of the dam was carried away by a freshet, owing it was alleged by the plaintiff to the insufficiency of the alterations in the dam, and it was alleged that material damage was done to the plaintiff's land, but the evidence as to its precise nature and extent was slight and unsatisfactory and the defendants denied any liability.—*Held*, that the questions involved being the liability of the defendants, and the extent of the injury sustained by the plaintiff, and the Court doubting its jurisdiction to assess the damages, the bill should be dismissed and the plaintiff left to his remedy at law. —A diversion of a natural stream from its natural channel in front of the land of a riparian proprietor in actionable at his instance without proof of actual or probable damage.—A mandatory injunction will not be granted except in cases where extreme or very serious damage will ensue if the injunction is withheld.—The form of a mandatory injunction adopted in *Jackson* v. *Normanby Brick Co.* (1899), 1 Ch. 438, approved of. *Saunders* v. *William Richards Co. Ltd.*, 2 Eq., p. 303.

The defendant, the owner of a saw mill on a floatable river, erected booms in connection therewith, which, with the logs of the defendant, impeded the passage of logs of the plaintiff. — The obstructions were removed before the hearing, but after notice of motion had been given for an interim mandatory injunction.—The Court refused, in the above suit, to assess plaintiff's damages, as he had a remedy at law, and at the time the bill was filed the grounds for an injunction had ceased. *Watson* v. *Patterson*, 2 Eq., p. 488.

Sale of goods under decree reversed for error—Where goods of the defendant were sold under a decree subsequently reversed for error, not for irregularity, he was held to be entitled to the sum the goods sold for, and not to their value or to damages. *Robertson* v. *Miller*, 3 Eq., p. 78.

Sewers—Damages from back flowage—In the exercise of their statutory duties the corporation of the city of M. provided a system of sewers for the city.—In the year 1894 the plaintiff built a house on the east side of lower R. street and in pursuance of a by-law of the city requiring drains to be made from all houses and buildings on the streets to the sewers, entered a sewer already laid down in the street.—The sewer extended along lower R. street to a point a short distance south of the plaintiff's house, where it connected with a cross drain leading eastwardly into a main outlet sewer

discharging into the P. river at a point below high water mark.—In the year 1898 when an unusually high tide took place, the water backed up through the sewer into the plaintiff's and other cellars on lower R. street. —The same thing occurred several times afterwards.—In 1901 the corporation, with a view, if possible, of preventing damage in future by back flowage, continued the sewer on lower R. street southwardly to the P. river, the outlet being below high water mark.—The new sewer was constructed according to plans prepared by the city engineer and approved of by the city council and the device at the outlet to prevent back flowage is the same as in the other sewers in the city, and similar in principle and mode of operation to those used in other places where sewers discharge into tidal waters such as the P.—The new sewer did not prevent back flowage and the action was brought for loss and damage by the flowage of back water from the main sewer into the plaintiff's cellar through the house drain.—*Held* (*per* Tuck C. J., Barker, McLeod and Gregory JJ., Hanington and Landry JJ. dissenting), that the city, having the statutory authority to construct the sewer, and having built it after plans made by a competent engineer and adopted by the council, was not guilty of actionable negligence on account of the insufficiency of the sewer to answer its purpose, and a person thereby injured has no remedy by action at law, and it makes no difference in this particular whether the use of the sewer is voluntary or under compulsion. *Lirette* v. *The City of Moncton*, 36, p. 475.

Sewers. Failure to repair on notice—A municipal corporation which fails after notice to repair a sewer laid under statutory authority, thereby causing continuous damage to a person connected therewith for sewerage purposes, is guilty of a misfeasance and liable for damages in a civil suit.—(*Per* Hanington, McLeod and Gregory JJ., Tuck C. J. and Landry J. dissenting). *Lirette* v. *The City of Moncton*, 36 N. B. R. 475 distinguished. *Curless* v. *The Town of Grand Falls*, 37, p. 227; *McKay* v. *The City of Saint John*, 38, p. 393.

Sheriff, Illegal sale by—Goods seized by the sheriff under an execution at the suit of *B.* v. *R.* were claimed by E. R., the wife of R., as her property.—After a formal levy it was arranged between the sheriff and E. R. that she should hold the goods for the sheriff until they were required for sale under the execution.—After the seizure, and before sale, a suit was commenced by E. R. against the sheriff and a declaration was filed containing two counts: 1st, for seizing, taking away and converting the plaintiff's goods; 2nd, for detention.—Part of the goods seized were sold, and part released.—*Held*, that a verdict for the full value of the goods sold was proper, though the sale did not take place until after the commencement of the action.—That, as far as the sheriff was concerned, the levy was effectual and complete. *Rideout* v. *Tibbits*, 36, p. 281.

Trespass — Action by reversioner — A tenant for years, not in possession, cannot maintain trespass against a defendant who enters upon the land without objection on the part of those actually in possession; nor can he recover in case, unless there is evidence of an act necessarily injurious to the reversion or in denial of his right.—Where the declaration is in trespass and the plaintiff on the trial relies upon and directs all his evidence to proving injury to his possession, the attention of the trial judge not being in any way called to the fact that he was proceeding for injury to the reversion, he cannot afterwards upon a motion to set aside a non-suit and enter a verdict for himself, claim the right under 60 Vict., c. 24, s. 95, to have a verdict entered for him in case as if he had declared for and proved damages to his reversionary interest. *McDougall* v. *The Campbellton Water Supply Co.*, 34, p. 467.

Warranty. Breach of—Privity—Plaintiff sold a mill with a warranty to a company of which the defendants were directors, and took a promissory note made by the company and endorsed by the defendants in part payment.—Subsequently defendants gave their individual note to the plaintiff in renewal of the company note.—In an action upon this renewal note, *held*, there was no privity of contract between the plaintiff and defendants as to the sale and warranty and therefore defendants could not set-off or counterclaim for damages on a breach of the warranty not amounting to failure of consideration. *Allis-Chalmers-Bullock Ltd.* v. *Hutchings*, 41, p. 444.

Workmen's Compensation Act—Under section 6 of the Workmen's Compensation Act, damages may be assessed to an amount equal to the estimated earnings of the workman for three years preceding the injury, although that amount should exceed $1,500. —This section fixes a limit, but not a measure of damages which, as in other cases, must be computed. *Henry* v. *Malcolm*, 39, p. 74.

DEBENTURES.

See COMPANY—MUNICIPAL LAW.

DEBTOR AND CREDITOR.

Assignment of debt—*See* CHOSE IN ACTION.

Attachment of Debt. *See* GARNISHMENT.

Attachment of Debtor. *See* ARREST.

Compromise. *See* BANKRUPTCY AND INSOLVENCY.

Payment of Debt. *See* PAYMENT.

Absconding debtor — Seizure under warrant—F. claimed to be the owner of a horse that S. had given her for the board of herself and child.—S., being indebted to H., left the province and H. seized the horse as the property of S. under an absconding debtor's warrant.—While the horse was in the possession of the sheriff under the warrant, negotiations were had with H. by persons professing to be acting for F., and a bill of sale of the horse was given to H. and the horse was returned to F.—The amount secured by the bill of sale not having been paid, H. seized the horse under the bill of sale and F. brought an action in the Kent County Court against H. for a conversion of the horse.—On the trial the judge told the jury that the only question was, who was the owner of the horse at the time it was taken, and that the plaintiff was not estopped by the bill of sale from recovering in the action.—*Held*, on appeal from a judgment affirming a verdict entered on a finding on this direction, that the direction was right (Landry J. dissenting). *Hannay* v. *Fraser*, 37, p. 39.

Collateral security—Payment by principal debtor after action brought—The N. company owed the plaintiff $4,000 for which he held as collateral security the defendant's note for $3,000 made for the accommodation of the company, and some other collateral.—After action brought on the note the plaintiff received a dividend from the company, which had gone into liquidation, and realized on some of the other collateral, but these facts were not pleaded. —Verdict having been entered for the full amount of the note, *held*, that the plaintiff was entitled to judgment for the full amount of the note, but the amount realized upon the collateral should be credited upon the execution. *Gorman* v. *Copp*, 39, p. 309.

Collateral security — Payment into Court—In a suit by the mortgagor to set aside a bill of sale, an interim injunction order to restrain a sale by the mortgagee was granted upon condition of the mortgagor paying into Court the amount due the mortgagee.—The bill of sale was collateral security for promissory notes, some of which had been indorsed over for value.—*Held*, that the amount to be paid into Court should not be reduced by the amount of such notes. *Petropolous* v. *F. E. Williams Co. Ltd.*, 3 Eq., p. 267.

Collateral security — Redemption in mortgage collateral to bill of sale of vessel—See *Kennedy* v. *Nealis et al*, 1 Eq., p. 455.

Judgment creditor—Costs in foreclosure suit—Where a judgment creditor having registered a memorial of his judgment is made a party to a suit for the foreclosure of a mortgage given previously by the judgment debtor, and disclaims he is not entitled to costs on the dismissal of the bill as against him. *Horn & Kennedy*, Eq. Cas., p. 311; *Nicholson* v. *Reid*, 1 Eq., p. 607.

Judgment by confession—The defendant, in consideration of a promise by a trader to pay to the defendant a sum of money on account of his indebtedness within a given time or to give security, and believing the trader to be solvent, gave him on credit a further supply of goods.—Subsequently the trader, becoming insolvent, announced the fact to his creditors.—The defendant thereupon reminded the trader of his promise to him, and urged and induced him to give a confession of judgment for the amount of his indebtedness to the defendant, and to execute an assignment of his book debts to him.—*Held*, that the confession of judgment having been obtained by pressure and without collusion, was not within s. 1 of Act 58 Vict., c. 6, and that the assignment of book debts having been obtained by pressure, was not within s. 2 of the Act.—The presumption created by section 2 (a) of the Act does not arise where the sixty days therein mentioned have expired at the date the writ of summons in the suit is sent to the sheriff for service, though the sixty days had not expired at the date of the teste of the writ. *Amherst Boot and Shoe Mfg. Co. Ltd.* v. *Sheyn*, 2 Eq., 236.

Loan without interest—Payment in advance—By agreement between A. and the town of N., A. agreed to organize a company and erect a factory in the town of N. and to maintain and operate the same for twenty years, and employ an average of seventy-five hands during the same period, and the town agreed to make certain concessions to the company and to lend it $20,000 repayable without interest by annual instalments of $1,000 to be secured by a mortgage on the company's property with the provision that the company might at any time repay the balance of the loan "at the then cash value figured at the rate of four per centum per annum."—The company was organized, the factory built as agreed, and a mortgage given in pursuance of and referring to the above agreement, and the factory was insured for $20,000 payable to the town "as its interest may appear."—After three years the company ceased to operate and went into liquidation, and shortly after that the factory was burned. —Two instalments had been paid and one was overdue.—*Held*, the town of N. was entitled out of the insurance money to retain the amount of the overdue instalment with interest, and the liquidator was entitled to have the mortgage discharged on the further payment to the town out of the insurance money of an amount equal to the cash value of the future instalments at the date of payment on the basis of 4 per cent. compounded annually. *In re the Anderson Furniture Co. Ltd.*, 39, p. 139.

Secured creditor — Account stated — Tender—If a creditor holding a security

absolute on its face furnishes the debtor with a statement of the amount alleged to be due, a tender of that amount is binding, notwithstanding it subsequently appears on taking an account between the parties that the tender was for less than the amount actually due. *McLaughlin* v. *Tompkins*, 44, p. 249.

Unintentional release through ignorance—M. executed and delivered to the defendant a leasehold mortgage and a bill of sale of personal property to secure the payment of $500 and $1,500 respectively. —Subsequently M. executed and delivered to the defendant as party of the second part a deed of assignment for the benefit of her creditors, being parties of the third part.—A condition in the deed stipulated that the parties of the second and third parts in consideration of the sum of one dollar to each of them paid "did severally remise, release and discharge the party of the first part of, from and against all debts, dues, claims and demands, actions, suits, damages, and causes and rights of action which they then had or might thereafter have against the party of the first part, for or by reason of any other matter or thing from the beginning of the world up to that date."—The defendant and other creditors executed the deed.—The assignor was indebted to the defendant in no other amount than that secured by the mortgage and bill of sale. —In a suit by the plaintiff, a creditor of M., to have the defendant enter a discharge and satisfaction of the mortgage upon the records, and to discharge the bill of sale, and to have the same declared null and void, *held*, that the defendant had released the mortgage and bill of sale, and that it was immaterial that he had no intention of releasing them, or that he was ignorant of the legal effect of his act. *May* v. *Sieveright*, Eq. Cas, p. 499.

DEBTS—ASSIGNMENT OF.

See CHOSE IN ACTION.

DEED.

For Trust Deeds *see* TRUSTS AND TRUSTEES.

Absolute conveyance when treated as a mortgage—Land of the plaintiff worth $1,500, subject to a mortgage for $900, and other charges for $300, was conveyed to the defendant in consideration of his paying $140 due for instalments under the mortgage, for the recovery of which an action had been brought.—The costs of the action were paid by the plaintiff. —The Court, finding under the evidence that the deed, though absolute in form, was intended as a mortgage, allowed the plaintiff to redeem. *Beaton* v. *Wilbur*, 3 Eq., p. 309.

See also *McLaughlin* v. *Tompkins*, 44, p. 249.

Acknowledgment — Certificate by justice of the peace—An acknowledgment of a deed of land in the county of Restigouche, headed "Restigouche SS" and purporting to have been taken before "Donald McAllister Esq., one of her majesty's justices of the peace in and for the county of Restigouche" and subscribed "Dond McAllister J. P." is a good acknowledgment under the statute and the deed was properly received in evidence as a registered conveyance. *Gooden* v. *Doyle*, 42, p. 435.

Acknowledgment—No mention of delivery—An acknowledgment that the grantor "signed, sealed the within instrument" without stating that it was delivered or executed, is bad. *The Tobique Salmon Club* v. *McDonald*, 36, p. 589.

Acknowledgment — Territorial jurisdiction of justice of the peace—A justice of the peace has no power to take an acknowledgment of a deed out of the county for which he is appointed a justice, and an acknowledgment stating that it was taken before W. E., "one of her majesty's justices in and for the county of V." without anything further to show that it was taken in the county, is bad. *Tobique Salmon Club* v *McDonald*, 36, p. 589.

Ambiguity re reservation—Parol agreement—The lower and the upper half of a lot of land were respectively conveyed to separate purchasers.—In the deed of the lower half the grantor reserved to himself, his heirs and assigns, the right of way to convey water by aqueduct or otherwise from one of the springs on the lower lot to the upper lot.—The easement was assigned in the deed of the upper lot.—On the lower lot were two springs known as the front and back springs.—It was agreed, and acted upon, by the purchasers of the lots that the back spring should be set apart for the exclusive use of the owner of the upper lot under the reservation in the deed of the lower lot. —*Held*, that the agreement between the original purchasers of the lots to limit the easement to the back spring was binding upon the defendant. *Miller* v. *Cronkhite*, 2 Eq., p. 203.

Consideration — Construction — A railway company started expropriation proceedings to acquire a right of way across an intervale farm owned by the plaintiffs; subsequently the parties came to a verbal agreement, that the proceedings would be abandoned and the plaintiffs would convey to the company the land required for five hundred dollars, provided it would construct a culvert in the railway embankment where it crossed the plaintiff's intervale, in order that the spring freshets might continue to

freely overflow the same.—In case the company did not care to construct the culvert, the plaintiffs asked one thousand dollars more for their land.—The location of the culvert was to be selected by the plaintiff and staked out by the company's agent.—The company's agent visited the farm and set out stakes where the plaintiffs wanted the culvert located.—Nothing was said as to the kind of culvert, except that it was to be big enough to let the water flow through, and no arrangment was made about its maintenance.—The plaintiffs executed a deed for the right of way in which the consideration was stated to be one dollar, and were paid the five hundred dollars agreed upon.—The embankment was constructed across the intervale but an opening left at the space marked for the culvert.—Later the company decided not to build the culvert but fill in this space.—On an action for specific performance, *held*, that the defendant would be given the option of paying one thousand dollars in lieu of the performance of the contract, as this was the amount asked for by the plaintiffs if the culvert was not constructed.—The deed of the right of way contained the following clause: "And the grantors further release the railway company from all claims and demands for severance and depreciation arising out of the taking or expropriation by the railway company of the said lands, and the construction, maintenance and operation thereon of a line of railway and other works."—The company claimed that by this clause it was released from any claim which might arise from its failure to construct the culvert.—*Held*, that the effect of this clause was to release the company from such damages only as were necessarily consequent upon the authorized severance, and that the damage complained of was unnecessary and could be avoided by the defendant carrying out its agreement for the construction of the culvert. *Whitcombe* v. *Saint John and Quebec Rwy. Co.*, 43, p. 42, C. D.

Consideration not expressed—Lien—Where land was conveyed in consideration of a bond by the grantee to maintain the grantor and his wife for life, but the consideration was not expressed in the deed, a decree was made charging the land with a lien for the performance of the agreement in the bond. *Duguay* v. *Lanteigne*, 3 Eq., p. 132.

Construction — Conflicting clauses — The description in a deed described the land by metes and bounds which included the lot in question, and these words were added: "being the same land and premises . . . sold and conveyed by F. to P."—The conveyance from F. to P. excepted this lot but grantors claimed title to the lot from other deeds.—*Held*, the description by metes and bounds would govern and the title to the lot would pass under the deed. *Chute et al.* v. *Adney et al*, 39, p. 113.

Construction — Erroneous description—In a deed from T. H. to S. the lands were described as beginning at a stake standing on the west side of the highway road, being 6.86 chains at right angles from T. H.'s south line, thence north 84 degrees 45 minutes west, 25 chains to a cedar post standing on Lenihan's east line, thence north 5 degrees 45 minutes east, along the said line 6.86 chains to T. H.'s south line, thence south 84 degrees 45 minutes east along said line to the west side of said highway road, thence southerly along west side of said road to the place of beginning, containing 20 acres more or less.—The description as it stood could not be applied to the land, and evidence was admitted as to the location of the stake and post and of a former survey.—*Held*, on the evidence that the words T. H.'s "south line" in the description intended to describe the northern boundary of the lot, were an error and the lot bounded on the north by T. H.'s north line would pass under the deed. *Chute et al* v. *Adney*, No. 2, 39, p. 93.

Construction — Grant bounded by "bank of creek"—The M. creek is a tidal water emptying into the Bay of Fundy.—Previous to the erection of an aboideau across its mouth it overflowed its banks at high tide.—The aboideau was erected in the latter part of the last century by a riparian owner and was fitted with gates adjusted to open at ebb tide and close at half flood tide, with the result of preventing the creek overflowing its banks.—A considerable quantity of fresh water drains into the creek in times of freshets and heavy rains.—Above the aboideau is a natural pondage or basin, sufficiently large to hold any heavy drainage into the creek when the gates are closed at flood tide.—The creek is navigable for small boats, but ingress or egress is barred by the aboideau.—In 1837, C., a riparian proprietor, conveyed a part of the land on the westerly side of the creek adjoining the aboideau to S. and described the land as bounded by the margin or bank of the creek.—Ultimately this piece of land was conveyed to the defendant.—In 1874 the defendant placed sills and posts in the bed of the creek between high and low water mark and erected a barn thereon.—The posts were objected to by riparian owners as tending to obstruct the free course of the creek by causing the collection and deposit of floating material about their base and decreasing the area of the pondage and eventually producing an overflow.—The bed of the creek was divested from the Crown by the original Crown grant of the marsh lands.—*Held* (1) that the conveyance to the defendant's predecessor in title did not pass the soil of the creek, and that the same was reserved for the benefit of all the riparian owners; (2) that assuming the title passed in the soil *ad medium filum aquae* it was subject to an easement in all the riparian owners to have the creek kept open for pondage purposes; (3) that the riparian owners were entitled

to have the erections removed without proof of actual damage, if there was a probability of damage being done to them, and to prevent the defendant setting up a right to maintain the erections by acquiescence. *Jardine et al* v. *Simon*, Eq. Cas., p. 1.

Construction — Inconsistent clause — Land was conveyed by A. and wife by deed for the expressed consideration of £25 to their daughter and her husband and "their heirs forever, and to them only."—"To have and to hold to them and their heirs only, to their sole use and benefit and behoof forever."—"And be it remembered that the said (grantees) shall not sell, grant nor bargain the said lot of land nor any part or partition thereof, but that it shall be kept to the true intent and meaning of within." —*Held*, that the grantee took an estate in fee simple. *Ahearn* v. *Ahearn et al*, 1 Eq., p. 53.

Construction, Principles of—In construing documents of title giving the length of a course in feet or other denomination with the addition "or until it comes to an object" that object, be it less or more than the length given, is the boundary. —Therefore, where a town justified a trespass on the ground that the act complained of was to remove or prevent an encroachment on R. street, the western boundary of the plaintiff's property, the burden of proving the street boundary is on the town though the point to which the plaintiff claims is some five feet beyond the number of feet given in the plaintiff's deed as the distance from the starting point to R. street. *Milmore* v. *The Town of Woodstock*, 38, p. 133.

Construction of grant—In 1813, pursuant to Crown license, T. erected on public land in the city of Fredericton a public market house and public weigh-scales in connection therewith.—The scales were kept in use until 1874, when they were voluntarily removed by their then owner.—In 1816 the market building was sold by T. to the defendants, and in 1817 the land on which it and the scales stood was granted by the Crown to the defendants in trust to use the lower floor of the building, and the land, for a public market place, and the upper floor for a County Court House.—By Act 20 Vict., c. 17, s. 3, it was enacted that the land should be used as a public landing, street and square for the Court and market house, and for no other purpose whatever. —By s. 4 of the Act it was provided that nothing therein should in anyway affect public rights.—In 1898 the defendants sought to erect on the land public weigh-scales to be used in connection with the market.—A suit for an injunction having been instituted by the plaintiffs to restrain the defendants from proceeding with the erection of the scales, *held*, that the Crown grant to the defendants contained an implied authority to the defendants to erect upon the land structures necessary or reasonably convenient or useful for the purposes of the market, including weigh-scales, and that this authority was not taken away by Act 20 Vict., c. 17. *City of Fredericton* v. *Municipality of York*, 1 Eq., p. 556.

Construction of lease—"Office"—The defendant L. holds certain premises under a lease granted by the plaintiff N. to one W. and assigned by W. to L.—The lease contains express covenants, but nothing in reference to its assignment, or to the use of the premises, with the exception of the word "office" used in the description, which is as follows: "All that certain office situate on the ground floor of her brick building on the east side of Main street in the said town of Woodstock, and the office in the said building fronting on the south side of Regent street in the said town, also the lower part of the shed in the rear of the said office, etc." —W. is an attorney and occupied the premises as an office.—L. is a retail meat and fish dealer, and proposes to carry on this business in the premises.—*Held*, that there was no implied covenant in the lease restricting the lessee to the use of the premises as an office, as it was not necessary to carry out any obvious intention of the parties; and that the word "office" in the lease was used merely as a means of identifying the premises included in the demise. *Nevers* v. *Lilley*, 4 Eq., p. 104.

Construction of deeds—See also *Ingram* v. *Brown*, 38, p. 256.

Deed by administrator—Proof of license to sell—An administrator's deed duly proved and registered under 3 Vict., c. 61, s. 56, reciting all the facts required by the statute and having the affidavit of the administrator endorsed thereon that the premises mentioned in the deed had been duly advertised and sold according to law, is not sufficient proof of title in one claiming thereunder without proof of the license to sell. *Johnson* v. *Calnan*, 38, p. 52.

Deed by disseised grantor—A deed of land by a grantor who is disseised will convey his right of entry under s. 17 of the Property Act, C. S. 1903, c. 152 (*per* Barry J.). *Miller et al* v. *Rundle et al*, 41, p. 591. Affirmed S. C. of C.

A registered deed of lands held adversely to the legal owner for over 20 years previous to the time the deed was given will not inure to give title or possession to the grantee so as to enable him to maintain trespass against the person in actual possession, although there is evidence of isolated acts of ownership on the land by the grantee after the deed was given. *Johnson* v. *Calnan*, 38, p. 52.

Deed to church corporation, Construction of—In 1810 the Crown granted to the rector, church wardens and vestry of Christ Church in the parish of Fredericton, and

their successors, a lot of land "for the use and benefit of the said church forever, and to and for none other use, interest or purpose whatever."—The church was organized on the formation of the province of New Brunswick under authority from the parent Church of England in England to certain persons in New Brunswick to establish churches in New Brunswick in connection with and to be a part of the Church of England in England, and under its ecclesiastical authority.—*Held*, that the grant was to Christ Church as it existed at the time of the grant and while it remained in connection with the Church of England and adhered to its faith, creed, doctrines, forms of worship and discipline as then established. *Bliss* v. *The Rector etc. of Christ Church, Fredericton*, Eq. Cas., p. 314.

Deed unrecorded but perfected by possession—An unrecorded deed from the heir-at-law of the owner of the fee to his widow in occupation at the time of his death, which occupation was continued by the widow to the time the deed was given, is not a deed by one disseized (the possession not being adverse) but operates as a conveyance of the heir's title, or at all events, is good as a release against the heir and when followed by more than twenty years possession against anyone claiming through him under a recorded deed. *Cairns* v. *Horsman*, 35, p. 436.

Grant or quit claim — Where the owner of the fee simple grants, bargains, sells, assigns and conveys, all his interest in land, to have and to hold the same unto the purchaser, his heirs and assigns, the conveyance is not a deed of quit claim, but transfers to the purchaser all the interest of the grantor sufficient to sustain a claim of purchase for value. *King* v. *Keith*, 1 Eq., p. 538.

Grant or quit claim—It is not a deed of quit-claim where the grantor remises, releases, and quit-claims unto the grantee, his heirs and assigns, a lot of land, and covenants that the land is free from incumbrances made by him, and that he will warrant and defend the same to the grantee, his heirs and assigns, against the demands of all persons claiming by or through the grantor; and the grantee under such a deed, if registered, will not be postponed under the Registry Act, 57 Vict., c. 20, to the equities of a prior purchaser, of which he had no notice. *Bourque* v. *Chappell*, 2 Eq., p. 187.

Implied grant—Easement—A store, two rooms and cellar connected with the store by hatchway and stairs were leased to the plaintiffs "with the privileges and appurtenances thereunto belonging."—The rooms communicated with the store, and a door in one of the rooms opened off an alleyway leading from the street to the rear of the premises.—A coal chute to the cellar also opened off the alleyway which was sufficiently wide to allow coal being carted to the chute. —The alleyway was part of the lot upon which the demised premises were, and was in the ownership and possession of the defendant lessor at the date of the lease.—For many years previous to the lease, the door off the alleyway had been used by occupiers of the premises, including the defendant who was in occupation at the date of the lease, and coal had always been carted by them to the chute.—The defendant now sought to build upon the alleyway to the extent of blocking up the alleyway door and preventing access to the chute by carts.—In an injunction suit to restrain the defendant from erecting the building, he contended that the alleyway door was not necessary for the convenient use of the premises; that coal could be put in the cellar by way of the front door and hatch, and that a right to the use of the alleyway did not pass in the absence of an express grant.—*Held*, that the tenant was entitled to the unimpaired use of the alleyway since it was in use at the date of the lease as an easement belonging to the premises. *Jones* v. *Hunter*, 1 Eq., p. 250.

Incapacity of grantor—Where at the time of the execution of a deed of conveyance the grantor was 70 years of age, was sick and in feeble health, and it was the opinion of some witnesses, though not of others, that he did not understand the nature of his act; and the effect of the deed was to deprive him of means of support, and the evidence was uncertain respecting the existence of adequate consideration for the deed, and favored the view that it was intended as a gift, the deed was set aside. *Winslowe* v. *Mc Kay*, 3 Eq., p. 84; 37 N. B. R., p. 213.

Undue influence—William Davidson died in 1890, leaving real estate consisting of his homestead and lot "A," all of which he left absolutely to his wife Helen Davidson, and appointed her and the defendant William Ferguson executors.—In 1898 James Davidson, son of William and Helen Davidson, being indebted to the defendants William Ferguson and Philip Arsenault, became insolvent and assigned to Philip Arsenault. —Nearly all the creditors, including Ferguson and Arsenault, agreed to compromise at ten cents on the dollar, but James Davidson made a secret agreement with Ferguson and Arsenault that they should be paid in full.—By arrangement between James Davidson, William Ferguson and Philip Arsenault, Ferguson for James Davidson purchased the assets from Arsenault as assignee for $1,000, and for the securing Ferguson the balance advanced and balance of his old debt against James Davidson, Helen Davidson in 1899 being then about seventy-six years of age, without any independent advice, executed to William Ferguson a mortgage of lot "A" for $822.90.—Ferguson gave James Davidson a power of

attorney to deal with these assets, who in the name of Ferguson sold and converted them into money to an amount greater than the mortgage.—In December 1899, James Davidson arranged that his mother should sell to Philip Arsenault the said lot "A" for $600, $200 of it to go to Arsenault's old account against James Davidson and $400 by notes made by Philip Arsenault in favour of William Ferguson, and which the latter took on his account against James Davidson.—Both the mortgage and deed were written by James Davidson and Helen Davidson had no independent advice and had become of feeble intellect.—In March, 1900, Helen Davidson made a will leaving all her property to her son James and his family.—William Ferguson drew this will, is named in it an executor, and had full knowledge of its contents.—In December, 1902, James Davidson, being indebted to William Ferguson to the amount of $1,250.97, Helen Davidson at the request of William Ferguson and James Davidson gave a mortgage of the homestead to William Ferguson for $1,250.97 to secure that amount, which was shown by the evidence to be the total sum due from James Davidson to William Ferguson at that time.—Helen Davidson lived practically all the time with James Davidson, and he had great influence over her, which fact was well known to both William Ferguson and Philip Arsenault.—*Held*, that the first mortgage to Ferguson made in March, 1899, was discharged and must be set aside, as the amount which it had been given to secure had been paid in full.—*Held*, that the conveyance to Arsenault, made in December, 1899, must be set aside, as obtained through undue influence and pressure on the part of James Davidson and solely for his benefit; and on the ground of the mental weakness of the grantor, and that she had no independent advice; that Arsenault, as he knew the relation which James Davidson occupied with regard to the grantor, and all the circumstances in connection with the transaction, stood in no better position than James Davidson would stand, and was bound by, and responsible for, any acts committed by Davidson, or omitted to be done by him.—*Held*, that the second mortgage to Ferguson, made in December, 1902, must be set aside, as obtained through undue influence and pressure on the part of James Davidson and William Ferguson, and solely for their own benefit; that Ferguson had the same knowledge of all the facts as Arsenault, and was bound in the same way by the acts and omissions of James Davidson; that the grantor had no independent advice, and was so deranged mentally as to be incapable of transacting business. *M Gaffigan et al* v. *Ferguson et al*, 4 Eq., p. 12.

Lost grant—If bound to presume a grant there is no more difficulty in presuming one made by husband and wife jointly, than by the wife only. *McGaffigan* v. *Willett Fruit Co. et al*, 4 Eq., p. 353.

Where plaintiffs' predecessors in title always rested their right to an easement on a lease and not upon adverse user.—*Held*, that in view of the known facts, the plaintiff's right to the easement could not be supported on the presumption of a lost grant and a continuous uninterrupted user for over twenty years referable to that title. *Loggie* v. *Montgomery*, 38, p. 112.

Nominal consideration—Evidence re real consideration—Where a deed sets out only a nominal consideration, the parties thereto may give parol evidence of the real consideration and there is no onus of proof upon the grantor.—(*Per* White J.) *Shaw et al* v. *Robinson et al*, 40, p. 473.

Rectification of deed—Though in order to secure the rectification of an instrument the clearest evidence is required to be adduced, yet, if one of the parties to it denies that there is any mistake, the Court will consider all the circumstances surrounding the making of the instrument and whether it accords with what would reasonably and probably have been the agreement between the parties, and, if satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, will rectify it. *Douglas* v. *Sansom*, 1 Eq., p. 122.

Rectification — Manifest error — Evidence of surveys—In a deed from T. H. to S., the lands were described as beginning at a stake standing on the west side of the highway road being 6.86 chains at right angles from T. H.'s south line, thence north 85 degrees 45 minutes, 25 chains to a cedar post standing on Lehihan's east line, thence north 5 degrees 45 minutes east, along said line 6.86 chains to T. H.'s south line, thence south 84 degrees 45 minutes east along said line to the west side of said highway road, thence southerly along west side of said road to the place of beginning, containing 20 acres more or less.—The description as it stood could not be applied to the land, and evidence was admitted as to the location of the stake and post and of a former survey. —*Held*, on the evidence that the words T. H.'s "south line" in the description intended to describe the northern boundary of the lot, were an error and the lot bounded on the north by T. H.'s north line would pass under the deed. *Chute et al* v. *Adney*, 39, p. 93.

Rectification — Mutual mistake — Nature of estate—Rectification decreed of misdescription in conveyance of land arising from mutual mistake of grantor and grantee, as against a subsequent purchaser with notice of mistake, but without costs.—Bill sustained for the rectification of a mortgage, and for the foreclosure and sale of the mortgaged premises.—A purchaser of a lot of land taking under a conveyance describing by mistake of grantor and grantee a different lot, has merely an equitable right to have

the conveyance rectified as distinguished from an equitable estate and the maxim *qui prior est tempore potior est jure* has no application as against a subsequent purchaser for value without notice. *King* v. *Keith*, 1 Eq., p. 538.

Rectification, Suit for — Principles applicable—The plaintiff, intending to sell the whole of a piece of land, sold it under a verbal contract describing it as the D. lot.—The deed to the purchaser followed the description in the vendor's deed.—After the vendee's death, and about ten years after the contract of sale was made, the vendor sought to have the deed rectified on the ground that it contained more land than that known as the D. lot.—The evidence did not show that the D. lot did not embrace the whole of the land conveyed.—*Held*, that the bill should be dismissed.—Principles upon which the Court proceeds in reforming deeds, considered. *Carman* v. *Smith*, 3 Eq., p. 44.

Rectification—See also *Carroll* v. *Rogers*, 2 Eq., p. 159, or at 165.

Referee in Equity, Deed by, Evidence of—A deed of a Referee in Equity, though purporting to have been made under a decree of the Court, is not admissible in evidence without proof of the decree. *Loggie* v. *Montgomery*, 3 Eq. p. 238.

Trust deed for creditors, Construction of—The plaintiff deposited with the defendants, a banking firm, a sum of money at interest, and received as security 275 shares owned by the defendants in the M. bank which were transferred into the plaintiff's name.—The plaintiff gave to the defendants an acknowledgemnt, stating that he held the shares in trust and as collateral security for the due payment of moneys deposited with the defendants, on the payment of which he would re-transfer the shares to them.—On a redistribution by the bank of the shares, they were reduced to 99. The dividends on the shares were always paid by the bank to the defendants, who treated the shares as their own in their office books.—The bank went into liquidation and the plaintiff was obliged to pay $9.900, double liability on the shares.—The defendants made an assignment for the benefit of their creditors and the deed of trust contained the following clause: "In the next place in full, or so far as the proceeds of the said joint property will extend, to pay all persons, by and in whose name the stock of the bank belonging to the said M. and B. (the defendants) whether in the name of M. and Company (the defendants) or the said M. or B., or any other person or persons, firm or corporation, before transferred to such persons, is or has been held as security for money loaned by any person or persons to the said M. and B., all claims they may have against the said M. and B. by reason of any double liability they may incur, or moneys they shall be obliged to pay for double liability on such shares under section 20 of chapter 120 of the Revised Statutes, or other statute or statutes of the Dominion of Canada, on account of the said shares, standing in the name of the said persons, or having so stood."—*Held* (1) that the plaintiff and defendants stood in the relation of mortgagee and mortgagor in respect of the shares, and not of trustee and cestui que trust, and the defendants were not liable under such relation to indemnify the plaintiff; (2) that the plaintiff was a beneficiary under the trust deed, in respect of the amount he had paid as double liability, and that his right to be such was not intended to depend upon his having an enforceable right to be indemnified. *Marsters* v. *MacLellan et al*, Eq Cas., p. 372.

DEFAMATION.

1. Libel.
   - (a) EVIDENCE.
   - (b) PRACTICE.
   - (c) PLEADINGS.
2. Slander.
   - (a) EVIDENCE.
   - (b) PRACTICE.
   - (c) PLEADINGS.

(a) EVIDENCE.

Admissibility—The defendant, a merchant, in a letter accused the plaintiff of theft and threatened to expose him.—This letter was handed to a confidential clerk and copied, and the copy was signed by the defendant and sent by post to the plaintiff.—As the defamatory words imputed a crime and are actionable in themselves, the clerk could not be asked what she understood by them unless there were some circumstances proved which would or might give a meaning to them different from what they ordinarily have.—(*Per* Barker C. J. and McLeod J., Landry J. doubting and Hanington J. dissenting.)—*Held* (*per* Hanington J.), that the question was proper, because while the answer could not be a justification, it might go in mitigation of damages. *Moran* v. *O'Regan*, 38, p. 399.

Evidence pressed in but withdrawn by trial judge—The plaintiff, in an action for libel against a newspaper company, pressed in, subject to objection and against the opinion of the presiding judge, evidence disclosing the name of the writer of the libellous letter.—*Held* (*per* Sir E. McLeod C. J. and Grimmer J.,) that even if the evidence was improperly admitted it was no ground for a new trial as the judge had practically withdrawn it from the jury by stating subsequently that he had been

wrong in allowing the plaintiff to have disclosure of the name of the writer of the libellous letter, and so far as he could correct it he wished to do so.—*Held* (*per* White J.), that as the witness had not seen the name attached to the letter, and had no personal knowledge who the writer was, the evidence was based entirely on hearsay, and was, on that ground, improperly admitted.—That having been pressed in, subject to objection, and against the opinion of the trial judge, it was not clear that it did not influence the verdict and a new trial should be granted, notwithstanding the judge's subsequent statement to the jury that he was wrong in admitting the evidence and wished to correct the error so far as he could.—Quaere:—If there should be any hard and fast rule that where evidence is improperly admitted and is afterwards withdrawn from the jury, a new trial will not be granted on the ground of its improper admission, especially if the evidence was forced in against the opinion of the trial judge. (*Per* White J.) *Culligan* v. *The Graphic Ltd.*, 44, p. 481.

(b) PRACTICE.

Indictment—An indictment for defamatory libel is good which purports to set out only the tenor and effect of the alleged libel, but in fact sets out the exact words. —Such an indictment following the statutory form, Criminal Code, form 64 (h) need not state that the words were likely to injure the reputations of the persons alleged to be defamed by exposing them to hatred, contempt or ridicule, or that they were designed to insult such persons. *R.* v. *McDougall*, 39, p. 388.

Notice under C. S. 1903, c. 136, s. 4—Section 4 of the Libel Act, C. S. 1903, c. 136, providing for notice of action does not apply to an anonymous correspondent not being a regular correspondent of the newspaper, who causes a libel to be published therein.—Quaere:—Whether this action applies to an editor or to a regular correspondent of a newspaper. *Underwood* v. *Roach*, 39, p. 27.

Notice of action. Service of—In an action against a newspaper corporation for libel, notice of the intended action served on a reporter on the staff of the paper in a room on the fourth floor of a building occupied by the defendant and used by it as a library, the third floor being occupied by persons employed in mechanical work connected with the issue of the paper, and the second floor by the manager and office staff, is not a good service within the meaning of O. 9, r. 6, of the Judicature Act, 1909, providing that service may be made on the officers or agent of the corporation, or within the meaning of s. 80 of the New Brunswick Joint Stock Companies Act, C. S. 1903, c. 85, providing that service may be made by leaving it at the office of the company with any grown person in its employ.—Where the facts involve a question of notice and are in dispute, the defence of want or insufficiency should be pleaded and the question is for the jury; where, however, the facts are not disputed and the question is the legal effect or result of such facts, it is for the Court, and the proper procedure is to apply at chambers to set aside the writ and all proceedings and not to stay the action.—(McKeown J. in chambers). *Carter* v. *The Standard Ltd.*, 44, p. 1.

See also *Culligan* v. *The Graphic Ltd.*, 44, p. 481.

(c) PLEADING, ETC.

Confidential clerk—Usual course of business—In an action for libel the declaration alleged that the defendant falsely and maliciously published a letter containing defamatory matter, etc.—The defendant by his pleas denied malice, and alleged that the letter was drafted by him and given to his typewriter to be copied; that the typewriter was his confidential clerk, and as such was accustomed to deal with letters of a confidential nature, and that the typewriting of the letter in question was done in the performance of her duty as such confidential clerk, that no persons except the defendant and the typewriter saw the letter, and its contents were not disclosed to any person other than the plaintiff.—*Held* on demurrer (*per* Tuck C. J., Landry Barker and McLeod JJ., Hanington J. dissenting), that the pleas admit a publication and do not show that the occasion was privileged, and if proved, would not be an answer to the *prima facie* cause of action alleged in the declaration and were bad on demurrer.—*Held* (*per* Hanington J.), that as the publication was to a confidential clerk whose duty it was in the usual course of the defendant's business to copy letters of a confidential character the occasion was privileged, and there should be judgment for the defendant on the demurrer. *Moran* v. *O'Regan*, 38, p. 189.

Misuse of official position as M. L. A. —In an action for libel against a newspaper company, the words in the published letter complained of charged in effect that the plaintiff used his position as a member of the Provincial Legislature to increase the business carried on by the plaintiff and his brother as partners by requiring persons seeking employment on public works in his county to trade at the firm's store as a condition of getting such employment.—*Held* (*per curiam*), that the charge upon its face is defamatory and constitutes a libel. *Culligan* v. *The Graphic Ltd.*, 44, p. 481.

Publication—Privilege—The defendant, a merchant, in a letter accused the plaintiff of theft and threatened to expose him.—This letter was handed to a confidential clerk and copied, and the copy was signed by the defendant and sent by post to the

plaintiff.—*Held* (*per* Barker C. J., Landry and McLeod JJ., Hanington J. dissenting), that the writing of such defamatory statements did not fall within the ordinary business of a merchant, and the giving of it to his clerk to copy was a publication and the occasion of such publication was not privileged. *Moran* v. *O'Regan*, 38, p. 399.

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2. Slander.

(a) EVIDENCE.

Evidence re malice—The publication of a slander by a person believing he was acting as a constable in an endeavour to ferret out a crime and bring the guilty party to justice, but who as a matter of fact was not a constable and was not acting under orders from any person with authority, is not privileged.—It was improper to allow the defendant to be asked whether or not he was actuated by malice in speaking to the different parties of the subject matter of the complaint, and whether or not he had any intention of hurting or doing any damage to the plaintiff. *Trafton* v. *Deschene*, 44, p. 552.

Onus of proof—See *Gorman* v. *Urquhart*, 34, p. 322 (under Privilege post).

(b) PRACTICE.

Costs—21 Jac. I, c. 16—The Statute 21 Jac. I, c. 16, is in force in this province, therefore a plaintiff in an action of slander, who recovered damages in an amount less than forty shillings, was not allowed costs. *Gallagher* v. *O'Neill*, 34, p. 194.

Statement of claim—In an action of slander the statement of claim must set out the words claimed to be defamatory with sufficient facts to enable the Court to say that they are capable of the defamatory meaning attributed to them, and it is not sufficient to set out words not actionable in themselves, alleging a defamatory meaning in an innuendo.—*Harris* v. *Clayton*, 21 N. B. R. 237 followed. *Sonier* v. *Breau*, 41, p. 177.

Statement of claim, Amending—Where the statement of claim in an action of slander was defective by reason of not setting out sufficient facts to show that the words were defamatory, and it appeared that an amendment would not have affected the evidence to be given, and that the Court had all materials before it necessary for a final determination of the case, the Court, acting under O. 40, r. 10, ordered the statement of claim to be amended and refused a motion to set aside the verdict for the plaintiff and enter a verdict for the defendant or for a nonsuit or for a new trial, without costs. *Sonier* v. *Breau*, 41, p. 177.

Verdict—Submitting questions to jury—In actions of slander the judge may submit questions to the jury instead of taking a general verdict but if he instructs the jury to bring in a general verdict he is not obliged to submit questions at the request of counsel—*Toronto Ruy. Co.* v. *Balfour*, 32 S. C. R. 239; *Furlong* v. *Carroll*, 7 A. R. Ont. 145, 154 specially referred to. *Sonier* v. *Breau*, 41, p. 177.

(c) PLEADINGS.

Privilege—Magistrate spoken to—Defamatory words spoken to a magistrate without intention of basing a criminal charge on the facts disclosed, are not privileged. *Sonier* v. *Breau*, 41, p. 177.

Privilege—Onus of proof—Words charging the offence of adultery uttered in the presence of the accused persons constitute a privileged communication, and the privilege is not lost by the fact that the words might have been overheard by third persons, in the absence of evidence that the words were overheard by them. *Gorman* v. *Urquhart*, 34, p. 322.

Privilege — Unauthorized constable — The publication of a slander by a person believing he was acting as a constable in an endeavour to ferret out a crime and bring the guilty party to justice, but who as a matter of fact was not a constable and was not acting under orders from any person with authority, is not privileged.—It was misdirection to tell the jury that if the defendant believed he was a constable and was making the enquiries *bona fide* and discreetly in the discharge of his duty as an officer of the law endeavouring to ferret out a crime, he was not guilty whether he was a constable or not. *Trafton* v. *Deschene*, 44, p. 552.

DISCOVERY.

1. Interrogatories.
2. Production of Documents.
3. Miscellaneous.

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1. Interrogatories.

Answer must state knowledge, information and belief—It is not sufficient for the plaintiff, in answer to an interrogatory, to deny having any knowledge, without stating his information and belief.—The defendant is entitled to have from the plaintiffs an express and positive admission or denial of the truth of the facts on which they are interrogated; of their personal knowledge if they have any, and if not, of their information and belief. *Laughlan et al* v. *Prescott et al*, 1 Eq., p. 342; *Hannaghan et al* v. *Hannaghan et al*, 1 Eq., p. 395; *Scott* v. *Sproul*, 2 Eq., p. 81.

Answering—The bill alleged that a testator by his will bequeathed a fourth part of his estate to be divided equally among the four children of his son, who were living at the date of the will; that the plaintiff was one of the children, and a beneficiary under the will.—The defendants, trustees under the will, to interrogatories whether the plaintiff was not one of the four children of the son mentioned in the will, and living at the date thereof, and beneficially entitled thereunder to some and what interest in the estate, after admitting the will, answered that they did not know that the plaintiff was one of the children of the said son, or that she was living at the date of the will, or that she was beneficially entitled to an interest in the estate, although they were so informed and believed.—*Held*, sufficient. —Specific information should be given in answers upon facts within the knowledge of the party answering, and the matter should not be left to inference. *Crosby* v. *Taylor*, 2 Eq., p. 511.

Answering as to knowledge—A defendant who has acted entirely through his solicitor in any matter, and has himself no personal knowledge, must state in his answer when required to do so, the knowledge that he has of the matters he is interrogated upon, basing his answer upon the information given him by his solicitor. *Fenerty et al* v. *Johnston*, 4 Eq., p. 101.

Answering—Exceptions to answer—Where defendants, in answering interrogatories filed as part of the bill, neglect to state their belief, or, when required to set out a document at length, neglect to do so without assigning a sufficient reason, the answer is insufficient, and exceptions on that ground will be allowed.—If, however, interrogatories relate to matters which are altogether irrelevant, the exceptions will be overruled. *Golden and wife* v. *McGivery et al*, 4 Eq., p. 42.

Answering fully—Where a defendant has answered, though he might have demurred or pleaded, he cannot excuse himself from answering fully on the ground that the bill does not disclose a case against him upon the matters interrogated upon. *Gilbert* v. *Union Mutual Life Insurance Co.*, Eq. Cas., p. 266; 25 N. B. R., p. 221.

Answering fully and plainly—An answer to an interrogatory must be in plain and positive language, and clear in meaning so that it may be safely put in evidence. —Where a plaintiff was properly interrogated as to the existence of a document in a public office it was held that he was not bound to seek knowledge as to the fact, but that if he had such knowledge, or information or belief upon the subject, he should answer fully as to his knowledge, information and belief. *Scott* v. *Sproul*, 2 Eq., p. 81.

Answers to interrogatories must be made substantially and fully, and not with a view to avoid giving information, but they need not be in strict or technical language.—The rule in *Reade* v. *Woodroofe* (24 Beav. 421) followed. *Pick* v. *Edwards et al*, 4 Eq., p. 151.

Answering positively—To an interrogatory to set out particulars of a claim of debt by the defendant against the defendant company, the defendant answered that he believed that schedules (which contained the information sought) attached to the answer of the defendant company were true, *held*, allowing an exception for insufficiency, that the interrogatory relating to a matter within the defendant's knowledge, he should have made positive oath of the correctness of the schedules, or that they were correct to the best of his knowledge, information and belief, accounting for his inability to swear positively to their correctness. *Lodge* v. *Calhoun*, 3 Eq., p. 100.

Exceptions — Need of particulars — Where an interrogatory contains a number of questions, each distinct and complete in itself, some of which are fully answered, an exception for insufficiency must not be to the whole answer, but must point out in what particular the interrogatory is not sufficiently answered. *Burpee et al* v. *The American Bobbin Spool and Shuttle Co. et al*, Eq. Cas., p. 484; *Fenerty et al* v. *Johnston*, 4 Eq., p. 101.

Interrogatories — Practice — Insufficient answers — The plaintiff answered defendant's interrogatories on November 28th and on December 12th took out a summons to set the cause down for hearing.—The defendant objected that the cause was not at issue claiming that he had two months in which to except to the answer.—*Held* that under section 31 of chapter 49 C. S. and Act 45 Vict. c. 8 s. 2 the remedy of a defendant upon an insufficient answer is not to except thereto but to move within a reasonable time to dismiss the bill upon fourteen days notice of motion, and that a reasonable time having here elapsed and the defendant not now desiring to have the bill dismissed the cause should be set down for hearing. *Dowl* v. *Dowl* Eq Cas. p. 388.

Practice—Interrogatories, Form of—The plaintiffs omitted to add any foot-note to their interrogatories as provided by s. 44 of the Supreme Court in Equity Act, C. S. 1903, c. 112.—On a motion to set aside an order setting exceptions to the answer down for hearing, *held*, that by a proper construction of the section, such an omission was equivalent to a requirement that all the defendants should answer all the interrogatories. *Golden et ux* v. *McGivery et al*, 4 Eq., p. 42.

Practice—Setting cause down for hearing—An application to set a cause down

for hearing cannot be made until fourteen days after the replication is filed, the defendant having that time, under ss. 31 and 37, c. 49, C. S. N. B., in which to file interrogatories. *Chase* v. *Briggs*, Eq. Cas., p. 53.

Setting aside interrogatories—Relevant interrogatories will not be set aside.—Applications to strike out interrogatories are extremely rare, as under O. 31, r. 6, of the Judicature Act, 1909, objection to interrogatories may be taken in affidavit in answer, even though no application has been made to set them aside. *Leveque* v. *Lambert et al*, 42, p. 336, C. D.

Sufficiency of answers—Exceptions—When substantial information is given by the answer to an interrogatory, the Court discourages exceptions for insufficiency and will not require minute and vexatious discovery.—A bill to set aside certain conveyances made in 1890 by the defendant W. as fraudulent and void, alleged that after their execution the defendant built a dwelling house upon the land from money obtained from a surrender of one life policy taken out in 1879 and the hypothecation of another taken out in 1883 on the life of his wife, and that the policies were effected and maintained by the defendant when in insolvent circumstances.—The defendants were required by the interrogatories to give an exact state of W.'s business at the time the policies were effected and at the several times the premiums were paid.—Having only partially answered, they contended on an exception to the sufficiency of the answer that the discovery sought was not pertinent and material to the suit.—*Held*, that the interrogatories were proper, and that the defendants must answer according to the best of their information. *Wiley* v. *Waite et al*, 1 Eq., p. 150.

See also *Dowd* v. *Dowd* Eq. Cas. p. 388 supra.

2. Production of Documents.

Plaintiff, Production by—The Court will not ordinarily compel a plaintiff to produce documents in his possession or power although the defendant swears that he cannot fully answer without their production.—If the plaintiff on request refuses to produce them, he cannot complain of the insufficiency of the defendant's answer. *Hegan* v. *Montgomery*, 1 Eq., p. 247.

Practice — Discovery — Production — Where inspection is sought of documents in the possession of the opposite party, an order should be obtained under s. 59 of Act 53 Vict., c. 4, for discovery by affidavit as to what documents are in his possession, when an order may be made under s. 61 for their production and inspection. *Cushing Sulphite Fibre Co. Ltd.*, v. *Cushing*, 2 Eq., p. 458.

Production—Act 53 Vic., c. 4, ss. 59 and 61—Section 59 of the Supreme Court in Equity Act, 1890, does not empower the Court to order the production of documents discovered to be in the possession or power of one of the parties. The section is limited to discovering whether documents are in his possession or power.—If admitted to be, their production may be ordered under section 61. *Hegan* v. *Montgomery*, 1 Eq., p. 247.

Production abroad — Discretion of Court—While the Court may have power to order production abroad of documents here, it will not exercise it except in special circumstances.—Where inspection of documents was had by consent, an objection on a summons for an order for inspection abroad subsequently taken out, that a demand in writing for inspection was required by sect. 62 of Act 53 Vict., c. 4, to be first made, was overruled as technical, the Court declining to express an opinion upon its correctness, and as entailing costs, while without benefit to the suitors, a result avoided by the Court where possible. *Cushing Sulphite Fibre Co. Ltd.* v. *Cushing*, 2 Eq., p. 469.

Scope or extent of discovery—The plaintiff is only entitled to discovery as to all material matters relevant to his own case as made out by the bill, and not to the defendant's case.—Where defendant's books contain parts not relevant to the plaintiff's case, and to the inspection of which the defendant objects, the defendant on the hearing of a summons for discovery should state the existence of such parts, that the order may be qualified by giving him liberty to seal up such parts.—If defendant does not take this course, the liberty will be granted to him on application by summons taken out for the purpose.—Production will be ordered against a defendant foreign corporation; and it is no answer that its books are abroad.—Application may be made for production, though the information has been refused in answer to interrogatories, and it cannot be objected that the answer should have been excepted to. *Robertson* v. *The St. John City Rwy. et al*, Eq. Cas., p. 462.

3. Miscellaneous.

Appeal—Conditions of staying proceedings—Upon an order for discovery by the defendants, the Court made it a condition of staying proceedings pending an appeal, that the defendants put in security to indemnify the plaintiff from any loss arising from the delay, the Court having no judicial doubt as to the correctness of its order, and considering that greater injury would fall upon the plaintiff by the delay than to the defendants by a refusal to stay proceedings. *Robertson* v. *The St. John City Rwy. et al*, Eq. Cas., p. 476.

Practice—Discovery, Affidavit of—An affidavit of discovery should sufficiently identify documents referred to, as to enable the Court to order their production; the convenient and safe course being to letter or number each document.—Where therefore, an affidavit referred to two sealed parcels of letters marked A and B, and as containing correspondence between named dates but the several letters were not numbered or otherwise identified, it was *held* insufficient. *Cushing Sulphite Fibre Co. Ltd.* v. *Cushing*, 2 Eq., p. 466.

Practice—Discovery of books of defendant showing profits on sales to plaintiff—Discovery (not production) asked for and ordered of defendant of books showing profits on sales by him to the plaintiff company while its managing director, in a suit for an accounting of such profits, to which the defence was set up that the sales were at a price fixed by an agreement with the company. *Cushing Sulphite Fibre Co. Ltd.* v. *Cushing*, 2 Eq., p. 472.

Suit for account—Abstract right to discovery—In a suit for account plaintiff stated that he was appointed deputy sheriff by the defendant, under an agreement that he was to have half of the net receipts of the sheriff's office.—The defendant stated the agreement to be that the plaintiff was to have one half of the fees from writs and executions only.—On the probabilities of the evidence the Court found in favor of the defendant's version of the agreement. —*Held*, that the bill should not be dismissed as the plaintiff had an abstract right to ask for discovery regarding some books to which he had not access. *Hawthorne* v. *Sterling*, 2 Eq., p. 503.

DISTRESS.

Attornment clause in mortgage—An attornment clause in a mortgage is valid if it constitute a real relation of landlord and tenant between the mortgagee and mortgagor, and a distress levied for the rent is good, though the rent reserved is sufficient during the term specified in the mortgage, viz., ten years, to repay the principal money and interest thereon at seven per cent. *Massey-Harris Co. Ltd.* v. *Young*, 37, p. 107.

Breach of covenant to repair by landlord—The defendant, having distrained for rent in arrear, the plaintiff in an action for damages for a breach of the covenant to repair and for illegal distress, alleged that there was no fixed rent due from him to the defendant because he had never been put in complete possession of the whole of the demised premises, and also because the defendant had failed to make the repairs he had agreed to make.—The defendant denied the breach of covenant and counterclaimed for the balance of rent due over the amount received as the proceeds of the sale of goods distrained.—*Held*, that the plaintiff, having gone into possession under the lease, could not set up the failure to make the repairs agreed upon, or set up a trespass by the landlord even to the extent of depriving the tenant of the enjoyment of a portion of the demised premises, unaccompanied by any intention to evict and put an end to the tenancy, as an answer to the claim for rent. *Gordon* v. *Sime*, 44, p. 535, K. B. D.

Company law — Distress — Winding up — Sale under distress — A distress for rent is not avoided by proceedings taken under the Winding-up Act (2 R. S. C., c. 129) to put a company in liquidation if the distress is made before the making of the winding-up order.—(*Per* Hanington, Landry, Barker and McLeod JJ., Tuck C. J. and Gregory J. dissenting.)— Quaere:— Whether a sale may be made under the distress without the leave of the Court. *In re F. C. Colwell Candy Co. Ltd. (In liquidation)*, 35, p. 613.

Contract suspending right of distress —Where an agreement was made between the plaintiff and the defendant that if the plaintiff would pay the rent on the 1st of April and give up the premises so that the defendant could have the month for making repairs for a new tenant coming in on the 1st of May, he, the plaintiff, would not distrain for the rent until after default on the 1st of April.—*Held*, the agreement would have the effect of suspending the right to distrain, and if the defendant in violation of it distrained, he would render himself a trespasser. *Mooers* v. *Manzer*, 36, p. 205.

Distress for rent under illegal lease — Replevin will lie to recover goods distrained for rent in arrear under an illegal lease. The maxim, *In pari delicto potior est conditio possidentis*, is applicable only when the possession results from the act of the parties, and not when it results from some incident attached to a legal instrument.—Per Tuck C. J., Barker and McLeod JJ. (Hanington and VanWart JJ. dissenting). *Gallagher* v. *McQueen*, 35, p. 198.

Distress suspends right of re-entry for nonpayment of rent—A landlord can not, during the currency of the lease and before the expiration of the term, re-enter for nonpayment of rent for which he has distrained on goods and chattels still held by him under the distress. *Whittaker* v. *Goggin*, 38, p. 378.

Fraudulent removal to avoid distress— Goods fraudulently or clandestinely removed to avoid distress cannot be seized under distress if there is no rent in arrear. *Clarke et al* v. *Green et al*, 37, p. 525.

Illegal distress after sunset—Abandonment—Under a distress for rent issued on the 12th of March the defendant took possession of the plaintiff's store after sunset and evicted him.—On the 13th of March, discovering that the distress was illegal, he induced the plaintiff to go to the store with his attorney and the bailiff who made the distress, where they informed him that the distress was illegal and a new one would have to be made, and they then handed him the key of the store and an inventory of the goods distrained and tendered him with $17 as damages for the eviction.—The bailiff immediately informed him that he had a new demand and received back the key and they left the store.—It was not left to the jury to say whether there had been an abandonment of the distress under the first warrant, but they found in answer to a question left that the bailiff at no time prior to the service of the second warrant gave up the possession and control of the goods under the first.—*Held* (*per* Hanington, Landry and Barker JJ.), that it should have been specifically left to the jury to say whether what took place and what was done on the discovery of the mistake made on executing the warrant and making the distress after sunset was done with the intention of abandoning the distress.—*Held* (*per* McLeod J.), that the evidence and the answers of the jury to the questions submitted showed that the defendant at the time the second warrant was issued had the goods in his possession by virtue of an illegal warrant, and the trespass continued as if no second warrant had issued. *Mooers* v. *Manzer*, 36, p. 205.

Illegal distress—Breach of covenant forfeiting rent—In an action of replevin by a sub-lessee against the lessor for goods taken by the lessor under a distress for rent, the plaintiff is entitled to prove on cross-examination of the lessor that there had been a breach of a covenant in the lease which forfeited the rent claimed. *Rinquette* v. *Hebert*, 37, p. 68.

Illegal distress—Quantum of damages—In an action for an illegal distress the plaintiffs are entitled to recover the value of the goods sold, although they are subject to a bill of sale by way of mortgage to secure a compromise which the plaintiffs have made with their creditors.—*Semble* (*per* Barker J.), an unlawful sale of defendant's goods by plaintiffs, which goods defendants were using in a particular way, give defendant's the right to demand the value of the goods by way of damages. *Clark et al* v. *Green, et al*, 37, p. 525.

Illegal distress, Survival of action for—Where one wrongfully distrains and converts to his own use, and sells the goods of the plaintiff and dies after writ issued, but before declaration, the action may be continued against his executors, and they are liable on a count for money had and received.—In the above case the declaration was in trespass and for conversion and upon the argument of the motion for a new trial, application was made to add a count for money had and received.—*Held* (*per* Hanington, Landry and Gregory JJ.), that as the only fact in dispute, namely, the existence of a tenancy between the parties had been passed upon by the jury in favor of the plaintiff, and as no possible injustice could be done to the defendants, the amendment should be allowed.—*Held* (*per* Barker and McLeod JJ.), that as the proposed amendment introduced a new form of action to which there were on the record no suitable pleas, and upon which there was no issue joined or damages assessed, the amendment proposed was improper and should not be allowed at that stage of the case. *Frederick* v. *Gibson et al Executors etc. of Gibson*, 37, p. 126.

Liquor License Act—Distress in default of payment of penalty imposed—Where a conviction under the Liquor License Act, C. S. 1903, c. 22, ordered a distress in default of the penalty imposed which order is not authorized by the Act this part was treated as surplusage and struck out of the conviction. *R.* v. *O'Brien ex parte Chamberlain*, 38, p. 385.

DISTRIBUTION OF ESTATES.

Descent — Partition of real estate — C. S. 1903, c. 161—L. died intestate, leaving him surviving heirs, consisting of an uncle and the representatives of two deceased uncles and three deceased aunts on his father's side; and of the representatives of a deceased uncle and aunt on his mother's side.—*Held*, that the heirs on the maternal side rank equally with the heirs on the paternal side, when they stand in the same degree of relationship, and that the partition of the real estate must be made in this basis.—The case of *Doe. Dem. Wood* v. *DeForrest* (23 N. B. R. 209) followed as to distribution of real estate. *Carter* v. *Lowerison et al*, 4 Eq., p. 10.

Family compact re property of father dying intestate—J. H. died intestate possessed of property worth about $40,000, and survived by his widow, two sons and three daughters.—Part of his property consisted of lumber lands worth about $21,000 which it had been his intention, known to all the members of the family, to give to the sons, who were associated with him in his business as a lumberman.—A few days before his death, in discussing with his solicitor the terms of a will he intended to make, he stated he wanted his lumber lands and mill property to go to the sons, who should continue his business and pay his debts, and that he did not intend making

any provision for the daughters.—At a meeting of the family held after his death, they were informed of these wishes; that performance of an outstanding contract by the deceased for the delivery of a quantity of lumber was being pressed, and that his liabilities were $15,000 or $20,000, though in fact they were $22,000.—It was agreed for the purpose of giving effect to the deceased's intentions that the sons should assume the debts; that the daughters should convey all their interest in the estate to the sons; that the sons should pay to the plaintiff $500, to another daughter $600, and should join in a conveyance to the third of land given to her by her father, but unconveyed by him.—At the time the exact condition of the estate was unknown. —Before the deed to the sons was executed, the solicitor of the deceased present at the meeting explained to the daughters their legal rights and the effect of the deed.—On the true condition of the estate being subsequently ascertained, the plaintiff sought to have the conveyance set aside.—*Held*, that the agreement as a family arrangement, entered into for the purpose of giving effect to the intentions of the deceased, without fraud or misrepresentation, should be upheld. *Sears* v. *Hicks*, 3 Eq., p. 281.

Intestates' Estates Act, C. S. 1903, c. 161—K. died intestate leaving no widow, one son, three daughters and one granddaughter, daughter of a deceased daughter. —*Held* the word "children" in the clause beginning "and if there be no widow" in s. 2 of the Intestates' Estate Act C. S. 1903 c. 131 includes grand-children and that K.'s grand-daughter was entitled to the share of the personal estate which her mother would have received if living. *In re Estate David Kennedy* 40 p. 437.

Next of kin—Childless intestate leaving father and mother—Where a child died intestate and unmarried entitled to personal estate, leaving a father, mother, brother and sister, the father is entitled as the next of kin in the first degree to the whole of the personal estate exclusive of all others.—This rule of construction, as to the distribution of personal property, has not been in any way altered by any provision of the Married Women's Property Act, 1895.—(*Per* Hanington, Landry, Barker, McLeod and Gregory JJ.)—*Held* (*per* Tuck C. J., that the father and mother, as next of kin, share equally in the distribution. *Lewin* v. *Lewin*, 36, p. 365.

DONATIO MORTIS CAUSA.

See GIFT.

DOWER.

Admeasurement — Laches — Statute of Limitations—The husband of the petitioner gave a mortgage of a piece of land in which the petitioner did not join.—The husband died in 1859 owning the equity of redemption, and the petitioner remained in possession of the mortgaged premises from then until 1870.—In 1891 she brought the present petition for the admeasurement of her dower in the land.—The mortgage was foreclosed.—*Held*, that twenty years having elapsed since her husband's death, or at least since she ceased to occupy, the petitioner's right to bring an action at law by writ of dower was extinguished by section 3 of chapter 84 C. S. and that by analogy the present petition was barred in equity. *In re Margaret McAfee*, Eq. Cas., p. 438.

Admeasurement — Monetary equivalent—Where commissioners to admeasure dower reported that it was difficult and not advisable to set off the widow's dower in the premises, the report was referred back to them to state what the value of her dower was in the premises. *In re Berthia J. Cushing*, 1 Eq., p. 163.

Admeasurement — Money equivalent —Report of commissioners—Under Act 53 Vict., c. 4, s. 237 *et seq.*, a widow will not be compelled to take money in lieu of land because such a course will be more satisfactory or profitable to the owner of the land subject to dower.—Affidavits upon questions of fact inquired of or relevant to an inquiry by commissioners to admeasure dower cannot be read on a motion to confirm their report. *In re Kearney*, 2 Eq., p. 264.

Adultery — Innocent bona fide remarriage on reasonable grounds—A wife voluntarily separated from her husband after having lived with him for three years. —Nine years later she married again, knowing that her first husband had married, and believing that he had obtained a divorce from her and that she was at liberty to marry.—Subsequently she learned that her second marriage was illegal, and she immediately left her second husband.—*Held*, that under the Stat. 13 Edw. I, c. 34, the dower right of the wife in the estate of her first husband was not barred by her subsequent cohabitation with another, as she acted *bona fide*, believing, on reasonable grounds, that she was legally entitled to marry again. *Phillips* v. *Phillips et al*, 4 Eq., p. 115.

Agreement of life estate in lieu of dower—Statute of Limitations—Statute of Frauds—An assignment of dower by verbal agreement is valid, and under such assignment the widow may take any part or even the whole of the descendent lands. —Where the heir-at-law permits the widow

of the owner of the fee to occupy the whole of the estate during her life, under a verbal arrangement with the heir understood to be in lieu of dower, but with no definite agreement or understanding to that effect, the widow's possession is not adverse to the heir-at-law, and the Statute of Limitations will not run against the right of entry.—(*Per* Hanington, Landry, Barker and Gregory JJ., Tuck C. J. and McLeod J. dissenting.) *Lloyd* v. *Gillis et al*, 37, p. 190.

Bequest in lieu of dower—Divesting clause in case of re-marriage—A testator by his will gave a lot of land with house thereon and personal property to his wife absolutely.—The residue of his estate he gave to trustees in trust for his sons.—The will then provided that the devise and bequest to his wife should be in lieu of dower, and that if she married again the property devised to her should vest in the testator's trustees for the benefit of his sons.—*Held*, that if the wife elected to take the benefits given her under the will in lieu of dower, they must be accepted in lieu of dower and no right to dower would survive even though the property should divest by remarriage. *Leonard* v. *Leonard*, 1 Eq., p. 576.

Mortgage, Foreclosure of — Wife's dower barred for want of appearance and defence—Where a married woman joined with her husband in a mortgage of his freehold property, and the husband afterwards gave a second mortgage on the property in which the wife did not join, on motion for foreclosure and sale, both husband and wife being joined as defendants, *held*, that the wife's dower was barred on the ground that she had not appeared and defended the action.—Quaere:—Under the circumstances would the wife's dower be completely barred by the ordinary order for foreclosure and sale. *Vaughan* v. *Parker*, 43, p. 442, C. D.

Mortgage—Payment to wife of part of loan to secure release of dower—Money paid to a wife by her husband to secure her execution of a mortgage of lands of which she is dowable under an agreement that she was to receive half of the money advanced is not money received by the wife from her husband during coverture within the meaning of the qualifying part of sub-section 2 of section 4 of chapter 78 of C. S. 1903 and if an honest and *bona fide* transaction entered into in good faith, cannot be impeached as a fraud against the husband's creditors. *Cormier* v. *Arsineau*, 38, p. 44.

Partition suit—Dowress joined — Bar of dower—Quaere:—Whether the inchoate right of dower of the wife of a tenant in common is barred by a sale of the land in a partition suit to which she is made a party. *Close* v. *Close et al*, Eq. Cas., p. 414.

Partition suit—Joining wife of tenant in common—The wife of a tenant in common in land sought to be sold in a partition suit should be a party to the suit. *Hannaghan et al* v. *Hannaghan et al*, 1 Eq., p. 302.

Partition suit—Right to add dowerss—A suit may be brought for partition of land and assignment of dower, and the dowress should be made a party to the suit. *Wood et al* v. *Akerley et al*, Eq. Cas., p. 305.

Partnership property—Realty purchased by partners with partnership funds for partnership purposes must be regarded as personal estate in the absence of an agreement to the contrary, and consequently is not subject to dower. *In re Cushing Estate, ex parte Berthia J. Cushing*, 1 Eq., p. 102.

DURESS.

Bond executed to stifle criminal prosecution of brother—See *Smith* v. *Halifax Banking Co* 1 Eq. p. 17.

Chattel mortgage executed under pressure—A lease of store premises was obtained by plaintiffs through a guarantee of payment of the rent by defendant.—Subsequently at plaintiff's request defendant took out in his own name a lease of the premises for a further term of four years upon an agreement to assign it to them in consideration of their purchase from him of an automatic electric piano.—The purchase price was $750, upon which a payment of $100 was to be made.—The cash payment subsequently was waived and notes for the full amount of the purchase money given.—After the purchase, plaintiffs incurred an additional indebtedness to the defendant of about $400.—This amount, together with the notes, some of which were overdue, was outstanding when the plaintiffs asked for an assignment of the lease.—This the defendant demurred to giving, desiring to retain the lease as security.—The plaintiffs then, but against the defendant's advice executed a chattel mortgage of their stock-in-trade to him, whereupon he made the over lease to them.—*Held*, that the chattel mortgage could not be set aside on the ground of having been obtained by coercion. *Petropolous* v. *F. E. Williams Co. Ltd.*, 3 Eq., p. 346.

Judgment, Confession of, obtained under pressure—See *Rogers* v. *Porter* 37 p. 230

EASEMENT.

Alleyway—Implied grant in lease—A store, two rooms and cellar connected with the store by hatchway and stairs were leased to the plaintiffs "with the privileges

and appurtenances thereunto belonging."—The rooms communicated with the store, and a door in one of the rooms opened off an alleyway leading from the street to the rear of the premises.—A coal shute to the cellar also opened off the alleyway which was sufficiently wide to allow coal being carted to the chute.—The alleyway was part of the lot upon which the demised premises were, and was in the ownership and possession of the defendant lessor at the date of the lease.—For many years previous to the lease the door off the alleyway had been used by occupiers of the premises, including the defendant who in occupation at the date of the lease, and coal had always been carted by them to the chute.—The defendant now sought to build upon the alleyway to the extent of blocking up the alleyway door and preventing access to the chute by carts.—In an injunction suit to restrain the defendant from erecting the building he contended that the alleyway door was not necessary for the convenient use of the premises; that coal could be put in the cellar by way of the front door and hatch, and that a right to the use of the alleyway did not pass in the absence of an express grant.—*Held*, that the tenant was entitled to the unimpaired use of the alleyway since it was in use at the date of the lease as an easement belonging to the premises. *Jones* v. *Hunter*, 1 Eq., p. 250.

Aqueduct and use of spring—License Revocation of—The lower and the upper half of a lot of land were respectively conveyed to separate purchasers.—In the deed of the lower half the grantor reserved to himself, his heirs and assigns, the right of way to convey water by aqueduct or otherwise from one of the springs on the lower lot to the upper lot.—The easement was assigned in the deed of the upper lot.—On the lower lot were two springs known as the front and back springs.—It was agreed, and acted upon, by the purchasers of the lots that the back spring should be set apart for the exclusive use of the owner of the upper lot under the reservation in the deed of the lower lots. Plaintiffs and defendants, becoming respectively the owners of the lots, entered into a parol agreement for the construction by the defendant of a a pipe from the front spring to her house, to be tapped on her land by a pipe leading to the plaintiff's house.—The plaintiff paid for the pipe connecting with his house and for the part of the main pipe from the spring to the dividing line between the lots, and the defendant paid for the remainder.—The flow of water to the plaintiff's house having been stopped by the defendant, the plaintiff forbade the defendant the use of the front spring.—In the plaintiff's bill it was admitted that the defendant was entitled to use the back spring.—*Held*, that the agreement between the original purchasers of the lots to limit the easement to the back spring was binding upon the defendant; and that the license to the defendant to use the front spring was revocable upon the plaintiff making equitable compensation fixed by the Court to the defendant for her expenditure under the license.—Where license is given to lay pipes on another's land to convey water to the licensee's land the burden of repair rests in law upon the licensee, and it is a revocation of the license to refuse to the licensee permission to go upon the licensor's land for the purpose of making repairs. *Miller* v. *Cronkhite*, 2 Eq., p. 203.

Aqueduct — Lease — Adverse possession—Statute of Limitations — In 1854, R. B., owner of lot 8, conveyed the northern part thereof to M., together with the privilege of taking water thereto through a pipe, which M. was empowered to build, from a spring on the southern part of the lot.—By mesne assignment M.'s lot, with the water privilege, became vested in J. B.—In 1871 he executed to S. for 21 years, with covenant for renewal, a lease of the spring, with the right to lay a pipe therefrom through the southern part of Lot 8 to Lot 9.—The ownership of the southern part of Lot 8 was then in H., and in 1905 became vested in the defendant.—In 1872, S. built a pipe from the spring across H.'s land to Lot 9, and it has been in uninterrupted use ever since, a period exceeding 20 years.—In 1904 Lot 9, with the lease, was assigned to the plaintiffs. The plaintiff's predecessors in title always rested their right to the easement on the lease and not upon adverse user.—*Held*, that in view of the known facts, the plaintiff's right to the easement could not be supported on the presumption of a lost grant and a continuous uninterrupted user for over twenty years referable to that title. —*Held* (*per* Hanington J.), that assuming the plaintiffs were entitled to the easement as claimed, the erection by the defendant of a building on his land as proposed was no infringement of the plaintiff's right for which an injunction ought to be granted. *Loggie* v. *Montgomery*, 3 Eq., p. 238; 38 N. B. R., p. 112.

Right of way for specific purposes—Plaintiff claimed a right of way over a private road of several hundred feet in length, in part on land of defendant adjoining plaintiff's land, and leading from a public highway to lots comprised in part by defendant's land, sold by defendant's predecessor in title, B., under a conveyance reserving to the grantees the use in common of the road. —The evidence of plaintiff's predecessor in title, K., was, that shortly after the sale of these lots, he moved back on his land his farm house and fence, to widen the entrance of the private road at its junction with the highway, under an agreement with B., concurred in, as he believed, by the owners of the lots, that he, K., should have for so doing, a right of way with them over the road.—B. denied that an agreement was concluded, and his evidence was corroborated by H., a former owner of the lots, and by

drafts of an agreement, containing alterations indicating that the parties were merely in treaty, and providing for the maintenance of the road by K., in common with the owners of the lots, an obligation disclaimed by plaintiff, and for a conveyance by K., of the part of his land to be used for widening the entrance.—This conveyance was never made, and the land was included in the conveyance to the plaintiff.—The road had been used, from the time of the alleged agreement, by K. and plaintiff in connection with a farm house, situate about two hundred feet from the public highway, until it was torn down, and the plaintiff had used, but not without interruption, the road for about 15 years for a considerable part of its length.—Shortly after the date of the alleged agreement, fences, with gates, crossing the road at separate points a considerable distance from its entrance, were erected by H. without objection by K.—*Held*, that the easement or user proved having been simply for the purpose of gaining access to the farm house, it would cease when the farm house was destroyed and was not an easement for all purposes. *Fairweather* v. *Robertson*, 2 Eq., p. 412. Reversed 36 N. B. R., 548, but restored by Privy Council.

Right of way—Private road—The successor in title of the owner of a block of land containing twenty-five acres, which had been laid out on a plan in lots with intended streets running through it, is estopped from denying that a purchaser of a lot described as abutting on one of the intended streets is entitled to use it as a right of way, although it is not used as a street and nothing has been done to it with the intention of making it a public street. *Budd* v. *Johnston*, 42, p. 485.

Use of walls to support joists—Prescriptive right—Increased use of wall—The plaintiff, McG., and the defendants, the W. F. Co., are the owners of adjoining lots which originally comprised one lot. —On each lot is a building which entirely covers its whole area.—The wall about which this dispute has arisen is used as the northern wall of the plaintiff's building and the southern wall of the defendants'.—It is clear, however, from the evidence that it stands entirely on the plaintiff's lot.—In 1877 the buildings on these two lots were destroyed by fire, the foundations, however, being left standing, and when the buildings were rebuilt, immediately after the fire, these old foundations were used, the walls were rebuilt on them, and the then owner of the defendants' lot used the wall in question as a support for the joists of the building he constructed.—The original lot was first divided in 1833 when the part now owned by the plaintiff was conveyed to one T. P. who continued to own it down to the time of his death in 1875.—T. P. died intestate leaving him surviving a widow and five daughters.—In 1896 this piece of property became vested in one of these daughters by a conveyance from all the heirs of T. P. to her.—In 1899 she and her husband conveyed it to one E. F. J., who was acting for the plaintiff and later on in the same year conveyed it to him.—The eldest daughter of T. P. became of age in 1876 and the youngest in 1887.—One of the daughters married before she reached her majority. —*Held*, that while the wall in question is entirely the property of the plaintiff and is not a party wall, the defendants have an easement for the support of the joists of their building in the wall as constructed after the fire in 1877, it having been openly and uninterruptedly used for that purpose for a period of more than twenty years; that a lost grant must be presumed to which this user would be referred.—*Semble*, the plaintiff when he purchased the building in 1899 had at least constructive notice of this easement.—*Held*, *also*, that as the youngest daughter of T. P. became of age in 1887, over twenty two years before this action was commenced, the grant might have been made at any time during the two years succeeding her attaining her majority; and further that coverture does not bar the presumption of the making of this grant. —The defendants recently constructed an elevator in their building, and for that purpose let beams or joists into the wall in question and used it for the support of the elevator.—Mandatory injunction granted for the removal of these beams or joists. *McGaffigan* v. *Willett Fruit Co. et al*, 4 Eq., p. 353.

EDUCATION.

See SCHOOLS.

EJECTMENT.

Action in Chancery re title—R. filed a bill in equity praying that M. might be restrained from asserting title to a lot of land, and that R. might be declared to be entitled to the lot in fee simple.—The judge in equity directed that R. bring an action of ejectment against M. to try the title. —Both parties failed to prove a documentary title, and relied upon, and gave evidence of title by possession.—On questions submitted the jury found that R. and his predecessors in title had been in possession of the lot since 1876.—On this finding the trial judge ordered a verdict to be entered for R.—*Held*, that the direction was right, and the Court was not obliged to treat the action under the order of the Equity Court as an ordinary action of ejectment, and assume the defendant to be in possession and nonsuit the plaintiff on failure to prove title. *Robertson* v. *Miller*, 35, p. 686. Note—Bill in Equity dismissed, see 35 S. C. R. 80.

Appeal—Verdict for defendant—In an action of ejectment, where the verdict is for the defendant, the Court will not ordinarily grant a new trial, unless special circumstances exist which prevent the plaintiff from bringing another action. (*Per* Hanington, Landry, Barker, McLeod and Gregory JJ.)—*Held* (*per* Tuck C. J.), that where material evidence has been improperly received a new trial should be granted. *Tobique Salmon Club* v. *McDonald*, 36, p. 589.

Deed by metes and bounds—Reference to former grant—In a case of ejectment brought against one of the heirs of a former owner, the description in the deed relied on described the land by metes and bounds which included the lot in question, and these words were added, "being the same land and premises . . . sold and conveyed by F. to P.—The conveyance from F. to P. excepted this lot, but the grantors of the deed claimed title to it from other sources.—*Held*, the description by metes and bounds would govern and the title to the lot would pass under the deed. *Chute et al* v. *Adney et al*, 39, p. 113.

Defence on equitable grounds—Agreement of sale—Injunction—On an application for an injunction order, in a suit for the specific performance of an agreement for the sale of land, to restrain an action of ejectment by the vendor to recover possession of the land, the Court ordered that on the defendant confessing the action of ejectment the plaintiff should be restrained until further order from taking possession; otherwise the application should be dismissed. *Freeman* v. *Stewart*, 2 Eq., p. 365.

Defence on equitable grounds—Agreement of sale and purchase—In an action of ejectment where the defendant pleads he is entitled to possession on equitable grounds under an agreement of purchase which he is ready to carry out, and the judge trying the case without a jury finds that the plea is proved, it is proper under section 134 of cap. 111, C. S. 1903, to order a verdict for the defendant, although the legal title and right to possession is in the plaintiff, and the effect of verdict is to deprive the plaintiff of the costs of the ejectment. *Souci* v. *Ouillette*, 37, p. 393.

Evidence—Declaration by deceased occupant made on the premises—The declarations of one in adverse possession made on the premises while in occupation importing a claim of a statutory title in himself are admissible in an action of ejectment against his representatives to support the presumption of title from possession whether they are against interest or not and whether made before or after the statutory title accrued. *Rundle et al* v. *Mc Neil et al*, 38, p. 406.

Evidence—Failure to prove appointment of liquidators through whom title came—P. by his will made in 1879 and registered in 1883 devised the land in dispute to the defendant M. D. for her life, she being then in possession, on condition that she pay a certain sum of money to a person named at a time specified, and on her death, or in default of payment, to W. H. P. in fee.—There was no evidence whether M. D. paid the money or not, but she remained in possession of the property, and there were other circumstances from which it was assumed that she did.—W. H. P. mortgaged the property to B. in 1895.—This mortgage was foreclosed in equity, in which suit M. D. was joined as a defendant.—The bill was taken *pro confesso* for want of an appearance and a decree for sale made.—At the sale under this decree W. H. P.'s wife became the purchaser, and, in 1897 she mortgaged to the Globe Savings and Loan Co.—The Globe Co., through liquidators, assigned the mortgage to the plaintiffs, and they sold under the power of sale and acquired through a third party any title that could be derived from that source.—No proof was given of the liquidation proceedings or the appointment of liquidators.—In an action of ejectment by the plaintiff against M. D. and her husband the trial judge held that, assuming the interest of M. D. in the property to have been foreclosed by the equity suit, the plaintiff, by failing to prove the liquidation proceedings or the appointment of liquidators, made out no title which entitled it to eject the defendants in possession, and ordered a nonsuit.—*Held*, on an application to set aside the nonsuit and enter a verdict for the plaintiffs, that the nonsuit was right. *The Colonial Investment and Loan Co.* v. *DeMerchant et al*, 38, p. 431

Guardians—Defence of possession by infants personally—In an action of ejectment the plaintiffs claimed title as the guardians of infants appointed by the Probate Court.—At the time the action was brought, the infants, who were each over fourteen years of age, were living with the defendant who occupied the premises in question with their consent and approval.—*Held*, that the defendant could not set up as a defence, that on equitable grounds he was entitled to possession for the infants as against the plaintiffs, and that the plaintiffs had no title, the Probate Court having acted without jurisdiction in appointing them guardians. *Furlotte et al Guardians etc.* v. *LaPoint*, 38, p. 140.

Landlord and tenant—Covenant to pay for improvements—Holding over—The plaintiff, the lessor in a lease (which is a renewal of a former lease of the same premises) containing a covenant to renew at the end of the term or pay for improvements "heretofore erected, or which may be hereafter erected or made by the said C. (the lessee)."—The improvements to be valued by two disinterested persons to be chosen by the parties, which two persons, in case of disagreement, were to choose a third,

the appraisement of whom or any two of them to be conclusive as to the value.—The lessor having determined not to renew, appraisers were appointed by the parties, and they failing to agree appointed a third.—The three met, and the appraiser of the plaintiff and the third chosen agreed on the sum of $2,500 as the value of the improvements, which sum the plaintiff tendered and the defendant refused to accept.—The defendant also refused on demand to give up possession, and the plaintiff brought ejectment.—At the trial, without a jury, the judge found that improvements for which the defendant was entitled to compensation had not been considered by the appraisers and the appraisement was not full and complete.—In addition to denying the plaintiff's title the defendant by plea, asserted the right to hold possession on equitable grounds, and asked to have the award set aside, and a renewal lease decreed to be executed.—*Held*, that the lease neither expressly or impliedly gives the defendant the right of possession claimed, and the facts do not entitle her on equitable grounds to retain possession, or on this application to have the award set aside or the relief asked for.—*Held also* that section 289 of S. C. Act of N. B. did not authorize that Court to grant relief to the lessee under her equitable plea; that such a plea to an action of ejectment must state facts which would entitle the defendant to retain possession, which the plea in this cause did not do. *Purdy* v. *Porter* 38 N. B. R. p. 465; 41 S. C. R. p. 471.

Statute of Limitations—Trustee—J. purchased and went into possession of the property in dispute in 1878; in 1879 he mortgaged it, and in 1880 conveyed the equity of redemption to B. without consideration.—In 1887 (within twenty years of the commencement of this action) at the request of, and for the benefit of J., the plaintiff paid and took an assignment of the mortgage, and B., also at the request of J., conveyed the equity of redemption to the plaintiff. J. and the defendant continued in possession down to the bringing of the action, and never paid any rent or anything on account of the mortgage.—*Held*, in an action of ejectment against the defendant, the successor in title of J., that the action was not barred by the Statute of Limitations and plaintiff was entitled to recover. *Stevens* v. *Jeffers*, 38, p. 233.

Tenant under agreement of purchase—Default—W. went into possession of a lot of land under an instrument in writing whereby it was agreed that the purchase money was to be paid in four equal instalments in six, twelve, eighteen and twenty-four months.—It was also agreed that W. was to be tenant at will, and that he should remain in possession until default in the payment of any of the instalments.—*Held*, that W. was not a tenant at will, or a tenant for a fixed term so as to be subject to the provisions of the Summary Ejectment Act, C. S., c. 83, or amending acts. *Winslow* v. *Nugent*, 36, p. 356.

Title from mortgage given by married woman but imperfectly acknowledged—A purchaser under a mortgage of the property of a married woman, executed by her while living with her husband prior to the Married Woman's Property Act of 1895 (58 Vict., c. 24), not appearing to have been executed with the consent of her husband and not acknowledged as the statute requires, cannot maintain ejectment against the mortgagor. *Everett* v. *Everett*, 38, p. 390.

Town of Grand Falls—Squatting on common—Certain lands were by Order in Council and Act of Assembly vested in the Municipality of Victoria for the use and benefit, as a common, of the inhabitants of the Town of Grand Falls.—By subsequent legislation they were transferred to and vested in the Town of Grand Falls "to the same extent as was given to the said Municipality."—By another act a portion of the common without the town limits was transferred to the said town.—Upon the land within the town limits the defendant entered and commenced to erect a house.—The plaintiffs thereupon brought ejectment.—*Held*, (1) that the action of ejectment would lie; (2) that the evidence shewed sufficient demand of possession; (3) that it was not necessary to make a tender for improvements as the Act 38 Vict., c. 42, only applied to improvements on the land at the time of its passage; (4) that the Act 59 Vict., c. 69, does not abridge or take away any of the rights to the common within the town. *Town of Grand Falls* v. *Petit*, 34, p. 355.

Verdict against weight of evidence—On the trial of an action of ejectment where the plaintiff claimed title by adverse possession, the judge in charging the jury, told them that if what the plaintiff stated was true it would be difficult for them to find the defendant's holding to be open and adverse to the plaintiff.—The jury, however, found that the defendant had title by adverse possession.—*Held*, that the verdict was not perverse, but there should be a new trial, as it was against evidence. *Porter* v. *Brown*, 36, p. 585.

ELECTIONS.

1. Parliamentary.
2. Municipal.

1. Parliamentary.

Controverted Elections Act (N. B.)—Costs on rule setting aside order for hearing—The costs on a rule setting aside an order fixing time for hearing under the New Brunswick Controverted Elections Act,

C. S. 1903, c. 4, s. 15, include the costs, if any, of the order set aside, and the application to set it aside, but not the costs of subpoenaing witnesses, etc. for the trial fixed by the order so rescinded, unless a special order be made.—The Court will not rehear or alter its order after it has been made and entered, provided that it accurately expresses the intention of the Court. *Owens* v. *Upham*, 39, p. 281.

Controverted Elections Act (Dom.)—Extending time for service—An election petition filed in the clerk's office on the 17th of December was sent to the petitioner at C. by registered letter on the 20th, and was received at the post office at C. on the evening of that day, but for some reason that was not explained, the letter was not delivered, and the petitioner had no knowledge of its receipt until the 27th, the last day for service.—*Held*, that an order extending the time for service was properly made. *McAllister* v. *Reid*, 35, p. 390.

Controverted Elections Act (Dom.)—Extending time for personal service—Under substituted section 10 (s. 8, of c. 20, Acts 1891), of the Dominion Controverted Elections Act, a judge of the election Court has jurisdiction to extend the time for personal service of the petition on the ground of special circumstances of difficulty in effecting service, if it appears there was a *bona fide* attempt to serve and ordinary diligence is used in trying to effect a service, even though it is shown that the petition was not delivered to the officer for service for four days after it was filed, and during the whole period allowed by the section for service the respondent was at or in the vicinity of his residence, and made no attempt and colluded with no person to avoid service, and might have been served if more than ordinary diligence had been used. *Nason* v. *Wilmot*, 35, p. 457.

Under section 8 of c. 20 of 54-55 Vict. substituted for s. 10 of the Dominion Controverted Elections Act R. S. C. c. 9 the Court has jurisdiction to make an order for substituted personal service where the application for the order is not made until after the time allowed for personal service has expired.—The order is not bad because it omits to fix a time within which the substituted service must be made.—Here the petitioner by reason of a deception practised upon him, erroneously believed a personal service had been effected and allowed five days after the extended time to elapse before taking out the order for substituted service. —*Held*, it was not too late. *McLeod* v. *Gibson*, 35, p. 376.

Controverted Elections Act (Dom.)—Petitioning—In the matter of an election petition under the Dominion Controverted Elections Act, *held*, (1) that the failure to file for the petitioner a copy of the preliminary objections to the petition (R. S. C., c. 9, s. 12, N. B. General Rules of the Election Court, Easter Term, 1887, 12) was waived by the taking of subsequent proceedings before raising the question, but, in any case, it was only an irregularity that could be amended, and the respondent was allowed to file such copy *nunc pro tunc*; (2) that the affidavit of the petitioner was sufficient notwithstanding that it did not set out the reasons for deponent's belief as to the facts sworn to therein; (3) that the fact that the petitioner had himself been guilty of corrupt practices did not preclude him from being a petitioner;(4) that the petitioner's affidavit not having been read over to him and he not being acquainted with its contents, it was in fact no affidavit.—*Also*, that as the affidavit was false and untrue, it was an abuse of the process of the Court, and the petition was dismissed.—(VanWart J. dissented.) *Alexander* v. *McAllister*, 34, p. 163.

Controverted Elections Act (N. B.)—Posting in Registry Office—Posting a copy of an election petition in the vestibule of a building owned by the county, part of which is occupied as the county registry office, and part as chambers of the County Court judge and part for other county purposes is not "posting in the registry office," although such vestibule is within the main walls of the building and was designated by the registrar of deeds as the place for posting notices to be posted in his office.—Publication by posting made by the sheriff thirty-five days after receipt of the copy of the petition from the clerk of the pleas is bad under s. 6 of the Act, requiring the petition to be published "forthwith", the delay being due to error on the part of the sheriff. *Owens* v. *Upham*, 39, p. 344.

Controverted Elections Act (N. B.)—Publication of Petition—Publication of an election petition in three consecutive issues of a weekly paper is not publication "for three consecutive days" and, therefore, not sufficient under s. 81 of "The New Brunswick Controverted Elections Act," C. S. 1903, c. 4.—*Herbert* v. *Harington*, 14 N. B. R. 324 followed.—And where publication of the petition is insufficient, an order cannot be made fixing the date of trial. *Owens* v. *Upham*, 39, p. 198.

Deposit made by friend of candidate—Ownership of fund—A. loaned B., a candidate for election to the Commons of Canada, the sum of $200 to deposit with the returning officer as required by R. S. C. c. 8 s. 22.—B. was not elected but received a sufficient number of votes to entitle him to a return of the money so deposited—Before the money was paid over C. a judgment creditor of B. garnisheed the money in the hands of the returning officer.—*Held* (Landry J. dissenting) that the money deposited belonged to A. not B. and the attaching order was properly set aside. *Ex parte Peck* 33 p. 623.

2. Municipal.

Canada Temperance Act—Scrutiny of ballots—Boxes lost or stolen—On an application to a County Court judge for a scrutiny of ballots in an election for the repeal of the Canada Temperance Act, *held* (Tuck C. J. dissenting), that secondary evidence of the ballots contained in lost or stolen ballot boxes was properly receivable. *Ex parte LeBlanc*, 34, p. 88.

Candidates for councillors—A licensed vendor under the second part of the Canada Temperance Act is disqualified from being a member of the municipal council.—(*Per* Tuck C. J. Hanington, Landry, Barker and McLeod JJ.)—An inspector under the Canada Temperance Act appointed by the municipality is disqualified from being a member of the municipal council.—(*Per* Tuck C. J. Landry, Barker and McLeod JJ.) *Ex parte Williams; In re Dickie* 38 p. 156.

Fredericton—Civic elections—By the Act 22 Vict. c. 8 s. 24 (1859) it is provided that any candidate or any elector dissatisfied with the decision of the presiding officer in any election for mayor etc., in the city of F. may within ten days after the election, make application in writing through the city clerk to the council, setting forth the cause of the complaint and demanding an investigation thereof, and by s. 11 of the amending Act 26 Vict., c. 33 (1863) it is provided that no petition complaining of an undue election shall be inquired into by the city council unless within two hours after the declaration a protest against the return be delivered to the presiding officer stating the grounds of the protest; and confines the inquiry to the grounds stated in the protest. —*Held*, on an application for a mandamus, that the city council was not justified in refusing to grant an investigation on a protest filed demanding a recount of the ballots cast, and assigning as a cause of complaint that certain ballots were accepted which were illegal in that they were not in accordance with the law relating to elections in the city of F., on the grounds that the council had no jurisdiction to hold a recount, and that there was no specific statement of grounds in the protest.—The council cannot inquire into grounds stated in a petition praying for an investigation which have not been stated in the protest delivered under s. 11 of 26 Vict., c. 33. *Ex parte Farrell*, 42, p. 478.

Municipal election—Loss of vote by negligence of civic officer—An action will lie when one is deprived of his right to vote at a municipal election by the negligence of another.—A municipal corporation is answerable for the negligent performance of his duties by one of its officers, who is appointed and removable by it, even where the duties, the negligent performance of which gave rise to the action, were imposed by the legislature and not by the corporation. —(*Per* Tuck C. J., Landry and McLeod JJ., Hanington J. dissenting.) *Crawford* v. *The City of Saint John*, 34, p. 560.

Protest against election—Municipal by-law—A by-law of a municipality respecting elections provided that an elector might file a protest against the election of a councillor with the county secretary within twenty days after the election; that the protest so filed should be read before the council on the first day of the first session after the election, and in case a majority of the council considered there was sufficient ground of complaint it should appoint a committee of three members to examine into the matter and report to the council.—The by-law also provided that the council might adjourn the investigation from time to time.—*Held*, where a protest was filed and read before the council, and a committee appointed as provided by the by-law, and the council adjourned without receiving a report from the committee or adjourning the investigation, the Court refused a rule for a writ to prohibit the council from proceeding to hear and determine the protest, at a special meeting called for that purpose. *Ex parte Murchie re Kerr*, 42, p. 475.

EQUITABLE ASSIGNMENT.

See CHOSE IN ACTION.

ESTATES.

1. Devolution and Distribution of Estates
2. Dower.
3. Partition of Estates.
4. Tenant by Curtesy.
5. Tenants in Common.

Leasehold Estates—*See* LANDLORD AND TENANT.

1. Devolution and Distribution of Estates.

See DISTRIBUTION OF ESTATES.

2. Dower.

See DOWER.

3. Partition of Estates.

Partition suit—Failure to appear and support answer.—Costs—Where in a partition suit one of the defendants did not appear at the hearing, and his answer was unsupported by evidence, and was assumed

by the Court to be unnecessary, he was held not entitled to any costs. *Shields* v. *Quigley*, 1 Eq., p. 154.

Partition suit—Vendor and purchaser—Costs—Where a suit for partition of lands sold previously to the commencement of the suit established the exclusive title of the vendor, and the suit was not caused by any fault of his, the vendee made a party to the suit was held not to be entitled to deduct his costs from the purchase money. *Patterson* v. *Patterson*, 3 Eq., p. 106.

Refusal to partition amicably—Costs of subsequent suit—Where a co-tenant refused to amicably partition a piece of land, and proceeded to strip it of its timber, the costs of a partition suit were ordered to be paid by him, and made a charge upon his share of the proceeds of the sale. *Cassidy* v. *Cassidy et al*, Eq. Cas., p. 480.

Standing grass, Sale of—During the pendency of a partition suit the Court will not, in opposition to the tenant in possession, order the sale of standing grass and payment of the proceeds into court, unless it is necessary in the interest of the co-tenants. *Smith* v. *Smith et al*, 1 Eq., p. 320.

Title in dispute—Parties—Where, in a partition suit, the title at law of the plaintiff is *bona fide* in dispute, the Court of Equity will not decree partition but will retain the bill with liberty to the plaintiff to bring an action to establish his title at law.—Quaere: as to whether the lessee of a tenant in common should be made a party to a partition suit. *Ogden* v. *Anderson et al*, Eq. Cas., p. 395.

4. Tenant by Curtesy.

Married woman living apart from husband—Husband's interest—A married woman, being the owner in fee at the time of her marriage of a lot of land, was compelled to live separate and apart from her husband, not wilfully and of her own accord.—*Held*, that while such separation continued she was entitled to an injunction restraining her husband from enjoying any marital rights in the property, or interfering with its use and occupation by her. *Johnston* v. *Johnston*, 1 Eq., p. 164.

Tenant by curtesy initiate, Judgment creditor of—Foreclosure suit—A judgment creditor, who has registered a memorial of judgment, is a necessary party to a suit to foreclose a mortgage on land belonging to the wife of the judgment debtor. *Horn et al* v. *Kennedy et al*, Eq. Cas., p. 311.

5. Tenants in Common.

Adverse possession against co-tenants—Statute of Limitations—Land was conveyed in fee to two brothers as tenants in common.—One brother died on May 9th, 1876, intestate, leaving him surviving his co-tenant, his mother and three sisters, of whom the plaintiff is one.—The mother died September 5th, 1876.—The surviving brother had from the time of his brother's death until his own death on November 8th, 1896, exclusive possession and use of the land, and the receipt of the rents and profits therefrom, without accounting.—He and his sisters lived together on premises situated elsewhere until his marriage in 1890.—He always contributed to their support, but the contributions were not meant, and were not understood, to be a share by the sisters in the rents and profits of the land. —In a suit commenced September 21, 1899, by the plaintiff for the partition of the land.—*Held*, that the plaintiff's title was extinguished by c. 84, s. 13, C. S. (Statute of Limitations). *Ramsay* v. *Ramsay*, 2 Eq., p. 179.

Chattels—Fishing licenses—A Dominion Government fishery license for one year, without right of renewal, was taken out a number of consecutive years by the plaintiff and defendants until 1899, in which year and in the year following, the license was taken out and the fishing thereunder was carried on by the defendants. The plaintiff and defendants owned as tenants in common fishing gear used in fishing under the license.—They were not partners in respect of the license, and each catch of fish was divided at the time it was made among such of the licensees as assisted in it.—The expense of repairing the fishing gear was proportionately borne by the plaintiff and defendants up to the years 1899 and 1900, when it was borne by the defendants.—In the years 1899 and 1900 the fishing gear was possessed and used exclusively by the defendants in fishing under the license.—*Held*, that the plaintiff was not entitled to a declaration of interest in the license, nor to a share of the earnings thereunder for the years 1899 and 1900, and that the defendants were not liable to account to him for profits from the use by them of the fishing gear in those years. *Guptill* v. *Ingersoll*, 2 Eq., p. 252.

Parties—Wife of tenant in common—The wife of a tenant in common in land sought to be sold in a partition suit should be a party to the suit. *Hannaghan et al* v. *Hannaghan et al*,1 Eq., p. 302. Cf. *Close* v. *Close et al*, Eq. Cas., p. 414.

Trespass—Ouster by co-tenant—One tenant in common can sue another for trespass if there has been an actual ouster. *Wathen* v. *Ferguson*, 41, p. 448.

Trespass—Suit by one co-tenant only—The plaintiff, a tenant in common with others of certain lands, but in possession under an agreement with the other tenants in common that he was to have possession

and ownership of the lands and all appertaining thereto, is entitled in his own name to sue and recover for damages arising from the negligent setting fire by defendant on his own land and its spreading to the land in possession of plaintiff. *Phillips* v. *Phillips*, 34, p. 312.

ESTOPPEL.

1. By Record.
2. By Deed.
3. By Matter in pais.

1. By Record.

Judgment debtor—The judgment debtor in an application to set aside garnishee proceedings having denied any wages were due him from the garnishee would be thereafter estopped to claim any exemption for wages due. *Ex parte Bowes*, 34, p. 74.

Judgment, effect of, on bond alleged to have been obtained by threat etc.—See *Smith* v. *The Halifax Banking Co.*, 1 Eq., p. 17.

Judgment of inferior Court—The judgment of an inferior Court is not conclusive as between the parties and their privies upon the question of jurisdiction, therefore when an action was brought to the Supreme Court against bail given in a cause, which had been commenced and tried in the City Court of Saint John and the defendant had by plea denied the jurisdiction of the said Court, and at the trial gave evidence in support of his plea, *held* (*per* Hanington, Landry, Barker, McLeod and Gregory JJ.), that the defendant was not estopped by the judgment of the City Court from offering such proof, and that as the plaintiff had chosen to rely entirely upon the estoppel he must fail.—The fact that the judgment relied upon by way of estoppel had been affirmed upon review by a County Court judge made no difference. *Jack* v. *Bonnell*, 35, p. 323.

Privilege not availed of — Action against bail—The arrest of a person having privilege by reason of his being an officer of a Superior Court, under an execution issuing out of the City Court of S. is not void, nor does such privilege afford any defence in an action on a limit bond entered into by such officer in order to obtain his discharge.—"Whether defendant Fry could or could not legally have obtained his discharge when arrested by applying at once to the Court where his duty held him, not having done so, and having entered into the limit bond, he is now estopped from going behind the bond to avail himself of this defence."—(*Per* Landry J.) *Dibblee* v. *Fry*, 35, p. 282.

Railway Act, Award under—Jurisdiction—In an application under O. XIV of the Judicature Act for leave to enter final judgment in an action on an award for the value of land expropriated by a railway company pursuant to the Railway Act, C. S. 1903, c. 91, it was objected that the award was bad, because the arbitrators had not been sworn by a justice of the peace for the county in which the lands lie as required by s. 17 (7) of the Act.—They had been sworn by a person, who had in fact resigned his commission as a justice, but was a commissioner for taking affidavits. —At the commencement of the proceedings before the arbitrators it was stated in good faith that the arbitrators had been properly sworn before a justice for the county, and that statement was dictated by the counsel for the company to the stenographer, and, with the consent of the counsel for the other side, entered on the record.—*Held* (*per* White and Crockett JJ.), that the statutory provision requiring the arbitrators to be sworn might be waived and the defendant company is estopped or precluded from objecting on that ground, by what took place before the arbitrators.—*Held* (*per* Barry J.), that the statutory provisions requiring the arbitrators to be sworn is a condition precedent to their jurisdiction, and want of jurisdiction can not be waived by admission, nor can jurisdiction be conferred by estoppel *Turney* v. *Saint John and Quebec Rwy. Co.*, 42, p. 557.

Trial—Consent by counsel—At the trial of an indictable offence the presiding judge has the power to order the Court to be adjourned to a place in the county other than the court house for the purpose of allowing the jury to hear the evidence of a witness, who was unable through illness to leave his house, the counsel for the prisoner having consented thereto. *R.* v. *Rogers*, 36, p. 1.

2. By Deed.

Bill of sale obtained by pressure—F. claimed to be the owner of a horse that S. had given her for the board of herself and child.—S., being indebted to H., left the province and H. seized the horse as the property of S. under an absconding debtor's warrant.—While the horse was in the possession of the sheriff under the warrant, negotiations were had with H. by persons professing to be acting for F., and a bill of sale of the horse was given to H. and the horse was returned to F.—The amount secured by the bill of sale not having been paid, H. seized the horse under the bill of sale, and F. brought an action in the Kent County Court against H. for a conversion of the horse.—On the trial the judge told the jury that the only question was, who was the owner of the horse at the time it was taken, and that the plaintiff was not estopped by the bill of sale from recovering

in the action.—*Held*, on an appeal from a judgment affirming a verdict entered on a finding on this direction, that the direction was right (Landry J. dissenting.) *Hannay* v. *Fraser*, 37, p. 39.

Bond issued by municipality on behalf of a constituent parish See *Grimmer* v. *The Municipality of Gloucester*, 35, p. 263; appealed, 32 S. C. R. 305.

Crown—There is no mode by which the Crown, apart from statutory authority, can convey land, otherwise than by its grant under the Great Seal, and it would not therefore be barred by acquiescence or adoption or recognition of a line to which one claims to hold adversely. *Mersereau* v. *Swim*, 42, p. 497.

Highway—Plan—User—In an action for obstructing a highway there was conflicting evidence as to its location and user by the public.—Part of the defendants' title were a lease and an assignment thereof, both of which had a plan attached exhibiting the highway as located where the plaintiffs claimed it to be.—Neither the lease nor the assignment made any reference to the plans.—The defendants' evidence showed the highway as actually used in a location differing from that shown by the plans.—The jury found in favor of the defendants, both as to location and user.—The learned judge who tried the cause held that as the deeds and plans must be read together, the defendants were estopped from disputing the location of the highway, and disregarding the findings of the jury as to its location and user, ordered a verdict to be entered for the plaintiffs. —*Held*, that the verdict was properly so entered. (Reversed on appeal 29 S. C. R., 627.) *Woodstock Woollen Mills Co. Ltd.* v. *Moor et al*, 34, p. 475.

Insurance policy—Payment of premium by note—A condition in a policy of life insurance provided that if any premium, or note given therefor, was not paid when due the policy should be void.—A note given, payable with interest, in payment of a premium provided that if it were not paid at maturity the policy should forthwith become void; on the maturity of the note it was partly paid, and an extension was granted, and on a part payment being again made a further extension was granted.—The last extension was overdue and balance on note was unpaid at the death of assured. —A receipt by the company, given at the time of taking the note, was of the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note in terms thereof."—While the note was running the policy was assigned for value, with the assent of the company, to the plaintiff, to whom the receipt was delivered by the assured.—*Held*, that no estoppel was created by the receipt; that there was no duty upon the company to have afforded the plaintiff an opportunity of paying the premium; and that the policy was void. *Wood* v. *Confederation Life Insurance Co.*, 2 Eq., p. 217. (Reversed 35 N. B. R. p. 512, but upheld S. C. of C.)

Landlord and tenant—Landlord's title —A lessee cannot deny his lessor's title and set up title in himself in an equitable replication in an action brought by him against the lessor for an illegal distress for rent in arrear under the lease by alleging and proving (no issue of fraud being raised) that he did not understand the effect of the lease, and believed that in executing it he was completing an option of purchase of the demised premises given in a prior lease from the defendant's predecessor in title.—(*Per* Hanington, McLeod and Gregory JJ., Tuck C. J. and Landry J. dissenting.) *Sweet* v. *Young*, 38, p. 571.

Successor in title—The successor in title of the owner of a block of land containing twenty-five acres, which had been laid out on a plan in lots with intended streets running through it, is estopped from denying that a purchaser of a lot described as abutting on one of the intended streets is entitled to use it as a right of way, although it is not used as a street and nothing has been done to it with the intention of making it a public street. *Budd* v. *Johnston*, 42, p. 485.

Written document, Interpretation of —A person who went into possession of land under a written agreement of purchase which *inter alia* agreed that he should be a tenant at will is not estopped from setting up the fact that he is not a tenant at will because the document read as a whole shows the character of his holding to be contrary to such a tenancy. *Winslow* v. *Nugent*, 36, p. 356.

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3. By matter in pais.

Acquiesence — Accommodation promissory note—The defendant at the request of a third party without the knowledge of the plaintiff made a promissory note in favor of the plaintiff for the third party's accommodation.—The plaintiff credited the third party with the face value of the note and made some cash advances thereon.—The note was subsequently renewed on several occasions, and on one renewal the defendant personally paid the interest to the plaintiff. —*Held*, in an action on the last renewal that the objection that there was no consideration moving from the plaintiff was not an answer to the action. *McCain Produce Co.* v. *Lund*, 44, p. 242.

Actions and declaration of plaintiff— The plaintiffs who were the owners of a quantity of logs, upon being asked by the defendant if they were for sale replied in the negative, adding that they had already been sold to one M.—The defendant there-

upon bought a portion of said logs from M. who was in possession and had all the *indicia* of title to the same, and paid M. in cash for them.—As a matter of fact the sale to M. was subject to the condition that no property in the logs was to vest in M. until they were paid for, of which condition the defendant had no knowledge.—In an action of trover brought to recover the value of the logs so purchased from M. by the defendant. *Held* (*per* Tuck C. J., Hanington and Barker JJ., Landry J. dissenting), that the plaintiffs were estopped by their declaration as to the sale to M. from setting up that the title was not in him, and that a verdict ought, therefore, to be entered for the defendant.—*Held* (*per* McLeod J.), that the evidence showed an intention on the part of the plaintiff to abandon the conditional element of their contract with M. and that he was clothed by the plaintiffs with authority to sell the logs accounting to them for the proceeds.—*Held* (*per* Gregory J.), that the circumstances were such that the defendant could not reasonably have had any doubt as to the right of M. to sell, and, as the plaintiffs had put M. in a position to practice a fraud on the defendant, they must suffer the loss.—Further, it being apparent from the evidence that the plaintiffs intended that M. should dispose of the logs in the usual course of his business, he of necessity had an implied authority to sell and pass the title. *People's Bank of Halifax* v. *Estey*, 36 N. B. R., p. 169; 31 S. C. R., p. 429.

Action of plaintiff—Acquiesence—An arrangement entered into by the plaintiff, the commissioner of the City Court of Moncton, an officer appointed by the lieutenant-governor in council, with the city council of the city of Moncton to accept a reduction of his salary, which arrangement had been assented to by both parties and acted upon for a period of five years, is binding and cannot be repudiated on the ground that it is void as against public policy. *Kay* v. *The City of Moncton*, 36, p. 377.

Actions under pressure—A judgment of an inferior Court signed on a confession obtained by fraud is void and may be attacked collaterally.—Acts subsequent to the judgment made under pressure and while physically unfit for business do not constitute an estoppel. *Rogers* v. *Porter*, 37, p. 235.

Branch bank manager—Ratification by general manager—See *MacKintosh* v. *Bank of New Brunswick*, 42, p. 152.

Conduct — Acquiesence — Rendering bill to other party—The plaintiff agreed to sell 40 feet of curbing stone to one P. who had a contract to place curb stones in the Town of W.—Prior to this agreement, the town, with the plaintiff's knowledge but without any authority or permission on his part except such as can be implied from the fact that he saw the town's servants taking the stone and made no protest or objection, had taken away and made use of 174 feet of plaintiff's curbing stone.—The plaintiff sent a bill for all the stone to P. and at his request the town held back P.'s payment so as to force a settlement of the bill, but P. refused to pay the plaintiff for more, than 40 feet.—The town being threatened with suit by P. paid him, and the plaintiff then sued the town in trover for conversion of 174 feet of stone.—*Held*, reversing the judgment of the County Court judge, that the plaintiff's conduct did not estop him from recovering against the town and a verdict was ordered in his favor for the value of 134 feet. *Fisher* v. *Town of Woodstock*, 39, p. 192.

Conventional line—A plaintiff is not estopped by a conventional line concurred in by a predecessor in title, when the defendant has subsequently admitted in writing the correctness of a different line as located by survey. *McIntyre* v. *White*, 40, p. 591.

Estoppel in pais, Requisites for—To constitute an estoppel in pais, there must be a representation made with the intention that it should be acted upon, which representation is acted upon by the party to whom it is made, in the belief that it is true and by which he is prejudiced.—The jury found that the plaintiff made a contract with one F. as agent of the defendant, and also made the following finding: "Did defendant knowingly permit F. to so deal with the public as to lead the plaintiff to infer that he (F.) had authority to make contracts binding on the defendant? Yes."—*Held*, the question as framed was insufficient to constitute an estoppel. *Giberson* v. *The Toronto Construction Co. Ltd.*, 40, p. 309.

Forgery—Delay in repudiating signature—On July 15th, 1907, defendant received notice of dishonor of a note purporting to be endorsed by him and on October 7 this action was begun against him on the note.—On November 26 defendant notified the plaintiff that his endorsement was forged by G., the maker.—G. died on December 12 following.—There was a genuine endorsement on the note by W. Co. and W. Co. was solvent.—*Held*, reversing the judgment of the County Court judge, that the defendant was not estopped from denying his signature as the plaintiff had his remedy against W. Co. and against G.'s estate, and the loss of costs in this action was not such damage as would ground an estoppel.—*Ewing* v. *Dominion Bank*, 35 S. C. R. 133 distinguished. *Connell et al* v. *Shaw*, 39, p. 261.

Husband and wife—Assessments and taxes—An assessment under 3 Geo. V, c. 21, in respect of land owned by plaintiff made against plaintiff's husband, with her knowledge and without objection by her, she having from time to time paid former taxes so assessed, is valid, and plaintiff is estopped from

from contending that property is improperly assessed. *Byrne* v. *Town of Chatham*, 44, p. 271, C. D.

Husband and wife—Claim of fraud—Laches—The plaintiff was named as the beneficiary in a policy of insurance on the life of her husband.—The policy was taken out by the husband, and the premiums were paid by him.—By an assignment, to which the plaintiff was a party, the loss was made payable to the defendants, for valuable consideration moving to the husband.—Upon the death of the husband, the plaintiff claimed the benefit of the policy, setting up that her consent to the assignment was procured by her husband's fraud.—*Held*, that as she had full knowledge of the facts for at least three years previous to her husband's death, she was estopped from disputing the validity of the assignment. *Gunter* v. *Williams et al*, 1 Eq., p. 401.

Husband and wife—Damage from log driving—The plaintiff in the Court below, a married woman, was the owner in fee of a lot of land through which flowed a stream, too small, however, in the natural state for stream-driving purposes.—The land had previously been owned by the plaintiff's husband, who both while such owner and afterwards, had assisted as a laborer in constructing a driving-dam above the plaintiff's lot.—The defendants' logs were driven by means of the driving-dams which were owned by them, and such user flooded the plaintiff's intervale and injured the banks of the stream.—*Held* (Hanington J. dissenting), (1) that the plaintiff was not estopped from taking proceedings to restrain further injury to the property and from claiming damages for the injury done; (2) that the acquiescence or leave and license by which a person can be deprived of his legal rights, must be of such a nature and given under such circumstances as will make it fraudulent in him to set up these rights against another prejudiced by his acts. *Wright et al* v. *Mitten*, 1 Eq., p. 171; 34, p. 14.

Malicious prosecution—Permitting use of name—In an action for false arrest and malicious prosecution, it appeared that one Cox, acting as cashier for the defendant company, believing that he had overpaid the plaintiff, an employee of the defendant company $100.00 caused him to be arrested by the defendant company in an action in the County Court.—The defendant company charged Cox with the $100.00 and made no demand upon the plaintiff for the amount and while it did not authorize Cox to issue the capias it permitted the action to proceed and paid the costs on judgment being given for the present plaintiff.—*Held*, that the defendant company, by permitting its name to be used in the action in the County Court, was estopped from setting up that it did not authorize the action and arrest. *Landry* v. *The Bathurst Lumber Co. Ltd.*, 44, p. 374.

Tender of amount claimed—If a creditor holding a security absolute on its face furnishes the debtor with a statement of the amount alleged to be due, a tender of that amount is binding, notwithstanding it subsequently appears on taking an account between the parties that the tender was for less than the amount actually due. *McLaughlin* v. *Tompkins*, 44, p. 249.

Woodmen's Lien Act—Giving of Bond—The appellant under a contract in writing made by him with the respondent for an agreed price per thousand, cut upon the land of the respondent a quantity of logs and hauled them to a portable mill upon the land, where they were manufactured into deals, planks etc.—The work was performed in part by the appellant himself with his team, though there was no stipulation to that effect between the parties, but chiefly by labourers and teams, by the terms of the contract hired and paid by the appellant.—A portion of the amount due to the appellant under the agreement being unpaid he caused an attachment to be placed upon the above mentioned deals, planks etc., claiming a lien thereupon by virtue of "The Woodmen's Lien Act, 1894."—*Held* (*per* Hanington J.), that the respondent, by giving a bond in order to secure the payment of the amount claimed if the the lien should prove effectual, and thus obtaining a release of the deals, etc., attached, did not estop himself from disputing the validity of the lien. *Baxter* v. *Kennedy*, 35, p. 179.

EVIDENCE.

1. On Motion.
2. At Trial.
3. Onus.
4. Admissability.
5. On Commission.
6. Parol Evidence.
7. Documentary Evidence.
8. Corroborations.
9. Judicial Notice.
10. Presumptions.
11. Secondary Evidence.
12. Witnesses.

1. On Motion.

New trial, Motion for—Contradictory affidavits—Where one of the grounds in support of a motion for a new trial was that some of the jury had been tampered with, and the charge included the defendant's attorney an officer of the Court, and a

number of affidavits very contradictory and of an entirely irreconcilable nature were read, under the special circumstances of the case an order was made that the deponents should appear before the Court to be examined *viva voce* touching the matters in question. *Wood* v. *LeBlanc*, 38, p. 47.

Rebuttal—If evidence is admitted by way of rebuttal, which is cumulative and not properly rebuttal testimony, despite the objection of the opposing counsel, he having an opportunity to produce further evidence to meet the evidence so admitted, such evidence should be accepted as part of the case upon which to decide a motion to set aside the verdict. *Robinson* v. *Haley et al*, 42, p. 657.

2. At Trial.

Admission of facts—Order 32, r. 4—Where notice to admit facts is given under Order 32, rule 4, it is the duty of the party receiving the notice to admit the facts, or give reasons why it is not necessary to admit them. *Murchie* v. *The Mail Publishing Co. Ltd.*, 42, p. 36, C. D.

New trial—Action on bill of exchange—Presentment not proved—Plaintiff placed a note in B. of M. for collection; by mistake it was returned unpaid to defendant, a prior endorser, who however denied receipt thereof until the time of trial, when he produced it after plaintiff's case was closed.—Plaintiff believed note payable at B. of M. whereas it was in fact payable at B. of N. S.—No proof was given by plaintiff of presentment at B. of N. S.—On appeal against verdict for plaintiff, appeal was allowed but in view of defendant's action, a new trial was ordered so that plaintiff might have opportunity to prove presentment.—No costs. *Ayer* v. *Murray*, 39, p. 170.

Plans—Witnesses should prepare all illustrations in the presence of the Court and the jury—(*Per* Gregory J.) *Wood* v. *LeBlanc*, 38, p. 56.

Refreshing memories of Jury.—A commission issued on the application of the plaintiff, and exhibits put in evidence by the plaintiff, were taken into the jury room without the consent of counsel, to be used by the jury in considering their verdict.—*Held*, (*per* Barker C. J. and McLeod J.), if juries wish to have their memories refreshed they should come into the Court for the purpose, where counsel, if they wish, can request the judge to read to the jury at the same time other evidence bearing on the same point. *Miles Bros. Inc.* v. *Bell*, 40, p. 158.

3. Onus.

Administrator's deed—An administrator's deed duly proved and registered under 3 Vict., c. 61, s. 56, reciting all the facts required by the statute and having the affidavit of the administrator endorsed thereon that the premises mentioned in the deed had been duly advertised and sold according to law, is not sufficient proof of title in one claiming thereunder without proof of the license to sell. *Johnson* v. *Calnan*, 38, p. 52.

Agency. Onus of proving—The burden of proof is on the person dealing with any one as an agent, through whom it is sought to charge another as principal and it must be shown the agency did exist and that the agent had the authority he assumed to exercise, therefore, authority of a husband to make a contract on behalf of his wife to pay brokerage commission for procuring a lessee of her property will not be implied from the fact that he lived with his wife and managed her hotel and had on a previous occasion leased the same and sold some of her furniture through a broker who had been paid a commission, and a lease had subsequently been made by the wife to the person introduced by the plaintiff, even though the wife is not called on the trial and no evidence is adduced to rebut the alleged authority. *McCormack* v. *Gallagher*, 44, p. 630.

Appeal—Where a promissory note was given to the agent of an insurance company in payment of a first premium on a policy, and a policy was issued and sent to the insured and retained by him, containing provisions to the effect that the insurance should not take effect or be binding until the first premium had been paid to the company or a duly authorized agent, also, that if a promissory note or obligation were given for the premium and should not be paid at maturity, the policy should not be in force while the default continued, but the party should be liable on the note, the Court refused to set aside a verdict for the agent of the company on the note, on the ground that there was no consideration, holding that the defendant (appellant) was bound to show affirmatively that the verdict was wrong. *Crawford* v. *Sipprell*, 35, p. 344.

The City of Moncton Incorporation Act, 53 Vict., c. 60, s. 65, provides that a sitting magistrate may act for the police magistrate when he "is any way disqualified by being a witness, or from relationship or otherwise."—*Held*, that a conviction by a sitting magistrate stating that he was acting for the police magistrate, "he being disqualified" and not alleging the grounds of disqualification, is sufficient on its face, the onus of proof that he was in fact not disqualified being on those attacking the conviction. *R.* v. *Stevens ex parte Gallagher*, 39, p. 4.

For onus of proving that findings by trial judge are wrong see under title "APPEAL."

Arrest, Justifying—In order to justify a conductor under Rule 136 of the "Rules and Regulations for Government Railways" in arresting a passenger, there must be evidence that he was annoying other passengers and abusive language to the conductor is not in itself evidence of such annoyance. *McAllister* v. *Johnson*, 40, p. 73.

Breach of maintenance bond—In a suit to enforce a lien upon land conveyed to the defendant by the plaintiffs (husband and wife) in consideration of an agreement by defendant to support them, the onus of proving a breach of the agreement is upon the plaintiffs. *Ouilette* v. *LeBel*, 3 Eq., p. 205.

Custom of the trade—A contract read to "drill or punch all holes required in the ironwork on the extension of the Intercolonial Railway Station, Saint John, N. B., according to plans and specification", at the rate of five cents per hole, which will include riveting and bolting up."—An attempt to prove that the local custom of the trade was to charge for punching assembled plates to be bolted and riveted as one hole was considered insufficient for lack of evidence that the plaintiffs had knowledge of such custom. *Wilson et al* v. *Clark et al*, 38, p. 69.

A custom must be of such a public and general nature that the parties must be taken to have it in mind in making their contract (*per* Barker C. J.). *McLaughlin* v. *Westell*, 41, p. 193.

Deed by sheriff—Quaere:—Is it necessary for a person claiming title under a sheriff's deed to give any evidence of the execution under which levy and sale took place? *Ross* v. *Adams*, 34, p. 158.

Foreign law—Onus of proof re difference—A share in the annual income of an estate in Ireland payable under a will through the hands of the executor living in New Brunswick to the beneficiary living and domiciled in Massachusetts was assigned by the beneficiary by assignment executed in Massachusetts to trustee in trust, first, to maintain the assignor and his family, and, secondly, to pay his creditors a limited sum.—In a suit in this province to set aside the assignment as fraudulent and void against a judgment creditor of the assignor, under the statute 13 Eliz., c. 5, *Held*, that assuming the validity of the assignment should be determined by the law of Massachusetts the onus of proving that the assignment was invalid by that law was upon the defendant, and that in the absence of such proof it must be assumed that the law of Massachusetts was the same as that of New Brunswick. *Black* v. *Moore*, 2 Eq., p. 98.

Foreign law—Foreign law is a matter of fact to be ascertained by the evidence of experts skilled in such law. Where the evidence is unsatisfactory and conflicting the Court will for itself examine the decisions of the foreign courts and text writers referred to in order to arrive at a satisfactory conclusion upon the question of foreign law. *Papageorgiouw* v. *Turner*, 37, p. 449.

The plaintiff and defendant, both residents of this province, applied to the government of the province of Quebec and were allotted lots 31 and 32 in Robinson settlement in the county of Temiscouata, Quebec.—Neither lot was granted to the parties but each took possession of the lot applied for and engaged in cutting pulp-wood and logs on their respective locations, the plaintiff on 31 and the defendant on 32.—The dividing line between the lots had never been run.—The parties spotted trees for about five rods along the supposed line and each party agreed to be guided in his operation by this spotted line and its projection until they could get a surveyor to run a proper line, and on such line being run, if it were found that either party had cut over on the other, "he would return the wood."—No proper line was ever run.—*Held*, on appeal, reversing the judgment of Barry J. in an action claiming damages for the conversion by the defendant of the plaintiff's pulp-wood and logs, that the action necessarily involved the determination of the proper location of the line between lots 31 and 32, land in a foreign jurisdiction, and therefore could not be entertained by the Courts of this province.—The Court has no jurisdiction to try an action between parties resident in this province for a tort committed in a foreign jurisdiction unless it be alleged and proved that the tort was actionable in the latter jurisdiction. *Long* v. *Long*, 44, p. 590.

Fraudulent conveyance, Setting aside—Where a creditor is seeking on behalf of himself and all other creditors, to have a conveyance declared fraudulent and void, it is only necessary to allege and prove that he had a claim against the debtor and not that the claim had been carried to judgment. *McDermott* v. *Oliver*, 43, p. 533.

Gifts—The doctrine of undue influence and the burthen of proof in cases of voluntary gifts *inter vivos* considered. *Bradshaw* v. *Foreign Mission Board of Baptist Convention of Maritime Provinces*, 1 Eq., p. 346.

Grantee from Crown—The production on the trial by the plaintiff's solicitor of a grant from the Crown to a person of the same name as the person from whom the plaintiff claims the property granted as heir and devisee of the grantee, is sufficient evidence of the identity of the plaintiff's predecessor in title with the grantee to sustain a verdict for the plaintiff in an action for the land. *Simpson* v. *Malcolm*, 43, p. 79.

Guardian—Defeating father's right to be appointed—To defeat the right of a father to the custody of his child, as against its maternal grandmother, his habits and

character must be open to the gravest objections.—The Court must be satisfied, not merely that it is better for the child, but essential to its safety or welfare in some very serious and important respect before it will interfere with the father's rights. *In re Annie E. Hatfield*, 1 Eq., p. 142.

See also *In re Armstrong*, 1 Eq., p. 208.

Heirship—Evidence of a witness that he is a member of a firm of bankers who had acted as agents for a family and had had business relations with it for over fifty years, that he personally knew the plaintiff, and from the knowledge and belief derived from such knowledge of the family he believes the plaintiff to be a daughter and the only surviving child of such family is proper proof of the relationship.—The production on the trial by the plaintiff's solicitor of a grant from the Crown to a person of the same name as the person from whom the plaintiff claims the property granted as heir and devisee of the grantee, is sufficient evidence of the identity of the plaintiff's predecessor in title with the grantee to sustain a verdict for the plaintiff in an action for the land. *Simpson* v. *Malcolm*, 43, p. 79.

Husband and wife—Purchase of land—Land purchased by a husband as a home for himself and wife was by his direction conveyed to her and a house was built thereon. —Where, in such a case the wife claims that the money with which the property in question was purchased, and the house built was her money, the burden of proof to the contrary is upon the husband. *Palmer* v. *Palmer*, 42, p. 23, C. D.

Incorporated company — Powers — Presumption—The fact that a company is incorporated by Letters Patent stating it to be one of the objects of the company to take over a business and property used in connection therewith, and that the company does take over and continue such business as before, is not sufficient to establish an agreement on the part of the company to assume the liabilities and contracts of such business. *Jones* v. *James Burgess & Sons Ltd.*, 39, p. 603.

Incorporation of company—In an action in the magistrate's Court by a foreign corporation the only evidence of the incorporation was supplementary letters of incorporation increasing the capital stock. —This evidence was received by the magistrate without objection and a judgment entered for the plaintiff.—On review before a County Court judge the judgment was set aside on the ground that there was no evidence of incorporation. *Ex parte Ault & Wiborg Co. of Canada Ltd.*, 42, p. 548.

Legitimacy—To prove that C. was the legitimate son of A. by an alleged previous marriage, it was shown that he resided for two or three years at A.'s home previous to departing to learn a trade, and also at a subsequent time for a few months; that he addressed him as "father," was treated as a member of the family, was recognized and treated by A.'s wife as his son, and by children by her as their brother; that after removal to the United States he wrote letters to A., in one of which he informed him of his (C.'s) marriage; and that in an oral declaration by A. in the hearing of a witness, who was a neighbor of the family, he referred to the Christian name of his former wife, and to her personal appearance.—*Held*, that C.'s legitimacy had been proved. Quaere Whether declarations in letters written *ante litem motam*, between D., a son of A., and G., a son of C., in which D. recognized C.'s relationship to him, were admissible in D.'s lifetime; but, *Semble*, that where *prima facie* evidence of C.'s legitimacy had been given, declarations in G.'s letters, he being dead, were admissible. *Johnston* v. *Hazen*, 3 Eq., p. 147.

Medical attendance—Ordinary care and skill—In an action against a surgeon for not exercising ordinary care and skill in treating the plaintiff for an injury to his arm, caused by his being accidently thrown from his sleigh, the learned judge who tried the case non-suited the plaintiff on the ground that as neither the plaintiff nor any of his witnesses were able to say that the arm was dislocated as a result of the accident, and as both the defendant and another surgeon who was called in by the defendant and examined the arm three weeks after the accident swore that it was not dislocated, and as the dislocation which was sworn to exist a year and nine months after the accident by a third surgeon whom the plaintiff consulted, and which was admitted to exist at the time of the trial, more than three years after the accident, might have been the result of disease, as was shown by the evidence of several expert witnesses, there was no evidence to leave to the jury upon which they could properly find a verdict for the plaintiff.—*Held* (*per* Tuck C. J., Landry, VanWart and McLeod JJ., Hanington J. dissenting), that the non-suit was right, and that even if the dislocation was the result of the accident the mere fact that the defendant did not discover it and treat the plaintiff accordingly, was not of itself evidence of want of ordinary care and skill on the part of the defendant.—*Held* (*per* Hanington J.), that as there were symptoms of dislocation immediately after the accident, as the arm was admittedly dislocated at the time of the trial, and had been so for some considerable time before, as the plaintiff's wife swore that the arm at the time of the trial exhibited very much the same appearance that it did when the defendant was treating it, as three weeks after the accident the defendant admitted that the arm might have been slightly out, and at that time adopted means to reduce the dislocation the learned judge should have left it to the jury to find whether or not the dislocation was caused by the accident, and existed at the time the defendant was called in, and if so whether or not the defendant

was negligent or showed want of ordinary care and skill in not discovering it. *James* v. *Crockett*, 34, p. 540.

Medical practitioner—In an action by a physician to recover for professional services the burden is on him to prove that he was a duly registered practitioner under the New Brunswick Medical Act, C. S. 1903, c. 73, at the time the services were rendered, and there is no presumption from the fact that the plaintiff is registered in one year that he continues to be registered beyond that year.—*Tozer* v. *McIntosh*, 39, p. 550.

Mortgage — Onus — Creditor — Where a mortgagor is seeking to discharge himself from liability by payment, the onus of proof is upon him.—Where a conveyance, absolute on its face, but subject to certain verbal agreements as to reconveyance, is taken by a creditor to secure advances, instead of the ordinary form of mortgage in which the terms of agreement would have been set out, the onus of proof in case any dispute arises is on the creditor to show the exact sum for which the conveyance is to stand as security. *Nixon* v. *Curry et al.*, 4 Eq., p. 153.

Negligence — Careless driving—In an action on the case for negligence in driving the defendant's horse whereby his wagon came into collision with and damaged that of the plaintiff, it is not sufficient to prove merely that the defendant was driving on the wrong side of the road, especially as it was shown that the defendant just before the collision had crossed from the left side of the road for the purpose of speaking to a man sitting on a door step on the other side, and that the plaintiff's horse at the time of the accident was running away and beyond control.—(*Per* Tuck C. J., Hanington, Landry and VanWart JJ., Barker and McLeod J. dissenting). *Adams* v. *Stout*, 35, p. 118.

Negligence—Property hired and returned damaged—A bailee for hire who returns the property bailed in a damaged condition, and who, being the only person with full knowledge of the circumstances causing the damage, fails to give any explanation of the same, is presumed to have been negligent, and the onus of proving that there was no negligence lies on the defendant. *Gremley* v. *Stubbs*, 39, p. 21.

Payment of debt—Payment of a debt must be proven by the debtor beyond reasonable doubt. *True* v. *Burt*, 2 Eq., p. 497.

Payment, Plea of—Upon a plea of payment to a count for money had and received the burden of proof is on the defendant and the payment must be proved beyond a reasonable doubt. *Massey Harris Co. Ltd.* v. *Merrithew*, 39, p. 544.

Payment—A plea of payment by the maker of a promissory note where the payee is dead must be established beyond all reasonable doubt. *Kelley* v. *Ayer*, 41, p. 489;

Specific performance — Evidence necessary for decree—In a suit for specific performance the evidence must satisfactorily shew that the agreement is substantially what it is alleged to be by the plaintiff.—If the agreement is denied on oath by the defendant the Court will not decree specific performance of it unless the plaintiff's evidence is so corroborated by witnesses or by the surrounding circumstances as to leave no substantial doubt that the defendant is in error. *Calhoun* v. *Brewster*, 1 Eq., p. 529.

Title to land—Deed from liquidators—The Globe Savings and Loan Co., through liquidators, assigned a mortgage to the plaintiff, who sold under the power of sale and acquired, through a third party, any title that could be derived from that source. —No proof was given of the liquidation proceedings or the appointment of liquidators.—In an action of ejectment the trial judge held that the plaintiff, by failing to prove the liquidation proceedings or the appointment of liquidators, made out no title which entitled it to eject the defendants in possession, and ordered a nonsuit.—*Held*, on an application to set aside the nonsuit and enter a verdict for the plaintiffs, that the nonsuit was right. *The Colonial Investment and Loan Co.* v. *DeMerchant et al*, 38, p. 431.

Trespass—A registered deed of lands held adversely to the legal owner at the time the deed was given will not inure to give title or possession to the grantee so as to enable him to maintain trespass against the person in actual possession, although there is evidence of isolated acts of ownership on the land by the grantee after the deed was given. *Johnson* v. *Calnan*, 38, p. 52.

In construing documents of title, giving the length of a course in feet or other denomination with the addition "or until it comes to an object," that object, be it less or more than the length given, is the boundary.—Therefore, where a town justified a trespass, on the ground that the act complained of was to remove or prevent an encroachment on R. street, the western boundary of the plaintiff's property, the burden of proving the street boundary is on the town, though the point to which the plaintiff claims is some five feet beyond the number of feet given in the plaintiff's deed as the distance from the starting point to R. street. *Milmore* v. *The Town of Woodstock*, 38, p. 133.

Will—Probate of a will devising real estate is not conclusive evidence of the validity of the will in the Courts of Equity. *Turner* v. *Turner*, 2 Eq., p. 535.

4. Admissibility.

Assault—Damages—In an action for an assault evidence of provocation by words spoken three days before the assault by the plaintiff to the defendant was properly admitted in mitigation of damages. *Murphy* v. *Dundas*, 38, p. 563.

Conversations without prejudice—Conversations had with a view to settlement of a dispute especially where expressly stated to be without prejudice are inadmissible and it is for the judge and not for the jury to determine the facts upon which the admissibility of evidence depends. *Guimond* v. *Fidelity Phenix Fire Insurance Co.*, 41, p. 145.

Death—Letters of administration are admissible to prove the death of the intestate. *Scribner* v. *Gibbon* (1858) 9 N. B. R. 182 followed. *Simpson* v. *Malcolm*, 43, p. 79.

Declaration against interest by predecessor in title—A statement of a person through whom a plaintiff claims made to a stranger, not in the presence of the plaintiff, and before the transfer to the plaintiff, that he, the predecessor in title, was not the owner of the property in question is evidence as a declaration against interest, and its rejection is ground for a new trial. *Lloyd* v. *Adams*, 37, p. 590.

Donatio mortis causa—The statement of a living person is admissable in proof of a *donatio mortis causa*, even if he be the donee and even if his statement be uncorroborated. *The Eastern Trust Co.* v. *Jackson*, 3 Eq., p. 180.

Entries by deceased in course of business—Entries in the handwriting of a deceased person in his books of account, made in the ordinary course of his business, as follows:

Balance due Robert Anderson...$41.25
July 15, 1892. By cash on due-bill for Thompson Farm..... 41.25

Settled.....$00.00
1886, May 23. Balance due R. H. Anderson.....$35.63
By Cash to self..... 10.00

By balance due R. And.....$25.63
Credit on due-bill settled in full.....$25.63

are admissible under sec. 38, c. 127, C. S. 1903, and the first entry being admitted to be a payment on account of a land purchase, the second is evidence of a payment on the same account on the 23rd of May, 1886.—That the second entry was too indefinite to prove a payment on account of the land in dispute.—Where an entry in the handwriting of a deceased person is *prima facie* against interest it is admissible for all purposes, irrespective of its effect or value when received. *Anderson* v. *Anderson*, 37, p. 432.

False imprisonment by a justice of the peace acting without jurisdiction—By C. S., c. 90, s. 11, it is enacted that "where the plaintiff shall be entitled to recover in any action against a justice he shall not have a verdict for any damages beyond two cents, or any costs of suit, if it shall be proved that he was guilty of the offence of which he was convicted, etc."—In an action of false imprisonment brought against a magistrate, who without jurisdiction had committed to prison the plaintiff for making default in the payment of a fine imposed upon him for selling liquor without a license, evidence was offered and admitted in proof of the plaintiff's innocence of the charge.—*Held*, that the evidence was properly received and that the plaintiff, in order to prove his innocence, was not confined to such evidence as had been given before the magistrate on the trial of the information. *LaBelle* v. *McMillan*, 34, p. 488.

False imprisonment—Evidence inadmissible—In an action against a justice for false arrest and imprisonment under an illegal warrant, the following evidence is inadmissible: (1) evidence of the character of the informant upon whose information the warrant was issued; (2) evidence of injuries received by the plaintiff at the hand of the informant. (*Per* Landry, White, Barry and McKeown JJ.) The admission of such evidence caused no substantial wrong or miscarriage in this action. (*Per* Barker C. J., and McLeod J.), *Campbell* v. *Walsh*, 40, p. 186.

Fraud—Admissibility of evidence of similar acts—In an action by an insurance company to set aside a policy of life insurance issued by it, on the ground that the policy was procured by fraud of the assured and the assignee of the policy, evidence is admissible as bearing upon the fraudulent intent of the assignee that in other cases, before as well as after, he had engaged in other transactions of a like character with the same fraudulent intent. *The Mutual Life Assurance Co. of New York* v. *Jonah et al*, 1 Eq., p. 482.

Horse, Value of—Evidence of the value of a horse at the time of the trial, a year after the sale, was properly rejected when offered to prove the value at the time of the sale. *Finn* v. *Brown*, 35, p. 355.

In an action for breach of warranty of the soundness of a horse, tried with a jury, upon a plea of the general issue the trial judge rejected evidence of one witness tending to show that the horse was sound prior to the time of the sale—After verdict for the plaintiff the judge refused a new trial. —On appeal, *held*, the evidence was admissible but there was no substantial wrong under Order 39, r. 6, where the defendant admitted that when he sold the horse he knew it was subject to the attacks which eventually caused its death, though he did not believe

them to be serious. *Tompkins* v. *Hale*, 41, p. 269.

Impeaching own witness—Plaintiff's counsel read to his own witness statement made by witness at a coroner's inquest and asked him to confirm them.—No ruling was obtained that the witness was adverse, but the questions were admitted subject to objection.—*Held*, inadmissible, because such questions were either an attempt on the part of counsel to have the evidence at the inquest sworn to before the jury or an attempt to contradict his own witness for which no foundation was laid. *McGowan, Adm. etc.* v. *Warner*, 41, p. 524.

Judgment debtor, Examination of—An order committing a debtor to prison based upon evidence given in a former proceeding against the debtor, and not reproved upon the hearing of the application for the order in question is bad. *R.* v. *Forbes ex parte Dean*, 36, p. 580.

Jury view—On a motion for a new trial in an action of trespass involving the location of a line, the Court will hear affidavits of jurors in answer to affidavits stating that one of the parties interfered with the jury while viewing the *locus in quo*. *Hanson* v. *Ross*, 42, p. 650.

Land titles—Evidence that would be good against a predecessor in title is also good against his successor claiming through him. *Ross* v. *Adams*, 34, p. 158.

Letter from deceased parent—Land purchased by a husband as a home for himself and wife was by his direction conveyed to her and a house was built thereon. —Both claimed to have owned the money with which the property in question was purchased and the house built.—A letter to the wife from her mother, since deceased, is not without more admssible in proof of the wife's claim. *Palmer* v. *Palmer*, 42, p. 23 C. D.

Letter written after event—Letter written after event in an action to recover a commission due on the sale of a property, which sale was consummated directly with the defendants. — *Held* on appeal that admission of a letter written by one of the plaintiffs to the defendant company after the sale notifying it that the sale was made through the efforts of the plaintiffs and claiming a commission under an alleged verbal promise made in December 1914, is not a ground for a new trial.—*Gilbert* v. *Campbell*, 12 N. B. R. 471 distinguished. *Jardine et al* v. *Prescott Lumber Co. Ltd.*, 44, p. 505.

Libel—Authorship of letter—New trial—The plaintiff pressed in, subject to objection and against the opinion of the presiding judge, evidence disclosing the name of the writer of the libellous letter.—*Held* (*per* Sir E. McLeod C. J. and Grimmer J.), that even if the evidence was improperly admitted it was no ground for a new trial, as the judge had practically withdrawn it from the jury by stating subsequently that he had been wrong in allowing the plaintiff to have disclosure of the name of the writer of the libellous letter, and so far as he could correct it he wished to do so.—*Held* (*per* White J)., that as the witness had not seen the name attached to the letter, and had no personal knowledge who the writer was, the evidence was based entirely on hearsay, and was, on that ground, improperly admitted.—That having been pressed in, subject to objection, and against the opinion of the trial judge, it was not clear that it did not influence the verdict and a new trial should be granted, notwithstanding the judge's subsequent statement to the jury that he was wrong in admitting the evidence and wished to correct the error so far as he could.—Quaere:— If there should be any hard and fast rule that where evidence is improperly admitted and is afterwards withdrawn from the jury a new trial will not be granted on the ground of its improper admission, especially if the evidence was forced in against the opinion of the trial judge (*per* White J.) *Culligan* v. *The Graphic Ltd.*, 44, p. 481.

Libel—Witness' understanding of letter—The defendant, a merchant, in a letter accused the plaintiff of theft and threatened to expose him.—This letter was handed to a confidential clerk and copied, and the copy was signed by the defendant and sent by post to the plaintiff.—As the defamatory words imputed a crime and were actionable in themselves, the clerk could not be asked what she understood by them, unless there were some circumstances proved which would or might give a meaning to them different from what they ordinarily have.—(*Per* Barker C. J. and McLeod J., Landry J. doubting and Hanington J. dissenting.—*Held* (*per* Hanington J.), that the question was proper, because while the answer could not be a justification, it might go in mitigation of damages. *Moran* v. *O'Regan*, 38, p. 399.

Malicious prosecution — Magistrate's record—In an action for malicious prosecution where the record of the proceedings before the magistrate was improperly admitted, but the same witnesses were examined at the trial also, it was held that the wrongful admission of the record was not sufficient to warrant a new trial. *Crocket* v. *Storey*, 43, p. 69.

Malicious prosecution — Witness in criminal trial dead—The evidence of a witness taken before a magistrate on a criminal charge is admissible in an action for malicious prosecution founded on that charge, where the witness, at the time of the trial, is dead. *Peck* v. *Peck et al*, 35, d. 484.

Marriage register—A. was married at St. Paul's church, Halifax, in 1809.—In the entry of the marriage in the church's marriage register his name appears with the addition "batr", a contraction for bachelor.—There was nothing to show by whom the entry of the addition was made, or that it was made in pursuance of a duty prescribed by statute.—*Held*, that the register, while admissible in proof of the marriage, could not be received as evidence that A. had previously not been married. *Johnston* v. *Hazen*, 3 Eq., p. 147.

Notice to produce—Secondary evidence—Defendant's counsel refused to produce a lease at the trial after notice to produce, and the plaintiff was compelled to prove it by secondary evidence.—Later, defendant offered the lease in evidence, and upon its rejection offered secondary evidence by oral testimony, which was also rejected. —*Held*, that the evidence was properly rejected.—The defendant, after refusing to produce a document in his possession when called for by the plaintiff, could not afterwards put it in evidence for his own advantage. *Cyr* v. *DeRosier*, 40, p. 373.

Payment, Plea of—Upon a plea of payment to a count for money had and received, the burden of proof is on the defendant and the payment must be proved beyond a reasonable doubt.—Upon such pleadings evidence that the plaintiff's clerks had made a mistake in a similar matter by not crediting a remittance made to the plaintiff is inadmissible. *Massey Harris Co. Ltd.* v. *Merrithew*, 39, p. 544.

Payment, Plea of—Defendants had a contract for the erection of a school house. —They sub-contracted with the plaintiff for a portion of the concrete, stone and brick work.—On the completion of the subcontract disputes having arisen the plaintiff brought this action for extra work claiming $1,464.20.—The defendants pleaded payment and set-off, claiming thereunder to recover a balance from the plaintiff, but omitted to deliver particulars of their set-off. —On the trial without a jury, the judge found that the defendants had overpaid the plaintiff the contract price by $288.11; that the plaintiff was entitled to extras to the amount of $695.50, and ordered a verdict for the plaintiff for the difference, refusing to allow evidence of the payment of an accommodation note for $265.00 which the defendants had endorsed for the plaintiff during the pendency of the contract and had paid at maturity, on the ground that under the pleadings it must be considered in the nature of a set off and therefore not admissible as no particulars had been given, neither was it admissible under the plea of payment as a payment to the plaintiff.—*Held*, on appeal, that as the accommodation was obtained in view of the contract, that the defendants were entitled to prove the note and payment thereof under the plea of payment and the verdict should be reduced by the amount thereof. *LeBlanc* v. *Lutz et al*, 44, p. 398.

Reading statement made at inquest—Plaintiff's counsel read to his own witness statement made by witness at a coroner's inquest and asked him to confirm them.—No ruling was obtained that the witness was adverse, but the questions were admitted subject to objection.—*Held*, inadmissible, because such questions were either an attempt on the part of counsel to have the evidence at the inquest sworn to before the jury or an attempt to contradict his own witness for which no foundation was laid. *McGowan Adm. etc.* v. *Warner*, 41, p. 524.

Rebuttal—The defendant, in an action for negligence causing the death of three foxes, to establish its defence that the foxes died from natural causes and not from its negligence, called a veterinary surgeon who stated that the conditions that he found in the lungs on a post mortem examination showed that the foxes died of pneumonia and not from suffocation, and gave his reasons for his conclusions; the plaintiff in answer or rebuttal called another veterinary and on the evidence of the defendant's veterinary being read to him stated that the symptoms described would not necessarily show that death resulted from pneumonia, and were quite consistent with the supposition that it resulted from suffocation.—*Held*, that the evidence in answer or rebuttal was properly received. *Trenholm* v. *Dominion Express Co.*, 43, p. 98.

Replevin—In an action of replevin by a sub-lessee against the lessor for goods taken by the lessor under a distress for rent, the plaintiff is entitled to prove, on cross-examination of the lessor, that there had been a breach of a covenant in the lease which forfeited the rent claimed.—A sub-lessee in such an action is entitled to the benefit of a covenant in the lease which forfeits the rent as a penalty for a breach, though there has been no assignment of the lease in writing. *Ringuette* v. *Hebert*, 37, p. 68.

Res gestae—Statement by deceased—In an action for compensation for the death of the intestate of the plaintiff caused by the wrongful act or default or neglect of the defendant company, the defendant put in evidence, subject to objection of the plaintiff's counsel, a statement, made on cross-examination at the inquest of the doctor who attended the deceased immediately after the accident, as to what the deceased told him was the cause of the accident, and also a statement of a similar character made to the manager of the defendant company shortly after the accident.—*Held*, on a motion to set aside the verdict for the plaintiff or for a new trial, that a statement made by the deceased to the plaintiff shortly after the accident

explaining how it happened, was, under the circumstances, properly received, and was not a ground for a new trial. *Wentzell* v. *The New Brunswick and Prince Edward Island Rwy. Co.*, 43, p. 475. Appealed to S. C. of C.

Res judicata re findings in other suit—On an application for an injunction restraining defendants from cutting timber, it appeared that both parties claimed title by possession.—*Semble*, that on such an application, the verdict of a jury in an action of replevin for timber cut upon said lands should not be disregarded, although a motion for a new trial was undisposed of. *Wood* v. *LeBlanc*, 2 Eq., p. 427.

Ship, Registry of—An extract purporting to be taken from the register book of the Registrar of Shipping, Customs House, Glasgow, dated December 9, 1915, certifying the names, residence and description of the owners of the "Marina" to be "The Donaldson Line, Limited, of 58 Bothwell Street, Glasgow" and further certifying the extract to be a true extract from the register book in the custody of the person certifying made pursuant to section 64 and 695 of The Merchant Shipping Act 1894 (Imp.) and signed "C. F. Tallach, Asst. Registrar" is proper evidence in proof of ownership in an action in this province for damages for an accident causing the death of an employee under section 39 of "The Evidence Act," C. S. 1903, c. 127, providing for proof of register of or declaration respecting British ships by production of the original or an examined or certified copy.—*Semble*, that the certificate is admissible under The Merchant Shipping Act, 1894, 57 and 58 Vict. (Imp.), c. 60, ss. 64 and 695. *Boddington Administratrix etc.* v. *Donaldson et al*, 44, p. 290.

See also *Ex parte Troop Sailing Ship Co.* 34, p. 449, under title "Merchants Shipping Act," section 7 (Documentary Evidence) post. col., 339.)

Slander—In an action of slander it is improper to allow the defendant to be asked whether or not he was actuated by malice in speaking to the different parties of the subject matter of the complaint, and whether or not he had any intention of hurting or doing any damage to the plaintiff. *Trafton* v. *Deschene*, 44, p. 552.

Statements against interest by defendant's husband—In an action to recover the purchase price of certain liquor sold to the defendant, evidence by the plaintiff's attorney of statements made to him by defendant's husband that the latter was defendant's agent to purchase goods and that he purchased the goods in question as such agent, where such statements were made after action brought and one year after the purchase in question, is not admissible. *LeBlanc* v. *LaPorte Martin & Co.*, 40, p. 468.

Trespass by lessor—In an action brought by a lessee against his lessor, to a count for breaking and entering plaintiff's premises and ejecting plaintiff therefrom, defendant pleaded that the premises were not the plaintiff's and gave evidence that the plaintiff had abandoned the premises, and defendant had taken possession before the alleged trespass.—*Held*, that the evidence was admissible under the plea, there being no special allegation of title in the declaration other than that the premises were the plaintiff's and that the defendant need not plead abandonment specially. *Whittaker* v. *Goggin*, 39, p. 403.

Trespass, Evidence of possession in case of—P. petitioned the Crown for a grant of land in the parish of St. Martins, and on the 24th of July, 1834, the Crown gave him a ticket of possession of a tract called lot B of 200 acres, more or less, describing the tract as bounded on the north by the grant to Isaac and David Springstead, on the east by lot C., on the south by vacant land, and on the west by lot A.—P. went into possession under the ticket of lot B.—In 1837 the Crown granted to B. lot A., describing it by metes and bounds, and stating that it contained 300 acres, more or less.—In 1838, the Crown, having ascertained that there were not 200 acres between Lots A. and C., issued a grant of lot B. to P. describing it by metes and bounds, and stating that it contained 134 acres, more or less.—The plaintiff acquired the title to Lot B. by mesne conveyances from P., referring to the grant and describing the lot by metes and bounds as therein described. —In an action of trespass by the plaintiff against the defendant, the successor in title of lot A., where the question in dispute was the location of the eastern boundary of lot A. and the western boundary of lot B., *Held* (*per* Landry, Barker and McLeod JJ.), that as the title of the plaintiff was by conveyance describing the lot by metes and bounds as given in the grant, the possession of her predecessors in title under the ticket of possession, or otherwise outside of the bounds of the grant, would not enure to her benefit and the ticket of possession was improperly received as evidence of either title or possession.—*Held* (*per* Tuck C. J. and Hanington J.), that as the plaintiff was claiming the land in dispute by continuous and exclusive possession for the statutory period, the ticket of possession was some evidence of the extent of the possession, and was properly received. *Ingram* v. *Brown*, 38, p. 256.

Will, Proof of by Registrar of Probates—Proof of a will affecting real estate was made by calling the Registrar of Probates, who produced the will and the record of probate of the same in common form.—No certified copy had been recorded in the office of the Registrar of Deeds as provided by the Evidence Act, s. 65.—Objection to

admission of this mode of proof was overruled. *Floyd* v. *Hanson*, 43, p. 399, C. D.

Will—Unnamed beneficiary for unnamed amount—Parol evidence admissible—Where a testator directs an executor to pay a sum previously made known to him to a person whose name had been communicated to him, this is a good bequest; and evidence may be given showing the amount of money to be paid and to whom it should be paid.—The plaintiff claimed to be entitled to a sum of money under the following paragraph in a will: "I direct my said executor . . . to pay a certain person whom I have made known to him, and whose name I otherwise desire to be kept strictly secret, a certain sum of money as soon after my decease as can conveniently be done, the amount of which is to be kept secret, but has been made known to him by me."—She also claimed that the defendant executor was a trustee of the money and entitled to hold the same only for the benefit of the plaintiff.—*Held*, to be a good beques but not a trust, and the plaintiff was entitled to show by evidence the amount of money to be paid and to whom it should be paid. *Lemon* v. *Charlton Executor etc.*, 44, p. 776, C. D.

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5. On Commission.

Admission—It will be presumed that a witness whose evidence was taken abroad under a commission is out of the province at the time of the trial, and such deposition may be given in evidence under O. XXXVII, r. 18, of the rules of the Supreme Court, 1909. without proof that the deponent is dead, or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the trial.—*Burpee* v. *Carvill*, (1875), 16 N. B. R. 141, followed. *Simpson* v. *Malcolm*, 43, p. 79.

Affidavit, Applying for—An order for the examination of a witness out of the jurisdiction may be granted upon an affidavit of the plaintiff stating positively that the witness is necessary and material and the nature of his evidence and that witness is unwilling to attend the trial in this province, but without giving the sources of his information, and an affidavit of plaintiff's solicitor that he had advised the plaintiff that this witness was necessary and material. *Brown* v. *Bartlett*, 42, p. 222.

Failure to return—At the instance of the defendants a commission was issued to take the evidence of certain persons abroad.—The commission, though executed, was never returned to the Court and a copy of the evidence of one of the witnesses being tendered in evidence on behalf of the plaintiff, was, upon objection by the defendants' counsel, rejected.—The learned judge told the jury that the conduct of the defendants in not having the commission returned was an element which might fairly be considered by them in determining the credibility of the plaintiff, although the defendants' counsel had offered to allow copies of all the evidence taken under the commission to be used as if it had been returned into Court, which offer was refused.—*Held*, (*per* Tuck C. J., Hanington and McLeod JJ., VanWart J. dissenting,) misdirection in both instances. *Hesse* v. *St. John Rwy. Co.*, 35, p. 1.

See also 30 S. C. R., p. 218.

Jury, Refreshing memories of, Commission—On the trial of an action on a promissory note, the evidence of a witness taken under a commission was, subject to the objection of counsel, given to the jury, and by them taken to the jury room when they retired to consider as to their verdict. —*Held*, by the majority of the Court, that the practice was not usual, and was not to be commended, but as the incident could not have had a prejudicial effect it was not a ground for a new trial. *The Royal Bank of Canada* v. *Hale*, 37, p. 47.

Preventing return of commission—A party to an action, who procures a commission for taking evidence abroad has no right to prevent its return. *Hesse* v. *St. John Rwy.*, 30 S. C. R., 218.

Proof—Certificates by stenographer and commissioner—A certificate of a stenographer, signed and dated and attached to the depositions certifying that he took faithful and accurate notes of the examination of the witnesses, and that the writing on the sheets of paper annexed is a faithful and accurate transcript made by him of his notes, is a sufficient compliance with the requirements of the order that the stenographer shall certify the transcript as correct. —A certificate signed by a commissioner, certifying that the sheets of paper annexed were furnished to him by the stenographer as containing a transcript of his notes of evidence, followed by the typewritten evidence, is a sufficient compliance with O. XXXVII, r. 16, requiring the deposition to be authenticated by the signature of the commissioner, and with the commission requiring the deposition to be signed by the commissioner. *Simpson* v. *Malcolm*, 43, p. 79.

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6. Parol Evidence.

Parol evidence to correct written instrument—The following clause was contained in a will: "I release and direct my executors to cancel without collecting the money, the mortgage to me from John Doherty."—Testatrix held no mortgage from J. D. and she had never had any dealings with anyone of the name of J. D. but she did hold one from W. D.—*Held*, that parol evidence was admissible to correct such a mistake. *Morrison* v. *Bishop of Fredericton et al*, 4 Eq., p. 162.

Parol, qualifying written contract—Statute of Frauds—The defendant purchased from plaintiff at auction, a property described in the advertisement of sale as "No. 171 Chesley street" and signed a bidding paper containing a similar description.—The defendant supposed the property fronted on Chesley street.—As a matter of fact it was distant about one hundred feet from Chesley street, had no access thereto, and fronted on an alley.—Chesley street had a civic water supply.—The alley had no water supply.—It appeared that the plaintiff's agent had represented to the auctioneer that the house was on Chesley street, and to get the number of the house thereon for the advertisement they had consulted the street directory and found that the address of a tenant on the premises was there given as "171 Chesley."—No other evidence was offered to show that the premises were known as "No. 171 Chesley street."—In an action for specific performance, *held*, that the property did not answer the description of the property the defendant had contracted to buy, and the defendant could not be compelled to accept it.—The plaintiff offered evidence to show that before the bidding commenced the auctioneer in reply to an inquiry from the defendant, referred the defendant to the city directory for the address.—*Held*, oral evidence of this nature to alter or qualify the contract of sale was not admissible: and further, the plaintiff would be relying on a new contract which, not being in writing, did not satisfy the requirements of the Statute of Frauds. *Porter* v. *Rogers*, 42, p. 82, C. D.

Parol evidence re written instrument—Although collateral evidence is admissible to shew that notwithstanding the plain terms of an absolute transfer of property, it was intended that the transferor should have a right of redemption, the evidence must be of the clearest and most conclusivd character to overcome the presumption that the deed of transfer truly states the transaction. *McLeod* v. *Weldon*, 1 Eq., p. 181.

Parol testimony to explain written contract—By a written offer made by the plaintiffs, and accepted by the defendant, the plaintiffs leased from the defendant a store for a term of years.—This offer further provided that the plaintiffs had the option during the term, of buying the building in which the store was situate "for not less than $10,000."—On an action for specific performance of the agreement, the defendant alleged that he refused to accept the plaintiffs' offer of an option, but made a counter offer to them to the effect that he would give them a preference over any other purchaser, in case he decided to sell during the term.—This counter offer, he alleged, was accepted by the plaintiffs and he signed the agreement on the express understanding that, as far as it related to buying the building, it should operate only to the effect that the defendant, should, in case he decided to sell the building, sell to the plaintiffs in preference to any other purchaser who might offer the same price.—Neither fraud nor misrepresentation was charged against the plaintiffs.—*Held*, hat the intention of the parties must be collected from the written instrument and no evidence *aliunde* should be received to give a construction to the agreement contrary to its plain import. *Hunter* v. *Farrell*, 42, p. 323, C. D.

Parol evidence to explain technical term in written document—A contract in writing made for clearing the right of way of a railway contained a clause under which the plaintiff "agreed to do and complete all the right of way, clearing between stations 490 and 714 in conformity with the specifications" for thirty dollars per acre.—*Held*, that extrinsic evidence was properly admitted to show that amongst railway contractors and on railway construction work the words "right of way clearing" had acquired a special and technical meaning, and applied only to land requiring to be cleared and not to the full area of the right of way. *Laine et al* v. *Kennedy et al*, 43, p. 173.

Written Contract—Ambiguity—Parol evidence—Plaintiff, by parol, agreed with defendants in January, 1902, to teach school beginning February 1st for the remainder of the term then current.—On February 4th a written contract was signed by the parties providing that plaintiff should teach the unexpired portion of the term ending June 30th, 1902, for $75.00.—The term contained 121 days of which plaintiff's contract covered 100.—Clause 4 provided "that for a term or any part of a school year the teacher is to receive such proportion of the salary stated in the contract as the number of days actually taught bears to the whole number of teaching days in the unexpired portion of the term."—The regulations of the board of education, which have the force of law, provide that each teacher before entering on duty shall make a written agreement with the trustees according to a prescribed form.—In the 4th clause the prescribed form says: "for a term or any part of a school year the teacher is to receive such a portion of the yearly salary stated in the contract, as the number of days actually taught bears to the whole number of teaching days in the school year."—Clause 5 provides that "in default of written notice the contract shall continue in force from school year to school year."—Plaintiff taught the unexpired portion of the term and was paid the agreed salary and continued teaching the next term which began on July 1st and ended December 31st following, but which in consequence of holidays under the regulations of the board of education, contained only 92 teaching days.—The returns sent to the chief superintendent by the teacher and trustees as required by the school law

stated the salary to be $180 per year.—These returns were sworn to by two of the trustees.—The trustees refused to pay the plaintiff for the short term more than $69.00, claiming she was only entitled to the same rate per day as the first term, viz: 75c. per day.—In an action for the balance of salary claimed, evidence of the parol agreement of January, 1902, and the school returns were admitted to explain the written contract in its application to the second term upon the ground that the terms were ambiguous because of the use of the expression: "the unexpired portion of the term" when it came to be applied to the subsequent term under the operation of clause 5.—And the County Court judge, reading the written agreement and the parol evidence together, held that the plaintiff was entitled to $90 for the short term.—*Held* (*per* Tuck C. J., Hannington and McLeod JJ., Barker J. taking no part, Landry and Gregory JJ. dissenting), that the finding of the County Court judge was right and the appeal should be dismissed. —*Held* (*per* Landry and Gregory JJ.), that the plaintiff was only entitled to 75c. per day for the days actually taught under the extended term.—That there was no ambiguity and evidence of the parol agreement, and the school returns should not have been received. *Trustees of School District No.* 9 v. *Haines*, 36, p. 617.

Written contract, Parol contract supplementing—A written contract wherein A. agreed to haul certain bark belonging to B. for $1.87 per cord, contained a clause to the following effect: The survey to be made by buyer or his agent, and the owner or his agent, who, failing to agree shall choose a man who shall choose a third whose scale shall be considered final reckoning, 128 feet per cord.—Bark to be estimated by agent of owner as soon as finished hauling, and paid for accordingly; account to be balanced as soon as bark is sold.—When the hauling was finished B.'s agent estimated the number of cords hauled on the basis of 140 feet to the cord, and the hauling was paid for on that basis.—The bark was not sold, and no final survey was made or account balanced as provided in the contract.—In an action by A. against B. in 1906 in York County Court, claiming a balance due on the contract, evidence was admitted of a parol agreement to sell the bark by July 1st, 1904.—*Held*, properly admitted. *Stairs* v. *Shaw et al*, 37, p. 593.

Written contract, Parol evidence explaining—The plaintiff and defendant entered into a written contract by which the plaintiff agreed to cut, haul and deliver a quantity of logs to be used as pulpwood.—The contract contained the following printed clauses: "The plaintiff agrees to haul none but good, sound merchantable logs," and "all logs hauled by plaintiff to be scaled by..... or some other competent person to be appointed" by defendant "whose scale shall be final between the parties to this instrument," and a typewritten clause as follows: "Logs to be scaled by scaler equal to what in his judgment will make good merchantable lumber."—The plaintiff offered evidence of a collateral oral agreement that the scaler should use a certain scale, and the jury found the contract was made relying on this oral agreement.—*Held*, (1) in construing the contract, the typewritten clause controls the printed clauses (*Glynn* v. *Margetson*, 1893, A. C. 351, followed); (2) the contract contemplated some particular method of scaling to ascertain what was "merchantable lumber" for pulpwood, but was doubtful and uncertain in not specifying this method, and inasmuch as there is no usage in this province as to scaling pulpwood which could be read into the contract, oral evidence is admissible to explain what scale was intended by the parties. *Mann* v. *St. Croix Paper Co.*, 41, p. 199.

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7. Documentary Evidence.

Ancient documents—After a lapse of thirty years a deed by an administratrix, under a license from the Probate Court to sell, will be presumed to be good, though there is no affidavit of the administratrix endorsed thereon as required by the Probate Act of 1840, and no proof that the provisions of the act as to notice of sale etc. were complied with. *Cairns* v. *Horsman*, 35, p. 436.

Deed — Registration — An acknowledgment of a deed of land in the county of Restigouche, headed "Restigouche SS" and purporting to have been taken before "Donald McAllister Esq., one of her majesty's justices of the peace in and for the county of Restigouche" and subscribed "Dond McAllister J. P." is a good acknowledgement under the statute and the deed was properly received in evidence as a registered conveyance. *Gooden* v. *Doyle*, 42, p. 435.

Highway — Plan — User — In an action for obstructing a highway there was conflicting evidence as to its location and user by the public.—Part of the defendants' title were a lease and an assignment thereof, both of which had a plan attached exhibiting the highway as located where the plaintiffs claimed it to be.—Neither the lease nor the assignment made any reference to the plans.—The defendants' evidence showed the highway as actually used in a location differing from that shown by the plans.—The jury found in favour of the defendants, both as to location and user.—The learned judge who tried the cause held that as the deeds and plans must be read together the defendants were estopped from disputing the location of the highway, and disregarding the findings of the jury as to its location and user ordered a verdict to be entered for the plaintiffs.—*Held*, that the verdict

was properly so entered. *Woodstock Woollen Mills Co. Ltd.* v. *Moore et al*, 34, p. 475. Reversed on appeal, 29 S. C. R. 627.

Merchant Shipping Act—Certificate of Board of Trade—Ownership—By section 227 of the Merchant Shipping Act, 1854, it is provided that if any expenses in respect of the illness, injury, or hurt, of any seaman as are to be borne by the owner are paid by any consular officer or other person on behalf of Her Majesty, etc., etc. in any proceeding for the recovery thereof, the production of a certificate of the facts signed by such officer or other person shall be sufficient proof that the said expenses were duly paid by such consular officer or other person.—And by section 107 thereof it is provided that every register of a declaration made in pursuance of the second part of the act may be proved in any court of justice, etc., etc. by a copy thereof purporting to be certified under the hand of the registrar or other person having charge of the original. —In an action brought before the police magistrate of the City of Saint John to recover hospital fees, board and cost of conveying from Hong Kong to London a seaman of the ship Troop, a certificate of the payment of the said expenses by the Board of Trade, signed by the assistant secretary of the Board, was put in evidence. —The present ownership of the ship was proved by a copy of the registry certified under the hand of the Registrar General at London, the ship being registered in Liverpool. —*Held*, that the payment of the expenses etc. was sufficiently proved by the certificate of the assistant secretary of the Board of Trade (affirmed on appeal), and also that the certificate of the Registrar General was insufficient to prove the ownership, there being nothing to show that he had charge of the original registry (reversed on appeal 29 S. C. R., page 662, on ground that proof of ownership might be given by above mode provided for in Act of 1894, which repealed Act of 1854). *Ex parte The Troop Sailing Ship Co.*, 34, p. 449.

Merchant Shipping Act—Proof of ownership—See *Bodington* v. *Donaldson*, 44, p. 290 under title "Ship, Registry of" in Section 4. *Supra*. (Col. 331.)

Notice to produce—On the trial of an action involving disputed accounts it is not a ground for a new trial that the judge told the jury they might draw inferences favorable or unfavorable to the plaintiff's case from the fact that he refused to produce, under notice, documentary evidence in his possession, which, it was admitted, contained some account of the transaction in dispute. *Hale* v. *Leighton*, 36, p. 256.

Notice to produce—Defendant's counsel refused to produce a lease at the trial after notice to produce, and the plaintiff was compelled to prove it by secondary evidence. —Later, defendant offered the lease in evidence and upon its rejection offered secondary evidence by oral testimony, which was also rejected.—*Held*, that the evidence was properly rejected.—The defendant, after refusing to produce a document in his possession when called for by the plaintiff could not afterwards put it in evidence for his own advantage. *Cyr* v. *DeRosier*, 40, p. 373.

Will—Copy certified by deputy registrar—A copy of a will certified by the deputy registrar of probate after the death of the registrar and during a vacancy in the office was properly received in evidence (*per* Tuck C. J.). *Ingram* v. *Brown*, 38, p. 256.

Will not probated—Conveyance by executors—A document purporting to be a certified copy of an unprobated will executed in the province of Quebec by a resident of that province, and a certified copy of a conveyance purporting to have been made by the executors under the said will, both of which documents are registered in the county of Gloucester, are not, in the absence of proof of the death of the testator, admissible to prove title in one claiming through him. *Sweeney* v. *DeGrace*, 42, p. 344.

Written document—Verbal statement of contents by counsel—Where a statement of the contents of a written document is made by counsel and accepted by both sides as a correct version, although there is no evidence of its loss or destruction, the Court must construe its meaning in the same manner as if it had been produced. *O'Regan* v. *C. P. Rwy. Co.*, 41, p. 347.

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8. Corroborations.

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

Uncorroborated evidence of claim vs. deceased—See *Fish* v. *Fish*, 44, p. 617.

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9. Judicial Notice.

Domicile—Administration suit—In a contest for administration *de bonis non* between the next of kin of the deceased

administrator (husband of the intestate) and the next of kin of the intestate, whose status as a petitioner depended on the domicile of the intestate being in Ontario, the judge of probate disregarded the fact that letters of administration had been issued out of this Court on the estate of the intestate as domiciled in this province, the petition upon which the letters were granted not having been put in evidence or the statements therein relied upon, and he refused to consider as evidence a statement in the unsworn petition of a trust company applying for administration as the representative of the next of kin of the husband that at the time of her death the intestate was domiciled in this province.—The petition of the next of kin of the intestate was under oath and stated that the husband's domicile at the time of his wife's death was in Toronto.—*Held*, on appeal, that the decision that the wife's domicile was that of her husband and therefore in Toronto was right. *In the matter of the Estate of Vesta Edith Forester*, 37, p. 209.

Probate Court—A judge of probate is not bound to take judicial notice of the proceedings in his Court; evidence should be submitted (*per* Hanington J.) *In re Estate of Vesta Edith Forester*, 37, p. 209.

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10. Presumptions.

Expropriation—The Woodstock Railway Company was incorporated by 27 Vict., c. 57, by which Act it is given power to expropriate land for a right of way of ninety-nine feet in width and provision is made for the assessment and payment of damages.—In 1871 the company built their main track on a strip fourteen feet in width but there was no evidence that any damages had been assessed or paid.—The defendant company acquired the rights of the Woodstock Railway Company and in 1892 laid side tracks adjoining the fourteen foot strip and within the ninety-nine feet allowed by the Act 27 Vict., c. 57.—In May, 1911, the plaintiffs brought an action of trespass for laying the side tracks on this land.—*Held*, the Court would not presume from the occupation of the fourteen foot strip that the Woodstock Railway Company took possession of the whole width of ninety-nine feet which it was entitled to expropriate. *Carr* v. *Canadian Pacific Rwy. Co.*, 41, p. 225.

Husband and wife—Presumption—In the absence of any evidence to the contrary, it will be presumed that a married woman is living with her husband. *Everett* v. *Everett*, 38, p. 390.

Infant, Purchase by mother in name of—Intention—Where a mother makes a purchase in the name of her child, there is no presumption that an advance was intended.—In such a case, it is a question of evidence whether there was an intention to advance. *Moore* v. *Moore*, 1 Eq., p. 204.

Intention — Evidence — Transfers of shares in an incorporated company made by the deceased to different members of his family while in good health, years before his death, will not be considered made for the purpose of evading the payment of succession duties under the Act 59 Vict., c. 42. *Receiver General of New Brunswick* v. *Schofield et al*, 35, p. 67.

Marriage—Where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed, although there may be no positive evidence of any marriage having taken place; and the presumption can be rebutted only by strong and weighty evidence to the contrary. *Johnson et al* v. *Hazen*, 43, p. 154, C. D.

Ships managed for owners—Merely proving that a vessel was managed by persons other than the registered owners does not of itself rebut the presumption that it was so managed by them as agents for the registered owners. *Bodington Administratrix etc.* v. *Donaldson et al*, 44, p. 290.

Title to land—Conventional line—Where adjoining occupiers of land, fully cognizant of the dispute as to the location of the line dividing their properties agree upon a line as a division line and occupy up to and recognize such chosen line as a common boundary of their respective holdings, the successors in title of each of the parties so agreeing, in the absence of fraud, are bound by the line whether it be the true boundary line or not. *Phillips* v. *Montgomery et al*, 43, p. 229.

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11. Secondary Evidence.

Foundation—The question as to whether a proper foundation has been laid for the admission of secondary evidence is for the trial judge and the Court refused to interfere with his discretion. *Cyr* v. *DeRosier* 40, p. 373.

Secondary evidence, Notice of—A notice of intention to offer in evidence a certified copy of a document need not state the particular Court at which the document will be offered.—It is sufficient if it states generally that the document will be offered at the trial of the cause, and it is good until the cause is tried. *Smith* v. *Smith*, 37, p. 7.

Writ of execution, Secondary evidence of—The testimony of a sheriff who had executed under a writ of execution that he had searched for it in his office but could not find it; that he believed that it was not

in his office or in his possession; that he thought that he had returned it to the attorney who had issued it; also, the testimony of the clerk of the Court out of which the execution had issued, that he had made search for it but could not find it, and his belief was that it had never been filed in his office, was held a sufficient foundation upon which to admit secondary evidence of the contents of the execution (*per* VanWart J.) *Ross* v. *Adams*, 34, p. 158.

12. Witnesses.

Competency—A person offered as a witness upon being examined on the *voir dire*, stated that he believed in God, but did not believe in a future state of rewards and punishments dependent upon his conduct while on earth, whereupon he was rejected as incompetent.—*Held*, that he was properly so rejected. *Bell* v. *Bell*, 34, p. 615.

Where a person stated that he believed in a Supreme Power, a God as defined by Christ's teachings; in heaven and hell, and in a future state of rewards and punishments, but that he did not believe he was under any greater obligation to tell the truth by reason of taking the oath and that he did not believe that a person who swears falsely will be punished in the hereafter, it was held that he was competent to be sworn as a witness. *Farrell* v. *Portland Rolling Mills Co. Ltd.*, 3 Eq., p. 508.

Damages—Competency of witness—In an action to recover the value of two black fox pups and one cross pup, part of a lot of nine shipped at Dryden, Ont., to be delivered to the plaintiffs at Sackville, N. B., on the ground that the three foxes died of suffocation on the journey through the negligence of the employees of the defendant, *held*, that a part owner who had purchased the foxes and who stated in his evidence that there were several fox ranches where he lived, that he knew the market value of foxes from what people said and from what he had read, and that he had been engaged in the fox business to a considerable extent since making the purchase, was a competent witness to prove their value. *Trenholm* v. *Dominion Express Co.*, 43, p. 98.

EXECUTION.

1. Seizure.
2. Sale under.

1. Seizure.

Action for conversion by sheriff—Goods seized by the sheriff under an execution at the suit of B. v. R. were claimed by E. R., the wife of R., as her property.—After a formal levy it was arranged between the sheriff and E. R. that she should hold the goods for the sheriff until they were required for sale under the execution.—After the seizure, and before sale, a suit was commenced by E. R. against the sheriff and a declaration was filed containing two counts; 1st, for seizing, taking away and converting the plaintiff's goods; 2nd, for detention.—Part of the goods seized were sold, and part released.—*Held*, that a verdict for the full value of the goods sold was proper, though the sale did not take place until after the commencement of the action; that, as far as the sheriff was concerned, the levy was effectual and complete. *Rideout* v. *Tibbits*, 36, p. 281.

What is seizable—A memorial of judgment when registered, or a writ of execution when filed with the sheriff, only affects such interest in land as the debtor then has, and therefore does not postpone the title of a trustee thereto under a creditors' deed previously executed by a number of the creditors, though not registered.—Property, including a lot of land, was conveyed by A. to B. by deed in trust for the former's creditors.—The deed was executed by some of the creditors and was then registered.—It was subsequently discovered that the certificate of acknowledgment was defective, and a new certificate was endorsed on the deed.—Between the date of registration and the endorsement of the second certificate a creditor obtained and registered a judgment against the debtor, and seized the land under a writ of *fi. fa.*—A sale of the land being advertised by the sheriff, the trustee filed a bill praying for a declaration of his title, and, as consequent relief, for an injunction.—*Held*, that the trustee's title to the land was not displaced by either the registered judgment or the writ of execution, and that he was entitled to the declaration prayed for.—*Semble*, that before a sale of the land by either party took place the right to sell should not be in doubt so as to prejudice the sale. *Trueman* v. *Woodworth et al*, 1 Eq., p. 83.

2. Sale.

Equity of redemption in chattels—An equitable interest in personal property cannot be sold under an execution. *Ex parte Miller*, 34, p. 5.

Purchaser at sale not "purchaser for value"—A purchaser at sheriff's sale is not a purchaser for valuable consideration within C. S., c. 74, s. 4. *Trueman* v. *Woodworth et al*, 1 Eq., p. 83.

Purchaser at sale—Title obtained—A purchaser at a sheriff's sale under an execution stands in no better or different position as to the property than the execution debtor did. *The Continental Trust Co.* v. *The Mineral Products Co.*, 3 Eq. p. 28; 37 N. B. R., p. 140.

Sale under execution—Partnership interest—L. and P. each carried on business in Saint John, buying and selling fruit. P. was a licensed auctioneer.—To avoid competition between the parties it was agreed that P. was to buy all the apples handled by either in the market square, L. to furnish the money when apples were purchased. —All commissions on commission sales, and net profits on sales of apples purchased were to be equally shared.—Under this agreement P. purchased the cargo of the Schooner D, some 342 barrels.—After a part had been sold, the sheriff under an execution in the suit of *R.* v. *P.*, seized and, without removing any of them, sold 62 barrels.—At the sale the sheriff, in answer to a bidder, stated that he was selling P.'s interest only, and would guarantee nothing, and he did not deliver the barrels sold to the purchaser.—In an action of trover in the Saint John County Court against the sheriff for a conversion of the 62 barrels, the judge told the jury that if they found that the apples were purchased under the agreement on the joint account of L. and P. there was a conversion, and the verdict should be for the plaintiff. —*Held*, on appeal, that the direction was wrong; that the sheriff had a right to sell any interest P. had and there must be a new trial. *Ritchie* v. *Law*, 37, p. 36.

Sale under execution—Unregistered mortgage of mining leases—Mining leases of lands in this province and of the minerals therein issued by the Crown to the appellant company, subsequent to a mortgage executed by it in the state of N. to the respondent company, incorporated under the state of N., which laws, unlike those of his province, do not reserve the minerals to the state, are subject to the mortgage.—A judgment creditor of the mortgagor having purchased the leases at sheriff's sale under an execution upon his judgment, whereupon new leases were issued to him in his own name, the Crown having no knowledge of the mortgage, took said new leases subject to the mortgage. —The mortgage, though not registered under section 139 of the General Mining Act, C. S. 1903, c. 30, is not void as against a judgment creditor who had notice of the mortgage, and whose judgment was not registered under the section at the commencement of the suit. *The Mineral Products Co. et al* v. *The Continental Trust Co.*, 37, p. 140.

EXECUTORS AND ADMINISTRATORS.

Accounts of executors passed in Probate Court not res judicata—The testator P. by his will bequeathed to his wife an annuity of $1,200 during her life, and to the plaintiff an annuity of $2,000 during her life, and directed his executors and trustees to set apart out of the funds of the estate, stocks or securities sufficient to pay both annuities, and that if the income therefrom should not be sufficient a portion of the principal should be applied for the purpose, and that under no circumstances whatever should there be any default or delay in paying the annuities.—The will then contained a number of devises and specific legacies and the testator devised all the residue of both his real and personal estate after the payment of his debts, funeral and testamentary expenses, to his son, J. H. P.—He then appointed his wife, his son J. H. P. and three others to be the executors and trustees of his will.—Probate was granted to all of the executors.—The trustees failed to set apart funds for the payment of the annuities. —In an administration suit brought for the purposes *inter alia* of construing the will, and determining whether the trustees had distributed the estate and accounted in accordance with the will, J. H. P. claimed that the trustees after paying the debts and settling of specific legacies, were unable to comply with the directions of the will as to appropriating funds for the payment of the annuities, and that he had expended the whole of the corpus of the estate in paying the annuities, and had passed his account in the Probate Court.—By the executors' accounts filed and passed in the Probate Court, it appeared that the judge of the Probate Court found and decreed a balance due J. H. P. of $5,020.00.—*Held*, that the Probate Court not being a court of construction, and having no authority to determine questions relating to the meaning of a will and whether executors and trustees have discharged their duties in accordance therewith, the suit was not *res judicata* by reason of its decree. *Parks* v. *Parks et al*, Eq. Cas., p. 382.

Action against administrator — Security for costs—Security for costs will be ordered against a plaintiff resident out of the jurisdiction in a suit against an administrator for the administration of his intestate's estate, where the estate is insolvent, and the plaintiff's claim against the estate is not admitted. *Aiton* v. *McDonald*, 2 Eq., p. 324.

An executor or administrator of an insolvent debtor cannot be said to have the debt in his hands as security for costs.—He has only what he actually receives, which may be but a percentage of the indebtedness. *Id.*

Action against administrator personally—The plaintiff of an extra provincial corporation sued S. in a County Court for debt.—S. died and the plaintiff then recovered judgment by default against the defendant as administrator of S.—Execution was issued and returned *nulla bona*, although the administrator had assets in his hands.—The plaintiff then brought this action against the defendant personally upon the County Court judgment relying on the judgment as evidence of assets, and the return of the

execution as evidence of waste.—Judgment having been given for the plaintiff, the defendant moved to set it aside on the ground that the County Court judgment was void because (1) no affidavit of debt had been filed with him under C. S. 1903, c. 118, s. 44, and (2) the plaintiff had no license under C. S. 1903, c. 18.—*Held*, the County Court judgment was conclusive against the defendant upon both defences and that they could not be set up in this action. *Sanford Manufacturing Co. Ltd.* v. *Stockton*, 40, p. 423.

Action against executors for trespass by testator—Where there has been a wrong which resulted in increasing the estate of the wrongdoer, the estate should make it good to the person who had suffered that wrong.—(*Per* Hanington J.) *Frederick* v. *Gibson et al, Executors of Gibson*, 37, p. 130.

Action against executors, when proper parties to suit—G. died in 1902 leaving a will by which his property was bequeathed to his eight children, with a small annuity to his wife.—This suit is brought to compel the cancellation of a mortgage given by the plaintiff to G., and the reconveyance to the plaintiff of a certain life insurance policy and other property which was held by G. to secure certain monies advanced by G. to the plaintiff; and also to compel the conveyance of two lots of land which the plaintiff claims he purchased from G. under an agreement that G. was to give him the deed for them whenever he demanded it.—*Held*, overruling the demurrer, that it was by no means certain that the defendants (executors of G.) were not all necessary or proper parties in regard to all the causes of action set out in the bill, or that they did not all have a common interest in them; but if that were not so, there were no special circumstances in this case which rendered it either difficult or impossible to deal fully and properly with all the causes of action, without causing inconvenience to anyone, and therefore any discretion which this Court has, should be exercised in favor of continuing the suit in its present form. *Cummings* v. *Gibson et al*, 4 Eq., p. 55.

Action by executors (also devisees) for injury to reversion—Quaere, as to whether executors who are seized in fee under a devise of land and building to them in trust can bring a suit in their character as executors to restrain an injury to the reversion, or whether the suit should not be brought in their character as devisees and legal owners of the property. *Humphrey et al* v. *Banfil*, Eq. Cas., p. 243.

Action by executor's executor—An executor may sue in his individual right on contracts made with himself where the money, when recovered, would be assets of the estate, and therefore his personal representative may sue on such a contract in his representative capacity. *Kelley* v. *Ayer*, 41, p. 489.

Administrator ad litem — Practice — Upon the death of one of several defendants to a suit in the Supreme Court in Equity the plaintiff may continue the suit by applying for administration *ad litem* or by application to the Equity Court under s. 116 or s. 119 of the Supreme Court in Equity Act, C. S. 1903, c. 112, and therefore where one of several defendants died after judgment of the Supreme Court *en banc* confirming a decree of the Equity Court dismissing the plaintiff's bill with costs, and the plaintiff delayed his appeal to the Supreme Court of Canada for eight months thereafter on the ground that no administration had been taken out, *held*, this was no excuse for the delay and the judgment of McLeod J. refusing to allow the appeal under s. 71 of the Supreme Court Act, R. S. C. 1906, c. 139 was confirmed.—*Held, also*, that the mistake of the solicitor as to the procedure on defendant's death, even though supported by opinion of counsel, was not a sufficient excuse.—*Held* (*per* McLeod J.), the plaintiff (appellant) could have filed a suggestion and proceeded under s. 85 of the Supreme Court Act, R. S. C. 1906, c. 139. *Harris et al* v. *Sumner et al*, 39, p. 456.

Administration de bonis non—In a contest for administration *de bonis non* between the next of kin of the deceased administrator (husband of the intestate) and the next of kin of the intestate, whose status as a petitioner depended on the domicile of the intestate being in Ontario, the judge of probate disregarded the fact that letters of administration had been issued out of this Court on the estate of the intestate as domiciled in this province; the petition upon which the letters were granted had not been put in evidence nor the statements therein relied upon, and the judge refused to consider as evidence a statement in the unsworn petition of a trust company applying for administration as the representative of the next of kin of the deceased administrator, that at the time of her death the intestate was domiciled in this province.—*Held*, on appeal, that the decision was right, and that administration was properly granted to the representative of the next of kin of the intestate, both parties being equally interested. *In re Estate Vesta Edith Forester*, 37, p. 209.

Appeal—A party aggrieved by a decree of a judge of probate may appeal therefrom, although he did not appear in the Court below.—An order extending the time for appeal made *ex parte* is not a nullity, and if not set aside the Court will hear an appeal taken under it. *In re Estate Wm. F. Welch*, 36, p. 628.

Applying for advice of Court—On an application by an executor under s. 130 of c. 49, C. S., all of the facts upon which the advice of the Court is sought must appear in the petition itself.—If the facts are not stated correctly, the advice given will be

no protection to the petitioner.—The facts in the petition must be sworn to by an accompanying affidavit of the petitioner, or his agent having a knowledge of them.—The definite quesiton to be asked should be propounded in the petition, and not a general reference made to the Court for its opinion.—The petition should be presented to the Court *ex parte*, when direction will be given who is to be represented or have notice of the hearing.—The order of the Court should recite the petition. *In re Isabella Brooks Estate*, Eq. Cas., p. 269.

Assets — Promissory notes — Accommodation—Re claim that note found among assets of testator was for accommodation of testator see *Fish* v. *Fish*, 44, p. 617.

Breach of trust—Relief from personal liability—A testator, in one part of his will, gave all his real and personal estate to his wife "to be hers in such a way that she shall, during her life, have the full use, benefit and enjoyment thereof," and then over, and in a subsequent clause, after directing his executors to sell his real estate, empowered them to make investments in certain classes of securities, "so that my said wife may have the interest and income therefrom during her life."—The plaintiffs, with testator's widow, were appointed executors of the will. —The estate was comprised in part of real estate, which was sold by the executors, and the proceeds were handed by the plaintiffs to their co-executor to be held by her under the terms of the will, they honestly believing that such was their duty under the will.—On her death an investment made by her representing a part of these proceeds came to the hands of the plaintiffs; the remainder of the proceeds having been either used or lost by her.—*Held*, that the estate was devised in trust to pay the income only therefrom to the widow during her life, and that there was a breach of trust by the plaintiffs; but that they had not acted unreasonably in the view they took of the meaning of the will, and that they should be relieved from personal liability, under Act 61 Vict., c. 26. *Simpson* v. *Johnston*, 2 Eq., p. 333.

Commission allowed executors—Part of a testator's estate consisted of a dry goods business, which was carried on by his two executors for nearly a year before it was sold *en bloc*, one executor doing practically all the work.—Upon passing the accounts, the probate judge allowed a commission of four and one-half per cent. upon the whole estate to the executor who carried on the business and a commission of one-sixth per cent. to the other. No commission was allowed upon sales made in carrying on the business.—Upon appeal, the Court refused to interfere with the judge's discretion in apportioning the commission. *In re Estate of Benjamin B. Manzer*, 42, p. 251.

Deed by administratrix—Presumption re license to sell—After a lapse of thirty years a deed by an administratrix, under a license from the Probate Court to sell, will be presumed to be good, though there is no affidavit of the administratrix indorsed thereon, as required by the Probate Act of 1840 and no proof that the provisions of the Act as to notice of sale etc. were complied with. *Cairns* v. *Horsman*, 35, p. 436.

Deed by administrator—An administrator's deed, duly proved and registered under 3 Vict., c. 61, s. 56, reciting all the facts required by the statute and having the affidavit of the administrator endorsed thereon that the premises mentioned in the deed had been duly advertised and sold according to law, is not sufficient proof of title in one claiming thereunder without proof of the license to sell. *Johnson* v. *Calnan*, 38, p. 52.

Disbursements — Defending suit for heirs—A. died intestate leaving as heirs a sister and two nephews.—Upon passing accounts of his estate a sum of $1,000 was found to be in the hands of his administrators, and was directed to be left there till final winding up of the estate.—*Held*, that the payment of that amount or any part of it to defend a suit to set aside a trust deed of the sister after her death could not be allowed. *In re Estate Geo W. Anning*, 34, p. 308.

Distribution — Conflict of laws — Assets and administration in two countries —A person, deceased, died domiciled in this province, leaving personal property here and in Maine.—Administration of the estate was taken out in both countries by the same person.—The proceeds of the Maine property were brought by the administratrix to this province.—The deceased was indebted to creditors in both countries. —An administration suit was brought in this province against the administratrix by the New Brunswick creditors.—By a decree of the Maine Probate Court, the Maine assets were ordered to be distributed among the creditors of the deceased in accordance with the provisions of a Maine statute.—The effect would be that the Maine creditors would be paid their share of the whole estate without contributing to the costs of the administration suit in this province.—*Held*, that the costs of the administration suit could not be charged against the Maine assets, and that their distribution must be in accordance with the Maine law. *Warner* v. *Giberson*, 1 Eq. p. 65.

Executor de son tort—Following assets —If property held by an executor *de son tort* has been disposed of by him and the proceeds invested, the beneficial owners may follow the substituted property into the hands of a third person not a purchaser for value without notice.—Where an executor *de son tort* is sued by an administrator

time runs only from the grant of administration. An executor *de son tort* sold property and invested the proceeds in land, and conveyed it to his daughter by a deed to which his wife was not a party. —After his death a suit was brought against the widow and daughter to have the land charged with the trust affecting the original property.—*Held*, that the widow was properly joined in the suit. *Dunlop* v. *Dunlop*, 1 Eq., p. 72.

Foreclosure of mortgage by executor de son tort holding assets sufficient to pay same—An executor *de son tort* cannot foreclose a mortgage given to him by the intestate if he has in his hands sufficient assets of the deceased to pay the mortgage debt.—Where, in a suit by an executor *de son tort* for foreclosure of a mortgage to himself by the intestate, it appeared that no administrator had been appointed, and by the answer of the heirs, it was alleged that the plaintiff had assets in his hands belonging to the deceased sufficient to pay the mortgage, the Court under c. 49, C. S., s. 47 appointed a barrister of the Court to represent in the suit the estate of the deceased, and ordered the heirs to file a cross-bill against the plaintiff for an account. *Kenny* v. *Kenny et al*, Eq. Cas., p. 301.

Insolvent executor — Application for receivership—An insolvent executor and trustee disputed a creditor's claim, and the creditor filed a bill for the appointment of a receiver and the payment of his debt. —The appointment of a receiver was opposed by all other parties interested in the estate.—Pending the suit the creditor brought an action at law upon his debt and recovered much less than the amount originally demanded of the executor.—The debt was then paid.—*Held*, that the bill should be dismissed with costs. *Mills* v. *Pallin*, 1 Eq., p. 601.

Legacy, Payment of—Failure of assets —W. by his will appointed his wife sole executrix, and left her the residue of his estate after payment of four legacies.—The executrix proved the will and paid two of the legacies.—She died intestate, and the defendant took out letters of administration of her estate.—The plaintiff, a married woman, who was one of the unpaid legatees under W.'s will, obtained letters of administration *de bonis non* of W.'s estate, and filed a bill against the defendant to have the estate administered in equity, an account taken of the unadministered assets received by the defendant, and payment of the same to the plaintiff.—There was no allegation in the bill that any of the legacies had been paid, and that this was an admission of assets for the payment of all of them.—The defendant in his answer claimed that there were no assets to pay the legacies, as W. at the time of his death was indebted to his wife for advances out of her own separate property which, with some other debts, exceeded the value of his estate.—*Held*, that the plaintiff was not entitled to a decree against the defendant for payment of her legacy without a reference being had and an account taken, when the bill did not charge that the testator's executrix had admitted assets and become personally liable by paying two of the legacies, and the defendant had expressly denied there were any assets for the payment of the legacies. *Walsh* v. *Nugent*, 1 Eq., p. 335.

Legacy, Failure to pay—Costs of action —Compelling payment—Trustees who refuse to pay over a legacy when they have no reasonable doubt but that it should be paid, will not be allowed any costs in an action to compel its payment.—Quaere, in such a case are not trustees personally liable for the costs of the proceedings? *Taylor* v. *McLeod et al, Trustees*, 4 Eq., p. 262.

License to sell real estate—A judge of probate is not warranted in granting a license to sell real estate to pay debts, unless he is judicially satisfied by proof, and finds the amount of the personalty and the amount of the debts, and thus ascertains what the deficiency is.—A bald adjudication that there is a deficiency based on a list of attested accounts, and the evidence of the petitioner that they were filed against the estate is not sufficient.—(*Per* Hannington, Landry, Barker and McLeod JJ.)—*Held* (*per* Tuck C. J., dissenting), that as there was sufficient evidence of the matter of the petition to justify the judge of probate in making the order, the appeal should be dismissed. *In the matter of the Estate of Wm. F. Welch*, 36, p. 628.

Life insurance policy—Whether assets or not—By a written application, dated 26th February, 1896, C. applied to the Norwich and London Accident Insurance Association for $2,000 accident insurance, the policy "to be payable in case of death by accident under provisions thereof to M.", wife of the deceased.—The company issued its policy, payable to the representatives or assigns of the assured.—M.'s name was not mentioned in the policy, neither was there anything in it to indicate in any way her as a beneficiary.—M. as administratrix of C., brought an action on the policy for the recovery of the $2,000.—The action was afterwards settled by the company paying the $1,000 now in dispute to the administratrix in discharge of the policy.—On an application to pass the administratrix's accounts before the judge of probates, it was claimed, on behalf of the creditors of C. that the administratrix should account for the $1,000 as assets of the estate, and on behalf of M. that she was the sole beneficiary under the policy, and the money formed no part of C.'s estate.—It appeared by the evidence of one of the chief agents of the company, that it was not the practice of the company in a case of this kind, notwithstanding the terms of the application,

to issue a policy payable to the beneficiary named therein, but they held themselves bound in case of death, to pay the amount due to the beneficiary named in the application.—It also appeared C. told M. the policy was payable to her, and he gave it to her when he took it out.—The judge of probate held that the money paid under the policy belonged to the estate of C.—From this decision the administratrix appealed.—*Held* (*per* Landry, Barker, McLeod and Gregory JJ., Tuck C. J. and Hannington J. dissenting), that there was no complete gift *inter vivos* of the policy and fund to M. from her husband; and the intended gift being purely voluntary and incomplete, the Court would not complete it, and there was no trust created and declared in her favor.—Apart from the Act 58 Vic., c. 25, no interest would pass to M. even had she been named in the policy as beneficiary, merely by reason of that fact, and if C. wished such interest to pass he must have left the money to her by will or settled it upon her during his life.—The Act 58 Vict., c. 25, for securing to wives and children the benefit of life insurance, does not apply to accident insurance.—The application cannot be said to be a declaration under the act, as under section 6 the policy must be in existence before there can be a declaration affecting it. —*Held* (*per* Tuck C. J. and Hannington J.), that the transaction was a gift final complete and executed as between C. and his wife M. and one that, if necessary a Court of Equity would compel the legal representatives of C. to carry into effect. *Cornwall* v. *The Halifax Banking Co.*, 35, p. 308. Reversed 32 S. C. R., p. 442.

Negligence of executor—If an executor deal with a property of the deceased in a manner that no prudent man would use in dealing with his own property, he must answer personally for the loss occasioned. *In re Estate Paul Daly*, 37 N. B. R., p. 483; 39 S. C. R., p. 122.

Passing accounts — Disbursements made in accordance with power of appointment.—By will F. left his estate to a trustee with directions to invest one portion and to "pay and apply the annual income arising therefrom or from any accumulations thereof, in such manner and at such times as my wife and daughter, during their joint lives, shall by directions in writing require my trustee so to do," and in case of the death of either the power of appointment was to go to the survivor.—The daughter was an infant (18 years of age), and her step-mother (testator's wife) was testamentary guardian.—They jointly appointed the income of this portion, as it accrued to the step-mother and the money so appointed was expended for the benefit of both equally.—On the accounting of the trustee before the judge of probate under s. 51 of The Probate Courts Act, C. S. 1903, c. 118, the judge of probate found that the income so appointed was necessary for the maintenance of the infant in her station of life and that it had been properly expended by her guardian, but refused to confirm the payments by the trustee on the ground that the infant had an interest in the estate which was capable of being affected, diminished or disposed of to some extent by the exercise of this power and that therefore the appointments were invalid.—On appeal, *held*, (1) that the payments should have been allowed irrespective of the provisions of the will, as they were properly made by the trustee for the maintenance of the infant; (2) the appointments were valid as it was the testator's clear intention that the power should be exercised during infancy. *In re Estate Wm. D. Forster*, 39, p. 526.

Sale of real estate to pay debts.—The Court of Equity will not under C. S. c. 49 s. 58, direct a sale of the real estate of an intestate for the payment of his debts, if the personal estate that the deceased died possessed of was sufficient for the purpose, had it not been wasted or misapplied by the administrator.—*Semble*, that an application under s. 58, c. 49. C. S., for the sale of real estate to pay the debts of an intestate on account of the insufficiency of the personal estate must be made within ten years from the grant of letters of administration.—*Semble*, that in an administration suit for the sale of real estate of an intestate for the payment of his debts the purchaser of the real estate from the heir is a necessary party to the suit. *The People's Bank* v. *Morrow et al.* Eq. Cas., p. 257.

Transfer by executor of shares specifically bequeathed—Under The Bank Act, c. 120, R. S. C., a bank cannot refuse to register a transfer to a purchaser by an executor of shares in the bank standing in the name of the testator, though by the testator's will the shares are specifically bequeathed. *Boyd* v. *The Bank of New Brunswick*, Eq. Cas., p. 546.

Waste by administrator—The Court of Equity will not under section 58, c. 49, C. S., direct a sale of the real estate of an intestate for the payment of his debts if the personal estate that the deceased died possessed of was sufficient for the purpose, had it not been wasted or misapplied by the administrator. *Peoples Bank of Halifax* v. *Morrow et al* Eq. Cas. p. 247.

EXPROPRIATION.

Appeal from award—By Act 57 Vict., c. 74, providing for the expropriation of lands by the Saint John Horticultural Association by arbitration, it is enacted that "any party to the arbitration may within one month after receiving a written

notice from one of the arbitrators of the making of the award appeal therefrom upon any question of law or fact to a judge of the Supreme Court, and upon the hearing of the appeal, the judge 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.—The judge, upon such appeal, shall have the right to hear additional evidence and decide the question upon the original as well as the new evidence."—On an appeal from an award made under the Act, *held*, that the judge appealed to was not to disregard the award and the reasoning in support of it, and deal with the evidence *de novo*, but that he was to examine into the justice of the award on its merits, both upon the facts and the law, and whether a reasonable estimate of the evidence had been made in accordance with the principles of compensation.—In assessing damages upon the expropriation of land regard should be had to its prospective capabilities.—Rule considered as to when evidence of an arbitrator will be admitted in explanation of the award. *In re Gilbert and Saint John Horticultural Association*, 1 Eq., p. 432.

See ARBITRATION—RAILWAY.

EXTORTION.

See FRAUD—(EQUITY) COURTS.

FALSE ARREST.

See MALICIOUS PROSECUTION.

FAMILY SETTLEMENT.

Agreement for division of intestate's estate—See ESTATES, DISTRIBUTION OF, *Sears* v. *Hicks*, 3 Eq., p. 281.

Voluntary conveyances to children—Maintenance—K. and wife and three sons, F., J. and R., lived on K's homestead farm.—Subsequently F. acquired another farm.—In 1909 an arrangement was made between K. and his sons by which K. was to convey the homestead farm to F. in consideration that F. would convey his farm to his brother J., K. to have the 1909 crop off the homestead farm and R., who was then some fifteen years of age, to have one-half the homestead farm if he continued to work for F. until of age; otherwise, his interest to go to F.—There was also a verbal understanding that F. should support K. and his wife on the homestead farm during their lives.—The homestead farm was worth, according to the price paid for it, some four or five times as much as F.'s farm.—The arrangement was carried out, and in June, 1909, conveyances were executed by which K. was left with practically no assets but the crop.—At the time of the conveyances K. owed the plaintiff for fertilizer, though the amount was not payable till January, 1910.—The crop was a failure and plaintiff took judgment against K. and brought suit on behalf of himself and other creditors to set aside the deed of the homestead to F. and the deed of one-half the homestead from F. to R.—The trial judge found that there was no fraud or intent to defeat creditors, but held that the conveyances were voluntary, and as their effect was to defeat creditors that they were void under the Statute 13 Eliz., c. 5.—On appeal, *held*, there was no fraudulent intent and the conveyance of F.'s farm and his agreement to support K. and wife constituted a valuable consideration for the deed of the homestead to F., and the deed was valid, even though the principal part of the consideration moved to J., a third person, and though the effect of the conveyance was to leave K. unable to pay his debts.—This consideration covered the whole homestead farm and the deed to R. was also valid.—In an action to set aside a conveyance under 13 Eliz., c. 5 where no fraud is shown and there is valuable consideration, the Court will not enquire into the amount of such consideration except so far as it is evidence that the transaction was a sham.—*Held* (*per* Barry J.), the conveyances of 1909 were made in pursuance of a family settlement of 1907 which was *bona fide*, and the consideration was adequate.—Family arrangements are exempt from the ordinary rule which affects other deeds, even as against creditors, the consideration being composed partly of natural love and affection, partly of value.—*Held* (*per* White J.), services rendered by a child during minority may constitute a good consideration in support of a conveyance of land by the parent to the child as against the creditors of the parent. *Jack* v. *Kearney*, 41, p. 293.

Reversed on appeal S. C. of C. (unreported.) Original decision 4 Eq., 415 upheld.

The doctrine as to family arrangements applies as between members of the family but not as against creditors.—(*Per* Barker C. J.) *Id.*

FERRIES.

Appurtenances—Sale of ferry—The authority conferred on a municipality to make by-laws for establishing, licensing and regu-

lating a ferry authorizes it to provide a boat and other appliances for operating the same.—And where a ferry, so established with the boat and appliances was sold at public auction by the municipality, it is bound to put the vendee in possession, and is liable in an action of damages for a failure to do so, and to an action to recover back the purchase money. *Currey* v. *The Municipality of Victoria*, 35, p. 605.

Constitutional law—Intra provincial ferry—The Act respecting Public Ferries, R. S. C., 1905, c. 108 does not apply to a ferry running between points in the same province. *R.* v. *Chaisson ex parte Savoy*, 39, p. 591.

FIRES.

Damages—Action by tenant in common in possession—The plaintiff, a tenant in common of certain lands, but in possession under an agreement with the other tenants that he was to have possession and ownership of the lands and all appertaining thereto, is entitled in his own name to sue and recover for damages arising from the negligent setting of fire by defendant on his own land and its spreading to the land in possession of plaintiff. *Phillips* v. *Phillips*, 34, p. 312.

Master and servant—A master is liable for an injury by fire caused by the wrongful act of his servant within the scope of his authority, although the master has expressly forbidden the servant to do the act from which the injury resulted. *Read* v. *McGivney*, 36, p. 513.

Negligence — Nonsuit — Notice under C. S. 1903, c. 94—In an action for negligence in starting a fire in June without notice, contrary to the Act respecting Protection of Woods from Fire, C. S. 1903, c. 94, tried before a County Court judge without a jury, plaintiff proved that defendant had a number of brush piles on his land thirty or forty feet apart, that defendant was seen going towards these piles, and twenty minutes afterwards smoke arose and defendant was found near the piles, fifteen of which were burning.—There was also evidence of a statement by defendant that tobacco dropped out of his pipe and set the fire.—A wind was blowing at the time towards the plaintiff's land and plaintiff's woodland was burned.—Plaintiff having been nonsuited, *held*, the nonsuit should be set aside.—*Held* (*per* White J.), in the absence of contradiction the evidence entitled the plaintiff to a verdict and therefore the nonsuit should be set aside.—*Held* (per Barry J.), a nonsuit should not be granted where there is sufficient evidence for the plaintiff to submit to a jury.—*Held* (*per* Barry J.), section 20 of the Act does not apply to cases of inevitable accident.—It must be proved that defendant started the fire intentionally or negligently. *Cochran* v. *Lloyd*, 42, p. 112.

Negligence of employee of railway company—Statutory liability—In an action brought by the owner of a lot of woodland adjoining defendant's line of railway to recover damages alleged to have been caused by a fire negligently started by defendants' servants and allowed to extend to plaintiff's land, it appeared in evidence that N., a section foreman of the railway, set fires to burn up some piles of sleepers and rubbish on the railway line.—The weather had been very dry for a long time, and forest fires were burning all over the country.—Witnesses on behalf of the plaintiff testified that they saw fire on the railway line at this time, and traced its course through the fence to the plaintiff's land.—N. swore that the fires which he started were all burnt out before the fire was seen on the plaintiff's property. and other evidence was given to the same effect.—The jury found that the fire spread from the fire set by N. and that N. negligently and unreasonably allowed it to extend.—A verdict was entered for the plaintiff for $500.—*Held*, that there was sufficient evidence to justify the verdict. —*Held* (*per* Tuck C. J. and McLeod J.), that the acts 48 Vict., c. 11 and 60 Vict., c. 9 (to prevent the destruction of forests and other property by fire) are not *ultra vires* of the local legislature.—*Held* (*per* McLeod J.), that the defendants having brought on their land a dangerous element not naturally there, did so at their peril, and if it caused injury they were liable though no negligence was proved.—The provision of said acts declaring that a person starting a fire, except for certain purposes specified, between May 1st and December 1st, is guilty of negligence, applied to the defendants, and they were, therefore, liable under the acts as well as at common law. *Grant* v. *The Canadian Pacific Rwy. Co.*, 36, p. 528.

FISHERIES.

City of Saint John—Harbor fisheries—By its charter the city of Saint John is granted "all the lands and waters thereto adjoining or running in, by or through the same" within defined boundaries, including a course at low water mark; "as well the land as the water, and the land covered with water within said boundaries."—The fisheries between high and low water mark on the harbour are declared by the charter to be for the sole use of the inhabitants, but by Act of Assembly they are directed to be annually sold by the city.—*Held*,

that where the city is bounded by low water mark it has not a title to sell the right of fishing beyond such mark, though within the harbour or river. *The City of Saint John* v. *Wilson*, 2 Eq., p. 398.

Fisheries Act—Imprisonment may be adjudged under the act for default in payment of a penalty imposed without awarding a distress. *King* v. *Fraser*, 36, p. 109.

Fisheries Act, s. 18—Remitting penalties—Section 18 of The Fisheries Act as amended by the act of 1898 enacts "Except as herein otherwise provided, every one who violates any provision of this act or of the regulations under it shall be liable to a penalty not exceeding $100 and costs, and, in default of payment, to imprisonment for a term of not exceeding three months, and any fishery officer or justice of the peace may grant a warrant of distress for such penalty and costs."—R. was convicted under this section, and fined $20 and costs. —Both fine and costs were remitted under sub-section 6 of section 18 which provides that "persons aggrieved by any such conviction may appeal by petition to the minister of marine and fisheries who may remit penalties and restore forfeitures under this Act."—G., the prosecutor, applied to the convicting magistrate for a warrant of distress for the costs, claiming the minister of marine and fisheries had no power to remit the costs.—The magistrate refused to issue the warrant, and a mandamus was moved for. —*Held* (*per* Tuck C. J., Hanington and McLeod JJ.), that the minister had no power to remit the costs, and it was the duty of the magistrate to issue the warrant of distress for their recovery, and that the mandamus should go.—*Held* (*per* Barker and Gregory JJ.), that the penalty having been remitted, the magistrate had no power to proceed to collect the costs, or, at all events, his right was so doubtful that the Court, in the exercise of its discretion should refuse the mandamus.—*Held* (*per* Landry J.), that as in the section in question the term "penalties" included the costs as well as the fine, the writ ought not to issue. *Ex parte Gilbert*, 36, p. 492. Court divided, rule dropped.

Illegal fishing, Evidence of—Evidence that a person was seen on the river in a canoe between ten and eleven o'clock at night with the appliances commonly used in illegal salmon fishing is, in the absence of any explanation of the situation and where the charge is not denied on oath, sufficient to justify a conviction for fishing salmon by means of a spear in contravention of the Fisheries Act.—A complaint charging the accused with having been engaged in "illegal fishing" in contravention of the Fisheries Act is too indefinite to support a conviction under the act. *King* v. *Fraser*, 36, p. 109.

License — Renewal — Tenants in common — Possession — Accounting — A Dominion Government fishery license for one year, without right of renewal, was taken out a number of consecutive years by the plaintiff and defendants until 1899, in which year and in the year following, the license was taken out and the fishing thereunder was carried on by the defendants.—The plaintiff and defendants owned as tenants in common fishing gear used in fishing under the license.—They were not partners in respect of the license, and each catch of fish was divided at the time it was made among such of the licensees as assisted in it.—The expense of repairing the fishing gear was proportionately born by the plaintiff and defendants up to the years 1899 and 1900, when it was borne by the defendants.—In the years 1899 and 1900 the fishing gear was possessed and used exclusively by the defendants in fishing under the license.—*Held*, that the plaintiff was not entitled to a declaration of interest in the license, nor to a share of the earnings thereunder for the years 1899 and 1900, and that the defendants were not liable to account to him for profits from the use by them of the fishing gear in those years. *Guptill* v. *Ingersoll*, 2 Eq., p. 252.

Riparian owner—Right to unpolluted water—A riparian owner has the right to the full flow of the water in its natural state, without diminution or pollution, so, where it is shown that the defendant was polluting the water by operating an iron mine and thereby injuring the fishing rights of the plaintiff, an injunction was granted, but, as the works of the defendant were important, the Court ordered that the injunction should not become operative for over three months, in order that the defendant might have an opportunity to prevent the pollution by alterations to its plant. *Nepisiquit Real Estate & Fishing Co. Ltd.* v. *Canadian Iron Corporation*, 42, p. 387, C. D.

FIXTURES.

Dwelling affixed to realty by lessee—The lessee of land under a lease renewable from term to term at his option, affixed to the soil a dwelling-house with a shop in the lower storey.—*Held*, that his actions under the circumstances furnished evidence of his intention to annex the building to the freehold. *Allan* v. *Rowe*, 1 Eq., p. 41.

Injunction against mortgagor of chattels purchased conditionally and affixed to realty—See *Poirier* v. *Blanchard*, 1 Eq., p. 322.

Mortgage — Goods sold conditionally —Lien not registered—The Port Elgin Woollen Company purchased from the plaintiffs, on the instalment plan, a steam engine under an agreement in writing which provided that it should not become the property of the vendee until the payment of all the instalments, and should be removable by the vendor on failure of the vendee to pay as agreed.—The engine was affixed

to the freehold of the vendee by bolts and screws to iron plates embedded in concrete to prevent it from rocking and shifting, and might have been removed at any time without injury to the freehold.—It was used for driving the machinery in the factory of the vendee.—Default having been made in the payment of the instalments, the engine, was claimed by the vendor and also by the defendant, a mortgagee of the land on which the mills were situate and all the mill plant, engines, etc., who took his mortgage after the engine had been installed and without notice of the plaintiff's claim, the agreement not having been registered.—The mortgage was foreclosed by the defendant and the mortgaged property was bought in by him under a sale by a referee in equity for an amount less than the mortgage debt.—The plaintiffs were not parties to foreclosure proceedings, but were aware of the pendency of the same.—No report of the sale or motion to confirm was made.—*Held* (*per* Tuck C. J., Hanington, Landry, McLeod and Gregory JJ.), that the engine was sufficiently annexed to the land to become part of the freehold, and passed to the defendant under his mortgage.—That by the mortgage to the defendant the engine passed as part of the realty, and on his taking possession, if not by virtue of the mortgage alone, all right in the plaintiffs to retake it was put an end to.—That the act 62 Vict., c. 12, s. 8, sub-sec. 2, which provides that where goods or chattels are sold on the instalment or hire and purchase system, and the property is not to pass until payment, the right of the owner shall not be affected by such goods or chattels being affixed to the realty, does not apply to past transactions where the goods had been affixed to, and become part of the realty before the passing of the act. *The Goldie & McCulloch Co. Ltd.* v. *Hewson*, 35, p. 349.

FRANCHISE.

Electoral franchise—An action will lie when one is deprived of his right to vote at a municipal election by the negligence of another.—A municipal corporation is answerable for the negligent performance of his duties by one of its officers, who is appointed and removable by it, even where the duties, the negligent performance of which gave rise to the action, were imposed by the legislature and not by the corporation. —(*Per* Tuck C. J., Landry and McLeod JJ., Hanington J. dissenting.) *Crawford* v. *The City of Saint John*, 34, p. 560.

Ferry rights—The authority conferred on a municipality to make by-laws for establishing, licensing and regulating a ferry authorizes it to provide a boat and other appliances for operating the same.—And where a ferry, so established with the boat and appliances was sold at public auction by the municipality, it is bound to put the vendee in possession, and is liable to an action of damages for a failure to do so, and to an action to recover back the purchase money. *Currey* v. *The Municipality of Victoria*, 35, p. 605.

River driving rights, Assignment of—The plaintiff, an incorporated company, with the exclusive right to drive lumber down the South-west Miramichi River within the company's limits, and of collecting tolls fixed by law therefor, contracted with the defendant, in consideration of a bonus to be paid by him to the company, to allow him to do the driving and receive the tolls. —*Held*, that the contract was against the public interest, and invalid. *The South-west River Driving Co.* v. *Lynch*, 38, p. 242.

River driving rights, Delegation of—The South-west River Driving Company and the Upper South-west Miramichi Log Driving Company, incorporated companies, having the exclusive right within certain limits to drive the lumber cut off the south-west Miramichi and collect the tolls fixed by statutory authority therefor, made an arrangement with the plaintiff to do the driving for the season of 1904, and to receive as compensation the tolls allowed the corporations by law.—In an action by the plaintiff against the defendant company for tolls for driving its lumber, the trial judge ruled that there was no liability from the defendants to the plaintiff.—*Held*, (*per* Tuck C. J., Barker and McLeod JJ., Hanington and Landry JJ. dissenting), that the ruling was right that the powers conferred and duties imposed by the legislature on the driving companies could not be delegated or transferred, and no action could be maintained on a contract based on such transfer.—*Held* (*per* Hanington and Landry JJ.), that the arrangement between the driving corporations and the plaintiff was a reasonable and proper method of carrying on the work which by their acts of incorporation the companies were bound to perform, and, having been made with the knowledge and consent of the defendant company, it is liable to the plaintiff on an express or implied contract to pay the amount agreed upon. *Lynch* v. *William Richards Co. Ltd.*, 38, p. 160.

FRAUD AND MISREPRESENTATION.

Bill of exchange—Defence of fraud—Where promissory notes were given to aid a defaulter in making up a deficiency and in the hope that he would be continued in his position, the fact that he was not so continued is not sufficient to maintain a defence of fraud against a *bona fide* holder for value. *Potter* v. *Morrisey and Creaghan*, 35, p. 465.

Business style, Protection of—Fraud on public—A right to the use of a name to denote a place of business carried on by a particular person will be protected where it would be a fraud upon that person and the public for another person to make

use of it in such a way as to deceive the public into believing that they were dealing with the person who originally used it. *McCormick* v. *McCoskery*, Eq. Cas., p. 332.

Collusion on part of convicting magistrate—Section 887 of the Criminal Code which enacts that "no writ of certiorari shall be allowed to remove any conviction or order had or made before any justice of the peace, if the defendant has appealed from such conviction or order to any Court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal" does not deprive the Court of the right to quash a conviction on certiorari, where the convicting justice acted as a partisan in collusion with the prosecutor and without jurisdiction, even though an appeal had been taken which has failed by reason of the refusal of the justice to make the return required by law.—(Landry J. dissenting).—*In re Kelly*, 27 N. B. R., 553 discussed. *R.* v. *Delegarde ex parte Cowan*, 36, p. 503.

Confession of judgment—A judgment of an inferior court signed on a confession obtained by fraud is void and may be attacked collaterally.—(*Per* Tuck C. J., Hannington, Landry and Gregory JJ.) *Rogers* v. *Porter*, 37, p. 235.

Costs—Charges of fraud unsupported—Charges of fraud against the defendant were preferred in a number of sections of a bill for an accounting which charges were unsupported at the hearing.—*Held*, that the decree in plaintiffs' favor for the balance due by the defendant on overpayment should be without costs, and that the defendant should have the costs of the sections of the bill alleging fraud. *Cushing Sulphite Fibre Co. Ltd.* v. *Cushing*, 2 Eq., p. 539; 37, p. 313.

Creditors, Fraud against—Payment to wife—Money paid to a wife by her husband to secure her execution of a mortgage of lands of which she is dowable under an agreement that she was to receive half of the money advanced is not money received by the wife from her husband during coverture within the meaning of the qualifying part of sub-section 2 of section 4 of chapter 78 of the C. S. 1903, and if an honest and *bona fide* transaction entered into in good faith cannot be impeached as a fraud against the husband's creditors. *Cormier* v. *Arsineau*, 38, p. 44.

Debtor and creditor—See *Donald* v. *McManus et al*, 4 Eq., p. 390.

Deceit, Action of—Principal and agent—An action of deceit will lie against an auctioneer, who being employed to effect the sale of a piece of property, concealed from his principal a material fact, by reason of which concealment the latter sold the property for a smaller sum than he could have obtained if he had been in possession of all the facts.—Such failure of duty on the part of the auctioneer towards his principal deprives him of any right to the compensation agreed to be paid to him upon the sale being effected. *Ring* v. *Potts*, 36, p. 42.

Evidence—Examination of debtor—In disclosure proceedings the question whether the debtor has transferred any property intending to defraud the plaintiff, or since his arrest given any preference to any other creditor, are for the officer taking the examination, and the Court will not interfere with his discretion merely because the circumstances of the transfer are suspicious. *R.* v. *Ebbett ex parte Smith*, 38, p. 559.

Fiduciary relationship, Absence of—Lease drawn by tenant—R. was the owner of certain premises which she leased to E. and M. by a written indenture of lease made February 4th, 1908.—The defendant M. offered to draw the lease for her, and did so, and it was executed by all the parties at the same time, in the presence of the father of the defendant E.—The lease was read over by R. to M. on two separate occasions, and was given to R. to read for herself. —R. is a middle-aged woman of property. —She has been accustomed to transact all her own business and manage her own property without assistance from anyone, and it was not contended that she was not fully capable of making an agreement of this nature.—*Held*, that the lease would not be set aside, as there was no fraud or misrepresentation; that the defendant M. did not stand in any fiduciary relationship to R. by reason of his having drawn the lease and the rule as to independant advice in such cases was not applicable here. *Robinson* v. *Estabrooks et al*, 4 Eq., p. 168.

Fraud alleged but not borne out by evidence — Ratification — Estoppel — See *Culbert* v. *The McCall Co.*, 40, p. 385.

Garnishee proceedings—Assignment of fire insurance policy—The loss payable under a policy of fire insurance was assigned by the assured to the plaintiff with the consent of the insurers.—A loss occurring, a judgment creditor of the assured obtained an attaching order under Act 45 Vict., c. 17, against the insurers.—In a suit by the plaintiff for a declaration of his title to the insurance and to restrain the garnishee proceedings, he alleged that the defendant intended setting up the claim that the assignment to the plaintiff was fraudulent and that the plaintiff had merely an equitable title, which could not be used to defeat the defendant's rights under the garnishee process.—*Held*, that the plaintiff was entitled to have his rights determined in equity, instead of under the garnishee proceedings, and that an injunction should be granted. *Robertson* v. *Bank of Montreal*, Eq. Cas., p. 541.

Husband and wife—The plaintiff was named as the beneficiary in a policy of insurance on the life of her husband.—The policy was taken out by the husband, and the premiums were paid by him.—By an assignment, to which the plaintiff was a party, the loss was made payable to the defendants, for valuable consideration moving to the husband.—Upon the death of the husband, the plaintiff claimed the benefit of the policy, setting up that her consent to the assignment was procured by her husband's fraud.—*Held*, that the plaintiff had failed to discharge the onus of proof devolving on her, and *further held*, that the assignment was valid without the consent of the plaintiff. *Gunter* v. *Williams et al*, 1 Eq., p. 401.

Fire insurance policy—An application for insurance made by the plaintiff contained the following questions: "Are you the owner of the land on which the above described building stands?"—Before the written answer to this was put down the plaintiff told M., the defendant's agent, that he was not the owner of the land but that the building stood on the highway. —Whereupon M. said, "We will put it down as yours" and, with the consent of the plaintiff, wrote "Yes" as the answer to the question.—The application contained this provision also: "If the agent of the company fills up or signs this application he will in that case be the agent of the applicant and not the agent of the company." —*Held* (*per* Hanington, Landry and McLeod JJ., Tuck C. J. and VanWart J. dissenting), that notwithstanding the foregoing provision the communication made to M. the agent, must be taken as if made to the company, and, therefore, there was no misrepresentation on the part of the plaintiff. —(Reversed 29 S. C. R. 470 on ground of warranty and collusion to defraud.) *LeBell* v. *The Norwich Union Life Insurance Society* 34 p. 515.

Landlord and tenant—Fraudulent removal to avoid distress—Goods fraudulently or clandestinely removed to avoid distress cannot be seized under distress if there is no rent in arrear. *Clark et al* v. *Green et al*, 37, p. 525.

Life insurance policy—Evidence of similar frauds—In an action by an insurance company to set aside a policy of life insurance issued by it, on the ground that the policy was procured by fraud of the assured and the assignee of the policy, evidence is admissible as bearing upon the fraudulent intent of the assignee that in other cases, before as well as after, he had engaged in other transactions of a like character with the same fraudulent intent. *The Mutual Life Assurance Co. of New York* v. *Jonah et al*, 1 Eq., p. 482.

Life insurance policy—A policy of life insurance in the plaintiffs' company, obtained by the fraudulent misrepresentation of the assured was assigned by him to the defendant. —Learning of the fraud the plaintiffs' agent charged the defendant with being a party to it, but, upon the defendant denying it, withdrew the charge and asked that the policy be surrendered, offering to pay the defendant whatever money he had laid out in connection with it.—This offer the defendant refused, as also a similar offer subsequently made in a more formal manner. —In a suit to set the policy aside, the assured and the defendant were charged with having procured it by fraud, but the evidence at the hearing failed to establish the charge with respect to the defendant.—*Held*, that the bill should be dismissed as against the defendant with respect to the charge of fraud, but without costs, as the suit had been made necessary by his refusal of the plaintiffs' offer.—If a charge of fraud as a ground of relief is made by a bill, and is not established by the evidence and another case for relief is also made by the bill which is established, so much only of the bill as relates to the charge of fraud is to be dismissed, and relief may be given upon the other part of the case.—While a general allegation of fraud, without stating the acts which constitute it, is bad pleading, it was held that fraud was sufficiently pleaded in a bill to set aside a policy of life insurance which set forth representations made by the assured as to his health, and alleged that they were false and fraudulent to the knowledge of the assignee of the policy.—Terms of relief considered with respect to an assignee of a policy of life insurance, in a successful suit by the insurers to set the same aside on the ground of fraud by the assured in procuring the policy. *The Mutual Life Assurance Co. of New York* v. *Anderson et al*, 1 Eq., p. 466.

The assignee of a policy of life insurance obtained by fraud has no better rights than the assured. *Id.*

Oppressive contract, Jurisdiction of Equity Court to relieve—In an action brought to recover the amounts due on three several promissory notes, the defendants pleaded an equitable plea.—The Court being of the opinion that the facts set up thereby disclosed such an inadequacy of consideration, accompanied by other circumstances, as would justify a jury in finding that there was fraud in the transaction and that it was unconscionable, gave judgment for the defendants on demurrer.—(*Per* Barker J.), While parties competent to contract may render themselves liable to pay any rate of interest which they agree to pay, Courts of Equity have held that the repeal of the Usury Laws has not interfered with their jurisdiction to relieve those who have been led into making improvident bargains unconscionable in their nature and entered into under circumstances of fraud or oppression. *MacPherson* v. *McLean et al*, 34, p. 361.

Pleading — Action for damages for fraud—In an action by the plaintiff com-

pany against the defendant, the first count of the declaration alleged that the defendant was hired for the purpose of receiving and forwarding to the company applications for fire insurance, yet the defendant not regarding his duty, so negligently and wrongfully received and forwarded to the company an application for insurance containing statements which he knew at the time to be false, and material to the risk, and said company, relying upon the truth of the application accepted the risk and issued a policy thereon which became a claim and said company was put to great costs in defending an action at law.—The second count alleged the false statements were received and forwarded to the company by the defendant fraudulently and in collusion with the applicant against the company.—*Held* (*per* Tuck C. J., Landry, McLeod and Gregory JJ.), that both counts stated a cause of action and were good on demurrer.—*Held*, (*per* Hanington J.), that the defendant's duty, under the contract, was to receive and forward all applications, whether the statements were true or false, and as the first count did not charge any duty beyond that or fraud, it was bad on demurrer; that he was in doubt as to the second count, because it did not allege that the damage suffered was directly caused by the fraud and collusion of the defendant. *The Norwich Union Fire Insurance Society* v. *McAlister*, 35, p. 691.

Prospectus, Fraudulent — Cancelling subscriptions for shares—F., in June, 1903, purchased paid-up shares in the capital stock of an industrial company on the faith of statements in a prospectus prepared by a broker employed to sell them. —In January 1904 he attended a meeting of shareholders and from something he heard there suspected that some of said statements were untrue.—After investigation, he demanded back his money from the broker and wrote to the president and secretary of the company repudiating his purchase.—At subsequent meetings of shareholders he repeated such repudiation and demand for re-payment and in December, 1904, brought suit for rescission.—*Held*, that his delay from January to December, 1904, in bringing suit was not a bar and he was entitled to recover against the company.—*Held*, *also*, that he could not recover against the directors who had instructed the broker to sell the shares as they were not responsible for the misrepresentations in the prospectus.—Judgment of the Supreme Court of New Brunswick (38 N. B. R. 364) affirming the decision at the hearing (3 N. B. Eq. 508) reversed. *Farrell* v. *Manchester*; *Farrel*, v. *The Portland Rolling Mills Co. Ltd.*, 40 S. C. R. p. 339.

Sale of farm — Misrepresentation — Acceptance of deed and possession—An agreement for the sale of a farm made between plaintiff and defendant bearing date May 9, 1914, described the property as containing eighty-six acres, more or less.—By deed, bearing date June 20th, 1914, the plaintiff and his wife conveyed to the defendant and his wife for the sum of $4,800 the farm in question, and by indenture of mortgage, bearing even date therewith, the defendant mortgaged the property to the plaintiff to secure payment of the balance of the purchase price $2,400.—The deed contained no statement or warranty as to acreage of the land thereby conveyed.—In an action for foreclosure of the mortgage, defendants set up that they were induced to purchase the farm by misrepresentations and false statements of plaintiff and his agent that the farm contained eighty-six acres, whereas in reality the farm contained only sixty-six acres and a fraction of an acre.—Defendants by their answer asked to have the deed and mortgage set aside, the part payment of $2,400 repaid with interest and to be recouped for disbursements made by them for improvements. *Held*, that the representation that the farm contained eighty-six acres more or less, being both material and false, defendants would have been justified in refusing to accept conveyance of property, but not being fraudulent, and the defendants having accepted the deed and consequent possession of the property, without requiring or receiving in the deed any covenant or warranty as to the acreage, and the agreement under which the deed was executed containing no stipulation that the plaintiff should make compensation for any shortage in area, the defendants are without remedy.—*Joliff* v. *Baker* (1883) 52 L. J. Q. B. 609 followed.—*Palmer* v. *Johnston* (1884) 53 L. J. Q. B. 348, discussed and distinguished. *Hand* v. *Warner*, 44, p. 331.

Signed instrument put to fraudulent use—Where a person puts his name to a paper without taking ordinary precautions, he cannot afterwards plead that he did not know what he was doing and thought it was only a form; and where such a paper is used by another, not for the purpose for which it was intended, but for the purpose of committing a fraud, that fact does not make it any the less the instrument of the person who signed it. *Cheeseman* v. *Carey et al*, 42, p. 409, C. D.

Warranty—Pleading—In an action in the County Court on a promissory note given by the defendant to the plaintiff for the balance of the purchase money for a boat sold by the plaintiff to the defendant, the defendant pleaded the general issue and gave notice of two defences; (a) no consideration, (b) fraud and misrepresentation.—At the trial without a jury the judge found there was misrepresentation as to the age of the boat but that there was no fraud as defendant had protected himself by a warranty and did not rely upon the plaintiff's statement in respect to the boat's age; and held that under the pleadings the defendant could not avail himself of the breach of warranty in answer to the action on the note.—*Held*, that the trial judge having found that there

was no fraud, the verdict on the pleadings was right for the amount of the note and interest, and defendant's remedy was by cross action. *Losier* v. *Mallay*, 43, p. 364.

Warranty—Action of deceit—A verdict for damages for breach of a warranty cannot be sustained on the ground that the jury might have assessed the like damage on the evidence adduced in an action of deceit. *Gallant* v. *The Lounsbury Co. Ltd.*, 44, p. 225.

Will, probate, in solemn form—Allegations of fraud—Where a clause in a will drafted by testator's solicitor, had a legal effect contrary to the testator's instructions and contrary to the explanation given by the solicitor when he read the will to the testator, *held*, in the absence of fraud, that the testator, by his assent, adopted the clause as written, although he had been misled as to its effect, and the will, including this clause, was admitted to probate.—On proof of the will in solemn form, under C. S. 1903, c. 118, the testator's widow filed allegations alleging incapacity, and fraud and undue influence on the part of the executor and testator's sisters.—The executor gave the instructions to the solicitor for, and took a remote interest under, the will; one of the testator's two medical attendants pronounced him to be incapable of making a will, and the judge of probate refused to admit the will to probate.—He also ordered that the executor should receive no costs, and should personally pay costs of the widow, including stamps.—*Held*, reversing the judgment of the judge of probate, that the will should be admitted to probate and the ordinary order made as to costs in the Probate Court. —Costs of the appeal were allowed to the widow out of the estate, to be taxed as between party and party, and to the executor to be taxed as between solicitor and client. *In re Estate of Wm. John Davis*, 40, p. 23.

Woodmen's lien—In proceedings under The Woodmen's Lien Act, 1894, an order allowing the claimants' lien will be set aside if the evidence discloses an attempt on the part of the claimants acting in collusion with the defendant to defraud the owners, notwithstanding that the judge in the Court below has found that the evidence established the claimants' lien. *Murchie et al* v. *Fraser et al*, 36 p. 161.

FRAUDULENT CONVEYANCES.

Assignment by foreign beneficiary of moneys payable through N. B. trustee —A share in the annua income of an estate in Ireland payable under a will through the hands of the executor living in New Brunswick to the beneficiary living and domiciled in Massachusetts was assigned by the beneficiary by assignment executed in Massachussetts to trustee in trust, first, to maintain the assignor and his family, and, secondly, to pay his creditors a limited sum.—In a suit in this province to set aside the assignment as fraudulent and void against a judgment creditor o the assignor, under the Statute 13 Eliz., c. 5, *held*, (1) that the validity of the assignment should not be determined by the *lex domicilii* of the assignor but by the law of New Brunswick; (2) that assuming the validity of the assignment should be determined by the law of Massachusetts the onus of proving that the assignment was invalid by that law was upon the defendant, and that in the absence of such proof it must be assumed that the law of Massachusetts was the same as that of New Brunswick; (3) that as the money coming into the hands of the executor was liable to attachment under Act 45 Vict., c. 17, s. 21, or to equitable execution, the plaintiff was prejudiced by the assignment within the Statute 13 Eliz., c. 5. *Black* v. *Moore*, 2 Eq., p. 98.

The assignment though void as against creditors is good as between the parties, and the Court will appoint a receiver if necessary until the creditors are paid. *Id.*

Conveyance by intestate—Action to set aside—Pleadings—Delay—In a suit by simple contract creditors of an intestate to set aside as fraudulent under the Stat. 13 Eliz., c. 5, a conveyance by him of real estate, and for the administration by the Court of his estate, an administrator of the intestate's estate appointed by the Probate Court is a necessary party to the suit, though there are no personal assets of the intestate. —The failure to make the administrator a party to such a suit is not a ground of demurrer, but may be taken advantage of under Act 53 Vict., c. 4, s. 54.—In such a suit it is not necessary for the plaintiff to allege that he has obtained, or is in course of obtaining a judgment upon his debt.— The Court will not, in such a suit, appoint a person under Act 53 Vict., c. 4, s. 89, to represent the estate of the intestate, instead of requiring the administrator of the intestate's estate to be made a party to the suit.—The Probate Court has jurisdiction to grant letters of administration where an intestate dies indebted possessed of real, but of no personal estate.—Delay cannot be set up against a creditor seeking to set aside a conveyance of lands as fraudulent under the Stat. 13 Eliz., c. 5, where the creditor's debt is not barred under the Statute of Limitations at the commencement of the suit.—In a suit, commenced in 1899, by a creditor to set aside as fraudulent under the Stat. 13 Eliz., c. 5, a conveyance of land, the bill stated the debt arose upon two promissory notes, dated respectively in March and April, 1885, payable with interest three and twelve months after date, that the notes "were renewed and carried along from time to time by renewal or new or other notes, but have never been paid, but with interest thereon are still due to the plaintiff."—*Held* that the allegations were too vague,general and uncertain to show a valid and subsisting debt, not barred by

the Statute of Limitations at the time of the commencement of the suit, and that the bill was therefore demurrable. *Trites* v. *Humphreys*, 2 Eq., p. 1.

Conveyance by judgment debtor—The Court will not set aside an order committing a judgment debtor to prison on the ground of his having made a fraudulent disposition of his property whereby the judgment creditor is materially prejudiced in obtaining satisfaction of his judgment, unless it appears that the judge making the order has taken some manifestly mistaken view of the law or the facts.—As such judge has had the opportunity of hearing the witnesses give their testimony *viva voce*, and of observing their demeanour, his decision on questions of fact must be taken to have the same weight as the verdict o a jury.—(*Per* Tuck C. J., Hanington, Landry and Gregory JJ., McLeod J. dissenting on the ground that no evidence of fraud had been disclosed and that a Court of Equity would have compelled the judgment debtor to do just what he had done.) *Ex parte Despres*, 36, p. 13.

Conveyance from mother to son—Consideration part cash, part past indebtedness—A son living on a farm owned by his mother, worth about $700, and who had worked on it without wages, and had contributed his earnings from other work to the support of herself and family, refused to continue the arrangement.—A conveyance of the farm was thereupon made to him for $500, his contributions from his earnings being placed at $300, and the balance being paid by cash and a horse.—At the time, the mother was indebted to the plaintiff in the sum of $131.—*Held*, that the conveyance was not fraudulent under Statute 13 Eliz., c. 5. *Smith* v. *Wright*, 2 Eq., p. 528.

Conveyance from father to sons—Father not in debt but liable as surety—In 1891, E. S., a farmer agreed with two of his sons, in consideration of their remaining on the farm and supporting him and their mother, and paying to their two sisters $1,000 each, that the farm and his personal property should be theirs.—The farm consisted of adjoining pieces of land, each worth about $3,200.—Subsequently the sons paid about $3,000 in paying off balances of purchase money due on the farm, paid $2,000 to the sister, and supported the father and mother.—On July 9, 1899, the father, in performance of the agreement, conveyed the farm to the sons for an expressed consideration of one dollar.—At that time he was not in debt, but he was surety with others for loans amounting to $14,000 to a company, of which he and they were directors, the last loan being for $3,000, and made June 7, 1899.—On May 3, 1901, the company went into liquidation, and the amount for which the directors were sureties was paid by them, except E. S.—In a suit by them to set aside the conveyance as fraudulent, and void under the Stat. 13 Eliz., c. 5, *held* that the bill should be dismissed. *Baird* v. *Slipp*, 3 Eq., p. 258.

Conveyance in consideration of support—Grantor not then in debt—In 1893 the defendant and his son entered into a parol agreement that the defendant should convey his farm to the son, and that the son should labor upon the farm and support his parents.—The farm was not conveyed to the son until October 2, 1895. —On September 24, and on October 10, 1895, the defendant spoke words alleged to be defamatory of the plaintiff.—Before the date of the conveyance the plaintiff warned the defendant of her intention to bring an action against him for slander.—An action was brought for the words spoken on both occasions, and the plaintiff obtained a verdict for $123, which on motion for new trial was reduced to $63, being the amount of damages awarded by the verdict in respect to the defamatory words uttered on October 10.—At the date of the conveyance the defendant was not in debt.—In a suit to set the conveyance aside as fraudulent and void against the plaintiff under the Statute 13 Eliz., c. 5, *held*, that the conveyance was not within the statute. *Gorman* v. *Urquhart*, 2 Eq., p. 42.

Conveyance in consideration of support—A conveyance by a person of all his property in consideration of the support of himself and wife for life, is a voluntary one, and will be presumed fraudulent under 13 Eliz., c. 5 as against existing creditors. —A bill of sale, absolute in form, of all the property of the vendor, in which the consideration was stated to be one thousand dollars, was drawn up and filed in conformity with the provisions of c. 142, C. S. 1903, respecting Bills of Sale.—The consideration in reality was the support of the vendor and his wife for life.—*Held*, that the transfer was void as against plaintiff, who was a creditor of the vendor at the time of the transfer. —*Jack* v. *Kearney*, 4 N. B. Eq. 415, followed. *Ouellette* v. *Albert*, 42, p. 254, C. D.

Conveyance under pressure—The defendant, in consideration of a promise by a trader to pay to the defendant a sum of money on account of his indebtedness within a given time et to give security, and believing the trader to be solvent, gave him on credit a further supply of goods.—Subsequently the trader becoming insolvent announced the fact to his creditors.—The defendant thereupon reminded the trader of his promise to him, and urged and induced him to give a confession of judgment for the amount of his indebtedness to the defendant, and to execute an assignment of his book debts to him.—*Held*, that the confession of judgment having been obtained by pressure and) without collusion, was not within s. 1 of Act 58 Vict., c. 6, and that the assignment of book debts having been obtained by pressure, was not within s. 2 of the Act. —The presumption created by sect. 2 (a

of the Act does not arise where the sixty days therein mentioned have expired at the date the writ of summons in the suit is sent to the sheriff for service, though the sixty days had not expired at the date of the teste of the writ. *Amherst Boot and Shoe Mfg. Co. Ltd.* v. *Sheyn*, 2 Eq., p. 236.

Fraudulent conveyance by insolvent for valuable consideration with intent to defeat creditors—A conveyance by an insolvent debtor in good faith and for valuable consideration, though made with intent to defeat creditors to the knowledge of the purchaser, is not void under the Statute 13 Eliz., c. 5.—An interim injunction granted restraining the transfer of land by the grantee in a suit by a judgment creditor of the grantor impeaching the conveyance as fraudulent under the Statute 13 Eliz., c. 5. *White* v. *Hamm*, 2 Eq., p. 575.

Pleading — Fraudulent Conveyance — *Semble*, a bill in a suit by a judgment creditor to set aside a conveyance made by the debtor to a third person, on the ground of fraud, is sufficient if it avers that before the commencement of the suit execution upon the judgment was sued out and that it was avoided by the conveyance, though it does not aver a return to the execution.—*Black* v. *Hazen* (13 N. B. R. 272) discussed and distinguished. *Wiley* v. *Waite et al*, 1 Eq., p. 31.

Reconveyance of land received as consideration of maintenance—An insolvent debtor being in expectation that his property would be seized under execution conveyed to his father, who had a knowledge of his son's insolvency, land previously conveyed by the father to the son in consideration of the son's bond to support and maintain him and his wife for their lives.—After the conveyance to the father he conveyed the land to the son's wife in consideration of her paying off a mortgage upon the land and agreeing to support the father and his wife.—*Held*, that the conveyance from the son to the father, having been made *bona fide* and for valuable consideration, and not for the purpose of retaining a benefit to the son, was good within the statute 13 Eliz., c. 5, though made for the purpose of preferring the father as against other creditors. *Atkinson* v. *Bourgeois*, 1 Eq., p. 641.

Sale for valuable consideration—Creditor defeated—On February 10th, 1908, the plaintiff D. commenced an action at law against the defendant M., a verdict was given for D. and judgment was signed for $764.58 on June 5th, 1908, which judgment still remains unsatisfied.—On May 20th, 1908, M. conveyed certain real estate which he owned in Charlotte county to his son A. M. for the consideration of $900, taking in part payment a mortgage for $500, accompanied by a promissory note for a like amount.—A. M. performed work for his father M. and on May 20th, 1908, the latter was indebted to him in the sum of $400, which with the mortgage for $500 made up the sum of $900 the consideration for which M.'s property was conveyed to A. M.—M. was not insolvent at the time he made the conveyance to his son A. M.—The only creditors he had besides his son were the plaintiff, and his solicitor to whom he owed a small amount for professional services rendered in connection with D.'s suit against him.—*Held*, that the conveyance would not be set aside and the bill must be dismissed, as the evidence showed that the sale was made *bona fide* for a valuable consideration with the intent to pass the property, and in such a case it was immaterial whether or not there was an intention to defeat or defraud a creditor. *Dyer* v. *McGuire et al*, 4 Eq., p. 203.

Title through fraudulent conveyance as opposed to unregistered lien—In an action for conversion the plaintiff claimed title under a registered bill of sale which the jury found was made without consideration, and in fraud of creditors, the defendant justified the taking under an unregistered lien note given subsequent to the bill of sale. —*Held*, on appeal, reversing the judgment of Carleton J., that the verdict was properly entered for the defenant. *Poitras* v. *Pelletier*, 38, p. 63.

Voluntary deed defeating or hindering creditors—A. and his wife and three sons, F., J. and R. lived on A.'s homestead farm. —A. helped F. buy an adjoining farm.—Both farms were worked by A. and the sons.—Two years later, A., wishing to provide for his other sons, made an agreement with F. in pursuance of which F., conveyed his farm to J. for a nominal monetary consideration, and A. for a like consideration conveyed the homestead to F. who had agreed to convey half thereof to R., and did so. —There was a verbal understanding that F. should support A. and wife on the homestead. —By this conveyance A. practically denuded himself of all his property except the crop then in the ground, the proceeds from which F. agreed should go to pay A.'s debts.—The crop failed.—No express intention was shown to defeat, hinder or delay creditors.—In a suit brought by a creditor of A. to set aside the deeds from A. to F., and F. to R., as void under Statute 13 Eliz., c. 5, *held*, that the deeds were voluntary and without valuable consideration, in whole or in part, and as their effect was to defeat, hinder and delay creditors, they were void.—Even if the agreement to support was in such a condition that it could be enforced, it was not a consideration sufficient to support the deed against the plaintiff; nor was the fact that the sons worked at home a consideration.—*In re Johnston*, 20 C. D. 389 distinguished. *Jack* v. *Kearney*, 4 Eq., p. 415. Reversed 41 N. B. R. 293 but confirmed S. C. of C. unreported.

GAME ACT.

Review of conviction under C. S. 1903, c. 33—Where the County Court judge of York county quashed on review a conviction made by a magistrate of Northumberland county under the Summary Convictions Act, C. S. 1903, c. 123 for taking one caribou contrary to the provisions of the Game Act, C. S. 1903, c. 33, s. 3 (1) (a) on the ground that *mens rea* was a necessary part of such offence, and was not proved, *held* (1) a County Court judge has jurisdiction to review such conviction though the offence was committed and the case tried in a county for which he is not a County Court judge (*Ex parte Graves* 35 N. B. R. 587 followed); (2) that under the facts the order of the County Court judge should not be disturbed; —*Held* (*per* Barker C. J., Barry and McKeown JJ.), where there is no want or excess of jurisdiction the judgment of a County Court judge on review should not be disturbed.—*Held* (*per* Landry, McLeod and White JJ.), the Supreme Court in the exercise of its inherent jurisdiction to supervise the proceedings of inferior tribunals may set aside the order of a County Court judge on review in order to prevent a gross miscarriage of justice. *R.* v. *Wilson Ex parte Fairley*, 39, p. 555.

GAMING.

See CONTRACT II 2.

GARNISHMENT.

Debts assigned cannot be attached—An attaching order under the Act 45 Vict., c. 17, will not operate upon debts of which the judgment debtor has diverted himself by assignment, even though the assignment may be void as against creditors under the Statute of 13 Eliz., c. 5. *Ex parte Black*, 34, p. 638.

Election deposit put up by person other than candidate—A. loaned B. a candidate for election to the Commons of Canada, the sum of $200 to deposit with the returning officer as required by R. S. C. c. 8 s. 22.—B. was not elected but received a sufficient number of votes to entitle him to a return of the money so deposited.—Before the money was paid over, C. a judgment creditor of B. garnisheed the money in the hands of the returning officer.—*Held* (Landry J. dissenting) that the money deposited belonged to A. not B. and the attaching order was properly set aside. *Ex parte Peck* 33 p. 623.

Exemptions—Costs—The salary for services for deputy sheriff and goaler cannot be termed "wages" so as to entitle to exemption of twenty dollars under 45 Vic., c. 17 s. 33. —The judgment debtor in an application to set aside garnishee proceedings having denied any wages were due him from the garnishee, would be thereafter estopped to claim any exemption for wages due.—It is no ground for certiorari that the County Court judge ordered the costs of the garnishee order and application to be taxed by the clerk of the Supreme Court instead of taxing them himself. *Ex parte Bowes*, 34, p. 76.

Trust fund. Attaching—An attaching order under the Act 45 Vic., c. 17, will not lie against the income of a trust fund, unless there are trust moneys actually in the hands of the trustees at the time the order is served. *Ex parte Black*, 34, p. 638.

See also *Black* v. *Moore*, 2 Eq., p. 98.

Trust fund in bank—A sum of $800,00 was deposited in a bank by A. G. to the credit of T. G. for the specific purpose of satisfying a distress warrant for $750.00 levied against T. G. by S., which warrant A. G. had agreed with S. to pay.—*Held*, the $800.00 was held by T. G. in trust and that no part of that sum was liable to attachment by his judgment creditor. *R.* v. *McLatchy*, *Ex parte Gorman*, 39, p. 374.

GIFT.

Bank account in joint names, either to draw—The mere fact that money has been deposited in a bank by a testator in the joint names of himself and his daughter with power to either to withdraw raises no presumption that a gift of the fund to the daughter was intended. *In re Estate Paul Daley*, 37, N. B. R., p. 483; 39 S. C. R., p. 122.

See also *Clark* v. *Clark*, 4 Eq., p. 237; *VanWart* v. *Diocesan Synod of Fredericton*, 42, p. 1, C. D.

Delivery for safe keeping, not a gift or donatio mortis causa—A person on his deathbed handed to his wife out of a satchel which he kept in a closet of his bedroom $2,000 in bonds and $1,550 in cash, telling her to "take them and put them away; wrap them up and lock them up in your trunk."—At the same time he handed to her a pocket book containing $150, saying that it was for present expenses.—A few minutes later he handed to his business partner the remaining contents of the satchel, consisting of $1,000 belonging to the firm. —Subsequently he made a will bequeathing to his wife $3,000, a horse, two carriages, and all his household effects; to his partner his interest in partnership property; to two grand-nephews $500 each; and to nieces and nephews the residue of his estate.—His private estate was worth $7,500.—When giving directions for the drafting of his will, on the amount of the legacies to his wife and grand nephews being counted up, he said, "there is more than that."—*Held*, that there was not a *donatio mortis causa* to the wife, the deceased intending no more than a delivery for safe-keeping. *The Eastern Trust Co.* v. *Jackson*, 3 Eq., p. 180.

Endorsing of accommodation note—Promise to pay same—*Semble*, that where the payee (deceased) on endorsing a promissory note for the accommodation of the maker promises without consideration to pay it, this does not constitute a gift nor create a liability against the estate *inter se*. *Johnston* v. *Hazen*, 3 Eq., p. 341.

Husband and wife — Joint bank account—Presumption of gift rebutted—Where money was deposited in a bank by a husband in the joint names of himself and wife, the presumption of a gift enuring for the benefit of the wife as survivor was held to be rebutted by showing that the wife's name was added as a matter of convenience for the husband, who, through physical incapacity, was unable to attend personally at the bank.—The mere fact that the money was made payable to either or the survivor did not make the presumption irrebuttable. *VanWart et al Executors etc. of James W. Belyea* v. *The Diocesan Synod of Fredericton et al*, 42, p. 1, C. D.

Husband and wife—Purchase by husband of surrenders of leases of wife's freehold—*Held*, on appeal, affirming the judgment of the Court below, that where a husband in the management of his wife's property, of which he was receiving the benefit, purchased certain freehold lots with his own money, with a view of improving his wife's estate, and took the conveyance in her name, the purchase money is not a charge upon the property, and so between husband and wife the presumption is that a gift was intended, unless displaced by evidence necessary to establish a resulting trust in his favor.—The onus is upon the husband of establishing a resulting trust in his favor in land purchased by him in the name of his wife. *DeBury* v. *DeBury*, 36, p. 57.

Husband and wife—Purchase by husband in wife's name—Where property purchased by a husband as a home for himself and wife was by his direction conveyed to her, so that the title might be in her in case of his death, it was held that a gift was intended, to take effect upon his death if she should survive him. *Evans* v. *Evans*, 3 Eq., p. 216.

Insurance (accident) policy—Gift from husband to wife—By a written application dated 26th February 1896, C. applied to the Norwich and London Accident Insurance Association for $2,000 accident insurance, the policy "to be payable in case of death by accident under provisions thereof to M." wife of the deceased.—The company issued its policy, payable to the representatives or assigns of the assured.—M.'s name was not mentioned in the policy, neither was there anything in it to indicate in any way her as a beneficiary.—M., as administratrix of C., brought an action on the policy for the recovery of the $2,000.00.—The action was afterwards settled by the company paying the $1,000 now in dispute to the administratrix in discharge of the policy.—On an application to pass the administratrix's account before the judge of probate, it was claimed on behalf of the creditors of C. that the administratrix should account for the $1,000, as assets of the estate, and on behalf of M. that she was the sole beneficiary under the policy, and the money formed no part of C.'s estate.—It appeared by the evidence of one of the chief agents of the company, that it was not the practice of the company in a case of this kind, notwithstanding the terms of the application, to issue a policy payable to the beneficiary named therein, but they held themselves bound in case of death, to pay the amount due to the beneficiary named in the application.—It also appeared C. told M. the policy was payable to her, and he gave it to her when he took it out.—The judge of probate held that the money paid under the policy belonged to the estate of C.—From this decision the administratrix appealed.—*Held* (*per* Landry, Barker, McLeod and Gregory JJ., Tuck C. J. and Hanington J. dissenting), that there was no complete gift *inter vivos* of the policy and fund to M. from her husband; and the intended gift being purely voluntary and incomplete the court would not complete it, and there was no trust created and declared in her favor.—Apart from the act 58 Vict., c. 25, no interest would pass to M. even had she been named in the policy as beneficiary, merely by reason of that fact, and if C. wished such interest to pass he must have left the money to her by will or settled it upon her during his life.—*Held* (*per* Tuck C. J. and Hanington J.), that the transaction was a gift final, complete and executed as between C. and his wife M. and one that if necessary a Court of Equity would compel the legal representatives of C. to carry into effect. *Cornwall* v. *The Halifax Banking Co.*, 35, p. 398.

Reversed 32 S. C. R., p. 442 (gift upheld.)

Trust — Bank book — Joint account — A deceased person in her last illness, and shortly before her death, handed to the defendant a government savings bank pass-book in which was credited in the names of the defendant and the deceased a sum of money deposited in their names, and at the same time told the defendant to pay to the plaintiff $400 out of the bank, pay some debts owing by the deceased, and her funeral expenses, to which the defendant assented.—The money on deposit belonged to the deceased but could be withdrawn by the defendant on delivery up of the pass-book, before or after the deceased's death.—*Held*, (1) that the pass-book was a good subject of a *donatio mortis causa*; (2) that there was a valid *donatio mortis causa* constituted by trust, and enforceable in equity, in favor of the plaintiff. *Thorne* v. *Perry*, 2 Eq., p. 146; 35 N. B. R., p. 398.

Undue influence—The doctrine of undue influence and the burthen of proof in cases of voluntary gifts *inter vivos* considered.

Bradshaw v. *The Foreign Mission Board of the Baptist Convention of the Maritime Provinces* 1 Eq., p. 346.

Undue influence — Incapacity of donor—Where at the time of the execution of a deed of conveyance the grantor was 70 years of age, was sick and in feeble health, and it was the opinion of some witnesses, though not of others, that he did not understand the nature of his act; and the effect of the deed was to deprive him of means of support, and the evidence was uncertain respecting the existence of adequate consideration for the deed, and favored the view that it was intended as a gift, the deed was set aside. *Winslowe* v. *McKay*, 3 Eq., p. 84; 37 N. B. R., p. 213.

Will — Testamentary gift — Gift inter vivos—Delivery—J. A. C., the testator died April 15th, 1907.—In his will, which was dated March 13th, 1906, there was the following residuary clause: "all the rest and residue of my estate, real and personal excepting only such personal property as may be found in my private cash box or in my box in the vaults of the Bank of New Brunswick, St. John, and which I had already given to my daughter Hannah Gertrude, to meet the immediate personal necessities of herself and her sister Jean, I give in trust to my executors, etc."—On or before April 11th, 1905, the testator gave to J. S. C., one of the executors afterwards named in his will, an envelope which J. S. C. believed to contain securities, and which the testator at that time stated he had given to his daughter H. G. C., and requested J. S. C. to take the envelope and deposit it in a vault box in the Bank of New Brunswick.—J. S. C. leased a vault box as directed, in the names of J. A. C. and H. G. C., either to have access, and gave both the keys of the box to J. A. C.—After J. A. C.'s death, a number of securities were found in the private cash box, and in the vault box an envelope containing securities was found, addressed "Rev'd. John A. Clark, Hannah Gertrude Clark," and also a number of loose securities. —*Held*, that only those securities which had been actually assigned, and to which she had the legal title, and which were therefore ear-marked for her, were the property of H. G. C., as given to her by the testator during his lifetime.—*Held*, *also*, that in respect to the other securities there was no perfected gift *inter vivos*, as no delivery had been shown; that there was no valid testamentary gift to H. G. C.; and that therefore the other securities were a part of the testator's residuary estate.—Where the only evidence of a gift of a promissory note is its endorsement to the alleged donee without delivery, the title does not pass.—Money deposited by one, in a savings account, in his own name and another's, payable to the survivor, as a rule becomes the property of the survivor absolutely.—*In re Paul Daley* (37 N. B. R. 483) distinguished. *Clark* v. *Clark et al Executors*, 4 Eq., p. 237.

GUARANTEE.

See PRINCIPAL AND SURETY—COMPANY LAW.

GUARDIAN.

See INFANT.

HABEAS CORPUS.

Appeal — County Court Judge — Liquor License Act—No appeal lies from a decision of a judge of a County Court, under section 105 of the Liquor License Act, C. S. 1903, c. 22., from an order made under habeas corpus proceedings discharging a prisoner in custody for default of payment of fines imposed for offences against the Liquor License Act. *McCrea* v. *Watson*, 37, p. 623.

The jurisdiction of the judges of the Supreme and County Courts is co-ordinate in the matter of habeas corpus. *Id.*

Bastardy Act — Defendant under recognizance—Defendant was arrested upon a warrant under the Bastardy Act, C. S. 1903, c. 182, and after examination of the complainant was released, under s. 8 of the Act, upon his recognizance to stand trial at the next term of the County Court.—*Held*, defendant was not entitled to a writ of habeas corpus *cum causa*, such process being intended to give relief only to persons in actual custody wrongfully. *Ex parte Seriesky*, 41, p. 475.

County Courts—The County Courts of New Brunswick are not Courts of Oyer and Terminer and general gaol delivery; therefore the Court refused to discharge, on habeas corpus, a prisoner who had been committed for trial for an offence against the provisions of the Criminal Code, 1892, s. 270. *Ex parte Wright*, 34, p. 127.

Discharge by habeas corpus as basis for action of malicious prosecution—In an action for malicious prosecution a statement in the declaration that the plaintiff was discharged from custody under a habeas corpus order, whereby the prosecution was determined, is not a sufficient allegation of the determination of the prosecution and is bad on demurrer. *McKinnon* v. *The McLaughlin Carriage Co. Ltd.*, 37, p. 3.

Habeas corpus refused—Crime committed at Sydney—Tried at Halifax—A prisoner arrested in the city of Halifax, in the province of Nova Scotia charged with unlawfully breaking and entering a store situate at Sydney in the said province, may be tried at Halifax by a stipendiary magistrate having jurisdiction within the city of Halifax, if he consents to be tried summarily without a jury under section 785 of the Crimina[l]

Code 1892, as amended by the Criminal Code Amendment Act 1900. *R.* v. *Warden of Dorchester Penitentiary, Ex parte Seeley*, 38, p. 517.

Illegal commitment founded on good conviction—Where a person is in custody under a warrant of commitment, founded on a good conviction, the Court will not quash the commitment on certiorari, even if it is illegal.—The proper procedure is by way of habeas corpus. *R.* v. *Melanson, Ex parte Bertin*, 36, p. 577.

Jurisdiction of County Court judge—A judge of a County Court has no jurisdiction to grant an order under the Habeas Corpus Act, C. S., c. 41, where the person applying is not confined within a county of which he is a judge.—Where there is conflicting evidence in a case for selling liquor contrary to the Liquor License Act, 1896, the finding of the committing justice on questions of fact can not be reviewed on an application for an order in the nature of a habeas corpus. *R.* v. *Wilson, Ex parte Irving*, 35, p. 461.

(Explained and commented upon *Ex parte Graves*, 35, p 587.)

Motion for discharge — Conviction under Canada Temperance Act—Separate informations were laid against the accused charging him with having committed twenty offences against the Canada Temperance Act at different hours on April 25, 26, 27 and 28, 1914.—On being brought before the magistrate on a warrant he pleaded not guilty to the first information; an offence was proved and the magistrate ruled the accused was put upon his defence.—No defence was offered.—The magistrate reserved his adjudication and called upon the accused to plead to the second information, —The accused, who appeared by counsel, objected to the magistrate's proceeding with the second and subsequent informations until the first was disposed of.—The objection was overruled and the accused pleaded not guilty and the magistrate proceeded and dealt with the second and eighteen subsequent informations in the same manner as he did with the first, the accused by his counsel objecting in each case as he had done in the first.—At the conclusion of the evidence of the prosecution on all the informations the magistrate adjudicated in each case, finding the accused guilty and imposing a fine of $50.00 and costs in each case. —Before each adjudication he asked the accused if he wished to offer any defence and the accused by his counsel stated that he did not intend to do so.—*Held* (*per* White and Barry JJ., Crocket J. dissenting), that the postponement by the magistrate of his decision until he had disposed of all the cases, did not, under the circumstances, afford a sufficient ground for quashing the convictions, and assuming that it is established that the magistrate did not afford the accused a fair opportunity of making a defence until the conclusion of the case of the prosecution on all the informations, the objection was one to procedure and not to jurisdiction and was no ground for quashing the convictions under the Canada Temperance Act.—Where several convictions are made against the same person for distinct offences at the same time, the magistrate is justified in imposing the costs of conveying to gaol in each conviction.—If the costs imposed are excessive the excess should by amendment be striken out.—Imprisonment not exceeding three months may be imposed in a conviction under the Canada Temperance Act in default of goods.—*Held* (*per* Crocket J.), that the return and affidavits disclose facts showing that the accused had not a fair opportunity of making his defence, and the magistrate in making the convictions acted without jurisdiction and the convictions should be quashed and an order for discharge of the defendant under the habeas corpus proceedings made. *R.* v. *Steeves, Ex parte Richard*, 42, p. 596.

Second arrest on same warrant—The prisoner, who had been arrested under a warrant to serve a sentence of imprisonment for an offence against the Canada Temperance Act, was, upon his own request, suffered to go at large for a time by the officer who had the execution of the warrant. —Shortly after he was again arrested upon the same warrant and conveyed to the county gaol to serve his term of imprisonment.—Upon an application for an order in the nature of a habeas corpus, *held* (*per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ., VanWart dissenting), that the second arrest upon the same warrant was legal, and that the order should be refused. *Ex parte Doherty*, 35, p. 43.

HAWKING AND PEDDLING.

Arrest for peddling without a license —Jurisdiction—The defendant, a justice of the peace, without any information having been laid before him, issued a warrant against the plaintiff for peddling without a license, contrary to C. S. 1903, c. 175.—A constable arrested the plaintiff under the warrant, but before doing so asked him to exhibit his license, which the plaintiff could not do. —In an action for false arrest defendant sought to justify under s. 6 of the Act, but *held* (*per* Barker C. J., McLeod, White and Barry JJ, Landry J. dissenting), that although the defendant was liable to arrest under s. 6, the warrant was issued without jurisdiction and the arrest having been made thereunder, defendant was liable. *McCatherin* v. *Jamer*, 41, p. 367.

Licence — What constitutes hawking and peddling—One who travels about from house to house for the purpose of selling sewing machines, carrying with him only one machine as a sample, his stock being stored in a shop rented for the purpose, cannot be convicted under the act of Assem-

bly 58 Vict., c. 39, s. 4, of hawking or peddling goods without a license.—*Semble*, that proof of a single act of sale of goods or merchandise against a man does not constitute him a hawker or peddler within the meaning of the above act. *R.* v. *Phillips*, 35, p. 393.

HIGHWAYS

See WAY.

HIRE OF GOODS

See BAILMENT.

HUSBAND AND WIFE.

1. Action by and Against—Parties and Services.
2. Alimony—Alimentary Allowances.
3. Divorce and Separation.
4. Marriage.
5. Matrimonial Offences.
6. Separate Property of Wife.
7. Transactions between Husband and Wife.
8. Miscellaneous Cases.

1. Actions by and against.

Action against wife—Separate property—In an action against a married woman on a contract it is not necessary under the Married Women's Property Act of 1895 to allege on the record, or prove on the trial as a fact that either at the time the contract was made, or at the time the action was commenced she had or was possessed of separate property. *Johnson* v. *Jack et al*, 35, p. 492.

Action by wife—Joining husband—The plaintiff, a married woman, who was one of the unpaid legatees under W.'s will, obtained letters of administration *de bonis non* of W.'s estate, and filed a bill against the defendant to have the estate administered in equity, an account taken of the unadministered assets received by the defendant, and payment of the same to the plaintiff.—The plaintiff did not make her husband a party to the suit.—*Held*, that the bill should be amended by making plaintiff's husband a co-plaintiff.—Section 18 of the Married Women's Property Act, 1895, does not apply to suits commenced before the Act came into force. *Walsh* v. *Nugent*, 1 Eq., p. 335.

Action by wife — Parties — Demurrer—Where a husband is made a plaintiff with his wife in a suit relating to her separate estate, the objection that the suit should have been brought by the wife's next friend may be taken by demurrer. *Alward et al* v. *Killam*, Eq. Cas., p. 360.

Action by wife re separate property—Parties—Husband and wife should not be joined as co-plaintiffs in a suit relating to the wife's separate property.—The suit should be in the name of the wife's next friend, or, since The Married Women's Property Act, 58 Vict., c. 24, it may be in the wife's name. *Cronkhite* v. *Miller*, 2 Eq., p. 51.

2. Alimony.

Costs of prosecuting suit for divorce—In a suit by a wife for divorce *a mensa et thoro* the libel was dismissed with costs.—Pending an appeal to the Supreme Court an order was made by the judge of the Divorce Court for alimony but an application for suit money pending the appeal was refused.—The appeal was *bona fide* and it appeared that the plaintiff had no means to prosecute such appeal.—*Held*, that the plaintiff was entitled to suit money as well as alimony pending the appeal, and the matter was referred back to the judge of the Divorce Court to fix the amount of the suit money. *Currey* v. *Currey*, 39, p. 440.

3. Divorce and Separation.

Cruelty—Findings by judge—In a suit for divorce *a mensa et thoro* on the ground of cruelty plaintiff must prove either actual bodily hurt or injury to health or such acts or circumstances as are likely to produce an apprehension of such hurt or injury.—The trial of this suit was begun in the Court of Divorce and Matrimonial Causes before Gregory J and, after his resignation, continued before McKeown J. who delivered judgment dismissing the plaintiff's libel with costs, on the ground that there was not sufficient evidence of cruelty.—The judge assumed, for the purposes of his judgment that the plaintiff's testimony was correct, but made no findings on the other evidence, which was very contradictory.—A considerable portion of the evidence was read to McKeown J. from the stenographer's notes.—On appeal, *held* (*per* Landry, Barry, McKeown JJ.), that the appeal should be dismissed with costs. *Held* (*per* Barker C. J., McLeod and White JJ.), that the appeal should be allowed with costs, on the grounds (1) that the rule that findings of fact by a trial judge should not be set aside unless clearly wrong does not apply where the judge did not see and hear the witnesses during a large portion of the testimony; and (2) that there was sufficient evidence of cruelty to entitle the plaintiff to a divorce *a mensa et thoro*, *Currey* v. *Currey*, 40, p. 98.

Evidence—In the Court of Divorce and Matrimonial Causes the amount of credence to be given to the witnesses is entirely for the judge who hears the case.—Therefore on the trial of a libel filed by the wife for a divorce *a vinculo matrimonii* on the ground of the adultery of the husband when the presiding judge accepted the evidence of a single witness to prove the adultery as to which fact she was not corroborated though on other matters she was, and entirely rejected the uncontradicted statements of several witnesses called to prove immoral conduct on the part of the wife it was *held* that he had a right so to do. *Bell* v. *Bell* 34 p. 615.

4. Marriage, etc.

Marriage settlement made in Quebec —Registration a nullity—By an ante-nuptial contract entered into in Quebec, the intending husband endowed his future wife in a sum of money as a dower prefixed chargeable at once upon his property in New Brunswick.—The contract was executed in Quebec before a notary.—A copy of the contract certified to by the notary was registered in Madawaska county.—Subsequently to its registration a mortgage by the husband of his real estate in Madawaska county to the plaintiff was registered in that county.—The plaintiff was a purchaser for value and had no notice of the ante-nuptial contract.—*Held*, that as the Registry Act, c. 74, C. S., provides only for the registration of an original instrument, except in certain cases, the copy of the marriage contract was improperly on the records and the marriage contract was not entitled to priority over the plaintiff's mortgage.—Section 69 of the Registry Act, 57 Vict., c. 20, providing that the registration of any instrument under the Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration, notwithstanding any defect in the proof for registration does not apply where the registration is a nullity, as where the proof of the execution required by the Act is wanting. *Murchie* v. *Theriault*, 1, Eq., p. 588.

5. Matrimonial Offences.

Adultery — Second marriage in good faith—Dower—A wife voluntarily separated from her husband after having lived with him for three years.—Nine years later she married again, knowing that her first husband had married, and believing that he had obtained a divorce from her and that she was at liberty to marry.—Subsequently she learned that her second marriage was illegal, and she immediately left her second husband.—*Held*, that under the Stat. 13 Edw. 1, c. 34, the dower right of the wife in the estate of her first husband was not barred by her subsequent cohabitation with another, as she acted *bona fide*, believing on reasonable grounds that she was legally entitled to marry again. *Phillips* v. *Phillips et al*, 4 Eq., 115.

See also ADULTERY under title "CRIMINAL LAW.

6. Separate Property of Wife.

Action re separate property—See supra section 1.

Agency of husband to accept surrender of lease—Authority to accept surrender of a lease will not be implied from the fact that a husband living with his wife has collected the rents of the property and looked after repairs made. *R.* v. *Forbes, Ex parte Bramhall*, 36, p. 333 (A. D. 1903)

Agency of husband — Brokerage — Onus of proof—The burden of proof is on the person dealing with any one as an agent, through whom it is sought to charge another as principal and it must be shewn the agency did exist and that the agent had the authority he assumed to exercise, therefore, authority of a husband to make a contract on behalf of his wife to pay brokerage commission for procuring a lessee of her property will not be implied from the fact that he lived with his wife and managed her hotel and had on a previous occasion leased the same and sold some of her furniture through a broker who had been paid a commission, and a lease had subsequently been made by the wife to the person introduced by the plaintiff, even though the wife is not called on the trial and no evidence is adduced to rebut the alleged authority. *McCormack* v. *Gallagher*, 44, p. 630.

Agency of husband — Estoppel — The plaintiff in the Court below, a married woman, was the owner in fee of a lot of land through which flowed a stream, too small however in the natural state for stream-driving purposes.—The land had previously been owned by the plaintiff's husband who, both while such owner and afterwards had assisted as a laborer in constructing a driving-dam above the plaintiff's lot.—The defendants' logs were driven by means of the driving-dams which were owned by them, and such user flooded the plaintiff's intervale and injured the banks of the stream.—*Held* (Hanington J. dissenting), (1) that the plaintiff was not estopped from taking proceedings to restrain further injury to the property and from claiming damages for the injury done; (2), that the acquiescence, or leave and license, by which a person can be deprived of his legal rights, must be of such a nature and given under such circumstances as will make it fraudulent in him to set up these rights against another prejudiced by his acts.—Quaere:—Whether the plaintiff's husband could give leave and license to the injury of her inheritance. *Wright et al.* v. *Mitten*, 34, p. 14.

Contract with respect to separate property, Requisites of—Where it is sought to charge the separate property of a married woman with a debt contracted by her, it must be shown under chapter 72, C. S. N. B. that she expressly contracted with respect to her separate property.—Where it is sought to charge the personal property of a married woman, her consent thereto must be given under chapter 72 C. S. N. B., and a joint and several note signed by her and her husband in payment of the husband's debt, is not such a consent as is required by the Act.—Observations that property belonging to a married woman is made her separate property by chapter 72, C. S. N. B. *Gaskin* v. *Peck et al*, Eq. Cas., p. 40.

Deed by wife only—Under the Married Women's Property Act, 58 Vict., c. 24, a married woman married before the commencement of the Act may make a conveyance without her husband's concurrence of her real estate not acquired from him during coverture, subject however to his tenancy by the curtesy consummate. *DeBury* v. *DeBury* No. 1, 2 Eq., p. 278; 36 N. B. R., p. 57.

Deed by wife of property received from husband—A married woman cannot, during her husband's lifetime, transfer either the title or possession of property acquired from her husband during coverture. *DeBury* v. *DeBury*, 36, p. 57.

Equitable mortgage — Decree charging estate with debt — Priorities — A married woman owning leasehold land as her separate estate, agreed by parol with A. that in consideration of his building a house thereon, she would secure him by a mortgage of the premises, and the house was accordingly built.—Subsequently she became indebted to the plaintiffs, and they obtained a decree charging her separate estate with their debt.—The decree was never registered.—After the decree, she gave a mortgage to A. in accordance with her agreement with him, and the mortgage was duly registered.—In a petition by A. to have the mortgage declared a valid charge upon the property in priority to the plaintiffs' decree, *held*, that the plaintiffs' decree must be postponed to the equities existing against the property in favour of A. at the time of the decree. *In re The Petition of William G. Bateman*; *Chute et al* v. *Amelia Gratten et al*, Eq. Cas., p. 538.

Expenditures by husband on wife's estate—The changed condition in the husband's status brought about by the Married Women's Property Act, 58 Vict., c. 24, by which the marital rights of a husband to his wife's property have been materially curtailed, does not give him an equity to be compensated for the purchase of the surrender of leases of property of which the wife had acquired a reversionary interest, and for moneys expended in making useful and necessary repairs upon the leasehold premises.—The effect of the surrender is a merger of the outstanding term of years in the greater estate. *DeBury* v. *DeBury*, 36, p. 57.

Lost grant, Presumption of—When there is a legal presumption of a lost grant there is no more difficulty in presuming one made by husband and wife than one made by the wife only.—(Barker C. J.) *McGaffigan* v. *The Willett Fruit Co. et al*, 4 Eq., p. 353.

Marriage Settlement—See Section 4.

Mortgage by wife—Absence of husband's consent—A purchaser under a mortgage of the property of a married woman, executed by her while living with her husband prior to the Married Women's Property Act, 1895, not appearing to have been executed with the consent of her husband and not acknowledged as the statute requires, cannot maintain ejectment against the mortgagor.—In the absence of any evidence to the contrary, it will be presumed that a married woman is living with her husband. *Everett* v. *Everett*, 38, p. 390.

Mortgage — Verbal agreement — Statute of Frauds — Lien — A married woman procured the plaintiff to make payments from time to time on account of the principal and interest of a mortgage on freehold property forming part of her separate estate, by verbally undertaking to have an assignment made of the mortgage, or to convey the mortgaged premises to the plaintiff.—*Held*, that the agreement not being in writing could not be specifically enforced, but that it was binding on the separate estate of the married woman, including the realty, and that the plaintiff should be paid out of the same, with interest. *Bulley* v. *Bulley*, Eq. Cas., p. 450.

Payment to husband of account due wife—Lack of agency—The plaintiff, a married woman, carried on a meat and provision business at 28 Main street, in the city of Saint John, at a shop called "Ross's Meat Store."—Prior to November, 1912, when the business was transferred to the plaintiff by bill of sale, it had been carried on by the plaintiff's husband at the same place in his name.—At the time the debt sued for was contracted, the plaintiff's husband lived with her and was employed as an assistant in the business.—The defendant knew the business belonged to the plaintiff and intended to deal with her.—The account sued for was made out to Ross's Meat Store, and through an error of a clerk of the defendant and an oversight of its manager, a cheque was made payable to the plaintiff's husband or his order and was sent to him by mail.—The cheque was received by the husband, cashed, and the proceeds retained.—At the time the cheque was received the husband and wife were living separate and apart.—*Held*, reversing the judgment of Forbes J., that there was

no evidence to support the finding that payment of the claim to the husband was a valid payment of the debt due to the wife. *Ross* v. *The New Brunswick Construction Co.*, 43, p. 291.

Taxes on wife's property assessed to husband—An assessment under 3 Geo. V. c. 21, in respect of land owned by plaintiff made against plaintiff's husband, with her knowledge and without objection by her, she having from time to time paid former taxes so assessed, is valid, and plaintiff is estopped from contending that property is improperly assessed.—*R.* v. *The Town of Grand Falls, Ex parte The Grand Falls Co. Ltd.* (1913) 42 N. B. R. 122, distinguished. *Byrne* v. *The Town of Chatham et al*, 44, p. 271, C. D.

Wife separated, not wilfully or of her own accord—A married woman, being the owner in fee at the time of her marriage of a lot of land, was compelled to live separate and apart from her husband, not wilfully and of her own accord.—*Held*, that while such separation continued she was entitled to an injunction restraining her husband from enjoying any marital rights in the property, or interfering with its use and occupation by her. *Johnston* v. *Johnston*, 1 Eq., p. 164.

Will—Trust for daughter—Continuance during coverture—W. by her will gave and devised all her real and personal estate unto J. as executor and trustee, his heirs and executors, to hold the same to the sole use of her daughter during her natural life, and after her decease, unto the use of her heirs, and also willed and devised that her said executor and trustee should sell and dispose of any real or personal estate that she might died siesed or possessed of, and after payment of her just debts, and funeral and testamentary expenses, invest the proceeds in such securities as he might think fit, and that he should annually or semi-annually pay the interest accruing on such securities to her said daughter, and in case of her death to her children.—The daughter survived the testatrix.—*Held*, (1) that the daughter took an absolute interest; (2) that the trust continued during the daughter's marriage. *Nealis* v. *Jack*, Eq. Cas. p. 426 (A. D. 1890).

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7. Transactions between Husband and Wife.

Advancements—A purchase by a husband in the name of his wife is presumed to be an advancement to the wife, and the presumption will not be rebutted by the fact of the husband devising the property by will. *Leonard* v. *Leonard*, 1 Eq., p. 576.

Chattel mortgage from husband to wife—J. E. F. who was the husband of the plaintiff and a livery stable keeper, being indebted to C., in December, 1895, gave him a chattel mortgage of his stock, which was in the terms following: "All and singular the goods, chattels and property mentioned and set out in the schedule hereunto annexed marked A, which is to be read in connection with these presents and form a part thereof, and also any and all the property that may hereafter during the continuance of these presents be brought to keep up the same in lieu thereof and in addition thereto, either by exchange or purchase, which so soon as obtained, and in actual or constructive possession of the said party of the first part, shall be subject to all the provisions of this indenture."—The schedule was as follows: "Eight horses and harnesses now in livery stable owned by said J. E. F.; six waggons in storehouse; four pungs, coach harness, buffaloes and robes now in said stable."—In March, 1896, J. E. F., being indebted to the plaintiff, his wife, to the extent of six hundred dollars and upwards, gave her a chattel mortgage in which the property conveyed was described in almost the same words as were used in the mortgage to C., but the schedule thereto, after enumerating specifically a number of articles, concluded as follows: "Also all other goods, furnishings and articles and materials now or hereafter during the continuance of these presents used in connection with the livery stable now owned by the said J. E. F. and all property hereafter acquired therein."—In July, 1896, C. assigned to the defendant his mortgage, which had been reduced to two hundred and seventy-two dollars for a consideration of two hundred and fifty dollars, but the assignment was silent as to after-acquired property.—In September, 1896, J. E. F. gave a further chattel mortgage to defendant, which covered all the property he had formerly mortgaged to plaintiff, and shortly after handed him a delivery order authorizing the defendant to take possession of everything connected with the livery stable business, which defendant did. —Plaintiff had also given to her husband one hundred dollars with which he was to buy for her a phaeton buggy.—He, without her knowledge, bought a buggy on credit for one hundred and forty dollars, which he delivered to his wife, and which was accepted by her.—This buggy, though not mentioned in any of the mortgages, was seized by defendant when he took possession under the delivery order.—The mortgage from J. E. F. to plaintiff was first drawn to secure the sum of five hundred dollars, but afterwards and before execution, the sum secured was changed to six hundred dollars in every place except in the recital, where the word "five" was inadvertently left in the place of a six.—In an action of trover for the conversion of the phaeton buggy and all the property conveyed to secure the plaintiff's debt, except such as was covered by the mortgage to C., *held*, (1) that the mortgage was not invalid by reason of its having been made by the husband directly to the wife; (2) that there was no evidence that it was made to delay or hinder creditors; (3) that it contained a sufficient description of the

mortgaged property to satisfy the Bills of Sale Act (1893) and that there was no such untrue statement in the affidavit attached to the mortgage as would invalidate it, the evidence affording a satisfactory explanation of the mistake in the recital; (4) that it was sufficient to cover after acquired property; (5) that it was not bad under the Act 58 Vict., c. 6; (6) that the mortgage to C. and the assignment thereof to defendant were insufficient to cover after acquired property; (7) that the circumstances under which the phaeton buggy was purchased made it the separate property of plaintiff, and as such it was not liable to seizure by defendant. *Fraser* v. *MacPherson*, 34, p. 417.

Contract of wife to cook for husband's lumber crew—Woodmen's lien—A contract by a married woman with her husband to cook in the lumber woods for a crew of men, whom her husband had engaged to get lumber for a third person under an agreement at a fixed price per thousand off the land of the third person, who was to furnish supplies, is not a valid contract under "The Married Women's Property Act" C. S. 1903, c. 78, and cannot be enforced as a lien under The Woodmen's Lien Act, C. S. 1903, c. 148. *Patterson* v. *Bowmaster*, 37, p. 4.

Death bed transfer to wife—Whether gift or for safe keeping—A person on his death-bed handed to his wife out of a satchel which he kept in a closet of his bedroom $2,000 in bonds and $1,550 in cash, telling her to "take them and put them away; wrap them up and lock them up in your trunk."—At the same time he handed to her a pocket book containing $150, saying that it was for present expenses.—A few minutes later he handed to his business partner the remaining contents of the satchel, consisting of $1,000 belonging to the firm,. Subsequently he made a will bequeathing to his wife $3,000, a horse, two carriages, and all his household effects; to his partner his interest in partnership property; to two grand-nephews $500 each; and to nieces and nephews the residue of his estate.—His private estate was worth $7,500.—When giving directions for the drafting of his will, on the amount of the legacies to his wife and grand nephews being counted up, he said, "there is more than that".—*Held*, that there was not a *donatio mortis causa* to the wife, the deceased intending no more than a delivery for safe-keeping. *The Eastern Trust Co.* v. *Jackson*, 3 Eq., p. 180.

Insurance (life) policy, Assignment of—Consideration given to husband—The plaintiff was named as the beneficiary in a policy of insurance on the life of her husband —The policy was taken out by the husband, and the premiums were paid by him.—By an assignment, to which the plaintiff was a party, the loss was made payable to the defendants, for valuable consideration moving to the husband.—Upon the death of the husband, the plaintiff claimed the benefit of the policy, setting up that her consent to the assignment was procured by her husband's fraud.—*Held*, that the assignment being made previous to 58 Vict., c. 25, was valid without the consent of the plaintiff. *Gnteru* v. *Williams et al*, 1 Eq., p. 401.

Payment to wife to secure signature to mortgage—Money paid to a wife by her husband to secure her execution of a mortgage of lands of which she is dowable under an agreement that she was to receive half of the money advanced is not money received by the wife from her husband during coverture within the meaning of the qualifying part of sub-section 2 of section 4 of chapter 78 of C. S. 1903, and if an honest and *bona fide* transaction, entered into in good faith, can not be impeached as a fraud against the husband's creditors. *Cormier* v. *Arsineau*, 38, p. 44.

Presumption of gift rebutted—Where money was deposited in a bank by a husband in the joint names of himself and wife, the presumption of a gift enuring for the benefit of the wife as survivor was held to be rebutted, by showing that the wife's name was added as a matter of convenience for the husband, who, through physical incapacity, was unable to attend personally at the bank. —The mere fact that the money was made payable to either or the survivor did not make the presumption irrebuttable. *Van-Wart* v. *Diocesan Synod of Fredericton et al*, 42, p. 1, C. D.

Purchase by husband in name of wife—*Held*, on appeal, affirming the judgment of the Court below that where a husband, in the management of his wife's property of which he was receiving the benefit, purchased certain freehold lots with his own money with a view of improving his wife's estate and took the conveyance in her name, the purchase money is not a charge upon the property, and so between husband and wife the presumption is that a gift was intended, unless displaced by evidence necessary to establish a resulting trust in his favor.—The onus is upon the husband of establishing a resulting trust in his favor in land purchased by him in the name of his wife. *DeBury* v. *DeBury*, 36, p. 57.

A purchase by a husband in the name of his wife is presumed to be an advancement to the wife, and the presumption will not be rebutted by the fact of the husband devising the property by will. *Leonard* v. *Leonard*, 1 Eq., p. 576.

Where property purchased by a husband as a home for himself and wife was by his direction conveyed to her, so that the title might be in her in case of his death, it was held that a gift was intended, to take effect upon his death if she should survive him. *Evans* v. *Evans*, 3 Eq., p. 216.

Where land purchased by a husband as a home for himself and wife was by his direc-

tion conveyed to her and a house was built thereon with his money, but the facts and surrounding circumstances established an intention that it was to be held by her for him, it was held that there was a resulting trust in the husband's favor.—Where, in such a case the wife claims that the money with which the property in question was purchased, and the house built, was her money, the burden of proof to the contrary is upon the husband.—An accounting and payment ordered of the moneys in the wife's possession belonging to the husband. *Palmer* v. *Palmer*, 42, p. 23, C. D.

8. Miscellaneous Cases.

Agency of wife—Canada Temperance Act—Defendant's wife sold liquor for the defendant and was convicted of selling liquor in violation of the Canada Temperance Act. —Later, on the same evidence, defendant was convicted of keeping liquor for sale.—*Held*, the defendant's conviction was good. *Ex parte Campbell*, 40, p. 350.

Distribution of estates—Next of kin to deceased child—Where a child died intestate and unmarried entitled to personal estate, leaving a father, mother, brother and sister, the father is entitled as the next of kin in the first degree to the whole of the personal estate exclusive of all others.—This rule of construction, as to the distribution of personal property, has not been in any way altered by any provision of the Married Women's Property Act, 1895.—(*Per* Hanington, Landry, Barker, McLeod and Gregory JJ.)—*Held* (*per* Tuck C. J.), that the father and mother, as next of kin, share equally in the distribution. *Lewin* v. *Lewin*, 36, p. 365.

Guardian, Married woman as sole—A married woman will not be appointed sole guardian of the person and estate of an infant. *Re Gladys Julia Freeze*, 3 Eq., p. 172.

Presumption of marriage—Where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed, although there may be no positive evidence of any marriage having taken place; and the presumption can be rebutted only by strong and weighty evidence to the contrary.—The law of the country where a marriage is celebrated determines the validity of the ceremony; the personal capacity of the parties to the ceremony depends on the law of their domicile. *Johnson et al* v. *Hazen*, 43, p. 154, C. D.

INDIANS.

Indian Act — Warrant — Jurisdiction —Amending conviction—The information for the warrant upon which defendant was arrested stated an offence under the Indian Act, R. S. C. 1906, c. 81, s. 135.—At the hearing the informant admitted that his knowledge was based on information and belief only.—Upon certiorari, *held*, the magistrate acquired jurisdiction by the information, which was sufficient on its face, and even if the warrant was bad, the conviction would not therefore be set aside. —The conviction purported to follow Form 62 of the Criminal Code, R. S. C. 1906, c. 146, but omitted to adjudge costs of commitment and also omitted to order that the costs should be paid to the informant. —*Held*, the Court would amend the conviction by adding the parts omitted. *R.* v. *Matheson, Ex parte Belliveau*, 40, p. 368.

INFANT.

Adoption of illegitimate child—Under the provisions of the Supreme Court in Equity Act, 1890, the Court cannot grant leave to adopt an illegitimate child without the consent of both its parents. *In re C. F. An Infant*, 1 Eq., p. 313.

Defendant in equity suit—An order for appearance of infant defendant will be granted at expiration of time for appearance mentioned in the summons where the bill is on file, though it has not been on file for the time referred to in section 29, c. 49, C. S. *Kennedy* v. *Case et al*, Eq. Cas., p. 242.

Ejectment by guardians—Defence of possession by and for infants—In an action of ejectment the plaintiffs claimed title as the guardians of infants appointed by the Probate Court.—At the time the action was brought the infants, who were each over fourteen years of age, were living with the defendant who occupied the premises in question with their consent and approval. —*Held*, that the defendant could not set up as a defence, that on equitable grounds he was entitled to possession for the infants as against the plaintiffs, and that the plaintiffs had no title, the Probate Court having acted without jurisdiction in appointing them guardians. *Furlotte et al* v. *LaPoint*, 38, p. 140.

Equitable lien against property of infant—A farm was conveyed by an aged couple to their son in consideration of his agreement to board them on the farm.—On the death of the son in their lifetime, leaving a wife and infant daughter, his brother, the plaintiff, at the request of the widow and the parents, took possession of the farm and performed the agreement.—*Held*, that the plaintiff was entitled to a lien on the land for money expended by him in making permanent improvements thereon and in the performance of the agreement, even though the infant heir could not be a party to the agreement. *Waters* v. *Waters*, 1 Eq., p. 167.

False imprisonment—Arrest of infant on execution—An execution issued out of a magistrate's Court on a judgment by default against an infant on his promissory note is a good answer to an action for false imprisonment under the execution. *McGaw* v. *Fisk*, 38, p. 354.

Guardian, Appointing married woman sole—A married woman will not be appointed sole guardian of the person and estate of an infant. *Re Gladys Julia Freeze*, 3 Eq., p. 172.

Guardian — Domicile — Conflicting jurisdiction of provinces — Life insurance in the Home Circle, a United States corporation, taken out by L. whose domicile was in Nova Scotia, was payable to E. in trust for L.'s infant daughter by his deceased wife. —Upon L.'s death E. was appointed guardian in Nova Scotia of the person and estate of the infant.—The infant, after her father's death, removed to New Brunswick for a temporary purpose, and B. her maternal grandfather, having been appointed guardian of her person and estate in this province, brought this suit to restrain the Home Circle from paying the insurance to E., or to any other person than B. and to restrain E. from receiving it, and obtained an interim injunction.—*Held*, that the insurance was payable to the legal personal representative of the deceased, and that the injunction should be dissolved.—*Semble*, though the Court of this province has jurisdiction to appoint a guardian of an infant residing here, but domiciled elsewhere, it will not supersede the guardian appointed by the Court of the infant's domicile unless necessary to the infant's interest. *Loasby* v. *The Home Circle, et al* Eq. Cas., p. 533.

Guardian, Father's right to be appointed—To defeat the right of a father to the custody of his child, as against its maternal grandmother, his habits and character must be open to the gravest objections. —The Court must be satisfied, not merely that it is better for the child, but essential to its safety or welfare in some very serious and important respect, before it will interfere with the father's rights.—A father cannot as a rule, by mere agreement, deprive himself of his right to the custody of his child, or free himself from his parental obligations. —*Semble*, if in consequence of an agreement by a father to give up the custody of his child to a third person, the latter has incurred pecuniary liability, the Court will protect him. *In re Annie E. Hatfield, an Infant*, 1 Eq., p. 142.

In determining whether the custody of an infant child ought to be given to the mother as against the father, under sections 182 and 183 of the Supreme Court in Equity Act, 1890, 53 Vict., c. 4, the Court will take into consideration the paternal right, the marital duty of husband and wife so to live that the child will have the benefit of their joint care and affection, and the interest of the child.—If both the parents have disregarded their marital duty in the above respect the Court will award the custody of the child to the father, unless it is satisfied that it would not be for the child's welfare. *In re Armstrong, an Infant*, 1 Eq., p. 208.

Guardian — Referee's report — Practice—A motion to confirm report of a referee on a reference for the appointment of a guardian, recommending the appointment of the father, was refused where the order of reference was not attached to the report as required by Act 53 Vict., c. 4, s. 170, and the evidence taken by the referee was not entitled in the matter, was in lead-pencil writing, contained abbreviations impossible to understand, and it appeared that relatives of the infant, except her father, had not been notified of the hearing before the referee *In re Turner, an Infant*, 2 Eq., p. 318.

Guardian, Removing, Who has left province—It is a ground for the removal of the guardian of the persons of infant children that he has removed out of the jurisdiction of the Court. *In re Lawton Infants*, 3 Eq., p. 279.

Guardian superseding guardian appointed by Court of domicile—*Semble*, though the Equity Court of this province has jurisdiction to appoint a guardian of an infant residing here, but domiciled elsewhere, it will not supersede the guardian appointed by the Court of the infant's domicile unless necessary to the infant's interest. *Loasby* v. *The Home Circle et al*, Eq. Cas., p. 533.

Guardianship in socage—As a mother can now inherit from her children she is no longer capable of acting as their guardian in *socage*.—Guardianship in *socage* may be considered as gone into disuse, and it can hardly be said to exist in the province of New Brunswick. *Hopper et al* v. *Steeves*, 34, p. 591.

Guardianship of person—Trustees for maintenance and support under father's will—Mother's rights—A testator bequeathed his estate to trustees, and directed them out of their investments of the same to set apart £1,000 "to be used by them for the purpose of educating and giving a profession to my son, provided he has not already been educated and received a profession."—He then directed the trustee to use and apply one-half of the income of the residue of the estate, as far as deemed necessary, for the maintenance and support of the said son, and that upon his arriving at the age of 25 years one-half of the estate with all accumulations thereon should be given to him absolutely.—The testator left him surviving his wife, the mother of the son mentioned in the will, and the said son, an infant of about nine years of age.—On an application by the mother of the infant to be appointed guardian of his person; *held*

that the trustees were not appointed by the will guardians of the person of the infant, that the application should be granted, and that the mother as such guardian had the power, subject to the order of the Court, of selecting the school at which the infant should be educated. *In re Taylor*, 1 Eq., p. 461.

The fact that the trust survived until the infant was 25 was an indication that no testamentary guardianship was intended, as that of necessity would cease at majority of the infant. *Id.*

Legitimacy, Proof of—To prove that C. was the legitimate son of A. by an alleged previous marriage, it was shown that he resided for two or three years at A.'s home previous to departing to learn a trade, and also at a subsequent time for a few months; that he addressed A. as "father," was treated as a member of the family, was recognized and treated by A.'s wife as his son, and by children by her as their brother; that after removal to the United States he wrote letters to A., in one of which he informed him of his (C.'s) marriage; that in an oral declaration by A. in the hearing of a witness, who was a neighbor of the family, he referred to the Christian name of his former wife, and to her personal appearance.—*Held*, that C.'s legitimacy had been proved.—Quaere, whether declarations in letters written *ante litem motam*, between D., a son of A., and G., a son of C., in which D. recognized C.'s relationship to him, were admissible in D.'s lifetime, but, *semble*, that where *prima facie* evidence of C.'s legitimacy had been given, declarations in G.'s letters, he being dead, were admissible. *Johnston* v. *Hazen*, 3 Eq., p. 147.

Lost grant—Infancy of itself does not rebut the presumption of a lost grant.—*Obiter dictum* Barker C. J. *McGaffigan* v. *The Willett Fruit Co. et al*, 4 Eq., p. 353.

Maintenance and education, Trust for—Relieving parent of expense—A testator by his will gave his estate to trustees in trust to pay over the net income to the support, maintenance and education of the children of his son until the youngest should attain the age of twenty-one years.—Some of the children were of age, and the others were minors.—The father was able to support, maintain and educate the children. —*Held*, that so much of the income as would be necessary should be paid to the father while he was under an obligation to support, maintain and educate the children, and did so, until the youngest child became of age. *Schofield* v. *Vassie*, 1 Eq., p. 637.

Purchase by mother in name of child —Advancement—Where a mother makes a purchase in the name of her child, there is no presumption that an advance was intended.—In such a case, it is a question of evidence whether there was an intention to advance. *Moore* v. *Moore*, 1 Eq., p. 204.

Sale of land of infant under sec. 175 Equity Court Act—Section 175 of the Supreme Court in Equity Act, 1890, refers to the exclusive interest of an infant in land, the proceeds of which on its sale will be solely for the infant's benefit.—Application was made under the above section for an order for the sale of an infant's interest in land inherited from his father with the intention of using part of the proceeds to pay debts of the deceased owner who died intestate and possessed of no personal property.—*Held*, the Court had no power to make the order, but the proper course was to take out letters of administration. *In re Hopper Infants*, 1 Eq., p. 245.

Sale of land—Trust for two infants—Practice—The Court has not power under section 213 of the Supreme Court in Equity Act, 1890, to order the sale or disposal of land held in trust for two infants, to pay for past expenditures upon the trust property nor can it consider a petition which does not recognize the separate rights of each infant. *In re Steen's Estate*, 1 Eq., p. 261.

Services by infant—Consideration for deed—Services rendered by a child during minority may constitute a good consideration in support of a conveyance of land by the parent to the child as against the creditors of the parent.—(*Per* White J.) *Kearney et al* v. *Jack*, 41, p. 293. Reversed on appeal S. C. of C., unreported.

Trespass — Conditional sale to infant —Repossession—An infant can not maintain trespass for taking property held by him under a contract of sale with the defendant which stipulated that the property should not pass until payment, where there has been a default in payment of part of the purchase money. *McGaw by next friend* v. *Fisk*, 38, p. 354.

See also BASTARDY, HUSBAND AND WIFE.

INJUNCTION.

Abuse of process—The defendant was the holder of forty-eight promissory notes indorsed by the plaintiff, and had obtained judgment in the City Court of Moncton on thirteen of them in separate actions brought when all the notes were due.—Some of the notes were of such an amount that two of them could have been included in one action.—The plaintiff was arrested twice on executions on two of the judgments and was discharged on disclosure.—Immediately after his second discharge he was arrested on a third judgment, and was discharged by habeas corpus.—In a suit for an injunction to restrain the defendant from using the process of the City Court of Moncton for malicious or vexatious purposes, *semble*, that the injunction should go if it appeared that the defendant intended to further arrest the plaintiff for the malicious purpose of harassing and punishing him, and endanger-

ing his health, and not for the purpose of obtaining payment of the debt. *Babang* v. *The Bank of Montreal* Eq. Cas., p. 524.

Action for injunction—Practice—Under Act 53 Vict., c. 4, ss. 23, 24, a bill in an injunction suit need not be sworn to or supported by affidavit.—It is only where an injunction is sought before the hearing that the bill must be supported by affidavit. *Trites* v. *Humphreys*, 2 Eq., p. 1.

Appeal from ex parte order—Practice—An appeal from an *ex parte* order made at chambers granting a mandatory injunction on the ground that the judge acted without jurisdiction was refused, because the appellant had not, before taking his appeal, applied to the judge to vary or rescind his order, and it was held that the necessity for such an application was not obviated by O. 58, r. 3 of The Judicature Act, 1909, giving an appeal on notice from any judgment final or interlocutory, and providing that: "Every judgment or decision made by a judge in Court or in chambers, except orders made in the exercise of such discretion as by law belongs to him, may be set aside or discharged upon notice, by the Court."—*Bell* v. *Moffat*, 18 N. B. R. 151 and *Jackson* v. *McLellan*, 19 N. B. R. 494, considered and not followed *The Saint John Rwy. Co.* v. *City of Saint John*, 43, p. 498.

Application, Bona fides of—See *White* v. *Hamm*, 2 Eq., p. 575.

Application by party in contempt—The rule that a defendant in contempt for failure to obey a mandatory injunction cannot be heard in a voluntary application, has many exceptions and the circumstances of each particular case should be inquired into. —(*Per* Barry J.) *The Saint John Rwy. Co.* v. *City of Saint John*, 43, p. 498.

Application for ex parte injunction—A bill in Equity praying for an *ex parte* injunction must be supported by affidavit. *Glasier et al* v. *MacPherson*, 34, p. 206.

Application — Sufficiency of affidavit in support—It is the duty of a party applying for an *ex parte* injunction to state all the material facts within his knowledge, and other facts cannot be brought forward to sustain the injunction on an application to dissolve it. *Domville* v. *Crawford et al*, Eq. Cas., p. 122.

It is not a ground for the dissolution of an *ex parte* injunction that the plaintiff suppressed facts relating to the subject matter of the suit, which, though material as between the plaintiff and a person not a party to the suit, are not material to the suit with the defendant. *Poirier* v. *Blanchard*, 1 Eq., p. 322.

The rule that on an application for an *ex parte* injunction order a full and truthful disclosure must be made of all material facts, must be strictly observed.—Where in an interpleader suit, an *ex parte* injunction order was dissolved for suppression of material facts, leave was granted to move again for the order, together with the right to file an affidavit denying collusion. *The Canadian Pacific Rwy. Co.* v. *Nason*, 3 Eq., p. 476.

In an appeal from an order continuing an interim injunction on the ground of failure to disclose material facts on the *ex parte* application for the interim injunction, the Court, where all the material facts were before the judge on the motion to discontinue, dismissed the appeal without considering whether or not all the material facts had been disclosed on the *ex parte* application. *McDermott* v. *Oliver*, 43, p. 533.

Bank Act—Transfer of shares by executor—Under The Bank Act, c. 120 R. S. C., a bank cannot refuse to register a transfer to a purchaser by an executor of shares in the bank standing in the name of the testator, though by the testator's will the shares are specifically bequeathed, and a mandatory injunction will issue if necessary to compel it to make such transfer. *Boyd* v. *The Bank of New Brunswick*, Eq. Cas., p. 546.

Banking—Restraining holding of annual meeting—Parties—The plaintiff, a shareholder of the Maritime Bank by his bill set out that on the 14th of February, 1873, the directors of the Maritime Bank passed a by-law fixing the first Tuesday in June in each year thereafter, as the day of the annual meeting of the shareholders for the election of directors; that on the 26th of April, 1880, the directors passed another by-law fixing Friday, the 4th day of June next, for the then next annual meeting; that the Bank of Montreal was the owner of 1,070 shares of the Maritime Bank, upon all of which there were unpaid calls, and had appointed the defendant B. its attorney to attend and vote at the annual meeting of the Maritime Bank shareholders, called for the 4th of June.—The bill prayed for an injunction to restrain the Bank of Montreal and its attorney from voting at such annual meeting on the grounds: (1) that there were unpaid calls upon their shares; (2) that by Act 42 Vict., c. 45, s. 2 (D) one bank cannot hold stock in another bank; (3) that the Bank of Montreal could only vote by its own officer and not by an attorney, also to restrain the Maritime Bank from permitting the Bank of Montreal and its attorney to vote at the meeting, and to restrain the Maritime Bank from holding the meeting on the ground that the power to pass a by-law fixing a day for the annual meeting of the shareholders is vested in the shareholders. —The Maritime Bank was incorporated by Act 35 Vict., c. 58 (D).—No provision is made in the Act as to by-laws.—By section 6 it incorporates into its provisions the Banks and Banking Act 34 Vict., c. 5.—The 33rd

section of the latter Act enacts: "That directors etc. shall have power to make such by-laws and regulations (not repugnant to the act or the laws of the Dominion of Canada) as to them shall appear needful and proper touching the management and disposition of the stock, property, estate and effects of the bank, and touching the duties and conduct of the officers, clerks and servants employed therein, and all such matters as appertain to the business of a bank. . . . Provided always, that all by-laws of the bank lawfully made before the passing of this Act as to any matter respecting which the directors can make by-laws under this section . . . shall remain in full force until repealed or altered under this Act."—By the 30th section it is enacted that the directors shall be "elected on such day in each year as may be or may have been appointed by the charter, or by any by-law of the bank, and at such time of the day, and at such place where the head office of the bank is situate, as a majority of the directors for the time being shall appoint."—The 28th section enacts: "That shareholders in the bank shall have power to regulate by by-law the following matters *inter alia* incident to the management and administration of the affairs of the bank, viz.: the qualification and number of directors . . . the method of filling up vacancies in the board of directors whenever the same may occur during the year, and the time and proceedings for the election of directors, in case of a failure of any election on the day appointed for it."—On an application by the defendants to dissolve an *ex parte* injunction obtained by the plaintiff, *held*, that no power was vested in the directors to pass the by-law in question and that it therefore was *ultra vires*, but that the injunction should be dissolved on the ground: (1) that the plaintiff could not maintain a bill in his own name alone respecting an injury common to all the shareholders; (2) that the bill was multifarious by the joinder of grounds of complaint against the Maritime Bank and the Bank of Montreal and B. that were independent and distinct.—Though the objection of multifariousness in a bill has not been taken by demurrer, the objection may be taken by the Court.—Where a company was restrained by *ex parte* injunction from holding its annual meeting on the date fixed therefor, it is no ground for refusing a motion to dissolve the injunction that the purpose for which it was granted has been served. *Busby* v. *The Bank of Montreal et al*, Eq. Cas., p. 62.

City of Saint John—Transfer of harbor and wharf properties—The charter of the City of Saint John grants the harbour of St. John within certain boundaries to the Mayor, Aldermen and Commonalty of the city, but any previous grant of the Crown in any part of the same is reserved and excepted. —In addition to the wharves and water-lots owned by the city there are within the limits of the harbour wharves owned as private properties under grants from the Crown and reserved by the charter, and also wharves on lands leased from the city.—By Act 38 Vict., c. 95 (N. B.), it was provided *inter alia*, that the Mayor, Aldermen and Commonalty of the city might contract and agree for the transfer to commissioners, to be duly appointed to constitute and form a Board of Harbour Commissioners for the port and harbour of St. John, of all the right, title and interest of the Mayor, Aldermen and Commonalty of, in and to the harbour of St. John, and of, in and to the land, water and the land covered with water, wharves, tenements, and hereditaments within certain bounds of the harbour, provided that at least two thirds of the members of the common council concurred in and agreed thereto.—At a meeting of the common council held after the passing of the Act a report from the general committee of the council was submitted recommending that application be made to the Dominion parliament for legislation placing the harbour of St. John in commission in accordance, *inter alia*, with the terms of the said Act, and that the Board of Harbour Commissioners be composed of five members, three of whom should be appointed by the Governor General in Council, and two by the Common Council. —The report was adopted by the council on a vote of twelve to four, the Mayor, who was present, abstaining from voting though he was in favor of the report, and had signed it as one of the general committee.—The common council was composed of nineteen members, including the Mayor.—The Dominion parliament, in accordance with the terms of a request from a committee of the common council by Act 45 Vict., c. 51, created a board or corporation of harbour commissioners to consist of five members, three to be appointed by the Governor in Council, one by the common council, and one by the St. John Board of Trade.—The Act gave the board large powers relating to the management and control of the harbour, including the mooring and placing of ships at wharves transferred to the board, or at private wharves, in their discretion, and the fixing and regulating of tolls and dues payable by ships at private wharves and slips.—On an application to dissolve an *ex parte* injunction restraining the defendants from transferring the harbour and wharf property to the board, *held*, that the Act 38 Vict., c. 95, should be strictly construed and that the membership of the harbour board not having been constituted under Act 45 Vict., c. 51, in accordance with the terms consented to by the common council, the injunction was properly granted. —Quaere:—whether the consent required by the Act 38 Vict., c. 95, was the consent of two-thirds of all members of the common council or of two thirds of the members present at a meeting.—An *ex parte* injunction order absolute in its terms, by omitting to state that it was to continue until further order as provided in form E. of chapter 49, C. S., was ordered to be varied in this respect with costs of application. *Berton* v. *The Mayor etc. of the City of Saint John*, Eq. Cas., p. 150.

Commitment — Practice — An order to commit for breach of an injunction will not be set aside on the ground that the copy of the decree served on which the notice of the motion for the order was based was not indorsed as is required by rule 3 of Hilary Term 1875, and as the original decree filed in the Registrar's office is indorsed.—The notice of motion to commit for breach of an injunction prohibiting the defendant from trespassing on the plaintiff's property is a "commencement of proceedings" and not a step in the cause, and should be indorsed under O. IV, rr. 1-4, with the name and address of the solicitor, but failure to do so is an irregularity which does not necessarily render the proceedings void, and under O. LXX, r. 1, may be condoned in the discretion of the Court.—Service of a copy of a decree over a month after breach is not such delay as will prevent it from being sufficient upon which to base a motion to commit where the breach complained of is a continuing trespass in breach of the injunction.—An applicant is not barred from seeking to enforce an injunction by motion to commit by reason of his having allowed two months to elapse after knowledge of the breach if the party moved against has in no way suffered by the delay.—Quaere:—If the Court has the right to refer to affidavits on file in the registrar's office in support of a judgment on a motion to commit for contempt when such affidavits were not referred to by counsel on the hearing and of the intention to use which no notice had been given. *Turnbull Real Estate Co.* v. *Segee et al*, 42, p. 625.

Conditional sale of goods — Restraining interference with repossession—See *Lame* v. *Guerette et al*, 1 Eq., p. 199.

Contempt — Commitment — Interim injunction — Failure to move for continuance—Commitment for disobedience of an injunction is based on the wilful disregard of the same: it is a question between the offender and the Court, and the breach thereof must be proved beyond a reasonable doubt. —*Semble*, even if the Court directs the extension of an interim injunction until the hearing at a future date to be decided by the solicitors, a commitment for contempt will not be made where the applicant has allowed a long period of time to elapse without moving to continue, in this case twelve months. *Snowball* v. *Sullivan*, 42, p. 318, C. D.

Contempt—Costs of motion to commit —Where, in a suit for a declaration that the plaintiff and defendant were partners, the defendant, in breach of an interim injunction order, collected debts due to the alleged firm, but which, subsequently to the service of a notice of motion for his commitment, he paid to the receiver in the suit, he was ordered to pay the costs of the motion. *Burden* v. *Howard*, 2 Eq., p. 531.

Contempt of injunction order—Practice—In proceeding for contempt for breach of an injunction order restraining the doing of an act, the proper course is to move that the party in contempt stand committed, notice of the motion having been first personally served upon him, and not to move that he shall show cause why he shall not stand committed, or why an attachment shall not issue against him. *Poirier* v. *Blanchard*, 1 Eq., p. 605.

Damages payable under undertaking—Claims for small damages by some defendants ordered to be included in an order for assessment of damages of other defendants under an undertaking given on obtaining an interlocutory injunction, where they arose from the restraint of acts the injunction was obtained to prevent from being done. *Wood* v. *LeBlanc*, 3 Eq., p. 116.

Dismissing bill on dissolution of injunction—Where plaintiff, on usual undertaking as to damages, obtained an *ex parte* injunction, which was subsequently dissolved, he was allowed to have his bill dismissed with costs but without payment of damages recoverable under the undertaking.—The undertaking being distinct from the suit may be enforced at any time. *Morehouse* v. *Bailey*, 1 Eq., p. 393.

Fixtures, Restraining removal of—The lessee of land under a lease renewable from term to term at his option, affixed to the soil a dwelling house with a shop in the lower storey.—*Held*, that his acts under the circumstances furnished evidence of his intention to annex the building to the freehold, and that its removal by him was restrainable by injunction.—*Doran* v *Willard*, 14 N. B. R. 358 and *Fowler* v. *Fowler*, 15 N. B. R. 488 distinguished. *Allan* v. *Rowe*, 1 Eq., p. 41.

Husband and wife living apart—Restraining him from exercising marital rights in her separate estate—A married woman being the owner in fee at the time of her marriage of a lot of land was compelled to live separate and apart from her husband, not wilfully and of her own accord.—*Held*, that while such separation continued she was entitled to an injunction restraining her husband from enjoying any marital rights in the property or interfering with its use and occupation by her. *Johnston* v. *Johnston*, 1 Eq., p. 164.

Insurance policy — Garnishment — Suit by assignee of policy—The loss payable under a policy of fire insurance was assigned by the assured to the plaintiff with the consent of the insurers.—A loss occurring, a judgment creditor of the assured obtained an attaching order under Act 45 Vict., c. 17 against the insurers.—In a suit by the plaintiff for a declaration of his title to the insurance and to restrain the garnishee proceedings, he alleged that the defendant intended setting up the claim that the

assignment to the plaintiff was fraudulent and that the plaintiff had merely an equitable title, which could not be used to defeat the defendant's rights under the garnishee process.—*Held*, that the plaintiff was entitled to have his rights determined in equity, instead of under the garnishee proceedings, and that an injunction should be granted. *Robertson* v. *Bank of Montreal et al*, Eq. Cas., p. 541.

Interim injunction, Continuance of—Solicitor's agreement—An interim injunction granted until a day certain, or until such time as any motion to be on that day made to continue it should be heard and disposed of, is spent as soon as the conditions upon which the Court authorizes its continuance beyond the date fixed have been forfeited and not taken advantage of. —An agreement between solicitors that the hearing of a motion to continue an injunction should be postponed to a date convenient to both, does not amount to an extension of the injunction beyond the date fixed by the Court.—Commitment for disobedience of an injunction is based on the wilful disregard of the same; it is a question between the offender and the Court, and the breach thereof must be proved beyond a reasonable doubt. —*Semble*, Even if the Court directs the extension, a commitment for contempt will not be made where the applicant has allowed a long period of time to elapse without moving to continue, in this case twelve months *Snowball* v. *Sullivan*, 42, p. 318, C. D.

Mandatory injunction, Particulars necessary for—Quaere:—Whether a party asking for a mandatory injunction should not suggest specifically what measures he wishes the Court to enforce. *Saunders* v. *Wm. Richards Co. Ltd.*, 2 Eq., p. 303.

Mandatory injunction — When granted — Pecuniary damages only — By an agreement the plaintiffs were to lease their line of railway to the defendants upon the condition *inter alia* that the defendants would run a passenger train each way each day between stations A. and B.—The lease was not executed, but the defendants went into possession of and operated the line.—The plaintiffs alleged in their bill that at the time of the agreement, as was known to the defendants, they were under contract with the government of New Brunswick to run a passenger train each way each day between A. and B., but the contract was not set out in full.—In 1897 a lease was executed by the plaintiffs and defendants by which it was provided that the defendants would run a passenger train one way each day between A. and B., "and if and whenever it may be necessary to do so in order to exonerate the (plaintiff) from its liability to the government of New Brunswick then the (defendants) will run at least one train carrying passengers each way each day."—On July 31, 1899, the Attorney-General of New Brunswick gave notice to the plaintiffs that their contract with respect to running a passenger train each way each day between A. and B. must be enforced, but no further proceedings with respect to the matter were taken by the government, though the defendants continued to run a passenger train but one way each day.—It did not appear whether the notice of the Attorney-General might not have been given at the plaintiffs' instance.—On a motion for an interlocutory mandatory injunction in this suit which was brought to compel the defendants to run a passenger train each way each day between A. and B., *held*, that no case was made out for relief by mandatory injunction which will be only granted where necessary for the prevention of serious damage, and that the question raised was merely one of pecuniary damages between the plaintiffs and defendants, for which the defendants were well able to account to the plaintiffs, and which by the lease of 1897 the plaintiffs had agreed to accept in event of their liability, if any, to the government and that it did not appear that such liability had arisen. *Tobique Valley Rwy. Co.* v. *Canadian Pacific Railway Co.*, 2 Eq., p. 195.

A dam was carried away by a freshet, owing, it was alleged by the plaintiff, to insufficiency of devices in the dam to carry off surplus water, and it was alleged that material damage was done to the plaintiff's land, but the evidence as to its precise nature and extent was slight and unsatisfactory; the defendants denied any liability. —The bill prayed for an injunction restraining the flow of water and compelling the construction of the dam in a proper manner; also for an assessment of damages.—*Held*, that the questions involved being the liability of the defendants and the extent of the injury sustained by the plaintiff, and the Court doubting its jurisdiction to assess the damages, the bill should be dismissed, and the plaintiff left to his remedy at law. *Saunders* v. *William Richards Co. Ltd.*, 2 Eq., p. 303.

Mandatory injunction — When granted—A mandatory injunction will not be granted except in cases where extreme or very serious damage will ensue if the injunction is withheld.—The form of a mandatory injunction adopted in *Jackson* v. *Normanby Brick Co.* (1899) 1 Ch. 438, which directs specific acts to be done, approved of. *Saunders* v. *William Richards Co. Ltd.*, 2 Eq., p. 303.

Municipality—Restraining acts ultra vires—A ratepayer on behalf of himself and all other ratepayers of a municipal corporation, has a right to maintain an action to restrain the corporation from doing acts which he believes are *ultra vires*, without bringing the action in the name of the Attorney-General *ex relatione*, where the Crown is not directly interested. *Stevees et al* v. *City of Moncton*, 42, p. 465.

Municipal officer, Disqualification of —Form of action—The Incorporation Act

of the town of Portland, 34 Vict., c. 11, s. 9, provides that no person shall be qualified to be elected to serve as chairman or councillor or, being elected, shall serve in either of the said offices, so long as he shall hold any office or place of profit in the gift or disposal of the Council.—By Act 45 Vict., c. 61, the name of the town of Portland was changed to "The City of Portland" and it was provided that instead of a chairman annually elected by the councillors there should be a mayor.—By Act 51 Vict., c. 52, provision was made for the appointment of a commission of three persons to prepare a scheme for the union of the city of Saint John and the city of Portland.—The Act provided that one of the commissioners should be appointed by the council of the city of Portland, that each commissioner should be paid a specified sum for his services, besides expenses, and that the cost of the commission should be borne by both cities. —The council of the city of Portland appointed the defendant C. who was then mayor of the city, its commissioner.—At a meeting of the council held shortly after, presided over by C. as mayor, certain accounts were ordered to be paid, and estimates for the year were approved, and an assessment ordered therefor.—The plaintiff, a ratepayer, brought this suit on behalf of himself and all other ratepayers, who should come in and contribute to the expense of the suit, to restrain C. from signing orders for the payment of the accounts ordered to be paid by the council and the defendant W., the chamberlain of the city, from paying them on orders signed by the defendant C. and for a declaration that C. was incapacitated from acting as mayor.—*Held*, that the suit should be by information by the Attorney General on the relation of all or some of the ratepayers, the plaintiff not having sustained, or likely to sustain, any injury not common to all the ratepayers.—Where a bill is demurrable the objection may be taken as a ground to dissolve an *ex parte* injunction. *Merritt* v. *Chesley et al*, Eq. Cas., p. 324.

Nuisance, Restraining — Noise — See *Humphrey et al* v *Banfil*, Eq. Cas., p. 243.

Nuisance — Smells — To constitute a private nuisance arising from offensive odours they must occasion material discomfort and annoyance for the ordinary purposes of life, according to the ordinary mode and custom of living.—The doctrine of acquiescence in relation to nuisance considered.—Where on an application for an interim injunction to restrain a nuisance a jury finds upon the facts, under act 53 Vict., c. 4, s. 83, the question upon them is *res judicata* for all the purposes of the suit, and cannot be re-tried at the hearing. *McIntosh* v. *Carritte*, Eq. Cas., p. 406.

Nuisance — Smell — Legitimate business—The defendant L. holds certain premises under a lease granted by the plaintiff N. to one W. and assigned by W. to L.—The lease contains express covenants, but nothing in reference to its assignment, or to the use of the premises, with the exception of the word "office" used in the description, which is as follows: "All that certain office situate on the ground floor of her brick building on the east side of Main street in the said town of Woodstock, and the office in the said building fronting on the south side of Regent street in the said town, also the lower part of the shed in the rear of said office, etc."—W. is an attorney and occupied the premises as an office.—L. is a retail meat and fish dealer, and proposes to carry on this business on the premises.—*Held*, that there was no implied covenant in the lease restricting the lessee to the use of the premises as an office, as it was not necessary to carry out any obvious intention of the parties; and that the word "office" in the lease was used merely as a means of identifying the premises included in the demise.—*Held*, that as no actual damage had been shown, the action was in the nature of a *quia timet* action; and that as the defendant was carrying on a legitimate business, and there was no probability of any immediate or irreparable damage to the plaintiff arising, the application for an injunction must be dismissed. *Nevers* v. *Lilley et al*, 4 Eq., p. 104.

Nuisance to public—The Court of Equity has jurisdiction to interfere by injunction in cases of nuisance to the public. —Circumstances considered under which the Court of Equity will interfere by injunction to restrain a nuisance to the public. *Attorney General of N. B.* v. *Pope, Acting Minister of Rwys and Canals*, Eq. Cas., p. 272.

Partnership — Restraining partner from realizing on assets—On a motion for an interlocutory injunction to restrain defendant from disposing of assets of an alleged partnership between him and the plaintiff to carry on a business previously conducted by the defendant, and for a receiver, the plaintiff alleged that new books of account were opened up, and a bank account kept, in the firm's name; that billheads with the name of the firm, and names of the plaintiff and defendant thereon, were used, and a circular under the firm name distributed by the defendant announcing that plaintiff was associated in the business. —The defendant denied that a partnership was formed, and alleged that it was contingent upon the plaintiff paying into the business a sum of money equal to the value of the defendant's stock in trade on hand; that this had never been done; that the plaintiff was employed at a weekly salary; and that the bill heads were ordered by plaintiff without authority, and their use only permitted after his assurance that he would shortly purchase an interest in the business.—These allegations were denied by the plaintiff.—*Held*, that the motion should be granted.—On a motion for an interlocutory injunction, the Court should be satisfied that there is a serious question to be determined, and that under the facts

there is a probability the plaintiff will be held entitled to relief. *Burden* v. *Howard*, 2 Eq., p. 461.

Pilots, Restraining from acting as—Quo warranto—The pilots for the district of Miramichi having resigned, the defendants were appointed pilots for the district by the pilotage commissioners.—An injunction was sought to restrain the defendants from acting as pilots under licenses granted to them by the commissioners on the grounds: (1) that their appointments were not made by by-law confirmed by the Governor General in Council, and published in the Gazette as required by The Pilotage Act, c. 80, s. 15 (d), R. S. C.; (2) that under that Act the commissioners fixed by regulation a standard of qualification for a pilot, and that the defendants were not examined as to their competency; (3) that the defendants were not appointed at a regularly called meeting of the commissioners, or by the commissioners acting together as a body.—A pilot appointed under the Act is appointed during good behaviour for a term not less than two years. —*Held*, that the office of pilot being a public and substantive independent office, and its source being immediately, if not mediately, from the Crown, and as the objections related to the validity of the defendants' appointments, and as there was no pretence that the appointments were made colorably and not in good faith, the remedy if any was not by injunction, but by information in the nature of a *quo warranto*. *Attorney General* v. *Miller*, 2 Eq., p. 28.

Pollution of water, Restraining—A riparian owner has the right to the full flow of the water in its natural state, without diminution or pollution, so, where it is shewn that the defendant was polluting the water by operating an iron mine and thereby injuring the fishing rights of the plaintiff, an injunction was granted; but, as the works of the defendant were important, the Court ordered that the injunction should not become operative for over three months, in order that the defendant might have an opportunity to prevent the pollution by alterations to its plant. *Nepisiquit Real Estate and Fishing Co.* v. *Canadian Iron Corporation*, 42, p. 387, C. D.

Private Act of parliament, Restraining—Circumstances considered under which a Court of Equity will interfere by injunction in the exercise of its jurisdiction in personam to restrain an application to parliament for a private Act. *The Corporation of the Brothers of the Christian Schools* v. *Atty General of N.B. and the Rt. Rev. John Sweeney, R. C. Bishop of Saint John*, Eq. Cas., p. 103.

Restraining arbitration when conditions precedent not complied with—An injunction will not be granted to restrain a party from proceeding with an arbitration where the result of the arbitration will be merely futile and of no injury to the party seeking the injunction.—An injunction to restrain an arbitration to determine the value of land of the plaintiff taken by the defendants on the ground that condition precedent to the taking of the land had not been complied with, refused. *Duncan* v. *The Town of Campbellton*, 3 Eq., p. 224.

Restraining assignment for benefit of creditors—Where an *ex parte* injunction order restrained a trader, who had obtained goods from the plaintiffs under an agreeent that the property therein was to remain in them with liberty to them to take possession, from *inter alia* making an assignment for the general benefit of his creditors, it was ordered to be discharged in that respect. *The Gault Brothers Co. Ltd.* v. *Morrell*, 3 Eq., p. 123.

Restraining conveyance of land by grantee of judgment debtor—An interim injunction granted restraining the transfer of land by the grantee in a suit by a judgment creditor of the grantor impeaching the conveyance as fraudulent under the Statute 13 Eliz., c. 5. *White* v. *Hamm*, 2 Eq., p. 575.

Restraining proceedings when result futile—An injunction will not be granted to restrain proceedings where the result will be merely futile and of no injury to the party seeking the injunction. *Duncan* v. *Town of Campbellton*, 3 Eq., p. 224.

Right of access to harbor—The plaintiff S. is the lessee from the city of Saint John of two water lots (so called) situated between high and low water mark in the harbor of Saint John, on which a wharf or wharves and buildings have been erected, which have been used at different times for various purposes.—One of their advanatges consists of access by the waters of the harbor of Saint John, there being ten feet of water on the southern side of the plaintiff's wharf at high tide.—The southern side is the only part of the plaintiff's wharf to which he has direct access by the waters of the harbor, his lot or lots, as originally leased, being shut off on the other three sides.—The lease, under renewals of which S. is tenant, was granted by the city of Saint John some fifty years ago, both lots being included in the one lease at the time.—The defendant K. is the lessee from the city of Saint John of the water lot lying immediately south of S.'s lots.—It is bounded on the north by S.'s southerly line, and extends along the entire southern side of S.'s lot.—K.'s lease was granted a few months ago, being dated March 10th, 1909, and is precisely similar in terms to S.'s leases, except as to rent reserved.—K. is proceeding to build a wharf covering his entire lot, which when finished will completely close up all direct access by water from the harbor to S.'s lots.—By the charter of the city of Saint John, confirmed by an act of the legislature, the title to these water lots was vested in the city, and in addition to this the city was made the conservator of the water of the harbor, and

has sole power over it.—In the charter is the following saving clause: "So always as such piers or wharves so to be erected or streets so to be laid out, do not extend to the taking away of any person's right or property, without his, her or their consent, or by some known laws of the said province of New Brunswick or by the law of the land." —*Held*, that the right of direct access by water from the harbor appertained to the plaintiff's lots and could not be taken away, and that the plaintiff was entitled to an injunction restraining the defendants from interfering with this right. *Seely* v. *Kerr et al*, 4 Eq., p. 184. (Reversed 44 S. C. R., 629, on ground that S. had no riparian rights.)

Shipping — Restraining vessel from sailing until bill of lading signed—By charter party a vessel was to proceed to the port of St. John and load lumber; the vessel was to haul to loading berth as required by charterer; cargo was to be furnished at customary despatch; lay days were to commence from the time the vessel was ready to receive cargo, and written notice was given to the charterer; bills of lading were to be signed as presented without prejudice to the charter party, and vessel was to have an absolute lien on cargo for demurrage.—On arrival the vessel proceeded to the ballast wharf when the master was notified by charterer that cargo would be furnished at the government wharf.—On August 28th the master mailed a notice to the charterer that vessel was at loading berth and would be ready to receive cargo on the 29th. When notice was sent vessel was not at loading berth.—The cargo was brought to the berth by the Intercolonial Railway, but owing to pressure of traffic the railway was unable to commence forwarding cargo until a number of days after vessel was at berth, or to forward cargo thereafter on a number of days, and during which no loading took place.—A claim for demurrage was made by the master, and he refused to sign the bills of lading until the claim was settled or notice thereof was inserted in bills of lading.—An injunction having been obtained restraining the vessel from proceeding with the cargo to sea, *held*, that master should have signed bills of lading and that the injunction was properly granted. *Cushing* v. *McLeod*, 2 Eq., p. 63.

Timber, Cutting of — Injunction dissolved on failure to prove title—A bill, upon which an *ex parte* injunction was granted restraining defendants from cutting timber, stated that the land upon which it was cut had been seized and possessed by plaintiff's predecessor in title, that he was the owner of it in fee, and that defendants were cutting timber upon the land wastefully, and without documentary title were pretending to have a title by possession.—On an application to dissolve the injunction, it appeared that the plaintiff had not a documentary title, and that both parties claimed title by possession.—*Held*, that the injunction should be dissolved.—*Semble*, that on such application, the verdict of a jury in an action of replevin for timber cut upon said lands should not be diregarded, although a motion for a new trial was undisposed of. *Wood* v. *LeBlanc*, 2 Eq., p. 427.

Trespass, Restraining—Remedy at law—In an ordinary case of trespass where there is an adequate legal remedy in the nature of damages, an injunction will only be granted by a Court of Equity when special circumstances are shown. *Godard* v. *Godard*, 4 Eq., p. 268.

Waterway, Obstruction of—Removal of obstruction—The defendant, the owner of a saw mill on a floatable river, erected booms in connection therewith, which with logs of the defendant impeded the passage of logs of the plaintiff.—The obstructions were removed before the hearing, but after notice of motion had been given for an interim mandatory injunction, which was granted.—*Held*, that the bill should be dismissed, but without costs, except costs to the plaintiff of the taking out and service of the injunction order.—An injunction to perpetually restrain defendant from closing or obstructing the river refused.—The owner of land on a floatable river is entitled to erect booms and piers necessary for reasonable use of the river in operating a saw mill.—The Court refused, in the above suit, to assess plaintiff's damages, as he had a remedy at law, and at the time the bill was filed the grounds for an injunction had ceased. *Watson* v. *Patterson*, 2 Eq., p. 488.

INSURANCE.

1. Accident Insurance.

2. Fire Insurance.

3. Life Insurance.

1. Accident Insurance.

Beneficiary — Failure of policy to comply with application—By a written application, dated 26th February, 1896, C. applied to the Norwich and London Accident Insurance Association for $2,000 accident insurance, the policy "to be payable in case of death by accident under provisions thereof to M." wife of the deceased.—The company issued its policy, payable to the representatives or assigns of the assured.—M.'s name was not mentioned in the policy, neither was there anything in it to indicate her in any way as a beneficiary.—M., as administratrix of C., brought an action on the policy for the recovery of the $2,000.—The action was afterwards settled by the company paying the $1,000 now in dispute to the administratrix in discharge of the policy.—On an application to pass the administratrix's

accounts before the judge of probates, it was claimed, on behalf of the creditors of C. that the administratrix should account for the $1,000 as assets of the estate, and on behalf of M. that she was the sole beneficiary under the policy, and the money formed no part of C.'s estate.—It appeared by the evidence of one of the chief agents of the company, that it was not the practice of the company in a case of this kind, notwithstanding the terms of the application, to issue a policy payable to the beneficiary named therein, but they held themselves bound in case of death, to pay the amount due to the beneficiary named in the application.—It also appeared C. told M. the policy was payable to her, and he gave it to her when he took it out.—The judge of probates held that the money paid under the policy belonged to the estate of C.—From this decision the administratrix appealed.—*Held* (*per* Landry, Barker, McLeod and Gregory JJ., Tuck C. J. and Hanington J. dissenting), that there was no complete gift *inter vivos* of the policy and fund to M. from her husband: and the intended gift being purely voluntary and incomplete, the Court would not complete it, and there was no trust created and declared in her favor.—Apart from the Act 58 Vict., c. 25, no interest would pass to M. even had she been named in the policy as beneficiary, merely by reason of that fact, and if C. wished such interest to pass he must have left the money to her by will or settled it upon her during his life.—The act 58 Vict., c. 25 for securing to wives and children the benefit of life insurance does not apply to accident insurance. —The application cannot be said to be a declaration under the act, as under section 6 the policy must be in existence before there can be a declaration affecting it. —*Held* (*per* Tuck C. J. and Hanington J.), that the transaction was a gift final, complete and executed as between C. and his wife M. and one that, if necessary a Court of Equity would compel the legal representatives of C. to carry into effect. *Cornwall* v. *The Halifax Banking Co.*, 35, p. 398. Reversed 32 S. C. R., p. 442.

Surrender of policy—Cancellation—A policy of accident insurance contained a warranty that the applicant had not withheld any information which was calculated to influence the decision of the directors as to the applicant's eligibility for insurance, and also a warranty that no application ever made by the applicant for accident insurance had been declined and no accident policy issued to him had been cancelled by any company.—The plaintiff had effected previous insurance which, on a settlement of a disputed claim was put an end to during its currency with the consent of the plaintiff, but at the request of the company, the unearned premiums being returned.—*Held*, that the proper question for the jury was whether the withholding of this information was in fact material, and it was misdirection to tell the jury that they were to consider whether the plaintiff believed it material. —*Held* (*per* Hanington, Landry, Barker, McLeod, and Gregory JJ., Tuck C. J. dissenting), that the putting an end to the policy with the consent of the plaintiff was a surrender and not a cancellation, and was not a breach of the warranty that no policy issued to him had ever been cancelled. *Smith* v. *The Dominion of Canada Accident Insurance Co.*, 36, p. 300.

2. Fire Insurance.

Additional insurance without notice—A policy of insurance on a mortgaged property contained a condition that the insured should give notice of any other insurance already made, or which should afterwards be made elsewhere on the same property, whether valid or not valid, and whether concurrent or otherwise, so that a memorandum of such insurance might be indorsed on the policy.—The mortgagee, without such notice or endorsement, effected another insurance with another company in the name of the plaintiff's wife, with the loss, if any, payable to himself as his interest might appear.—*Held*, that the mortgagee's insurance without the notice and endorsement, voided the plaintiff's insurance. *Perry* v. *Liverpool London and Globe Insurance Co.*, 34, p. 380.

Additional insurance—A policy of insurance against fire contained the following condition: "If the assured have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the property above mentioned, or any part thereof . . . this policy shall become void, unless consent in writing by the company be endorsed hereon."—*Held*, following the judgment of the Supreme Court of Canada in *Commercial Union Assurance Co.* v. *Temple*, 29 S. C. R. 205, that where additional insurance was applied for, but not accepted until after the property insured was destroyed by fire, the condition had no application. *Temple* v. *Western Assurance Co.*, 35, p. 171.

Application — Misrepresentation — Diagram—An application for insurance made by the plaintiff contained the following question: "Are you the owner of the land on which the above described building stands?" —Before the written answer to this was put down the plaintiff told M. the defendant's agent that he was not the owner of the land, but that the building stood on the highway. —Whereupon M. said: "We will put it down as yours" and, with the consent of the plaintiff, wrote "Yes" as the answer to the question.—The application contained this provision also: "If the agent of the company fills up or signs this application he will in that case be the agent of the applicant and not the agent of the company."—The jury found that the house stood on the highway. —*Held*, in an action on the policy (*per* Hanington, Landry and McLeod JJ., Tuck C. J. and VanWart J. dissenting), that notwithstanding the foregoing provision the

communication made to M., the agent, must be taken as if made to the company and, therefore there was no misrepresentation on the part of the plaintiff.—The first condition in the policy was as follows: "If an application, survey, plan or description of the property herein insured is referred to in this policy, such application, survey, plan or description shall be considered a part of this contract etc."—The only reference to the application in the policy was as follows: "Situate on the north side of the Great Road from Dalhousie to Bathurst, in the parish of Durham, Restigouche county, N. B., as per diagram filed with application."—The diagram was on the back of the application, but it was not put there until after the plaintiff had signed the application.—The presumption is that it was so put there by M., the company's agent.—*Held* (*per* Hanington, Landry and McLeod JJ., Tuck C. J. and VanWart J. dissenting), that as the diagram was treated as a separate piece of paper, the words of reference in the policy were not sufficient to incorporate into it the whole application. (Reversed 29 S. C. R. 470 on ground of warranty and collusion to defraud.) *LeBell* v. *The Norwich Union Life Insurance Society*, 34, p. 515.

Assignment of chose in action upon policy — Attachment by judgment creditor—The loss payable under a policy of fire insurance was assigned by the assured to the plaintiff with the consent of the insurers.—A loss occurring, a judgment creditor of the assured obtained an attaching order under Act 45 Vict., c. 17, against the insurers.—In a suit by the plaintiff for a declaration of his title to the insurance and to restrain the garnishee proceedings, he alleged that the defendant intended setting up the claim that the assignment to the plaintiff was fraudulent and that the plaintiff had merely an equitable title, which could not be used to defeat the defendant's rights under the garnishee process.—The plaintiff also alleged that his assignor was insolvent though he did not allege that the assignor had refused to allow an action at law on the policy in his name.—*Held*, that the plaintiff was entitled to have his rights determined in equity, instead of under the garnishee proceedings, and that an injunction should be granted.—An assignee of a policy of fire insurance is entitled to sue thereon in equity where the assignor is insolvent, without a refusal by him to allow an action at law in his name. *Robertson* v. *The Bank of Montreal et al*; *Robertson* v. *Thorpe et al*, Eq. Cas., p. 541.

The insurance company ordered to pay the money into Court but without interest. *Id.*

Business tax — City of Saint John — 5 Geo. V., c. 94—The plaintiff, agent of the National Insurance Company of Hartford, Connecticut, carrying on the company's business in the city of Saint John, issued policies with the heading "Atlantic Fire Underwriters' Agency."—The policies continued: "by this policy the National Fire Insurance Company of Hartford, Connecticut, in consideration . . . does insure etc."—The policies are signed by the president and secretary of the National and are the policies of that company.—There is no association of underwriters known as the Atlantic Fire Underwriters' Agency, it being merely a name adopted by the National in issuing its policies.—Under the act 5 Geo. V., c. 94 (1915) amending 3 Geo. V., c. 55 (1913), by adding to s. 2, sub-s. (g), providing that every agent who issues a policy of any company and causes or permits to be represented thereupon the name of any other insurance company or association whether the same be connected with responsibility under the policy or not shall pay a fee of $100 for each company or association which he represents.—The agent of the National paid under protest to the city of Saint John in addition to the fee for that company payable under 3 Geo. V., c. 55, a fee of $100 for the Atlantic Fire Underwriters' Agency.—*Held*, that the name Atlantic Fire Underwriters' Agency, not being the name of any other insurance company, insurance association, underwriters' agency or other mode of association of underwriters, the plaintiff was not liable for the payment of the additional fee. *Howard* v. *The City of Saint John*, 43, p. 521.

Change of interest—Chattel mortgage—A policy of fire insurance on a factory and machinery contained a condition making it void if the said property was sold or conveyed or the interest of the parties therein changed.—*Held*, that by a chattel mortgage given by the assured on said property his interest therein was changed and the policy forfeited under said condition.—*Held*, further, that an agent with power limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach. *Tarrop* v. *Imperial Fire Insurance Co.*, 34 N. B. R., p. 113; 26 S. C. R., p. 585.

"Church furnishings etc."—Chimes of bells included—On July 3rd, 1911, Christ Church Cathedral, Fredericton, was partially destroyed by fire, and a chime of bells in the tower was wholly destroyed.—The building was insured for $55,000 in ten different companies, and the schedule of insurance in all of the policies was the same, being as follows: "(1) On the stone building, roof covered with tin shingles including the tower, spire and chancel thereof, as well as the choir room and vault, and all monuments and memorial tablets in said building, situate on the south side of Church street in the city of Fredericton, occupied as a place of public worship, and known as Christ Church Cathedral; amount, $42,000; rate, $.80; premium, $336.00.—(2) On pipe organ and appurtenances belonging thereto including choir music, communion table, pulpit, font, lectern, desks, pews and seating chairs, carpets,

stoves, furnaces and their attachments, steam heating apparatus, including piping, clocks, printed books, plate and plated ware, vestments and all church furnishings, furniture and fixtures, fuel, lighting equipment, including acetylene plant and all piping used in connection therewith while contained in said building; amount, $10,000; rate, $1.00; premium, $100.00.—(3) On stained glass and all other windows in said building; amount, $3,000; rate, $1.00; premium, $30.00." —*Held*, all parties agreeing that the bells were intended to be insured under the policies, that the "chime of bells" fell within class (2) under the description "all church furnishings, furniture and fixtures." *The Bishop of Fredericton* v. *The Union Assurance Co.* et al, 4 Eq., p. 408.

Collateral security—Bank's lien on insurance—Where a company is being wound up under the New Brunswick Winding Up Act, a bank is entitled to an order for the payment to it of the proceeds of policies of fire insurance effected by the company on their property, and made payable, in case of loss, to the bank as interest may appear, under a verbal agreement between the bank and the company that the policies should be so effected as security for advances which the bank from time to time might make, the bank having no interest in the property insured. *In re The Shediac Boot and Shoe Co. Ltd.*, 37, p. 98.

Concealment of facts — Outstanding judgment—A policy of fire insurance in the A. company was issued to the plaintiff upon an application in which it was stated by him that there was no judgment or seizure against him at the time of the making of said policy. —On the expiry of the policy the plaintiff took out a policy in the defendant company in which it was stipulated to be a condition precedent to its issue that it was based upon the representations and warranties contained in the application upon which the policy in the A. company was issued.—Between the issue and expiry of the first named policy a judgment was recovered against the plaintiff and execution issued. —This fact the plaintiff did not disclose to the defendant company.—*Held* (*per* VanWart J., Tuck C. J. and Barker J. expressing no opinion), that the representation by the plaintiff was not limited in its application to the circumstances at the date of the policy of the A. company but applied to the circumstances at the date of the policy of the defendant company. *Long* v. *The Phoenix Insurance Co.*, 34, p. 223.

Conditions of policy—Proximity of railway — Chattel mortgage or other change in interest—Defendant company issued a fire insurance policy upon the plaintiff's lumber.—By one clause the insured warranted "that no railway passes through the lot on which said lumber is piled or within two hundred feet of the same." —*Held*, the word "railway" includes a railway in course of construction upon which construction trains are running, though not opened for general public traffic.—Where the agent of an insurance company other than the defendant company was requested to procure insurance and sent the application to the general agent of his own company who placed part of the insurance with the defendant, *held*, no agency was established between the person taking the application and the defendant company, and therefore the defendant could not be charged with the knowledge of such person as to the nature of the risk or the value of the insured property. —The insurance policy contained conditions making the policy void "if the subject of insurance be personal property and be or become encumbered by a chattel mortgage," and "if any change other than by the death of an insured take place in the interest, title or possession of the subject of insurance."—After the policy issued, the plaintiffs, in pursuance of an agreement with a bank, transferred the lumber insured to the bank as security for indebtedness by transfer under the Bank Act.—*Held*, this transfer was a breach of the above conditions. *Gunnond* v. *Fidelity Phenix Fire Insurance Co*, 41 N. B. R., p. 145; 47 S. C. R., p. 216.

Conditions in policy—"Just and reasonable"—In an action for a loss on a fire policy containing a condition that any change material to the risk should avoid the policy unless promptly notified to the company and that any change of occupancy or non-occupancy should be deemed material to the risk, it was proved that the premises insured had been vacant for some months during the currency of the policy, but were occupied at the time of the loss, and it did not appear that the loss was in any sense due to the non-occupancy.—Under a proviso in the policy that certain conditions (including the one in question) should be in force only so far as the Court or a judge should declare it to be just and reasonable to be exacted by the company, the trial judge declared the condition as to occupancy made at the time the policy issued, but tested with relation to the circumstances which afterwards arose, to be unjust and unreasonable. —He submitted to the jury the questions whether the change from occupancy to non-occupancy was material to the risk in this case, and whether it was material generally. —To the former question the jury answered "No" and to the latter "Yes."—On the e answers a verdict was entered for the plaintiff. —*Held* (*per* Barker C. J., Hanington and McLeod JJ., Landry J. dissenting), that the condition as to occupancy was to be tested as to its being just and reasonable in the light of circumstances at the time the policy issued and not at the time of the loss, and being so applied was just and reasonable, and the breach of non-occupancy avoided the policy, and a verdict should be entered for the defendant. *Payson* v. *The Equity Fire Insurance Co.*, 38, p. 436.

Condition precedent — Waiver — The policy required that the insured in their proofs of loss "shall render a statement to this company signed and sworn to by said insured stating the knowledge and belief of the insured as to the time and origin of the fire."—The proofs stated that the origin of the fire was unknown to the insured but did not state insured's belief.—*Held* (*per* Barker C. J., Landry and McKeown JJ.), that this was not a compliance with the condition.—Another condition of the policy required insured to state in their proof of loss "the interest of the insured and of all others in the property."—The plaintiff stated that the property belonged to them and no other person had any interest in it except a specified bank for advances, but failed to state the nature of the bank's interest or the amount of the advances. —*Held* (*per* Barker C. J., Landry and McKeown JJ.), that this was not a compliance with the condition. —*Held* (*per* Barker C. J., Landry and McKeown JJ.), the fact that the defendant company notified the plaintiffs after the fire that the matter was in the adjuster's hands and sent an adjuster to inspect the loss, who made inquiries as to the origin of the fire and other matters mentioned in the proofs of loss does not establish a waiver of such proofs.—*Held* (*per* Barker C. J., Landry and McKeown JJ.), Mere retention of proofs of loss by an insurance company for a long time without objection does not constitute a waiver of defects in such proofs.—*McManus* v. *The Aetna Insurance Co.*, 11 N.B.R. 314, followed.—*Imperial Fire Insurance Co.* v. *Bull*, 15 A. R. (Ont.) 421, confirmed; 18 S. C. R. 697 distinguished.—*Guimond et al* v. *Fidelity - Phenix Fire Ins. Co.* 41 N. B. R. 145; 17 S. C. R., p. 216.

Condition precedent to claim—Waiver —A policy of insurance contained a condition requiring the assured, in case of loss, to procure a certificate as to the matters contained in the statement of loss under the hands of two magistrates most contiguous to the place of the fire.—A further condition provided that no condition should be deemed to have been waived unless the waiver was expressed in writing indorsed on the policy. —*Held* (*per* Tuck C. J., Hanington, Barker and Gregory JJ.), that the production of the certificate of the magistrates most contiguous to the place of fire was a condition precedent to the assured's right to recover.— *Held* (*per* Landry and McLeod JJ.), that the magistrate most contiguous qualified to act is the most contiguous within the meaning of the condition, though not the nearest in point of distance to the place of the fire.—*Held* (*per* curiam), that if there could be a waiver under the condition without endorsement on the policy, the acceptance of the proof of loss by the company without objection was not such a waiver. *LeBlanc* v. *The Commercial Union Insurance Co.*, 35, p. 665.

Material change in risk—Non-occupancy—See *Payson* v. *Equity Fire Insurance Co.*, 38, p. 436, supra.

Pleading—Declaration against agent for breach of duty—In an action by the plaintiff company against the defendant, the first count of the declaration alleged that the defendant was hired for the purpose of receiving and forwarding to the company applications for fire insurance, yet the defendant not regarding his duty, so negligently and wrongfully received and forwarded to the company an application for insurance containing statements which he knew at the time to be false, and material to the risk, and said company relying upon the truth of the application accepted the risk and issued a policy thereon which became a claim and said company was put to great costs in defending an action at law.—The second count alleged the false statements were received and forwarded to the company by the defendant fraudulently and in collusion with the applicant against the company.—*Held* (*per* Tuck C. J., Landry, McLeod and Gregory JJ.), that both counts stated a cause of action and were good on demurrer.—*Held* (*per* Hanington J.), that the defendant's duty, under the contract was to receive and forward all applications, whether the statements therein were true or false, and as the first count did not charge any duty beyond that or fraud, it was bad on demurrer; that he was in doubt as to the second count, because it did not allege that the damage suffered was directly caused by the fraud and collusion of the defendant. *The Norwich Union Fire Insurance Society* v. *McAlister*, 35, p. 691.

Pleading to claim on policy—To the declaration of a policy of fire insurance, dated in 1893, issued by the defendant company, it was pleaded that it was made a condition precedent to its issue that it was based on the written representations and warranties contained in the application upon which a policy in the A. company was issued, and although in said application the plaintiff represented that there was no judgment or seizure against him at the time of the making of the said policy of insurance mentioned in said first count and before the said property was burnt, damaged or destroyed by fire, as alleged in said first count, there was a judgment against the plaintiff signed on the 15th day of June, 1891, and an execution for the amount of said judgment was in the hands of the sheriff at the time the property insured was burnt, and also at the time the defendant's policy was issued.— *Held* (*per* Tuck C. J. and Barker J.), that the plea was bad, as it did not allege that there was a representation at the time the policy declared on was issued that there was no judgment against the plaintiff, and *held* (*per* Tuck C. J.), that in the absence of the date of the application to the A. company there was no evidence that the judgment against plaintiff was not obtained subsequently to the date of the application.— To the above declaration the defendant company pleaded that the policy was subject to a condition endorsed upon it that it should be void if any material fact or circumstance,

stated in writing or otherwise, had not been correctly represented by the assured, or if any fact material to the risk had been withheld, and that the plaintiff at the time of the making of the policy withheld the fact that said judgment had been signed against him.—*Held* (*per* Tuck C. J., Barker and VanWart JJ.), that the plea was bad, it not being alleged that the fact withheld was material; and *semble* (*per* Tuck C. J.), that the fact withheld was not material.—To the above declaration the defendant company pleaded that, subsequently to the making of the policy there was a change in the risk not made known to the defendants, and that by a condition of the policy, if the occupancy, situation or circumstances affecting the risk should, with the knowledge, advice, agency or consent of the assured, be so altered as to cause an increase of the risk, then the policy should become void.—*Held* (*per* Tuck C. J., Barker and VanWart JJ.), that the plea was bad for not alleging what the change in the risk was. *Long* v. *The Phoenix Insurance Co.*, 34, p. 223.

Repairing damage—Claim of lessor to have benefit—A lessee covenanted for himself and assigns that buildings of the lessor on the premises at the date of the lease would be left on the premises in as good repair as they then were; also that machinery of the lessee would not be removed from the premises during the term without the lessor's consent, but the same should be held by the lessor as a lien for the performance of the lessee's covenants and for any damage from their breach.—Under a deed of assignment for the benefit of the lessee's creditors the lease became vested in trustees.—A fire subsequently occurring, which destroyed the buildings and machinery, insurance on the latter was paid to the trustees.—The lessor demanded of the trustees that the insurance be applied to re-instating the buildings or the machinery. —By Act 14 Geo. III, c. 78, s. 83, insurance companies are authorized and required, upon request of a person interested in or entitled unto a house or other buildings which may be burnt down or damaged by fire . . . . to cause the insurance money to be laid out and expended towards rebuilding, re-instating or repairing such house or buildings.—*Held*. (1) without deciding whether the Act was in force in this province, or not, that the lessor was not entitled to the benefit of it, the Act not applying to machinery belonging to a lessee, and the lessor not having made a request upon the insurance company as provided by the Act; (2) that even had the insurance been upon the building, the lessor would have had no equity to it, there being no covenant by the lessee to insure for the former's benefit. *Randolph* v. *Randolph*, 3 Eq., p. 576.

Representation — Sole and unconditional owner — Pleading — A mortgagor is the "sole and unconditional owner" of property within the meaning of a condition in a policy of insurance against fire stipulating that the policy shall become void if the assured is not the sole and unconditional owner of the property insured.—The policy also contained a condition that it should become void if any building intended to be insured stood on grounds not owned in fee simple by the assured.—The land upon which the buildings stood was subject to a mortgage.—*Held*, that the defence that the lands were not owned in fee simple by the assured mortgagor was not available under a plea charging that the plaintiff had been guilty of misrepresentation in the application for insurance, in that he stated that the property insured was not mortgaged or otherwise encumbered whereas etc. it was mortgaged. *Temple* v. *Western Assurance Co.*, 35 N. B. R., p. 171; 31 S. C. R., p. 373.

Representations or warranties—There is a distinction between the non-communication of a material state of facts which the insurer knows all about and an express warranty by the insured in the policy itself that a certain state of facts exists.—(*Per* Barker C. J.) *Guimond et al* v. *Fidelity-Phoenix Fire Insurance Co.*, 41, p. 145.

Subsequent insurance — Formation of contract—A condition in a fire insurance policy making the policy void "if any subsequent insurance is effected with any other insurer" is not violated unless the insured could successfully maintain an action upon such policy with the other insurer.—An insurance policy issued in Canada by a company not licensed under The Insurance Act 1910, 9-10 Edw. VII (Dom.), c. 32, is void and therefore does not constitute "an insurance" within the meaning of the above condition.—An insurance policy does not take effect until delivery and its validity is determined by the law of the place where delivery is made. *The Pacific Coast Fire Insurance Co.* v. *Hicks*, 42, p. 294.

3. Life Insurance.

Assignment of policy for valuable consideration — Wife beneficiary — The plaintiff was named as the beneficiary in a policy of insurance on the life of her husband. —The policy was taken out by the husband, and the premiums paid by him.—By an assignment, to which the plaintiff was a party, the loss was made payable to the defendants for valuable consideration moving to the husband.—Upon the death of the husband, the plaintiff claimed the benefit of the policy, setting up that her consent to the assignment was procured by her husband's fraud.—*Held*, that the assignment, made previous to 58 Vict., c. 25, was valid without the consent of the plaintiff. *Gunter* v. *Williams et al*, 1 Eq., p. 401.

Condition precedent to action — Demand on head office—By the terms of a policy the defendants agreed to pay at its head office at the city of Hamilton in the province of Ontario.—*Held* (*per* Tuck C. J.),

that a non suit should not be granted on the ground that the plaintiff had failed to prove a demand at the head office or on the ground that no ancillary probate had been taken out in Ontario before action brought. *Seery et al* v. *Federal Life Assurance Co. of Canada*, 38, p. 96.

Delivery—Formation of contract—The plaintiff's mother applied to the defendant company for a $1,000 policy of life insurance. —Soon after her application she paid the first premium and obtained a receipt from the company's agent.—Her application was approved by the defendant, and a policy of insurance for $1,000 to which was attached a copy of the application, was issued and mailed to the defendant's agent, together with the official receipt for the premium.—The company at the same time called its agent's attention to the fact that there was a discrepancy between the age of the applicant as stated in her application and as given in the doctor's report.—The agent called at the applicant's home and learned from the plaintiff that her mother was one year older than she had stated in her application.—The agent then informed the plaintiff that if the policy was to be for one thousand dollars there would have to be an additional premium paid.—The plaintiff paid the additional amount and the agent returned the policy to the company's head office.—A few days later he received a new policy bearing the same date and similar in all other respects to the first policy, except that the premium was larger.—When this policy was received the agent did not deliver it as he had learned that the applicant was ill.—A few days later she died.—Her application and the policy both provided that the policy should not take effect until it was delivered, the first premium paid and the official receipt surrendered by the company during the lifetime and continued good health of the assured.—*Held*, that no contract of insurance was executed and in force at the time of the death of the plaintiff's mother. *Donovan* v. *Excelsior Life Insurance Co.*, 43, p. 325, C. D.; 43, p. 580 on appeal; affirmed S. C. of C., 31 D. L. R., p. 113.

Findings by jury—New trial—In an action against an insurance company on a life policy a verdict was entered for the plaintiff on answers of the jury to questions submitted by the Court and counsel.—Some of the answers on material issues were inconsistent and unsatisfactory and some pertinent and relevant questions were not answered.—*Held* (*per* Tuck C. J., Hanington and Barker JJ.), that there should be a new trial on the ground that the findings were incomplete, unsatisfactory and inconsistent. *Seery et al* v. *Federal Life Assurance Co. of Canada*, 38, p. 96.

Fraud in obtaining policy—A policy of life insurance in the plaintiff's company, obtained by the fraudulent misrepresentation of the assured was assigned by him to the defendant.—Learning of the fraud the plaintiff's agent charged the defendant with being a party to it, but upon the defendant denying it, withdrew the charge and asked that the policy be surrendered, offering to pay the defendant whatever money he had laid out in connection with it.—This offer the defendant refused, as also a similar offer subsequently made in a more formal manner.—In a suit to set the policy aside, the assured and the defendant were charged with having procured it by fraud, but the evidence at the hearing failed to establish the charge with respect to the defendant.—*Held*, that the bill should be dismissed as against the defendant with respect to the charge of fraud, but without costs, as the suit had been made necessary by his refusal of the plaintiff's offer.—While a general allegation of fraud, without stating the acts which constitute it, is bad pleading, it was held that fraud was sufficiently pleaded in a bill to set aside a policy of life insurance which set forth representations, made by the assured as to his health, and alleged that they were false and fraudulent to the knowledge of the assignee of the policy.—Terms of relief considered with respect to an assignee of a policy of life insurance, in a successful suit by the insurers to set the same aside on the ground of fraud by the assured in procuring the policy. *The Mutual Life Assurance Co. of New York* v. *Anderson et al*, 1 Eq., p. 466.

The assignee has no better right in reference to a policy procured by the fraud of the assured than the assured could have.—*Id.*

Fraud, Setting aside policy for—In an action by an insurance company to set aside a policy of life insurance issued by it, on the ground that the policy was procured by fraud of the assured and the assignee of the policy, evidence is admissible as bearing upon the fraudulent intent of the assignee that in other cases, before as well as after, he had engaged in other transactions of a like character with the same fraudulent intent. *The Mutual Life Assurance Co. of New York* v. *Jonah et al*, 1 Eq., p. 482.

Payee of claim — Infant beneficiary — Separate guardians in different jurisdictions—Life insurance in the Home Circle, a United States corporation, taken out by L., whose domicile was in Nova Scotia, was payable to E. in trust for L.'s infant daughter by his deceased wife.—Upon L.'s death, E. was appointed guardian in Nova Scotia of the person and estate of the infant.—The infant, after her father's death, removed to New Brunswick for a temporary purpose, and B., her maternal grandfather, having been appointed guardian of her person and estate in this province, brought this suit to restrain the Home Circle from paying the insurance to E., or to any other person than B. and to restrain E. from receiving it, and obtained an interim injunction.—*Held*, that the insurance was payable to the legal personal representative of the deceased,

and that the injunction should be dissolved. *Loasby* v. *The Home Circle et al*, Eq. Cas., p. 533.

Pleading—To the two counts of a declaration upon a policy or certificate of life insurance defendants pleaded thirty-four pleas.—The first and eighteenth were alike and were as follows: "The defendants say that no demand of the said sum of two thousand dollars was made at the Association's office in Galesburg, Illinois, and by reason thereof, and by the laws of the state of Illinois, the plaintiff cannot recover upon the said certificate."—The third and twentieth pleas were also alike and were as follows: "The defendants say that the death of the said August P. B. LeBlanc was from a cause exempted by the provisions and agreements contained in the said certificate."—An order was made by Landry J. in Chambers striking out these four pleas as being embarrassing.—Upon a motion to rescind said order, *held*, (1) that the first and eighteenth pleas were bad for not averring what the law of the state of Illinois was by reason of which the plaintiff could not recover, and (2) that the second and twentieth pleas were good, it being unnecessary to specify the particular cause relied upon by defendants as exempting them from liability as reference could be made to the certificate for this information. *LeBlanc* v. *Covenant Mutual Benefit Association*, 34, p. 444.

Premium note, Consideration for—Where a promissory note was given to the agent of an insurance company in payment of a first premium on a policy; and a policy was issued and sent to the insured and retained by him, containing provisions to the effect that the insurance should not take effect or be binding until the first premium had been paid to the company or a duly authorized agent; also, that if a promissory note or obligation were given for the premium and should not be paid at maturity, the policy should not be in force while the default continued, but the party should be liable on the note, the Court refused to set aside a verdict for the agent of the company on the note, on the ground that there was no consideration, holding that the defendant (appellant) was bound to show affirmatively that the verdict was wrong. *Crawford* v. *Sipprell*, 35, p. 344.

Premium note — Consideration — Application withdrawn before acceptance—The defendants signed an application to the Mutual Life Insurance Co. of New York for insurance on the lives of the directors of the defendant company.—When the application was given the plaintiff, the agent of the company, took from the defendants their note payable to his own order for the amount of the premium, and gave the defendants a receipt on one of the company's forms which contained this provision: "The insurance so applied for shall be in force from this date provided that the said application shall be accepted and approved by the said company at its head office in the city of New York, and a policy thereon duly issued.—In case the application is not so accepted and approved and no policy is issued, or should the applicant receive no notification from the company within thirty days from the date of this receipt of any application, then in every such case no insurance shall be effected, and it shall be understood and agreed that the company declines the risk, whereupon all moneys paid hereunder shall be returned on the delivery of this receipt."—The plaintiff discounted the note and placed the amount to his own credit, and paid the amount of the premiums less his commission to his principals.—After the note was discounted, but before the application was accepted, the defendants notified the plaintiff and his principal at its head office in New York that they withdrew the application.—*Held*, in an action on the note by the agent, that the application was a mere proposal for insurance and might be withdrawn at any time before acceptance; that the consideration for the note having failed, defendants were not liable in an action by the payee. *Johnson* v. *The G. & G. Flewelling Mfg. Co. Ltd.*, 36, p. 397.

Premium paid by note—Note past due—A condition in a policy of life insurance provided that if any premium, or note given therefor was not paid when due the policy should be void.—A note given, payable with interest, in payment of a premium provided that if it were not paid at maturity the policy should forthwith become void.—On the maturity of the note it was partly paid, and an extension was granted, and on a part payment being again made a further extension was granted.—The last extension was overdue and balance on note was unpaid at the death of assured.—A receipt by the company, given at the time of taking the note, was of the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note in terms thereof."—While the note was running the policy was assigned for value with the assent of the company to the plaintiff, to whom the receipt was delivered by the assured.—*Held*, that no estoppel was created by the receipt; that there was no duty upon the company to have afforded the plaintiff an opportunity of paying the premium; and that the policy was void. *Wood* v. *Confederation Life Insurance Co.*, 2 Eq., p. 217. (Reversed 35 N. B. R. 512, but upheld S. C. of C.)

Representation, Materiality of—An applicant for life insurance answered "no" to the two following questions asked by the defendant company: "Has any proposal to insure your life been declined, withdrawn or postponed?—Give full particulars.—Have you any other insurance on your life?—If so, where and for what amount?—Give full particulars."—The application containing these answers provided that it should be the

basis of the contract and that all answers were true so far as they were material to the contract.—As a matter of fact the applicant had previously asked another company for certain insurance but had been refused on the ground that the company did not insure a markswoman for over two hundred dollars.—This latter company, however, had issued the applicant a policy, known as an industrial policy, for a smaller amount without any formal written application and without any medical examination.—*Held*, that the answer to the first question was not a material misrepresentation as what took place did not constitute either a proposal to insure or a declining of the same within the meaning of the question, and *held*, that the answer to the second question was not a material misrepresentation inasmuch as the amount of the previous insurance was so small. *Katherine Donovan* v. *The Excelsior Life Insurance Co.*, 43, p. 325, C. D.

Wagering policy—A policy of life insurance in the plaintiff's company was taken out by the assured after it had been represented to him by the plaintiffs' agent that he could raise money upon it from the defendant by selling the policy to him, and the policy was taken out by the assured for that purpose.—At the time the assured was too poor to pay the premium and was unable to carry the policy.—Immediately upon the policy being issued, it was assigned to the defendant for a small sum and the defendant paid the original and subsequent premiums.—In a suit to set aside the policy as a wager policy and void as against the plaintiffs, the assured in his evidence stated that when he assigned the policy he expected to redeem it, and carry it for his own benefit.—*Held*, that the policy was not a wagering policy. *Mutual Life Assurance Co. of New York* v. *Anderson et al*, 1 Eq., p. 466.

Will. Effect of on insurance policies—A testator by his will gave a lot of land with house thereon and personal property to his wife absolutely, to enable her to maintain a home for herself and the testator's sons until they should attain the age of 21 years.—The residue of his estate he gave to trustees in trust for his sons.—The will then provided that the devise and bequest to his wife should be in lieu of dower, and that if she married again the property devised to her should vest in the testator's trustees for the benefit of his sons.—*Held*, that the wife took as her separate estate two life insurance policies made payable to her and the same were not subject to forfeiture in case of remarriage. *Leonard* v. *Leonard*, 1 Eq., p. 576.

Will made previous to 5 Edw. VII, c. 4. Effect of—B. died in 1907, having made a will in February, 1905, by which he left, among other legacies, one for $1,100 to his wife, the defendant in this suit.—B. had insured his life some years previous to 1905 for $1,500, the policy being made payable to his wife.—In his will B. created a fund for the payment of the several legacies, and included as part of this fund the policy for $1,500 mentioned above.—*Held*, that this provision in the will did not operate as a reapportionment of the insurance money as regards this policy for $1,500, under the N. B. Life Insurance Act, 5 Edw. VII, c. 4, passed April 8th, 1905, and that the proceeds of the same are payable to the defendant as sole beneficiary thereunder. *Boyne* v. *Boyne*, 4 Eq., p. 48.

INTEREST.

Bonds and debentures—Bonds dated July 1, 1902, provided for payment of the principal in ten years from date, and that in the meantime interest thereon should be paid at the rate of 10 per cent.—Default having been made in payment of the interest, the trustee under a mortgage given to secure the bonds, made on January 1 1905 a declaration calling in the principal and interest, under an acceleration clause in the mortgage.—*Held*, that interest at the rate provided for, and not at the statutory rate was payable after the date of the declaration. *The Eastern Trust Co.* v. *Cushing Sulphite Fibre Co. Ltd.*, 3 Eq., p. 392.

Contract—Delay in completion not fault of contractor—Interest on delayed payment—A contract between C., the defendant, a contractor with the department of railways and canals of the Dominion government and M. the plaintiff, a sub-contractor provided that for $145,000 to be paid to him he was to complete certain work for the defendant, and that the payments should be made (less ten per cent.) monthly as the work progressed according to the estimate of the government engineer in charge.—The work on the principal contract was to be completed on the 30th of September, 1899.—It was not completed for more than one year after that date, but the delay was not the fault of the plaintiff.—There was no stipulation in the contract in reference to the payment of interest on any sums due but not paid.—M.'s claim was disputed.—On an action being brought, it was established that he was entitled substantially to what he claimed.—*Held* (*per* Hanington, Landry, Barker and McLeod JJ., Tuck C. J. and Gregory J. dissenting), that the plaintiff was not entitled to interest, his claim not being for a sum certain payable by virtue of a written instrument at a time certain within the meaning of section 175 of 60 Vict., c. 24.—*Held* (*per* Tuck C. J., Hanington and Gregory JJ.), that if the plaintiff had been entitled to interest the rate would not be restricted to five per cent. under the Statutes of Canada, 63-64 Vict., c. 29, the contract having been entered into before the passing of that act. *Mayes* v. *Connolly*, 35, p. 701.

Debt—Interest by way of damages—On an appeal from a judgment allowing interest on an amount found due the plaintiff on an account taken between the parties for money paid by the plaintiff for the defendant, and for work done and materials supplied by the plaintiff for the defendant in the erection of a house owned in common by the plaintiff and defendant.—*Held*, that interest may be allowed when authorized by statute or when payable by contract and such contract may be inferred from trade or mercantile usage, or from a course of dealing between the parties; but, varying the judgment of Barry J. appealed from, it cannot be allowed by way of damages merely because of long delay under vexatious and oppressive circumstances, or because the money has been used and interest earned thereon (except in the case of trust moneys) nor because the debt has been wrongfully withheld by the plaintiff after the defendant has endeavoured to obtain it.—*Raymond* v. *Hay* (1840), 3 N. B. R. 99 considered and distinguished. *Duffy* v. *Duffy*, 43, p. 555.

Guarantee for certain amount—Liability for interest thereon—The defendants wrote the plaintiff the following letter: "As the C. Co. of W. New Brunswick, desires to make purchases from you, therefore to open a line of credit with you, we declare that in consideration of your complying with their request we hereby bind and oblige ourselves, jointly and severally, as principal debtors, with them towards you to the amount of $1,000 for purchases they may make from you at any time, as also for any notes given in settlement thereof by them or for any balance due thereon to the extent of the aforesaid sum of $1000." —*Held*, that this was a guarantee and not a mere offer to guarantee, and the defendants were liable thereon to the extent of $1,000 but not for interest beyond the sum of $1,000. *E. N. Heney & Co. Ltd.* v. *Birmingham et al*, 39, p. 336.

Principal and agent—An agent refusing to give an account and pay over balance is chargeable with interest. *Simonds* v. *Coster*, 3 Eq., p. 329.

Timber contract—Interest on advances—The plaintiff and defendant entered into a written contract by which the plaintiff agreed to cut, haul and deliver a quantity of logs to be used as pulpwood.—Under the contract the plaintiff was to pay interest on advances until payment on his logs became due "which will be in August after delivery of logs."—In an action to recover amount due for lumber delivered under contract, *held*, plaintiff was entitled to interest on the contract price from September 1, at five per cent. *Mann* v. *The St. Croix Paper Co.*, 41, p. 199.

Trust—Money paid sheriff in lieu of bail—Money paid to a sheriff by the defendant upon arrest for debt under the provisions of C. S. 1903, c. 30. s. 5, is held by the sheriff as a statutory trustee and the interest, if any, upon such money must be accounted for by him in the same way as the principal. *McKane* v. *O'Brien*, 40, p. 392.

See also MORTGAGES.

INTERNATIONAL LAW

Right to exclude aliens—By international law, and apart from any civil enactment, a sovereign state has the right at its pleasure to exclude or deport any alien from its dominions; therefore no action will lie in a British Court against an official exercising that right at the command and on behalf of the state of which he is the servant. *Papageorgiouw* v. *Turner*, 37, p. 449.

See CONFLICT OF LAWS.

INTERPLEADER

Interpleader—Where, in an interpleader suit, an *ex parte* injunction order was dissolved for suppression of material facts, leave was granted to move again for the order, together with the right to file an affidavit denying collusion. *The Canadian Pacific Railway Co.* v. *Nason*, 3 Eq., p. 476.

INTOXICATING LIQUORS.

1. Canada Temperance Act.
2. Liquor License Acts.
3. Miscellaneous.

1 Canada Temperance Act.

Adjournment of hearing—When the hearing of a case before a justice is adjourned, the justice is not bound to commence the trial at the hour of adjournment, but may postpone the hearing until a later hour in the day; nor is the Justice bound to be at the place of hearing continuously from the hour of adjournment until the commencement of the hearing. *Ex parte Card*, 34, p. 11.

Adjournment by Court—Agreement by counsel—At the hearing of an information under the Canada Temperance Act the magistrate adjourned his Court from December 14th, 1910 to January 5th, 1911, at 10 a. m.—Subsequently the counsel on both sides agreed on account of convenience of train service, that the trial should not proceed until 2.30 p. m.—when the Court met at 10 a. m., the magistrate was informed of the agreement but he proceeded with the trial, counsel for prosecutor being present and the defendant and his counsel absent.—The defendant's counsel refused to take further part in the proceedings and the defendant was convicted.—Upon certiorari, *held*, the magistrate did not lose his jurisdiction by reason of the agreement between counsel. *R.* v. *Allen ex parte Gorman*, 40, p. 459.

Amendments to 7-8 Edw. VII, c. 71—The Act 7-8 Edw. VII, c. 71, takes effect wherever Part II of the Canada Temperance Act is in force, without being voted upon. *R.* v. *Peck ex parte Beal*, 40, p. 320; *R.* v. *Peck ex parte O'Neill*, 40, p. 339.

Autrefois acquit—Where a person is convicted of an offence under the C. T. A. committed at a time falling within the period covered by a previous information upon which he was acquitted, in order to sustain a plea of *autrefois acquit* he must show that the offence for which he was convicted and that for which he was acquitted were identical. *Ex parte Flanagan*, 34, p. 577.

Bias—A conviction under the Canada Temperance Act made by two justices of the peace will not be quashed on the ground that one of them was related to the defendant, within the ninth degree of consanguinity, if the justice was not aware of the relationship, and no objection was taken at the trial. *R.* v. *Biggar et al ex parte McEwen*, 37, p. 372.

If the mere fact of existing litigation is relied on as the disqualification of a presiding justice on the ground of bias, the litigation must be really pending.—Service of a notice of action not followed by an action is not sufficient. *R.* v. *Kay, Ex parte Gallagher*, 38, p. 498.

A magistrate is not disqualified from trying a charge under the act by reason of a writ having been made out and sent to the sheriff for service in an action by the accused against the magistrate for alleged misconduct as a judicial officer, where the writ was not served before the conviction was made. *R.* v. *Bryon ex parte Owen A. Batson*, No. 2, 37, p. 383.

The fact that the police magistrate of the city of Moncton is a member of the Board of Police Commissioners for that city as established by 7 Edw. VII, c. 97, does not disqualify him from hearing an information laid by a police officer who was appointed by such Board. The police commissioners merely exercise a function of the provincial government, and are not responsible for the acts of the police officers they appoint. *R.* v. *Kay ex parte Wilson*, 39, p. 124.

Under section 136 of the Liquor License Act, the municipalities are authorized to pay the liquor license inspector all necessary costs incurred by him in prosecuting complaints under the Canada Temperance Act. —By arrangement between the municipality and the magistrate his costs were taxed at a lump sum of $5.00 where the complaint was dismissed or costs not paid by the defendant.—This amount would be more than the taxable costs in certain cases, and it was claimed the excess could not be paid out of the ordinary funds, but would have to be paid out of fines.—*Held*, such an interest on the part of the magistrate was too remote to disqualify him from trying a charge under the Canada Temperance Act.—*Ex parte McCoy*, 33 N. B. R. 605 followed.—*Held*, further, the municipality has authority to pay such agreed costs out of its ordinary funds under C. S. 1903, c. 165, ss. 112, 113, 115 and s. 95, sub-ss. 2 and 3. *R.* v. *Holyoke ex parte McIntyre*, 42, p. 135.

Certiorari, Delay in applying for—The Court refused to interfere with the discretion of a judge in granting a certiorari on the ground of want of jurisdiction although two terms had gone by before the application.—(*Per* Landry, White and Barry JJ., McLeod J. dissenting.) *Id.*

Commencement of prosecution—The laying of the information of an offence against the C. T. A. is the commencement of the prosecution. *Ex parte Flanagan*, 34, p. 577.

Conviction—Absence of accused—If the accused had proper notice of the proceedings and was aware that judgment might be pronounced against him, and he might have been present, it is no objection to the conviction that judgment was pronounced and sentence of imprisonment imposed in his absence. *R.* v. *Kay ex parte Landry*, 38, p. 332.

Conviction by "Sitting Magistrate"—The City of Moncton Incorporation Act, 53 Vict., c. 60, s. 65, provides that a sitting magistrate may act for the police magistrate of the city of Moncton when he is temporarily absent or ill or "is in any way disqualified by being a witness, or from relationship or otherwise."—*Held*, that a conviction by a sitting magistrate stating that he was acting for the police magistrate, "he being disqualified" and not alleging the grounds of disqualification, is sufficient on its face. *R.* v. *Stevens ex parte Gallagher*, 39, p. 4. See also *Ex parte Cormier*, 39, p. 435.

Convictions — Concurrent trials — Separate informations were laid against the accused charging him with having committed twenty offences against the Canada Temperance Act at different hours on April 25, 26, 27 and 28, 1914.—On being brought before the magistrate on a warrant he pleaded not guilty to the first information; an offence was proved and the magistrate ruled the accused was put upon his defence. —No defence was offered.—The magistrate reserved his adjudication and called upon the accused to plead to the second information.—The accused, who appeared by counsel, objected to the magistrate's proceeding with the second and subsequent informations until the first was disposed of.—The objection was overruled and the accused pleaded not guilty and the magistrate proceeded and dealt with the second and eighteen subsequent informations in the same manner as he did with the first, the accused by his counsel objecting in each case as he had done in the first.—At the

conclusion of the evidence of the prosecution on all the informations the magistrate adjudicated in each case, finding the accused guilty and imposing a fine of $50.00 and costs in each case.—Before each adjudication he asked the accused if he wished to offer any defence and the accused by his counsel stated that he did not intend to do so.—*Held* (*per* White and Barry JJ., Crocket J. dissenting), that the postponement by the magistrate of his decision until he had disposed of all the cases did not, under the circumstances, afford a sufficient ground for quashing the convictions, and assuming that it is established that the magistrate did not afford the accused a fair opportunity of making a defence until the conclusion of the case of the prosecution on all the informations, the objection was one to procedure and not to jurisdiction and was no ground for quashing the convictions under the Canada Temperance Act.—*Held* (*per* Crocket J.), that the return and affidavits disclose facts showing that the accused had not a fair opportunity of making his defence, and the magistrate in making the convictions acted without jurisdiction and the convictions should be quashed and an order for discharge of the defendant under the habeas corpus proceedings made. *R.* v. *Steeves ex parte Richard*, 42, p. 596.

Convictions for two offences, periods partly concurrent—Two informations were laid against the defendant under the Canada Temperance Act for unlawfully selling intoxicating liquor, the first charging a sale between June 25 and September 20, 1909; and the second charging a sale between July 1st and September 20, 1909.—After hearing the first information the magistrate proceeded with and heard the second; and after the second had been heard the defendant was convicted of both offences.—There was evidence in the first case of a sale to W., and in the second case evidence of a sale to P.—*Held*, the convictions were good there being evidence of a distinct offence in each case. *R.* v. *Alexander ex parte Monahan*, 39, p. 430.

Conviction, Form of—A conviction which states in terms that the accused is convicted of the offence charged, though not in the words of the Act, is sufficient, and will not be quashed on certiorari. *R.* v. *Kay ex parte Landry*, 38, p. 332.

Conviction, Form of—Penalty—A conviction for an offence against the Canada Temperance Act, adjudging a fine and costs to be paid forthwith and in default thereof imprisonment, is proper under s. 872 (b) of the Criminal Code, 1892, without awarding distress and in default of distress then imprisonment. *Ex parte Casson*, 34, p. 331; *Ex parte Gorman*, 34, p. 397.

Conviction — Information after search warrant—A conviction under the Canada Temperance Act, R. S. C. 1906, c. 152 for keeping liquor for sale, on an information laid by W. will not be set aside because W. also laid the information for and executed a search warrant by which the evidence in support of the conviction was obtained.—*Ex parte McCleave*, 35 N. B. R. 100 distinguished. *Ex parte Dewar*, 39, p. 143.

Conviction quashed on certiorari—A rule *nis* to quash a conviction will be made absolute as a matter of course on proof of due service and on production of the writ of certiorari with a proper return thereto if no one appears to show cause.—(*Per* Tuck C. J., Hanington and Landry JJ., McLeod and Gregory JJ. dissenting.) *R.* v. *Sweeney et al ex parte Cormier*, 38, p. 6.

Conviction where period of alleged sale ran back over three months—A conviction under the Canada Temperance Act for selling between two dates, where one day in such period was more than three months before the date of laying the information, held bad for lack of evidence that the sale actually took place within the three months. *R.* v. *Kay ex parte Hebert*, 39, p. 67.

Conviction wrongly entitled, Amending—A conviction under the Canada Temperance Act was erroneously drawn up in the "District of Chipman Civil Court."—It was in fact made by the stipendiary magistrate for the district of Chipman.—Upon certiorari the Court amended the conviction by striking out the words "Civil Court." *Ex parte Weston*, 40, p. 379.

Costs—Where costs were wrongly assessed the conviction was amended. *Ex parte Davidson*, 39, p. 124; *R.* v. *Clarkson ex parte Hayes*, 40, p. 363.

Where several convictions are made against the same person for distinct offences at the same time, the magistrate is justified in imposing the costs of conveying to gaol in each conviction.—If the costs imposed are excessive the excess should by amendment be stricken out. *R.* v. *Steeves ex parte Richard*, 42, p. 596.

Costs, Excessive—An allowance of costs, under a conviction for a violation of the Canada Temperance Act, beyond what is allowed by the tariff of fees under s. 871 of the Criminal Code, 1892, is not such an excess of jurisdiction on the part of the magistrate as to justify quashing the conviction. *Ex parte Raysworth*, 34, p. 74.

Crown — Canadian Government Railways—The Crown, not being expressly mentioned in the Canada Temperance Act, R. S. C. 1906, c. 152, is not bound thereby, and therefore a station agent of the Intercolonial Railway, a government railway, cannot be convicted under s. 117 of the Act as amended by 7-8 Edw. VII (Dom.), c. 71, for warehousing and keeping for delivery, in the course of his duty as station agent,

intoxicating liquor brought to his station by the railway. *R.* v. *Marsh ex parte Walker*, 39, p. 329.

Custodia legis—Claim of property—Liquor consigned to McK. was seized under a search warrant issued under part II of the Canada Temperance Act, R. S. C. 1906, c. 152, s. 136, on information of C., a liquor license inspector and given into C.'s custody for safe keeping.—The warrant was issued by the proper officer and was regular and valid on its face.—McK. replevied the goods from C. who put in a claim of property under C. S. 1903, c. 111, s. 361.—*Held*, reversing the judgment of the County Court judge, that C. was entitled to retain possession of the liquor until it should be disposed of according to law, such possession being necessary to the carrying out of the act.—*Semble*, An appeal lies direct to the Supreme Court from the judgment of a County Court judge on a claim of property under C. S. 1906, c. 111, s. 361. *McKeen* v. *Colpitts*, 39, p. 256.

Defence of autrefois convict—If a party charged with an offence sets up as a defence a previous conviction for the same offence, the onus is on him to prove the identity of the offences. *R.* v. *Kay ex parte Gallagher*, 38, p. 325.

Delay in issuing summons—Where an information under the Canada Temperance Act was laid within three months after the offence, but no summons was issued thereon for a year and fourteen days after information laid, *held* (*per* Barker C. J., Landry, White and Barry JJ., McLeod and McKeown J. dissenting), that the delay in issuing summons did not deprive the magistrate of jurisdiction. *R.* v. *Peck ex parte Beal*, 40, p. 320; *R.* v. *Peck ex parte O'Neill*, 40, p. 339.

Destruction of Liquor—The prosecutor of a charge of keeping liquor for sale contrary to the Canada Temperance Act, being personally liable for costs in the event of the prosecution failing, is though a peace officer disqualified from executing a search warrant or an order for the destruction of the liquor, for the keeping for sale of which the information was laid.—(*Per* Hanington, Landry and VanWart JJ., Tuck C. J. and McLeod J. dissenting). *Ex parte McCleave*, 35, p. 100.

Destruction of liquor—An order for destruction of liquor condemned under a conviction under the Canada Temperance Act may be executed by the complainant on whose information the conviction was made where the order for destruction does not form part of the conviction.—*Ex parte Dewar*, 39 N. B. R. 143, followed.—*Ex parte McCleave*, 35 N. B. R. 100, distinguished. *R.* v. *Lawlor ex parte Doyle*, 44, p. 244.

Dies non, Easter Monday not—Easter Monday is not a non-juridical day and the Court refused to set aside a conviction made on that day for an offence against the Canada Temperance Act. *R.* v. *Kay ex parte Henry Cormier*, 38, p. 231.

Disqualification of magistrate—Pecuniary interest in fund no bar.—$100 salary. See *Ex parte McCoy*, 33, p. 605.

Disqualification of magistrate—Both the police and the sitting magistrate of the city of M. were residents and ratepayers thereof, and the police magistrate was in receipt of a fixed salary from the city as City Court Commissioner.—Fines imposed for violation of the Canada Temperance Act therein were paid over to the treasurer of the city, by him placed to the credit of its general funds and used to meet unforeseen expenses.—The city, by one of its policemen employed for the purpose of enforcing the Act, was the prosecutor in all the cases. — *Held* (Hanington J. dissentiente and Landry J. dubitante) that there was no disqualification of either the police or the sitting magistrate by reason of pecuniary interest, nor was there such a probability of bias on the part of either by reason of their being corporators of the city, which was the virtual prosecutor, as to invalidate convictions made by them for violations of the Canada Temperance Act in the said city of M.—*Ex parte Driscoll*, 27 N. B. R. 216, considered. *Ex parte Gorman et al.* 34, p. 397.

Disqualification of prosecutor to search or destroy—The prosecutor of a charge of keeping liquor for sale contrary to the Canada Temperance Act, being personally liable for costs in the event of the prosecution failing is, though a peace officer, disqualified from executing a search warrant or an order for the destruction of the liquor, for the keeping for sale of which the information was laid.—(*Per* Hanington, Landry and VanWart JJ., Tuck C. J. and McLeod J. dissenting.) *Ex parte McCleave*, 35, p. 100.

A conviction under the Canada Temperance Act, R. S. C. 1906, c. 152, for keeping liquor for sale, on an information laid by W. will not be set aside because W. also laid the information for and executed a search warrant by which the evidence in support of the conviction was obtained.—*Ex parte McCleave*, 35 N. B. R. 100, distinguished. *Ex parte Dewar*, 39, p. 143.

Druggist, Sale by—A prescription for ten ounces of gin signed by a physician containing the words "use for medicine only" and "repeat once only" and the name of the purchaser, is not sufficient under the Canada Temperance Act, R. S. C. 1906, c. 152, s. 125, to justify a druggist in making a second sale of the liquor. *R.* v. *Kay ex parte Nugent*, 39, p. 135.

Election under Canada Temperance Act—On an application to a County Court judge for a scrutiny of ballots in an election

for the repeal of the Canada Temperance Act, *held* (Tuck C. J. dissenting), that secondary evidence of the ballots contained in lost or stolen ballot boxes was properly receivable. *Ex parte LeBlanc*, 34, p. 88.

Evidence, Failure to read over to witness—The provision of section 721, subsection 3 of the Criminal Code requiring the evidence to be read over to a witness on the trial of an information or complaint is a matter of procedure, and its omission does not go to the jurisdiction of the magistrate.—*Ex parte Doherty*, 32 N. B. R. 479, followed. *R.* v. *Kay ex parte Gallagher*, 38, p. 498.

Evidence not signed by justice—The provisions of s. 682, sub-s. 4 of the Criminal Code, R. S. C. 1906, c. 146, requiring that the depositions of witnesses should be signed by the justice is a matter of procedure and does not go to the jurisdiction.—*Ex parte Gallagher*, 38 N. B. R. 498, followed. *Ex parte Budd*, 39, p. 602.

Evidence, Sufficiency of—G., L. and C. were convicted for keeping liquor for sale contrary to the Canada Temperance Act.—Orders *nisi* to quash the convictions were granted on the ground that improper evidence was admitted, without which there was no evidence that the beer sold was intoxicating.—The evidence objected to was the certificate of one P., an analyst, of the percentage of absolute alcohol in the beer sold.—Affidavits of the prosecutor, his counsel, and the magistrate were read on the return of the order stating that on the trial of a prior complaint against one T., P. gave evidence and it was agreed between the counsel for the prosecution and the counsel for the accused that his evidence might be used in the cases against the accused.—In affidavits in reply, the accused denied the alleged agreement, and no reference was made to it in the magistrate's return.—*Held* (*per* Tuck C. J. Barker, McLeod and Gregory JJ., Landry J. dissenting,) that there being some evidence to justify the conviction the orders under the decision in *Ex parte Daley*, 27 N. B. R. 129, must be discharged.—*Held* (*per* Landry J.), that the agreement having been denied, and not having been referred to in the return, the Court should treat it as not existing.—That if it existed there was nothing in the affidavits or the return to show what the evidence of the analyst in the case against T. was, and therefore no evidence upon which to base the convictions against the accused, and the orders should be made absolute. *R.* v. *Kay ex parte Gallant*, 37, p. 72.

The Court will not quash a conviction under the Canada Temperance Act, R. S. C. 1906, c. 152, for selling liquor where there is some evidence to sustain the conviction, although that evidence is little more than opinion. *R.* v. *Kay ex parte Horsman*, 39, p. 129.

Certiorari having been taken away in proceedings for violation of the Canada Temperance Act, a conviction for having unlawfully kept for delivery intoxicating liquor will not be interfered with though there is insufficient evidence of the offence charged, the magistrate having jurisdiction over the person and the offence.—Upon a conviction against the agent of an express company for having unlawfully kept for delivery intoxicating liquor in violation of the Canada Temperance Act, R. S. C. 1906, c. 152, amended by 7-8 Edw. VII (Dom.), c. 71, certiorari will not be granted on the ground (1) no evidence that the defendant had any knowledge that the packages kept by him contained intoxicating liquor or (2) no evidence that the liquor received was not for personal or private use or (3) no evidence that the liquor was brought into the county where the offence was committed in violation of the Act.—*Ex parte Daley*, 27 N. B. R. 129, discussed and followed. *R.* v. *Hornbrook ex parte Morrison*, 39, p. 298.

The Court refused to quash a conviction under the Canada Temperance Act on the ground that the magistrate convicted without sufficient evidence of the defendant's guilt. *R.* v. *Dibblee, Ex parte McIntyre*, 39, p. 361; *Ex parte McCoy*, 33, p. 605.

Certiorari will not go on the ground of insufficient evidence where magistrate has jurisdiction. *R.* v. *Holyoke, Ex parte Blair*, 41, p. 223; *R.* v. *Lawlor, Ex parte Doyle*, 44, p. 244.

The Court will not quash a conviction had under the Canada Temperance Act on the ground that there is no evidence of the offence.—Here, in the opinion of the Court, there was evidence in support of the conviction. *R.* v. *Nickerson ex parte O'Regan*, 39, p. 428.

Whether liquor is intended for personal use or for sale is a question of fact to be decided by the magistrate and his decision is not open to review on certiorari.—*Ex parte Daley*, 27 N. B. R. 129, followed. *R.* v. *Holyoke ex parte McIntyre*, 42, p. 135. *R.* v. *Holyoke, Ex parte Blair*, 41, p. 223.

Exceptions—Since the Act 9 Edw. VII (Dom.), c. 9, amending s. 717 of the Criminal Code, R. S. C. 1906, c. 146, it is not necessary for the prosecutor to negative exceptions in ss. 117 and 127 of the Canada Temperance Act. *R.* v. *Dibblee ex parte McIntyre*, 39, p. 361.

Express company agent, Delivery by, C. O. D.—The agent of an express company in the county of W. where the Canada Temperance Act was in force, in the ordinary course of business, delivered a parcel containing intoxicating liquor to the person to whom it was addressed, and collected from him the price thereof, the liquor by the buyer's instructions having been sent to him by express C. O. D.—The sale of th

liquor was effected at a place outside of the county of W.—*Held* (*per* Tuck C. J., Hannington, Barker and McLeod JJ., Landry J. dubitante), that the agent could not be convicted of selling intoxicating liquor contrary to the provisions of the said act. *R.* v. *Cahill ex parte Trenholm*, 35, p. 240; c. f. *R.* v. *Lawlor, ex parte Doyle*, 44, p. 244 post col. 444.

Information, establishing territorial jurisdiction—In order to give a magistrate jurisdiction over an offence against the Canada Temperance Act, where the accused did not appear, the information must charge an offence committed within his territorial jurisdiction; and the statement that the offence was committed in violation of Part II of the Act then in force in the county in which the magistrate has territorial jurisdiction, without a statement that it was committed in such county, is not sufficient, and the defect is not cured by the fact that the summons stated, and the evidence proved the offence to have been committed within his territorial jurisdiction. *R.* v. *Hubbard ex parte Monahan*, 42, p. 524.

Information defective — Appearance—The information for a violation of the Canada Temperance Act was defective in that it was not sworn to by the prosecutor at the place and time stated therein.—The defendant, however, appeared and pleaded not guilty.—*Held*, that as the magistrate had jurisdiction of the offence and the defendant had appeared, the conviction must stand. *Ex parte Sonier*, 31, p. 84.

Information, Laying of—Where a prosecution is brought before two justices under the Canada Temperance Act, the information must be laid before two justices, the Criminal Code, s. 842, not having altered the law under which *Ex parte Sprague* (31 N. B. R. 236), was decided. *Ex parte White*, 34, p. 333.

Information on day of offence—Where an information was laid on the 11th of March, 1908, and the defendant was convicted for an offence committed between the 8th and 11th days of that month, it was held that the conviction was not bad for uncertainty as to whether the offence had been committed before the information was laid. *R.* v. *Kay ex parte Wilson* No. 2, 38, p. 503.

Information on separate pieces of paper—The Court refused to set aside a search warrant issued under the Canada Temperance Act where the informant's grounds of suspicions were written on a separate piece of paper attached to the information, but not initialled. *R.* v. *Wilson, ex parte Harrington et al*, 40, p. 384.

Incorporated company—The president of an incorporated company, who hired the clerks and had the entire management of the business, was convicted of selling liquor contrary to the provisions of the second part of the Canada Temperance Act, where the sale had been made by a clerk under general directions received by him from the president. —Conviction affirmed (VanWart J. dissenting). *Ex parte Baird*, 34, p. 213.

Information laid over telephone—C. signed an information for an offence against the Canada Temperance Act, leaving the date and a place for the magistrate's name in blank, and mailed it to magistrate J.—J., being ill, handed the information to magistrate M.—C. then requested magistrate M. over the telephone to take the information and to issue a summons thereon. —Summons was issued and at the hearing, after the evidence was all in, the defendant's counsel appeared and objected to the magistrate's jurisdiction, but took no further part in the proceedings.—*Held*, that the information was improper, because not laid and signed before the magistrate and that the magistrate acted without jurisdiction. —*Held, also*, that the appearance of defendant's counsel merely to object to the jurisdiction did not operate as a waiver.—*Ex parte Sonier* (34 N. B. R. 81), distinguished. *R.* v. *Murray ex parte Copp*, 40, p. 289.

Information signed by only one justice—A conviction under 51 Vict., c. 34, s. 8, amending s. 105 of the Canada Temperance Act, made by two justices of the peace on an information purporting on its face to have been taken and signed by only one of them, was affirmed on argument on the return of a rule *nisi* to quash the conviction removed by certiorari.—(*Per* Tuck C. J., Hannington and Landry JJ., McLeod J. doubting.)—Quære:—If affidavits can be read on the return of a rule nisi to quash a conviction removed by certiorari, to establish facts necessary to jurisdiction not appearing on the face of the proceedings. *R.* v. *Hennessy et al ex parte Pallen*, 38, p. 103.

"Intoxicating liquor"—Liquor containing a little over ½ per cent. of spirits may be "intoxicating liquor" under the act. *R.* v. *Kay ex parte Horsman*, 39, p. 129.

See also *R.* v. *Marsh, Ex parte Lindsay*, 39, p. 119, post col. 441.

Jurisdiction — Subsequent information—Where information is laid before a magistrate, he acquires jurisdiction over the offence charged, and his jurisdiction is not ousted by a subsequent information before and determination by another magistrate of the same offence. *R.* v. *Kay ex parte Gallagher*, 38, p. 325.

Magistrate, Jurisdiction of—By Act 39 Vict., c. 16, provision was made for the appointment by the Lieutenant Governor in Council of a person resident in the parish of Salisbury, in the county of Westmorland, to be a district or stipendiary police magistrate for the said county.—By Act 53 Vict., c. 77, Act 39 Vict., c. 16 was amended by

inserting the word "or" between the words "stipendiary" and "police" and it was enacted that any person theretofore appointed a stipendiary and police magistrate under the words "stipendiary police magistrate" should be held and taken to be a stipendiary and police magistrate for the county of Westmorland. The Royal Gazette, containing the appointment of a person in pursuance of the Act 39 Vict., c. 16, designated him as "Police Magistrate for Salisbury."—*Held*, that he was appointed for the county of Westmorland. *Ex parte Gallagher*, 34, p. 329.

"Malt liquor"—Beer manufactured from malt, although not in fact intoxicating, is a "malt liquor" and therefore an "intoxicating liquor" within the meaning of the Canada Temperance Act, R. S. C. 1906, c. 152, s. 2 (A). *R.* v. *Marsh ex parte Lindsay*, 39, p. 119.

Mens rea—Upon a charge for unlawfully selling intoxicating liquor in violation of the Canada Temperance Act, it is not necessary to prove knowledge on the part of the defendant that the liquor sold was intoxicating. *R.* v. *Marsh ex parte Lindsay et al*, 39, p. 119.

Military canteen—The infantry school corps at Fredericton has the right to establish and maintain a canteen to be conducted in accordance with the Queen's Regulations and, inasmuch as the active militia is subject to the e orders and regulations, every officer and man of the militia from the time of being called out for active service, and also during the period of annual drill or training, has an equal right with the members of the infantry school corps to purchase ale and other articles for sale at the canteen. *Ex parte Patchell*, 34, p. 258.

Moncton — Sitting magistrate — The word "absence" in section 65 of the City of Moncton Incorporation Act, 53 Vict., c. 60, does not mean absence from the place of trial but inability to attend to the business of the Court.—Here the police magistrate was in the court room during part of the trials but during the trials was obliged to attend before a commissioner appointed by the provincial government to inquire into his official conduct. *R.* v. *Steeves ex parte Cormier*, 39, p. 435.

See also *Ex parte Gallagher*, 39, p. 4.

Moncton, City of—*Semble*, that the police officers of the city of Moncton have authority to make a seizure of liquor outside the city limits. *R.* v. *Kay ex parte Wilson*, 39, p. 124.

Municipal councillor, Disqualification of, if vendor or inspector—A licensed vendor under the second part of the Canada Temperance Act is disqualified from being a member of the municipal council. (*Per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ.) An inspector under the Canada Temperance Act, appointed by the municipality is disqualified from being a member of the municipal council. (*Per* Tuck C. J., Landry, Barker and McLeod JJ.) *Ex parte Williams in re Dickie*, 38, p. 156.

Municipality, Liability of, for act of police officer—A city is not liable for the act of a police officer who unlawfully broke and entered the premises of the plaintiff and carried away therefrom certain intoxicating liquors there kept for sale by the plaintiff contrary to the provisions of the Canada Temperance Act although such officer had been specially appointed to see the said Act was enforced therein.—Where the servant of a municipal corporation does an act in which the corporation has no peculiar interest, and from which it derives no benefit in its corporate capacity, but which is done in pursuance of some statute for the general welfare of the inhabitants of the community, such servant cannot be regarded as the agent of the corporation for whose wrongful acts it would be liable, and the doctrine of respondeat superior does not apply.—*Further held*, that the city could not make itself liable for the acts of the officer unless it ratified and adopted them with a full knowledge of their illegality.—(*Per* Tuck C. J., Barker, McLeod and Gregory, JJ., Hanington and Landry JJ. dissenting.) *McCleave* v. *City of Moncton*, 35 N. B. R., p. 296; 32 S. C. R., p. 106.

Parish Court commissioner, Jurisdiction of—A Parish Court commissioner by the Act respecting Parish Courts, C. S. 1903, c. 120, s. 17, is given the power conferred upon two justices by the Dominion Act respecting summary convictions, Part XV of the Criminal Code, and has therefore jurisdiction to try offences under the Canada Temperance Act, R. S. C. 1906, c. 152. *R.* v. *Alexander ex parte Monahan*, 39, p. 430.

Penalty — Imprisonment not exceeding three months may be imposed in a conviction under the Canada Temperance Act in default of goods. *R.* v. *Steeves ex parte Richard*, 42, p. 596.

Penalty under c. 41 (1904)—Chapter 41 of the Acts of 1904 (Dom.) enacting "Everyone who by himself . . . keeps for sale . . . any intoxicating liquor in violation of the second part of the Canada Temperance Act shall, on summary conviction be liable to a penalty for the first offence of not less than $50.00, or imprisonment for a term not exceeding one month etc." gives an alternative penalty so that either a fine or a term of imprisonment may be imposed. *R.* v. *Kay ex parte McDougal*, 38, p. 1.

Penalty—$200 fine—A conviction for a first offence against the second part of the Canada Temperance Act, imposing a penalty of $200 under c. 41 of the Acts of the Parliament of Canada (1904), which imposes a penalty for a first offence of not less than $50 is a good conviction.—*Semble*, that such

a conviction would not be sustained if it imposed such an exorbitant penalty as to imply that the convicting magistrate acted from motives that were not judicial. *R.* v. *Kay ex parte Henry Cormier*, 38, p. 3.

(Cf. *In re Richard*, 38 S. C. R., p. 394. Editor.)

Penalty—The amendment to the Canada Temperance Act, R. S. C. 1906, c. 152, s. 127, authorizes imprisonment for a term not exceeding one month, with or without hard labor, without the option of a fine for a first offence and applies to localities that had adopted the act prior to the amendment. *R.* v. *Kay ex parte Gallagher*, 38, p. 325; *Ex parte Landry*, 38, p. 332.

The refusal of the commissioner to adjourn in order to procure attendance of counsel is a matter in his discretion and does not go to his jurisdiction. *Id.*

A Parish Court commissioner has jurisdiction to try offences under the Canada Temperance Act.—The Act 62 Vict., c. 57, does not make the village of St. Mary's an incorporated town, and does not deprive a Parish Court commissioner of his jurisdiction in that village. *R.* v. *Clarkson ex parte Hayes*, 40, p. 363.

Police magistrate, Jurisdiction of—A police magistrate appointed under 46 Vict., c. 3, for the county of Westmorland, with civil jurisdiction within the parish of Shediac, has jurisdiction to try offences against the Canada Temperance Act committed at the city of Moncton, and such jurisdiction is not restricted by the Act relating to the Jurisdiction of Police or Stipendiary Magistrates, 2 Edw. VII, c. 11, giving police or stipendiary magistrates appointed for a parish jurisdiction for the county in which such parishes are situate, and providing that such magistrates shall have no jurisdiction over offences committed within the limits of any city or incorporated town. *R.* v. *McQueen ex parte Landry*, 38, p. 48.

Prescription, Sale under—A prescription for ten ounces of gin signed by a physician containing the words "use for medicine only" and "repeat once only" and the name of the purchaser, is not sufficient to justify a druggist in making a second sale of the liquor under the Canada Temperance Act, R. S. C. 1906, c. 152, s. 125. *R.* v. *Kay ex parte Nugent*, 39, p. 135.

Principal and agent—Purchase by agent for illegal purpose—The plaintiff agreed, subject to the general control and supervision of the defendant, to act as manager of defendant's hotel situate in the city of Moncton where the Canada Temperance Act is in force.—At the request of the defendant, plaintiff purchased in his own name in the city of Saint John, intoxicating liquor to be supplied to the hotel guests and sold at the bar.—There was no proof that the vendor knew that the Canada Temperance Act is in force in Moncton.— *Held*, that having knowledge that the liquor was to be disposed of contrary to law, the plaintiff could not recover from the defendant on her promise, express or implied, to pay or indemnify him against payment for the liquor. *Wilkins* v. *Wallace*, 38, p. 80.

Principal and agent—Conviction of both—Defendant's wife sold liquor for the defendant and was convicted of selling liquor in violation of the Canada Temperance Act. —Later, on the same evidence, defendant was convicted of keeping liquor for sale.— *Held*, the defendant's conviction was good. *Ex parte Campbell*, 40, p. 350.

Principal and agent — Express company—A conviction against the defendant, an express agent, for unlawfully storing intoxicating liquor contrary to Part II of the Canada Temperance Act, was affirmed on certiorari, although the only evidence of storing was that the man employed to attend the trains and receive and deliver parcels forwarded by express, received from the express car a barrel containing the liquor in question and placed it on the station platform with the intention of putting it in the company's wareroom, but before he had an opportunity of doing so it was seized by the inspector under the Canada Temperance Act, who opened and examined it, and sent it to the police station.—The defendant was not present and personally had nothing to do with the transaction. *R.* v. *Lawlor ex parte Doyle*, 44, p. 244, c. f. *R.* v. *Cahill, ex parte Trenholm*, 35, p. 240, supra col. 439.

Principal and agent — Incorporated company—The president of an incorporated company may be convicted of shipping intoxicating liquor in violation of the Canada Temperance Act where the shipment is made by a clerk of the company, but on an order directed to the president personally. *R.* v. *Holyoke ex parte McIntyre*, 42, p. 135.

Principal, Conviction of—Agent unknown—The principal may be convicted under the Canada Temperance Act for selling liquor although his agent who actually made the sale is unknown, and, therefore, cannot be convicted. *Ex parte Johnson*, 39, p. 73.

Re-arrest on same warrant—The prisoner, who had been arrested under a warrant to serve a sentence of imprisonment for an offence against the Canada Temperance Act, was, upon his own request, suffered to go at large for a time by the officer who had the execution of the warrant.—Shortly after he was again arrested upon the same warrant and conveyed to the county gaol to serve his term of imprisonment.—Upon an application for an order in the nature of a habeas corpus, *held* (*per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ., VanWart J. dissenting), that the second arrest upon the same warrant was legal, and that the order should be refused. *Ex parte Doherty*, 35, p. 43.

Record, Necessity of proper—The fact that in the case of Canada Temperance Act convictions certiorari is taken away does not affect the necessity of a proper record to support the conviction; firstly, because without such record the jurisdiction of the inferior Court to make the conviction would not appear upon the face of the proceedings; and secondly, because the statute has expressly prescribed what record shall be kept and the mode in which the same shall be verified and authenticated in all cases of summary conviction.—(*Per* White J.) *R.* v. *Limerick ex parte Dewar et al*, 44, p. 237.

Replevin of liquor—In custodia legis—See *Mitchell* v. *Davis*, 39, p. 486.

Search warrant, Information for, insufficient—The validity of a conviction under the Canada Temperance Act, R. S. C. 1906, c. 152, is not affected by the fact that the evidence upon which the conviction is based was obtained by means of a search warrant, the information for which was insufficient. *R.* v. *Kay, Ex parte Wilson*, 39, p. 124.

Search warrant—A search warrant issued under the Canada Temperance Act, R. S. C. 1906, c. 152, will be quashed upon certiorari, where no grounds of suspicion are stated in the information.—An order for protection under s. 1131 of the Criminal Code was made by consent. *R.* v. *Nickerson ex parte Weston*, 40, p. 382.

Search warrant, Evidence from illegal—A conviction made upon evidence obtained by means of an illegal search warrant, held good.—The evidence was admissible whatever liability on the part of the magistrate might be created by the irregularity of the search warrant. *R.* v. *Clarkson ex parte Hayes*, 40, p. 363.

Search warrant—Time of service—A search warrant under the Canada Temperance Act cannot be executed on Sunday.—Quaere: Whether a search warrant nine days old should be withheld from execution on the ground that it is stale. *R.* v. *Lawlor ex parte Willis*, 44, p. 347 (Chambers).

Second offence—A certificate that the defendant had been convicted for keeping intoxicating liquor for sale contrary to the Canada Temperance Act is sufficient proof under the act of a previous offence upon which to base a second conviction for keeping for sale, though it did not appear from the certificate, and was not otherwise proved that such previous conviction was for a first offence. *R.* v. *Bryon ex parte Batson*, 37, p. 83.

In the absence of an admission by the accused of the fact of previous convictions, certificates of such previous convictions are under section 115 sufficient proof of such convictions, and it is not necessary that evidence apart from such convictions should be given of the identity of the accused with the person formerly convicted, where he was present at the trial and did not raise the question of identity. *R.* v. *Byron*, 37, p. 383.

Stenographer, unsworn—Section 25 of the Criminal Code Amendment Act, 1913, c. 13, repealing and re-enacting s. 683 of the Criminal Code, 1906, authorizing the depositions taken by a justice on a preliminary inquiry to be taken in shorthand by a stenographer, who, before acting, shall, unless he is a duly sworn official court stenographer, make oath that he will truly and faithfully report the evidence, made applicable to the trial of complaints under summary conviction proceedings, by sub-s. 3 of s. 27 of the Criminal Code 1906, is imperative and a conviction made for an offence against the Canada Temperance Act on evidence taken in shorthand by a stenographer who was not sworn to truly and faithfully report the evidence, and was not a duly sworn official court stenographer, was quashed on certiorari as having been made without jurisdiction.—The defect is not cured by an affidavit of the stenographer made subsequent to the trial and conviction, stating that the evidence had been truly and faithfully reported, even if such an affidavit could be produced and read on the return of the rule *nisi* to quash. *R.* v. *Limerick ex parte Dewar et al*, 44, p. 233.

Stipendiary magistrate, Jurisdiction of—T. was convicted of an offence against the Canada Temperance Act by C., who, in making the conviction professed to be acting as stipendiary magistrate of the county of W.—No record of his appointment to this office could be found either in the minutes of the executive council or in the office of the provincial secretary; but there was a record of his appointment to the office of stipendiary magistrate of the parish of S.—C. swore (and herein he was corroborated) that upon it being discovered that his commission as stipendiary magistrate of the parish of S. was illegal a new commission appointing him stipendiary magistrate of the county of W. was issued to him which commission had been lost, but under which he had been acting without objection for many years.—Afterwards, when the town of S. was carved out of the parish of S. and incorporated under the Towns Incorporation Act, C. was appointed stipendiary magistrate of the town.—Sub-section 2 of section 131 of the Towns Incorporation Act provides *inter alia* that on an appointment of a police or stipendiary magistrate for a town incorporated thereunder, the commission of a police or stipendiary magistrate appointed for and having jurisdiction in the parish within which such town is situate and theretofore acting in such town shall thereupon *ipso facto* be cancelled, and he shall cease to hold office as such police or stipendiary magistrate.—*Held* (*per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ.), that there was sufficient proof of C. having been duly commissioned to

act as stipendiary magistrate of the county of W., and that under the above subsection he did not vacate such office upon being appointed police magistrate of the town of S. *R.* v. *Cahill ex parte Tait*, 37, p. 18.

Summons—A summons under the Canada Temperance Act charged an offence during a period of one day in excess of three months of the alleged date of the laying of the information.—The information in fact charged an offence within a period of three months from the laying thereof.—The party charged did not appear and the magistrate in his absence convicted him of an offence between the dates stated in the information.—*Held*, on an application for a certiorari, that the conviction was good. *R.* v. *Kay ex parte LeBlanc*, 41 N. B. R. 99, distinguished. *Ex parte Johnson*, 44, p. 353.

Summons imperfect—No place of trial mentioned—A conviction under the Canada Temperance Act, R. S. C. 1906, c. 152, was set aside where no place of trial was mentioned in the summons and defendant did not appear.—Summons read "before me on." *R.* v. *Wilson ex parte Harrington*, 40, p. 383.

Summons — Information necessary — Since the passing of the Act 8-9 Edw. VII. (Dom.,) c. 9, s. 2, amending s. 655 of the Criminal Code, a magistrate may issue a summons under the Canada Temperance Act upon a written and signed information alleging information and belief only, without examining witnesses.—He must, however, be reasonably satisfied that a summons ought to issue.—The defendant, by appearing without objection, waives any defect in the procedure upon issuing the summons. *R.* v. *Kay ex parte Dolan*, 41, p. 95.

Summons, Lack of jurisdiction on face—A summons under the Canada Temperance Act stated that the information upon which it was issued was laid more than three months after the offence.—The information was in fact laid within three months.—The defendant did not appear, and a conviction was entered.—*Held*, the summons was bad on its face and was not cured by ss. 723, 724 of the Criminal Code, or s. 146 of the Canada Temperance Act, and the conviction should be quashed. *R.* v. *Kay ex parte LeBlanc*, 41, p. 99.

Summons not corresponding to information—On an information for keeping intoxicating liquor for sale contrary to the Canada Temperance Act the accused was summoned to answer a charge of selling; he did not appear, and a conviction was made for keeping for sale.—*Held*, that as the accused had not been summoned to answer the information laid, the magistrate had never acquired jurisdiction over the person and the conviction was bad, and was not cured by section 669 or section 724 of the Criminal Code. *R.* v. *Kay ex parte Melanson*, 38, p. 362.

Summons, Service of, cured by appearance—The defendant residing in the city of Saint John was served there with a summons issued by a justice of Carleton county for unlawfully causing intoxicating liquor at the city of Saint John in the county of Saint John to be shipped into the county of Carleton, contrary to Part II of the Canada Temperance Act, R. S. C. 1906, c. 152.—The defendant appeared on the trial by counsel and gave evidence in his own defence, but was convicted.—*Held*, affirming the conviction, that the justice was given jurisdiction over the offence by sub-s. 4 of s. 127 of the Canada Temperance Act amended by 7-8 Edw. VII (Dom.), c. 71, and also by ss. 584 (b) and 707 of the Criminal Code and that the defendant by appearing waived any defect in the service of the summons. *R.* v. *Dibblee ex parte McIntyre*, 39, p. 361.

Summons, Service of, in another county—The defendant, residing in the county of St. John, was personally served there with a summons issued by a justice of Carleton county for an offence under Part II of the Canada Temperance Act.—He did not appear and was convicted in his absence.—*Held*, that such service was good under s. 658 of the Criminal Code, and on proof of such service the magistrate could proceed *ex parte* to convict.—Prior to the Act 8-9 Edw. VII (Dom.), c. 9, amending the Criminal Code, a magistrate might issue a summons for an offence against the Canada Temperance Act without taking evidence substantiating the information upon which he could exercise his judgment and discretion as to whether summons should issue or not. *R.* v. *Dibblee ex parte O'Regan*, 39, p. 378.

Third offence—An information for a first offence under the Canada Temperance Act was laid on the 13th of May, and a conviction had thereon on the 27th of May, for an offence on the 8th of May.—Information for a second offence was laid on the 6th of August, and a conviction had thereon on the 19th of August for an offence between the first of June and the 11th of July.—An informa ion for a third offence was laid on the 10th of October, and a conviction had thereon on the 2nd of November for an offence on July 12th.—*Held* (*per* Hanington and Landry JJ.), that a third offence to be punishable as such must be one committed after a conviction for the second offence, and the third conviction in this case was bad. —*Held* (*per* Barker and Gregory JJ.), that the conviction was bad because the information for a second offence had not been laid before the commission of the offence for which the third conviction was made.—*Held* (*per McLeod* J.), that as the conviction was for an offence committed on a different day from the first and se ond offences, and after information was laid for a first offence, it was good. *R.* v. *Marsh ex parte McCoy*, 36, p. 186.

Third offence — The Act 7-8 Edw. VII (Dom.), c. 71, re-enacts s. 117 of the Canada Temperance Act with amendments and therefore a conviction for a third offence under s. 117 as amended is good, although the first two convictions were made before the passing of the amending act. *Ex parte Staples*, 40, p. 378.

Third offence—Evidence of second offence—On certiorari the Court refused to quash a conviction for a third offence against the second part of the Canada Temperance Act, where the magistrate, after finding the accused guilty of the subsequent offence charged, inquired concerning previous convictions, and on production of a certificate from a magistrate to the effect that two previous convictions had been made against the accused but without any proof so far as appeared by the return that either was for a second offence as such, convicted the accused of a third offence. *R.* v. *Steeves, ex parte Gogan*, 43, p. 285.

Warrant, Establishing jurisdiction to issue—A sworn information stating that the complainant had just cause to suspect, and does suspect and believe that the party charged had committed an offence against the Canada Temperance Act triable under sections 558, 559 and 843 of the Criminal Code, 1892, will not authorize a justice to issue a warrant to arrest in the first instance. —It is the duty of the justice before issuing a warrant to examine upon oath the complainant or his witnesses as to the facts upon which such suspicion and belief are founded, and to exercise his own judgment thereon.—(*Ex parte Boyce*, 24 N. B. R. 347, followed.) *R.* v. *Mills ex parte Coffon*, 37, p. 122.

A sworn information containing a positive statement that the party charged had committed an offence triable under the Summary Conviction Act is sufficient to authorize the issue of a warrant in the first instance without an examination of the informant or his witnesses.—(*R.* v. *Mills ex parte Coffon*, 37 N. B. R. 122, distinguished.)—Where the parties charged are arrested on a warrant and give bail and a time is fixed in their presence for the hearing and they do not appear at the time so fixed the justice may under section 722 of the code, R. S. C. 1905, c. 146, proceed with the hearing in their absence, to judgment and sentence.—Failure to serve a copy of the warrant issued in the first instance at the time of the arrest, is no ground for setting aside a conviction under the Summary Conviction Act for an offence against the Canada Temperance Act, *R.* v. *Hornbrook ex parte Madden*, 38, p. 358.

Warrant issued after summons—The magistrate issued his summons upon an information alleging only information and belief without previously examining witnesses, and, upon proof that the summons had been duly served, and the failure of the defendant to appear, he issued a warrant, upon which the defendant was arrested and brought to trial.—Upon certiorari *held* (*per* Barker C. J., Landry, White and Barry JJ.), the conviction is good even though the warrant was improperly issued.—*Held* (*per* Barker C. J., Landry and White JJ.), the warrant is good because no sworn information is necessary where defendant disobeys a summons.—*Held* (*per* Barry J.), the warrant is bad because a sworn information is necessary and where no witnesses are examined the information must contain a positive statement that an offence was committed.—The warrant however was merely a collateral proceeding. *R.* v. *Peck ex parte O' Neill*, 40, p. 339.

Withdrawal, Certificate of — Subsequent information — Section 138 of the Canada Temperance Act, R. S. C. 1906, c. 152, and ss. 1124 and 1125 of the Criminal Code, R. S. C. 1906, c. 146, are applicable to offences under the amendments to the Canada Temperance Act, 7 & 8 Edw. VII (Dom.), c. 71, and it is therefore unnecessary to negative exceptions in proceedings for such offences.—Upon the trial of an information for violation of the Canada Temperance Act after some evidence taken, the prosecutor having some doubt as to the magistrate's jurisdiction asked that the information be withdrawn.—No one appeared for the defendant, and the magistrate gave a certificate of withdrawal stating the facts.—*Held*, that this was not equivalent to a dismissal of the information and not a bar to subsequent information.—*Ex parte Case*, 28 N. B. R. 652 followed. *R.* v. *Nickerson ex parte Mitchell*, 39, p. 316.

Withdrawal of charge—Under section 858 of the Criminal Code after the evidence has been heard the magistrate is not bound either to convict or discharge the defendant; he may allow the prosecutor to withdraw the charge, and he may do so even when another information for the same offence has been laid by the same prosecutor against the same defendant, and the determination thereof is still pending.—(*Per* Tuck C. J., Hanington and VanWart JJ., Landry J. dissenting.) *Ex parte Wyman*, 34, p. 608.

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2. Liquor License Acts.

Appeal — Certiorari — Where a party prosecuting an appeal under the Liquor License Act, C. S. 1903, c. 22, being unable to get the proceedings certified by the clerk of the County Court as provided by section 105, had them returned under a writ of certiorari, the Court heard the matter as an appeal under the section. *McCrea* v. *Watson*, 37, p. 623.

Appeal, Evidence available on—On an appeal to a judge of the County Court from a conviction for selling liquor contrary to

the provisions of the Liquor License Act 1887, 50 Vict., c. 4, the appellate judge has power to adjudicate on the evidence taken before the convicting magistrate; or he may hear the evidence of witnesses other than those examined below, or the further evidence of the witnesses already examined. *Ex parte Abel*, 34, p. 121.

Arrest by unqualified person—The fact that the defendant was arrested and brought before the magistrate who made the conviction, by a constable who was not qualified as required by C. S., c. 99, s. 69, is no ground for a certiorari under the Liquor License Act 1896.—The improper arrest does not go to the jurisdiction of the convicting magistrate.—He had jurisdiction of the offence and also over the person when before him. *Ex parte Giberson*, 34, p. 538.

Arrest without warrant—The accused was arrested under s. 147, c. 8 of 5 Geo. V., the Liquor License Act 1915, providing for the arrest without warrant, by any inspector or sub-inspector under the said act or the Canada Temperance Act, or by any provincial or police constable, of any person suspected of being in personal possession of any intoxicating liquor with the intention of selling or disposing of the same contrary to law.—The accused thus under arrest was brought before a magistrate and charged with keeping intoxicating liquor for sale contrary to Part II of the Canada Temperance Act.—The charge was read over to him and he pleaded not guilty.—At the hearing of the information upon which a conviction was made, the accused was represented by counsel who objected that the accused was illegally before the Court and should be discharged because the constable making the arrest had not laid any charge upon oath or given his reasons for his belief as to the guilt of the accused as required by said s. 147.—*Held*, that the magistrate having jurisdiction over the person and offence and the accused being present, it mattered not how he was brought there, the magistrate acquired jurisdiction and the conviction would not be quashed on certiorari.—Quaere:—As to the power of the provincial legislature to enact s. 147 of the Liquor License Act 1915, 5 Geo. V., c. 8. *R.* v. *McDougall ex parte Goguen*, 44, p. 369. (Chandler J., Chambers.)

Bias—The fact that B., a convicting justice for an offence against the provisions of the Liquor License Act 1896, 59 Vict., c. 5, is an inspector under the Act, but not for the district where the offence is alleged to have been committed, is not such an interest as to disqualify him or cause bias. *Ex parte Michaud*, 34, p. 123.

Signing a petition praying that a license be issued to a party subsequently charged with an offence against the act does not disqualify a magistrate so signing from trying the charge. *R.* v. *Davis ex parte Vanbuskirk*, 38, p. 335.

The magistrate is not disqualified because of being a ratepayer in the district where the case was tried.—Certiorari is taken away in cases of convictions for selling without license by the Liquor License Act 1896, s. 104.—There were a number of other objections going to show that the magistrate was disqualified by reason of his relationship to the real prosecutor and by reason of bias, etc., but it was held that these objections were not established in point of fact. *Ex parte Hebert*, 34, p. 455.

A magistrate is not disqualified from adjudicating upon an information laid under the Liquor License Act 1896 by a license inspector, by reason of being related to the wife of the assistant inspector where such assistant inspector took no part in the proceedings.—A magistrate is not disqualified from adjudicating upon an information laid under the Liquor License Act 1896 by reason of being a ratepayer of the county, and the penalty sought to be recovered being payable into the county funds. *Ex parte Flannagan*, 34, p. 326.

Certiorari—Where a right of appeal or review to a County Court judge exists, certiorari will be granted only under exceptional circumstances.—This applies to convictions under the Liquor License Act, C. S. 1903, c. 22.—*Ex parte Price* 23 N. B. R. 85 followed. *R.* v. *Murray, Ex parte Dambois*, 39, p. 265.

Certiorari —Evidence—Rejection of—An order *nisi* having been obtained to quash a conviction for selling liquor without a license upon the ground, among others, of the improper rejection of evidence tendered on behalf of the defendant.—*Held*, that this was no ground for certiorari. *Ex parte Hebert*, 34, p. 455.

Certiorari re vote of ratepayers—A vote having been taken of the ratepayers in a parish under s. 20 of the Liquor License Act, C. S. 1903, c. 22, as amended by 9 Edw. VII, c. 16, s. 21, a writ of certiorari was applied for to remove and quash the order of the county council directing the vote to be taken, and the proceedings upon which the order was based, on the ground of irregularities in the petition for the election.—*Held*, certiorari did not lie, the acts complained of not being judicial. *Ex parte Doyle*, 41, p. 138.

City of Saint John—The number of licenses that may issue in the city of Saint John under the Liquor License Act, C. S. 1903, c. 22, is subject to the limitation that they shall in no case exceed seventy-five, exclusive of hotel licenses, and that they shall be apportioned among the several wards in which licenses may issue in a fixed proportion according to the scale provided by subsection 1 of section 19 of the act.—(*Per* Barker C. J., Hanington, Landry, McLeod and Gregory JJ., White J. dissenting.)—*Held* (*per* White J.), that while the total

number is to be ascertained and is limited as stated, there is nothing in the sub-section which requires the total number when so ascertained to be apportioned among the several wards in any fixed proportion. *Jamieson* v. *Blaine et al*, 38, p. 508.

Conviction, Amending — *Semble*, the Court will not amend a conviction when by so doing it has to exercise a discretion confided to the justice. *R.* v. *Charest ex parte Daigle*, 37, p. 492.

Where the accused was charged under the Liquor License Act, C. S. 1903, c. 22, with a third offence, and the conviction stated it was for a third offence, but was in other respects in the form of a conviction for a first offence and the only proof was of a first offence and the prosecution on the trial asked to have a conviction entered for a first offence, *held*, on application to quash that the conviction might be amended under section 89 of the Act. *R.* v. *O'Brien ex parte Chamberlain*, 38, p. 385.

Where the conviction ordered a distress in default of payment of the penalty imposed, which order is not authorized by the act, it was treated as surplusage and struck out of the conviction.—The convicting magistrate under section 74 (2) has power to award in addition to the costs, the charges of commitment and conveying of the defendant to gaol. *Id.*

Where a summons to answer an offence under the Liquor License Act, C. S. 1903, c. 22, was served personally on the evening of April 14, returnable at 10 a. m., April 16, and on the return of the same the defendant appeared by counsel and procured an adjournment to April 19, the Court refused to set aside the conviction subsequently had, on the ground that the defendant did not have a reasonable opportunity of appearing and defending.—The conviction as first made was defective by reason of not stating the place of the offence, but the place was stated in the information and summons and in the magistrate's minutes.—The magistrate having returned an amended conviction upon certiorari, *held*, such amendment was proper since the facts appearing in the magistrate's minutes warranted the conviction in its amended form. *R.* v. *McQuarrie ex parte Giberson*, No. 1, 39, p. 367.

Conviction, Correctness of name in—Defendant was convicted of a second offence against the Liquor License Act, C. S. 1903, c. 22, under the name of Haid Petros.—Upon certiorari he made affidavit that his name was Shilala and his surnames Haid, Petros, and Nahea.—It appeared that he had pleaded guilty to the first offence when summoned under the name of Haid Petros, and also paid taxes assessed against him under the same name.—*Held*, the conviction was good. *R.* v. *Matheson, Ex parte Shilala*, 41, p. 386.

Conviction, Form of—It is not necessary to state in the conviction the name of the informant. *R.* v. *Davis ex parte Vanbuskirk*, 38, p. 336.

A conviction for selling liquor to a minor under section 67 of the Liquor License Act, C. S. 1903, c. 22, imposing a fine and in default of payment distress, but which does not award imprisonment, is bad.—Section 67 not providing any mode of enforcing the penalty authorized, the conviction should follow the form prescribed in section 22 of the Summary Convictions Act, C. S. 1903, c. 123. *R.* v. *Davis ex parte Vanbuskirk*, 38, p. 526; *R.* v. *Wathen ex parte Vanbuskirk*, 38, p. 529.

A conviction for selling liquor "on the 24th day of December or the 25th day of December, both dates inclusive, A. D. 1912," in violation of the Liquor License Act, C. S. 1903, c. 22, is not a conviction in the alternative and is good on its face. *Ex parte Teed*, 41, p. 555.

Conviction, Minute of—It is not necessary under C. S., c. 62, s. 22, that a minute of a conviction be entered at the time the conviction is made if the conviction itself be drawn up. *Ex parte Flannaghan*, 34, p. 326.

If the conviction is complete there is no necessity for a minute of the conviction. *R.* v. *Davis, Ex parte Vanbuskirk*, 38, p. 336.

In a prosecution for selling intoxicating liquor contrary to the Liquor License Act, the minute of conviction imposed a penalty and costs without specifiying the amount of the costs or the costs of commitment and conveying to gaol on default of payment.—The conviction was in the proper form, imposed the penalty, fixed the amount of costs and awarded imprisonment in default of payment of the said sums and the costs of commitment and conveying in gaol. —*Held* (*per curiam*), on a motion to quash the conviction on certiorari, that apart from the provisions of s. 89, the minute was sufficient to support the conviction, but assuming that it was defective it is not a ground under s. 89 for quashing the conviction.—*Held* (*per* Grimmer J.), that if it were necessary to support the conviction the minute could be amended under s. 89 (2). *R.* v. *Dugas ex parte Paulin*, 43, p. 58.

Costs—The Court will not interfere with a conviction on the ground that the costs are excessive, where it is not shown in what particular they are excessive. *R.* v. *Davis ex parte Vanbuskirk*, 38, p. 336.

Costs—Upon a conviction under the Liquor License Act, C. S. 1903, c. 22, for unlawful selling, no costs can be taxed for serving the defendant with notice of adjournment of hearing.—A conviction will not be set aside

because a magistrate taxed witnesses' mileage fees relying on his own knowledge of distances and without affidavits, there being no evidence that the mileage was incorrectly allowed, and the magistrate having sworn that he was acquainted with the witnesses and familiar with the distances they had to travel.—A constable is only entitled to five cents per day for attendance upon the trial. *R.* v. *Bassett ex parte Davidson*, 39, p. 271.

Disqualification of justice—A justice of the peace who accepts the offices of clerk of the peace and clerk of the County Court is not disqualified from trying an offence charged under the Liquor License Act on the ground that the offices are incompatible. *R.* v. *Plant ex parte Morneault*, 37, p. 500.

Disqualification of magistrate—The convicting magistrate was not disqualified by reason of having circulated and obtained signatures to a petition praying that no license be granted in the parish where the defendant lived, and in which he was the sole applicant for a license. *R.* v. *Charest ex parte Daigle*, 37, p. 492.

D., the defendant, was twice convicted for offences against the Liquor License Act. In the first case C. was the informant and prosecutor; in the second he was the convicting magistrate.—*Held*, that while the first case was pending before this Court on certiorari C. had no jurisdiction to try the information in the second case. *R.* v. *Charest ex parte Daigle*, 37, p. 492.

Evidence — Conviction of license holder—In a prosecution for selling intoxicating liquor contrary to the provisions of s. 48 (1) of the Liquor License Act, which prohibits the sale by license holders during certain hours, proof that the accused kept an hotel and sold liquors is, in the absence of any proof to the contrary, evidence that the accused was a license holder, and a conviction based on such evidence will not be quashed on certiorari. *R.* v. *Dugas ex parte McLeary*, 43, p. 65.

Evidence — Magistrate called as witness—The defendant applied to call the magistrate as a witness but as he declined to state in any other than in a general way what he purposed to prove by him, the magistrate refused to leave the Bench to be sworn.—In this he was sustained by the Court notwithstanding the defendant swore that the application was made in good faith. *Ex parte Hebert*, 34, p. 455.

Evidence, Refusal of magistrate to give—On a motion for a rule to quash a conviction on the ground that the presiding magistrate refused to give evidence when requested by the defendant, it must be shown that the request was made in good faith and that the defendant was prejudiced by the refusal.—Where it was set forth in affidavit what evidence the magistrate was expected to give, but the affidavit showed that the deponent did not have knowledge that the magistrate could give the evidence, the rule was refused. *Ex parte Flannaghan*, 34, p. 326.

Evidence, Rejection of—On the trial of an information for an offence against the Liquor License Act, the counsel for the defendant proposed to ask him as to what took place between him and a witness for the prosecution.—On objection the evidence was rejected.—It did not appear, and the counsel on the argument was unable to state, what was proposed to be proved.—*Held*, no ground under the circumstances for quashing the conviction.—Quaere:—If an objection that evidence was improperly rejected is open to the accused on certiorari where an appeal is given. *R.* v. *Davis ex parte Vanbuskirk*, 38, p. 335.

Evidence, Sufficiency of—Where there is conflicting evidence in a case for selling liquor contrary to the Liquor License Act 1896, the finding of the committing justice on questions of fact can not be reviewed on an application for an order in the nature of a habeas corpus. *R.* v. *Wilson ex parte Irving*, 35, p. 461. (Explained and commented upon *Ex parte Graves*, 35, p. 587.)

The Court refused to quash a conviction for keeping liquor for sale contrary to the provisions of the Liquor License Act, C. S. 1903, c. 22, where there was some evidence to warrant the conviction.—*Held* (*per* Barry J.), the right to certiorari is not taken away by s. 104 (1) of the Liquor License Act providing that conviction thereunder shall be "final and conclusive," but the Court will not set aside the magistrate's findings upon the questions at issue, although erroneous, if there is any evidence to warrant such findings. *R.* v. *Allingham ex parte Keefe*, 41, p. 558.

Certiorari is taken away by s. 104, sub-s. 1 of the Liquor License Act, C. S. 1903, c. 22 and if the convicting magistrate has jurisdiction over the subject matter of the information and the person charged, his finding as to the facts is conclusive, and the Court will not on certiorari inquire into the want or sufficiency of the evidence.—*Ex parte Daley* (1888), 27 N. B. R. 129 and *Ex parte Hebert* (1899), 34 N. B. R. 455, followed.—(*Per* Barker, C. J., McLeod, White and McKeown JJ.)—*Held* (*per* Barry J.), the act does not take away the certiorari where there is no evidence or no sufficient evidence to prove the offence charged, notwithstanding the magistrate had jurisdiction over the subject matter of the offence and the person charged. *R.* v. *Davis ex parte Miranda*, 42, p. 338.

Habeas corpus — Appeal from County Court judge—No appeal lies from a decision of a judge of a County Court, under section 105, from an order made under habeas corpus proceedings discharging a prisoner in

custody for default of payment of fines imposed for offences against the Liquor License Act. *McCrea* v. *Watson*, 37, p. 623.

Illegal sale by licensee—The holder of a tavern license under the Liquor License Act, C. S. 1903, c. 22, who is guilty of selling liquor in quantities exceeding one quart, has not a "license therefor as by law required" and is therefore liable to the penalty imposed by s. 62 of the Act. *Poitras* v. *R.*, 39, p. 323.

Intra vires—Section 62 of the Liquor License Act authorizing as a penalty in default of the fine imposed for a first offence imprisonment for a period of not less than three months, is not *ultra vires*. *R.* v. *Plant ex parte Morneault*, 37, p. 500.

Jurisdiction—A justice appointed for a county has jurisdiction to try in a parish of the county an offence committed in another parish in the county. *Id.*

License commissioner—A member of a board of license commissioners, who with a knowledge of all the facts issues a license contrary to the provisions of the Liquor License Act, C. S. 1903, c. 22, is guilty under section 59 of "knowingly" issuing a license contrary to law, though there is no evidence of a corrupt motive or criminal intent. *R.* v. *Ritchie ex parte Blaine*, 37, p. 213.

License commissioners, Power of—The license commissioners, under the Liquor License Act, C. S. 1903, c. 22, have no power to extend the duration of an existing license under section 23 for a greater period than three months of the next ensuing license year, or to grant a second extension.—The power of revocation, under section 31, extends to an extension of the original license by the commissioners, under section 23.—(*Per* Tuck C. J., Landry and McLeod JJ.)—*Held* (*per* Gregory J.), section 31 does not give the judges therein named power to revoke an extension of a license granted by the license commissioners under section 23, but such power is limited to an original license when proved to have been given contrary to the terms of the act, or obtained by fraud. *R.* v. *Wilkinson ex parte Cormier*, 37, p. 53.

License, Issuing—License commissioners under the Liquor License Act, C. S. 1903, c. 22, have no jurisdiction to grant a certificate for a license unless the inspector has reported the applicant to be a fit and proper person to have a license, and the other requirements provided for in section 11 of the act have been complied with.—A writ of prohibition is the proper remedy to restrain the issuing of a license where the commissioners acted without jurisdiction, and may be issued after the certificate for a license had been granted.—*Ex parte Levely* 1900 (unreported) followed.—*Semble*, an affidavit can not be used in support of an application for a writ of prohibition, if it is sworn before a commissioner who is a partner in a firm of attorneys acting in the matter as attorneys for the applicant. *Ex parte Demmings*; *Re License Commissioners of Victoria*, 37, p. 586; *Ex parte Desrosiers*, 41, p. 395.

License issued after May 1st—At a meeting for that purpose, for which notice had been given, a tavern license was granted under the Liquor License Act by commissioners under the act to one D. on the 8th of August, 1904, for the year ending the 30th of April, 1905, on a petition of D. dated the 2nd of July, 1904, the chairman objecting on the ground that they had no authority to grant a license after the 1st of May, except on special grounds, and that no such grounds were either stated in the petition or shown at the time; on an application to a County Court judge to revoke the license under section 31 on these grounds, an order was made revoking the license, the judge refusing to admit evidence tending to show that special grounds for the granting of the license existed, and were acted upon by the commissioners, holding that he, and not the commissioners, is the authority who determines as to the sufficiency of the special grounds and whether the grounds alleged are special grounds within the meaning of the act; also, on the ground that the petition for a license subsequent to the 1st of May should allege the special grounds upon which the application is based.—*Held* (*per* Landry, Barker and McLeod JJ.), on making absolute the order *nisi* to quash the order revoking the license, that the commissioners, and not the judge, are to determine the sufficiency of the special grounds, and whether the grounds alleged are special; and that the petition need not allege the special grounds upon which the application is based.—*Held* (*per* Tuck C. J.), that the County Court judge was right in revoking the license on the grounds that no special grounds had been shown. —*Held* (*per* Gregory J.), that the order should be discharged because the Court has no jurisdiction to review an order made by a judge acting under section 31 of the Liquor License Act. *R.* v. *Wilkinson ex parte Dugay*, 37, p. 90.

License issued wrongfully—A wholesale license to sell liquor granted under the Liquor License Act 1896 at a special meeting of the license commissioners held after the regular meeting for the issue of licenses, when a license was refused to the applicant and the license for the previous year was extended to the 1st of August then next, of which special meeting no notice had been published, and no proof on oath of any special grounds why the license should issue had been shown and the commissioners had refused to hear evidence in proof of objections to the license being granted is a license issued contrary to the provisions of the act and should be revoked on an application to a judge under section 31. *Miles* v. *Rogers*, 36, p. 345; *Ex parte Desrosiers*, 41, p. 395.

License, Restraining wrongful issue of—A writ of prohibition is the proper remedy

to restrain the issuing of a license where the commissioners acted without jurisdiction, and may be issued after the certificate for a license has been granted.—*Semble*, An affidavit can not be used in support of an application for a writ of prohibition, if it is sworn before a commissioner who is a partner in a firm of attorneys acting in the matter as attorneys for the applicant. *Ex parte Demmings; Re License Commissioners of Victoria*, 37, p. 586.

Municipal councillor, Disqualification of—Section 61 of the Liquor License Act provides that if any member of a municipal council is convicted of knowingly committing any offence against the Act he shall thereby forfeit and vacate his seat.—*Held*, that a councillor convicted for selling without license did not forfeit his seat where the conviction did not state that the offence was committed knowingly, and it is not the duty of the Court to examine the proceedings before the magistrate to ascertain if guilty knowledge had been proved. *R.* v. *The Municipality of Restigouche ex parte Murchie*, 42, p. 529.

Obstructing officer—Obstruction of an officer making a search under s. 114 of the Liquor License Act may consist of words only. Where a Liquor License Inspector entered to search defendant's premises on which liquor was reputed to be sold and defendant said, "I refuse you to search," and the Inspector testified he believed that he would have had to use force to make a search, *held* (*per* Landry, McLeod and Barry JJ., White J. dissenting) that there was evidence upon which defendant might be convicted of obstructing an officer in making a search under s. 114 of the Act. *R.* v. *Matheson, Ex parte Guimond*, 41, p. 581.

Search, right to—When information is given to a liquor license inspector that there is cause to suspect a person of violating the Liquor License Act, he may enter premises on which liquor is reputed to be sold, where he is not obliged to force an entrance, and make a search without a search warrant, under s. 114 of the Act. *R.* v. *Matheson ex parte Guimond*, 41, p. 581.

Order for sale of liquor—Under the Act 60 Vict., c. 6, s. 12, it is not necessary for a magistrate to specify in his order any particular public hospital to which the proceeds derived from the sale of liquor seized by reason of its being illegally kept for sale are to be paid. *R.* v. *McQuarrie ex parte Rogers*, 36, p. 39.

Penalty — Thirty days — A conviction will not be quashed because the minute awarded an imprisonment of thirty days, while the section of the act under which the conviction was made limited the time for imprisonment to one month. *Id.*

Penalty less than statutory term —A conviction orderir ; the defendant to be imprisoned for sixty days in default of payment of a fine cannot be supported under a section of the act which authorizes imprisonment for not less than three months in case of such default. *R.* v. *Charest ex parte Daigle*, 37, p. 492.

Petitions under 7 Edw. VII, c. 46—One of several petitions under 7 Edw. VII, c. 46, s. 1, amending the Liquor License Act, C. S. 1903, c. 22, s. 21, was accompanied by a mere certificate as to genuiness of signatures etc. and another by a certificate purporting to have been sworn to, stating that the names in the petition were genuine, and that the petitioners signed themselves or gave authority to some member of their family or to the party certifying, to sign for them.—*Held*, that this was not a compliance with the Act. *Ex parte Stavert*, 39, p. 6.

Petition — Warden not qualified — M. was elected councillor for the parish of St. L. in October, 1907, and was appointed warden of the county in January.—On September 29, 1908, he resigned his position of councillor, but afterwards and before December 29, 1908, was elected councillor by a newly created parish in the same county, and in January, 1909, was reappointed warden —*Held*, M.'s resignation as councillor operated as a resignation of his position of warden, as the warden must be a councillor under the Municipalities Act, C. S. 1903, c. 165, and therefore presenting a petition to him on December 29, 1908, would not be sufficient under the provisions of the Liquor License Act, C. S. 1903, c. 22, s. 21, amended 7 Edw. VII, c. 46. *Ex parte Stavert*, 39, p. 239.

Petition—A petition to have a vote taken under the Liquor License Act, C. S. 1903, c. 22 as amended by 9 Edw. VII, c. 16, s. 4, was received by the town clerk of Campbellton, with a solemn declaration folded therein but not attached in any way.—The first page of the petition was marked "B" and the declaration referred to it as "hereto annexed marked "B".'—*Held*, this was a sufficient compliance with the Act. *R.* v. *The Town of Campbellton ex parte Cormier*, 39, p. 593.

Practice — Habeas corpus — Certiorari —Where a person is in custody under a warrant of commitment founded on a good conviction, the Court will not quash the commitment on certiorari, even if it is illegal. —The proper procedure is by way of habeas corpus. *R.* v. *Melanson ex parte Bertin*, 36, p. 577.

Principal and agent—See *LeBlanc* v. *LaPorte Martin & Co.*, 40, p. 468.

Review, Right of—If the convicting magistrate has jurisdiction there is no right of review from a conviction for selling without license contrary to section 62 of the Liquor License Act.—Quaere:—If there is any review if the magistrate acted without jurisdiction. *R.* v. *Carleton ex parte McCrae*, 38, p. 42.

Sale in livery stable—A livery stable is a place within the meaning of section 99 of the Liquor License Act, C. S. 1903, c. 22, in which proof of a sale by a person employed by the occupant may make the occupant liable to a penalty under the act, though there be no proof that the offence was committed with his authority or by his direction. *R.* v. *McQuarrie ex parte Rogers*, 37, p. 374.

Second offence—A conviction under the Liquor License Act, C. S. 1903, c. 22, can not be had for a second offence without proof of conviction of a first offence committed before the date of the commission of the second offence. *R.* v. *O'Brien ex parte Chamberlain*, 38, p. 381.

Where defendant is represented by counsel he may be convicted of a second offence under the Liquor License Act, C. S. 1903, c. 22, although not present so that he may be questioned personally as to a previous offence under s. 85 (a).—*Ex parte Groves*, 24 N. B. R. 57, applied.—On the trial of a charge under the Liquor License Act, the magistrate admitted a certificate in evidence to prove a former conviction, before enquiring into the subsequent offence.—The magistrate then proceeded to take evidence upon the subsequent offence and found the defendant guilty. —He then asked if defendant had previously been convicted and receiving no answer the certificate of a former conviction was again put in evidence.—After conviction for a second offence, *held*, that the provisions of s. 85 (a) of the Act, requiring that the magistrate shall inquire into the subsequent offence first, are directory only and receiving the certificate in evidence before finding defendant guilty was an irregularity which did not affect the magistrate's jurisdiction. —*R.* v. *Graves*, 21 O. L. R. 329 followed. *R.* v. *Matheson ex parte Martin*, 41, p. 187.

A defendant may be convicted of a second offence under the Liquor License Act, C. S. 1903, c. 22, s. 85, although not present or represented by counsel.—*Ex parte Groves* (1884) 24 N. B. R. 57 followed.— *R.* v. *Coote* (1910) 22 O. L. R. 269 approved. *R.* v. *Matheson ex parte Shilala*, 41, p. 386.

Summons, Amending — A summons charging a sale on the 24th may be amended to a charge for a sale on the 20th, and a conviction made for a sale on that day in the absence of the accused.—(McLeod J. doubting.) *Ex parte Tompkins*, 37, p. 534.

Summons — Conflict of dates — Where a party is summoned to answer a charge of selling liquor contrary to the Liquor License Act on a certain day of the month and on a day of the week which would not be the day of the month named, he is bound to attend on the day of the month named, disregarding the day of the week, and may be properly convicted in default of appearance. *Id.*

Summons — Copy served not a true copy—The defendant was served with a copy of a summons under the Summary Conviction Act, C. S. 1903, c. 123, to appear at a magistrate's office in the parish of P. and answer to a charge of violating the Liquor License Act, C. S. 1903, c. 22.—In the original summons the place was stated to be in the parish of A. and in fact the magistrate's office was in A.—The constable made affidavit that he served a true copy of the original summons.—At the trial the defendant's counsel appeared in answer to a summons for another offence returnable before the same magistrate at the same time and place.—He also had authority to defend this case but he did not appear in it or defend.—The magistrate understood that defendant's counsel appeared in both cases and granted an adjournment of both.—After conviction, *held*, that in absence of an affidavit that the defendant was misled by the mistake the conviction would not be set aside. *R.* v. *McQuarrie ex parte Giberson*, No. 2, 39, p. 371.

Summons — Reasonable service necessary—A justice has no jurisdiction to hear a complaint unless there is evidence before him to show that the defendant was served with the summons a reasonable time before the return.—A summons issued at ten o'clock in the morning, returnable the same day at one, does not allow the defendant a reasonable time to appear and defend, and a conviction in default of appearance founded on such a proceeding should be quashed on certiorari. (*Per* Hanington J.) *R.* v. *Wathen ex parte Vanbuskirk*, 38, p. 529.

Third offence—Where the accused was charged under the Liquor License Act, C. S. 1903, c. 22, with a third offence and the conviction stated it was for a third offence, but was in other respects in the form of a conviction for a first offence and the only proof was of a first offence and the prosecution on the trial asked to have a conviction entered for a first offence.—*Held*, on application to quash, that the conviction might be amended under section 89 of the Act. *R.* v. *O'Brien ex parte Chamberlain*, 38, p. 385.

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3. Miscellaneous.

Beer license—The Act 7 Edw. VII, c. 91, authorizes the town of Woodstock to regulate the sale of beer of all kinds (not however to include any intoxicating liquor) within the town.—Under the authority conferred a by-law was made, providing in one section a retail license fee of $100 and in another that no license should be granted to any person who had been convicted of an offence against the Canada Temperance Act within one month prior to the date of application.—The defendant who had no license and had not applied for one, was convicted for selling without a license.— *Held*, on an application to quash the con-

viction that the section of the by-law imposing the license was not *ultra vires* as imposing such an excessive tax as to be in effect prohibitive and not merely regulative.—That while the section excluding the persons indicated therein from the privilege of obtaining a license might be beyond the limits of the authority conferred, it was no ground for quashing the conviction against the defendant, he never having applied for a license. *R.* v. *Dibblee ex parte Smith*, 38, p. 350.

Criminal Code, Part III—Re public works—An information was laid against L. for "keeping for sale" intoxicating liquor contrary to the provisions of s. 150 of the Criminal Code, Part III, but the summons charged that L. "unlawfully did sell."—L. appeared to the summons in person and by counsel, and pleaded to the information.—His counsel at once objected that there was a variance between the information and summons and on the application of counsel for the prosecution the summons was amended to conform with the information.—L.'s counsel then applied for an adjournment of the ground that L. was not prepared to meet the new charge, but offered no affidavit or other evidence in support of his application.—The commissioner having refused the adjournment the cause was heard and L. made his defence.—*Held*, the adjournment was in the discretion of the commissioner and was not a matter going to his jurisdiction.—The Dominion Police Act, R. S. C. 1906, c. 92 is *intra vires* of the Dominion Parliament, under s. 101 of the British North America Act.—*In re Vancini*, 34, S. C. R. 621, discussed and followed. *R.* v. *LeBell ex parte Farris*, 39, p. 368.

Drunkard's estate—Where the estate of a drunkard did not yield sufficient income to maintain him and to partly maintain his family, the Court, under Act 53 Vict., c. 4, s. 276, ordered a yearly sum to be paid out of principal by the Drunkard's Committee to the family for their support. *In re Stackhouse*, 2 Eq., p. 91.

The provisions in reference to "habitual drunkards" by which the Court of Equity is vested with power to act, have as their primary object the preservation of the drunkard's property.—It is not enough to give the Court power to interfere that the man should be an habitual drunkard, but he must be possessed of or entitled to property which by reason of his habits he is unable to manage, and which he squanders, or else he must by reason of his habits be transacting his business prejudicially to the interests of his family. *Id*, p. 94.

JUDGMENTS AND ORDERS.

1. Definition and Classification.

2. How Obtained.

i. AT TRIAL—*See* TRIAL.

ii. ON DEFAULT.

iii. ON CONFESSION.

iv. SUMMARILY.

3. Form.

i. AMENDING.

ii. VARYING.

iii. GENERAL.

4. Effect.

5. Terms—*See* TRIAL, III.

6. Relief Against.—*See also* APPEAL.

7. Assignment of.

8. Satisfaction of.

9. Actions on—(a) **Generally**, (b) **Foreign Judgments.**

10. Enforcement of.

i. GENERALLY.

ii. REGISTRATION.

See EXECUTION.

1. Definition and Classification.

Consent, Orders by—A consent order represents the agreement of the parties thereto and not the judgment of the Court making the order. *Meagher* v. *Canadian Pacific Rwy. Co.*, 42, p. 46.

Order for directions—An order for directions was made in this action by the Registrar.—Subsequently plaintiff applied to a judge by fresh summons for an order for a commission to examine witnesses.—This order was granted and the commission issued.—*Held*, applications for directions subsequent to the general order for directions should be by notice under Order 30, r. 5, but the judge had jurisdiction to make the order and the Court would not set it aside after commission issued, simply because the plaintiff was not compelled to pay costs of the application. *Clull* v. *Brown*, 41, p. 280; following *D'Israeli* v. *Isaacs*, 40, p. 431.

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2. How Obtained.

ii. ON DEFAULT.

Judgment by default — Foreclosure suit—An offer to suffer judgment by default, under Act 53 Vict., c. 4, s. 130, is not applicable to a suit for the foreclosure of a mortgage and sale of the mortgaged premises.—One of several defendants cannot offer to suffer judgment by default. *Jeffries* v. *Blair et al*, 1 Eq., p. 420.

iii. ON CONFESSION.

Offer to suffer judgment—Costs—Where an offer to suffer judgment was not accepted in a suit involving several issues, and the plaintiff succeeded upon but one issue entitling him to damages less than

the amount of the offer, he was allowed costs of whole suit up to the date of the offer. *Barclay* v. *McAvity*, 1 Eq., p. 146.

The defendant may make more than one offer to suffer judgment, but by the making of a new offer he will be taken to have abandoned any previous offers. *Barclay* v. *McAvity*, No. 2, 1 Eq., p. 59.

Offer to suffer judgment — Costs — The plaintiff, notwithstanding that she had received notice of an offer to suffer judgment by default, within the ten days allowed to her by the statute for its acceptance, carried the cause down to trial and obtained a verdict therein (also within the ten days) for a sum exactly equal to the amount mentioned in the offer.—On a motion to review the taxation of the plaintiff's costs, *held* (*Per* Tuck C. J., Hanington, Landry and McLeod JJ., Gregory J. dissenting), that the making of the offer in no way operated as a stay of proceedings and the taking of the cause down to trial by the plaintiff was not equivalent to a rejection thereof; and that she was, therefore, entitled to have the costs of the trial allowed to her on taxation.—Quaere (*per* Tuck C. J.): If the verdict had been for a less amount than that for which the offer to suffer judgment was made, could the plaintiff after verdict have accepted the offer and signed judgment for the larger sum? *Sharp* v. *Trustees of School District No. 6 Woodstock*, 35, p. 243.

iv. SUMMARILY.

Summary judgment—Defence a question of law only—In an application under O. XIV. of the Judicature Act for leave to enter final judgment in an action on an award for the value of land expropriated by a railway company pursuant to the Railway Act, (C. S. 1903, c. 91,) it was objected that the award was bad because the arbitrators had not been sworn by a justice of the peace for the county in which the lands lie as required by s. 17 (7) of the Act.—They had been sworn by a person who was not in fact a justice, but was a commissioner for taking affidavits.—*Held* (*per* White J.), where the defence disclosed in answer to an application for leave to enter final judgment under O. XIV is a pure question of law, it is proper under the conditions existing in this Province for a judge at chambers to decide the question and avoid the delay and expense of a trial. *Turney* v. *The Saint John and Quebec Railway Co.*, 42, p. 557.

Summary judgment—Leave to defend—Upon an application for summary judgment in the County Court under C. S. 1903, c. 116, ss. 49 and 50, the defendant is entitled to leave to defend if the facts submitted by him, which he alleges he can prove, raise a defence which ought to be tried. *Neil* v. *Balmain*, 41, p. 429.

Order XIV, authorizing a judge to grant summary judgment upon a specially endorsed writ applies only where there can be no reasonable doubt that the plaintiff is entitled to judgment.—Here, the Court reversed the judgment of Barry J. granting summary judgment, on the ground that there were disputed questions of fact which the defendant had a right to have submitted to a jury. —(*Per* McLeod J.) If defendant swears to a counterclaim arising out of the cause of action he is entitled to leave to defend. *McDonald et al* v. *Pinder*, 42, p. 227.

Summary judgment—Signing after appearance—Time for appearance—An order allowing the plaintiff to sign judgment after appearance on a specially endorsed writ may be made under section 73 of 60 Vict., c. 24 (Supreme Court Act) though the time limited for appearance by the writ has not expired.—(*Per* Tuck C. J., McLeod and Gregory JJ., Hanington J. dissenting.) *Dom. Cotton Mills Co.* v. *Maritime Wrapper Co.*, 35, p. 676.

3. Form.

i. AMENDING.

Debenture-holders' suit, Amending order in—Where the original order appointing a receiver in a debenture-holders' suit was claimed to be too broad in its terms as to the property to be taken possession of by the receiver, it was varied to read "property conveyed by said mortgage or thereby in any way charged as a security for the payment of the said bonds." *Bank of Montreal* v. *The Maritime Sulphite Fibre Co. Ltd.*, 2 Eq., p. 328.

ii. VARYING.

Varying—See remarks of Barker J. in *Robertson* v. *Miller*, 2 Eq., p. 496.

In a suit to restrain the sale of property by K., an auctioneer, at the instance of M, and for a declaration of the plaintiff's title, K. appeared and jointly answered with M.—M. thereafter undertook the conduct of the suit and alone appeared at the hearing, K. holding himself to be but a nominal party.—Judgment with costs having been given against both defendants, an application by K. to have the suit reheard for the purpose of varying so much of the decree as ordered him to pay costs was refused, the decree being exactly what the judge intended to make. *Id.*

If a decree is wrong in point of law, the remedy is by appeal. *Id.*

Varying injunction order—Where an *ex parte* injunction order restrained a trader, who had obtained goods from the plaintiffs under an agreement that the property therein was to remain in them with liberty to them to take possession, from, *inter alia*, making an assignment for the general benefit of his creditors, it was ordered to be discharged in that respect. *The Gault Bros. Co. Ltd.* v. *Morrell*, 3 Eq., p. 123.

Varying—Interest wrongly computed—Decree of Court below in suit for redemption varied without costs by correcting a mistake in the calculation of interest. *McKensie* v. *McLeod et al*, 39, p. 230.

Varying — Order rightly expressing judge's intention—A company, against which a winding-up order had been made, obtained at the instance of the large majority of its shareholders and holders of its bonds an order in an action by it against C., granting leave to appeal to the Supreme Court of Canada from a judgment of the Supreme Court of this Province, and entrusting the conduct of the appeal to the company's solicitors.—Subsequently the liquidators of the company moved to vary the order by adding a direction that the case on appeal should not be settled until an appeal from the judgment of the Supreme Court of this Province refusing to set aside the winding-up order was determined, and that the company's solicitors on the appeal in the action against C. should act therein only on instructions of the liquidators or their solicitor. —*Held*, that as there was no error or omission in the order resulting from mistake or inadvertence, and the order expressed the intention of the Judge who made it the motion should be refused. *In re The Cushing Sulphite Fibre Co. Ltd.*, 3 Eq., p. 231.

See also *Owens* v. *Upham*, 39, p. 21.

iii. GENERAL.

Application by executor for advice—On an application by an executor under s. 130 of chapter 49, C. S., all of the facts upon which the advice of the Court is sought must appear in the petition itself.—If the facts are not stated correctly, the advice given will be no protection to the petitioner. —The facts in the petition must be sworn to by an accompanying affidavit of the petitioner, or his agent having a knowledge of them.—The definite question to be asked should be propounded in the petition and not a general reference made to the Court for its opinion.—The petition should be presented to the Court *ex parte*, when direction will be given who is to be represented or have notice of the hearing.—The order of the Court should recite the petition. *In re Isabella Brooks Estate*, Eq. Cas., p. 269.

Failure to entitle in cause—It is not a ground for setting aside the service of an *ex parte* injunction order that the order is not entitled in the cause, where the defendant has not been misled. *The Cault Brothers Co. Ltd.* v. *Morrell*, 3 Eq., p. 123.

Foreclosure of debenture mortgage—Form of decree adopted in suit to foreclose debenture mortgage—See *Shaugnessy* v. *The Imperial Trusts Co.*, 3 Eq., p. 5.

Order must accord with notice of motion—Where defendant appeared to a foreclosure suit and the plaintiff gave notice of motion to take the bill *pro confesso* for want of a plea answer or demurrer, he was not allowed to move that the amount due on the mortgage be assessed and the usual order of sale made.—The only order obtainable is one in accordance with the notice given. *Hanford* v. *Howard*, 1 Eq., p. 241.

Cf. Rule of Court, H. T., 1896, Ed.

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4. Effect.

Costs — Order for payment — Where no time is limited by a decree in a suit for payment of costs, a further order for their payment must be taken out, after which an order for execution will be made *ex parte*. *Wright* v. *Wright*, Eq. Cas., p. 496.

Decree dismissing redemption suit—A decree dismissing a bill on default of payment of the amount found due in a suit for redemption of a mortgage is equivalent to a decree of absolute or unconditional foreclosure, and the court of equity has jurisdiction under it to order a writ of possession to be issued under C. S. 1903, c. 112, s. 141. *Patchell* v. *Colonial Investment and Loan Co.*, 38, p. 333.

Finality of judgment—The plaintiff, an extra-provincial corporation, sued S. in a County Court for debt.—S. died and the plaintiff then recovered judgment by default against the defendant as administrator of S.—Execution was issued and returned *nulla bona*, although the administrator had assets in his hands.—The plaintiff then brought this action against the defendant personally upon the County Court judgment relying on the judgment as evidence of assets, and the return of the execution as evidence of waste.—Judgment having been given for the plaintiff, the defendant moved to set it aside on the ground that the County Court judgment was void because (1) no affidavit of debt had been filed under C. S. 1903, c. 118, s. 44 and (2) the plaintiff had no license under C. S. 1903, c. 18.—*Held*, the County Court judgment was conclusive against the defendant upon both defences and that they could not be set up in this action. *Sanford Manufacturing Co. Ltd.* v. *Stockton*, 40, p. 423.

Judgment of inferior Court—The judgment of an inferior Court is not conclusive as between the parties and their privies upon the question of jurisdiction; therefore, where an action was brought in the Supreme Court against bail given in a cause which had been commenced and tried in the City Court of Saint John, and the defendant by plea denied the jurisdiction of the said Court, and at the trial gave evidence in support of his plea, *held* (*per* Hanington, Landry, Barker, McLeod and Gregory JJ.), a defendant was not estopped by the judgment of the said City Court from offering such proof, and that as the plaintiff had chosen to rely entirely upon the estoppel he must fail. *Jack* v. *Bonnell*, 35, p. 323.

Order extending term for appeal made ex parte—An order extending the time for appeal made *ex parte* is not a nullity, and if not set aside the Court will hear an appeal taken under it. *Re estate Wm. F. Welch*, 36, p. 628.

5. Terms

See TRIAL III

6. Relief Against.

Defence, Allowing — Judgment set aside—Certiorari will not be granted to remove an order of a county court judge setting aside a judgment obtained in such county court and letting the defendant in to defend. *Ex parte Joiens*, 39, pl 589.

Relief—If a decree is wrong in point of law, the remedy is by appeal. *Robertson* v. *Miller*, 2 Eq. p. 496.

Setting aside—Collusion, Affidavit re—A judgment will not be set aside on the ground of collusion and undue preference where the affidavit in proof of the collusion is founded on information and belief only, and does not state the origin of the information, and no circumstances are assigned for deponent's belief. *Dominion Cotton Mills Co.* v. *Maritime Wrapper Co.*, 35, p. 676.

See also APPEAL.

7. Assignment of.

8. Satisfaction of.

9 Actions on.

Pleading — Action on foreign judgment—C. S., c. 48—The declaration charged that the defendant was indebted to the plaintiff in $326 by virtue of a judgment recovered in the Superior Court of the district of M. in the province of Q.—Plea, that the defendant was not personally served with the first process in the suit within the jurisdiction of the Court where the said judgment was obtained, and that the defendant was never indebted to the plaintiff in the claim on which the judgment was obtained.—Replication that the contract on which the judgment was recovered was made at M. within the jurisdiction of the Superior Court of the district of M., that the said Court had jurisdiction of the subject matter of the said suit, and the said judgment was regularly obtained according to the practice of the said Court, and that the sum mentioned in the said judgment and ordered to be paid is justly and truly due and payable by the defendant to the plaintiff.—Demurrer to the replication, and notice of objection to the plea.—*Held* (*per* Hanington, Landry, Barker and McLeod JJ., Gregory J. dissenting), that the plea as a defence that the enforcement of the judgment by this Court was contrary to natural justice was bad, as it did not negative the existence of all facts which, if proved, would render the judgment enforceable.—That it was not sufficient to enable the defendant to go into the merits of the original cause of action under C. S., c. 48, as it did not set out the cause of action.—That the replication was bad, as it did not join issue on the conclusion of the plea "Never indebted" and merely reiterated in another form the right to enforce the judgment.—*Held* (*per* Gregory J.), that there should be judgment for the defendant, for, while the plea was defective for want of an averment, that the original cause of action was one to which the plea of "never indebted" was applicable; the objection was not open to the plaintiff, as he had pleaded over, and the replication alleges a cause of action to which it must be assumed the plea was proper.—That the replication was bad, being equivalent in this record to an averment that when parties enter into a contract within the jurisdiction of a Court that wherever they may go the Court has jurisdiction over them in relation to the contract. *Shearer & Co.* v. *McLean*, 36, p. 284.

10. Enforcement of.

Decree charging land, Priority of—A married woman owning leasehold land as her separate estate, agreed by parol with A. that in consideration of his building a house thereon she would secure him by a mortgage of the premises, and the house was accordingly built.—Subsequently she became indebted to the plaintiffs and they obtained a decree charging her separate estate with their debt.—The decree was never registered.—After the decree, she gave a mortgage to A. in accordance with her agreement with him, and the mortgage was duly registered.—In a petition by A. to have the mortgage declared a valid charge upon the property in priority to the plaintiffs' decree, *held*, that the plaintiff's decree must be postponed to the equities existing against the property in favour of A. at the time of the decree. *In re the Petition of William G. Bateman*; *Chute et al* v. *Amelia Gratten et al*, Eq. Cas., p. 538.

Judgment of Privy Council—It is the proper practice to move to have a judgment of the Privy Council entered as a judgment of this Court in a case appealed from this Court. *Robertson et al* v. *Fairweather*, 37, p. 497.

Judgment of Supreme Court of Canada—When a judgment of the Supreme Court of Canada has been certified to the clerk of this Court, as provided by R. S. C. c. 105, s. 67, it becomes a judgment of this Court, and it is not necessary to obtain leave to issue an execution to enforce the payment of costs awarded to the applicant by the said judgment. *Ex parte Jones*, 35, p. 108.

Registration, Effect of—A memorial of judgment when registered, or a writ of execution when filed with the sheriff, only affects such interest in land as the debtor then has, and therefore does not postpone the title of a trustee thereto under a creditors' deed previously executed by a number of the creditors, though not registered.—Property, including a lot of land, was conveyed by A. to B. by deed in trust for the former's creditors.—The deed was executed by some of the creditors and was then registered. It was subsequently discovered that the certificate of acknowledgment was defective, and a new certificate was endorsed on the deed.—Between the date of registration and the endorsement of the second certificate, a creditor obtained and registered a judgment against the debtor, and seized the land under a writ of *fi. fa.*—A sale of the land being advertised by the sheriff, the trustee filed a bill praying for a declaration of his title, and, as consequential relief, for an injunction.—*Held*, that the trustee's title to the land was not displaced by either the registered judgment or the writ of execution, and that he was entitled to the declaration prayed for. *Trueman* v. *Woodworth et al*, 1 Eq., p. 83.

Winding-up Act, Judgment under—The correct practice in order to enforce an order or judgment of the Court of another province made under the Winding-up Act and produced to the registrar pursuant to s. 126, is to enter such order as a judgment of this Court under the rules made under the Act by this Court in Trinity Term, 1888, without any formal motion to that effect. *In re The Winding-up Act, re Sovereign Bank of Canada*, 43, p. 59.

See also ELECTIONS.

JUSTICES OF THE PEACE AND MAGISTRATES.

1. Appointment.
2. Qualification.
3. Jurisdiction.
4. Disqualification.
5. Liability to Action.
6. Practice and Procedure.
7. Miscellaneous Cases.

3. Jurisdiction.

Concurrent jurisdiction of justices for the county—An information for assault was laid before S., justice of the peace for A. county, after summons issued an order *nisi* of prohibition was served on him at the instance of the defendant and no further proceedings were taken before him.—B., another justice for the county, having been requested by S. to hear the charge, took another information and issued a summons.—On the return of the summons, the defendant's attorney, who was clerk of the peace, advised B. that he had no jurisdiction, and B. thereupon refused to proceed.—An information was then laid before R. another justice of the peace for A. county, who was requested by S. to act after B. had declined to proceed.—An order *nisi* of prohibition having been granted against R., *held*, that the three justices had concurrent jurisdiction and as S. and B. were not *bona fide* proceeding in the matter, there was no ground for interfering with R. *Ex parte Peck*, 39, p. 274.

Justice of the peace—A justice appointed for a county has jurisdiction to try in a parish of the county an offence against the Liquor License Act committed in another parish in the county. *R.* v. *Plant ex parte Morneault*, 37, p. 500.

Parish Court commissioners, Jurisdiction of—Section 103 (d), c. 106 of R. S. C., the Canada Temperance Act, in so far as it attempts to confer upon Parish Court commissioners jurisdiction to try offences against the Act is *ultra vires* of the Parliament of Canada. *Ex parte Flannaghan*, 34, p. 577.

See *In re Vanchini*, 34 S. C. R. 621, overruling.

Police magistrate for county—By 39 Vict., c. 16, provision was made for the appointment of a person resident in the parish of Salisbury, in the county of Westmorland, to be a district or stipendiary police magistrate for the said county.—53 Vict., c. 77 amended the Act by inserting the word "or" between the words "stipendiary" and "police" and enacted that any person theretofore appointed a stipendiary and police magistrate under the words "stipendiary police magistrate" should be held and taken to be a stipendiary and police magistrate for the county of Westmorland; the Royal Gazette, containing the appointment of a person in pursuance of 39 Vict., c. 16, designated him as "police magistrate for Salisbury."—*Held*, that he was appointed for the county of Westmorland. *Ex parte Gallagher*, 34, p. 329.

A police magistrate appointed under 46 Vict., c. 37, for the county of Westmorland, with civil jurisdiction within the parish of Shediac, has jurisdiction to try offences against the Canada Temperance Act committed at the city of Moncton, and such jurisdiction is not restricted by 2 Edw. VII, c. 11, giving police or stipendiary magistrates appointed for a parish jurisdiction for the county in which such parishes are situate, and providing that such magistrates shall have no jurisdiction over offences committed within the limits of any city or incorporated town. *R.* v. *McQueen ex parte Landry*, 38, p. 48.

"Public official"—A police magistrate, paid from a local fund, is not a 'public official.'

—He is not in the pay of the nation. *Kay* v. *The City of Moncton*, 36, p. 377.

Registry Act—Territorial jurisdiction of justices of the peace—A justice of the peace has no power to take an acknowledgment of a deed out of the county for which he is appointed a justice, and an acknowledgment stating that it was taken before W. E., "one of her majesty's justices in and for the county of V." without anything further to show that it was taken in the county, is bad. *The Tobique Salmon Club* v. *McDonald*, 36, p. 589.

Residence of magistrate—Effect of change of residence by police magistrate appointed under 49 Vict., c. 81 discussed—Office by statute in Andover, temporary residence in Perth. *R.* v. *McQuarrie ex parte Giberson*, 40, p. 1.

Stipendiary Magistrate — Ex officio justice of the peace—A stipendiary magistrate, designated as such in the proceedings, has jurisdiction to hold a preliminary examination under the Bastardy Act, because he is *ex officio* a justice of the peace, under C. S. 1903, c. 119, s. 1 (2). *Ex parte Seriesky*, 41, p. 475.

Stipendiary or police magistrates—Section 685 of the Criminal Code confers on the police and stipendiary magistrates in the province of Ontario, in case of a person charged with having committed an offence for which he may be tried at a Court of the general sessions of the peace, power to try the offence summarily with the consent of the party charged.—The Criminal Code Amendment Act, 1900, extended the power to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada.—*Held*, that the Court would take notice of the offences that might be tried at the Court of general sessions of the peace, and that the police magistrate of a city in this province had power to try such offences though there was no court of general sessions of the peace in this province.—An act of the provincial parliament which creates each and every stipendiary or police magistrate a Court, with all the powers and jurisdiction which any act of the parliament of Canada has conferred, or may confer, or which any act of the said parliament purports to confer upon any stipendiary or police magistrate within the province, is not a delegation of the powers conferred exclusively on the provincial parliament by the British North America Act, and is *intra vires* the provincial parliament. *Ex parte Vancini*, 36 N. B. R., p. 456; 34 S. C. R., p. 621.

Stipendiary magistrate for city—A prisoner arrested in the city of Halifax in the province of Nova Scotia, charged with unlawfully breaking and entering a store situate at Sydney in the said province, may be tried at Halifax by a stipendiary magistrate having jurisdiction within the city of Halifax, if he consents to be tried summarily without a jury under section 785 of the Criminal Code, 1892, as amended by the Criminal Code Amendment Act, 1900. *R.* v. *Warden of Dorchester Penitentiary*, 38, p. 517.

Stipendiary magistrate for county—Jurisdiction in town—T. was convicted of an offence against the Canada Temperance Act by C., who, in making the conviction professed to be acting as stipendiary magistrate of the county of W.—No record of his appointment to this office could be found either in the minutes of the executive council or in the office of the provincial secretary; but there was a record of his appointment to the office of stipendiary magistrate of the parish of S.—C. swore (and herein he was corroborated), that upon it being discovered that his commission as stipendiary magistrate of the parish of S. was illegal a new commission appointing him stipendiary magistrate of the county of W. was issued to him, which commission had been lost, but under which he had been acting without objection for many years.—Afterwards, when the town of S. was carved out of the parish of S. and incorporated under the Towns Incorporation Act, C. was appointed stipendiary magistrate of the town.—Sub-section (2) of section 131 of the Towns Incorporation Act provides *inter alia*, that on an appointment of a police or stipendiary magistrate for a town incorporated thereunder, the commission of a police or stipendiary magistrate appointed for and having jurisdiction in the parish within which such town is situate and theretofore acting in such town shall thereupon *ipso facto* be cancelled, and he shall cease to hold office as such police or stipendiary magistrate.—*Held* (*per* Tuck C. J., Hanington, Landry, Barker and McLeod, JJ., that there was sufficient proof of C. having been duly commissioned to act as stipendiary magistrate of the county of W., and that under the above sub-section he did not vacate such office upon being appointed police magistrate of the town of S. *R.* v. *Cahill ex parte Tait*, 37, p. 18.

Summary Conviction Act (Dom.)—A magistrate has no jurisdiction to issue a warrant on an information under the Dominion Summary Conviction Act without examining upon oath the complainant or his witnesses as to the facts upon which the information is based.—*Ex parte Boyce* and *R.* v. *Mills* followed. *R.* v. *Carleton ex parte Grundy*, 37, p. 389.

Summary jurisdiction of stipendiary magistrate for county—A police or stipendiary magistrate for "the county of Westmorland" with jurisdiction in the city of Moncton has no authority to try summarily a person charged with an offence under part LV of the Criminal Code, s. 785, sub-s. 2 as amended by the Criminal Code Amendment Act 1900, giving to police or stipendiary magistrates of cities and incor-

porated towns jurisdiction to try summarily indictable offences. *R.* v. *Benner*, 35, p. 632.

4. Disqualification.

Action brought by defendant—Writ not served—A magistrate is not disqualified from trying a charge under the Canada Temperance Act by reason of a writ having been made out and sent to the sheriff for service in an action by the accused against the magistrate for alleged misconduct as a judicial officer, where the writ was not served before the conviction was made. *R.* v. *Byron, Ex parte Owen A.Batson*, 37, p. 383.

Action pending against magistrate—If the mere fact of existing litigation is relied on as the disqualification of a presiding justice on the ground of bias, the litigation must be really pending.—Service of a notice of action not followed by an action is not sufficient. *R.* v. *Kay, Ex parte Gallagher*, 38, p. 498.

Action pending between magistrate and defendant's husband—A *bona fide* action pending between the husband of a defendant and the stipendiary magistrate before whom an information is laid for a violation of the second part of the Canada Temperance Act, is sufficient to disqualify the magistrate. *Ex parte Scribner*, 32 N. B. R. 175, distinguished. *Ex parte Hannah Gallagher*, 34, p. 413.

Action pending by husband of defendant—Failure to prosecute—The Court refused to quash a conviction on the ground of bias of the presiding justice by reason of an action pending against him where it appeared that the action was commenced and declaration and plea filed more than eight years before the conviction; that the action was by the husband (since deceased) of the accused against the justice, and arose out of a trespass committed under a search warrant issued by the justice for the examination of the husband's premises for liquor alleged to have been unlawfully stored; that no further proceedings had been taken, but it was stated in an affidavit of the accused read on the argument that it was not her husband's intention as she believed, and it was and is not her intention to allow the suit to abate.—Quaere:—If the action survives to the wife as administratrix?—And if so and is proceeded with has she such an interest as will disqualify the justice on the ground of bias? *R.* v. *Kay, Ex parte McCleave*, 38, p. 504.

Bias not established in point of fact—See *Ex parte Hebert*, 34, p. 455.

Bias, Reasonable apprehension of—If a state of facts exist which cause a reasonable apprehension of bias, that is sufficient to prevent an adjudication upon the matter in controversy being upheld, if it be impeached by a party who either had no knowledge at the trial of the existence of that state of facts or knowing of it objected to the magistrate acting. *R.* v. *McLatchy, Ex parte Antinori Fishing Club*, 44, p. 402.

Consanguinity — Ninth degree—A conviction under the Canada Temperance Act made by two justices of the peace will not be quashed on the ground that one of them was related to the defendant within the ninth degree of consanguinity, if the justice was not aware of the relationship, and no objection was taken at the trial. *R.* v. *Biggar et al ex parte McEwen*, 37, p. 372.

Consanguinity — Relationship to wife of assistant inspector under Liquor License Act—A magistrate is not disqualified from adjudicating upon an information laid under the Liquor License Act, 1896, by a license inspecter, by reason of being related to the wife of the assistant inspector where such assistant inspector took no part in the proceedings. *Ex parte Flannaghan*, 34, p. 326.

Consanguinity with informant—A justice is not disqualified from taking an information under the Criminal Code because the informant is his second cousin. *Campbell* v. *Walsh*, 40, p. 186.

Former relations between magistrate and accused—A justice of the peace is not disqualified from hearing a charge of assault on the ground of bias and prejudice, because the justice had been removed from the position of police magistrate of H., some five months before and the defendant appointed in his stead; or because some two months before, the justice had been charged with a criminal offence before the defendant acting as such police magistrate and by him committed for trial. *Ex parte Peck in re Stuart*, 39, p. 131.

Interest in municipal funds—Under s. 136 of the Liquor License Act the municipalities are authorized to pay the liquor license inspector all necessary costs incurred by him in prosecuting complaints under the Canada Temperance Act.—By arrangement between the municipality and the magistrate his costs were taxed at a lump sum of $5.00 where the complaint was dismissed or costs not paid by the defendant.—This amount would be more than the taxable costs in certain cases, and it was claimed the excess could not be paid out of the ordinary funds, but would have to be paid out of fines.—*Held*, such an interest on the part of the magistrate was too remote to disqualify him from trying a charge under the Canada Temperance Act.—*Ex parte McCoy*, 33 N. B. R., 605, followed. *R.* v. *Holyoke*, 42, p. 135.

Justice of the peace also county officer—A justice of the peace who accepts the officer of clerk of the peace and clerk of the County Court is not disqualified from

trying an offence charged under the Liquor License Act on the ground that the offices are incompatible. *R.* v. *Plant, Ex parte Morneault*, 37, p. 500.

Liquor License Act — Inspector for another district—The fact that B., a convicting justice for an offence against the provisions of the Liquor License Act, 1896, 59 Vict., c. 5, is an inspector under the Act, but not for the district where the offence is alleged to have been committed, is not such an interest as to disqualify him or cause bias. *Ex parte Michaud*, 34, p. 123.

Magistrate active re petition for no license—The convicting magistrate was not disqualified by reason of his having circulated and obtained signatures to a petition praying that no license be granted in the parish where the defendant lived, and in which he was the sole applicant for a license. *R.* v. *Charest, Ex parte Dagle*, 37, p. 492.

Magistrate informant in another case pending—D., the defendant, was twice convicted for offences against the Liquor License Act.—In the first case C. was the informant and prosecutor; in the second he was the convicting magistrate.—*Held*, that while the first case was pending before this Court on certiorari, C. had no jurisdiction to try the information in the second case. *R.* v. *Charest, Ex parte Daigle*, 37, p. 492.

Magistrate signatory to petition against license to accused—Signing a petition praying that no license be issued to a party subsequently charged with an offence against the act does not disqualify a magistrate so signing from trying the charge. *R.* v. *Davis, Ex parte Vanbuskirk*, 38, p. 335.

Membership on board of police commissioners—The fact that the police magistrate of the city of Moncton is a member of the board of police commissioners for that city as established by 7 Edw. VII, c. 97, does not disqualify him from hearing an information laid by a police officer who was appointed by such board.—The police commissioners merely exercise a function of the provincial government, and are not responsible for the acts of the police officers they appoint. *R.* v. *Kay, Ex parte Wilson*, 39, p. 124.

Ratepayer in county—A magistrate is not disqualified from adjudicating upon an information laid under the Liquor License Act 1896 by reason of being a ratepayer of the county and the penalty sought to be recovered being payable into the county funds. *Ex parte Flannaghan*, 34, p. 326; *Ex parte Hebert*, 34, p. 455.

Residents and ratepayers in city—The virtual prosecutor—Both the police and the sitting magistrate of the city of M. were residents and ratepayers thereof, and the police magistrate was in receipt of a fixed salary from the city as City Court commissioner.—Fines imposed for violation of the Canada Temperance Act therein were paid over to the treasurer of the city, by him placed to the credit of its general funds and used to meet unforeseen expenses.—The city, by one of its policemen employed for the purpose of enforcing the Act, was the prosecutor in all the cases. — *Held* (Hannington J. dissentiente and Landry J. dubitante), that there was no disqualification of either the police or the sitting magistrate by reason of pecuniary interest, nor was there such a probability of bias on the part of either by reason of their being corporators of the city, which was the virtual prosecutor, as to invalidate convictions made by them for violations of the Canada Temperance Act in the said city of M. *Ex parte Gorman*, 34, p. 397.

Sitting magistrate — "Absence" of police magistrate—The word "absence" in section 65 of the City of Moncton Incorporation Act, 53 Vict., c. 60, does not mean absence from the place of trial but inability to attend to the business of the Court.—Here the police magistrate was in the court room during part of the trials but during the trials was obliged to attend before a commissioner appointed by the provincial government to inquire into his official conduct. *R.* v. *Steeves, Ex parte Cormier*, 39, p. 435.

Sitting magistrate, Conviction by—The City of Moncton Incorporation Act, 53 Vict., c. 60, s. 65, provides that a sitting magistrate may act for the police magistrate of the city of Moncton when he is temporarily absent or ill or "is any way disqualified by being a witness, or from relationship or otherwise."—*Held*, that a conviction by a sitting magistrate stating that he was acting for the police magistrate "he being disqualified" and not alleging the grounds of disqualification is sufficient on its face. *R.* v. *Stevens, Ex parte Gallagher*, 39, p. 4.

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5. Liability to Action.

Action for false imprisonment — Evidence—C. S., c. 90, s. 11, enacts that "where the plaintiff shall be entitled to recover in any action against a justice, he shall not have a verdict for any damages beyond two cents, or any costs of suit, if it shall be proved that he was guilty of the offence of which he was convicted etc."—In an action of false imprisonment brought against a magistrate, who without jurisdiction had committed to prison the plaintiff for making default in the payment of a fine imposed upon him for selling liquor without a license, evidence was offered and admitted in proof of the plaintiff's innocence of the charge.—*Held*, properly received and that the plaintiff, in order to prove his innocence, was not confined to the evidence given before the magistrate on the trial of the information. *LaBelle* v. *McMillan*, 34, p. 488.

Action for false imprisonment — Lack of jurisdiction—In an action for false imprisonment where the justice who issued the warrant acted wholly without jurisdiction, proof of malice or want of probable cause is unnecessary.—A complaint in writing under oath for a search warrant under which a warrant was issued, and goods named therein were found in the possession of the accused, will not justify arrest without any further or other complaint. *Melanson* v. *LaVigne*, 37, p. 539.

Attachment of Supreme Court judge—A judge of the Supreme Court has no privilege against an attachment for any contempt which is of a criminal and not of a civil kind.—The process of attachment which may be issued under the provisions of sec. 36, of 59 Vict., c. 28, against a judgment debtor for contempt of an order calling upon him to appear and be examined orally as to any and what property he has which by law is liable to be taken in execution, is punitive or criminal in its nature; therefore a judge of the Supreme Court can not protect himself by his privilege against an attachment issued against him for refusing to obey such an order.—(*Per* Tuck C. J., Landry and Barker JJ.) *Ex parte VanWart*, 35, p. 78. "

See also MALICIOUS PROSECUTION.

6. Practice and Procedure.

Adjourning or refusing adjournment—A conviction under the Summary Convictions Act, C. S. 1903, c. 123, will not be set aside on certiorari because the trial was adjourned "to be taken up when County Court adjourns," the defendant's counsel having subsequently appeared and taken part in the trial without making objection. —Refusing an adjournment is a matter within the magistrate's discretion and does not go to the jurisdiction. *R.* v. *McQuarrie, Ex parte Giberson*, 40, p. 1.

Delay in issuing summons—Where an information under the Canada Temperance Act was laid within three months after the offence, but no summons was issued thereon for a year and fourteen days after the information laid, *held* (*per* Barker C. J., Landry, White and Barry JJ., McLeod and McKeown JJ., dissenting), that the delay in issuing summons did not deprive the magistrate of jurisdiction. *R.* v. *Peck ex parte Beal*, 40, p. 320; *R.* v. *Peck, Ex parte O'Neil*, 40, p. 339.

Evidence—Taking by stenographer—Section 25 of the Criminal Code Amendment Act, 1913, c. 13, repealing and re-enacting s. 683 of the Criminal Code, 1906, authorizing the depositions taken by a justice on a preliminary inquiry to be taken in shorthand by a stenographer, who before acting shall, unless he is a duly sworn official court stenographer, make oath that he will truly and faithfully report the evidence, made applicable to the trial of complaints under summary conviction proceedings by subs. 3 of s. 27 of the Criminal Code, 1906, is imperative and a conviction made for an offence against the Canada Temperance Act on evidence taken in shorthand by a stenographer who was not sworn to truly and faithfully report the evidence, and was not a duly sworn official court stenographer, was quashed on certiorari as having been made without jurisdiction.—The defect is not cured by an affidavit of the stenographer made subsequent to the trial and conviction, stating that the evidence had been truly and faithfully reported, even if such an affidavit could be produced and read on the return of the rule *nisi* to quash. *R.* v. *Limerick, Ex parte Dewar et al*, 44, p. 233.

Service of summons—A justice has no jurisdiction to hear a complaint unless there is evidence before him to show that the defendant was served with the summons a reasonable time before the return.—A summons issued at ten o'clock in the morning, returnable the same day at one, does not allow the defendant a reasonable time to appear and defend, and a conviction in default of appearance founded on such a proceeding should be quashed on certiorari. (*Per* Hanington J.) *R.* v. *Wathen, Ex parte Vanbuskirk*, 38, p. 529.

Witness, Magistrate refusing to become a—The defendant applied to call the magistrate as a witness, but as he declined to state in any other than in a general way what he purposed to prove by him, the magistrate refused to leave the Bench to be sworn.—In this he was sustained by the Court, notwithstanding the defendant swore that the application was made in good faith. *Ex parte Hebert*, 34, p. 455.

Witness, Reading evidence over to—C. C., s. 721 (3)—The provision of section 721, sub-section 3 of the Criminal Code requiring the evidence to be read over to a witness on the trial of an information or complaint is a matter of procedure, and its omission does not go to the jurisdiction of the magistrate.—*Ex parte Doherty*, 32 N. B. R. 479, followed. *R.* v. *Kay, Ex parte Gallagher*, 38, p. 498.

Witnesses — Signing of depositions, by magistrate—The provision of s. 682, sub-s. 4 of the Criminal Code, R. S. C. 1906, c. 146, requiring that the depositions of witnesses should be signed by the justice is a matter of procedure and does not go to the jurisdiction. *Ex parte Budd*, 39, p. 602.

7. Miscellaneous.

Collusion of convicting magistrate—Section 887 of the Criminal Code which enacts that "no writ of certiorari shall be allowed to remove any conviction or order

had or made before any justice of the peace, if the defendant has appealed from such conviction or order to any Court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal" does not deprive the Court of the right to quash a conviction on certiorari, where the convicting justice acted as a partisan in collusion with the prosecutor and without jurisdiction, even though an appeal has been taken which has failed by reason of the refusal of the justice to make the return required by law.—(Landry J. dissenting).—*In re Kelly*, 27 N. B. R. 553 discussed. *R.* v. *Delegarde Ex parte Cowan*, 36, p. 503.

Commissioner of Civil Court — Action for salary — Pleading — The declaration alleged that under 53 Vict., c. 60, a Court for the trial of civil causes was established in the city of M., that a commissioner of the said Court was to be appointed by the governor in council, that the salary of the said commissioner was to be fixed by the city council of the city of M. and paid out of their funds, that pursuant to the act the plaintiff was appointed commissioner, and his salary was fixed by the city council at $600 per annum, that he had performed the duties of the office and was entitled to be paid the salary, but the defendant had refused to pay.—*Held*, on demurrer (*per* Hanington, Landry, Barker, McLeod and Gregory JJ.), that the declaration was good as it alleged a statutory liability to pay the plaintiff out of the city funds. *Kay* v. *The City of Moncton*, 36, p. 202.

Commissioner of Civil Court — Action for salary — Mutual modification of contract — An arrangement entered into by the plaintiff, the commissioner of the City Court of Moncton, a provincial appointee, with the city council of the city of Moncton to accept a reduction of his salary, which arrangement had been assented to by both parties and acted upon for a period of five years, is binding and can not be repudiated on the ground that it is void as against public policy. *Kay* v. *The City of Moncton*, 36, p. 377.

LABOUR.

Industrial Disputes Investigation Act —In the matter of the Industrial Disputes Investigation Act, 1907, and in the matter of the dispute between the Longshoremen of the Port of Saint John, Employees and The Robert Reford Company, Limited et al., Employers, 42, p. 434.

See also ALIENS and WORK AND LABOR. (Contract 12.)

LACHES.

Action for damages, Delay in bringing —By the charter of the City of St. John, the corporation was given power not only to establish, appoint, order and direct, the making and laying out all other streets . . . . heretofore made, laid out or used or hereafter to be made, laid out and used, but also the altering, amending and repairing all such streets heretofore made, laid out, or used, or hereafter to be made, laid out or used in and throughout the said City of St. John and the vicinity thereof . . . So always as such . . . streets so to be laid out do not extend to the taking away of any person's right or property without his, her, or their consent, or by some known laws of the said Province of New Brunswick, or by the law of the land.—The charter is confirmed by 26 Geo. III, c. 46.—By Act 41 Vict., c. 9, intituled "An Act to widen and extend certain public streets in the City of St. John" it was provided that Dock street should be opened to a width of sixty-two feet by taking in twelve feet on its easterly side, and carrying the north-eastwardly line twelve feet to the eastward through its entire length from Market Square to Union street and that Mill street should be opened to the same width from Union street to North street by widening its eastwardly line. The effect of widening Dock street made it necessary either that Union street should be lowered and graded to its level, or that Dock street should be graded up to its level, and that if Union street was lowered, George street, opening off it, should also be lowered.—The corporation in January 1878 decided to excavate and lower Union street to the extent of twelve or thirteen feet after hearing the report of the city surveyor and the petitions of citizens for and against the cutting down of Union street, and immediately thereafter entered upon the work by contractors.—The plaintiffs were owners of a lot on the corner of Union and George streets upon which they had erected expensive business premises, and which, by the lowering of the streets, would be twelve or thirteen feet above them. —When the work of cutting down Union street was about two-thirds done, and approaching the plaintiff's premises, and after several months had elapsed from the time it was entered upon, the plaintiffs being unable to obtain compensation from the corporation, brought this suit for an injunction to restrain the continuance of the work.—*Held*, the injunction should be refused on the ground of delay in the application. *Yeats* v. *The Mayor etc. of St. John*, Eq. Cas., p. 25.

Action of rescission, Delay in bringing —F. in June 1903 purchased paid-up shares in the capital stock of an industrial company on the faith of statements in a prospectus prepared by a broker employed to sell them. In January, 1904, he attended a meeting of shareholders and from something he heard there suspected that some of said statements were untrue.—After investigation he demanded back his money from the broker and wrote to the President and Secretary of the company repudiating

his purchase.—At subsequent meetings of shareholders he repeated such repudiation and demand for re-payment and in December 1904, brought suit for rescission.—*Held*, that his delay from January to December, 1904, in bringing suit was not a bar and he was entitled to recover against the company. *Farrell* v. *The Portland Rolling Mills Co. Ltd.*, 40 S. C. R., p. 339.

Action re profits of syndicate transaction. See *Pugsley* v. *Fowler et al*, 4 Eq. p. 122.

Arbitration — Disqualification of arbitrator—Where objection to the qualification of an arbitrator was taken at the commencement of the arbitration proceedings, subsequent appearance under protest and taking part in the proceedings will not operate as a waiver of the objection. *In re Bessie B. Wilkins*, 41, p. 141.

Certiorari, Delay in applying for—The Court refused to interfere with the discretion of a judge in granting a certiorari on the ground of want of jurisdiction, although two terms had gone by before the application.—(*Per* Landry, White and Barry JJ., McLeod J. dissenting.) *R.* v. *Holyoke*, 42, p. 135.

Contract—Delay in answering offer—Damages—The respondents, wholesale grocers in St. John, ordered from the appellant company, packers in Montreal, through its agent in St. John, 200 cases of canned goods on October 21, 1916, requesting the agent to wire the order to his principal.—The agent did not wire but mailed the order that day.—The order reached the appellant company on the morning of October 22.—On October 21, the appellant company sent a night message to its agent in St. John advising him of an advance in prices and requesting him to put the advance into effect at once, and on receipt of the respondent's order on October 22, wrote the agent declining to accept respondents' order at the old price.—This letter was received by the agent on Saturday, October 23 after one o'clock in the afternoon.—The agent made no effort to communicate with the respondents personally on that day, but he mailed them a copy of his principal's letter which reached them on Monday, October 25, too late to place the order with other dealers at the old prices.—The respondents knew of a notice given by the appellant company to the trade informing it that orders taken by agents were subject to acceptance and prices were subject to change without notice.—*Held*, on appeal, reversing the judgment of the judge of the St. John County Court, that the agent had no authority to make a sale binding on his principal, and the appellant company was not estopped by laches of itself or its agent in communicating its refusal to accept the order for the 200 cases from setting up its refusal in answer to a counterclaim for damages in an action by the appellant company against the respondents for goods previously sold. *W. Clark Ltd.* v. *Baird & Peters*, 44, p. 413.

Delay in taking out administration—Statute of Limitations—Property taken possession of by an *executor de son tort* was disposed of by him and the proceeds invested in a purchase of land.—No administration was taken out until sixteen years after the death, when the *executor de son tort* was also dead.—*Held* not such laches as to bar the action.—Where an *executor de son tort* is sued by an administrator, time runs only from the grant of administration. *Dunlop* v. *Dunlop*, 1 Eq., p. 72.

Fraudulent conveyance—Delay cannot be set up against a creditor seeking to set aside a conveyance of lands as fraudulent under the Stat. 13 Eliz., c. 5, where the creditor's debt is not barred under the Statute of Limitations at the commencement of the suit. *Trites* v. *Humphreys*, 2 Eq., p. 1.

Inferior Court — Review — Delay in applying for—See *Lunt* v. *Kennedy*. 37, p. 639.

Trustee, Failure to demand accounting from—Where defendant received the rents of a property for a period of twenty-five years without during that time accounting to plaintiff, it was held that the right to an account was not barred by the lapse of time, defendant having taken possession of the property under an agreement with plaintiff, which had never been terminated, to hold the property for him and to account to him for it. *Pick* v. *Edwards*, 3 Eq., p. 410.

LANDLORD AND TENANT.

1. Leases and Agreements Generally.

2. Covenants.

3. Rent—Distress.

4. Termination of Tenancy.

5. Miscellaneous.

Fixtures—*See* FIXTURES.

1. Leases and Agreements Generally.

Appurtenances—Easement in use at date of lease—A store, two rooms and cellar connected with the store by hatchway and stairs were leased to the plaintiffs "with the privileges and appurtenances thereunto belonging."—The rooms communicated with the store, and a door in one of the rooms opened off an alleyway leading from the street to the rear of the premises.—A coal chute to the cellar also opened off the alleyway which was sufficiently wide to allow coal being carted to the chute.—The alleyway was part of the lot upon which the demised premises were, and was in the ownership and possession of the defendant lessor at the date of the lease.—For many years previous to the lease the door off the alleyway had been used by occupiers of

the premises, including the defendant who was in occupation at the date of the lease, and coal had always been carted by them to the chute.—The defendant now sought to build upon the alleyway to the extent of blocking up the alleyway door and preventing access to the chute by carts.—In an injunction suit to restrain the defendant from erecting the building, he contended that the alleyway door was not necessary for the convenient use of the premises; that coal could be put in the cellar by way of the front door and hatch, and that a right to the use of the alleyway did not pass in the absence of an express grant.—*Held*, that the tenant was entitled to the unimpaired use of the alleyway since it was in use at the date of the lease as an easement belonging to the premises. *Jones* v. *Hunter*, 1 Eq., p. 250.

Appurtenances — Riparian rights — Ancient plan, Variations from—The plaintiff S. is the lessee from the city of Saint John of two water lots (so called) situated between high and low water mark in the harbor of Saint John, on which a wharf or wharves and buildings have been erected, which have been used at different times for various purposes.—One of their advantages consists of access by the waters of the harbor of Saint John, there being ten feet of water on the southern side of the plaintiff's wharf at high tide.—The southern side is the only part of the plaintiff's wharf to which he has direct access by the waters of the harbor, his lot or lots, as originally leased, being shut off on the other three sides.—The lease under renewals of which S. is tenant, was granted by the city of Saint John some fifty years ago, both lots being included in the one lease at the time.—The defendant K. is the lessee from the city of Saint John of the water lot lying immediately south of S.'s lots.—It is bounded on the north by S.'s southerly line, and extends along the entire southern side of S.'s lot.—K.'s lease was granted a few months ago, being dated March 10th, 1909, and is precisely similar in terms to S.'s leases, except as to rent reserved.—K. is proceeding to build a wharf covering his entire lot, which when finished will completely close up all direct access by water from the harbor to S.'s lots.—By the charter of the city of Saint John, confirmed by an act of the Legislature, the title to these water lots was vested in the city, and in addition to this the city was made the conservator of the water of the harbor, and has sole power over it.—In the charter is the following saving clause: "So always as such piers or wharves so to be erected or streets so to be laid out, do not extend to the taking away of any person's right or property, without his, her or their consent, or by some known laws of the said province of New Brunswick or by the law of the land."—*Held*, that S. was not a riparian owner and had no rights in respect to the water lot other than those given him by his lease.—Hence he could not restrain the P. K. Co. from erecting a wharf on the adjoining lot which would prevent access to his from the south, a right of access not provided for in his lease.—Judgment of the Supreme Court of New Brunswick, 40 N. B. R. 8, maintaining the decree of the judge in equity, 4 N. B. Eq. 184, 261, reversed.—(Idington J. dissenting). *The Francis Kerr Co.* v. *Robert Seely*, 44, S. C. R., p. 629.

Assignment of lease—Change of use of premises—The defendant L. holds certain premises under a lease granted by the plaintiff N. to one W. and assigned by W. to L.—The lease contains express covenants, but nothing in reference to its assignment or to the use of the premises, with the exception of the word "office" used in the description, which is as follows: "All that certain office situate on the ground floor of her brick building on the east side of Main street in the said town of Woodstock, and the office in the said building fronting on the south side of Regent street in the said town, also the lower part of the shed in the rear, of the said office, etc."—W. is an attorney and occupied the premises as an office.—L. is a retail meat and fish dealer, and proposes to carry on this business in the premises.—*Held*, that there was no implied covenant in the lease, restricting the lessee to the use of the premises as an office, as it was not necessary to carry out any obvious intention of the parties; and that the word "office" in the lease was used merely as a means of identifying the premises included in the demise.—*Held*, that as no actual damage had been shown, the action was in the nature of a *quia timet* action; and that as the defendant was carrying on a legitimate business, and there was no probability of any immediate or irreparable damage to the plaintiff arising, the application for an injunction must be dismissed. *Nevers* v. *Lilley et al*, 4 Eq., p. 104.

Derogation from grant — Tenement house—Retention of control—Where a landlord leases a house to several tenants, he retains such control over the premises as to render him liable for damage caused by failure to repair a leak in a sewer pipe in the apartment of a tenant in an upper flat, which causes damage to the tenant of a shop on the ground floor of the premises. *Brown* v. *Garson*, 42, p. 354.

Highway — Lease with plans attached —User—In an action for obstructing a highway, there was conflicting evidence as to its location and user by the public.—Part of the defendants' title were a lease and an assignment thereof, both of which had a plan attached exhibiting the highway as located where the plaintiffs claimed it to be.—Neither the lease nor the assignment made any reference to the plans.—The defendant's evidence showed the highway as actually used in a location differing from that shown by the plans.—The jury found in favor of the defendants, both as to location and user.—The learned judge who tried the cause held, that the deeds and plans must be read

together, so the defendants were estopped from disputing the location of the highway as dedicated.—*Held*, that the verdict was properly so entered. *Woodstock Woollen Mills Co. Ltd.* v. *Moore et al*, 34, p. 475.

See appeal 29 S. C. R., p. 627.

Lessee ignorant of effect of lease—Denying lessor's title—A lessee cannot deny his lessor's title and set up title in himself in an equitable replication in an action brought by him against the lessor for an illegal distress for rent in arrear under the lease by alleging and proving (no issue of fraud being raised) that he did not understand the effect of the lease, and believed that in executing it he was completing an option of purchase of the demised premises given in a prior lease from the defendant's predecessor in title.—(*Per* Hanington, McLeod and Gregory JJ., Tuck C. J. and Landry J. dissenting). *Sivert* v. *Young*, 38, p. 571.

Merger of leasehold in freehold—Husband's right to compensation for purchase of lease of wife's land—The changed condition in the husband's status brought about by the Married Women's Property Act, 58 Vict., c. 24 by which the marital rights of a husband to his wife's property have been materially curtailed, does not give him an equity to be compensated for the purchase of the surrender of leases of property of which the wife had acquired a reversionary interest, and for moneys expended in making useful and necessary repairs upon the leasehold premises.—The effect of the surrender is a merger of the outstanding term of years in the greater estate. *DeBury* v. *DeBury* 36, p. 57.

Mortgagee in possession — Restoring tenancy to mortgagor—A mortgagor let the mortgaged premises subsequently to the mortgage.—The mortgagees gave a notice to the tenant informing him of the mortgage and requiring him to pay to them all rent due and payable under the lease.—*Held*, that the notice did not make the tenant the tenant of the mortgagee, and was not an adoption by the mortgagee of the lease within C. S., c. 83, s. 15.—*Semble* (*per* Tuck C. J.), that a notice under s. 15, may be revoked by the mortgagee so as to restore the original tenancy between the mortgagor and tenant and entitle the mortgagor to recover from the tenant rent accrued due before the revocation.—*Held* (*per* Barker J.), that a mortgagee is not bound to proceed under s. 15, c. 83, C. S., but may exercise his rights at common law for the recovery of rent payable under a lease of the mortgaged premises made subsequent to the mortgage. *Brock* v. *Forster*, 34, p. 262.

Subtenancy — Trespass — Injury to reversion—A tenant for years who has sublet, cannot maintain trespass against a defendant who enters upon the land without objection on the part of those actually in possession; nor can he recover in case, unless there is evidence of an act necessarily injurious to his reversion or in denial of his right. *McDougall* v. *Campbellton Water Supply Co.*, 34, p. 467.

Tenancy at will—Agreement of purchase—Payment of part of the purchase money by a person in possession of land under an agreement to purchase, is a renewal of the tenancy at will, and the Statute of Limitations begins to run from such payment.—A verbal admission by a person holding under an agreement to purchase that he is holding as tenant at will to the vendor, will not prevent the statute running against such vendor.—As between the vendor and a vendee in possession under an agreement to purchase, the vendor is substantially a mortgagee entitled to the rights and privileges secured to a mortgagee under sec. 30 of c. 139, C. S. 1903, and is also as a mortgagee within the exception provided by section 8 of the statute, and the right of entry of the vendor and his representatives would not be extinguished for 20 years after the last payment of principal or interest. *Anderson* v. *Anderson*, 37, p. 432.

Trespass—Injury to reversion—Where premises have been let, and the tenant is in possession, the landlord cannot maintain trespass against a stranger for taking down fences to make a road and hauling logs across the land where there has been no injury of a permanent character to the fences or land in question. *Crawford* v. *Clowes*, 43, p. 199.

See also *McDougall* v. *Campbellton Water Supply Co.*, 34, p. 467, supra.

2. Covenants.

Assignment of lease subject to rent and covenants—Breach by original lessee—The assignee of a lease of a store and premises and of certain personal property enumerated in a schedule annexed to the lease containing covenants not to assign without the consent of the lessor and at the expiration of the term to yield up the premises and return the articles mentioned in the schedule, who got the lessor to sign an assent to the assignment containing a proviso that it was subject to the payment of the rent and the performances of the covenants in the lease reserved is not liable in an action on the covenant to return the goods for a breach committed by the original lessee. *Goggin* v. *Whittaker*, 38, p. 415.

"Buildings and erections," Covenant to pay for—Where the city of Saint John expropriated land under lease from it consisting mostly of mud flats to be used for manufacturing purposes only, and the lease contained a covenant to pay at the end of the term for "the buildings and erections that shall or may then be on the demised premises," piling fastened with stringers necessary to make it available for buildings may be a subject of damages for which the city would be bound to pay on expropriation

under 63 Vict., c. 59, and should not be excluded from consideration on an assessment of damages.—(*Per* Barker C. J., Hanington and Landry JJ., McLeod J. dissenting.) *Sleeth et al* v. *The City of Saint John*, 38, p. 542.

Buildings and erections for manufacturing purposes—On expropriation under 63 Vict., c. 59 of lands under a lease, containing a covenant to pay at the end of the term for "any buildings or erections for manufacturing purposes" which should or might then be on the demised premises, *held*, that damages should be assessed for the value at the time of expropriation for all piling and filling in intended for and forming a necessary part of the foundation of such buildings.—(*Per* Barker C. J., Hanington, Landry, Gregory and White JJ., McLeod J. dissenting.) *Sleeth et al* v. *The City of Saint John*, 39, p. 56..

The city of Saint John leased certain mud flats, the lease containing a covenant that if the lessees should "put up any buildings and erections for manufacturing purposes" thereon, the same, at the expiration of the term, should be appraised in the manner provided and the city should have the option of paying the appraised value or renewing the lease.—On expiration of a term, the city elected to pay.—*Held* (*per* Barker C. J., sitting in Equity), that the words "erections and buildings" do not include any piling, capping or woodwork on the said demised lots or of the filling in of the same except where such piling, capping or woodwork shall be in actual use as a foundation for a building for manufacturing purposes, but did include the value of any earth or other material filled in such foundation which was necessary to strengthen and support the same so as to render it a safe and suitable foundation for the building thereon. *Gordon* v. *The City of Saint John*.—(Barker C. J. in Equity)—Reversed, 40 N. B. R., p. 541, but confirmed 43 S. C. R., p. 101.

Covenant to renew or pay for improvements—Lessor's option—A lease contained a covenant to the effect that the lessee might make improvements upon the demised premises and at the expiration of the lease, or any renewal thereof the same should be valued and paid for by the lessor and then concluded as follows: "And upon such payment upon such valuation not being duly made, the party of the first part, his heirs or assigns, shall, if so required, give or renew a lease including the covenants of the present lease to the parties of the second part for a further period of five years, with the like agreement of valuation and payment for improvements as in this lease expressed and at the same yearly rent."—On the expiration of the term, a dispute having arisen between the lessor and lessee as to the effect of the covenant (the former claiming that it was optional with him either to renew the lease or pay for the improvements after valuation, the latter that he was entitled to have the improvements valued and paid for by the lessor), a special case was stated in equity for the opinion of the Court.—Each party was ready and willing to perform the covenant as interpreted by him.—*Held* (*per* Landry, Barker and McLeod JJ.), (1) that the covenant was single and therefore that the lessor was discharged upon his showing that he was ready and willing to renew the lease; (2) that even if there were two separate and independent covenants one to pay the appraised value of the improvements and the other to renew, only one was to be performed and the option lay with the lessor, he being the first person called upon to act.—*Held* (*per* Tuck C. J.), that the lessee was entitled to have a valuation of the improvements made, that until the making of such valuation the lessor was not entitled to have a renewal lease executed, but that after valuation it was optional with the lessor to pay for the improvements or renew the lease. *Ward et al* v. *Hall*, 34, p. 600.

Covenant to renew or pay for improvements — Incomplete appraisal — Holding over—The plaintiff, the lessor in a lease (a renewal of a former lease of the same premises) containing a covenant to renew at the end of the term or pay for improvements "heretofore erected, or which may be hereafter erected or made by the said A. C. (the lessee)."—The improvements to be valued by two disinterested persons to be chosen by the parties, which two persons in case of disagreement were to choose a third, the appraisement of whom or any two of whom to be conclusive as to the value.—The lessor having determined not to renew, appraisers were appointed by the parties, and they failing to agree appointed a third.—The three met, and the appraiser of the plaintiff and the third chosen agreed on the sum of $2,500 as the value of the improvements, which sum the plaintiff tendered and the defendant refused to accept.—The defendant also refused on demand to give up possession, and the plaintiff brought ejectment.—At the trial, without a jury, the judge found that improvements for which the defendant was entitled to compensation had not been considered by the appraisers and the appraisement was not full and complete.—In addition to denying the plaintiff's title, the defendant by plea asserts the right to hold possession on equitable grounds, asks to have the award set aside and a renewal lease decreed to be executed.—*Held*, that the lease neither expressly or impliedly gives the defendant the right of possession claimed, and the facts do not entitle her on equitable grounds to retain possession, or on this application to have the award set aside or the relief asked for. *Purdy* v. *Porter*, 38, N. B. R., p. 465; 41 S. C. R., p. 471.

Covenant to repair—Waiver—The plaintiff was a physician practising at Sussex, and in receipt of a large income.—Having occasion to remove from the province, he entered into an agreement with the defendant,

a physician, to lease to him a part of his (the plaintiff's) house, including offices, for two years from July 1st, 1894.—An annual rental was reserved.—The defendant covenanted that at the end of the lease he would either purchase the house at a named sum, or would forthwith leave and depart from the parish of Sussex, and would not for a period of at least three years next thereafter reside in said parish, or practise thereat, either as physician or surgeon, or act directly or indirectly as partner or assistant to or with any other physician or surgeon practising in said parish or elsewhere within ten miles thereof, and that he would, at least three months before the end of the said term, give the plaintiff notice in writing whether he would so purchase or would depart from Sussex.—It was provided that if at the end of the term the plaintiff did not wish to sell he could return to Sussex and resume practising, in which case the defendant might remain and practise in Sussex.—The plaintiff covenanted that he would on or before July 1st, 1894, repair the roof of the house, and that from that date he would cease to practise in the parish of Sussex for two years, and that if the defendant purchased the house and lot as aforesaid, he would not practise in Sussex for three years from said date.—Repairs to the roof were not made until January, 1895, and were found to be insufficient and it was not until the fall of 1895 that the matter was attended to, when a new roof was put on.—At the time the defendant went into possession, July 1st, 1894, he was aware that the repairs had not been made, and he raised no objection to the plaintiff's default.—At the end of the lease the defendant declined to purchase the property or discontinue to practise at Sussex.—In a suit for an injunction to restrain the defendant from practising and residing at Sussex, in the terms of his covenant, *held, inter alia*, that there had been a waiver by the defendant with respect to the time of performance of plaintiff's covenant to make repairs, and that it's performance was not a condition precedent to the performance by the defendant of his covenant. *Ryan* v. *McNichol*, 1 Eq., p. 487; 34 N. B. R., p. 391.

Implied covenant—Butchers Market—The lease of a stall in a public market as "a butcher's market" carries the right to what is reasonably necessary to carry on a successful business as a butcher and includes the right to buy as well as the right to sell. *R.* v. *Manchester*, 38, p. 424.

Lease prepared by lessees—Female lessor — Independent advice — Amending renewal clause—R. was the owner of certain premises situated in Saint John, which she leased to E. and M. by a written indenture of lease made February 4th, 1908.—The defendant M. offered to draw the lease for her, and did so, and it was executed by all the parties at the same time, in the presence of the father of the defendant E.—The lease was read over to R. by M. on two separate occasions, and was given to R. to read for herself.—R. is a middle-aged woman of property.—She has been accustomed to transact all her own business and manage her own property without assistance from anyone, and it was not contended that she was not fully capable of making an agreement of this nature.—*Held*, that the lease would not be set aside, as there was no fraud or misrepresentation; that the defendant M. did not stand in any fiduciary relationship to R. by reason of his having drawn the lease, and the rule as to independent advice in such cases was not applicable here.—The lease contained the following provision for renewal: "For a further term of five years or more and containing and subject to precisely the same covenants, provisions and agreements as are herein contained."—The defendants consenting, the words "or more" in the renewal clause were expunged. *Robinson* v. *Estabrooks et al*, 4 Eq., p. 168.

Lien on machinery as security for performance of lessee's covenants—Fire loss—A lessee covenanted for himself and assigns that buildings of the lessor on the premises at the date of the lease would be left on the premises in as good repair as they then were; also that machinery of the lessee would not be removed from the premises during the term without the lessor's consent, but the same should be held by the lessor as a lien for the performance of the lessee's covenants and for any damage from their breach.—Under a deed of assignment for the benefit of the lessee's creditors the lease became vested in the trustees.—A fire subsequently occurring, which destroyed the buildings and machinery, insurance on the latter was paid to the trustees.—The lessor demanded of the trustees that the insurance be applied to reinstating the buildings or the machinery.—By Act 14, Geo. III, c. 78, s. 83, insurance companies are authorized and required, upon request of a person interested in or entitled unto a house or other buildings which may be burnt down or damaged by fire . . . to cause the insurance money to be laid out and expended towards rebuilding, reinstating or repairing such house or buildings.—*Held* (1) without deciding whether the Act was in force in this province or not, that the lessor was not entitled to the benefit of it, the Act not applying to machinery belonging to a lessee, and the lessor not having made a request upon the insurance company, as provided by the Act; (2) that even had the insurance been upon the building, the lessor would have no equity in it, there being no covenant by the lessee to insure for the former's benefit.; (3) that the lessor was not entitled to prove for damage against the estate with respect to the covenant to leave the premises in repair, the term not having expired. *Randolph* v. *Randolph*, 3 Eq., p. 596.

See 30 N. B. R., p. 37, *sub nomine*, *McKean* v. *Randolph*.

Right of re-entry for nonpayment of rent—A landlord can not, during the currency of the lease and before the expiration of the term, re-enter for non-payment of rent for which he has distrained on goods and chattels still held by him under the distress. *Whittaker* v. *Goggin*, 38, p. 378.

Sublease—Breach of covenant by lessor—Benefit of—In an action of replevin by a sub-lessee against the lessor for goods taken by the lessor under a distress for rent, the plaintiff is entitled to prove, on cross-examination of the lessor, that there had been breach of a covenant in the lease which forfeited the rent claimed.—A sub-lessee in such an action is entitled to the benefit of a covenant in the lease which forfeits the rent as a penalty for a breach, though there has been no assignment of the lease in writing. *Ringuette* v. *Hebert et al*, 37, p. 68.

3. Rent—Distress.

Agreement to suspend right of distress—Where an agreement was made between the plaintiff and the defendant that if the plaintiff would pay the rent on the 1st of April and give up the premises so that the defendant could have the month for making repairs for a new tenant coming in on the 1st of May, he (the plaintiff) would not distrain for the rent until after default on the 1st of April.—*Held*, the agreement would have the effect of suspending the right to distrain, and if the defendant in violation of it distrained, he would render himself a trespasser. *Mooers* v. *Manzer*, 36, p. 205.

Covenant to repair, Breach of—Trespass by landlord—The defendant, having distrained for rent in arrear, the plaintiff in an action for damages for a breach of the covenant to repair and for illegal distress, alleged that there was no fixed rent due from him to the defendant because he had never been put in complete possession of the whole of the demised premises, and also because the defendant had failed to make the repairs he had agreed to make.—The defendant denied the breach of covenant and counter-claimed for the balance of rent due over the amount received as the proceeds of the sale of goods distrained.—*Held*, that the plaintiff, having gone into possession under the lease, could not set up the failure to make the repairs agreed upon, or set up a trespass by the landlord even to the extent of depriving the tenant of the enjoyment of a portion of the demised premises unaccompanied by any intention to evict and put an end to the tenancy as an answer to the claim for rent. *Gordon* v. *Sime*, 44, p. 535, K. B. D.

Distress by collusion to defeat bill of sale—See *Glasier et al* v. *MacPherson*, 34, p. 206.

Distress — Denying lessor's title — Equitable defence—A lessee cannot deny his lessor's title and set up title in himself in an equitable replication in an action brought by him against the lessor for an illegal distress for rent in arrear under the lease by alleging and proving (no issue of fraud being raised) that he did not understand the effect of the lease, and believed that in executing it he was completing an option of purchase of the demised premises given in a prior lease from the defendant's predecessor in title.—(*Per* Hanington, McLeod and Gregory JJ., Tuck, C. J. and Landry J. dissenting.) *Sivert* v. *Young*, 38, p. 571.

Distress under illegal lease—Replevin will lie to recover goods distrained for rent in arrear under an illegal lease. The maxim *in pari delicto potior est conditio possidentis* is applicable only when the possession results from the act of the parties, and not when it results from some incident attached to a legal instrument. (*Per* Tuck, C. J., Barker and McLeod JJ., Hanington and VanWart JJ. dissenting).—*Held* (*per* Hanington J.), an illegal contract is valid as between the parties thereto for all purposes that can be accomplished without the aid of a Court, therefore that person must fail, who is first compelled to set a Court in motion in order to obtain such aid.—*Held* (*per* VanWart J.), the Court ought not to assist any of the parties to an illegal transaction, therefore, in the above case, the parties should be restored to the position in which the writ of replevin found them, that is, an order should be made to restore the goods replevied to him out of whose possession they were taken by the process of the Court. *Gallagher* v. *McQueen*, 35, p. 198.

Illegal distress after sunset—Abandoning distress—Fresh demand—Under a distress for rent issued on the 12th of March, the defendant took possession of the plaintiff's store after sunset and evicted him.—On the 13th of March, discovering that the distress was illegal, he induced the plaintiff to go to the store with his attorney and the bailiff who made the distress, where they informed him that the distress was illegal and a new one would have to be made, and they then handed him the key of the store and an inventory of the goods distrained and tendered him with $17 as damages for the eviction.—The bailiff immediately informed him that he had a new demand and received back the key and they left the store.—It was not left to the jury to say whether there had been an abandonment of the distress under the first warrant, but they found in answer to a question left that the bailiff at no time prior to the service of the second warrant gave up the possession and control of the goods under the first.—*Held* (*per* Hanington, Landry and Barker JJ.), that it should have been specifically left to the jury to say whether what took place and what was done on the discovery of the mistake made on executing the warrant and making the distress after sunset was done with the intention of abandoning the distress.—*Held* (*per* McLeod J.), that the evidence and the answers of the jury to

the questions submitted showed that the defendant at the time the second warrant was issued had the goods in his possession by virtue of an illegal distress warrant, and the trespass continued as if no second warrant had issued. *Mooers* v. *Manzer*, 36, p. 205.

Illegal distress—Death of party distraining—Survival of action—See *Frederick* v. *Gibson et al, Executors etc. of Gibson*, 37, p. 126.

Illegal distress—Goods fraudulently removed to avoid distress—Goods fraudulently or clandestinely removed to avoid distress can not be seized under distress if there is no rent in arrear.—In an action for an illegal distress the plaintiffs are entitled to recover the value of the goods sold, although they are subject to a bill of sale by way of mortgage to secure a compromise which the plaintiffs have made with their creditors.—*Semble*, an unlawful sale of defendant's goods by plaintiffs, which goods defendants were using in a particular way, gives defendants the right to demand the value of the goods by way of damages. *Clark et al* v. *Green et al*, 37, p. 525.

Illegal distress—Replevin—Breach of covenant—Forfeiture of rent—In an action of replevin by a sub-lessee against the lessor for goods taken by the lessor under a distress for rent, the plaintiff is entitled to prove, on cross-examination of the lessor, that there had been a breach of a covenant in the lease which forfeited the rent claimed. —A sub-lessee in such an action is entitled to the benefit of a covenant in the lease which forfeits the rent as a penalty for a breach, though there has been no assignment of the lease in writing. *Ringuette* v. *Hebert et al*, 37, p. 68.

Joint lessors—Action for rent—Rent due to the plaintiff jointly with another cannot be sued for in a County Court by the plaintiff alone, and where the nonjoinder is not disclosed until trial the defendant is entitled to a nonsuit.—*Vassie* v. *Chesley*, 33 N. B. R., p. 192, distinguished. *McLaughlin* v. *Knowles*, 41, p. 548.

Rent, Fairness of—Attornment clause in mortgage—An attornment clause in a mortgage is valid if it constitutes a real relation of landlord and tenant between the mortgagee and mortgagor, and a distress levied for the rent is good, though the rent reserved is sufficient during the term specified in the mortgage, viz., ten years, to repay the principal money and interest thereon at seven per cent. *Massey-Harris Co. Ltd.* v. *Young*, 37, p. 107.

4. Termination of Contract.

Abandonment of premises — Implied surrender—Trespass—Where a tenant, before the end of the term, abandoned the premises leased without any intention of returning to them and his landlord took possession with intent to put an end to the term, *held*, this was a surrender of the term by operation of law, and in any event the tenant, having abandoned possession, could not maintain an action of trespass. *Whittaker* v. *Goggin*, 39, p. 403.

Summary ejectment—Right of re-entry—Section 30 of the Landlord and Tenant Act, C. S. 1903, c. 153, providing for summary ejectment is not applicable to a tenancy for a fixed term unexpired where the landlord has a right of re-entry under s. 3 of the Act for nonpayment of rent. *Salesses* v. *Harrison*, 41, p. 103.

Summary ejectment—Defendant in possession of an hotel property under an agreement to purchase, after paying part of the purchase money, assigned all his property to the sheriff for the benefit of his creditors,—After the assignment the sheriff allowed the defendant to remain in possession, and the owner having died, the sheriff, as assignee of the defendant, under a resolution of his creditors, obtained the title from the estate of the owner and sold at public auction all his interest as assignee to the plaintiff.—*Held*, that the relation of landlord and tenant did not exist between the plaintiff and the defendant, and plaintiff could not recover possession by summary ejectment. *Sweeney* v. *DeGrace*, 42, p. 344.

5. Miscellaneous.

Nuisance affecting both landlord and tenant—Quære, as to whether a tenant and landlord can be joined in a suit to restrain an act amounting to a nuisance to the tenant and causing injury to the reversioner. *Humphrey et al* v. *Banfil*, Eq. Cas., p. 243.

LAND TITLES.

See also DEEDS—ESTATES—TRESPASS.

Adverse possession against Crown—Where the Crown has been out of possession of a lot of land for twenty years anterior to the grant to the defendant, the grant is not valid under the statute 21 Jac. I, c. 14, without the Crown having first established its title by an information of intrusion. *Emmerson* v. *Maddison*, 36 N. B. R., p. 260. (Reversed 34 S. C. R., 533 and 1906 A. C., 569.)

The period of sixty year's possession is essential to establish a claimant's right against the Crown, and the evidence must show exclusive, continuous, open, visible, adverse possession for the sixty year period, and when the land claimed is neither bounded by a fence or other visible boundary, nor its limits defined by deed, the doctrine of constructive possession does not apply; and the claimant can establish title by possession to so much only of the land as he

has held in actual adverse possession for the requisite statutory period.—There is no mode by which the Crown, apart from statutory authority, can convey land, otherwise than by its grant under the Great Seal, and it would not therefore be barred by acquiescence or adoption or recognition of a line to which one claims to hold adversely. *Mersereau* v. *Swim*, 42, p. 497.

Adverse possession against heir at law—A person in possession under a deed of lands described by metes and bounds has a colorable title and is deemed to be in possession of all the lands within the boundaries of the deed although not enclosed.—A trespasser to acquire a statutory title against him must not only take possession so as to disseize the owner, but such possession must be continuous, exclusive, open, visible, and notorious for the statutory period, of all the land to which adverse title is claimed.—An heir at law is not on the death of his ancestor bound to do any act to vest both the title and possession of the lands which he inherits, and he is not barred of his right of entry under C. S. 1903, c. 139, ss. 3 and 4 on any part of such lands not held against him by adverse possession for twenty years. *Gooden* v. *Doyle*, 42, p. 435.

Adverse possession—Conflicting claims—A bill, upon which an *ex parte* injunction was granted restraining defendants from cutting timber, stated that the land upon which it was cut had been seized and possessed by plaintiff's predecessor in title, that he was the owner of it in fee, and that defendants were cutting timber upon the land wastefully, and, without documentary title, were pretending to have a title by possession.—On an application to dissolve the injunction, it appeared that the plaintiff had not a documentary title ,and that both parties claimed title by possession.—*Held*, that the injunction should be dissolved.—*Semble*, that on such application, the verdict of a jury in an action of replevin for timber cut upon said lands should not be disregarded, although a motion for a new trial was undisposed of. *Wood* v. *LeBlanc*, 2 Eq., p. 427.

R. filed a bill in equity praying that M. might be restrained from asserting title to a lot of land, and that R. might be declared to be entitled to the lot in fee simple.—The judge in equity directed that R. bring an action of ejectment against M. to try the title.—Both parties failed to prove a documentary title, and relied upon, and gave evidence of title by possession.—On questions submitted, the jury found that R. and his predecessors in title had been in possession of the lot since 1876.—On this finding the trial judge ordered a verdict to be entered for R.—*Held*, that the direction was right, and the Court was not obliged to treat the action under the order of the Equity Court as an ordinary action of ejectment, and assume the defendant to be in possession and nonsuit the plaintiff on failure to prove title. *Robertson* v. *Miller*, 35, p. 686.

Adverse possession by dowress—An assignment of dower by verbal agreement is valid, and under such assignment the widow may take any part or even the whole of the descendent lands.—Where the heir-at-law permits the widow of the owner of the fee to occupy the whole of the estate during her life under a verbal arrangement with the heir understood to be in lieu of dower, but with no definite agreement or understanding to that effect, the widow's possession is not adverse to the heir-at-law, and the Statute of Limitations will not run against the right of entry.—(*Per* Hanington, Landry Barker and Gregory J J., Tuck C. J. and McLeod J. dissenting.) *Lloyd* v. *Gillis*, 37, p. 190.

Adverse possession—Declarations by occupant—A declaration of one in adverse possession, made upon the land by its then occupant, is evidence in support of a claim of title by adverse possession; provided, such declaration is apparently made in good faith and goes to show (a) the character, or (b) the extent, of the declarant's occupancy, but, *semble*, such a declaration is not admissible to prove simply the date when the declarant first acquired possession, or for how long a time he held it.—*Rundle* v. *Mc Neil*, 38, N. B. R., p. 406, considered. *Mersereau* v. *Swim*, 42, p. 497.

Adverse possession, What constitutes—In 1765 the land in question in this suit was granted by the Crown and from that date a documentary title can be traced to the present time vesting this land in the plaintiff company.—In 1855, the then owner of the land and the predecessor in title of the plaintiff company, gave a lease of a portion of it, and from that time to the present, the different owners and predecessors in title of the plaintiff company have given leases to various persons and collected the rents.—The plaintiff company during its ownership, has also given leases and collected rents.—In 1872, the defendant S. and his father went on the property and drove some stakes on the boundaries of the land in dispute, cut wood and made some excavations, either searching for magnesia or for some other reason.—From this date down to the present, the defendant has been more or less on the land, digging holes, and making excavations.—He did not live on the land but went on it and performed these acts whenever he was able.—During all this time the land not occupied by buildings was under lease to other persons for pasturage purposes, though the defendant recently drove off their animals on numerous occasions.—The defendant's father died in 1891, but neither he nor the defendant ever collected any rent from the tenants on the land in dispute, while the plaintiff company and its predecessors in title have collected rents during the whole time of their ownership.—In September, 1909, through his solicitor, the defendant wrote to the various tenants, claiming damages for trespass and threatening suit, but nothing further was

ever done; and in October, 1909, he gave a deed of a portion of this land to one M. M. W. —*Held*, that the defendant has no title by possession as his possession was not open, notorious and exclusive; as the plaintiff company and its predecessors in title exercised their rights and occupancy during the whole of the defendant's alleged possession.—Decree that the plaintiff company is the owner in fee simple of the tract of land in dispute, and for an injunction restraining the defendants from interfering with or disposing of or using or dealing with its land in any way, and further, that the defendants give the plaintiff company possession of the lands and premises.—The deed to M. M. W. will be declared void and set aside. *Turnbull Real Estate Co.* v. *Segee et al*, 4 Eq., p. 372.

Line fence, Destruction of—Criminal proceedings—The right of the Court to grant a certiorari is not taken away by section 887 of the Criminal Code in the order of a conviction under the Code for destroying a part of a line fence, made by a justice acting without jurisdiction by reason that the title to land was in dispute, from which conviction an appeal was taken to the County Court under section 879 of the Code and dismissed without consideration of the merits on the ground that the appeal had not been perfected. *R.* v. *O'Brein, Ex parte Roy*, 38, p. 109.

Mortgagor "sole and unconditional owner"—A mortgagor is the "sole and unconditional owner" of property within the meaning of a condition in a policy of insurance against fire stipulating that the policy shall become void if the assured is not the sole unconditional owner of the property insured.—The policy also contained a condition that it should become void if any building intended to be insured stood on grounds not owned in fee simple by the assured.—The land upon which the buildings stood was subject to a mortgage.—*Held*, that the defence that the lands were not owned in fee simple by the assured mortgagor was not available under a plea charging that the plaintiff had been guilty of misrepresentation in the application for insurance, in that he stated that the property insured was not mortgaged or otherwise encumbered whereas, etc. it was mortgaged. *Temble* v. *Western Assurance Co.*, 35 N. B. R., p. 171; 35 S. C. R., p. 373.

Possessory title against everyone but the Crown—The plaintiff owned a milling property on the south side of the Miramichi river.—In connection therewith he and his predecessors in title had (prior to any occupation by the defendant S. or his predecessors in title) actual occupation of a wharf built by certain predecessors in title of the plaintiff out into the river, which not only extended along the front of the plaintiff's property, but continued down stream across the defendant's (S.'s) lot or part thereof.—The wharf in question was built on land vested in the Crown.—The defendant S. claimed as against the plaintiff to be entitled to the possession of that part of the wharf which fronted on his land.—*Held*, on appeal, affirming the judgment of McLeod C. J., in the Chancery Division, that the plaintiff had a possessory title good against every one but the Crown, and was entitled to recover damages against the defendants in trespass. *Jones* v. *Sullivan et al*, 43, p. 208.

Possessory title as against grantee from Crown—The period that one adversely holds Crown lands will not enure against the grantee of the Crown; and the possessory claim of one seeking to establish title by adverse possession will not begin to run until the date of the grant to the Crown's grantee. *Ouellet* v. *Jalbert*, 43, p. 599.

Possessory title for nine years a consideration—Transfer of possessory title of nine years standing sufficient to maintain consideration for a contract. See *Vanbuskirk* v. *VanVart*, 36, p. 422.

Possessory title, Transmission of—Whether adverse possession for less than the statutory period by a father accrues to the heir. See *Turnbull Real Estate Co.* v. *Segee et al*, 4 Eq., p. 372.

See also *Ouellet* v. *Jalbert*, supra.

Possessory title, What is a—A contract for the sale of a freehold property contained the following provision: "A title by possession shall not be deemed a satisfactory title unless the purchaser so elects."—The vendor established a documentary title dating from a quit claim deed made in 1842.—The land had been granted in 1748, but there was no documentary title connecting the original owner with the grantor in the deed of 1842. —The purchaser claimed that the vendor's title was a title by possession.—*Held*, that the title was not one by possession within the meaning of the contract. *Floyd* v. *Hanson*, 43, p. 330, C. D.

Prescriptive title—Warehouse and user of siding adjoining—Plaintiff shipped produce direct from his warehouse built on the right of way over defendant's siding for thirty-five years.—*Held*, that he acquired a prescriptive title to the site of the warehouse only, not to the use of the siding. *Meagher* v. *Canadian Pacific Rwy. Co.*, 42, p. 46.

Tenant in common in sole possession under agreement with co-tenants—The plaintiff, a tenant in common with others of certain lands, but in possession under an agreement with the other tenants that he was to have possession and ownership of the lands and all appertaining thereto, is entitled in his own name to sue and recover for damages arising from the negligent setting fire by defendant on his own land and its spreading to the land in possession of plaintiff. *Phillips* v. *Phillips*, 34, p. 312.

Unregistered instrument from heir to occupant, Effect of—An unrecorded deed from the heir-at-law of the owner of the fee to his widow in occupation at the time of his death, which occupation was continued by the widow and her successors in title to the time the deed was given and for more than twenty years after, is not a deed by one disseized (the possession not being adverse) but operates as a conveyance of the heir's title, or at all events, is good as a release against the heir or one claiming through him under a recorded deed. *Cairns* v. *Horsman*, 35 p. 436.

LIMITATION OF ACTIONS

Action for possession against occupant under agreement of purchase—Payment of part of the purchase by a person in possession of land under an agreement to purchase is a renewal of the tenancy at will, and the Statute of Limitations begins to run from such payment.—A verbal admission by a person holding under an agreement to purchase that he is holding as tenant at will to the vendor, will not prevent the statute running against such vendor.—As between the vendor and a vendee in possession under an agreement to purchase, the vendor is substantially a mortgagee entitled to the rights and privileges secured to a mortgagee under sec. 30 of c. 139 of C. S. 1903, and is also as a mortgagee within the exception provided by section 8 of the statute, and the right of entry of the vendor and his representatives would not be extinguished for 20 years after the last payment of principal or interest. *Anderson* v. *Anderson*, 37, p. 432.

Admeasurement of dower—The husband of the petitioner gave a mortgage of a piece of land in which the petitioner did not join. —The husband died in 1859 owning the equity of redemption, and the petitioner remained in possession of the mortgaged premises from then until 1870.—In 1891 she brought the present petition for the admeasurement of her dower in the land.—*Held*, that twenty years having elapsed since her husband's death, or at least since she ceased to occupy, the petitioner's right to bring an action at law by writ of dower was distinguished by section 3 of chapter 84, C. S., and that by analogy the present petition was barred in equity. *In re Margaret McAfee*, Eq. Cas., p. 438.

Administrator, Suit by—Where an executor *de son tort* is sued by an administrator time runs only from the grant of administration. *Dunlop* v. *Dunlop*, 1 Eq., p. 72.

Crown's right to possession—The period of sixty years' possession is essential to establish a claimant's right against the Crown, and the evidence must show exclusive, continuous, open, visible, adverse possession for the sixty year period, and when the land claimed is neither bounded by a fence or other visible boundary, nor its limits defined by deed, the doctrine of constructive possession does not apply; and the claimanat can establish title by possession to so much only of the land as he has held in actual adverse possession for the requisite statutory period. *Merserem* v. *Swim*, 42, p. 497.

Damage by reason of construction of railway—Defendants were contractors engaged in building a portion of the National Transcontinental Railway in New Brunswick.—In the course of their work a locomotive was used and sparks escaping from it set fire to the plaintiff's timber lands.—These lands were held under license from the Crown.—In an action for damage to the timber the jury found negligence on the part of the defendants in not providing proper apparatus to prevent escape of sparks —*Held* (1) plaintiff as licensee could maintain an action for damages to the timber.; (2) this damage was caused by reason of the construction of a railway and s. 305 of the Railway Act providing "that all action or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year" applies. *West* v. *Corbett et al*, 41, p. 420.

Damages from log driving—Gradual and increasing damage to the land of a riparian owner from log driving operations and from an overflow of water caused by defendants' driving dam, extending over a number of years, will not give a right, either by prescription or under the Statute of Limitations, to commit further acts of additional damage. *Mitten* v. *Wright et al*, 1 Eq., p. 171; 34 N. B. R., p. 14.

Easement by virtue of lease — Statute of Limitations—In 1854, R. B., owner of lot 8, conveyed the northern part thereof to M., together with the privilege of taking water thereto, through a pipe which M. was empowered to build, from a spring on the southern part of the lot.—By *mesne* assignments, M.'s lot, with the water privilege, became vested in J. B.—In 1871 he executed to S. for 21 years, with covenant for renewal, a lease of the spring with the right to lay a pipe therefrom through the southern part of lot 8 to lot 9.—The ownership of the southern part of lot 8 was then in H., and in 1905 became vested in the defendant.—In 1872, S. built a pipe from the spring across H.'s land to lot 9, and it has been in uninterrupted use ever since, a period exceeding 20 years.—In 1904 Lot 9, with the lease, was assigned to the plaintiffs.—The plaintiff's predecessors in title always rested their right to the easement on the lease and not upon adverse user.—*Held*, that a prescriptive title to the easement could not be set up. *Loggie* v. *Montgomery*, 3 Eq., p. 238; 38 N. B. R., p. 112.

Heir at law—Possession by widow in lieu of dower—Where the heir-at-law permits the widow of the owner of the fee

to occupy the whole of the estate during her life under a verbal arrangement with the heir understood to be in lieu of dower, but with no definite agreement or understanding to that effect, the widow's possession is not adverse to the heir-at-law, and the Statute of Limitations will not run against the right of entry.—(*Per* Hanington, Landry, Barker and Gregory JJ., Tuck C. J. and McLeod J. dissenting.) *Lloyd* v. *Gillis et al*, 37, p. 190.

Heir at law—Right of entry—An heir at law is not on the death of his ancestor bound to do any act to vest both the title and possession of the lands which he inherits, and he is not barred of his right of entry under C. S. 1903, c. 139, ss. 3 and 4 on any part of such lands not held against him by adverse possession for twenty years. *Gooden* v. *Doyle*, 42, p. 435.

Joint and several bond — Separate mortgages — Payments by one debtor only—On September 27th, 1850, H. and W. gave their joint and several bond to C. to secure the payment of £1,000 on September 27th, 1855, with interest thereon quarterly in the meantime.—As between H. and W. the latter was surety, though they were both principal debtors by the bond.—On the same day H. and W. executed to C. separate mortgages on separate pieces of property owned by each to secure the payment on September 27th, 1855 of the amount of the bond, neither party executing or being a party to the mortgage of the other.—The mortgage from W. was upon the condition that if he and H. or either of them, their or either of their heirs, etc. paid to C. £1,000 and interest, according to the condition of the bond by H. and W. it should be void.—The mortgage given by H. contained a similar provision.—The interest on the debt was paid regularly by H. up to the 27th of March, 1879, after which his payments ceased.—W. and his successors in title were never out of possession of the land mortgaged by him from the date of the mortgage and never made any payment or gave any acknowledgement.—On January 20th, 1881, C.'s representative commenced this suit for foreclosure and sale of both mortgaged premises.—*Held*, that the mortgage given by W. was extinguished under the Statute of Limitations, c. 84, C. S. N. B., ss. 29 and 30. *Lewin* v. *Wilson et al*, Eq. Cas., p. 167. (Reversed 11 A. C., p. 638.)

Partition suit—Adverse possession by one co-tenant—Land was conveyed in fee to two brothers as tenants in common.—One brother died on May 9th, 1875, intestate, leaving him surviving his co-tenant, his mother, and three sisters, of whom the plaintiff is one.—The mother died September, 5th, 1876.—The surviving brother had from the time of his brother's death until his own death on November 8th, 1896, exclusive possession and use of the land, and the receipt of the rents and profits therefrom, without accounting.—He and his sisters lived together on premises situated elsewhere until his marriage in 1890.—He always contributed to their support, but the contributions were not meant, and were not understood by the sisters to be a share in the rents and profits of the land.—In a suit commenced September 21, 1899, by the plaintiff for the partition of the land, *held*, that the plaintiff's title was extinguished by the Statute of Limitations, C. S., c. 83, s. 13. *Ramsay* v. *Ramsay*. 2 Eq., p. 179.

See also *Patterson* v. *Patterson*, 3 Eq., p. 165.

Riparian owner—Prescriptive right to water—A prescriptive title to the uninterrupted use of the water of a river will not be obtained by a riparian owner who has made no use of the water different from that to which he was entitled as a riparian owner. *Brown* v. *Bathurst Elec. & W. Co. Ltd.*, 3 Eq., p. 543.

Trespass by railway—Continuing trespass—Six year limit—The Woodstock Railway Co. was incorporated by 27 Vict., c. 57, by which Act it is given power to expropriate land for a right of way of ninety-nine feet in width and provision is made for the assessment and payment of damages.—In 1871 the company built their main track on a strip fourteen feet in width but there was no evidence that any damages had been assessed or paid.—The defendant company acquired the rights of the Woodstock Rwy. Co. and in 1892 laid side tracks adjoining the fourteen foot strip and within the ninety-nine feet allowed by the Act 27 Vict., c. 57.—In May, 1911, the plaintiffs brought an action of trespass for laying the side tracks on this land.—*Held*, not an injury or damage "sustained by reason of the construction or operation of the railway," and therefore the limitation of one year for bringing action provided by s. 306 of the Railway Act, R. S. C. 1906, c. 37, does not apply.—The damage by such trespass is continuous and therefore the plaintiffs are entitled to recover damages for six years previous to bringing the action, under s. 306 of the Railway Act. *Carr et al* v. *Canadian Pacific Rwy. Co.*, 41, p. 225. Affirmed S. C. of C.

Trespass by railway—When Statute began to run—The defendant company in the year 1890, took possession of a piece of land claimed by plaintiff and built its line of railway across it, and fenced it on both sides of the track, and immediately thereafter began running its trains over the said track, and have continued to do so ever since.—The plaintiff saw what was going on and assisted in the building of the railway, but made no objection to its construction or the running of the trains until 1905, when this action was brought.—*Held* (*per* Hanington, Landry and Gregory JJ.), that the defendant in running its trains across the land was committing a continuing trespass and the plaintiff was

entitled to recover for the damage sustained for the six years preceding the commencement of the action.—*Held* (*per* McLeod J.), that the trespass, if any, was not a continuing trespass but was completed when the road was built in 1890, and when within six years the plaintiff might have recovered all the damages incident to the trespass which was now barred by the Statute of Limitations.—*Held* (*per* Tuck C. J.), that the evidence showed no possession in the plaintiff, or, if it did, plaintiff was bound by his acquiescence and could not maintain trespass. *Clair* v. *The Temiscouata Ry. Co.*, 37, N. B. R., p. 608. On appeal 38 S. C. R. 239, Tuck C. J. upheld.

Trustee—Adverse possession—J. purchased and went into possession of the property in dispute in 1878; in 1879 he mortgaged it, and in 1880 conveyed the equity of redemption to B. without consideration.—In 1887 (within twenty years of the commencement of this action) at the request of and for the benefit of J., the plaintiff paid and took an assignment of the mortgage, and B. also at the request of J. conveyed the equity of redemption to the plaintiff.—J. and the defendant continued in possession down to the bringing of the action, and never paid any rent or anything on account of the mortgage.—*Held*, in an action of ejectment against the defendant, the successor in title of J., that B. was trustee for J. and as J. would not hold adversely to his trustee, the action was not barred by the Statute of Limitations and plaintiff was entitled to recover. *Stevens* v. *Jeffers*, 38, p. 233.

Trust—Failure to account for twenty-five years no bar—Where defendant received the rents of a property for a period of twenty-five years without during that time accounting to plaintiff, it was held that the right to an account was not barred by the lapse of time, defendant having taken possession of the property under an agreement with plaintiff, which had never been terminated, to hold the property for him and to account to him for it. *Pick* v. *Edwards*, 3 Eq., p. 410.

MAGISTRATE.

See JUSTICES OF THE PEACE.

MALICIOUS PROSECUTION AND FALSE IMPRISONMENT

I. Defined.
II. Remedy.
III. Evidence.
IV. Damages.

I. Defined.

NO CASES.

II. Remedy.

Action against magistrate acting without jurisdiction—In an action for false imprisonment where the justice who issued the warrant acted wholly without jurisdiction, proof of malice or want of probable cause is unnecessary.—A complaint in writing under oath for a search warrant under which a warrant was issued, and goods named therein were found in the possession of the accused, will not justify arrest without any further or other complaint. *Melanson* v. *LaVigne*, 37, p. 539.

Action against peace officer, Notice of—In an action for false imprisonment, the defendant, acting as a peace officer under the criminal code, is entitled to notice of action under section 976, if he honestly believed the plaintiff had committed a felony.—The *bona fides* of the defendant's belief is a question of fact, and must be submitted to the jury, if any facts exist which could give rise to an honest belief.—The reasonableness of the belief is not material.—(*Per* Hanington, Landry, Barker and McLeod JJ., Tuck C. J. dissenting). *White* v. *Hamm*, 36 p. 237.

Arrest under illegal warrant—The defendant, a justice of the peace, without any information having been laid before him, issued a warrant against the plaintiff for peddling without a license, contrary to C. S. 1903, c. 175.—A constable arrested the plaintiff under the warrant, but before doing so asked him to exhibit his license, which the plaintiff could not do.—In an action for false arrest defendant sought to justify under s. 6 of the Act, but, *held* (*per* Barker, C. J., McLeod, White and Barry JJ., Landry J. dissenting), that although the defendant was liable to arrest under s. 6, the warrant was issued without jurisdiction and the arrest having been made thereunder, defendant was liable. *McCatherin* v. *Jamer*, 41, p. 367.

Canadian Government Railways—In order to justify a conductor under rule 136 of the "Rules and Regulations for Government Railways" in arresting a passenger, there must be evidence that he was annoying other passengers, and abusive language to the conductor is not in itself evidence of such annoyance.—The circumstances of this case did not justify the defendant handcuffing the plaintiff.—*Held* (*per* Barry and McKeown JJ.), a conductor may handcuff only when a prisoner has attempted to escape, or it is necessary in order to prevent him doing so.—*Held* (*per* Barker C. J., Landry and White JJ.), a conductor might be justified in using handcuffs for the protection of passengers. *McAllister* v. *Johnson*, 40, p. 73.

Functions of judge and jury—In an action for malicious prosecution, the question of reasonable and probable cause is for the judge.—The jury may be asked to

find on the facts from which reasonable and probable cause may be inferred; but the inference from the facts found must be drawn by the judge. *Peck* v. *Peck*, 35, p. 484.

In an action for malicious prosecution the question of malice is for the jury exclusively. —The question of reasonable and probable cause is for the judge to determine, but if the facts are in dispute they must be found by the jury, and one essential fact for the determination of this question is as to the belief of the prosecutor in the guilt of the accused. *Dugay* v. *Myles*, 42, p. 265.

Infant, Execution against—An execution issued out of a magistrate's court on a judgment by default against an infant on his promissory note is a good answer to an action for false imprisonment under the execution. *McGaw* v. *Fisk*, 38, p. 354.

International law—Sovereign powers—The civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law.—Therefore, the plaintiff, an alien, being unlawfully within the United States territory in violation of an act of Congress, and a person liable to be deported, has no right of action in this Court against an officer of the United States government for his arrest in, and deportation from, that country. —By international law, and apart from any civil enactment, a sovereign state has the right at its pleasure to exclude or deport any alien from its dominions; therefore no action will lie in a British Court against an official exercising that right at the command and on behalf of the state of which he is the servant. *Papageorgiouw* v. *Turner*, 37, p. 449.

Malice—Where T. Co. by a regular process issued out of a court of competent jurisdiction, caused the arrest of McD. for debt in a civil proceeding, which debt had been paid before action commenced, *held*, in the absence of malice, no action would lie against T. Co. for false arrest. *McDonough* v. *Telegraph Pub. Co.*, 39, p. 575.

Malice—Failure to prosecute civil action.—In an action for false imprisonment and malicious prosecution it appeared that the defendant had taken proceedings before a magistrate to collect the value of a piece of timber belonging to him which the plaintiff had taken without his knowledge or consent; that without prosecuting the civil proceedings to a conclusion the defendant, on the advice of counsel after informing him of all the facts, laid an information against the plaintiff for stealing.—*Held*, on a motion for a new trial, that it did not necessarily follow from the fact that the defendant took civil proceedings with a view of collecting from the plaintiff the value of the timber that that was the motive of the subsequent criminal prosecution apart from any idea of bringing the plaintiff to justice, and therefore malicious. *Priest* v. *McGuire*, 43, p. 469.

Malice—Honest belief in facts alleged —Advice of Counsel—In an action for malicious prosecution for charging the plaintiff with keeping a bawdy house, the fact that the defendant, owing to the mistaken idea he entertained as to what in law constituted a bawdy house, honestly believed, and under all the circumstances was reasonably justified in believing, the charge to be true is no defence, nor is the fact that the defendant acted *bona fide* and under the advice of the clerk of the peace and of counsel of itself enough to afford a good defence, the jury having found that the defendant acted from malicious motives.— *Crocker* v. *Storey*, 43, p. 69.

Malice—Use of name—Ulterior motive—In an action for false arrest and malicious prosecution, it appeared that one Cox, acting as cashier for the defendant company, believing that he had overpaid the plaintiff, an employee of the defendant company, $100 caused him to be arrested by the defendant company in an action in the County Court.—The defendant company had charged Cox with the $100 and made no demand upon the plaintiff for the amount and while it did not authorize Cox to issue the capias it permitted the action to proceed and paid the costs on judgment being given for the present plaintiff.—On the trial of this action the jury found in answer to questions, that Cox, when he caused the plaintiff to be arrested, honestly believed that he had overpaid him $100, but that he did not have reasonable grounds for such belief; that he was not actuated by malice in making the arrest, but did not take reasonable care to inform himself of all the available facts, and assessed the damage in the event of a verdict being ordered for the plaintiff at $250.—Upon these findings the learned judge found reasonable and probable cause and ordered a verdict to be entered for the defendant.—*Held* (*per* McLeod C. J. and Grimmer J., Barry J. dissenting), on an application to set aside the verdict and enter a verdict for the plaintiff and failing that for a new trial, that the verdict was properly entered. —*Held* (*per* Barry J.), that the defendant company, by continuing the proceedings in the County Court action and permitting the use of its name, ratified the act of Cox in causing the arrest, and the jury, on proper direction, must have found the company (having no interest in the matter) acted from some indirect motive and therefore with malice against the plaintiff, and the verdict should be set aside and a verdict entered for the plaintiff for the damages found with costs.—*Held* (*per curiam*), that the defendant company, by permitting its name to be used in the action in the County Court, was estopped from setting up that it did not authorize the action and arrest. *Landry* v. *The Bathurst Lumber Co. Ltd.*, 44, p. 374.

Municipal corporation—Acts of agents —A municipal corporation is liable to respond in damages for the act of its secretary-treasurer in sending to a collecting justice the

name of the plaintiff as having made default in the payment of a rate, which had been illegally imposed upon him, at the same time instructing the justice to enforce payment of the same which the justice did by issuing an execution against the plaintiff, under which, for want of goods and chattels whereon to levy, he was lodged in prison. *Mellon* v. *Municipality of Kings County*, 35, p. 153.

A municipal corporation can not be made to answer in damages for the unlawful acts of one of its police officers while attempting to perform a public duty.—The plaintiff, temporarily in the town of C. collecting subscriptions for a newspaper, was arrested by a police officer of the town for a breach of one of its by-laws, which required all persons, not ratepayers of the town or residents of the county of N., to pay a license fee before engaging in any calling, occupation or employment in the said town.—The arrest was made by the officer without any warrant, and the plaintiff was only released upon his paying to the town treasurer the fee demanded, which was retained.—In an action for false imprisonment against the town for the alleged unlawful arrest by the police officer, it was *held*, following *McCleave* v. *City of Moncton* (35 N. B. R. 296 and 32 S. C. R. 106), that, assuming the arrest to have been unlawful, the doctrine of *respondeat superior* did not apply, and the town was not liable.—*Held*, further, that the fact that the police officer in making the arrest was endeavoring to enforce a by-law of the town made for revenue purposes only was not sufficient to take this case out of the rule laid down in the *McCleave* case; and that the payment of the license fee to the town treasurer, and its retention by him, in the absence of any evidence of knowledge on the part of the town of the circumstances surrounding such payment and retention, was no proof of any intention on the part of the town to ratify the acts of the police officer.—(*Per* Tuck C. J., Landry, Barker, McLeod and Gregory JJ., Hanington J. dissenting.) *Woodside* v. *The Town of Chatham*, 37, p.

Municipal corporation, Officers of—The plaintiff was arrested under an illegal warrant for dog taxes issued by the town treasurer of Marysville and executed by a provincial constable.—The plaintiff gave notice of action under 49 Vict., c. 25, s. 84, directed to the defendants jointly, describing one as town treasurer of Marysville and the other simply as constable, and setting out specifically the acts complained of on the part of each.—Plaintiff then sued defendants jointly for false imprisonment.—A defence by statute that the defendant "lawfully acted by virtue of his office" is sustainable only where the act in question was done "lawfully" so far as the other party is concerned.—The Act respecting Protection of Constables, C. S. 1903, c. 64, does not apply here because the town treasurer had no authority by law to issue the warrant under which the constable acted. *Morkey* v. *Sloat*, 41, p. 235.

Pleading — Determination of prosecution—In an action for malicious prosecution a statement in the declaration that the plaintiff was discharged from custody under a habeas corpus order whereby the prosecution was determined is not a sufficient allegation of the determination of the prosecution and is bad on demurer. *McKinnon* v. *The McLaughlin Carriage Co. Ltd.*, 37, p. 3.

Probable cause—In an action for malicious prosecution and false imprisonment, it was proved on the trial that the plaintiff and one L. were fellow-passengers on the defendants' road.—L. complained to an officer of the company that a revolver had been stolen from his valise.—The plaintiff had been seen by an official of the defendant company at one of the stations to take something from L.'s valise.—L. made a charge of theft against the plaintiff, and he was arrested by a constable appointed by the government on the recommendation of the defendants, and employed by them for duty on their road and paid by them.—The prosecution was carried on by L. but at the instance and with the assistance of the officer making the arrest and other constables in the employment of the defendants.—After an investigation by a magistrate the plaintiff was discharged.—*Held* (*per curiam*), that the evidence showed probable cause for the arrest and prosecution and defendants were not liable.—*Held*, *also* (Landry J. doubting), that if there was want of probable cause the evidence failed to connect the defendants with the prosecution and imprisonment so as to make them responsible. *Dennison* v. *Canadian Pacific Rwy.*, 35, p. 250.

In an action for malicious prosecution and false imprisonment where the circumstances connected with the offence with which the plaintiff was charged in no way pointed to him as the guilty person, and the defendant (informant) interfered at the time of the arrest and failed to prosecute, want of probable cause may be inferred. *Savage* v. *Breton*, 37, p. 240.

Probable cause—Ordering a nonsuit to be entered on an appeal from the County Court. See *Miller* v. *Gunter*, 36, p. 330.

Statutory proviso no excuse—It is no answer to an action for malicious prosecution, that the conviction against the accused (plaintiff) was quashed by reason of a proviso in the statute creating the offence excusing the act charged. *Peck* v. *Peck*, 35, p. 484.

III. Evidence.

Action against justice—In an action against a justice for false arrest and im-

prisonment under an illegal warrant, the following evidence is inadmissible: (1) evidence of the character of the informant upon whose information the warrant was issued; (2) evidence of injuries received by the plaintiff at the hands of the informant. (*Per* Landry, White, Barry and McKeown JJ.)—*Held* (*per* Barker C. J. and McLeod J.), the admission of such evidence caused no substantial wrong or miscarriage in this action. *Campbell* v. *Walsh*, 40, p. 186.

Damages, Evidence in mitigation of—In an action for false arrest and imprisonment, the plaintiff may be cross-examined as to his having been arrested for drunkenness eight years previously, in mitigation of damages. *McAllister* v. *Johnson*, 40, p. 73.

Death of witness—Admissibility of record—The evidence of a witness taken before a magistrate on a criminal charge is admissible in an action for malicious prosecution founded on that charge, where the witness, at the time of the trial, is dead. *Peck* v. *Peck et al*, 35, p. 484.

Malice, Inference of—In an action for malicious prosecution actual malice need not be proved, but may be inferred from the absence of reasonable and probable cause. *Peck* v. *Peck*, 35, p. 484.

Suit against magistrate acting without jurisdiction—In an action of false imprisonment brought against a magistrate, who without jurisdiction had committed to prison the plaintiff for making default in the payment of a fine imposed upon him for selling liquor without a license, evidence was offered and admitted in proof of the plaintiff's innocence of the charge.—*Held*, that the evidence was properly received and that the plaintiff, in order to prove his innocence, was not confined to such evidence as had been given before the magistrate on the trial of the information. *LaBelle* v. *McMillan*, 34, p. 488.

IV. Damages.

Expenses—The expense to which a party complaining may have been put by an illegal arrest is a proper element of damage. *Melanson* v. *LaVigne*, 37, p. 539.

Quantum of damages—In an action for false imprisonment where the person or character of the plaintiff are injured a new trial will not be granted on the ground of excessive damages unless the verdict is so large as to satisfy the Court that it was perverse and the result of gross error, or unless it can be shown that the jury acted from undue motives or misconception. —In considering the amount of the damages in such an action the jury may take into consideration the plaintiff's loss of time and interruption of business, bodily and mental suffering, indignity, circumstances of family, condition of the gaol, costs of obtaining release for which the plaintiff is liable although not actually paid, and in addition and distinct from the foregoing, the illegal restraint of plaintiff's personal liberty. *Markey* v. *Sloat et al*, 41, p. 235.

Verdict—*Semble*:—If the verdict is general, and all the damages might have been recovered on either count, the Court will not grant a new trial, but will, if necessary, direct the verdict to be entered on the count sustained by the evidence. *Savage* v. *Breton*, 37, p. 240.

MANDAMUS AND PROHIBITION

Mandamus.

Boys' Industrial Home — Duty of chairman to issue warrant—In an application for a mandamus to the chairman of the Boys' Industrial Home to compel him to issue his warrant to deliver to the custody of the superintendent a boy sentenced to a term of imprisonment in the home under an act of the parliament of Canada, 56 Vict., c. 33, it appeared that s. 6 of the said act authorizes the jailer to retain the boy "until there is presented to such jailer a warrant from the chairman of the governing board (which warrant the chairman is hereby authorized to issue under his official seal) requiring the sheriff or a constable or other officer to deliver such boy to the superintendent of such industrial home," and that section 9 of the provincial act, 56 Vict., c. 16, says: "the said chairman may thereupon (referring to what shall precede the issuing of the warrant) issue his warrant," etc.—*Held* (*per* Tuck C. J., Hanington, Landry, McLeod and Gregory JJ.), that the words "is hereby authorized" in section 6 and "may" in section 9 are not only enabling words but imperative as well, and the chairman has no discretionary power as to the issue of the warrant.—That the chairman was not justified in refusing to issue the warrant because the certificate of sentence did not contain all the items of information specified in schedule "A" of the provincial act. *Ex parte The Attorney General*; *In re Goodspeed*, 36, p. 91.

Canada Temperance Act—A mandamus will be issued compelling a County Court judge to proceed with a scrutiny of ballots in an election for the repeal of the Canada Temperance Act even though some boxes are lost or stolen. *Ex parte LeBlanc*, 34, p. 88.

Civic election recount—City of Fredericton—By the Act 22 Vict., c. 8, s. 24, it is provided that any candidate or an elector dissatisfied with the decision of the presiding officer in any election for mayor, etc., in the city of F. may, within ten days after the election, make application in writing through the city clerk to the council, setting forth the cause of complaint and demanding an investigation thereof, and by s. 11 of the

amending Act 26 Vict., c. 33 (1863) it is provided that no petition complaining of an undue election shall be enquired into by the city council unless within two hours after the declaration a protest against the return be delivered to the presiding officer stating the grounds of the protest; and confines the inquiry to the grounds stated in the protest.—*Held*, on an application for a mandamus, that the city council was not justified in refusing to grant an investigation on a protest filed demanding a recount of the ballots cast, and assigning as a cause of complaint that certain ballots were accepted which were illegal in that they were not in accordance with the law relating to elections in the city of F., on the grounds that the council had no jurisdiction to hold a recount, and that there was no specific statement of grounds in the protest. *Ex parte Farrell*, 42, p. 478.

Commissioner of City Court of Moncton to issue writ before costs were paid—G. having applied to the commissioner of the City Court of M. for a summons, was refused unless he first paid the fee for the issuing thereof.—Relying upon a recommendation in a report of the finance committee of the city council of the said city, which was received and adopted by the council, G. then moved the Court for a rule *nisi* calling upon the commissioner to shew cause why a mandamus should not issue to compel him to issue the summons without the fee being paid or tendered in advance.—The recommendation was as follows: "Your committee would recommend that hereafter any and all claims within the jurisdiction of said Court may be sued and judgment therein taken without the payment of costs in advance, but that the same be retained out of the first moneys collected on the judgment."—*Held*, (1) that, as the commissioner was an appointee and servant of the Crown, and in no way responsible to the said city or under its direction or control, the city could not by resolution create any duty or obligation upon the commissioner to issue the summons without the fee therefor being prepaid; and (2) that the report and its adoption amounted to nothing more than a recommendation to the commissioner, which he was at liberty to act upon or not according to his discretion. *Ex parte Grant*, 35, p. 45.

Fisheries Act — Mandamus to issue warrant for costs when penalty remitted—Section 18 of the Fisheries Act as amended by the act of 1898, enacts: "Except as herein otherwise provided, every one who violates any provision of this act or of the regulations under it shall be liable to a penalty not exceeding $100 and costs, and, in default of payment, to imprisonment for a term not exceeding three months, and any fishery officer or justice of the peace may grant a warrant of distress for such penalty and costs."—R. was convicted under this section, and fined $20 and costs.—Both fine and costs were remitted under sub-s. 6 of s. 18, which provides that: "Persons aggrieved by any such conviction may appeal by petition to the minister of marine and fisheries who may remit penalties and restore forfeitures under this Act."—G., the prosecutor, applied to the convicting magistrate for a warrant of distress for the costs, claiming the minister of marine and fisheries had no power to remit the costs.—The magistrate refused to issue the warrant, and a mandamus was moved for.—*Held* (*per* Tuck C. J., Hannington and McLeod JJ.), that the minister had no power to remit the costs, and it was the duty of the magistrate to issue the warrant of distress for their recovery, and that the mandamus should go.—*Held* (*per* Barker and Gregory JJ.), that the penalty having been remitted, the magistrate had no power to proceed to collect the costs, or, at all events, his right was so doubtful that the Court, in the exercise of its discretion should refuse the mandamus.—*Held* (*per* Landry J.), that as in the section in question the term "penalties" included the costs as well as the fine, the writ ought not to issue. *Ex parte Gilbert*, 36, p. 492.

Liquor License Act—See *Ex parte Stavert*, 39, p. 6 and 39, p. 239.

Mandamus, Writ of, against public officials, How worded—The commissioners of sewers in the parish of Hopewell, appointed under C. S. 1903, c. 159, act for the whole parish and have power to assess the owners of any marsh lands therein for work done under s. 168, although such marsh lands may not have been set off as a district under s. 3 of the Act, and mandamus will lie to compel such assessment.—The fact that a new set of commissioners were elected after the application for mandamus but before judgment, would not prevent the granting of the writ, which went to "the commissioners of sewers for the parish of H." *Ex parte Dixon et al*, 41, p. 133.

Municipality, Action against, re bond issue—Whether in an action against the municipality of G. on bonds issued on behalf of the parish of Bathurst under 41 Vict., c. 102, the proper remedy was not by motion for a mandamus to compel the municipality to assess the parish of B. for the amount of the loan and interest. *Grimmer* v. *Municipality of Gloucester*, 35, p. 255.

School property, Obtaining payment of lien against—Property held by trustees for school purposes under the provisions of the Schools' Act, C. S. 1903, c. 50, is not Crown property and therefore not exempt from the operation of the Mechanics' Lien Act, although such property is not liable to be sold under execution.—An order for the payment of money under the Mechanic's Lien Act can be enforced in the same way as a judgment by compelling the school trustees to make an assessment. *Trustees*

School District No. 8 Parish of Havelock v. *Connelly et al*, 41, p. 374.

Schools, Right of attending public—M. owning and working a farm in School District No. 10 moved his family to District No. 8 and took up his residence there, although occasionally spending a part of his time at the farm.—The trustees of District No. 8 refused to allow his children to attend school, although the applicant had notified them of his change of residence, and had asked to be assessed for school purposes.—*Held*, that a mandamus should issue to compel the trustees to allow his children to attend school. *Ex parte Miller*, 34, p. 318.

Sewers, Civic by-law re entering—The city of M. by its act of incorporation is authorized to levy on the owners of lots frontage fees for sewers, and to collect them as ordinary city taxes; the act also gives authority to make by-laws to regulate the way and manner of entering the sewers, and to prevent the entry of any sewer unless the entry and frontage fees were first paid.—A by-law was made providing that no person should enter any public sewer until all entry and frontage fees were paid.—E., the owner of a lot by purchase from the sheriff under an execution by the city of M. for general city taxes (not frontage fees) on which frontage fees had been rated against a former owner and not paid, applied for a mandamus to compel the city to grant him a permit to enter a sewer without payment of the frontage fees.—*Held*, refusing the mandamus, that the city could not be compelled to issue the permit until the fees were paid, even though they had lost the right to enforce payment against the owner of the lot. *Ex parte Edgett*, 36, p. 224.

Writ of Prohibition.

Justice of the peace—An information for assault was laid before S., justice of the peace for A. county; after summons issued an order *nisi* of prohibition was served on him at the instance of the defendant and no further proceedings were taken before him.—B., another justice for the county having been requested by S. to hear the charge, took another information and issued a summons.—On the return of the summons the defendant's attorney who was clerk of the peace, advised B. that he had no jurisdiction, and B. thereupon refused to proceed.—An information was then laid before R., another justice of the peace for A. county, who was requested by S. to act after B., had declined to proceed.—An order *nisi* of prohibition having been granted against R., *held*, that the three justices had concurrent jurisdiction and as S. and B. were not *bona fide* proceeding in the matter, there was no ground for interfering with R. *Ex parte Peck*, 39, p. 274. See also at 39, p. 131.

Liquor License Act—License issued without jurisdiction—A writ of prohibition is the proper remedy to restrain the issuing of a license where the commissioners act without jurisdiction, and may be issued after the certificate for a license has been granted. *Ex parte Lovely* 1900 (unreported) followed.—*Semble*, an affidavit cannot be used in support of an application for a writ of prohibition, if it is sworn before a commissioner who is a partner in a firm of attorneys acting in the matter as attorneys for the applicant. *Ex parte Demmings; Re License Commissioners of Victoria*, 37, p. 586.

Municipal election, Protest against—Special meeting to hear report of committee.—A by-law of a municipality respecting elections provided that an elector might file a protest against the election of a councillor with the county secretary within twenty days after the election; that the protest so filed should be read before the council on the first day of the first session after the election, and in case a majority of the council considered there was sufficient ground of complaint it should appoint a committee of three members to examine into the matter and report to the council.—The by-law also provided that the council might adjourn the investigation from time to time.—*Held*, where a protest was filed and read before the council, and a committee appointed as provided by the by-law, and the council adjourned without receiving a report from the committee or adjourning the investigation, the Court refused a rule for a writ to prohibit the council from proceeding to hear and determine the protest at a special meeting called for that purpose. *Ex parte Murchie, re Kerr*, 42, p. 475.

MARRIAGE.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

I. The Contract.

II. Wages.

III. Special Statutes.

IV. Duties and Rights.

1. OF MASTER. (*See* NEGLIGENCE.)
2. OF SERVANT. (*See* NEGLIGENCE.)
3. OF THIRD PARTIES.

See NEGLIGENCE — PRINCIPAL AND AGENT.

I. The Contract.

Common employment — (*See* NEGLIGENCE.)

Risks assumed by servants — (*See* NEGLIGENCE).

Termination of agreement — Quantum meruit—Some time previous to the year 1891, a verbal agreement was entered into between the plaintiff and the defendant, under which the plaintiff was to be employed in the care and management of the defendant's business, and in return the defendant was to afford the plaintiff support and maintenance during the defendant's lifetime, and at his death was to give to him one-half of a certain island belonging to the defendant.—The plaintiff entered upon his duties and continued to perform his side of the agreement until the month of August, 1897, when by an injunction order, issuing out of the Equity Court, made in a suit in which both the plaintiff and the defendant were parties, he was restrained from any longer interfering with the care or management of the defendant's business and was compelled to quit the island.—He accordingly handed over to one B., who was acting under a power of attorney from the defendant, all the property of the defendant in his possession, and, treating the conduct of the defendant as equivalent to a recision of the agreement, in the same month of August brought an action against the defendant for the value of his services during the six years previous to the issuing of the injunction order.—The jury in answer to a question put by the learned judge who tried the case replied that the defendant had annulled and put an end to the agreement on the 3rd of August, 1897, the day the injunction order was issued, and a verdict was found for the plaintiff.—In December, 1897, some months after the commencement of the action, the defendant made a deed of the island in question to B. upon certain trusts, the nature of which did not appear in evidence.—Upon a motion for a nonsuit, pursuant to leave reserved at the trial, *held* (*per* Landry, Hanington, Barker and VanWart JJ.), that although neither the obtaining of the injunction order nor the making of the deed to B. was sufficient to sustain the finding of the jury as to the annulment of the agreement, and the plaintiff ought, therefore, in strictness to be non-suited, yet as there was a point of view of the facts which had not been presented to the jury and under which the plaintiff might be entitled to recover on a *quantum meruit*, the case should be further investigated, and there should therefore be a new trial.—*Held* (*per* Tuck C. J. and McLeod J.), that as there was no agreement proved that could be enforced during the lifetime of the defendant, and that as the obtaining of the injunction order was not sufficient to support the finding of the jury that the defendant had cancelled and put an end to the agreement, the plaintiff should be non-suited. *Frye* v. *Frye*, 34, p. 569.

Wrongful dismissal, Action for, or quantum meruit—If an employee, claiming he has been wrongfully dismissed under a contract of hiring, elects to treat the contract at an end and brings an action on the *quantum meruit* for his services, a subsequent action on the same contract for damages for wrongful dismissal will be stayed. *Gregory* v. *Williams et al*, 44, p. 204.

2. Wages.

Agreement to divide fees of office—In a suit for account, plaintiff stated that he was appointed deputy sheriff by the defendant, under an agreement that he was to have half of the net receipts of the sheriff's office.—The defendant stated the agreement to be that the plaintiff was to have one half of the fees from writs and executions only.—On the probabilities of the evidence the Court found in favor of the defendant's version of the agreement.—Of the receipts in which under this finding the plaintiff might be entitled on discovery to share, the fees in one case, amounting to $33 alone remained undivided.—*Held*, that the bill should not be dismissed.—Reference ordered and costs reserved. *Hawthorne* v. *Sterling*, 2 Eq., p. 503.

Profit sharing as part wages—Statute of Frauds—On an application for an accounting, the plaintiff alleged that under an agreement he and the defendant had entered into, he was to manage a business carried on in their joint names, be paid twelve dollars per week and receive one-quarter of the net profits at the end of the year.—The defendant denied the plaintiff was to receive one-quarter of the net profits, and alleged that the agreement was that the plaintiff was to be paid twelve dollars per week and have the right to buy a one-quarter interest at the end of the year.—*Held*, that the facts showed that the contract made was as alleged by the plaintiff and that he was entitled to an accounting.—*Held*, that the Court was inclined to be of the opinion that the plaintiff and defendant were partners as between themselves, but if such was not the case and the agreement between them was simply a contract of hire, it was not barred by the Statute of Frauds, as the plaintiff had performd his part of the agreement. *Orchard* v. *Dykeman*, 43, p. 181, C. D.

3. Special Statutes.

Canada Temperance Act—Liability of master—The president of an incorporated company, who hired the clerks and had the entire management of the business, was convicted of selling liquor, contrary to the provisions of the second part of the Canada Temperance Act, where the sale had been made by a clerk presumably acting under general directions received by him from the president.—Conviction affirmed (VanWart dissenting). *Ex parte Baird*, 34, p. 213.

See also *R.* v. *Holyoke*, *Ex parte McIntyre*, 42, p. 135.

Canada Temperance Act—Question of authority to sell—Where a person is accused of an offence under the Canada Temperance Act, the question whether the sale of the liquor was made by the consent or contrary to the order of the defendant is for the magistrate. *Ex parte Flanagan*, 34, p. 577.

Liquor License Act, C. S. 1903, c. 22—A livery stable is a place within the meaning of section 99 of the Liquor License Act, in which proof of a sale by a person employed by the occupant may make the occupant liable to a penalty under the act, though there be no proof that the offence was committed with his authority or by his direction. *R.* v. *McQuarrie, Ex parte Rogers*, 37, p. 374.

Workmen's Compensation Act — Effect of — The Workmen's Compensation for Injuries Act, C. S. 1903, c. 146, as amended by 8 Edw. VII, c. 31, simply places a workman on the same footing as a licensee, taking away from the master all defences based on the rule of common employment etc. *Campbell* v. *Donaldson et al*, 40, p. 525.

MECHANICS' LIENS.

Practice—Disputing claim of lien—The certificate granted by the judge under s. 40 of the Mechanics' Lien Act, C. S. 1903, c. 147, is, when registered, the commencement of proceedings required by s. 22 of the Act.—When a notice disputing lien is filed, under s. 45, the Court must first determine at a separate hearing the question raised by the notice, and afterwards if the lien is allowed proceed to take the accounts.—At a hearing upon a disputed claim of lien, under s. 45 of the Mechanics' Lien Act, C. S. 1903, c. 147, no proper evidence was offered of the existence or due prosecution of the lien, but defendant did not object to the evidence or take out a certificate under s. 45, and appeared later, when the accounts were being taken, without objection.—It appeared on the face of the proceedings that the lien had not been prosecuted within the statutory period—*Held*, defendant by his failure to object to the evidence did not waive the necessity of proof that the lien was in existence and had been duly prosecuted and an order allowing the lien was set aside. *Boucher* v. *Belle-Isle*, 41, p. 509.

Practice—Section 30 of Act—The affidavit or statutory declaration of the contractor or his agent required by section 30 (1) of the Mechanics' Lien Act, C. S. 1903, c. 147, that all persons who have been employed on the work and entitled to wages have been paid in full up to and inclusive of the 14th day previous to such declaration is not a condition precedent to a lien by a contractor on a completed contract, and an order of the judge of the Gloucester County Court dismissing a claim of lien because such affidavit or declaration had not been given to the respondent company was set aside. *Brown* v. *The Bathurst Co. Ltd.*, 43, p. 527.

School buildings—Property held by trustees for school purposes under the provisions of the Schools' Act, C. S. 1903, c. 50, is not Crown property and therefore not exempt from the operation of the Mechanics' Lien Act, although such property is not liable to be sold under execution.—An order for the payment of money under the Mechanic's Lien Act can be enforced in the same way as a judgment by compelling the School Trustees to make an assessment. *Trustees School District No. 8, Parish of Havelock* v. *Connely et al*, 41, p. 374.

MEDICINE AND SURGERY.

Physicians.

Agreement re practice — Registry—The plaintiff was a physician practising at Sussex, and in receipt of a large income.—Having occasion to remove from the province, he entered into an agreement with the defendant, a physician, to lease to him a part of his (the plaintiff's) house including offices, for two years from July 1st, 1894.—An annual rental was reserved.—The defendant covenanted that at the end of the lease he would either purchase the house at a named sum, or would forthwith leave and depart from the parish of Sussex, and would not for a period of at least three years next thereafter reside in said parish, or practise thereat, either as physician or surgeon, or act directly or indirectly as partner or assistant to or with any other physician or surgeon practising in said parish or elsewhere within ten miles thereof, and that he would, at least three months before the end of the said term, give the plaintiff notice in writing whether he would so purchase or would depart from Sussex.—It was provided that if at the end of the term the plaintiff did not wish to sell he could return to Sussex and resume practising, in which case the defendant might remain and practise in Sussex.—The plaintiff covenanted that he would on or before July 1st, 1894, repair the roof of the house, and that from that date he would cease to practise in the parish of Sussex for two years, and that if the defendant purchased the house and lot as aforesaid, he would not practise in Sussex for three years from said date.—Repairs to the roof were not made until January, 1895, and were found to be insufficient, and it was not until the fall of 1895 that the matter was attended to, when a new roof was put on.—At the time the defendant went into possession July 1st, 1894, he was aware that the repairs had not been made, and he raised no objection to the plaintiff's default.—At the time of the agreement the plaintiff was not a registered physician,

though he had been registered a year before, and was entitled to be registered on payment of the annual fee.—At the end of the lease the defendant declined to purchase the property or discontinue to practise at Sussex. —In a suit for an injunction to restrain the defendant from practising and residing at Sussex, in the terms of his covenant, *held*, (1) that the agreement was not invalid as being in restraint of trade, and contrary to public policy; (2) that there had been a waiver by the defendant with respect to the time of performance of plaintiff's covenant to make repairs, and that its performance was an independant covenant and not a condition precedent to the performance by the defendant of his covenant; (3) that it was immaterial that the plaintiff was not a registered physician at the time of the agreement; (4) that defendant's covenant was supported by consideration; (5) that the defendant should be enjoined from residing at Sussex as well as from practising there. *Ryan* v. *Mc Nichol*, 1 Eq., p. 487; 34 N. B. R., p. 391.

Local Boards of Health, Services rendered to—A medical practitioner employed by the local board of health of the city of Moncton to attend to cases of small-pox, cannot recover for his services in an action against the city.—The Public Health Act, 1898 (61 Vict., c. 33) imposes upon the cities or municipalities, wherein local boards of health are established, no liability, which can be enforced by action, for the expenses or contracts of such boards. *Cruise* v. *The City of Moncton*, 35, p. 249.

Negligence—In an action against a surgeon for not exercising ordinary care and skill in treating the plaintiff for an injury to his arm, caused by his being accidently thrown from his sleigh, the learned judge who tried the case non-suited the plaintiff on the ground that as neither the plaintiff nor any of his witnesses was able to say that the arm was dislocated as a result of the accident, and as both the defendant and another surgeon who was called in by the defendant and examined the arm three weeks after the accident swore that it was not dislocated, and as the dislocation, which was sworn to exist a year and nine months after the accident by a third surgeon whom the plaintiff consulted, and which was admitted to exist at the time of the trial, more than three years after the accident, might have been the result of disease, as was shown by the evidence of several expert witnesses, there was no evidence to leave to the jury upon which they could properly find a verdict for the plaintiff.—*Held* (*per* Tuck C. J., Landry, VanWart and McLeod JJ., Hanington J., dissenting), that the non-suit was right, and that even if the dislocation was the result of the accident the mere fact that the defendant did not discover it and treat the plaintiff accordingly, was not of itself evidence of want of ordinary care and skill on the part of the defendant. —*Held* (*per* Hanington J.) that as there were symptoms of dislocation immediately after the accident, as the arm was admittedly dislocated at the time of the trial, and had been so for some considerable time before, as the plaintiff's wife swore that the arm at the time of the trial exhibited very much the same appearance that it did when the defendant was treating it, as three weeks after the accident the defendant admitted that the arm might have been slightly out, and at that time adopted means to reduce the dislocation the learned judge should have left it to the jury to find whether or not the dislocation was caused by the accident, and existed at the time the defendant was called in, and if so whether or not the defendant was negligent or showed want of ordinary care and skill in not discovering it. *James* v. *Crockett*, 34, p. 540.

Overseers of the poor, Services rendered to—The overseers of the poor of each parish are a corporate body by statute but the very nature of the duties devolving on the overseers is sufficient to infer an agency in each overseer which will give him power to bind the corporation in case of emergency, such as prompt surgical aid necessary to save life. *Irving* v. *Overseers Parish of Stanley*, 37, p. 584.

Physicians and Surgeons—Registry—C. S. 1903, c. 73—In an action by a physician to recover for professional services, the burden is on him to prove that he was a duly registered practitioner under the New Brunswick Medical Act, C. S. 1903, c. 73, at the time the services were rendered, and there is no presumption from the fact that the plaintiff is registered in one year that he continues to be registered beyond that year. *Tozer* v. *McIntosh*, 39, p. 550.

MERGER.

Leasehold Merged in Freehold—See *DeBury* v *DeBury*, 36, p. 57.

Mortgage collateral to bond—Interest chargeable—The assignee of the equity of redemption in a mortgage on May 31st, 1884 executed his bond to the mortgagee conditioned to pay him $2,200 (this being the balance due on the mortgage) in one year and "in the meantime and until the said sum is fully paid and satisfied, pay interest thereon or upon such part thereof as shall remain unpaid, such interest to be calculated from the first day of June, 1884, at the rate of seven per centum per annum."—Suit for foreclosure of the mortgage was brought, the mortgagee having previously recovered judgment against the defendant on the bond. —*Held*, that the bond being merged in the judgment, the defendant thereafter could only be charged with the statutory rate of interest on judgment debts, and consequently no higher rate from then could be charged against him in the foreclosure suit. *Hanford* v. *Howard*, 1 Eq., p. 241.

MILITIA.

Canteen—*Held*, that the infantry school corps at Fredericton has the right to establish and maintain a canteen to be conducted in accordance with the Queen's Regulations; and that, inasmuch as the active militia is subject to these orders and regulations, every officer and man of the militia, from the time of being called out for active service, and also during the period of annual drill or training, has an equal right with the members of the infantry school corps, to purchase ale and other articles for sale at the canteen. Ex *parte Patchell*, 34, p. 258.

MINES MINING AND MINERALS.

Mining Act — Powers of Surveyor General—One R. assigned certain applications for licenses to work under the General Mining Act, C. S. 1903, c. 30, to "C." Co. and licenses to work were issued to "C." Co.—R. claimed that these applications were assigned to "C." Co. on certain trusts and on refusal of the "C." Co. to carry out such trusts he applied to the Surveyor General to cancel his assignment and the licenses issued to "C." Co.—On April 8, 1909, after an *ex parte* inquiry, the Surveyor General made an order cancelling the assignment and the licenses, and ordering new licenses to issue to R.—On May 27, 1909, upon applicaton of the "C." Co. the Surveyor General held a rehearing at which both parties were present, and after the hearing confirmed his first order.—On September 13, an order for certiorari was granted. —*Held*, (1) certiorari would lie to remove these orders; (2) the Surveyor General had no jurisdiction to make the orders, the dispute being between private parties, and the case not falling within the provisions of the General Mining Act authorizing the cancellation of licenses by the Surveyor General.; (3) the fact that the orders were void was no objection to their being removed and quashed on certiorari; (4) the delay of one term in applying for certiorari was not fatal, the orders having been made without jurisdiction; and (5) the fact that both parties submitted the case for adjudication by the Surveyor General would not confer jurisdiction upon him nor be construed as a submission to arbitration. *R.* v. *Grimmer, Ex parte Shaw*, 39, p. 477.

Mining rights, Assignment of—Whether absolute or not—See *Shaw et al* v. *Robinson et al*, 4 Eq., p. 286.

Mortgage made abroad of mining property in N. B.—Judgment creditor of mortgagor—Mining leases of lands in this province and of the minerals therein issued by the Crown to the appellant company, subsequent to a mortgage executed by it in the state of N. to the respondent company, incorporated under the laws to the said state of N., which laws, unlike those of this province, do not reserve the minerals to the state, are subject to the mortgage—A judgment creditor of the mortgagor having purchased the leases at sheriff's sale under an execution upon his judgment, whereupon, new leases were issued to him in his own name the Crown having no knowledge of the mortgage, took said new leases subject to the mortgage.—The mortgage, though not registered under section 139 of the General Mining Act, C. S. 1903, c. 30, is not void as against a judgment creditor who had notice of the mortgage, and whose judgment was not registered under the section at the commencement of the suit.—The judgment creditor is not entitled to a lien prior to the mortgagee for the amount of the rent paid to the government on the licenses declared to be held in trust for the mortgagee. As owner of the equity of redemption, such payment must be taken as in protection of his own interests. *The Mineral Products Co. et al* v. *The Continental Trust Co.*, 3 Eq., p. 28; 37 N. B. R., p. 140.

Right of riparian owner that water shall not be polluted—A riparian owner has the right to the full flow of the water in its natural state, without diminution or pollution, so, where it is shown that the defendant was polluting the water by operating an iron mine and thereby injuring the fishing rights of the plaintiff, an injunction was granted; but, as the works of the defendant were important, the Court ordered that the injunction should not become operative for over three months, in order that the defendant might have an opportunity to prevent the pollution by alterations to its plant.—Leases granted under the Mining Act, C. S. 1903, c. 30, do not empower the lessee to discharge polluted water into a stream; the Lieutenant-Governor-in-Council has no power to make a lease or grant that affects the rights of private individuals. *Nepisiguit Real Estate & Fishing Co. Ltd.* v. *Canadian Iron Corporation*, 42, p. 387, C. D.

MISTAKE.

Equity Court, Invoking aid from—The Court requires as a condition of its interference either by way of rectifying or of rescinding the instrument that the evidence should be so strong and convincing as to leave no reasonable doubt that the mistake has been made. *Carman* v. *Smith*, 3 Eq., p. 44.

Judge's order—Intention of judge—A company against which a winding-up order had been made obtained at the instance of the large majority of its shareholders and holders of its bonds an order in an action by it against C. granting leave to appeal to the Supreme Court of Canada from a judgment of the Supreme Court of this province confirming a judgment of the Supreme Court in Equity, and entrusting

the conduct of the appeal to the company's solicitors.—Subsequently the liquidators of the company moved to vary the order by adding a direction that the case on appeal should not be settled until an appeal to the Supreme Court of Canada from the judgment of the Supreme Court of this province refusing to set aside the winding-up order was determined, and that the company's solicitors on the appeal in the action against C. should act therein only on instructions of the liquidators or their solicitor.—*Held*, that as there was no error or omission in the order resulting from mistake or inadvertence, and the order expressed the intention of the judge who made it, the motion should be refused. *In re The Cushing Sulphite Fibre Co. Ltd.*, 3 Eq., p. 231.

Mistake of law—Ignorance of legal effect no excuse—M. executed and delivered to the defendant a leasehold mortgage and a bill of sale of personal property to secure the payment of $500 and $1,500 respectively.—Subsequently M. executed and delivered to the defendant as party of the second part a deed of assignment for the benefit of her creditors, being parties of the third part.—A condition in the deed stipulated that the parties of the second and third parts in consideration of the sum of one dollar to each of them paid "did severally remise, release and discharge the party of the first part of, from and against all debts, dues, claims and demands, actions, suits, damages, and causes and rights of action, which they then had or might thereafter have against the party of the first part, for or by reason of any other matter or thing from the beginning of the world up to that date."—The defendant and other creditors executed the deed.—The assignor was indebted to the defendant in no other amount than that secured by the mortgage and bill of sale.—In a suit by the plaintiff, a creditor of M. to have the defendant enter a discharge and satisfaction upon the records of the mortgage, and to discharge the bill of sale, and to have the same declared null and void, *held*, that the defendant had released the mortgage and bill of sale, and that it was immaterial that he had no intention of releasing them, or that he was ignorant of the legal effect of his act. *May* v. *Sievewright*, Eq. Cas., p. 499.

Mutual mistake—Parties not "ad idem"—Under a verbal agreement for the sale of a piece of land by the defendant to the plaintiff, with the consent of the defendant, entered upon the property and erected a barn and planted fruit trees.—On an action for specific performance, *held*, that the evidence failed to show that the parties were *ad idem* and, on that ground, the order was refused.—*Held*, that as no completed contract existed, the plaintiff was not entitled to damages under the Judicature Act, although since the passing of this Act damages may be awarded for the breach of an agreement, where the Court finds the plaintiff is not entitled to specific performance.—*Held*, that compensation should be allowed the plaintiff for the barn and fruit trees in the possession of the defendant, on the ground that a mutual mistake had been made by the parties, in believing a contract existed. *Kerr* v. *Cunard et al*, 42, p. 454, C. D.

Rectification of instruments — The plaintiff, intending to sell the whole of a piece of land, sold it under a verbal contract describing it as the D. lot.—The deed to the purchaser followed the description in the vendor's deed.—After the vendee's death, and about ten years after the contract of sale was made, the vendor sought to have the deed rectified on the ground that it contained more land than that known as the D. lot.—The evidence did not show that the D. lot did not embrace the whole of the land conveyed.—*Held*, that the bill should be dismissed. *Carman* v. *Smith*, 3 Eq., p. 44.

Though in order to secure the rectification of an instrument the clearest evidence is required to be adduced, yet, if one of the parties to it denies that there is any mistake, the Court will consider all the circumstances surrounding the making of the instrument and whether it accords with what would reasonably and probably have been the agreement between the parties, and, if satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, will rectify it. *Douglas* v. *Sansom*, 1 Eq., p. 122.

Will—Legal effect of language used—If a solicitor *bona fide* used language whose legal effect in his opinion was precisely what the testator intended by his instructions; if the testator, being of sound and disposing mind and memory, having the clause read to him, accepts the opinion of his solicitor that its legal effect is in accordance with his wishes, and then executes the will, then it must stand, however erroneous the opinion of the solicitor may be. *In re Estate Wm. John Davis*, 40, p. 23.

MORTGAGES.

1. **Assignment.**
2. **Bar by Statute of Limitation.**
3. **Construction and Operation.**
4. **Covenants.**
5. **Discharge.**
6. **Distress.**
7. **Equitable Mortgage.**
8. **Foreclosure.**
9. **Fraud and Mistake**—*See* FRAUD.
10. **Interest.**

11. Possession.

12. Redemption.

13. Reference and Accounts.

14. Registration.

15. Requisites and Validity.

(Execution and Delivery.)

16. Sale.

17. Subsequent Encumbrances.

1. Assignment.

Interest—Transfer taken at request of mortgagor—At the request of the mortgagor the defendant took a transfer of a mortgage and paid off the principal and interest.—*Held*, that, in the absence of an agreement, interest could not be charged on the sum paid for interest. *Thomas* v. *Girvan*, 1 Eq., p. 257.

Power of sale—*Semble*, the assignment of a mortgage containing a power of sale to be exercised by the mortgagee and assigns transfers the power of sale unless it is expressly excepted (*per* White J.). *Chute et al* v. *Adney*, 39, p. 93.

2. Bar by Statute of Limitations.

Separate mortgages to secure joint and several bond—On September 27th, 1850, H. and W. gave their joint and several bond to C. to secure the payment of £1,000 on September 27th, 1855, with interest thereon quarterly in the meantime.—As between H. and W. the latter was surety, though they were both principal debtors by the bond.—On the same day H. and W. executed to C. separate mortgages on separate pieces of property owned by each to secure the payment on September 27th, 1855, of the amount of the bond, neither party executing or being a party to the mortgage of the other.—The mortgage from W. was upon the condition that if he and H. or either of them, their or either of their heirs, etc. paid to C. £1,000 and interest, according to the condition of the bond by H. and W. it should be void.—The mortgage given by H. contained a similar provison.—The interest on the debt was paid regularly by H. up to the 27th of March, 1879, after which his payments ceased.—W. and his successors in title were never out of possession of the land mortgaged by him from the date of the mortgage and never made any payment or gave any acknowledgment.—On January 20th, 1881, C.'s representatives commenced this suit for foreclosure and sale of both mortgaged premises.—*Held*, that the mortgage given by W. was extinguished under the Statute of Limitations, c. 84, C. S. N. B., ss. 29 and 30. *Lewin* v. *Wilson et al*, Eq. Cas., p. 167. (Reversed 11 A. C., 639.)

3. Construction and Operation.

Agreement by mortgagor to convey does not bind mortgagee—N. B. Railway Act—An agreement by a mortgagor to convey lands under s. 14 of the New Brunswick Railway Act, C. S. 1903, c. 91, does not bind the mortgagee of such lands.—Proceedings based on a notice under s. 17, sub-s. 27 of the New Brunswick Railway Act, which has not been served on a mortgagee as ordered by the Court, will be set aside on application of the mortgagee. *In re Reardon and The Saint John & Quebec Railway, Ex parte Shea*, 42, p. 244.

Bank shares—Double liability—Indemnity—The plaintiff deposited with the defendants, a banking firm, a sum of money at interest, and received as security 275 shares owned by the defendants in the M. bank which were transferred into the plaintiff's name.—The plaintiff gave to the defendants an acknowledgment, stating that he held the shares in trust and as collateral security for the due payment of moneys deposited with the defendants, on the payment of which he would re-transfer the shares to them.—On a redistribution by the bank of the shares, they were reduced to 99.—The dividends on the shares were always paid by the bank to the defendants, who treated the shares as their own in their office books.—The bank went into liquidation and the plaintiff was obliged to pay $9,900 double liability on the shares.—*Held*, that the plaintiff and defendants stood in the relation of mortgagee and mortgagor in respect of the shares, and not of trustee and *cestui que trust*, and the defendants were not liable under such relation to indemnify the plaintiff. *Marsters* v. *MacLellan et al*, Eq. Cas., p. 372.

Bonus for loan—Fetter on redemption—The proviso for redemption in a mortgage dated August 30, 1902, to secure an advance of £3,500, was the payment on November 11, of £6,000 and the transfer of £5,000 in shares in a company to be promoted by the mortgagor.—The principal money advanced was applied in purchasing the mortgaged premises, the value of which was speculative, being practically comprised in undeveloped salt springs which the proposed company were to work.—In a suit for foreclosure, *held*, that the proviso for redemption should not be relieved against. *Buchanan* v. *Harris*, 3 Eq., p. 61.

Evidence — Transfer absolute in form really a mortgage—Although collateral evidence is admissable to shew that notwithstanding the plain terms of an absolute transfer of property, it was intended that the transferor should have a right of redemption, the evidence must be of the clearest and most conclusive character to overcome the presumption that the deed of transfer truly states the transaction. *McLeod* v. *Weldon*, 1 Eq., p. 181.

Maintenance, Lien for—Where a testator by his will gave his estate, consisting of farm and dwelling and personal property, to his son upon condition that he would maintain testator's widow and daughters, except in the event of their marrying or leaving home, and declared that they should have a home in the dwelling while unmarried, it was held that the estate was charged with their maintenance. *Cool* v. *Cool*, 3 Eq., p. 11.

Maintenance agreements—*See* BOND.

Mortgage made in New York where minerals pass with the land—Mining leases of lands in this province and of the minerals therein issued by the Crown to the appellant company, subsequent to a mortgage executed by it in the state of N. to the respondent company, incorporated under the laws of the said state of N., which laws, unlike those of this province, do not reserve the minerals to the state, are subject to the mortgage. *The Mineral Products Co.* v. *Continental Trust Co.*, 37, p. 140.

"Plant," Meaning of—The word "plant" in a mortgage of a mill, held not to include office furniture, or a horse and carriage used for occasional errand purposes in connection with the mill, or material kept on hand for repairs to machinery; but held to include scows used for lightering the output of the mill from its wharf to steamers, and in lightering coal for the use of the mill, and also to include such stores as axes, shovels and files and other articles complete in themselves, used in carrying on the mill business, but such stores only. *Eastern Trust Co.* v. *The Cushing Sulphite Fibre Co. Ltd.*, 3 Eq., p. 378.

Railway Acts 1888 and 1903 — Mortgage given in 1897—The Railway Act, 1888 (D), after providing that a railway may secure its debentures by a mortgage upon the whole of such property, assets, rents and revenues of the company as are described in the mortgage, provides that such rents and revenues shall be subject in the first instance to the payment of the working expenditure of the railway.—By the Railway Act, 1903 (D), the lien is enlarged to apply to the property and assets of the company, in addition to its rents and revenues.—A mortgage by the defendants, made in 1897, was foreclosed and the property sold, the proceeds being paid into Court.—In a claim for a lien thereon in priority to the mortgagee for working expenditure made after the commencement of the Act of 1903, *held*, that the clause in the Act of 1903 was not retroactive, and that as the mortgage was given under the Act of 1888, the lien was limited to rents and revenues, and did not apply to the fund in Court. *Barnhill* v. *The Hampton and Saint Martins Rly. Co.*, 3 Eq., p. 371.

4. Covenants.

Commuting future payments — By agreement between A. and the town N., A agreed to organize a company and erect a factory in the town of N. and to maintain and operate the same for twenty years, and employ an average of seventy-five hands during that period, and the town agreed to make certain concessions to the company and to lend it $20,000 repayable without interest, by annual instalments of $1,000 to be secured by mortgage on the company's property with the provision that the company might at any time repay the balance of the loan "at the then cash value figured at the rate of four per centum per annum." —The company was organized, the factory built as agreed, and a mortgage given in pursuance of and referring to the above agreement, and the factory was insured for $10,000 payable to the town "as its interest may appear."—After three years the company ceased to operate and went into liquidation, and shortly after that the factory was burned.—Two instalments had been paid and one was overdue.—*Held*, the town of N. was entitled out of the insurance money to retain the amount of the overdue instalment with interest, and the liquidator was entitled to have the mortgage discharged on the further payment to the town out of the insurance money of an amount equal to the cash value of the future instalments at the date of payment on the basis of 4 per cent. compounded annually. *In re the Anderson Furniture Co. Ltd.*, 39, p. 139.

Insurance effected by mortgagee without notice—A policy of insurance on a mortgaged property contained a condition that the insured should give notice of any other insurance already made, or which should afterwards be made elsewhere on the same property, whether valid or not valid, and whether concurrent or otherwise, so that a memorandum of such insurance might be indorsed on the policy.—The mortgagee, without such notice or endorsement, effected another insurance with another company in the name of the plaintiff's wife, with the loss, if any, payable to himself as his interest might appear.—*Held*, that the mortgagee's insurance without the notice and endorsement voided the plaintiff's insurance. *Perry* v. *Liverpool, London and Globe Insurance Co.*, 34, p. 380.

Interest clause—A mortgage provided for payment of the principal on a certain date, with interest thereon at the rate of nine per cent., payable annually, and that the same rate of interest should be paid from and after the expiration of the date fixed for payment of the principal until the whole sum was paid, and that overdue interest should bear interest at nine per centum per annum.—*Held*, that the principal bore interest at nine per cent., both before and after maturity, and that overdue interest bore interest at nine per cent., whether it accrued due before or after the maturity of the principal. *King* v. *Keith*, 1 Eq., p. 538.

Proviso — Scope of covenant — "and interest"—The proviso for payment in a mortgage to secure an indebtedness provided for the payment of "said overdrawn account and all promissory notes or bills of exchange (and interest upon the same) then due and payable."—*Held*, that interest was made chargeable upon the overdrawn account. *Bank of Montreal* v. *Dunlop*, 2 Eq., p. 388.

5. Discharge.

Assignment of mortgage — Payment of principal debt to mortgagee—Notice—A. gave B. a mortgage on land to secure payment of A.'s bond held by B.—Subsequently A. sold the equity of redemption to C. and B. assigned the bond and mortgage to the plaintiff by a registered transfer.—Afterwards C. obtained an advance of money from D. by a mortgage of the equity of redemption, the money being applied by D. to paying B. the amount of the original mortgage, and B. discharged the mortgage on the records.—Neither C. nor D. had notice of the assignment of the bond and mortgage to the plaintiff.—In a suit by the plaintiff for the foreclosure and sale of the mortgaged premises, *held*, that payment by A. or his assigns to B. of the indebtedness owing upon the bond without notice of the assignment of the bond and mortgage to the plaintiff entitled A. or his assigns to a reconveyance of the mortgaged premises, and that the registration of the assignment of the mortgage did not affect A. or his assigns with notice. *Lawton* v. *Howe et al*, Eq. Cas., p. 191.

Mining leases—The mortgage, though not registered under section 139 of the General Mining Act, C. S. 1903, c. 30, is not void as against a judgment creditor who had notice of the mortgage, and whose judgment was not registered under the section at the commencement of the suit.—The judgment creditor is not entitled to a lien prior to the mortgagee for the amount of the rent paid to the government on the licenses declared to be held in trust for the mortgagee.—Such payment must be taken as made in his own interest as owner of the equity of redemption. *The Mineral Products Co. et al* v. *The Continental Trust Co.*, 37, p. 140.

Payment. Proof of—Payment of a mortgage debt must be proven by the mortgagor beyond reasonable doubt. *True* v. *Burt*, 2 Eq., p. 497. *Nixon* v. *Curry et al*, 4 Eq., p. 153.

Payment to mortgagee's solicitor—Scope of solicitor's agency—Ratification—Land subject to mortgage to secure a loan arranged through the mortgagee's solicitor was purchased by the plaintiff.—On the death of the mortgagee certain monies of her estate were left by her administrator with the solicitor for investment, and the solicitor opened up in his books an account with the estate.—The solicitor, without the knowledge or authority of the administrator required the plaintiff to pay off the mortgage.—To raise the money the plaintiff gave a mortgage to one J., who paid the money to the solicitor, and he credited the payment of the mortgage in the accounts of the estate in his books.—The money was never paid or accounted for to the administrator.—Some months afterwards he instructed the solicitor to get in the mortgage.—The solicitor died insolvent.—*Held*, that the relation of solicitor and client between the administrator and the solicitor did not authorize the latter to receive payment of the mortgage; that an express authority for the purpose or an authority implied from a course of dealing between the parties, neither of which existed here, was necessary; that the subsequent authority did not operate as a ratification of the payment; and that the plaintiff must bear the loss. *Foreman* v. *Seeley*. 2 Eq., p. 341.

Unintentional discharge—Ignorance—M. executed and delivered to the defendant a leasehold mortgage and a bill of sale of personal property to secure the payment of $500 and $1,500 respectively.—Subsequently M. executed and delivered to the defendant as party of the second part a deed of assignment for the benefit of her creditors, being parties of the third part.—A condition in the deed stipulated that the parties of the second and third parts in consideration of the sum of one dollar to each of them paid, "did severally remise, release and discharge the party of the first part of, from and against all debts, dues, claims and demands, actions, suits, damages, and causes and rights of action which they then had or might thereafter have against the party of the first part, for or by reason of any other matter or thing from the beginning of the world up to that date."—The defendant and other creditors executed the deed.—The assignor was indebted to the defendant in no other amount than that secured by the mortgage and bill of sale.—In a suit by the plaintiff, a creditor of M., to have the defendant enter a discharge and satisfaction upon the records of the mortgage, and to discharge the bill of sale, and to have the same declared null and void, *held*, that the defendant had released the mortgage and bill of sale, and that it was immaterial that he had no intention of releasing them, or that he was ignorant of the legal effect of his act. *May* v. *Sievewright*, Eq. Cas., p. 499.

6. Distress.

Attornment clause—Distress—An attornment clause in a mortgage is valid if it constitute a real relation of landlord and tenant between the mortgagee and mortgagor, and a distress levied for the rent is good, though the rent reserved is sufficient during the term specified in the mortgage, viz., ten years, to repay the principal

money and interest thereon at seven per cent. *Massey-Harris Co. Ltd.* v. *Young*, 37, p. 107.

7. Equitable Mortgages.

Agreement of sale and purchase when vendee in possession equivalent to mortgage—Payment of part of the purchase money by a person in possession of land under an agreement to purchase is a renewal of the tenancy at will, and the Statute of Limitations begins to run from such payment. —As between the vendor and a vendee in possession under an agreement to purchase, the vendor is substantially a mortgagee entitled to the rights and privileges to a mortgagee under s. 30, c. 139, C. S. 1908, and is also as a mortgagee within the exception provided by section 8 of the statute, and the right of entry of the vendor and his representatives would not be extinguished for 20 years after the last payment of principal or interest. *Anderson* v. *Anderson*, 37, p. 432.

Priorities—A married woman owning leasehold land as her separate estate, agreed by parol with A. that in consideration of his building a house thereon she would secure him by a mortgage of the premises, and the house was accordingly built.—Subsequently she became indebted to the plaintiffs, and they obtained a decree charging her separate estate with their debt.—The decree was never registered.—After the decree, she gave a mortgage to A. in accordance with her agreement with him, and the mortgage was duly registered.—In a petition by A. to have the mortgage declared a valid charge upon the property in priority to the plaintiff's decree, *held*, that the plaintiffs decree must be postponed to the equities existing against the property in favour of A. at the time of the decree. *In re The Petition of William G. Bateman; Chute et al* v. *Amelia Gratten et al*, Eq. Cas., p. 538.

8. Foreclosure.

Administrator improperly joined — Disclaiming—Costs—As a general rule the administrator of a deceased mortgagor should not be made a party to a foreclosure suit.—Where an administrator is improperly made a party to such a suit he should disclaim in order to entitle him to have the bill dismissed with costs.—Disclaimer is as applicable where a defendant has no interest as where he has an interest which he is willing to abandon.—Where an administrator improperly made a party to a foreclosure suit did not disclaim and the cause proceeded to a hearing, he was equitably dealt with by being allowed costs, on the dismissal of the bill, up to and including his answer.—Where the administrator of a mortgagor was improperly joined in a foreclosure suit costs thereby incurred were not allowed to the plaintiff. *Barnaby* v. *Munroe et al*, 1 Eq., p. 94.

Assignment of surplus, if any, from foreclosure sale—See *Chapman* v. *Gilfillman*, 2 Eq., p. 129.

Company, owner of equity of redemption, in process of winding-up—By section 16 of the Winding-up Act, R. S. C., c. 129, proceedings by a mortgagee under a decree of foreclosure of the company's premises is stayed, but the mortgagee has the absolute right to have leave to proceed unless special circumstances make it inequitable for him to do so.—The exercise of discretion in granting or refusing leave by the judge having charge of the winding up proceedings may be reviewed on appeal. (*Per* Hanington, Barker and Gregory JJ.)—*Held* (*per* Tuck C. J.), that the power given by section 13 to stay, and the stay provided by section 16, of any suit or action, does not apply to proceedings under a decree of foreclosure.—*Held* (*per* Tuck C. J., Hanington Barker and Gregory JJ.), the liquidators have no equity to have the conduct of the sale under foreclosure proceedings, and an order made at their instance by the judge directing the winding-up proceedings, postponing the sale and directing the referee as to the advertising and fixing a subsequent date for the sale is bad.—*Held* (*per* McLeod J.), that the order, though wrong in point of form, was in substance an order for leave to proceed under section 16 and should not be interfered with on appeal.—*Held* (*per* Tuck C. J., Hanington, Barker and Gregory JJ.), that a judge other than the judge directing the winding-up proceedings may grant leave to appeal from his order, and any judge has the abstract right to make orders in a winding up proceeding, but ought not to do so unless specially requested by the judge in charge, or under exceptional circumstances.—*Held* (*per* McLeod J.), that no judge other than the judge having charge of the winding up proceedings has authority to make any order in reference thereto, unless such judge is unable to act.—*Held* (*per* Barker, McLeod and Gregory JJ.), the appeal from the order of a judge in charge of winding up proceedings is to the Court, and cannot be varied or rescinded by an order of a single judge, though made in excess of his jurisdiction under the Winding-up Act.—*Held* (*per* Tuck C. J. and Hanington J.), that as the judge, under the winding up proceedings has no jurisdiction to make an order interfering with the foreclosure proceedings, an order of another judge having jurisdiction staying that order and giving directions as to foreclosure proceedings is good. *In re The Cushing Sulphite Fibre Co. Ltd.*, 38, p. 581.

Ejectment, Action of based on foreclosure—See *The Colonial Investment and Loan Co.* v. *DeMerchant et al*, 38, p. 431.

Executor de son tort—Assets in hand to pay—Accounting—An executor *de son tort* cannot foreclose a mortgage given to him by the intestate if he has in his hands sufficient assets of the deceased to pay the

mortgage debt.—Where, in a suit by an executor *de son tort* for foreclosure of a mortgage to himself by the intestate, it appeared that no administrator had been appointed, and by the answer of the heirs, it was alleged that the plaintiff had assets to his hands belonging to the deceased sufficient to pay the mortgage, the Court under c. 49, C. S., s. 47, appointed a barrister of the Court to represent in the suit the estate of the deceased, and ordered the heirs to file a cross-bill against the plaintiff for an account. *Kenny* v. *Kenny et al.* Eq. Cas., p. 301.

Foreclosure suit — Appearance — Motion—Where defendant appeared to a foreclosure suit and the plaintiff gave notice of motion to take the bill *pro confesso* for want of a plea, answer or demurrer, he was not allowed to move that the amount due on the mortgage be assessed and the usual order of sale made. — The only order obtainable is one in accordance with the notice given. *Hanford* v. *Howard*, 1 Eq., p. 241. (January 1896) *cf.* Rule of Court H. T. 1896 (Ed.)

Interest chargeable—Bond collateral to mortgage—A. and his wife gave a mortgage bearing date January 25th, 1867, on land belonging to the former to secure the payment of £332 16s. with lawful interest, on June 1st, 1867, accompanied with A.'s bond in the same terms.—In 1875 the mortgage and bond became vested in the plaintiff.—On June 12th, 1880, A. executed a bond to the plaintiff, reciting that there was due on the original bond on December 31st, 1879, for principal and interest $1,971.90 and providing that, in consideration of time for its payment, annual interest thereon should be paid at seven per cent., and that the annual interest as it accrued due, if it were not paid, should become principal and bear interest as such.—In 1867 and 1873 A. acknowledged by memoranda indorsed on the mortgage, the amount due thereon, and in both instances the amount was computed by charging compound interest at six per cent. with yearly rests.—On August 18th, 1887, the balance due December 31st, 1886, was struck by charging compound interest at seven per cent. with yearly rests, from December 31st, 1879, to the time when the balance stated in the second bond was struck, and an acknowledgment stating the amount due on the mortgage was signed by A. upon the mortgage.—In a suit for foreclosure, after A.'s death in 1895, against his widow, to whom the equity of redemption had nominally been assigned by A. *held*, that there was evidence of an agreement by A. from the acknowledgments indorsed on the mortgage, to charge the land with the payment of compound interest at six per cent., with yearly rests up to December 31st, 1886, and that the land was so charged; but that the agreement in the second bond only created a personal liability, and that the mortgage bore simple interest at six per cent from December 31st, 1886.—On appeal by defendant, 34 N. B. R. 301, judgment affirmed that acknowledgment of Aug. 18th, 1887 bound the land.—*Semble* (*per* Tuck C. J.), whether if plaintiff had appealed, the mortgaged premises would not have been held bound for the whole amount due on R.'s bonds, the bonds and mortgage being inseparable, and there being an implication of law that the purchaser of mortgaged premises is under personal obligation to pay the mortgagor. *Jackson* v. *Richardson*, 1 Eq., p. 325.

Judgment creditor necessary party—A judgment creditor, who has registered a memorial of judgment, is a necessary party to a suit to foreclose a mortgage on land belonging to the wife of the judgment debtor. *Horn et al* v. *Kennedy et al*, Eq. Cas., p. 311.

Parties — Costs—Where a judgment creditor having registered a memorial of his judgment is made a party to a suit for the foreclosure of a mortgage given previously by the judgment debtor disclaims, he is not entitled to costs on the dismissal of the bill as against him.—*Horn* v. *Kennedy*, Eq. Cas., p. 311, followed. *Nicholson* v. *Reid*, 1 Eq., p. 607.

Practice—Offer to suffer judgment by default—An offer to suffer judgment by default, under Act 53 Vict., c. 4, s. 130, is not applicable to a suit for the foreclosure of a mortgage and sale of the mortgaged premises.—One of several defendants cannot offer to suffer judgment by default. *Jeffries* v. *Blair et al*, 1 Eq., p. 420.

Practice—Service of summons—It is not sufficient in an affidavit of service of summons in a foreclosure suit to state that the defendant was served with a true copy without stating that it was indorsed with a true copy of the indorsement on the summons. *Jackson* v. *Humphrey*, 1 Eq., p. 341.

Receivers' certificates, Priority of—In a debenture-holders' suit to enforce their security, which was against all the property of a railway company, receivers appointed to operate and manage the railway and business of the company, and maintain the road and rolling stock, were empowered to borrow a limited sum on receivers' certificates made a first charge on the company's property, in priority to the debenture security, to pay expenses incurred by them in necessary repairs, and in operating the road. *Sage* v. *The Shore Line Rwy. Co.*, 2 Eq., p. 321.

Sale by Court when title of mortgagor in question—A mortgagor will be foreclosed though he may have had no interest in the premises to mortgage, but, in such an instance, a sale will not be ordered.—It is not desirable, where any substantial question is suggested as to the title which a purchaser might get under a sale made in pursuance of a decree of the Court, to order one. *Doherty* v. *Hogan et al*, 1 Eq., p. 113.

Surplus—Paying into Court to avoid proceedings by creditor of mortgagor—A mortgage sale under power yielded a surplus of $320.29, out of which the mortgagee applied to pay into Court $246.89, being amount of a judgment against the mortgagor, which the judgment creditor sought by suit to have paid out of the surplus as against the owner of the equity of redemption in the mortgage.—*Held*, that on the mortgagee paying into Court the whole surplus, less the costs of his appearance and application, his name should be struck out of the suit. *Boyne* v. *Robinson*, 3 Eq., p. 57.

Trust mortgage — Company law — Petition for winding up—A company issued bonds payable to bearer, the payment of which was secured by a trust mortgage, by which the company purported to assign certain of its property to trustees, in trust for the benefit of the bond-holders, and covenanted with the trustees for the payment of the principal and interest of the bonds to the bondholders.—*Held* (*per* Barker, McLeod and Gregory JJ.,) that the holder of some of the bonds, the interest of which was overdue, was entitled to petition for the winding-up of the company.—*Held* (*per* Tuck C. J., and Hanington J.), that the bonds and trust mortgage must be read together, and that under the terms of the trust mortgage a bondholder was not a creditor within the meaning of the act, and was not entitled to petition for a winding-up order. *In re The Cushing Sulphite Fibre Co. Ltd.* and *The Winding-up Act and Amending Acts*, 37, p. 254.

Bill sustained for the rectification of a mortgage, and for the foreclosure and sale of the mortgaged premises. *King* v. *Keith*' 1 Eq., p. 538.

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9. Fraud and Mistake.

See FRAUD.

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10. Interest.

Acceleration clause in operation due to default—Bonds dated July 1, 1902, provided for payment of the principal in ten years from date, and that in the meantime interest thereon should be paid at the rate of 10 per cent.—Default having been made in payment of the interest, the trustees under a mortgage given to secure the bonds made on January 1, 1905 a declaration calling in the principal and interest, under an acceleration clause in the mortgage.—*Held*, that interest at the rate provided for, and not at the statutory rate, was payable after the date of the declaration. *The Eastern Trust Co.* v. *Cushing Sulphite Fibre Co. Ltd.*, 3 Eq., p. 392.

Bond merged in judgment —Lawful interest only—The assignee of the equity of redemption in a mortgage on May 31, 1884, executed his bond to the mortgagee conditioned to pay him $2,200 (this being the balance due on the mortgage) in one year and "in the meantime and until the said sum is fully paid and satisfied, pay interest thereon or upon such part thereof as shall remain unpaid, such interest to be calculated from the first day of June 1884, at the rate of seven per centum per annum."—In a suit for foreclosure of the mortgage, *held*, that, assuming that as against the assignee the land was chargeable with the debt and interest according to the terms of the bond the mortgagee was only entitled after the first of June 1885, to the statutory rate of interest.—Before the above foreclosure suit was brought the mortgagee recovered judgment against the defendant on the bond.—*Held*, that the bond being merged in the judgment, the defendant thereafter could only be charged with the statutory rate of interest on judgment debts, and consequently no higher rate from then could be charged against him in the foreclosure suit. *Hanford* v. *Howard*, 1 Eq., p. 241.

Mortgage, Advancing money to pay—Interest—At the request of the mortgagor the defendant took a transfer of a mortgage and paid off the principal and interest.—*Held*, that, in the absence of an agreement, interest could not be charged on the sum paid for interest. *Thomas* v. *Girvan*, 1 Eq., p. 257.

Overdue payments—Interest at higher rate than statutory one, Effect of—In a mortgage of real estate, the proviso for payment was that the principal should be paid in five equal annual instalments, with interest semi-annually at eight per cent.; and five promissory notes with interest at that rate were given.—*Held*, that in a suit for redemption, when there was no special agreement for interest on overdue payments the mortgagor adopting a certain rate higher than the statutory one and making payments under it, was bound by that rate so far as payments actually made were concerned, but was not bound as to unmade or future payments, and only the statutory rate could be enforced. *McKenzie* v. *McLeod et al*, 4 Eq., p. 72; 39 N. B. R., p. 230.

See also *King* v. *Keith*, ,1 Eq., p. 538 supra, col. 530, and *Jackson* v. *Richardson*, 1 Eq. p. 325, supra, col. 535.

Parol Agreement—A parol agreement to increase the rate of interest reserved by a mortgage upon land will not be enforced as against the land. *Murchie* v *Theriault*, 1 Eq., p. 588.

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11. Possession.

Abortive sale — Accounting — Interest—A mortgagee, his power of sale on default having arisen, sold the mortgaged premises ostensibly to a third person, in reality to himself.—Subsequently he sold a portion of the premises to a third person for an amount in excess of the mortgage debt.—He continued in possession of the remaining part, and received rent.—*Held*, that the sale by the mortgagee to himself was abortive, and that he was a mortgagee in possession, and should account to the

mortgagor for the surplus from the second sale, together with the rent, and interest should be paid by him on both sums and costs. *Mitchell et al* v. *Kinnear et al*, 1 Eq., p. 427.

Machinery affixed to realty — Unregistered lien — Possession — The Port Elgin Woollen Co. purchased from the plaintiffs on the instalment plan, a steam engine under an agreement in writing which provided that it should not become the property of the vendee until the payment of all the instalments, and should be removable by the vendor on failure of the vendee to pay as agreed.—The engine was affixed to the freehold of the vendee by bolts and screws to iron plates embedded in concrete to prevent it from rocking and shifting, and might have been removed at any time without injury to the freehold.—It was used for driving the machinery in the factory of the vendee.—Default having been made in the payment of the instalments, the engine was claimed by the vendor and also by the defendant, a mortgagee of the land on which the mills were situate and all the mill plant, engines, etc., who took his mortgage after the engine had been installed and without notice of the plaintiff's claim, the agreement not having been registered.—The mortgage was foreclosed by the defendant and the mortgaged property was bought in by him under a sale by a referee in equity for an amount less than the mortgage debt —The plaintiffs were not parties to foreclosure proceedings, but were aware of the pendency of the same.—No report of the sale or motion to confirm was made.—*Held* (*per* Tuck C. J., Hanington, Landry, McLeod and Gregory JJ.), that the engine was sufficiently annexed to the land to become part of the freehold, and passed to the defendant under his mortgage.—That, by the mortgage to the defendant, the engine passed as part of the realty, and on his taking possession, if not by virtue of the mortgage alone, all right in the plaintiffs to retake it was put an end to. *The Goldie & McCullough Co. Ltd.* v. *Hewson*, 35, p. 349.

Rentals — Collecting — Commission —Failure to collect—A mortgagee in possession is not as a rule entitled to commission for collecting rents.—There must be evidence to support such a charge.—Before a mortgagee in possession can be made liable for rents which he has failed to collect there must be evidence to show that it has been due to his default in some way. *Earle* v. *Harrison et al*, 4 Eq., p. 196.

Rent demanded by mortgagee—Restoring mortgagor to original tenancy—A mortgagor let the mortgaged premises subsequently to the mortgage.—The mortgagee gave a notice to the tenant informing him of the mortgage and requiring him to pay to them all rent due and payable under the lease.—*Held*, that the notice did not make the tenant the tenant of the mortgagee, and was not an adoption by the mortgagee of the lease within s. 15, c. 83, C. S.—*Semble* (*per* Tuck C. J.), that a notice under s. 15, c. 83, C. S. may be revoked by the mortgagee so as to restore the original tenancy between the mortgagor and tenant and entitle the mortgagor to recover from the tenant rent accrued due before the revocation.—*Held* (*per* Barker J.), that a mortgagee is not bound to proceed under s. 15, c. 83, C. S., but may exercise his rights at common law for the recovery of rent payable under a lease of the mortgaged premises made subsequent to the mortgage. *Brock* v. *Forster*, 34, p. 262.

12. Redemption.

Abortive sale under power—*See* SALE, Section 16.

Absolute deed—Intended as security only—Land of the plaintiff worth $1,500, subject to a mortgage for $900, and other charges for $300, was conveyed to the defendant in consideration of his paying $140 due for instalments under the mortgage, for the recovery of which an action had been brought.—The costs of the action were paid by the plaintiff.—The Court, finding under the evidence that the deed, though absolute in form, was intended as a mortgage, allowed the plaintiff to redeem. *Beaton* v. *Wilbur*, 3 Eq., p. 309.

See also *McLeod* v *Weldon*, 1 Eq., p 181.

Absolute deed as security only — Accounting—One W. Q. conveyed certain real estate to the defendant C. in 1891.—This conveyance was absolute on its face, but was really by way of mortgage to secure a certain sum of money in which W. Q. was indebted to C. for goods supplied from C.'s store.—W. Q. was also indebted to the plaintiff N., and the latter obtained judgment against him for the sum of $239.50, a memorial of which was filed December 3rd, 1896.—After the conveyance from W. Q. to C. had been made, the latter continued to supply goods to W. Q. and W. Q. worked for him and made cash payments to him, which amounts were credited by C. against his account.—W. Q. died in 1902, intestate, leaving a widow and several children.—In 1903, C. conveyed the premises to W. Q.'s son A Q., who, at the same time gave C. a mortgage on them.—In 1905, C. sold the premises under a power of sale contained in the mortgage to one A. S., who immediately reconveyed them to C.—This suit was originally to set aside the conveyance from W. Q. to C. on the ground of fraud, but the bill was amended, and it was by agreement treated as a redemption suit, the sole question of fact being what was the amount necessary to be paid C. in order to redeem the property.—*Held*, that where a mortgagor is seeking to discharge himself from liability by payment, the onus of proof is upon him.—*Held*, that where a conveyance, absolute on its face, but subject to certain verbal agreements as to reconveyance, is taken by a creditor to secure ad-

vances, instead of the ordinary form of mortgage in which the terms of agreement would have been set out, the onus of proof, in case any dispute arises, is on the creditor to show the exact sum for which the conveyance is to stand as security.—*Held*, that where there were several debts, in the absence of any appropriation by the debtor at the time of payment, the creditor had the right to appropriate the payment, to any of the debts he chose, and this right could be exercised at any time, and need not be shown by any specific act or declaration, but might be inferred from facts and circumstances.—*Held*, that the parties wishing a sale, there will be an order for sale in case the plaintiff fails to redeem, instead of the bill standing dismissed with costs, as is usual. *Nixon* v. *Currey et al*, 4 Eq., p. 153.

Costs of suit—Dispute re interest—A mortgagee will not be deprived of his costs in a redemption suit made necessary by a dispute as to the rate of interest to which he was entitled.—A mortgagor was indebted to the mortgagee in a sum in addition to the mortgage debt.—He made several payments in money and goods to the mortgagee.—He applied by his solicitor to the mortgagee for a statement of the payments made on the mortgage and of the amount due as he wished to pay the mortgage off.—Before answering, the mortgagee gave notice of sale of the mortgaged property under a power of sale contained in the mortgage.—In his answer he stated that the whole of the principal and interest at 12 per cent. or $311.53 was due, and that no payments had been made on account of the mortgage indebtedness.—The mortgagor thereupon filed a bill to restrain the sale and for redemption.—A reference having been had to take account, the referee found that a small payment had been made on the mortgage, and allowed interest on the mortgage from its maturity at six per cent., upon a construction of a covenant in the mortgage to pay interest at twelve per cent., and his report was confirmed by the Court.—*Held*, that the mortgagee was entitled to his costs of suit. *Thomas* v. *Girvan*, 1 Eq., p. 314.

Decree dismissing bill equivalent to foreclosure—A decree dismissing a bill on default of payment of the amount found due in a suit for redemption of a mortgage is equivalent to a decree of absolute or unconditional foreclosure, and the Court of Equity has jurisdiction under it to order a writ of possession to be issued under C. S. 1903, c. 112, s. 141. *Patchell* v. *Colonial Investment and Loan Co.*, 38, p. 339.

Hampering suit—Costs—A demand for a discharge of the mortgage and release of the debt, accompanying a tender by the mortgagor, makes the tender a conditional one, the amount actually due being in dispute—*Held*, that when the mortgagee hampered and oppressed the mortgagor, and obstructed his suit in every possible way, the mortgagee while entitled to the general costs of suit, would lose the costs of his own unnecessary pleadings, and would be compelled to pay the costs of any such pleadings by the mortgagor as were occasioned by his procedure.—If there had been a sufficient and unconditional tender by the mortgagor before the suit the mortgagee would have been liable for the costs of the suit.—*Held*, that a defendant who answered, and later on filed a disclaimer, would lose costs, even if successful in having the bill dismissed as against him. *Mc Kenzie* v. *McLeod et al*, 4 Eq., p. 72.

See also at 39 N. B. R., p. 230.

Quit claim deed as security—Tender of amount claimed—The defendant applied to the Crown Land Department for a grant of lot number 50, range 1 in the Blue Bell Tract(so called) in the county of Victoria under the regulations of the Department as applied to that tract.—Being in possession and having complied with most of the regulations he agreed in writing with the plaintiff to cut and deliver to him 100,000 superficial feet of lumber during the logging season of 1914, off the said lot under terms set out in the contract.—One clause provided that "all logs cut by the defendant or that he may have cut for him to apply to this contract."—Defendant also gave plaintiff a quit claim deed of the lot to secure him for any supplies furnished or cash advanced, and plaintiff gave defendant a written memorandum agreeing to recall the quit claim deed providing satisfactory arrangements were made to cover defendant's indebtedness.—Another clause in the contract provided if the contract was not progressing satisfactorily to the plaintiff he might on forty-eight hours' notice to the defendant, take over the operation and complete it.—The defendant, having contracted with Donald Fraser Jr. to get for him 50,000 feet of lumber off said lot 50 and having cut a quantity of lumber in pursuance of this contract, the plaintiff replevied the lumber cut for Fraser and took over the operation under defendant's contract with him, claiming (a) that as against the defendant he was entitled as the absolute owner of the land to everything on it and defendant had no right to dispose of any of the lumber to third parties; (b) that even if he did not own the land, that under the terms of his contract with the defendant he was entitled to all the lumber the defendant cut off lot 50 during the season of 1914 at the price agreed upon.—*Held*, on appeal affirming the judgment of McKeown J. that the quit claim deed and memorandum given therewith must be taken together and constituted in effect a mortgage to secure any indebtedness from the defendant to the plaintiff on the completion of the contract, and as the defendant had tendered the amount due any lien the plaintiff had by reason thereof was extinguished.—That under the contract the defendant was bound to supply lumber only to the extent of 100,000 su,per-

ficial feet cut on lot 50 to the plaintiff's contract, and plaintiff was not entitled to the Fraser logs.—If a creditor holding a security absolute on its face furnishes the debtor with a statement of the amount alleged to be due, a tender of that amount is binding, notwithstanding it subsequently appears on taking an account between the parties that the tender was for less than the amount actually due. *McLaughlin* v. *Tompkins*, 44, p. 249.

Tender—Conditions—A tender by the mortgagor of the amount due on the mortgage accompanied by a demand for the discharge of the mortgage and release of the debt is conditional, and does not deprive the mortgagee of his costs in a redemption suit. *Mc Kenzie* v. *McLeod et al*, 39, p. 230.

13. Reference and Accounts.

See ACCOUNTS—PRACTICE AND PROCEDURE.

14. Registration.

Marriage contract — Notarial copy registered—By an ante-nuptial contract entered into in Quebec, the intending husband endowed his future wife in a sum of money as a dower prefixed chargeable at once upon his property in New Brunswick.—The contract was executed in Quebec before a notary.—A copy of the contract certified to by the notary was registered in Madawaska county.—Subsequently to its registration a mortgage by the husband of his real estate in Madawaska county to the plaintiff was registered in that county.—The plaintiff was a purchaser for value and had no notice of the anti-nuptial contract. —*Held*, that as the Registry Act, c. 74, C. S., provides only for the registration of an original instrument, except in certain cases, the copy of the marriage contract was improperly on the records and the marriage contract was not entitled to priority over the plaintiff's mortgage.—Section 69 of the Registry Act, 57 Vict., c. 20, providing that the registration of any instrument under the Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration, notwithstanding any defect in the proof for registration does not apply where the registration is a nullity, as where the proof of the execution required by the Act is wanting. —A parol agreement to increase the rate of interest reserved by a mortgage upon land will not be enforced as against the land. *Murchie* v. *Theriault*, 1 Eq., p. 588.

15. Requisites and Validity.

Lunatics' committee mortgaging for needed repairs—Committee of the estate of a lunatic empowered to make needed repairs to the estate and to mortgage for that purpose. *In re McGivery, A Lunatic*, 3 Eq., p. 327.

Married woman — Agreement to give mortgage—Lien on separate estate—A married woman procured the plaintiff to make payments from time to time on account of the principal and interest of a mortgage on freehold property, forming part of her separate estate, by verbally undertaking to have an assignment made of the mortgage, or to convey the mortgaged premises to the plaintiff.—*Held*, that the agreement not being in writing could not be specifically enforced, but that it was binding on the separate estate of the married woman, including the realty, and that the plaintiff should be paid out of the same, with interest. *Bulley* v. *Bulley*, Eq. Cas., p. 450.

Married woman—Consent of husband —Acknowledgment—A purchaser under a mortgage of the property of a married woman, executed by her while living with her husband prior to the Married Woman's Property Act of 1895, not appearing to have been executed with the consent of her husband and not acknowledged as the statute requires, cannot maintain ejectment against the mortgagor. *Everett* v. *Everett*, 38, p. 390.

Setting aside mortgage—Res judicata —Where a bond given with a mortgage in pursuance of an agreement to secure a debt has been held valid in an action thereon, the defence of *res judicata* will lie to a suit to set aside the bond mortgage and agreement. *Smith* v. *The Halifax Banking Co.*, 1 Eq., p. 17.

Undue influence — Mortgage set aside —William Davidson died in 1890, leaving real estate consisting of his homestead and lot "A.", all of which he left absolutely to his wife Helen Davidson, and appointed her and the defendant William Ferguson executors.—In 1898, James Davidson, son of William and Helen Davidson, being indebted to the defendants William Ferguson and Philip Arsenault, became insolvent and assigned to Philip Arsenault.—Nearly all the creditors, including William Ferguson and Philip Arsenault, agreed to compromise at ten cents on the dollar, but James Davidson made a secret agreement with William Ferguson and Philip Arsenault that they should be paid in full.—By arrangement between James Davidson, William Ferguson and Philip Arsenault, William Ferguson for James Davidson purchased the assets from Philip Arsenault as assignee for $1,000, and for the securing William Ferguson the balance advanced and balance of his old debt against James Davidson, Helen Davidson in 1899, being then about seventy-six years of age, without any independant advice, executed to William Ferguson a mortgage of lot "A." for $822.90.—William Ferguson gave James Davidson a power of attorney to deal with these assets, who in the name of William Ferguson sold and converted them into money to an amount greater than the mortgage.—In December, 1899, James Davidson arranged that his mother should sell to

Philip Arsenault the said lot "A" for $600, $200 of it to go on Philip Arsenault's old account against James Davidson, and $400 by notes made by Philip Arsenault in favour of William Ferguson, and which the latter took on his account against James Davidson. —Both the mortgage and deed were written by James Davidson, and Helen Davidson had no independent advice and had become of feeble intellect.—In March, 1900, Helen Davidson made a will leaving all her property to her son James and his family.—William Ferguson drew this will, is named in it an executor, and had full knowledge of its contents.—In December, 1902, James Davidson being indebted to William Ferguson to the amount of $1,250.97, Helen Davidson, at the request of William Ferguson and James Davidson, gave a mortgage of the homestead to William Ferguson for $1,250.97 to secure that amount, which was shown by the evidence to be the total sum due from James Davidson to William Ferguson at that time.—Helen Davidson lived practically all the time with James Davidson, and he had great influence over her, which fact was well known to both William Ferguson and Philip Arsenault.—*Held*, that the first mortgage to Ferguson, made in March, 1899, was discharged and must be set aside, as the amount which it had been given to secure had been paid in full.—*Held*, that the conveyance to Arsenault, made in December, 1899, must be set aside, as obtained through undue influence and pressure on the part of James Davidson, and solely for his benefit; and on the ground of the mental weakness of the grantor, and that she had no independant advice; that Arsenault, as he knew the relation which James Davidson occupied with regard to the grantor and all the circumstances in connection with the transaction, stood in no better position than James Davidson would stand, and was bound by, and responsible for, any acts committed by Davidson, or omitted to be done by him.—*Held*, that the second mortgage to Ferguson, made in December, 1902, must be set aside, as obtained through undue influence and pressure on the part of James Davidson and William Ferguson, and solely for their own benefit; that Ferguson had the same knowledge of all the facts as Arsenault, and was bound in the same way by the acts and omissions of James Davidson; that the grantor had no independant advice, and was so deranged mentally as to be incapable of transacting business. *McGaffigan et al* v. *Ferguson et al*, 4 Eq., p. 12.

16. Sale.

Abortive sale—Accounting for possession—Costs—The mortgagee of a vessel took possession of her and transferred her to a clerk in his employ, who immediately re-transferred her to the mortgagee.—The consideration expressed in both instances was $2,000.—The mortgagee retained the management and possession of the vessel, until her loss, without making an effort to sell her, though she was not paying expenses and was depreciating in value from age, and the market demand for vessels of her class was declining.—In a suit to redeem a mortgage on land given as collateral security with the mortgage on the vessel, *held*, that there had not been a valid exercise of the power of sale vested in the mortgagee, and that he was chargeable with the value of the vessel at the time he took possession. —In the above suit a balance was found due the mortgagor by the mortgagee.—*Held*, that the mortgagee should pay the costs of the suit. *Kennedy* v. *Nealis et al*, 1 Eq., p. 455.

Abortive sale—Mortgagee seller and buyer—A mortgagee, his power of sale on default having arisen, sold the mortgaged premises ostensibly to a third person, in reality to himself.—Subsequently he sold a portion of the premises to a third person, for an amount in excess of the mortgage debt.—He continued in possession of the remaining part, and received rent.—*Held*, that the sale by the mortgagee to himself was abortive, and that he was a mortgagee in possession, and should account to the mortgagor for the surplus from the second sale, together with the rent, and interest on both sums and costs. *Mitchell et al* v. *Kinnear et al*, 1 Eq., p. 427 (A. D. 1888).

Abortive sale to mortgagee through third party—Costs—Mortgaged property sold under a power of sale, default having arisen, was bid in by an agent of the mortgagee, and subsequently conveyed by him to the mortgagee.—In a suit for redemption, *held*, that the mortgagee was entitled to be paid the costs of the abortive sale, except an amount charged for the conveyance. *Patchell* v. *The Colonial Investment and Loan Co.*, 3 Eq., p. 429.

Abortive sale—See also *King* v. *Keith*, 1 Eq., p. 538.

17. Subsequent Encumbrances.

Judgment creditor — Sale under Execution—A judgment creditor of the mortgagor of mining leases having purchased the leases at sheriff's sale under an execution upon his judgment, whereupon new leases were issued to him in his own name, the Crown having no knowledge of the mortgage, took said new leases subject to the mortgage. —The mortgage, though not registered under section 139 of the General Mining Act, C. S. 1903, c. 30, is not void as against a judgment creditor who had notice of the mortgage, and whose judgment was not registered under the section at the commencement of the suit.—The judgment creditor is not entitled to a lien prior to the mortgagee for the amount of the rent paid to the government on the licenses declared to be held in trust for the mortgagee.—Such payment must be taken as made in his own interest as owner of the equity of redemption. *The Mineral Products Co. et al* v. *The Continental Trust Co.*, 37, p. 140.

MUNICIPAL LAW.

1. Bridges.

2. By-laws.

3. Contracts.

4. Debentures.

5. Hawkers and Pedlars.

6. Licenses and Inspection.

7. Markets.

8. Officers and Servants.

9. Sewers.

10. Waterworks.

11. Miscellaneous Cases.

Expropriation of lands—*See* ARBITRATION AND AWARD.

Highways—*See* WAY.

Negligence—*See* NEGLIGENCE.

Taxes—*See* ASSESSMENT AND TAXES.

1. Bridges.

See WAY.

2. By-laws.

Beer licenses, By-law re—Intra vires—The Act 7 Edw. VII, c. 91, authorizes the town of Woodstock to regulate the sale of beer of all kinds (not however to include any intoxicating liquor) within the town.—Under the authority conferred, a by-law was made, providing in one section a retail license fee of $100 and in another that no license should be granted to any person who had been convicted of an offence against the Canada Temperance Act within one month prior to the date of application.—The defendant, who had no license and had not applied for one, was convicted for selling without a license.—*Held*, on an application to quash the conviction, that the section of the by-law imposing the license was not *ultra vires* as imposing such an excessive tax as to be in effect prohibitive and not merely regulative.—That while the section excluding the persons indicated therein from the privilege of obtaining a license might be beyond the limits of the authority conferred, it was no ground for quashing the conviction against the defendant, he never having applied for a license. *R.* v. *Dibblee, Ex parte Smith*, 38, p. 350.

Bread, Regulating the assize of—Subsection 5 of the City of Moncton Incorporation Act, 53 Vict., c. 60, s. 47, authorizing the council of the city of Moncton to make by-laws to regulate the assize of bread is not *ultra vires* of the local legislature as such regulations can apply to the city of Moncton only. *R.* v. *Kay, Ex parte LeBlanc*, 39, p. 278.

Election of councillors—A by-law of a municipality respecting elections provided that an elector might file a protest against the election of a councilor with the county secretary within twenty days after the election; that the protest so filed should be read before the council on the first day of the first session after the election, and in case a majority of the council considered there was sufficient ground of complaint it should appoint a committee of three members to examine into the matter and report to the council.—The by-law also provided that the council might adjourn the investigation from time to time.—*Held*, where a protest was filed and read before the council, and a committee appointed as provided by the by-law, and the council adjourned without receiving a report from the committee or adjourning the investigation, the Court refused a rule for a writ to prohibit the council from proceeding to hear and determine the protest at a special meeting called for that purpose. *Ex parte Murchie, re Kerr*, 42, p. 475.

Moving picture houses—The authority given in sub-s. 24 of s. 64 of the Towns Incorporation Act to regulate by licensing all theatres, circuses, or other shows or exhibitions for hire does not authorize a town incorporated under the Act to impose a license fee for revenue purposes and a by-law imposing an annual fee of $300 on moving picture shows was declared *ultra vires*. *R.* v. *Dimock*, 44, p. 124.

Quo warranto refused where by-laws had provided remedy—The Court will not grant a rule for a *quo warranto* calling upon county councillors to show by what authority they exercise the office of councillors of a parish on the ground of fraudulent and improper practices in making up the voters' list and in receiving and counting the ballots where the by-laws of the county provide that such matters may be investigated and determined on petition to the council. *Ex parte Nadeau*, 42, p. 473.

Tax exemptions—By Act, the council of the town of Woodstock are empowered from time to time, at their discretion, to give encouragement to manufacturing enterprises within the town by exempting the property thereof from taxation for a period of not more than ten years.—*Held*, that a by-law of the council exempting any company establishing a woollen mill in the town from taxation for a period of ten years was *ultra vires*, being a discrimination in favor of a company as against private persons engaged in the same business. *The Carleton Woolen Co. Ltd.* v. *Town of Woodstock*, 3 Eq., p. 138; 37 N. B. R., p. 545; 38 S. C. R., p. 411.

3. Contracts.

City Court commissioner, Salary of—An arrangement entered into by the plaintiff, the commissioner of the city court of Moncton, an officer appointed by the lieutenant-governor-in-council, with the city council of the city of Moncton to accept a reduction of his salary, which arrangement had been assented to by both parties and acted upon for a period of five years, is binding and can not be repudiated on the ground that it is void as against public policy. *Kay* v. *The City of Moncton*, 36, p. 377.

Magistrate — Agreement re costs — Under s. 136 of the Liquor License Act, the municipalities are authorized to pay the liquor license inspector all necessary costs incurred by him in prosecuting complaints under the Canada Temperance Act.—By arrangement between the municipality and the magistrate his costs were taxed at a lump sum of $5.00 where the complaint was dismissed or costs not paid by the defendant. —This amount would be more than the taxable costs in certain cases, and it was claimed the excess could not be paid out of the ordinary funds, but would have to be paid out of fines.—*Held*, the municipality has authority to pay such agreed costs out of its ordinary funds under C. S. 1903, c. 165, ss. 112, 113, 115 and s. 95, sub-ss. 2 and 3. *R.* v. *Holyoke*, 42, p. 135.

Sale by municipality of ferry—The authority conferred on a municipality to make by-laws for establishing, licensing and regulating a ferry authorizes it to provide a boat and other appliances for operating the same.—And where a ferry, so established, with the boat and appliances was sold at public auction by the municipality, it is bound to put the vendee in possession, and is liable in an action of damages for a failure to do so, and in an action to recover back the purchase money. *Currey* v. *The Municipality of Victoria*, 35, p. 605.

Saint John, Contract by city of, to remove snow—The Saint John Railway Company acquired the Saint John Street Railway in 1894, subject to the obligations of keeping in repair the streets in which the railway ran as provided by s. 10 of 50 Vict., c. 33, and also the obligation of removing the snow and ice as provided by s. 10 of 55 Vict., c. 29.—In 1895 the Act 58 Vict., c. 72, was passed, s. 6 of which authorized the company to agree with the city of Saint John to pay the said city an annual sum to be agreed upon as a consideration for taking care, etc. of the streets and the removal of the snow thereon, relieving the company from all liability for the same during the continuance of the agreement.—Acting under the authority of this section, the company and the city entered into a contract by which the city undertook to do what, by the section, it is authorized to do.—*Held* (*per* Tuck C. J., Hanington, Barker and McLeod JJ.), in an action for damages caused by the defendants' negligence in not removing the snow in a street through which the railway ran, that section 6, and the agreement made thereunder, imposes upon the city no greater liability in respect to the care of the streets than otherwise attaches to them as a municipal corporation, and neglect to remove the snow was a mere nonfeasance for which they were not liable at the suit of a private individual, and a nonsuit should be entered.—*Held* (*per* Gregory J.), that there was a statutory obligation on the railway company to level the snow and keep safe in that respect for public travel the streets where the railway runs.—That while the Act 58 Vict., c. 72, does not impose a duty on the city, it authorizes it in this instance to become a contractor for the performance of the work, and to stand in place of the company in respect to all its liabilities in regard to the removal of snow, and the city is liable to a private individual for damages caused by its failure so to do. *McCrea* v. *The City of Saint John*, 36, p. 144.

Saint John — Dredging contract — Loss of time at high tide—Plaintiff contracted with the defendants for three hundred and thirty hours dredging in the harbour of Saint John with a specific dredge and appliances, and for so much longer as the city might require on giving notice at the expiration of that period, to be paid for at the rate of $400 per each eleven hours, subject to deductions and allowances agreed upon for time lost (1) when the dredge was unable to work by reason of injury to the plant or machinery, and (2) where the work could not go on by reason of stormy weather.—The water was too deep at high tides for the dredge to work, and there was, therefore, delay caused in this way.—Both parties were aware at the time the contract was made that the high tides would interfere with the work, but there was no provision for any deduction or allowance on that contract.—*Held*, that a verdict for the plaintiff, ordered on a construction of the contract that there was an implied covenant that the defendants should pay for the time lost by reason of the high tides, was erroneous, and should be set aside and a new trial granted. *Connolly* v. *The City of Saint John*, 37 N. B. R., p. 411. Confirmed 35 S. C. R., p. 186.

4. Debentures.

Debentures issued by a municipal council on behalf of a parish—By Act of Assembly 41 Vict., c. 102, it was provided *inter alia* that the municipality of G., on the joint recommendation of the councillors of the Parish of B. should appoint three commissioners for purchasing or leasing a farm and lands and for erecting thereon a proper building for an alms and work-house for the said Parish of B. and for supporting and managing the same; that the cost thereof which was not to exceed three thousand

dollars was to be assessed by the said county council on the said Parish of B., that the said county council might cause bonds to be issued by the municipality intituled "Alms-house bonds, Parish of B." which should be wholly chargeable on the said parish, and be signed by the warden and secretary-treasurer and have the corporate seal affixed thereto, and be placed in the hands of the secretary-treasurer to be disposed of for the purposes of the act; and that the proceeds of such bonds should be placed to the credit of the said commissioners and be paid out on their order for the purposes of the act; that the said county council should make and levy upon the said Parish of B. a sum sufficient to pay the principal and interest of the said bonds as and when the same might become due, and that the said sums, when collected, should be held and paid by the secretary-treasurer for the purposes of the Act.—Under the provisions of this act the following instrument was issued, which was purchased by the intestate from the secretary-treasurer of the municipality of G.: "$1,000—Alms-house Bonds Parish of Bathurst—No. 1—This certifies that the Parish of Bathurst, in the County of Gloucester, Province of New Brunswick, is indebted to George S. Grimmer in the sum of One Thousand Dollars, current money of the Province of New Brunswick, which is payable to George S. Grimmer or order on or before the tenth day of April, one thousand eight hundred and eighty-four, together with interest at the rate of seven per centum per annum payable half-yearly at the Bank of New Brunswick, St. John, on the presentation of the proper coupons for the same, as hereunto annexed, pursuant to an act of assembly made and passed in the forty-first year of the reign of Her Majesty Queen Victoria intituled 'An Act to provide for the erection of an alms-house and work-house in the Parish of Bathurst, Gloucester County.'—In witness whereof, the county council, at the instance of the alms-house commissioners of the Parish of Bathurst, have caused the seal of the municipality of Gloucester to be affixed hereunto under the hand of the warden and the secretary-treasurer this tenth day of April, one thousand eight hundred and seventy-nine.—L. S., John Sivewright, secretary-treasurer; John Young, warden."—In an action brought against the municipality of G. by the administrators of the purchaser to recover the amount of the principal and interest due by virtue of the above bond or certificate of indebtedness.—*Held* (*per* Tuck C. J., Hanington, Landry, Barker, McLeod and Gregory JJ.), (1) that as the instrument sued on amounted to nothing more than a certificate by the municipality of G. that the Parish of B. was indebted to the intestate in the sum of $1,000.00 with interest, and that as the Act 41, Vict., c. 102, did not impose upon the municipality any liability for moneys borrowed under its provisions for the purposes of the alms-house commissioners, the defendants were not liable on a count framed upon the instrument itself; neither were they liable upon the common counts, as the evidence did not show that moneys to pay the above bond or certificate of indebtedness had been collected by taxation levied upon the parish of B., and paid over to the defendants for that purpose; and (2) that the plaintiff could not recover under the act 62 Vict., c. 67, as that act only authorized bonds to be issued for an indebtedness of the county then existing, and was not passed for the purpose of creating any new liability.—*Held*, further (*per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ., Gregory J. dissenting), that by the act in question the municipality was not authorized to issue any instrument which would create an indebtedness between it and the person advancing money upon such instrument.—*Semble* (*per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ.), that the plaintiff's remedy was by motion for a mandamus to compel the municipality to assess the Parish of B. for the amount of the loan and interest.—(Reversed on appeal 32, S. C. R., 305.) *Grimmer* v. *Municipality of Gloucester*, 35, p. 255.

School debentures—A debenture of the defendants, payable to bearer, sealed with their corporate seal and signed by their chairman and secretary, was allowed to get into circulation without the authority or knowledge of the defendants, and without their receiving any value therefor.—It was finally purchased by the plaintiff before maturity, who took it in good faith and gave full market value for it.—In an action brought upon two of the interest coupons attached to the debenture, the learned judge who tried the cause asked the jury the two following questions *inter alia* which were answered in the affirmative: "Did the bond come into the hands of the plaintiff as an innocent holder for value through the carelessness and neglect of the defendants, or those of their officers whose duty it was to have the bonds properly executed and issued, and in whose hands or custody the bonds should be detained until delivered to *bona fide* purchasers?"—"Do you find that the board of school trustees, or their officers, were guilty of such negligence in connection with the bond as that in your opinion it would be inequitable and unjust that the defendants should be permitted as against the plaintiff to set up a defence that the bond was not duly executed, or the issue thereof not authorized by the Board?"—A verdict was thereupon entered for the plaintiff.—*Held*, that the verdict was rightly so entered. *Robinson* v. *Board of School Trustees of Saint John*, 34, p. 503.

5. Hawkers and Pedlars.

Selling by sample—One who travels about from house to house for the purpose of selling sewing machines, carrying with him only one machine as a sample, his stock being stored in a shop rented for the purpose,

cannot be convicted under the act of Assembly, 58 Vict., c. 39, s. 4, of hawking or peddling goods without a license.—*Semble*, that proof of a single act of sale of goods or merchandise against a man does not constitute him a hawker or peddler within the meaning of the above act. *R.* v. *Phillips*, 35, p. 393.

6. Licenses and Inspection.

Fire insurance license fee—The plaintiff, agent of the National Insurance Company of Hartford, Connecticut, carrying on the company's business in the city of Saint John, issued policies with the heading "Atlantic Fire Underwriters' Agency."—The policies continued: "by this policy the National Fire Insurance Company of Hartford, Connecticut, in consideration," etc. "does insure," etc.—The policies are signed by the president and secretary of the National and are the policies of that company.—There is no association of underwriters known as the Atlantic Fire Underwriters' Agency, it being merely a name adopted by the National in issuing its policies.—Under the act of 5 Geo. V., c. 94 (1915), amending 3 Geo. V., c. 55 (1913) by adding to s. 2, sub-s. (g), providing that every agent who issues a policy of any company and causes or permits to be represented thereupon the name of any other insurance company or association whether the same be connected with responsibility under the policy or not shall pay a fee of $100 for each company or association which he represents.—The agent of the National paid under protest to the city of Saint John, in addition to the fee for that company payable under 3 Geo. V., c. 55, a fee of $100 for the Atlantic Fire Underwriters' Agency.—*Held*, that the name Atlantic Fire Underwriters Agency, not being the name of any other insurance company, insurance association, underwriters' agency or other mode of association of underwriters, the plaintiff was not liable for the payment of the additional fee. *Howard* v. *The City of Saint John*, 43, p. 521.

See also Section 2 By-Laws.

7. Markets.

Moncton—53 Vic., c. 60—Location of market—The city of Moncton has the right, under the powers conferred upon it by the Legislature, to change the location of its established market, and the fact that by 53 Vict., c. 60, it is "authorized to continue the market heretofore established" does not compel it to continue this market in the place where it was located at the time of the passing of the Act. *Steeves et al* v. *The City of Moncton*, 42, p. 465, C. D.

Saint John—Butchers' stalls in market building—The leased butchers' stalls in the city market of the city of Saint John are not part of the market within the meaning of the regulations making all articles sold or exposed for sale therein liable to pay toll, and a sale of vegetables in such a stall to be subsequently delivered at the stall to the lessee thereof is not an offence against a by-law requiring all persons carrying articles for sale into the market to report to the deputy clerk of the market and pay toll and forbidding all persons from selling or offering for sale any article without having a stand assigned, and at any place except at the stand so assigned. *R.* v. *Manchester*, 38, p. 424.

York county market—Right to erect weigh scales—In 1813, pursuant to Crown license, T. erected on public land in the city of Fredericton a public market house and public weigh scales in connection therewith.—The scales were kept in use until 1874, when they were voluntarily removed by their then owner.—In 1816 the market building was sold by T. to the defendants, and in 1817 the land on which it and the scales stood was granted by the Crown to the defendants in trust to use the lower floor of the building, and the land, for a public market place, and the upper floor for a County Court house.—By Act 20 Vict., c. 17, s. 3, it was enacted that the land should be used as a public landing, street and square for the Court and market house, and for no other purpose whatever.—By s. 4 of the Act it was provided that nothing therein should in any way affect public rights.—In 1898 the defendants sought to erect on the land public weigh-scales to be used in connection with the market.—A suit for an injunction having been instituted by the plaintiffs to restrain the defendants from proceeding with the erection of the scales.—*Held*, that the Crown grant to the defendants contained an implied authority to the defendants to erect upon the land structures necessary or reasonably convenient or useful for the purposes of the market, including weigh scales, and that this authority was not taken away by Act 20 Vict., c. 17. *City of Fredericton* v. *Municipality of York*, 1 Eq., p. 556.

8. Officers and Servants.

Appointment of parish officers—A county council, under s. 52 of the Municipalities Act which provides that "meetings may be adjourned from day to day for eight days in the whole, and no longer" can only sit for eight days including Sunday and the first day of the session, and the appointment of parish officers on January 28, by a council which met in regular session on January 20, and then adjourned from day to day, is illegal.—Under s. 65 of the Act, the council must appoint parish officers at its first general meeting, and has no power to appoint such officers at its semi-annual meeting in July.—Under a special Act passed April 2, 1914 (4 Geo. V., c. 67), the councillors for the parish of Durham were authorized to appoint for that year the parish officers for that parish, and the parish clerk when so appointed was required, within six days after

such appointment, to post up a list of the officers so appointed, who should qualify for their respective offices in ten days after such posting, otherwise their office should be deemed vacant.—*Held*, the council had no right to declare vacant the offices of officers properly appointed under the Act and performing the duties thereof on the ground that the offices had been vacated because no return of the officers having taken the oath of office had been filed with the secretary treasurer of the county.—Under s. 88 of the Act it will be assumed that persons properly appointed and acting as parish officers have taken the oath of office. *R.* v. *Municipality of Restigouche, Ex parte Murchie*, 43, p. 115.

Constables, Arrest by unqualified—Jurisdiction of magistrate—The fact that the defendant was arrested and brought before the magistrate who made the conviction, by a constable who was not qualified as required by C. S., c. 99, s. 69, is no ground for a certiorari under the Liquor License Act, 1896.—The improper arrest does not go to the jurisdiction of the convicting magistrate.—He had jurisdiction of the offence and also over the person when before him. *Ex parte Giberson*, 34, p. 538.

Constable, Illegal arrest by, Action for—The plaintiff was arrested under an illegal warrant for dog taxes issued by the town treasurer of Marysville and executed by a provincial constable.—The plaintiff gave notice of action under 49 Vict., c. 25, s. 84, directed to the defendants jointly, describing one as town treasurer of Marysville and the other simply as constable, and setting out specifically the acts complained of on the part of each.—Plaintiff then sued defendants jointly for false imprisonment.—*Held*, (1) the notice of action should be construed liberally and is sufficient if it substantially informs the defendants of the ground of complaint; (2) the joint notice here was sufficient because it set out the specific acts complained of on the part of each defendant and it was not necessary to state whether the action was to be joint or several.—The arrest and imprisonment of the plaintiff was the joint act of both officers.—A defence by statute that the defendant "lawfully acted by virtue of his office" is sustainable only where the act in question was done "lawfully" so far as the other party is concerned. —The Act respecting Protection of Constables C. S. 1903, c. 64, does not apply here because the town treasurer had no authority by law to issue the warrant under which the constable acted. *Markey* v. *Sloat et al*, 41, p. 235.

Dominion Police Act, R. S. C. 1906, c. 92—The Dominion Police Act, R. S. C. 1906, c. 92, is *intra vires* of the Dominion Parliament, under s. 101 of the British North America Act.—*In re Vancini*, 34 S. C. R. 621 discussed and followed. *R.* v. *LePell, Ex parte Farris*, 39, p. 468.

Moncton — Conviction by "sitting" magistrate—The City of Moncton Incorporation Act, 53 Vict., c. 60, s. 65, provides that a sitting magistrate may act for the police magistrate of the city of Moncton when he is temporarily absent or ill or "is any way disqualified by being a witness, or from relationship or otherwise."—*Held*, that a conviction by a sitting magistrate stating that he was acting for the police magistrate, "he being disqualified" and not alleging the grounds of disqualification, is sufficient on its face. *R.* v. *Stevens, Ex parte Gallagher*, 39, p. 4.

Moncton, Police magistrate of—The fact that the police magistrate of the city of Moncton is a member of the board of police commissioners for that city as established by 7 Edw. VII, c. 97, does not disqualify him from hearing an information laid by a police officer who was appointed by such board.—The police commissioners merely exercise a function of the provincial government, and are not responsible for the acts of the police officers they appoint. *R.* v. *Kay, Ex parte Wilson*, 39, p. 124.

Moncton—Police—*Semble*, that the police officers of the city of Moncton have authority to make a seizure of liquor outside the city limits. *R.* v. *Kay, Ex parte Wilson*, 39, p. 124.

Moncton—Ratepayer disqualified as arbitrator—A ratepayer of the city of Moncton is disqualified on the ground of pecuniary interest from acting as an arbitrator to determine the value of lands taken by the city for the purposes of the water department, under 56 Vict., c. 45.—Where objection to the qualification of an arbitrator was taken at the commencement of the arbitration proceedings, subsequent appearance under protest and taking part in the proceedings will not operate as a waiver of the objection. *In re Bessie B. Wilkins*, 41, p. 141.

Police officer, Action against—In a declaration (for assault) against a police officer appointed under the Campbellton Incorporation Act 51 Vict., c. 81, by s. 4, of which he was entitled to notice of action for anything done by virtue of his office, the first count contained an allegation that the acts were done by the defendant as a police officer and the second count omitted this allegation.—No notice of action was given within the time limited by the Act.—The jury found that the defendant was not acting as a police officer when he committed the assault, and that he did not honestly believe in the existence of a state of facts which if it had existed would have justified him in arresting the plaintiff.—*Held*, (1) that a verdict should be entered for the defendant on the first count; (2) that the verdict on the second count was against evidence and a new trial was ordered on the second count only. *Poirier* v. *Crawford*, 39, p. 444.

Saint John, City of—Alderman disqualified as arbitrator for city—An alderman of the city of SaintJohn is disqualified from acting as an arbitrator appointed by the city to determine with other arbitrators the value of property expropriated by the city under Act 61 Vict., c. 52. *In re Abell*, 2 Eq., p. 271.

Saint John, City of—Pilots right to speak vessels—Under the provisions of the Canada Shipping Act, R. S. C. 1906, c. 113, and the by-laws of the St. John pilot commissioners, a licensed pilot at the port of St. John may speak vessels from a gasoline launch, or from a row boat used in connection with the launch, provided that such launch and row boat are attached to a licensed pilot boat.—Such launch may be "attached" to a licensed pilot boat, although used by pilots to speak vessels independently of the pilot boat and at a distance of several miles from it.—*Held* (*per* Landry and Barry J.), a licensed pilot may speak vessels from a gasoline launch or any other boat, flying the pilot signals required by s. 502 of the Canada Shipping Act, even though such launch or boat is not attached to a licensed pilot boat. *Spears* v. *St. John Pilot Commissioners*, 39, p. 495.

See also Master and Servant—Negligence.

9. Sewers.

Damages caused by insufficient sewer—Lack of actionable negligence—In the exercise of their statutory duties the corporation of the city of M. provided a system of sewers for the city.—In the year 1894 the plaintiff built a house on the east side of lower R. street, and in pursuance of a by-law of the city requiring drains to be made from all houses and buildings on the streets to the sewers, entered a sewer already laid down in the street.—The sewer extended along lower R. street to a point a short distance south of the plaintiff's house, where it connected with a cross drain leading eastwardly into a main outlet sewer discharging into the P. river at a point below high water mark.—In the year 1898, when an unusually high tide took place, the water backed up through the sewer into the plaintiff's and other cellars on lower R. street.—The same thing occurred several times afterwards.—In 1901 the corporation, with a view, if possible, of preventing damage in future by back flowage, continued the sewer on lower R. street southwardly to the P. river, the outlet being below high water mark.—The new sewer was constructed according to plans prepared by the city engineer and approved of by the city council, and the device at the outlet to prevent back flowage is the same as in the other sewers in the city, and similar in principle and mode of operation to those used in other places where sewers discharge into tidal rivers such as the P.—The new sewer did not prevent back flowage, and the action was brought for loss and damage by the flowage of back water from the main sewer into the plaintiff's cellar through the house drain.—*Held* (*per* Tuck C. J., Barker, McLeod and Gregory JJ., Hanington and Landry JJ. dissenting), that the city, having the statutory authority to construct the sewer, and having built it after plans made by a competent engineer and adopted by the council, was not guilty of actionable negligence on account of the insufficiency of the sewer to answer its purpose, and a person thereby injured has no remedy by action at law; and it makes no difference in this particular whether the use of the sewer is voluntary or under compulsion. *Lirette* v. *The City of Moncton*, 36, p. 475.

Failure to repair after notice—A municipal corporation which fails after notice to repair a sewer laid under statutory authority, thereby causing continuous damage to a person connected therewith for sewerage purposes, is guilty of a misfeasance and liable for damages in a civil suit.—(*Per* Hanington, McLeod and Gregory JJ., Tuck C. J. and Landry J. dissenting.) *Lirette* v. *The City of Moncton*, distinguished. *Curless* v. *The Town of Grand Falls*, 37, p. 227.

If the city fails to repair a leak in one of its public sewers after notice of the defect, it is guilty of a misfeasance, and is liable for damages by water finding its way from the leak into the cellar of an adjoining property. *Curless* v. *The Town of Grand Falls* followed. *McKay* v. *The City of Saint John*, 38, p. 393.

Moncton sewers—Right of city to collect frontage fees—The city of M. by its act of incorporation is authorized to levy on the owners of lots frontage fees for sewers, and to collect them as ordinary city taxes; the act also gives authority to make by-laws to regulate the way and manner of entering the sewers, and to prevent the entry of any sewer unless the entry and frontage fees were first paid.—A by-law was made providing that no person should enter any public sewer until all entry and frontage fees were paid.—E., the owner of a lot by purchase from the sheriff under an execution by the city of M. for general city taxes (not frontage fees) on which frontage fees had been rated against a former owner and not paid, applied for a mandamus to compel the city to grant him a permit to enter a sewer without payment of the frontage fees.—*Held*, refusing the mandamus, that the city could not be compelled to issue the permit until the fees were paid, even though they had lost the right to enforce payment against the owner of the lot. *Ex parte Edgett*, 36, p. 224.

Sewer commissioners of Albert county, Mandamus to assess—The commissioners of sewers in the parish of Hopewell, Albert county, appointed under C. S. 1903, c. 159, act for the whole parish and have power to assess the owners of any marsh lands therein for work done, under s. 168, although such marsh lands may not have been set off as

a district under s. 3 of the Act, and mandamus will lie to compel such assessment.—The fact that a new set of commissioners were elected after the application for mandamus but before judgment, would not prevent the granting of the writ, which went to "the commissioners of sewers for the parish of H." *Ex parte Dixon et al*, 41, p. 133.

10. Waterworks.

Campbellton—Discretion re supplying water—By the Act 60 Vict., c. 58, the town of Campbellton was authorized to provide for said town a good and sufficient supply of water for domestic, fire and other purposes and to do all things necessary therefor. —The town accordingly put in a water system and supplied water to the inhabitants of the town for all purposes.—The plaintiff obtained water to run a motor in his printing establishment but the town council cut off his supply owing to scarcity of water.—They continued, however, to supply some other industrial establishments which gave employment to more men and used less water than the plaintiff.—*Held*, that under the Act the town was not bound to supply water to the plaintiff for industrial purposes at any and all times but had the right to cut off such supply whenever in the *bona fide* exercise of their discretion the town council deemed it best in the interests of the town. *Crockett* v. *Town of Campbellton*, 39 N. B. R., p. 573; 40 S. C. R., p. 606.

Campbellton—Trespass to lay pipes—See *McDougall* v. *Campbellton Water Supply Co.*, 34, p. 467.

Pollution of water—Where plaintiff was authorized by Act to take a specified quantity of water per day from a lake for, among other purposes, the domestic use of its citizens, it was held that it was entitled to receive the water in its pure natural state. *The City of St. John* v. *Barker*, 3 Eq., p. 358.

Re arbitrators' fees—See *In re Sutton and Jewett Arbitration*, 1 Eq., p. 568.

Saint John, City of—Expropriation under 5 Ed VII—By Act 63 Vict., c. 59, the city of St. John is empowered to take the lands, tenements, rights, property and premises of persons or corporations for needed public civic works, and provision is made for compensation.—By Act 1 Ed. VII, c. 55, the power of the city as to its right to expropriate for a water supply is extended, and the sections in 63 Vic., c. 59, providing compensation are made to apply.—By Act 5 Ed. VII, c. 59, passed for the purpose of further carrying out the provisions of the act or acts of the legislature empowering the city of Saint John to extend its water supply, the city is authorized to take by expropriation or purchase any land that may be needed for the purpose, but no provision is made for compensation except in the case of certain riparian owners on the Mispec River, and no reference is made to the compensation sections in the other acts.—*Held*, that persons other than those specially provided for in the act 5 Ed. VII, are entitled to compensation and for this purpose the provision in the other acts as to assessing and paying damages might be read into 5 Ed. VII; that the city might expropriate either the land and vest the title, or an easement to lay and maintain its pipes, but could not expropriate an easement to erect and maintain telegraph and telephone lines upon the land. *Chittick* v. *City of Saint John*, 38, p. 249.

See also *Ross* v. *City of Saint John*, 37, p. 58.

11. Miscellaneous.

Commons — Town of Grand Falls — 38 Vict., c. 42 — 59 Vict., c. 69—Certain lands were by Order in Council and Act of Assembly vested in the municipality of Victoria for the use and benefit, as a common, of the inhabitants of the town of Grand Falls. —By subsequent legislation they were transferred to and vested in the town of Grand Falls "to the same extent as was given to the said municipality."—By another act a portion of the common without the town limits was transferred to the said town.—Upon the land within the town limits the defendant entered and commenced to erect a house.—The plaintiffs thereupon brought ejectment.—*Held*, (1) that the action was properly brought in the name of the town of Grand Falls instead of the town council of Grand Falls; (2) that the action of ejectment would lie; (3) that the evidence shewed sufficient demand of possession; (4) that it was not necessary to make a tender for improvements as the Act 38 Vict. c. 42, only applied to improvements on the land at the time of its passage; (5) that the Act 59 Vict., c. 69, does not abridge or take away any of the rights to the common within the town. *Town of Grand Falls* v. *Petit*, 34, p. 355.

Councillor, Disqualification of—Quo warranto—The city of Moncton Incorporation Act, 53 Vict., c. 60, s. 6, provides that no person shall be qualified to act as alderman "who has any interest in any contract made with the council," and where an alderman of the city was shown to be a member of a firm occupying a market stall owned by the city and holding a butcher's license from the city, which license could be cancelled by the city council for violation of the market by-laws, the Court granted a writ of *quo warranto* calling on the alderman to show by what authority he exercised his office. *Ex parte Gallagher, In re Fryers*, 41, p. 545.

Councillor, Forfeiture of seat by—Section 61 of the Liquor License Act provides that if any member of a municipal council is convicted of knowingly committing any offence against the Act he shall thereby forfeit and vacate his seat.—*Held*, that a councillor convicted for selling without

a license did not forfeit his seat where the conviction did not state that the offence was committed knowingly, and it is not the duty of the Court to examine the proceedings before the magistrate to ascertain if guilty knowledge had been proved. *R.* v. *The Municipality of Restigouche, Ex parte Murchie*, 42, p. 529.

Criminal law — Indictable offences — Liability for costs of prosecution—A municipality is liable for the fees and expenses of a justice of the peace or a constable payable in relation to the prosecution of indictable offences only where they have been certified to be correct by the attorney general or other counsel acting for the Crown, and have been ordered to be paid by the judge presiding at the Court in which the indictment is presented.—The Act of Assembly, 57 Vict., c. 19, s. 1, whereby certain expenses in criminal prosecutions are made chargeable upon the municipalities is not *ultra vires* of the provincial legislature. *McLeod* v. *The Municipality of Kings*, 35, p. 163.

Criminal law—Liability for costs where nominal party—Where an appeal under the Towns Incorporation Act, 1896, from a conviction by a police magistrate, was allowed, and the conviction quashed on the ground that the magistrate had refused to hear material evidence, the Court (Hanington, Landry, Barker and McLeod JJ., Gregory J. dissenting), refused to make the order without costs against the town of Grand Falls, who took no part in the prosecution and were only parties by virtue of the act requiring the prosecution to be in their name. *Turner* v. *Mockler et al*, 36, p. 245.

Fredericton—Assessment Act 1907—Sheriffs are required by law to reside in the shiretown of their county unless otherwise permitted under C. S. 1903, c. 60, s. 8. —The sheriff of York county has an office in the city of Fredericton, the shiretown, where he spends a considerable portion of his time in the discharge of his duties, boarding at the county gaol when there.—His wife and family reside at his farm in the parish of S. where the sheriff also spends a large part of his time—He pays taxes in the parish of S., including poll tax, and swore that his residence and domicile were there.—For two years he paid without objection taxes levied on him as a resident in the city of Fredericton, and in his affidavits of service he described himself as "of the city of Fredericton."—Upon an application to quash an assessment of the city of Fredericton against the sheriff, on the ground that he was a non-resident, *held*, that the sheriff was in fact a resident of the city of Fredericton and liable to be assessed as such under the City of Fredericton Assessment Act, 1907.—*Held also*, that the sheriff if a non-resident, does not come within the exemption of s. 3 (11) of the City of Fredericton Assessment Act 1907, extended to non-residents "employed in the city of Fredericton in government or county offices whose duties are necessarily performed in Fredericton." *R.* v. *Assessors Fredericton, Ex parte Howe*, 41, p. 564.

The deputy sheriff of York county is also county gaoler, and as such occupies apartments with his wife in the county gaol at Fredericton.—He made affidavit that he had been for thirty years and still was an inhabitant and resident of the parish of Q., where he owns a farm and pays taxes, including a poll tax, and that he was in Fredericton only to discharge his duties.—Upon an application to quash an assessment of the city of Fredericton against the deputy sheriff, on the ground that he was a non-resident, *held*, he was in fact a resident of the city of Fredericton and liable to be assessed as such under the City of Fredericton Assessment Act, 1907. *R.* v. *Assessors Fredericton, Ex parte Timmins*, 41, p. 577.

A non-resident carrying on business in the city of Fredericton within the meaning of s. 34 of 7 Edw. VII, c. 48, (Fredericton Assessment Act, 1907) is liable to assessment in the city in respect to his personal property and income, notwithstanding the provisions of s. 30 of 3 Geo. V., c. 21 (Rates and Taxes Act, 1913), but if the non-resident be employed in a government office, whose duties thereunder are necessarily performed in Fredericton, he is exempt under sub-s. 11, of s. 3 of said Fredericton Assessment Act. *R.* v. *Assessors of Fredericton, Ex parte Maxwell*, 44, p. 563 (Chambers).

Mayor, Disqualification of—The Incorporation Act of the Town of Portland, 34 Vict., c. 11, s. 9, provides that no person shall be qualified to be elected to serve in the office of chairman or councillor, or being elected shall serve in either of the said offices, so long as he shall hold the office of police magistrate or sitting magistrate of the said town, or any office or place of profit in the gift or disposal of the Council.—By Act 45 Vict., c. 61, the name of the town of Portland was changed to "The City of Portland" and it was provided that instead of a chairman annually elected by the Councillors, there should be a Mayor.—By Act 51 Vict., c. 52, provision was made for the appointment of a commission of three persons to prepare a scheme for the union of the city of Saint John and the city of Portland.—The Act provided that one of the Commissioners should be appointed by the Council of the city of Portland, that each commissioner should be paid a specified sum for his services, besides expenses, and that the cost of the commission should be borne by both cities.—The Council of the city of Portland appointed the defendant C. who was then mayor of the city, its commissioner. —At a meeting of the Council held shortly after, presided over by C. as mayor, certain accounts were ordered to be paid, and estimates for the year were approved, and an assessment ordered therefor.—The plaintiff, a ratepayer brought this suit on behalf of

himself and all other ratepayers who should come in and contribute to the expense of the suit, to restrain C. from signing orders for the payment of the accounts ordered to be paid by the Council and the defendant W., the chamberlain of the city, from paying them on orders signed by the defendant C. and for a declaration that C. was incapacitated from acting as mayor.—*Held*, that the suit should be by information by the Attorney-General on the relation of all or some of the ratepayers, the plaintiff not having sustained, or likely to sustain, any injury not common to all the ratepayers. *Merritt* v. *Chesley et al*, Eq. Cas., p. 324.

Moncton — Assessment by municipality of county — Certiorari—The municipality of the county of Westmorland, having issued a warrant of assessment to the city of Moncton under the provisions of the Act respecting Rates and Taxes, C. S. 1903, c. 170, s. 34, before the same was delivered to the city assessors or any assessment made thereunder the city of Moncton applied for a certiorari to remove the warrant alleging that part of the amount to be assessed under it was not properly chargeable to the city.—There was no evidence that the city itself was liable to be taxed as a rate payer.—*Held* that there was no ground for the application, there being no assessment for the Court to act upon and the city as such having no interest in the assessment. *Ex parte The City of Moncton*, 39, p. 326.

Moncton — Civil Court commissioner—The declaration alleged that under Act 53 Vict., c. 60, a Court for the trial of civil causes was established in the city of M, that a commissioner of the said Court was to be appointed by the governor in council, that the salary of the said commissioner was to be fixed by the city council of the city of M. and paid out of their funds, that pursuant to the act the plaintiff was appointed commissioner and his salary was fixed by the city council at $600 per annum, that he had performed the duties of the office and was entitled to be paid the salary, but the defendant had refused to pay. —*Held*, on demurrer (*per* Hanington, Landry, Barker, McLeod and Gregory JJ.), that the declaration was good, as it alleged a statutory liability to pay the plaintiff out of the city funds. *Kay* v. *The City of Moncton*, 36 p. 202.

Moncton — Police magistrate, "Absence" of—The word "absence" in section 65 of the City of Moncton Incorporation Act, 53 Vict., c. 60, does not mean absence from the place of trial but inability to attend to the business of the Court.—Here the police magistrate was in the court room during part of the trials but during the trials was obliged to attend before a commissioner appointed by the provincial government to inquire into his official conduct. *R.* v. *Steeves, Ex parte Cormier*, 39, p. 435.

Moncton — Recommendation to City Court commissioner—G., having applied to the commissioner of the City Court of M. for a summons, was refused unless he first paid the fee for the issuing thereof.—Relying upon a recommendation in a report of the finance committee of the city council of the said city, which was received and adopted by the council, G. then moved the Court for a rule *nisi* calling upon the commissioner to shew cause why a mandamus should not issue to compel him to issue the summons without the fee being paid or tendered in advance.—The recommendation was as follows: "Your committee would recommend that hereafter any and all claims within the jurisdiction of said Court may be sued and judgment therein taken without the payment of costs in advance, but that the same be retained out of the first moneys collected on the judgment." —*Held*, (1) that, as the commissioner was an appointee and servant of the Crown, and in no way responsible to the said city or under its direction or control, the city could not by resolution create any duty or obligation upon the commissioner to issue the summons without the fee therefor being prepaid; and (2) that the report and its adoption amounted to nothing more than a recommendation to the commissioner which he was at liberty to act upon or not according to his discretion. *Ex parte Grant*, 35, p. 45.

Overseers of the poor—Medical services rendered—A physician who rendered professional services to an indigent person injured while a resident of the parish of S., by the direction of P., one of the overseers of the parish, can maintain an action for such services against the overseers of the parish in their corporate name. (*Per* Hanington, Landry, Barker and McLeod JJ.)—*Held* (*per* Tuck C. J., dissenting), that the overseers are not liable until notice and request is made pursuant to section 12 of the act relating to the support of the poor, C. S. 1903, c. 179, and as the notice (if any) in this case was not given to the overseers but to P., one of them, there is no liability. —The question whether a person relieved is a pauper or not is a question of fact for the jury, and, if not passed upon by them, a new trial will be granted to have the question determined. *Irvine* v. *Overseers Parish of Stanley*, 37, p. 572.

Public Health Act, 61 Vict., c. 33—A medical practitioner employed by the local board of health of the city of Moncton to attend to cases of small-pox cannot recover for his services in an action against the city. —The Public Health Act, 1898 (61 Vict., c. 33, imposes upon the cities or municipalities, wherein local boards of health are established, no liability, which can be enforced by action, for the expenses or contracts of such boards. *Cruise* v. *The City of Moncton*, 35, p. 249.

Public Health Act 1898 — Regulation 2 —The health district of the city and county of Saint John is not within regulation 2 of the regulations made under section 38 of the Public Health Act, 1898, which provides for compulsory vaccination when "it shall be found by the local board of health of any health district that a case of smallpox exists, in case such district be a city or town" and a conviction for refusing to attend at the office of the local board of health of the district of the city and county of Saint John and to be vaccinated, contrary to the statute and regulations, is bad —(*Per* Hanington, Barker and Gregory JJ., Tuck C. J. and McLeod J. dissenting.) *R.* v. *Ritchie, Ex parte Jack*, 35, p. 581.

Public Health Act, C. S. 1903, c. 53—Conviction under—A conviction under the Public Health Act, C. S. 1903, c. 53, for failing to remove material dangerous to the public health from premises indicated in a notice given by a health officer under section 36 of the Act held bad where the notice to remove described, not the premises of the defendant on which the material complained of is deposited but, other premises; and further held that the objection was not waived or the conviction cured by the defendant not being misled by the wrong description and not raising any objection on that ground, but appearing and defending on other grounds. *R.* v. *Kay Ex parte Allen*, 38, p. 536.

Public Health Act, C. S. 1903, c. 53, s. 73—A judge of the Supreme Court has no jurisdiction under section 73 of the Public Health Act, C. S. 1903, c. 53, to order a county council to pay an amount assessed for the expenses of a local board under section 72 of the act on the application of the chairman without the authority of the board.—(*Per* Hanington and McLeod JJ., Tuck C. J. dissenting). *Ex parte Municipality of York re Local Board of Health, District No. 3*, 37, p. 546.

Quorum—See *R.* v. *The Municipality of Restigouche, Ex parte Archibald Murchie*, 42, p. 540.

Saint John, City of—Assessment Act, 52 Vict., c. 27—The whole of an estate of a deceased person liable to be assessed in the city of Saint John may be rated in the names of the resident trustees under 52 Vict., c. 27, s. 135, though one of the three trustees, in whom it is vested, is resident abroad.—Railway bonds secured by a mortgage, are not mortgages within the meaning of section 121 as amended by 63 Vict., c. 43, and are not exempt from taxation. *R.* v. *Sharp, Ex parte Lewin*, 35, p. 470.

Book debts are assessable in the city of Saint John under s. 121 of 52 Vict., c. 27, as amended by 63 Vict., c. 43.—Railway bonds secured by a mortgage are not exempt under the said acts. *R.* v. *Sharp, Ex parte Turnbull*, 35, p. 477.

Saint John — Board of harbour commissioners—38 Vict., c. 95—The charter of the city of Saint John grants the harbour of St. John within certain boundaries to the mayor, aldermen and commonalty of the city, but any previous grant of the Crown in any part of the same is reserved and excepted. —In addition to the wharves and water-lots owned by the city there are within the limits of the harbour wharves owned as private properties under grants from the Crown and reserved by the charter, and also wharves on lands leased from the city.—By Act 38 Vict., c. 95 (N. B.) it was provided *inter alia*, that the mayor etc. of the city might contract and agree for the transfer to commissioners, to be duly appointed to constitute and form a board of harbour commissioners for the port and harbour of St. John, of all the right, title and interest of the mayor etc. of, in and to the harbour of St. John, and of, in and to the land, water and the land covered with water, wharves, tenements, and hereditaments within certain bounds of the harbour provided that at least two thirds of the members of the common council concurred in and agreed thereto.—At a meeting of the common council held after the passing of the Act a report from the general committee of the council was submitted recommending that application be made to the Dominion Parliament for legislation placing the harbour of St. John in commission in accordance *inter alia* with the terms of the said Act, and that the board of harbour commissioners be composed of five members, three of whom should be appointed by the Governor General in Council, and two by common council.—The report was adopted by the council on a vote of twelve to four, the mayor, who was present, abstaining from voting though he was in favor of the report, and had signed it as one of the general committee.—The common council was composed of nineteen members, including the mayor.—The Dominion Parliament, in accordance with the terms of a request from a committee of the common council, by Act 45, Vict., c. 51, created a board or corporation of harbour commissioners to consist of five members, three to be appointed by the Governor in Council, one by the common council, and one by the St. John board of trade.—The Act gave the board large powers relating to the management and control of the harbour, including the mooring and placing of ships at private wharves, and the fixing of tolls and dues payable by ships at private wharves and ships.—*Held*, that the Act 38 Vict., c. 95, should be strictly construed, and that the membership of the harbour board not having been constituted under Act 45 Vict., c. 51, in accordance with the terms consented to by the common council, an *ex parte* injunction restraining the defendants from transferring the harbour and wharf property to the board was properly granted.—Quære: whether the consent required by the Act was the consent of two-thirds of all the members of the common council, or of two thirds of the members present at a meeting. *Berton* v. *The Mayor etc. of the City of St. John*, Eq. Cas., p. 150.

Saint John, City of—Extent of fishing rights in harbor—By its charter the city of Saint John is granted "all the lands and waters thereto adjoining or running in, by or through the same" within defined boundaries, including a course at low water mark; "as well the land as the water, and the land covered with water within said boundaries." —The fisheries between high and low water mark on the harbour are declared by the charter to be for the sole use of the inhabitants, but by Act of Assembly they are directed to be annually sold by the city.—*Held*, that where the city is bounded by low water mark it has not a title to sell the right of fishing beyond such mark, though within the harbour or river. *The City of Saint John* v. *Wilson*, 2 Eq., p. 398.

Saint John, City of—Fire law, 35 Vict., c. 56—By Act 35 Vict., c. 56, intituled "An Act for the better prevention of conflagrations in the city of Saint John," all dwelling houses, store houses, and other buildings to be erected in the city of Saint John, on the eastern side of the harbour, within certain limits, must be made and constructed of stone, brick, iron, or other non-combustible material, with "party or fire walls" rising at least twelve inches above the roof, and the roof must be covered on the outside with tile, slate, gravel, or other safe materials against fire.—The defendants were erecting a building resting on stone foundation walls, and consisting of a wooden frame with brick filling four inches thick between the studding, and the whole encased with brick four inches thick.—In a suit by the corporation of the city of Saint John for an injunction to restrain the defendants from erecting the building as being in violation of the Act.—*Held*, (1) that the suit was properly brought in the name of the plaintiff and should not be by information in the name of the Attorney-General on their relation; (2) that the building was in violation of the Act and an injunction should be granted. *The Mayor etc. of Saint John* v. *Ganong et al*, Eq. Cas., p. 17.

Saint John, City of—Lease of water lot—S. is a lessee under lease from the city of Saint John of a water lot in the harbour; the F. K. Co. are lessees of the next lot to the south and there are other lots to the south between that of S. and the foreshore of the harbour.—By his lease S. has a right of access to and from his lot on the east and west sides.—*Held*, that S. was not a riparian owner and had no rights in respect to the water lot other than those given him by his lease.—Hence he could not restrain the P. K. Co. from erecting a wharf on the adjoining lot which would prevent access to his from the south, a right of access not provided for in his lease.—Judgment of the Supreme Court of New Brunswick (40 N. B. R. 8) maintaining the decree of the judge in equity (4 N. B. Eq. 184, 261) reversed. (Idington J. dissenting). *The Francis Kerr Co.* v. *Robert Seely*, 44 S. C. R., p. 629.

Saint John, City of—Liability re snow on streets under 58 Vict., c. 72—The Saint John Railway Company acquired the Saint John Street Railway in 1894, subject to the obligations of keeping in repair the streets in which the railway ran as provided by 50 Vict., c. 33, s. 10, and also the obligation of removing the snow and ice as provided by 55 Vict., c. 29, s. 10.—In 1895 the act 58 Vict., c. 72, was passed, s. 6 of which authorized the company to agree with the city of Saint John to pay the said city an annual sum to be agreed upon as a consideration for taking care etc. of the streets and the removal of the snow thereon, relieving the company from all liability for the same during the continuance of the agreement.—Acting under the authority of this section, the company and the city entered into a contract by which the city undertook to do what, by the section, it is authorized to do.—*Held* (*per* Tuck C. J., Hanington, Barker and McLeod JJ.), in an action for damages caused by the defendants' negligence in not removing the snow in a street through which the railway ran, that section 6, and the agreement made thereunder, imposes upon the city no greater liability in respect to the care of the streets than otherwise attaches to them as a municipal corporation, and neglect to remove the snow was a mere nonfeasance for which they were not liable at the suit of a private individual, and a nonsuit should be entered.—*Held* (*per* Gregory J.), that there was a statutory obligation on the railway company to level the snow and keep safe in that respect for public travel the streets where the railway runs.—That while the act 58 Vict., c. 72, does not impose a duty on the city, it authorizes it in this instance to become a contractor for the performance of the work, and to stand in the place of the company in respect to all its liabilities in regard to the removal of snow, and the city is liable to a private individual for damages caused by its failure so to do. *McCrea* v. *The City of Saint John*, 36, p. 144.

Saint John, City of—Police Court revenue—Smuggling—A penalty imposed by the police magistrate of the city of Saint John for harbouring smuggled goods under section 197 of the Customs Act, R. S. C., c. 32, forms part of the consolidated revenue of Canada and is payable to the receiver-general, and not to the chamberlain of the city of Saint John under 52 Vict., c. 27, s. 50. *R.* v. *McCarthy* (Two Cases), 38, p. 41.

Saint John, City of—Portwardens—Right to fees—Portwardens appointed by the city of Saint John have no exclusive right to examine hatches of incoming vessels, so as to entitle them to fees for the service paid to an outside person. *Portwardens of Saint John* v. *McLaughlin*, 3 Eq., p. 175.

Saint John, City of—Rights of city re street railway—The plaintiff company, under the provisions of its charter, constructed

a line of railway in the city of Saint John over and upon streets agreed upon between the city and the company.—The company laid its rails of a pattern and description approved of by the city at the time of the laying thereof and laid and placed them to the satisfaction of the city engineer for the time being.—The city in the exercise of its right to take up the rails and open up the streets traversed by the railway for the purpose of altering the grade or any other purpose, removed the rails and changed the grade at the intersection of certain streets and notified the plaintiff company that it would be necessary for it to raise its rails to the altered grade and replace the rails removed with grooved rails instead of the "T" rails removed.—*Held*, in answer to questions submitted in a stated case, (1) that the city having removed the rails temporarily for a specific purpose had no authority to order the company to replace them with rails of a different pattern; (2) that it had the right to require the company to keep its track level with the altered grade of the street on a sufficient foundation to keep it at the required level but had no right to require the use of any particular foundation. *The Saint John Rwy. Co.* v. *City of Saint John*, 43, p. 417.

Saint Marys—The act 62 Vict., c. 57 creating the Saint Mary's Village Water and Fire Commissioners a corporate body does not make the village of Saint Mary's an incorporated town, and does not deprive a Parish Court commissioner of his jurisdiction in that village. *R.* v. *Clarkson, Ex parte Hayes*, 40, p. 363.

Suit by ratepayer v. municipality—A ratepayer on behalf of himself and all other ratepayers of a municipal corporation, has a right to maintain an action to restrain the corporation from doing acts which he believes are *ultra vires*, without bringing the action in the name of the Attorney-General ex relatione, where the Crown is not directly interested. *Steeves et al* v. *City of Moncton*, 42, p. 465, C. D.

Warden, Office of—M. was elected councillor for the parish of St. L. in October, 1907, and was appointed warden of the county in January.—On September 29, 1908, he resigned his position of councillor, but afterwards and before December 29, 1908, was elected councillor by a newly created parish in the same county, and in January, 1909, was reappointed warden.—*Held*, M.'s resignation as councillor operated as a resignation of his position of warden, as the warden must be a councillor under the Municipalities Act, C. S. 1903, c. 165, and therefore presenting a petition to him on December 29, 1908, would not be sufficient under the provisions of the Liquor License Act, C. S., 1903, c. 22, s. 21, amended 7 Edw. VII, c. 46. *Ex parte Stavert*, 39, p. 239.

NEGLIGENCE.

1. Actions for Negligence.
1. GENERALLY.
2. AT COMMON LAW.
3. UNDER STATUTE.
4. STATUTE OF LIMITATIONS. (*See* **Limitation of Actions.**)

2. Animals.
1. CARRIAGE OF. (*See* **Carriers.**)
2. DANGEROUS. (*See* **Animals.**)
3. ON OR NEAR TRACKS. (*See* **Railways, post, No. 13.**)
4. RUNAWAY HORSES. (*See* **Animals.**)

3. Buildings.
4. Children and Others under Disability.
5. Contributory Negligence.
6. Damages.
1. COMPENSATION TO PERSON INJURED.
2. COMPENSATION TO RELATIVES
7. Driving Logs.
8. Evidence of Negligence.
9. Fires.
10. Highways—Unsafe Condition.
11. Hospitals — Inns — Theatres, etc.
12. Public.
13. Railways.
14. Sale of Dangerous Things.
15. Servants.
1. ACTS OR OMISSIONS OF—LIABILITY OF MASTER.
2. COMMON EMPLOYMENT.
3. DEFECTIVE SYSTEM.
16. Ships—Management of.
17. Vehicles—Reckless Driving, etc.
18. Work of Independent Contractors.
19. Miscellaneous Cases.
1. GENERALLY.
2. BROKER. (*See* **Broker.**)
3. CARRIERS. (*See* **Carriers.**)
4. SOLICITOR. (*See* **Solicitor.**)
5. TRUSTEES. (*See* **Trustees.**)

1. Actions for Negligence.

1. GENERALLY.

Charge to jury—In an action for damages for an injury caused by alleged negligence the verdict will not be set aside on the ground that the trial judge failed to instruct the jury as to what would, and what would not, constitute negligence, if counsel on the

trial neglected to ask the judge to so instruct them. *Robinson* v. *Haley et al*, 42, p. 657.

Duty of judge and jury—It is the duty of the trial judge to determine whether any facts have been established from which negligence may be reasonably inferred and for the jury to find whether from the facts so established negligence ought to be inferred. *Porter* v. *O'Connell*, 43, p. 458.

2. AT COMMON LAW.

Managing director—Duty to shareholders—The managing director of a company, without the authority but with the knowledge of all his company's directors except one, erected, at a cost of $17,000, a fuel house for the storage of mill wood and a conveyor for the purpose of moving the mill wood from his mill to the company's pulp mill to be used for fuel and pulp.—The fuel house and conveyor became of no use to the company by reason of the discontinuance of the use of mill wood.—*Held* (*per* Tuck C. J., Barker, McLeod and Gregory JJ., Hanington and Landry JJ. dissenting,) that there was no such gross negligence on the part of the managing director as made him liable for the expense of erecting the fuel house and conveyor. *The Cushing Sulphite Fibre Co. Ltd.* v. *Cushing*, 37, p. 313.

Master and servant—Failure of servant in duty to master—In an action by the plaintiff company against the defendant, the first count of the declaration alleged that the defendant was hired for the purpose of receiving and forwarding to the company applications for fire insurance, yet the defendant not regarding his duty, so negligently and wrongfully received and forwarded to the company an application for insurance containing statements which he knew at the time to be false, and material to the risk, and said company relying upon the truth of the application accepted the risk and issued a policy thereon which became a claim and said company was put to great cost in defending an action at law.—*Held* (*per* Tuck C. J., Landry, McLeod and Gregory JJ.), that the count stated a cause of action and was good on demurrer.—*Held* (*per* Hanington J.), that the defendant's duty, under the contract, was to receive and forward all applications, whether the statements were true or false, and as the first count did not charge any duty beyond that, or fraud, it was bad on demurrer. *The Norwich Union Fire Insurance Society* v. *McAlister*, 35, p. 691.

3. UNDER STATUTE.

Death of employee—Action by administrator of deceased—A plaintiff is not bound to elect at the trial whether he will proceed under the Workmen's Compensation Act or under the Act respecting Compensation to Relatives of Persons Killed by Wrongful Act, Neglect or Default, C. S. 1903, c. 79, but the action can be brought and proceeded with under both acts and the damages assessed under either act as the evidence may warrant. *Wentzell* v. *N. B. & P. E. I. Rwy. Co.*, 43, p. 475.

Questions for jury—In an action under the act "respecting compensation to relatives of persons killed by wrongful act, negligence or default," C. S. 1903, c. 79, the jury should be simply asked if the defendant was guilty of negligence causing the death, and if so, in what did such negligence consist?—If irrelevant and unnecessary questions are asked, and the judge's charge in respect to them is not warranted by evidence relevant to the issue, a new trial will not be granted unless the effect thereof is to prejudice the minds of the jury as to the real question to be tried. (*Per* Barker J.) *Collins, Administrator etc.* v. *The City of Saint John*, 38, p. 86.

Workmen's Compensation Act—Rights of workman—The provisions of the Workmen's Compensation for Injuries Act, C. S. 1903, c. 146, place a workman who has been killed by the negligence of his employer in the same position as a stranger, but give his personal representatives no other or better right than they would have if he was a stranger. *Murray et al* v. *Miramichi Pulp and Paper Co. Ltd.*, 39, p. 44.

2. Animals.

(See *as above*.)

3. Buildings.

Landlord—Failure to repair sewer pipe in adjoining apartment—Where a landlord leases a house to several tenants, he retains such control over the premises as to render him liable for damage caused by failure to repair a leak in a sewer pipe in the apartment of a tenant in an upper flat which causes damage to the tenant of a shop on the ground floor of the premises. *Brown* v. *Garson*, 42, p. 354.

Use of explosives—The owner of land who uses explosives in the usual way for the purpose of excavating rock for the foundation of a house is bound to exercise all reasonable care and is responsible for damage to an adjoining occupant due to the use of extra heavy blasts. *Id.*

4. Children and Others under Disability.

(*No Cases.*)

5 Contributory Negligence.

Answering questions necessary to establish contributory negligence—In an action for negligence in failing to properly guard a shaft or belt in defendant's mill by which plaintiff's intestate was caught

and killed, defendant pleaded contributory negligence (1) by deceased attempting to pass this shaft; (2) in attempting to step over instead of under the shaft; (3) in wearing an apron when passing the shaft.—No one saw the accident, but there were sufficient facts from which the jury could infer how the accident occurred.—The jury found there was no contributory negligence, but to the question: "In what way did the accident to the deceased occur and how did the deceased come in contact with the shaft or belt?" replied, "We do not know."—After verdict entered for the plaintiff, *held*, defendant was entitled to a new trial in order that the jury might find the facts necessary to determine the question of contributory negligence. *McGowan* v. *Warner*, 41, p 524.

Horse, Bailment of—Failure to give warning of vicious tendencies—The keeper of a livery stable who hires a horse to another is bound to give notice to the bailee of any dangerous quality in the animal hired of which he has or should have knowledge, and failure to give such notice, while it may not be accurately designated contributory negligence, may in an action against the bailee for an injury resulting from neglect to exercise proper caution go directly to the question of the bailee's negligence and liability. *Gray* v. *Steeves*, 42, p. 676.

Ultimate negligence—In an action for negligently driving a street car whereby deceased was struck and killed, the jury found that the defendant was negligent on account of the motorman being incompetent and not applying the emergency brake when he saw or should have seen deceased, and that the motorman had the last chance to avoid the accident.—The jury also found that there was contributory negligence on the part of the deceased in not taking proper precaution to notice whether the car was coming or not and that after deceased stepped on the track, the motorman could not have stopped the car in time to have avoided the accident.—After verdict for the plaintiff, *held*, the findings that the motorman was incompetent and did not apply the emergency brake were against evidence.—Under the findings of the jury the deceased had the last chance to avoid the accident and a verdict should be entered for the defendant. *Ryder* v. *Saint John Railway Co.*, 42, p. 89.

6. Damages.

1. COMPENSATION TO PARTY INJURED.

Loss of all fingers—Loss of hand—In an action under the Workmen's Compensation for Injuries Act, 4 Geo. V., c. 34 (1904), the trial judge found that the plaintiff, while working at a circular saw edger in the defendant's mills, lost all the fingers of his left hand by reason of the saw not being guarded as by law required, and assessed the full compensation allowed by clause (b) of sub-s. 2 of s. 6 of the Act, for the loss of a hand.—*Held*, on appeal, that the fair intendment to be made in favor of the judgment is the trial judge found that the plaintiff lost his hand and that the compensation allowed was not greater than the amount provided for by the Act, and the appeal was dismissed with costs. *Pankhurst* v. *Smith*, 44, p. 279.

Street railway accident—On the trial of an action brought to recover damages for injuries caused to the plaintiff by the negligence of the servants of the defendants while he was being carried as a passenger upon a car of the defendant company, the vice-president of the company, a witness for the plaintiff, who had gone to P., the plaintiff's place of residence, in order to pursue some inquiries as to the plaintiff's earning capacity and income, was asked what had been told him in reference thereto by one E.—Upon objection by the defendant's counsel the question was ruled out.—In charging the jury the learned judge, referring to the rejected evidence, told them that they might assume that if the witness had heard anything unfavourable to the plaintiff he would have told it, and that it was material which they might consider when they were endeavouring to arrive at the earning capacity and income of the plaintiff.—At the instance of the defendants a commission was issued to take the evidence of certain persons at P.—The commission, though executed, was never returned to the Court, and a copy of the evidence of one of the witnesses being tendered in evidence on behalf of the plaintiff, was, upon objection by the defendants' counsel, rejected.—The learned judge told the jury that the conduct of the defendants in not having the commission returned was an element which might fairly be considered by them in determining the credibility of the plaintiff, although the defendants' counsel had offered to allow copies of all the evidence taken under the commission to be used as if it had been returned into Court, which offer was refused.—*Held*, misdirection in both instances, (*per* Tuck C. J., Hanington and McLeod JJ., VanWart J. dissenting.)—B., a medical witness, swore that W., a surgeon who had been employed by the defendants to watch the plaintiff after he had been injured, told him that he would consent to an amputation of the plaintiff's foot if the plaintiff's attorney would not use it as a means of increasing the damages.—The learned judge commented severely upon this to the jury.—*Held*, misdirection as it was not a matter for which the defendants could be held liable.—(*Per* Tuck C. J., Hanington and McLeod JJ., VanWart J. dissenting.)—(*Per* Tuck C. J.), there should be a new trial by reason of the improper admission and rejection of evidence, and notably on account of the admission of evidence to show at what price the defendants' stock had been selling in the market.—Also (*per* Tuck C. J.), as the evidence of

the plaintiff's income and earning capacity was unsatisfactory, that there should be a new trial by reason of excessive damages, *Hesse* v. *St. John Railway Co.*, 35 N. B. R., p. 1: 30 S. C. R., p. 218.

2. COMPENSATION TO RELATIVES.

Damages for loss of prospective services—In an action by a husband as administrator of his wife under the act "respecting compensation to relatives of persons killed by wrongful act, negligence or default" C. S. 1903, c. 79, for her death caused by falling between the ferry boat and the float, damages based on a claim of $15 per month for loss of prospective services of the wife for a period of five years may be recovered and are assessed on a proper principle. *Collins (Administrator etc.)* v. *The City of Saint John*, 38, p. 86.

Damage to aged father who was also a creditor—In an action brought under C. S., c. 86 (Lord Campbell's Act) for the benefit of the father of the deceased, evidence was given to show that the father, who was a brass founder, and about seventy years old, had practically become unable to earn his own livelihood, although his prospects for some years of future life were good; that the deceased, who was twenty-six years of age, had always lived with his father, and for many years had paid various sums, sometimes as much as thirty dollars per month, for his board and lodging, though there was no evidence to show what such board and lodging were worth; that for the fifteen months immediately preceding his death he had ceased to pay anything, because, having gone into business on his own account, his father wished him to keep the money to put into the business; that the son was sober, industrious, a good man of business, and affectionate to his father.—When the son went into business for himself the father advanced to him $700.—After his death the business was closed up and the stock-in-trade, etc., sold, which sale realized $1,100.—Of this $700 went to creditors other than the father, leaving only $400 to satisfy the father's claim of $700.—The learned Chief Justice who tried the case, having left it to the jury in general terms to estimate what, if any, pecuniary damage the father had sustained by the death of his son, a verdict was found for the plaintiff for $3,500.—*Held* (*per* Hanington, Landry, Barker, VanWart and McLeod JJ.), that the amount of the verdict showed either the charge was too general in its terms or the jury misunderstood the principles upon which damages should be assessed in cases such as this, and, therefore, that there must be a new trial on the question of damages, and, further as the evidence of negligence on the part of the defendants was not altogether satisfactory, and the finding of the jury on the question of damages did not entitle their opinion on the question of negligence to much weight, that there must be a new trial on this point as well.—It having been urged on behalf of the plaintiff that he was entitled to retain a verdict for $300 at least, that being the balance due the father upon his $700 loan, as the jury would have a right to infer that the son, if he had lived, would have paid the debt in full.—*Held*, as before, that as such claim had not been mentioned in the particulars delivered under the act, and was not referred to either in the plaintiff's opening, the judge's charge, or in any other part of the case, it was impossible to say that the jury in assessing the damages had included this item, therefore, even admitting this claim to be a proper element of damage in case under the act, it must be submitted to the consideration of another jury. *Further held*, as before, that outside of the debt above referred to there was sufficient evidence to go to the jury of a pecuniary loss to the father by the death of the son.—*Held* (*per* Tuck C. J.), that as the jury had either misunderstood or wilfully disregarded the charge on the question of damages, there must be a new trial, and that the evidence of negligence should be submitted to another jury as well. *Runciman Adm.* v. *Star Line Steamship Co. Ltd.*, 35, p. 123.

7. Driving Logs.

See TIMBER.

8. Evidence of Negligence.

Admissibility of evidence—In an action for compensation for the death of the intestate of the plaintiff caused by the wrongful act or default or neglect of the defendant company, the defendant put in evidence, subject to objection of the plaintiff's counsel, a statement, made on cross-examination at the inquest, of the doctor who attended the deceased immediately after the accident, as to what the deceased told him was the cause of the accident, and also a statement of a similar character made to the manager of the defendant company shortly after the accident.—*Held*, on a motion to set aside the verdict for the plaintiff or for a new trial, that a statement made by the deceased to the plaintiff shortly after the accident explaining how it happened, was, under the circumstances, properly received, and was not a ground for a new trial. *Wentzell* v. *N. B. & P. E. I. Rwy. Co.*, 43, p. 475.

Circumstantial evidence — Contributory negligence—While B. was carrying a bag out of the defendant's grist mill by an ordinary means of exit he passed near a vertical shaft which was in motion, and in some way his overcoat was caught by the shaft and he was whirled around and instantly killed.—Between the shaft and the smutter, where B. tried to pass, was a passage of about six feet in width.—The shaft, which was unguarded, was three inches in diameter, and had been mended some years before with a chain and some wire

to secure a coupling.—This increased it's diameter by several inches, and there was evidence that a hook on the end of the chain and a piece of the wire were left protruding, though this was contradicted.—There was no witness of the accident, and the jury found that there was no negligence on the part of the defendant and that there was contributory negligence on the part of B.—*Held*, that the verdict was such as the jury, reasonably viewing all the evidence, might properly find. *Berthelot* v. *Sallesses*, 39, p. 144.

Horse, Allowing it to stand unbridled—The jury having found that it was negligence for the hirer of a horse to allow it to stand harnessed but unbridled in an open place near the shafts of the wagon while he went to the wagon to get the bridle, in consequence of which the horse escaped from his control into a ploughed field where it lay down and rolled and in getting up cut itself in the foreleg, the Court will not disturb the verdict.—The defendant's act in allowing the horse to stand harnessed but unbridled in an open space was the proximate cause of the injury and the action of the horse in rolling was not an independent intervening cause. *Gray* v. *Steeves*, 42, p. 676.

Ice and snow—Evidence necessary to prove negligence—A man hired to work about a building was killed by a mass of ice falling upon him from the roof.—In an action, under Lord Campbell's Act, by the administratrix of the deceased intestate against the owners and occupiers of the building.—*Held*, that the latter were not liable in the absence of evidence that they suffered the ice to remain there for an unusual and unreasonable time after they had notice of its accumulation and might have removed it.—In erecting a building the owner may adopt any style of architecture he pleases, provided he does not create a nuisance or violate any law or municipal ordinance; therefore the construction of a roof with projecting eaves, which caused an accumulation of ice and snow thereon, is not *per se* evidence of negligence on the part of the owner, although it may impose upon him a greater degree of watchfulness and care in order to prevent accidents. *Dugal* v. *Peoples Bank of Halifax*, 34, p. 581.

Onus of proof—Log driving over dam of riparian owner—The plaintiff, as owner of the alveus of a navigable river and of the land on both sides of it upon which a dam stands, has an absolute right to maintain it for the purpose of operating his mill by the use of the flowing water, and he has this right as an incident to the ownership of the property.—Such right must be exercised subject to the rights of other riparian proprietors to a reasonable use of the water and to the public right of passage.—The public right is not a paramount right, but a right concurrent with that of the riparian owners; and if, in the exercise of their public right, the defendants in driving their logs down the river, injured the plaintiff's dam, the onus is upon to them to show that they adopted all reasonable means and used all reasonable care and skill in order to avoid the injury. (*Per* Barker J.) *Roy* v. *Fraser et al*, 36, p. 113.

Presumption of negligence—Bailment—A bailee for hire who returns the property bailed in a damaged condition, and who, being the only person with full knowledge of the circumstances causing the damage, fails to give any explanation of the same, is presumed to have been negligent.—This applies to the hirer of a horse and carriage from a livery stable keeper. *Gremley* v. *Stubbs*, 39, p. 21.

Reckless driving—Evidence of speed—In an action for damages for an injury to the plaintiff caused by the defendant's servant in the course of his employment negligently and through want of proper care and skill in driving a horse and carriage running into and injuring the plaintiff, a witness for the plaintiff having stated that just before the accident happened the horse was trotting was asked: "Could you say how many miles an hour?" answered (subject to objection): "the horse was going so fast that I don't think he could have been pulled up immediately."—*Held*, that the answer was properly received. *Porter* v. *O'Connell*, 43, p. 458.

Rule of the road—Driving on wrong side—Runaway—In an action on the case for negligence in driving the defendant's horse whereby his wagon came into collision with and damaged that of the plaintiff, it is not sufficient to prove merely that the defendant was driving on the wrong side of the road, especially as it was shown that the defendant just before the collision had crossed from the left side of the road for the purpose of speaking to a man sitting on a door step on the other side, and that the plaintiff's horse at the time of the accident was running away and beyond control.—(*Per* Tuck C. J., Hannington, Landry and VanWart JJ., Barker and McLeod J. dissenting.) *Stout* v. *Adams*, 35, p. 118.

Statutory powers—Plans by competent engineer—In the exercise of their statutory duties the corporation of the city of M. provided a system of sewers for the city.—In the year 1894 the plaintiff built a house on the east side of lower R. street, and in pursuance of a by-law of the city requiring drains to be made from all houses and buildings on the streets to the sewers, entered a sewer already laid down in the street.—The sewer extended along lower R. street to a point a short distance south of the plaintiff's house, where it connected with a cross drain leading eastwardly into a main outlet sewer discharging into the P. river at a point below high water mark.—In the year 1898, when an unusually high tide took place, the water backed up through the sewer into the plain-

tiff's and other cellars on lower K. street.—The same thing occurred several times afterwards.—In 1901 the corporation, with a view, if possible, of preventing damage in future by back flowage, continued the sewer on lower R. street southwardly to the P. river, the outlet being below high water mark.—The new sewer was constructed according to plans prepared by the city engineer and approved of by the city council, and the device at the outlet to prevent back flowage is the same as in the other sewers in the city, and similar in principle and mode of operation to those used in other places where sewers discharge into tidal rivers such as the P.—The new sewer did not prevent back flowage, and the action was brought for loss and damage by the flowage of back water from the main sewer into the plaintiff's cellar through the house drain. —*Held* (*per* Tuck C. J., Barker, McLeod and Gregory JJ., Hannington and Landry JJ. dissenting), that the city, having the statutory authority to construct the sewer, and having built it after plans made by a competent engineer and adopted by the council, was not guilty of actionable negligence on account of the insufficiency of the sewer to answer its purpose, and a person thereby injured has no remedy by action at law; and it makes no difference in this particular whether the use of the sewer is voluntary or under compulsion. *Lirette* v. *The City of Moncton*, 36, p. 475.

Steamship — Injury from swinging door — Conflict of evidence — The plaintiff, a boy of four years of age, with his parents was being carried as a passenger on a steam-boat of the defendants.—The child and his mother were in a house on the boat's deck, leading from which out on the deck were doors fitted with appliances intended to keep them fastened back, when they should happen to be flung wide open.—While the plaintiff was in the act of passing through one of the doorways to get out on the deck to his father, the door swung to and jammed his fingers, so that the tips of some of them had to be amputated.—The plaintiff's father and elder brother swore that the fastening of the door was out of order, and would not hold it back.—There was evidence to show that the doors of the house were frequently being opened and shut by passengers and others, and that a very few minutes before the accident a passenger had gone through the doorway in question, leaving the door on the swing.—It was also proved that the fastenings had been put on the doors in order to hold them open in warm weather for the purposes of ventilation. —In an action on the case for negligence brought on the part of the plaintiff by his father as his next friend against the company to recover damages for the injury above mentioned, *held*, that there was no duty cast upon the defendant company to provide the doors with the appliances mentioned or to maintain them in good working order; and, even if there were, the evidence went to show that the proximate cause of the accident was the act of the passenger in leaving the door on the swing, for which the company could not be held liable. *Cormier* v. *The Dominion Atlantic Ruy. Co.*, 36, p. 11.

9. Fires.

Fire in June, Evidence of setting— In an action for negligence in starting a fire in June without notice, contrary to the Act respecting Protection of Woods from Fire, C. S. 1903, c. 94, tried before a County Court judge without a jury, plaintiff proved that defendant had a number of brush piles on his land thirty or forty feet apart, that defendant was seen going towards these piles, and twenty minutes afterwards smoke arose and defendant was found near the piles, fifteen of which were burning.—There was also evidence of a statement by defendant that tobacco dropped out of his pipe and set the fire.—A wind was blowing at the time towards the plaintiff's land and plaintiff's woodland was burned.—Plaintiff having been nonsuited, *held*, the nonsuit should be set aside.—*Held* (*per* White J.), in the absence of contradiction the evidence entitled the plaintiff to a verdict and therefore the nonsuit should be set aside.—*Held* (*per* Barry J.), a nonsuit should not be granted where there is a sufficient evidence for the plaintiff to submit to a jury.—*Held* (*per* Barry J.), section 20 of the Act does not apply to cases of inevitable accident.—It must be proved that defendant started the fire intentionally or negligently. *Cochran* v. *Lloyd*, 42, p. 112.

Fire near railway—In an action brought by the owner of a lot of woodland adjoining defendant's line of railway to recover damages alleged to have been caused by a fire negligently started by defendant's servants and allowed to extend to plaintiff's land, it appeared in evidence that N., a section foreman of the defendants' railway, set fires to burn up some piles of sleepers and rubbish on the railway line.—The weather had been very dry for a long time, and forest fires were burning all over the country.—Witnesses on behalf of the plaintiff testified that they saw fire on the railway line at this time, and traced its course through the fence to the plaintiff's land.—N. swore that the fires which he started were all burnt out before the fire was seen on the plaintiff's property, and other evidence was given to the same effect.—The jury found that the fire spread from the fire set by N. and that N. negligently and unreasonably allowed it to extend.—A verdict was entered for the plaintiff for $500.—*Held*, that there was sufficient evidence to justify the verdict.—*Held* (*per* McLeod J.), that the defendants having brought on their land a dangerous element, not naturally there, did so at their peril, and, if it caused injury, they were liable, though no negligence was proved.—The provision of said acts declaring that a person starting a fire, except for certain purposes specified,

between May 1st and December 1st, is guilty of negligence, applied to the defendants, and they were, therefore, liable under the acts as well as at common law. *Grant* v. *Canadian Pacific Ry. Co.*, 36, p. 528.

Trespasser, Fire started by—Where fire originated from defendant's mill wrongfully upon land in dispute, the plaintiff need not prove negligence in order to recover damages. *Jones* v. *Sullivan et al*, 43, p. 208.

10. Highways.

City of Saint John — Obstruction — Pleading—In an action against the city of Saint John for damages sustained in an accident caused by an obstruction in one of the streets of the city, the declaration alleged that the defendants wrongfully and negligently allowed a side-walk in one of the streets to be obstructed by a pile of lumber, and wrongfully and negligently allowed it to remain there for an unreasonable time, without lights or other signals thereon, whereby the plaintiff was thrown down and sustained the injury complained of.—*Held*, that as the declaration did not allege that defendants had knowledge of the obstruction, it disclosed a mere non-feasance, and was bad on demurrer. *Rolsten* v. *The City of Saint John*, 36, p. 574.

Obstruction improperly lighted—In an action for damages caused by negligence, tried before a judge without a jury, the judge found the defendant guilty of negligence in leaving a pile of bricks on a highway insufficiently lighted whereby plaintiff drove into the bricks and sustained injuries to himself and carriage.—He also found there was no contributory negligence and entered a verdict for the plaintiff.—Appeal having been taken on the ground that the verdict was against evidence the Court upheld the findings of the trial judge. *Turnbull* v. *Corbett*, 41, p. 284.

11. Hospitals, Inns, Theatres, etc.

No Cases.

12. Public.

Removal of snow from tracks—The Saint John Railway Company acquired the Saint John Street Railway in 1894, subject to the obligations of keeping in repair the streets in which the railway ran as provided by s. 10 of 50 Vict., c. 33 and also the obligation of removing the snow and ice as provided by s. 10 of 55 Vict., c. 29.—In 1895 the act 58 Vict., c. 72 was passed, s. 6 of which authorized the company to agree with the city of Saint John to pay the said city an annual sum to be agreed upon as a consideration for taking care etc. of the streets and the removal of the snow thereon, relieving the company from all liability for the same during the continuance of the agreement. —Acting under the authority of this section, the company and the city entered into a contract by which the city undertook to do what, by the section, it was authorized to do. —*Held* (*per* Tuck C. J., Hanington, Barker and McLeod JJ.), in an action for damages caused by the defendant's negligence in not removing the snow in a street through which the railway ran, that section 6, and the agreement made thereunder, imposes upon the city no greater liability in respect to the care of the streets than otherwise attaches to them as a municipal corporation, and neglect to remove the snow was a mere non-feasance for which they were not liable at the suit of a private individual, and a nonsuit should be entered.—*Held* (*per* Gregory J.), that there was a statutory obligation on the railway company to level the snow and keep safe in that respect for public travel the streets where the railway runs.—That while the act 58 Vict., c. 72, does not impose a duty on the city, it authorizes it in this instance to become a contractor for the performance of the work, and to stand in the place of the company in respect to all its liabilities in regard to the removal of snow, and the city is liable to a private individual for damages caused by its failure so to do. *McCrea* v. *The City of Saint John*, 36, p. 144.

Ship's hold. Invitation to enter—Failure to warn—The plaintiff, the agent of an express company and travelling in the defendant's steamer in charge of the company's express parcels, by direction of the steamer's officers went down on a twin freight elevator to look for some missing parcels in the hold.—The elevator stopped at the "between decks" and the plaintiff stepped off into the other elevator shaft and was injured.—He was not warned of the danger, the light was bad, and though he was given a ship's lantern it did not cast any light at his feet.—The jury found that he fell as a result of the defendant's negligence in not properly protecting the elevator, and that he was not guilty of contributory negligence. —*Held*, that the plaintiff being there at the invitation and direction of the ship's officers on business in which both were interested was entitled to require that the defendant exercise ordinary and proper care to render the premises reasonably safe for him, and that the verdict for the plaintiff should stand.—*Indermaur* v. *Dames*, L. R. 2 C. P. 311 followed. *McBeath* v. *The Eastern Steamship Co.*, 39, p. 77.

13. Railways.

Animals near tracks—Defective fences—A railway company is liable for damages for killing a cow which was at large on the highway with the knowledge of the owner contrary to the Railway Act, 1903, and which strayed from the highway to the land of D., and from there to the railway track through a defective fence which the defendant com-

pany were obliged to maintain.—The company are liable for damage done to the land of an adjoining owner by cattle of a neighbor trespassing by reason of a defective fence which it was the duty of the company to maintain.—(*Per* Landry J., Tuck C. J. and Hanington hesitante.) *Lizotte* v. *Temiscouata Rwy. Co.*, 37, p. 397.

Brakeman, Limit of risk of employment assumed—By hiring as a brakeman on a railway an employee does not undertake to assume the risk of an accident caused by the neglect of the company to take all necessary and legal precautions for the protection of its employees, and the company is liable in damages for an accident caused by such neglect. *Wentzell* v. *The New Brunswick and Prince Edward Island Railway Co.*, 43, p. 475.

Calf at large on highway—Killed on track—In an action for damages against a railway company for killing a calf by the company's train, the jury found that the plaintiff allowed his cattle to run at large upon the highway, and that the calf got upon the railway track from land adjoining the plaintiff's at a place where there was no fence along the track.—*Held*, reversing the verdict entered in the County Court, that the findings established that the calf got at large through the negligence or wilful act or omission of the plaintiff and therefore under s. 294, sub-s. 4 of the Railway Act, R. S. C. 1906, c. 37, he could not recover. *Dixon* v. *The Canadian Pacific Rwy. Co.*, 39, p. 305.

Cattle killed on track—Defective fences—Cattle being pastured in common by the occupiers of improved lands bordering on the defendant company's railway found their way to the track and were killed by a passing train of the defendant company.—It was proved that the defendants' fence along the common pasture was defective, that the company had notice of the defect and neglected to repair it, but there was no evidence as to how the cattle got on the track.—*Held*, that under the Railway Act it might be inferred that the cattle found their way to the track through the defendants' defective fence, and a verdict for the plaintiff was sustained.—Sub-section 4 of section 237 of the act provides that when any cattle or other animals at large upon the highway or "otherwise" get upon the property of the company and are killed or injured by a train, the owner shall be entitled to recover for the loss or injury from the company, unless it show the negligence or wilful act or omission of the owner.—*Held*, that the word "otherwise" means "otherwise at large," and not otherwise at large in a place *ejusdem generis* with a highway. *Daigle* v. *Temiscouata Rwy. Co.*, 37, p. 219.

Fires, Setting—See *Grant* v. *Canadian Pacific Rwy. Co.*, 36, p. 528 (supra col. 580).

Negligence in delivery of shipment under bill of lading—W. shipped two trunks by the Intercolonial Railway and received a bill of lading in which she was named as consignee.—The railway agent delivered the trunks to another party on demand and without presentation of the bill of lading.—W. sued the Government Railways Managing Board in a County Court under 9-10 Edw. VII (Dom.), c. 26, for damages caused by the loss of the trunks, alleging negligence, and recovered judgment.—On appeal, *held*, there was sufficient evidence of negligence on the part of the railway agent.—The cause of action was the breach of duty by negligently misdelivering plaintiff's goods, and therefore plaintiff was entitled to sue in a County Court, under 9-10 Edw. VII (Dom.), c. 26.—While the Crown in its operation of the Intercolonial Railway is not subject to the common law in regard to carriers, it is made liable for negligence of its servants on the Intercolonial Railway, resulting in loss of goods, by the Government Railway Act, R. S. C. 1906, c. 36, and the Act 9-10 Edw. VII (Dom.), c. 19, s. 1, amending the Exchequer Court Act, R. S. C. 1906, c. 140.—*Held* (*per* White J.), this was a case of negligent misfeasance and the cause of action could be maintained without relying on or proving a contract. *The Government Railways Managing Board* v. *Williams*, 41, p. 108.

Trackmaster and laborer—Common employment—Negligence of a track-master of a railway company causing an injury to a man employed as one of a crew engaged in removing gravel from a ballasting train working on a section of the road under the control of the track-master is the negligence of a fellow servant engaged in a common employment, and the company is not liable in an action for damage resulting therefrom. *Day* v. *The Canadian Pacific Railway Co.*, 36, p. 323.

14. Sale of Dangerous Things.

(*No Cases.*)

15. Servants.

1. ACTS OR OMISSIONS OF—LIABILITY OF MASTER.

Liability of master for wrongful act of servant—Action for damages for an injury to the plaintiff caused by the defendant's servant in the course of his employment negligently and through want of proper care and skill in driving a horse and carriage and running into and injuring the plaintiff *See Porter* v. *O'Connell*, 43, p. 458.

Liability of master for wrongful act of employee—A master is liable for an injury caused by the wrongful act of his servant within the scope of his authority, although the master has expressly forbidden

the servant to do the act from which the injury resulted. *Read* v. *McGivney*, 36, p. 513.

Malicious prosecution by employee—Liability of master—In an action for malicious prosecution and false imprisonment, it was proved on the trial that the plaintiff and one L. were fellow-passengers on the defendants' road.—L. complained to an officer of the company that a revolver had been stolen from his valise.—The plaintiff had been seen by an official of the defendant company at one of the stations to take something from L.'s valise.—L. made a charge of theft against the plaintiff, and he was arrested by a constable appointed by the government on the recommendation of the defendants, and employed by them for duty on their road and paid by them.—The prosecution was carried on by L. but at the instance and with the assistance of the officer making the arrest and other constables in the employment of the defendants.—After an investigation by a magistrate, the plaintiff was discharged.—*Held* (Landry J. doubting), that if there was want of probable cause the evidence failed to connect the defendants with the prosecution and imprisonment so as to make them responsible. *Dennison* v. *Canadian Pacific Rwy. Co.*, 36, p. 250.

Municipality — Liability for act of its officers—A municipal corporation is liable to respond in damages for the act of its secretary-treasurer in sending to a collecting justice the name of the plaintiff as having made default in the payment of a rate, which had been illegally imposed upon him, at the same time instructing the justice to enforce payment of the same, which the justice did by issuing an execution against the plaintiff, under which, for want of goods and chattels whereon to levy, he was lodged in prison. *Mellon* v. *Municipality of Kings County*, 35, p. 153.

Municipal corporation—Liability for acts of its officers—A city is not liable for the act of a police officer who unlawfully broke and entered the premises of the plaintiff and carried away therefrom certain intoxicating liquors there kept for sale by the plaintiff contrary to the provisions of the Canada Temperance Act, although such officer had been specially appointed to see that the said Act was enforced therein.—Where the servant of a municipal corporation does an act in which the corporation has no peculiar interest, and from which it derives no benefit in its corporate capacity, but which is done in pursuance of some statute for the general welfare of the inhabitants of the community, such servant cannot be regarded as the agent of the corporation for whose wrongful acts it would be liable, and the doctrine of *respondeat superior* does not apply.—*Further held*, that the city could not make itself liable for the acts of the officer unless it ratified and adopted them with a full knowledge of their illegality.—(*Per* Tuck C. J., Barker and Gregory, McLeod JJ., Hanington and Landry JJ. dissenting). *McCleave* v. *City of Moncton*, 35 N. B. R., p. 296; 32 S. C. R., p. 106.

A municipal corporation can not be made to answer in damages for the unlawful acts of one of its police officers while attemping to perform a public duty.—The plaintiff, who was temporarily in the town of C., collecting subscriptions for a newspaper published in the city of S., was arrested by a police officer of the town for a breach of one of its by-laws, which required all persons who were not ratepayers of the town or non-residents of the county of N., to pay a license fee before engaging in any calling, occupation or employment in the said town.—The arrest was made by the officer without any warrant, and the plaintiff was only released upon his paying to the town treasurer the fee demanded which was retained.—In an action for false imprisonment against the town for the alleged unlawful arrest by the police officer it was *held*, following *McCleave* v. *The City of Moncton*, that, assuming the arrest to have been unlawful, the doctrine of *respondeat superior* did not apply, and the town was not liable. *Held* further, that the fact that the police officer, in making the arrest was endeavoring to enforce a by-law of the town made for revenue purposes only was not sufficient to take this case out of the rule laid down in the *McCleave* case; and that the payment of the license fee to the town treasurer, and its retention by him, in the absence of any evidence of knowledge on the part of the town of the circumstances surrounding such payment and retention, was no proof of any intention on the part of the town to ratify the acts of the police officer.—(*Per* Tuck C. J., Landry, Barker, McLeod and Gregory JJ., Hanington J. dissenting.) *Woodforde* v. *The Town of Chatham*, 37, p. 21.

Municipal corporation — Liability for negligence of officers—A municipal corporation is answerable for the negligent performance of his duties by one of its officers, who is appointed and removable by it, even where the duties, the negligent performance of which gave rise to the action, were imposed by the legislature and not by the corporation.—(*Per* Tuck C. J., Landry and McLeod J J., Hanington J. dissenting.) *Crawford* v. *City of Saint John*, 34, p. 560.

Municipal corporation — Separate contractor — Liability for accident—Where work is done for a municipal corporation under a contract, the corporation is not responsible for damages for the death of an employee of the contractor from the negligent manner of doing the work though the corporation employs its own engineer to superintend the work. *Dooley, Adm. etc.* v. *City of Saint John*, 38, p. 455.

2. COMMON EMPLOYMENT.

Bank manager and labourer—The doctrine of common employment will not apply to a bank manager and a laborer employed casually to carry in wood.—(*Per* Barker J.) *Dugal* v. *Peoples Bank of Halifax*, 34, p. 581.

Steamer officer and longshoreman—Plaintiff was a member of a Longshoremen's Union and, with others, entered into a written agreement with defendant to work at a fixed rate of wages, defendant agreeing to employ these men in loading and unloading its steamers.—When men were required the defendant notified a union foreman, who selected certain men from amongst those who signed the agreement.—Defendant could not dismiss the men, but could dismiss the foreman and had entire control of the work and paid the men individually.—While plaintiff was proceeding up a gangway to defendant's steamship on his way to assist in unloading, the gangway fell and he was thrown on the deck and seriously injured.—The accident was caused by the negligence of one of the ship's officers in fastening the gangway insecurely.—The jury found that plaintiff was not a fellow servant of the defendant's officer and not engaged with him in a common employment, and verdict was entered for the plaintiff.—*Held*, reversing the verdict, that plaintiff was a fellow servant of the defendant's officer, and assumed the risk of such negligence as an implied condition of his employment.—*Hatfield* v. *The Saint John Gas Light Co.*, 32 N. B. R., 100 distinguished. *O'Regan* v. *Canadian Pacific Rwy. Co.*, 41, p. 347.

Trackmaster and member of crew—Negligence of a trackmaster of a railway company causing an injury to a man employed as one of a crew engaged in removing gravel from a ballasting train working on a section of the road under the control of the trackmaster is the negligence of a fellow servant engaged in a common employment, and the company is not liable in an action for damage resulting therefrom. *Day* v. *Canadian Pacific Rwy. Co.*, 36, p. 323.

3. DEFECTIVE SYSTEM.

Brakeman on railway—By hiring as a brakeman on a railway an employee does not undertake to assume the risk of an accident caused by the neglect of the company to take all necessary and legal precautions for the protection of its employees, and the company is liable in damages for an accident caused by such neglect. *Wentzell* v. *The New Brunswick and Prince Edward Island Railway Co.*, 43, p. 475.
(Appealed from.)

Ships gear for discharging vessel—A master is responsible for a system of work which needlessly exposes his workmen to risk of injury, and he cannot invoke the doctrine of common employment as a release from negligence for which he would otherwise be liable, therefore where the boom of a derrick employed in the loading of a vessel was made, so far as the system of loading was concerned, stationary and in being thus fixed, was so improperly guyed as to be dangerous to persons employed in the loading, the owners were held liable under "Lord Campbell's Act for an accident resulting in the death of an employee engaged in the loading caused by the improper guying of the derrick boom, although the jury found that the ultimate or proximate negligence, without which the accident could not have happened, was the negligence of fellow servants and might have been avoided by the exercise of a greater degree of care. *Bodington, Adm.* v. *Donaldson et al*, 44, p. 290.

Workmen's Compensation Act—Onus of proof—In order to recover under the Workmen's Compensation for Injuries Act, C. S. 1903, c. 146, as amended by 8 Ed. VII c. 31, s. 3 (*a*) for injuries caused Nov. 23 d, 1909, by a defect in the condition or arrangement of the gear etc. connected with, intended for, or used in the business of the employer *Held*, the workman must prove that the defect was due to negligence on the part of the employer. *Campbell* v. *Donaldson et al*, 40, p. 525.

16. Management of Ships.

See *O'Regan* v. *C. P. R.*, 41, p. 347 supra *Boddington* v. *Donaldson*, 44, p. 290 supra.

17. Vehicles—Reckless Driving etc.

Reckless driving by servant—See *Porter* v. *O'Connell*, 43, p. 458.

Rule of the road—See *Stout* v. *Adams*, 35, p. 118. Supra (subtitle 8.)

18. Work of Independent Contractors.

Municipal corporation — Independent contractors—Where work is done for a municipal corporation under a contract, the corporation is not responsible for damages for the death of an employee of the contractor from the negligent manner of doing the work, though the corporation employs its own engineer to superintend the work *Dooley, Administratrix etc.* v. *City of Saint John*, 38, p. 455.

19. Miscellaneous.

Carelessly allowing debenture to get into circulation wrongfully—Holder for value—See *Robinson* v. *Board of School Trustees*, 34, p. 503.

Partnership — Failure to manage business properly—In May, 1870, plaintiff and C. B. formed a partnership for manufacturing purposes under a verbal agreement to contribute equally to the capital stock and share equally in the profit and loss.—No amount was agreed upon as the capital, or when each was to contribute his proportion

of it, or in what manner the business was to be managed.—In June following J. B. was taken into partnership under the agreement that each partner should contribute a third of the capital stock and share equally in the profit and loss.—Plaintiff managed the business until August, 1871, when C. B. took over the management and forbade the plaintiff interfering with the business.—In a suit brought in October, 1872, for a dissolution of the partnership and an account, it was found plaintiff had contributed $4,312.97, C. B. $10,407, and J. B. $7,291.—It appeared that under the management of C. B. the business was mismanaged and neglected, that he did not keep the partnership accounts in the firm's books, or in books accessable to the plaintiff; that he repeatedly refused from the time he assumed the management, to render an account to the plaintiff, or to have a settlement of their accounts.—That he gave the plaintiff false information of the assets and liabilities of the business, and withheld information asked for, and that the plaintiff had no knowledge of the amount C. B. and J. B. had contributed to the capital of the firm.—*Held*, (1) that the plaintiff's costs of the hearing should be paid by C. B. and that the costs of the reference should be paid out of the partnership assets after payment of the partnership debts, and if the assets proved insufficient, then by C. B. (2) that C. B. should receive no remuneration for his services in the management of the business. *Young* v. *Berryman et al*, Eq. Cas., p. 110.

NUISANCE.

Diversion of highway—Public nuisance—The Court of Equity has jurisdiction to interfere by injunction in cases of nuisance to the public.—Circumstances considered under which the Court of Equity will interfere by injunction to restrain a nuisance to the public.—By section 5, sub-section 7 of the Government Railways Act, 44 Vict., c. 25 (d), the minister of railways has full power and authority "to make or construct in, upon, across, under or over any land, streets, hills, valleys, roads, railways or tramroads, canals, rivers, brooks, streams, lakes or other waters, such temporary or permanent inclined planes, embankments, cuttings, aqueducts, bridges, roads, sidings, ways, passages, conduits, drains, piers, arches, or other works as he may think proper.—And by sub-section 8 "To alter the course of any river, canal, brook, stream or water course, and to divert or alter as well temporarily as permanently the course of any such rivers, streams of water, roads, streets or ways, or raise or sink the level of the same, in order to carry them over or under, on the level of, or by the side of the railway, as he may think proper, but before discontinuing or altering any public road, he shall substitute another convenient road in lieu thereof, and the land theretofore used for any road, or part of a road, so discontinued, may be transferred by the Minister to, and shall thereafter become the property of the owner of the land of which it originally formed a part."—Section 49 of the Act provides that "The railway shall not be carried along an existing highway, but merely cross the same in the line of the railway, unless leave has been obtained from the proper municipal or local authority therefor, and no obstruction of such highway with the works shall be made without turning the highway so as to leave an open and good passage for carriages, and on the completion of the works, replacing the highway; but in either case, the rail itself, provided it does not rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction. —Provided always, that this section shall not limit or interfere with the powers of the minister to divert or alter any road, street or way, where another convenient road is substituted in lieu thereof, as provided in the eighth sub-section of section five."—*Held*, that by section 5, sub-sections 7 and 8, power is given to construct a railroad on, along and over a highway to the extent of occupying the whole of it and not merely alongside of it, and that section 49 does not limit this power. *Attorney General of N. B.* v. *Minister of Railways and Canals et al*, Eq. Cas., p. 272.

Legitimate business—The defendant L. holds certain premises under a lease granted by the plaintiff N. to one W. and assigned by W. to L.—The lease contains express covenants, but nothing in reference to its assignment, or to the use of the premises, with the exception of the word "office" used in the description, which is as follows: "All that certain office situate on the ground floor of her brick building on the west side of Main street in the said town of Woodstock, and the office in the said building fronting on the south side of Regent street in the said town, also the lower part of the shed in the rear of the said office, etc."—W. is an attorney and occupied the premises as an office.—L. is a retail meat and fish dealer, and proposes to carry on this business in the premises.—*Held*, that there was no implied covenant in the lease restricting the lessee to the use of the premises as an office, as it was not necessary to carry out any obvious intention of the parties; and that the word "office" in the lease was used merely as a means of identifying the premises included in the demise.—*Held*, that as no actual damage had been shown, the notice was in the nature of a *quia timet* action; and that as the defendant was carrying on a legitimate business, and there was no probability of any immediate or irreparable damage to the plaintiff arising, the application for an injunction must be dismissed. *Nevers* v. *Lilley et al*, 4 Eq., p. 104.

Public nuisance—For obstructions on the highway etc., see *Winslow* v. *Dalling*, 1 Eq., p. 608.

Public scales in marketplace—Right of passage—In 1813, pursuant to Crown license, T. erected on public land in the city of Fredericton a public market house and public weigh scales in connection therewith.—The scales were kept in use until 1874, when they were voluntarily removed by their then owner.—In 1816 the market building was sold by T. to the defendants, and in 1817 the land on which it and the scales stood was granted by the Crown to the defendants in trust to use the lower floor of the building, and the land, for a public market place, and the upper floor for a County Court house.—By Act 20 Vict., c. 17, s. 3, it was enacted that the land should be used as a public landing, street and square for the court and market house, and for no other purpose whatever. —By s. 4 of the Act it was provided that nothing therein should in anyway affect public rights.—In 1898 the defendants sought to erect on the land public weigh-scales to be used in connection with the market.—A suit for an injunction having been instituted by the plaintiffs to restrain the defendants from proceeding with the erection of the scales, *held*, that the Crown grant to the defendants contained an implied authority to the defendants to erect upon the land structures necessary or reasonably convenient or useful for the purposes of the market, including weigh-scales, and that this authority was not taken away by Act 20, Vict., c. 17.—That there was no analogy between the case of an ordinary street and this public right of passage for a specific purpose and that the proposed scales were not a nuisance *per se*. *City of Fredericton* v. *Municipality of York*, 1 Eq., p. 556.

Res judicata—Where on an application for an interim injunction to restrain a nuisance a jury finds upon the facts, under Act 53 Vict., c. 4, s. 83, the question upon them is *res judicata* for all the purposes of the suit, and cannot be re-tried at the hearing. *McIntosh* v. *Carritte*, Eq. Cas., p. 406.

Smell—To constitute a private nuisance arising from offensive odours they must occasion material discomfort and annoyance for the ordinary purposes of life, according to the ordinary mode and custom of living. —The doctrine of acquiescence in relation to nuisance considered.—Where on an application for an interim injunction to restrain a nuisance a jury finds upon the facts, under Act 53 Vict., c. 4, s. 83, the question upon them is *res judicata* for all the purposes of the suit, and cannot be re-tried at the hearing. *McIntosh* v. *Carrie* Eq. Cas., p. 406.

Smell—See also *Nevers* v. *Lilley, et al*, 4 Eq. p. 104, supra. Col. 590.

PARTIES.

1. **Addition of Parties.**
2. **Executors and Trustees.**
3. **Joinder—Misjoinder—Non-joinder.**
4. **Substitution of Parties.**
5. **Third Parties.**
6. **Miscellaneous Cases.**

1. Addition of Parties.

Assignment for benefit of creditors—Adding assignee—Where, after the commencement of a suit by creditors to set aside a bill of sale, as constituting a fraudulent preference under chap. 141, C. S. 1903, the grantor made an assignment for the benefit of his creditors, the assignee was added as a plaintiff. *Tooke Brothers Ltd.* v. *Brock & Patterson Ltd.*, 3 Eq., p. 496.

2. Executors and Trustees.

Assignee, Refusal to bring suit by—Suit by assignor—Where an assignor for the benefit of his creditors requests his assignees to bring a suit and they decline to do so, he can file a bill in his own name and join the assignees as defendants. *McLeod* v. *Weldon*, 1 Eq., p. 181.

Equity suit by plaintiff claiming in representative character—Section 16, of chapter 49, C. S., provides that all causes in Equity shall be commenced by summons, which shall include the names of all the parties, and disclose in a brief form the cause of action for which the bill is to be filed.—*Held*, that where a plaintiff is claiming in a representative character it should be stated in the summons.—The title of the bill should be of the same parties and in the same character, and in accordance with the cause of action and relief stated in the summons, and the bill itself should be in accordance with the title. *Vernon* v. *Oliver*, Eq. Cas., p. 179.

Executor and devisee—Restraining injury to realty—Quaere, as to whether executors who are seized in fee under a devise of land and building to them in trust can bring a suit in their character as executors to restrain an injury to the reversion, or whether the suit should not be brought in their character as devisees and legal owners of the property. *Humphrey et al* v. *Banfil*, Eq. Cas., p. 243.

Executor's power to sue in individual right in some cases—An executor may sue in his individual right on contracts made with himself where the money, when recovered, would be assets of the estate, and therefore his personal representative may sue on such a contract in his representative capacity. *Kelly* v. *Ayer*, 41, p. 489.

Insurance suit — Infant beneficiary with guardians in Nova Scotia and N. B.—Life insurance in the Home Circle, a United States corporation, taken out by L. whose domicile was in Nova Scotia, was payable to E. in trust for L.'s infant daughter by his deceased wife.—Upon L.'s death E. was appointed guardian in Nova Scotia of the person and estate of the infant.—The infant, after her father's death, removed to New Brunswick for a temporary purpose, and B., her maternal grandfather, having been appointed guardian of her person and estate in this province, brought this suit to restrain the Home Circle from paying the insurance to E., or to any other person other than B. and to restrain E. from receiving it.—*Held*, that the insurance was payable to the legal personal representative of the deceased; also that such personal representative must be a party to any suit affecting said insurance. *Loasby* v. *The Home Circle et al*, Eq., Cas. p. 533.

Mortgagor, Joining administrator of deceased—As a general rule the administrator of a deceased mortgagor should not be made a party to a foreclosure suit.—Where an administrator is improperly made a party to such a suit he should disclaim in order to entitle him to have the bill dismissed with costs.—Disclaimer is as applicable where a defendant has no interest as where he has an interest which he is willing to abandon.—Where an administrator improperly made a party to a foreclosure suit did not disclaim and the cause proceeded to hearing he was equitably dealt with by being allowed costs, on the dismissal of the bill, up to and including his answer.—Where the administrator of a mortgagor was improperly joined in a foreclosure suit costs thereby incurred were not allowed to the plaintiff.—*Barnaby* v. *Munroe et al*, 1 Eq., p. 94.

Trust, Charging land with—Executor de son tort—An executor *de son tort* sold property and invested the proceeds in land, and conveyed it to his daughter by a deed to which his wife was not a party.—After his death a suit was brought against the widow and daughter to have the land charged with the trust affecting the original property.—*Held*, that the widow was properly joined in the suit. *Dunlop* v. *Dunlop*, 1 Eq., p. 72.

Trust mortgage, Suit to enforce—Making trustee defendant—A suit to enforce a trust mortgage to secure debentures may be brought in the name of the debenture holders, the trustee being made a defendant.—In a suit by the holder of debentures to enforce a trust mortgage, the trustees made defendants in the suit were disallowed costs of a part of their answer setting up that the suit should have been brought in their name.—Form of decree adopted in suit to foreclose debenture mortgage. *Shaugnessy* v. *The Imperial Trusts Co.*, 3 Eq., p. 5.

Trustee refusing to join in suit—Trustee refusing to join with his co-trustee in a suit for the recovery of trust property made a defendant to the suit. See *Belyea Trustee Est. of Daniel L. Patton* v. *Conroy et al*, 1 Eq., p. 227.

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3. Joinder—Misjoinder—Nonjoinder

Administration suit—Sale of realty to pay debts—*Semble*, that in an administration suit for the sale of real estate of an intestate for the payment of his debts the purchaser of the real estate from the heir is a necessary party to the suit. *The People's Bank* v. *Morrow et al*, Eq., Cas. p. 257.

Assignment for benefit of creditors—Action by assignor for accounting—Creditors who do not claim the benefit of an assignment for the general benefit of creditors need not be made parties to a suit asking for an accounting and repayment of the balance after satisfying all claims filed with the assignee. *Thibideau* v. *LeBlanc*, 3 Eq., p. 436.

Co-tenant in possession—The plaintiff, a tenant in common with others of certain lands, but in possession under an agreement with the other tenants in common, that he was to have possession and ownership of the lands and all appertaining thereto is entitled in his own name to sue and recover for damages arising from the negligent setting fire by defendant on his own land and its spreading to the land in possession of plaintiff. *Phillips* v. *Phillips* 34 p. 312.

County Court—Nonjoinder of joint creditor—Rent due to the plaintiff jointly with another cannot be sued for in a County Court by the plaintiff alone, and where the nonjoinder is not disclosed until trial the defendant is entitled to a nonsuit.—*Vassie* v. *Chesley*, 33 N. B. R. 192 distinguished. *McLaughlin* v. *Knowles*, 41, p. 548.

Executors joined — Multifariousness—G. died in 1902 leaving a will by which his property was bequeathed to his eight children with a small annuity to his wife.—This suit is brought to compel the cancellation of a mortgage given by the plaintiff to G. and the reconveyance to the plaintiff of a certain life insurance policy and other property which was held by G. to secure certain monies advanced by G. to the plaintiff; and also to compel the conveyance of two lots of land which the plaintiff claims he purchased from G. under an agreement that G was to give him the deed for them whenever he demanded it.—*Held* overruling the demurrer that it was by no means certain that the defendants (executors of

G.) were not all necessary or proper parties in regard to all the causes of action set out in the bill or that they did not all have a common interest in them; but if that were not so there was no special circumstances in this case which render it either difficult or impossible to deal fully and properly with all the causes of action without causing inconvenience to anyone, and therefore any discretion which this Court has should be exercised in favor of continuing the suit in its present form. *Cummings* v. *Gibson et al*, 4 Eq., p. 55.

Foreclosure suit—Adding administrator of mortgagor's estate—As a general rule the administrator of a deceased mortgagor should not be made a party to a foreclosure suit.—Where an administrator is improperly made a party to such a suit he should disclaim in order to entitle him to have the bill dismissed with costs.—Disclaimer is as applicable where a defendant has no interest as where he has an interest which he is willing to abandon.—Where an administrator improperly made a party to a foreclosure suit did not disclaim and the cause proceeded to hearing he was equitably dealt with by being allowed costs, on the dismissal of the bill, up to and including his answer.—Where the administrator of a mortgagor was improperly joined in a foreclosure suit costs thereby incurred were not allowed to the plaintiff. *Barnaby* v. *Munroe et al*, 1 Eq., p. 94.

Foreclosure suit—Judgment creditor of husband—A judgment creditor, who has registered a memorial of judgment, is a necessary party to a suit to foreclose a mortgage on land belonging to the wife of the judgment debtor.—A judgment creditor made a party to a foreclosure suit under the above circumstances, upon disclaiming, will not be liable nor entitled to costs, though continued in the suit after disclaimer. *Horn et al* v. *Kennedy et al*, Eq. Cas., p. 311.

Fraudulent conveyance by intestate, Setting aside—In a suit by simple contract creditors of an intestate to set aside as fraudulent under the Stat. 13 Eliz., c. 5, a conveyance by him of real estate, and for the administration by the Court of his estate, an administrator of the intestate's estate appointed by the Probate Court is a necessary party to the suit, though there are no personal assets of the intestate.—The failure to make the administrator a party to such a suit is not a ground of demurrer, but may be taken advantage of under Act 53 Vict. c. 4, s. 54.—The Court will not, in such a suit, appoint a person under Act 53 Vict., c. 4, s. 89, to represent the estate of the intestate, instead of requiring the administrator of the intestate's estate to be made a party to the suit.—The Probate Court has jurisdiction to grant letters of administration where an intestate dies indebted possessed of real, but no personal estate. *Trites* v. *Humphreys*, 2 Eq., p. 1.

Insolvency Act, 1875—An insolvent and wife should not be joined in a suit brought by the insolvent's assignee under the Insolvency Act, 1875 (38 Vict., c. 16), to set aside a conveyance executed by the insolvent and wife prior to his insolvency, with intent to defraud his creditors. *Driscoll* v. *Fisher*, Eq. Cas., p. 89.

Joint creditors—Nonjoinder in County Court—Rent due to the plaintiff jointly with another cannot be sued for in a County Court by the plaintiff alone, and where the nonjoinder is not disclosed until trial the defendant is entitled to a nonsuit.—*Vassie* v. *Chesley*, 33 N. B. R., 192, distinguished. *McLaughlin* v. *Knowles*, 41, p. 548.

Married woman — Separate estate — Joining husband—Where a husband is made a plaintiff with his wife in a suit relating to her separate estate, the objection that the suit should have been brought by the wife's next friend may be taken by demurrer. *Atward et al* v. *Killam*, Eq. Cas., p. 360.

Married woman — Separate property — Proper party—Husband and wife should not be joined as co-plaintiffs in a suit relating to the wife's separate property.—The suit should be in the name of the wife's next friend, or, since the Married Women's Property Act, it may be in the wife's name. *Cronkhite* v. *Miller*, 2 Eq., p. 51.

Married woman, Suit by, previous to Married Women's Property Act—The plaintiff, a married woman, who was one of the unpaid legatees under W.'s will, obtained letters of administration *de bonis non* of W.'s estate, and filed a bill against the defendant to have the estate administered in equity, an account taken of the unadministered assets received by the defendant, and payment of the same to the plaintiff.—*Held*, (1) that the bill should be amended by making plaintiff's husband a co-plaintiff.—Section 18 of the Married Women's Property Act, 1895, does not apply to suits commenced before the Act came into force. *Walsh* v. *Nugent*, 1 Eq., p. 335.

Misjoinder, Time to object—Plaintiff brought action against defendants A. and J. claiming damages for trespass to land against A. and in the alternative for breach of covenant of title to such land against J.—No objection to the joinder of actions was made until after verdict had been rendered against both defendants.—A. then moved to set aside the verdict against him on the ground of misjoinder, and for a new trial.—*Held* (*per* Barker C. J., Landry and White JJ.,) the causes of action were improperly joined, but the objection could not be given effect on a motion for a new trial which if granted would not remedy the irregularity.—Here, too, the verdict against the appellant was trifling, and it did not appear that he was in any way prejudiced in his defence by the misjoinder.—*Held*

(*per* McLeod J.), the objection to misjoinder was made too late to be given effect.—*Held* (*per* Barry J.), the verdict should be set aside without costs and the plaintiff put to her election as to which cause she will proceed upon.—*Held* (*per* Barker C. J.), the proper procedure upon misjoinder is for defendant to move for a stay of proceedings until the plaintiff makes election between the two causes of action. *Wathen* v. *Ferguson et al*, 41, p. 448.

Partition suit—Dowress—A suit may be brought for partition of land and assignment of dower, and the dowress should be made a party to the suit. *Wood et al* v. *Akerley et al*, Eq. Cas., p. 305.

Partition suit—Dowress joined—Quaere whether the inchoate right of dower of the wife of a tenant in common is barred by a sale of the land in a partition suit to which she is made a party. *Close* v. *Close et al*, Eq. Cas., p. 414.

Partition suit—Dowress—The wife of a tenant in common in land sought to be sold in a partition suit should be a party to the suit. *Hannaghan et al* v. *Hannaghan et al*, 1 Eq., p. 302.

Partition suit—Lessee—Quaere, as to whether the lessee of a tenant in common should be made a party to a partition suit. *Ogden* v. *Anderson et al*, Eq. Cas., p. 395.

Restraining injury to realty—Quaere, as to whether executors who are seized in fee under a devise of land and building to them in trust can bring a suit in their character as executors to restrain an injury to the reversion, or whether the suit should not be brought in their character as devisees and legal owners of the property.—Quaere, as to whether a tenant or landlord can be joined in a suit to restrain an act amounting to a nuisance to the tenant and causing injury to the reversioner. *Humphrey et al* v. *Banfil*, Eq. Cas., p. 243.

Trust mortgage, Suit enforcing—A suit to enforce a trust mortgage to secure debentures may be brought in the name of the debenture holders, the trustee being made a defendant. *Shaugnessy* v. *The Imperial Trusts Co.*, 3 Eq., p. 5.

Trustee to secure bonds—Damage suit and injunction—Where a property had been assigned to a trustee to secure an issue of bonds, and possession still remained in the assignor, it was deemed not necessary to make the trustee a party to a suit for an injunction and for damages resulting from a dam, the construction of which was alleged to be faulty. *Saunders* v. *William Richards Co. Ltd.*, 2 Eq., p. 303.

4. Substitution of Parties.

Assignee for benefit of creditors substituted as defendant—Where after a suit was brought for a declaration that stock-in-trade in possession of defendants belonged to plaintiffs, the defendants made an assignment for the benefit of their creditors, and their assets were insufficient to pay their liabilities, the names of the defendants were ordered to be struck out and that of the assignee added. *The Gault Brothers Co. Ltd.* v. *Morrell* No. 2, 3 Eq., p. 173.

Death of party—Assignment of cause of action—After the bill was filed in a suit brought by a married woman by her next friend, she died, and her executors continued the suit.—Subsequently they assigned the cause of action to the next friend.—*Held*, that under sections 96 and 97 of the Supreme Court in Equity Act, 1890 (53 Vict., c. 4), an application to continue the suit in the name of the assignee could be made *ex parte*, subject to the order being varied or set aside if the defendants were prejudiced in their security for costs. *Robertson* v. *Appleby et al*, Eq. Cas., p. 509.

Death of one of several defendants—Appeal to Supreme Court of Canada—Upon the death of one of several defendants to a suit in the Supreme Court in Equity the plaintiff may continue the suit by applying for administration *ad litem* or by application to the Equity Court under s. 116 or s. 119 of the Supreme Court in Equity Act, C. S. 1903, c. 112, and therefore where one of several defendants died after judgment of the Supreme Court *en banc* confirming a decree of the Equity Court dismissing the plaintiff's bill with costs, and the plaintiff delayed his appeal to the Supreme Court of Canada for eight months thereafter on the ground that no administration had been taken out.—*Held*, this was no excuse for the delay and the judgment of McLeod J. refusing to allow the appeal under s. 71 of the Supreme Court Act, R. S. C. 1906, c. 139, was confirmed.—*Held*, also, that the mistake of the solicitor as to the procedure on defendant's death, even though supported by opinion of counsel, was not a sufficient excuse.—*Held* (*per* McLeod J.), the plaintiff (appellant) could have filed a suggestion and proceeded under s. 85 of the Supreme Court Act, R. S. C. 1906, c. 139. *Harris et al* v. *Sumner et al*, 39, p. 456.

5. Third Parties.

Non-privity of contract—Addition of third party by consent—Defendant contracted with one of the plaintiffs, Adams & Company, to cut and deliver to it in the Restigouche river in the spring of 1915 in time to be driven with the corporation drive, a quantity of logs.—The contract, after providing how the logs should be marked and surveyed contained the following clause: "It is also understood and agreed between the parties hereto that all logs cut or procured under this contract are cut and procured for the Dalhousie Lumber Co. Ltd. and all such logs and lumber shall be the property of the Dal-

housie Lumber Co. Ltd. from the stump." —*Held*, on appeal affirming the judgment of Crocket J., that there was no privity of contract between the defendant Walker and the plaintiff the Dalhousie Lumber Co. and Walker having had no written notice of any assignment of the contract to the Dalhousie Lumber Co. Ltd., that company was not entitled to recover from Walker damages resulting from his failure to put the logs in the river as he had agreed with Adams & Company.—On the trial of an action for the wrongful detention of a quantity of logs in which action the rights of a third party under a contract between the defendant and the third party were involved, it was agreed by counsel on the trial that the third party should be added as a party plaintiff, that the pleadings should be amended in all necessary particulars, that the case should be withdrawn from the jury and the presiding judge should determine the rights of all parties.—The Court on appeal refused to disturb the findings where the judge had acted within the scope of the agreement and was not manifestly in error. *Dalhousie Lumber Co. Ltd.* v. *Walker*, 44, p. 455.

Third Party joined—See *Canadian Pacific Railway Co.* v. *Canadian Bank of Commerce and Frank McDonald* (third party), 44 p. 130.

6. Miscellaneous.

Company Law—Bill in Equity for accounting filed by director—A director of a company cannot file a bill for an accounting against the company and his co-directors unless special circumstances are shown. —The report of a Royal Commission whose duties were inquisitorial and not judicial, finding that a sum of money received by the directors was unaccounted for and the fact that the complaining director was the Attorney General of the province at the time the money was received and as such an *ex-officio* director of the company by the act of incorporation are not such special circumstances as would support a bill for such an accounting. *Pugsley* v. *Bruce*, 4 Eq., p. 327; 40 N. B. R. p. 515.

Incorporated company, Action on behalf of—Where relief was sought by one shareholder on behalf of the company, *held*, the bill should have been filed in the name of the company itself, not by an individual shareholder. *Harris* v. *Sumner*, 4 Eq., p. 581; 39 N. B. R., p. 204.

Municipal law—Action by ratepayer—A ratepayer on behalf of himself and all other ratepayers of a municipal corporation, has a right to maintain an action to restrain the corporation from doing acts which he believes are *ultra vires*, without bringing the action in the name of the Attorney-General ex relatione, where the Crown is not directly interested. *Steeves et al* v. *City of Moncton*, 42, p. 465.

Cf. *Merritt* v. *Chesley*, Eq. Cas., p. 324.; *Rogers* v. *Bathurst*, 1 Eq., 266, post.

Nominal party—Costs—Where an appeal under the Towns Incorporation Act, 1896, from a conviction by a police magistrate, was allowed, and the conviction quashed on the ground, that the magistrate had refused to hear material evidence, the court (Hanington, Landry, Barker and McLeod JJ., Gregory J. dissenting) refused to make the order without costs against the Town of Grand Falls, who took no part in the prosecution and were only parties by virtue of the act requiring the prosecution to be in their name. *Turner* v. *Mockler et al*, 36, p. 245.

Privity of contract—The Southwest River Driving Co. and the Upper Southwest Miramichi Log Driving Co., incorporated companies, having the exclusive right within certain limits to drive the lumber cut on the Southwest Miramichi and collect the tolls fixed by statutory authority therefor, made an arrangement with the plaintiff to do the driving for the season of 1904, and to receive as compensation the tolls allowed the corporations by law.—In an action by the plaintiff against the defendant company for tolls for driving its lumber the trial judge ruled that there was no liability from the defendants to the plaintiff,—*Held* (*per* Tuck C. J., Barker and McLeod JJ., Hanington and Landry JJ. dissenting) that the ruling was right.—*Held* (*per* Tuck C. J.), that the action could only be brought by the driving companies. *Lynch* v. *William Richards Co. Ltd.*, 38, p. 160.

Restraining public officers—The plaintiff, a ratepayer of the city of Portland, brought this suit on behalf of himself and all other ratepayers who should come in and contribute to the expense of the suit, to restrain C., mayor of the said city, from signing orders for the payment of accounts ordered to be paid by the Council, and the defendant W. the chamberlain of the city, from paying them on orders signed by C. and for a declaration that C. was incapacitated from acting as mayor—*Held*, that the suit should be by information by the Attorney General on the relation of all or some of the ratepayers, the plaintiff not having sustained or likely to sustain, any injury not common to all the ratepayers.—Where a bill is demurrable the objection may be taken as a ground to dissolve an *ex parte* injunction. *Merrit* v. *Chesley et al*, Eq. Cas., p. 324.

A suit to restrain public officers from the commission of wrongful acts in breach of public trust and which injuriously affect the public as a whole should be on behalf of all the public and by information by the Attorney General ex relatione.—A Bill may be turned into an information by the Attorney General by amendment upon his consent being obtained. *Rogers et al* v. *Trustees School District No. 2, Bathurst*, 1 Eq., p. 266.

Town of Grand Falls, Suit by —Certain lands were by Order in Council and Act of Assembly vested in the municipality of Victoria for the use and benefit, as a common, of the inhabitants of the town of Grand Falls.—By subsequent legislation they were transferred to and vested in the town of Grand Falls "to the same extent as was given to the said municipality."—By another act a portion of the common without the town limits was transferred to the said town.—Upon the land within the town limits the defendant entered and commenced to erect a house.—The plaintiffs thereupon brought ejectment.—*Held*, (1) that the action was properly brought in the name of the town of Grand Falls instead of the town council of Grand Falls. *Town of Grand Falls* v. *Petit*, 34, p. 355.

PARTITION

See COSTS, ESTATES.

PARTNERSHIP

1. **Definitions.**
2. **Creation and Duration.**
3. **Relation of Partners to Third Parties.**
4. **Relation of Partners Inter Se.**
5. **Dissolution.**
6. **Actions by and against Partners.**
7. **General.**

1. Definitions.

(*No Cases.*)

2. Creation and Duration.

Profits to be divided, therefore partners—By an agreement between the plaintiffs and the defendant it was provided that the defendant, who was carrying on the business of manufacturing wire fencing, should furnish machines, in which he had patent rights, for the purpose of carrying on the business of manufacturing and selling wire fencing; that he should devote his time and energy in furthering the interests of the business; that the machines and patent rights therein should be security for money advanced by the plaintiffs; that the plaintiffs should advance to the defendant $500, purchase wire needed for manufacturing, and pay wages, etc., in consideration of a commission of five per cent. on all purchases and advances; that the plaintiffs should furnish space on their premises for the business at a yearly ren : that the defendant should receive a weekly salary; that the plaintiffs should attend to the office work of the business for which they should be paid a weekly sum; that the net profits of the business should be divided; that the business should be conducted under a company name, and that the agreement should continue for one year, when plaintiffs could purchase a half interest in the business and patent rights of the defendant or continue the business for a further term.—The business resulted in a loss.—*Held*, that the parties were partners *inter se*, and should share equally in the losses of the business. *Lawton Saw Co. Ltd.* v. *Machum* No. 1, 2 Eq., p. 112.

Promise nudum pactum to share profits—Upon information supplied by the plaintiff, the defendant purchased certain property held by a bank as security for advances to the plaintiff's father, which re-sale yielded a surplus after meeting a liability the defendant had assumed for the benefit of plaintiff's father.—The defendant promised the plaintiff that in the event of there being a surplus it should belong to him.—*Held*, that the plaintiff and defendant were not partners, entitling the plaintiff to share in the profits from the re-sale of the property, and that the defendant's promise, which was not a declaration of trust, was *nudum pactum*. *Leighton v. Hale*, 3 Eq., p. 68; 37 N. B. R., p. 545.

Realty owned by partnership not dowable—Realty purchased by partners with partnership funds for partnership purposes must be regarded as personal estate in the absence of an agreement to the contrary, and consequently is not subject to dower. *In re Cushings Estate, Ex parte Bertha J. Cushing*, 1 Eq., p. 102.

3. Relation of Partners to Third Parties.

Assignments for benefit of creditors by partners individually—Defendant endorsed a firm's note at three months for $500.00 which fell due August 10, 1915.—On July 21st, 1915, defendant obtained goods from firm's store to the amount of $511.75, computed at retail price.—Defendant gave his cheque for $500.00 bearing date July 21, 1915, to one of the partners, with which cheque the partner paid at the bank the note on which defendant was endorser.—One of the partners executed a deed of assignment for the benefit of his creditors to the plaintiff of all his individual and partnership property on August 4, 1915.—The other partner executed a deed of assignment for the benefit of his creditors of all his individual and partnership property on August 14, 1915.—*Held*, in an action brought by the assignee to set aside the transfer or conveyance of the goods to the defendant, that the plaintiff, by virtue of the assignments to him by each partner of his individual and partnership property had sufficient interest and status to maintain this suit.—Query, whether individual assign-

ments can be deemed to be an assignment of the debtor firm within the meaning of sub-s. 4 of s. 2, of the Assignments and Preferences Act, C. S. 1903, chapter 141. *Fleetwood Assignee Etc.* v. *Welton*, 44, p. 318, C. D.

Sale by sheriff of partner's interest—L. and P. each carried on business in Saint John, buying and selling fruit.—P. was a licensed auctioneer.—To avoid competition between the parties it was agreed that P. was to buy all the apples handled by either in the market square, L. to furnish the money when apples were purchased.—All commissions on commission sales, and net profits on sales of apples purchased were to be equally shared.—Under this agreement P. purchased the cargo of the schooner C., some 342 barrels.—After a part had been sold the sheriff under an execution in the suit of R. against P. seized, and, without removing any of them, sold 62 barrels.—At the sale the sheriff, in answer to a bidder, stated that he was selling P.'s interest only, and would guarantee nothing, and he did not deliver the barrels sold to the purchaser. —In an action of trover in the Saint John County Court against the sheriff for a conversion of the 62 barrels, the judge told the jury that if they found that the apples were purchased under the agreement on the joint account of L. and P. there was a conversion, and the verdict should be for the plaintiff. —*Held*, on appeal, that the direction was wrong, and there must be a new trial. *Ritchie* v. *Law*, 37, p. 36.

4. Relations of partners inter se.

Accounting — Dredging company — Stock only partly paid for—By an agreement entered into between the plaintiff and the defendant, the defendant agreed to sell the plaintiff the profits of twenty shares of dredging stock for $2,000.—This agreement further provided that on the winding up or the selling out of the company, the plaintiff was to share in its profits or losses on a basis of twenty shares.—After carrying on the business for a season, the company sold its plant.—At the time of the sale the plaintiff had paid $1,500 on account of the purchase price.—After the sale was concluded, the defendant paid the plaintiff $1,500 which he claimed was all the latter was entitled to, as he had failed to pay the full amount of the purchase price although frequently asked to do so.—On an action for an accounting, *held*, that the plaintiff was entitled to an account of the profits of twenty shares of the stock of the company, and also for an account of the money received by the defendant for the twenty shares on the sale of the plant. *Stocker* v. *Smith*, 43, p. 37, C. D.

Accounting—Share of profits as partner or as extra wages—On an application for an accounting, the plaintiff alleged that under an agreement he and the defendant had entered into, he was to manage a business carried on in their joint names, be paid twelve dollars per week and receive one-quarter of the net profits at the end of the year.—The defendant denied the plaintiff was to receive one-quarter of the net profits, and alleged that the agreement was that the plaintiff was to be paid twelve dollars per week and have the right to buy a one-quarter interest at the end of the year.—*Held*, that the facts shewed that the contract made was as alleged by the plaintiff and that he was entitled to an accounting.—*Held*, that the Court was inclined to be of the opinion that the plaintiff and defendant were partners as between themselves, but if such was not the case and the agreement between them was simply a contract of hire, it was not barred by the Statute of Frauds, as the plaintiff had performed his part of the agreement. *Orchard* v. *Dykeman*, 43, p. 181, C. D.

Fishing—Co-Licensees only—A Dominion Government fishery license for one year, without right of renewal, was taken out a number of consecutive years by the plaintiff and defendants until 1899, in which year and in the year following, the license was taken out and the fishing thereunder was carried on by the defendants.—The plaintiff and defendants owned as tenants in common fishing gear used in fishing under the license.—They were not partners in respect of the license, and each catch or fish was divided at the time it was made among such of the licensees as assisted in it.—The expense of repairing the fishing gear was proportionately borne by the plaintiff and defendants up to the years 1899 and 1900, when it was borne by the defendants.—In the years 1899 and 1900 the fishing gear was possessed and used exclusively by the defendants in fishing under the license. —*Held*, that the plaintiff was not entitled to a declaration of interest in the license, nor to a share of the earnings thereunder for the years 1899 and 1900, and that the defendants were not liable to account to him for profits from the use by them of the fishing gear in those years. *Guptill* v. *Ingersoll*, 2 Eq., p. 252.

Mismanagement by one partner—In May, 1870, plaintiff and C. B. formed a partnership for manufacturing purposes under a verbal agreement to contribute equally to the capital stock and share equally in the profit and loss.—No amount was agreed upon as the capital, or when each was to contribute his proportion of it, or in what manner the business was to be managed. —In June following J. B. was taken into partnership under the agreement that each partner should contribute a third of the capital stock and share equally in the profit and loss.—The plaintiff managed the business until August, 1871, when C. B. took over the management and forbade the plaintiff interfering with the business.—In a suit brought in October, 1872, for a dissolution of the partnership and an account, it was found on a reference to take the account that

the plaintiff had contributed $4,312.97, C. B. $10,407, and J. B. $7,291.—It appeared that under the management of C. B. the business was mismanaged and neglected, that he did not keep the partnership accounts in the firm's books, or in books accessable to the plaintiff; that he repeatedly refused from the time he assumed the management, to render an account to the plaintiff, or to have a settlement of their accounts.—That he gave the plaintiff false information of the assets and liabilities of the business, and withheld information asked for, and that the plaintiff had no knowledge of the amount C. B. and J. B. had contributed to the capital of the firm.—*Held*, (1) that plaintiff's costs of the hearing should be paid by C. B. and that the costs of the reference should be paid out of the partnership assets after payment of the partnership debts, and if the assets proved insufficient, then by C. B.; (2) that C. B. should receive no remuneration for his services in the management of the business. *Young* v. *Berryman et al*, Eq. Cas., p. 110.

Nominal partnership—No interest in profits—M. carried on business and had in his employ his sons J., R. and A.—An agreement was entered into between them by which the sons were to be associated with the father for a term of five years as co-partners in carrying on the business which was to be under the name and style of W. M. & Sons.—The father was to furnish the capital and stock in trade and the sons were to work in their several departments in carrying on the business.—J. was to have charge of the books of the business and power in the absence of the father to sign the firm's name and also in the absence of the father was to have general charge of the business.—R. and A. were to be under the direction of the father.—The agreement witnessed that each of the sons should accept from the father "out of the proceeds of the business as their and each of their several interests in the business on account of the services to be performed by each of them" a specified sum of money each year, and which the father covenanted to pay them "on account of their several interests in the business"—Provision was made for the withdrawal of the sons or either of them "from the said firm" on giving notice to the father upon which the account with the firm of the party giving such notice should be made up and the balance due him paid when all his interest in the business should cease.—It was further agreed that at the end of the term of five years the several accounts of the sons should be balanced and the money found to be due to each paid whereupon the agreement should terminate.—The sons were prohibited from entering into any contract on behalf of the firm involving more than $10.00 or engaging in any transaction out of the usual course of the retail business and the wish of the father in all matters respecting the general management of the business was to be binding on the sons.—In the books of the business kept by J. and accessible to the sons an account was opened against each of the sons in which they were charged the cash paid to them and were credited as salaries the amounts which by the agreement they were to be paid each year.—Stock was never taken and no steps were taken to ascertain the profits or losses of the business.—*Held* that the father and sons were not partners *inter se*. *Martin* v. *Martin* 1 Eq. p. 515.

Partnership alleged—Injunction pending hearing—On a motion for an interlocutory injunction to restrain defendant from disposing of assets of an alleged partnership between him and the plaintiff to carry on a business previously conducted by the defendant and for a receiver the plaintiff alleged that books of account were opened up and a bank account kept in the firm's name; that bill heads with the name of the firm and names of the plaintiff and defendant thereon were used and a circular under the firm name distributed by the defendant announcing that plaintiff was associated in the business.—The defendant denied that a partnership was formed and alleged that it was contingent upon the plaintiff paying into the business a sum of money equal to the value of the defendant's stock in trade on hand; that this had never been done; that the plaintiff was employed at a weekly salary; and that the bill heads were ordered by plaintiff without authority and their use only permitted after his assurrance that he would shortly purchase an interest in the business.—These allegations were denied by the plaintiff:—*Held* that the motion should be granted.—On a motion for an interlocutory injunction the Court should be satisfied that there is a serious question to be determined and that under the facts there is a probability the plaintiff will be held entitled to relief. *Burden* v. *Howard* 2 Eq. p. 461.

Speculation in land—Failure to provide capital—In November 1902 the plaintiff and the defendant F. with a number of others formed a syndicate for the purpose of acquiring options and purchasing land with a view to re-sale.—The transaction was a large one, involving the purchase of some 200,000 acres of land in the North-west Territories, and before the land was finally disposed of the syndicate was compelled to pay to the owners the sum of $60.000.—The agreement between the plaintiff and F. was verbal, and at the time it was made the plaintiff paid the sum of $200.—On the 30th of March, 1903, the defendant F. wrote to the plaintiff to hold himself in readiness to raise $2,000, "to hold your corner of the deal," and that if they had to call upon him it would be at short notice—The plaintiff took no notice of this letter and made no preparation for securing the money.—On the 14th of April, 1903, F. telegraphed the plaintiff as follows: "Three thousand dollars absolutely necessary to

hold your interest in the land deal.—Will I draw?—Wire."—To this the plaintiff sent no reply.—In 1903, the plaintiff learned that the speculation had been successful and that large profits had been made, but it was not until 1907 that this suit was brought. —*Held*, that in view of the special nature of the transaction, the plaintiff's refusal to contribute his share of the money required to complete the purchase and his refusal to answer or take any notice of both letter and telegram justified the defendants in acting on the assumption and belief that he had entirely abandoned the contract and his interest in the purchase, and that he did not intend being any longer bound by it. —*Held*, also that the plaintiff's delay in commencing a suit until long after he knew that a large profit had been made by a re-sale of the land, was, in the absence of any satisfactory explanation, evidence that his failure to pay the money, and his refusal to answer either the letter or telegram, were in fact intended at the time as an abandonment of all interest in the transaction. *Pugsley* v. *Fowler et al*, 4 Eq., p. 122.

5. Dissolution.

Ordinary wear and tear on machinery not a loss of capital invested—Where, under a partnership agreement, a partner contributed to the partnership business his time and skill, and the use of, but not the property in, certain machinery, in consideration of a weekly salary and one half of the net profits, he was held, in the absence of an agreement, not entitled on taking the partnership accounts to an allowance for the depreciation in the value of the machinery arising from ordinary wear and tear, as a loss to him of capital put into the business. *Lawton Saw Co. Ltd.* v. *Machum* No. 2, 2 Eq., p. 191.

Power of partner after dissolution—A firm of lumber operators hypothecated under the Bank Act their season's cut of lumber to a bank to secure future advances. —A member of the firm, without the knowledge of his co-partner, sold the lumber and applied part of the proceeds in paying a past indebtedness of the firm to the bank, and, with the consent of the bank, applied a portion of the remainder in paying other debts of the firm.—*Held*, that he had power to do so, though the partnership had then been dissolved, and that his co-partner was not entitled to have the money so appropriated, charged in reduction of the secured indebtedness to the bank. *Hale* v. *The People's Bank of Halifac*, 2 Eq., p. 433.

6. Actions by and against Partners.

(*No Cases.*)

7. General.

Shipping — Co-owners — Jurisdiction Court of Equity—The jurisdiction of the Court in Equity in a suit for account between co-owners of a ship has not been taken away by Act 54-55 Vict., c. 29 (D), which confers a like jurisdiction upon the Exchequer Court in Admiralty; any discretion the Court of Equity may have as to the exercise of its jurisdiction must depend upon the circumstances of each suit. *Penery* v. *Hanson*, 2 Eq., p. 233.

PATENTS

Improvement on original invention—Defendant was the inventor and owner of a patented snow plough, and by an agreement with K. sold to him a one-half interest in the invention and all improvements that subsequently might be made.—The invention proving unsatisfactory, defendant constructed a new plough which was an improvement in many important respects upon the original invention, and sufficiently dissimilar to it as not to be an infringement, and had it patented as a new invention.—In a suit by K.'s administrators to secure to them a one-half interest in the new patent, the defendant contended that the plough was a new invention and not an improvement of the old invention.—*Held*, that it did not amount to more than an improvement within the meaning of the agreement. *Jones et al* v. *Russell*, 1 Eq., p. 232.

Infringment, What is—Quantum of damages—A patent for an apparatus which combines a particular invention by the patentee with other things which are not his invention is not infringed by an apparatus which does not include the patentee's particular invention.—Plaintiff was the patentee of a lubricator, and by an agreement with the defendants gave them the exclusive right to manufacture and sell the article within a specified area, in consideration of a royalty payable upon each lubricator when sold.—The defendants agreed to manufacture the lubricator in sufficient numbers to supply the trade and to use every reasonable means to secure its sale.—The defendants duly manufactured the lubricator, kept it in stock for sale, and supplied all orders for it.—They also manufactured and sold another lubricator not under patent and not an infringement of the plaintiff's invention.—This and other lubricators in the market were sold so much cheaper than the plaintiff's could be manufactured and sold at, that the latter had a very limited sale.—The plaintiff contended that the manufacture and sale by the defendants of another lubricator was a breach of covenant by them to use every reasonable means to secure the sale of his invention.—*Held*, that there had been no breach of the agreement.—*Semble*, that if the article sold by defendants

had been an infringement of plaintiff's patent his damages would be the royalty payable under the agreement.—If it were not an infringement, but its sale a breach of the agreement, the damages would be as on an ordinary breach of covenant.—A licensee under a patent cannot question its validity.—But he may shew that an article sold by him in competition with the patent is not an infringement of it. *Barclay* v. *McAvity*, 1 Eq., p. 1.

Patent Act, Compliance with—The plaintiff L. obtained two Canadian patents for a certain log-hauling machine.—The first was applied for April 17th, 1901, and was granted July 16th, 1901. The second was applied for May 22nd, 1907, and was granted November 19th, 1907.—L. also obtained a patent in the United States for the latter device, which was applied for November 22nd, 1905, and granted in May, 1907.—Four of the machines were manufactured in the United States in accordance with the specifications of the 1907 Canadian patent, and were sold there in the years 1905 and 1906 with the knowledge and consent of L.—*Held*, that the Canadian patent dated November 19th, 1907, is void on the ground of non-compliance with the provisions of the Patent Act, as the invention so patented was in public use and on sale with the consent of the inventor thereof for more than one year previous to the application for the said patent in Canada, R. S. C., chap. 69, sec. 7.—The words "in Canada" in section seven of the Patent Act have reference to the application for the patent and not to the sale of the machine to be patented. *Smith* v. *Goldie*, 9 S. C. R. 46 commented on. —In the Canadian patent of 1907 small rollers were substituted for roller chains, as specified in the 1901 patent.—These rollers were afterwards found to be impracticable, and in all the machines manufactured both by L. or his agents, and by the defendants, with the exception of the four machines mentioned above, the roller chains were used as specified in the patent of 1901.—Three machines were manufactured in Canada by L.'s agents in 1908, and two were sold in Canada in that year.—Three machines were also manufactured in the United States by L. in the years 1906 and 1907 and sold by him in Canada during those years.—All these machines were fitted with roller chains according to the specifications for the patent of 1901, and not with rollers as provided for in the patent of 1907.—*Held*, also, that the Canadian patent dated November 19th, 1907, is void on the ground of non-compliance with the provisions of the Patent Act, as the construction or manufacture of the invention so patented had not been commenced or carried on in Canada within two years from the date of the said patent. R. S. C., c. 69, s. 38. *Lombard* v. *The Dunbar Co.*, 4 Eq., p. 271.

N. B. p. 20.

PAYMENT

Appropriation of payments—When a debtor pays money on account to his creditor and makes no appropriation, the creditor has the right of appropriation and may exercise the right up to the last moment by action or otherwise; he may even appropriate in satisfaction of a debt for which no action would lie by reason of the illegality of the transaction out of which the debt originated. *Mayberry et al* v. *Hunt et al*, 34, p. 628.

One W. Q. conveyed certain real estate to the defendant C. in 1891.—This conveyance was absolute on its face, but was really by way of mortgage to secure a certain sum of money in which W. Q. was indebted to C. for goods supplied from C.'s store.—W. Q. was also indebted to the plaintiff N., and the latter obtained judgment against him for the sum of $239.50, a memorial of which was filed December 3rd, 1895.—After the conveyance from W. Q. to C. had been made, the latter continued to supply goods to W. Q. and W. Q. worked for him and made cash payments to him, which amounts were credited by C. against his account.—*Held*, that where there were several debts, in the absence of any appropriation by the debtor at the time of payment, the creditor had the right to appropriate the payment to any of the debts he chose, and this right could be exercised at any time, and need not be shown by any specific act or declaration, but might be inferred from facts and circumstances. *Nixon* v. *Currey et al*, 4 Eq., p. 153.

Married woman—Payment to husband—The plaintiff, a married woman, carried on a meat and provision business at 28 Main street, in the city of Saint John, at a shop called "Ross' Meat Store."—Prior to November, 1912, when the business was transferred to the plaintiff by bill of sale, it had been carried on by the plaintiff's husband at the same place in his name.—At the time the debt sued for was contracted, the plaintiff's husband lived with her and was employed as an assistant in the business.—The defendant knew the business belonged to the plaintiff and intended to deal with her.—The account sued for was made out to Ross' Meat Store, and through an error of a clerk of the defendant and an oversight of its manager, a cheque was made payable to the plaintiff's husband or his order and was sent to him by mail.—The cheque was received by the husband, cashed, and the proceeds retained.—At the time the cheque was received the husband and wife were living separate and apart.—*Held*, reversing the judgment of Forbes J., that there was no evidence to support the finding that payment of the claim to the husband was a valid payment of the debt due to the wife. *Ross* v. *The New Brunswick Construction Co.*, 43, p. 291.

Misappropriation of funds assigned in payment of purchase price of land—Defendant employed a solicitor to search the title to land he wished to acquire.—He afterwards opened negotiations with the plaintiff for its purchase.—These negotiations were carried on through C., a mutual friend of the parties, to whom the defendant agreed to give a commission in case the sale was completed.—An agreement for the sale of the property was drawn up by C. and executed by the plaintiff.—C. then employed the solicitor, who had previously made the search, to prepare the necessary conveyance, —Defendant paid for the property by giving the plaintiff an order for money due him by a municipality.—This order was drawn by the same solicitor at the request of the defendant and was afterwards taken by the solicitor to the plaintiff who endorsed it. —The solicitor then took the order to the secretary of the municipality who gave him a cheque, payable to the plaintiff's order. —He took the cheque to the plaintiff, obtained her endorsement and appropriated the proceeds.—*Held*, that if any agency existed between the solicitor and the defendant, it came to an end when the order given by the defendant to the plaintiff was endorsed by her and delivered to the municipailty; this order was an equitable assignment, which removed all control of the fund from the defendant and vested it in the municipality as trustee for the plaintiff. *Cheeseman v. Corey et al*, 42, p. 409, C. D.

Payment into Court—*See* PRACTICE.

Payment out of Court—*See* PRACTICE.

Plea of payment—Proving payment of accommodation note—Defendants had a contract for the erection of a school house. —They sub-contracted with the plaintiff for a portion of the concrete, stone and brick-work.—On the completion of the sub-contract disputes having arisen, the plaintiff brought this action for extra work claiming $1,464.20.—The defendants pleaded payment and set-off, claiming thereunder to recover a balance from the plaintiff, but omitted to deliver particulars of their set-off.—On the trial without a jury, the judge found that the defendants had overpaid the plaintiff the contract price by $288.11; that the plaintiff was entitled to extras to the amount of $695.50, and ordered a verdict for the plaintiff for the difference refusing to allow evidence of the payment of an accommodation note for $265.00 which the defendants had endorsed for the plaintiff during the pendency of the contract and had paid at maturity, on the ground that under the pleadings it must be considered in the nature of a set-off and therefore not admissible as no particulars had been given, neither was it admissible under the plea of payment as a payment to the plaintiff.—*Held*, on appeal, that as the accommodation was obtained in view of the contract, that the defendants were entitled to prove the note and payment thereof under the plea of payment and the verdict should be reduced by the amount thereof. *LeBlanc* v. *Lutz et al*, 44, p. 398.

Proof of payment—Payment of a debt must be proven by the debtor beyond reasonable doubt. *True* v. *Burt*, 2 Eq., p. 497. *Massey Harris Co. Ltd.* v. *Merrithew*, 39, p. 544.

See also *Kelly* v. *Ayer*, 41, p. 489.

PLEADING

I. The Claim.
1. BILL OF COMPLAINT.
2. STATEMENT OF CLAIM.
3. COUNTERCLAIM.
4. DECLARATION.

II. The Defence.
1. STATEMENT OF DEFENCE.
2. STATEMENT OF DEFENCE TO COUNTERCLAIM.
3. SET-OFF.
4. DEMURRER.

III. The Reply.

IV. Exceptions.

V. General Rules of Pleading.

VI. Amendment.

I. The Claim.

1. BILL OF COMPLAINT.

Allegations—A bill must allege facts and not conclusions of law. *Smith* v. *The Halifax Banking Co.*, 1 Eq., p. 17.

Failure to allege admission of assets—W. by his will appointed his wife sole executrix, and left her the residue of his estate after payment of four legacies.—The executrix proved the will and paid two of the legacies.—She died intestate, and the defendant took out letters of administration of her estate.—The plaintiff who was one of the unpaid legatees under W.'s will, obtained letters of administration *de bonis non* of W.'s estate, and filed a bill against the defendant to have the estate administered in equity, an account taken of the unadministered assets received by the defendant, and payment of the same to the plaintiff.—There was no allegation in the bill that any of the legacies had been paid, and that this was an admission of assets for the payment of all of them.—The defendant in his answer claimed that there were no assets to pay the legacies, as W. at the time of his death was indebted to his wife for advances out of her own separate property which, with some other debts, exceeded the value of his estate.—*Held*, that the plaintiff was not entitled to a decree against the defendant for payment of her legacy without a reference being had and an account taken, when the bill did

not charge that the testator's executrix had admitted assets and become personally liable by paying two of the legacies, and the defendant had expressly denied there were any assets for the payment of the legacies. *Walsh* v. *Nugent*, 1 Eq., p. 335.

Form—Section 22 of chapter 49, C. S., provides that a bill shall conclude with a prayer for specific relief, under which, without a prayer for general relief, the plaintiff shall have any other relief to which the equities of his case may entitle him.—*Held* (1) that the prayer for specific relief must be substantially the same as the cause of action stated in the summons; (2) that relief to which the equities of a plaintiff's case entitle him under the above section must be consistent with the relief specifically prayed for. *Vernon* v. *Oliver*, Eq. Cas., p. 179.

Fraudulent conveyance—Semble, a bill in a suit by a judgment creditor to set aside a conveyance made by the debtor to a third person, on the ground of fraud, is sufficient if it avers that before the commencement of the suit execution upon the judgment was sued out and that it was avoided by the conveyance, though it does not aver a return to the execution.—*Black* v. *Hazen* discussed and distinguished. *Wiley* v. *Waite et al*, 1 Eq., p. 31.

Injunction suit — Under Act 53 Vict., c. 4, ss. 23, 24, a bill in an injunction suit need not be sworn to or supported by affidavit.—It is only where an injunction is sought before the hearing that the bill must be supported by affidavit. *Trites* v. *Humphreys*, 2 Eq., p. 1.

2. STATEMENT OF CLAIM.

Condition precedent must be pleaded—During negotiations for the sale of two standard stokers, warranted to give certain results in the saving of fuel, etc., a contract was submitted in which a particular test was specified to be applied to determine whether the stokers would produce the guaranteed results.—The defendant refused to be bound by the specified test, and the proviso was struck out and the contract signed, making a proviso for the test as follows: "To determine that these guarantees are lived up to and the same quality of coal is used and the same load is being carried, tests are to be made under ordinary running conditions on hand and stoker fired boilers."—The stokers were installed and defendant refused to pay for them, alleging that they did not fulfil the guarantee.—Plaintiffs brought this action declaring on the common counts for goods sold and delivered, etc.—The pleas were never indebted, and a special plea that the stokers did not fulfil the guarantees.—Defendant made two tests without reference to the plaintiffs.—In answer to questions the jury found that the defendant's tests were not fair and proper under the contract, and that the tests that the plaintiffs apply were better tests than the defendant's, and that no proper tests were ever made.—*Held* (*per* Tuck C. J., Landry and Barker JJ.) that while all the findings are in favor of the plaintiffs no verdict can be entered for them on the pleadings, as there is no allegation of waiver or proof that the conditions precedent to payment had been performed, and there must be a new trial.—*Held* (*per* McLeod J.) that the conditions precedent were not shown to have been performed, and no waiver of performance having been alleged that plaintiffs could not recover on the pleadings.—If the plaintiffs were allowed to amend and add a count for waiver a new trial should only be granted on payment of costs. *Underfeed Stoker Co. Ltd.* v. *Ready*, 37, p. 505.

County Court—Averring jurisdiction—A County Court capias will not be set aside because it does not aver in the statement of the cause of action that it arose within the jurisdiction of the Court. *Rogers* v. *Dunbar*, 37, p. 33.

Set-off cannot be partially converted into payment on account—A plaintiff cannot convert the undisputed fact of a claim of the defendant, recoverable in the plaintiff's action only by way of set-off or counterclaim, into a payment on account, and thereby compel defendant either to put in a defence or lose the unallowed balance of his account as *res judicata*. *Gamblin* v. *Myers*, 42, p. 280.

3. COUNTERCLAIM.

County Courts—Jurisdiction to entertain—The jurisdiction in respect to counterclaims conferred upon county courts by the County Courts Act, C. S. 1903, c. 116, as amended by the Act 5 Geo. V., c. 25 and enlarged by the Judicature Act, 1909, is confined to claims for an amount over which the Court would have had jurisdiction had the defendant sought to have recovered the subject matter of the counterclaim by suing therefor as plaintiff in the County Court. *Canadian Laundry etc. Co. Ltd.* v. *Ungar's Laundry etc. Ltd.*, 44, p. 423.

See also *Windsor* v. *Young*, 43, p. 323.

Particulars, Lack of—In an action on a written contract, the defendants counterclaimed for a breach of the contract but furnished no particulars and offered no proof of damage.—The jury, however, found that there had been a breach by the plaintiff and assessed the damages at $200.—They also found the defendants had accepted what the plaintiff did as a fulfilment of the contract.—*Held*, that the trial judge was right in refusing to deduct the $200.00 from the verdict found for the plaintiff as balance due him on the contract. *Blue* v. *Miller et al*, 43, p. 307.

4. DECLARATION.

"Goods sold and delivered"—"Goods bargained and sold"—See *Moore et al* v. *The Canadian Fairbanks Co. Ltd.*, 41, p. 485.

Trespass—Where the declaration is in trespass and the plaintiff on the trial relies upon and directs all his evidence to proving injury to his possession, the attention of the trial judge not being in any way called to the fact that he was proceeding for injury to the reversion, he cannot afterwards, upon a motion to set aside a non-suit and enter a verdict for himself, claim the right under 60 Vict., c. 24, s. 95, to have a verdict entered for him in case as if he had declared for and proved damages to his reversionary interest. *McDougall* v. *Campbellton Water Supply Co.*, 34, p. 467.

See also *Smith* v. *Smith*, 37, p. 7.

See also DEMURRER *post*.

II. Defence.

1. STATEMENT OF DEFENCE.

Bad pleas — Insurance policy — To the declaration on a policy of fire insurance, dated in 1893, issued by the defendant company, it was pleaded that it was made a condition precedent to its issue that it was based on the written representations and warranties contained in the application and although in said application the plaintiff represented that there was no judgment or seizure against him at the time of the making of the said policy of insurance mentioned in said first count and before the said property was burnt, damaged or destroyed by fire, as alleged in said first count, there was a judgment against the plaintiff signed on the 15th day of June, 1891, and an execution for the amount of said judgment was in the hands of the sheriff at the time the property insured was burnt, and also at the time the defendant's policy was issued.—*Held* (*per* Tuck C. J. and Barker J.) that the plea was bad, as it did not allege that there was a representation at the time the policy declared on was issued that there was no judgment against the plaintiff, and *held* (*per* Tuck C. J.) that in the absence of the date of the application there was no evidence that the judgment against plaintiff was not obtained subsequently to the date of the application.—To the above declaration the defendant company pleaded that the policy was subject to a condition endorsed upon it that it should be void if any material fact or circumstance, stated in writing or otherwise, had not been correctly represented by the assured, or if any fact material to the risk had been withheld, and that the plaintiff at the time of the making of the policy withheld the fact that said judgment had been signed against him.—*Held* (*per* Tuck C. J., Barker and VanWart JJ.) that the plea was bad, it not being alleged that the fact withheld was material.—To the above declaration the defendant company pleaded that, subsequently to the making of the policy there was a change in the risk not made known to the defendants, and that by a condition of the policy if the occupancy, situation or circumstances affecting the risk should, with the knowledge, advice, agency or consent of the assured, be so altered as to cause an increase of the risk, then the policy should become void. *Held*, per Tuck C. J. Barker and VanWart JJ. that the plea was bad for not alleging what the change in the risk was. *Long* v. *The Phoenix Insurance Company*, 34, p. 223.

Bail—Semble, that bail cannot by plea take advantage of matters forming grounds for equitable relief, but should apply to the Court by motion. *Dibblee* v. *Fry et al*, 35, p. 109.

Company law—Director contracting with company—Where there is no plea alleging that the plaintiff was incompetent to contract with the defendant company by reason of being a director thereof, it will be assumed that he was so competent. *McKean* v. *Dalhousie Lumber Co. Ltd.*, 40, p. 218.

Condition precedent—To an action on the common counts, the defendant pleaded: (1) never indebted; (2) payment; (3) satisfaction; (4) set-off.—*Held*, that the pleadings did not permit of a defence of a condition precedent not fulfilled. *Kennedy Island Mill Co. Ltd.* v. *The St. John Lumber Co.*, 38, p. 292.

County Court—Special defences unnecessary—In an action in the County Court the fact that the special matters set out in a notice of defence could be given in evidence under the general issue is not necessarily a good ground for an application to strike the said notice out. *Bennett* v. *Cody*, 35, p. 277.

Defamation—Notice of intended action—In an action for libel where the facts involve a question of notice and are in dispute the defence of want or insufficiency should be pleaded and the question is for the jury; where, however, the facts are not disputed and the question is the legal effect or result of such facts it is for the Court, and the proper procedure is to apply at chambers to set aside the writ and all proceedings and not to stay the action. *Carter* v. *The Standard Ltd.*, 44, p. 1.

Defence and disclaimer—A defence and disclaimer to whole bill cannot be put in, and where this is done defendant will not be allowed costs on bill being amended. *Roberts* v. *Howe et al*, 1 Eq., p. 139.

Defence—Misrepresentation re property being mortgaged—A policy of insurance against fire contained the following condition: that it should become void if

any building intended to be insured stood on grounds not owned in fee simple by the assured. The land upon which the buildings stood was subject to a mortgage.—*Held*, that the defence that the lands were not owned in fee simple by the assured mortgagor was not available under a plea charging that the plaintiff had been guilty of misrepresentation in the application for insurance, in that he stated that the property insured was not mortgaged or other, wise encumbered whereas etc. it was mortgaged. *Temple* v. *Western Assurance Co.*, 35 N. B. R., p. 171; 31 S. C. R., p. 373.

Disclaimer—Disclaimer is as applicable where a defendant has no interest as where he has an interest which he is willing to abandon. *Barnaby* v. *Munroe et al*, 1 Eq., p. 94.

Where an administrator is improperly made a party to such a suit he should disclaim in order to entitle him to have the bill dismissed with costs. *Id.*

Where an administrator improperly made a party to a foreclosure suit did not disclaim and the cause proceeded to hearing he was equitably dealt with by being allowed costs, on the dismissal of the bill, up to and including his answer. *Id.*

Embarrassing plea—To the declaration for a breach of a limit bond the defendants on equitable grounds pleaded a seventh plea, alleging that the note upon which the original action was brought in the City Court of Saint John had been paid; that the plaintiff, notwithstanding such payment, retained the note in his possession, and fraudulently, surreptitiously and illegally, in the absence of the defendant, W. H. F., and without summons or proper notice obtained a judgment thereon in the said City Court, that the defendant, W. H. F. was an official stenographer to the Courts of the province, and was privileged from arrest on civil process while in the performance of his duties as such official stenographer, yet the plaintiff caused the said W. H. F. to be arrested upon the judgment so fraudulently obtained while he was engaged in performing his official duties at the Equity Court in Saint John, that the said W. H. F. only went beyond the limits of the gaol of the city and county of Saint John when he was compelled so to do in order to perform his duties as such court stenographer, and the defendants, by reason of the premises, claimed relief etc. This plea being struck out by order, *held*, that the plea was bad as being both embarrassing and double. *Dibblee* v. *Fry et al*, 35, p. 109.

Equitable defence of possession by infant beneficiaries—In an action of ejectment the plaintiffs claimed title as the guardians of infants appointed by the Probate Court. At the time the action was brought the infants, who were each over fourteen years of age, were living with the defendant who occupied the premises in question with their consent and approval.—*Held*, that the defendant could not set up as a defence, that on equitable grounds he was entitled to possession for the infants as against the plaintiffs, and that the plaintiffs had no title the Probate Court having acted without jurisdiction in appointing them guardians. *Furlotte et al Guardians etc.* v. *LaPoint*, 38, p. 140.

Equitable defence to action of ejectment—See *Purdy* v. *Porter*, 38 N. B. R. p. 465; 41 S. C. R., p. 471.

Extra provincial company, Action by unlicensed—The defence that an extra provincial corporation is not licensed under C. S. 1903, c. 18 is not a matter to be pleaded, but a ground for a stay of proceedings. *The Empire Cream Separator Co.* v. *The Maritime Dairy Co.*, 38, p. 309; *Cuthbert* v. *The McCall Co.*, 40, p. 385.

See also *Sanford Mfg. Co. Ltd.* v. *Stockton*, 40, p. 423.

Failure to make avail of defence—If the defendant on the trial of a cause neglects to avail himself of a defence of which he was apprised, and which he could have then made if he had wished, it is not open to him to move for a new trial in order to make such defence. *The Kennedy Island Mill Co.* v. *McInerney*, 36, p. 612. Confirmed S. C. of C., No. 2455, unreported.

General issue—County Court—Special defences—In an action in the County Court the fact that the special matters set out in a notice of defence could be given in evidence under the general issue is not necessarily a good ground for an application to strike the said notice out. *Bennett* v. *Cody*, 35, p. 277.

General issue—County Court—See also *Tompkins* v. *Hale*, 41, p. 269.

Non assumpsit—The plaintiffs' declaration set out a contract between the plaintiffs and a partnership, and that the defendant company was incorporated to take over the property and business of the partnership, and that it did take over such property and business, and did at the request of the partnership and with the consent of the plaintiffs duly and regularly take over, adopt and assume such contract and agreed with the plaintiffs to perform the same.—To this the defendant pleaded *non assumpsit*.—*Held*, this plea denied the adoption of the contract by the defendant as well as all other facts alleged that were necessary to constitute a novation. *Jones et al* v. *James Burgess & Sons Ltd.*, 39, p. 603.

Non indebitatus—To a count setting out that defendant rented from plaintiffs twelve reels of moving picture films upon the terms of a certain application set out in full, and concluding as follows: "Which said twelve reels of moving picture films were delivered to the defendant on or about the 27th day of January, A. D., 1909, to be used

by him at the rents set out in said application for rental service, of which rent forty-seven weeks per reel are due and unpaid" the defendant pleaded "never indebted" and to a count as follows: "For that the plaintiff on or about the 27th day of January, A. D. 1909, let to the defendant twelve reels of moving picture films, to hold at a rent of ten dollars a reel per week, of which rent forty-seven weeks are due and unpaid" the defendant pleaded "never indebted." —*Held*, this plea put in issue the making of the contract alleged in each count, as well as all other facts from which the liability of the defendant would arise.—*Held* (*per* Barry J.), pleading "never indebted" when *non assumpsit* is applicable is an irregularity which is waived by the plaintiff joining issue thereon. *Miles Bros. Inc.* v. *Bell*, 40, p. 158.

Res judicata—Where a bond given with a mortgage in pursuance of an agreement to secure a debt has been held valid in an action thereon, the defence of *res judicata* will lie to a suit to set aside the bond mortgage and agreement. *Smith* v. *Halifax Banking Co.*, 1 Eq., p. 17.

Signature, Denying—Fraudulent use of signed paper—Where a person puts his name to a paper without taking ordinary precautions, he cannot afterwards plead that he did not know what he was doing and thought it was only a form; and where such a paper is used by another, not for the purpose for which it was intended, but for the purpose of committing a fraud, that fact does not make it any the less the instrument of the person who signed it. *Cheeseman* v. *Corey et al*, 42, p. 409, C. D.

Statute of Frauds—In a suit for specific performance of an agreement for sale and purchase of a leasehold interest in land, it is not necessary that the defendant plead the Statute of Frauds in an answer denying the agreement in order to set up the defence at the hearing. *Johnson* v. *Scribner et al*, Eq. Cas., p. 363.

Trespass by landlord—Abandonment by tenant—To a count for breaking and entering plaintiff's premises and ejecting plaintiff therefrom, defendant (landlord) pleaded that the premises were not the plaintiff's and gave evidence that the plaintiff had abandoned the premises, and defendant had taken possession before the alleged trespass. —*Held*, that the evidence was admissable under the plea, there being no special allegation of title in the declaration other than that the premises were the plaintiff's and that the defendant need not plead abandonment specially. *Whittaker* v. *Goggin*, 39, p. 403.

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2. STATEMENT OF DEFENCE TO COUNTERCLAIM.

(*No Cases.*)

3. SET-OFF.

Accommodation note — No particulars given — Plea of payment to declaration—Defendants had a contract and sub-contracted with the plaintiff for a portion.—On the completion of the sub-contract disputes having arisen the plaintiff brought this action for extra work claiming $1,464.20. —The defendants pleaded payment and set-off, claiming thereunder to recover a balance from the plaintiff, but omitted to deliver particulars of their set-off.—On the trial without a jury, the judge found that the defendants had overpaid the plaintiff the contract price by $288.11; that the plaintiff was entitled to extras to the amount of $695.50, and ordered a verdict for the plaintiff for the difference refusing to allow evidence of the payment of an accommodation note for $265.00 which the defendants had endorsed for the plaintiff during the pendency of the contract and had paid at maturity, on the ground that under the pleadings it must be considered in the nature of a set-off and therefore not admissible as no particulars had been given, neither was it admissible under the plea of payment as a payment to the plaintiff. —*Held*, on appeal, that as the accommodation was obtained in view of the contract, that the defendants were entitled to prove the note and payment thereof under the plea of payment and the verdict should be reduced by the amount thereof. *LeBlanc* v. *Lutz et al*, 44, p. 398.

Amount of set-off must be within jurisdiction of Court—To an action in the County Court on a promissory note for $300 the defendant pleaded the general issue and gave notice of set-off of a claim greatly in excess of the jurisdiction of the Court in debt or *assumpsit*; alleging that he had to pay the amount on certain other promissory notes outstanding between them which the plaintiff had agreed to pay; and claimed judgment for the excess of the set-off over the plaintiff's claim to the amount of $400.—*Held*, that the judge of the County Court had no jurisdiction to entertain the set-off, no abandonment of any part of the defendant's claim having been made to bring the amount within the jurisdiction of the Court. *Windsor* v. *Young*, 43, p. 313.

County Courts—A set-off in the County Court has the same effect as a cross-action under C. S. 1903, c. 111, s. 118, and no debts can be pleaded by way of set-off except such as are recoverable by action.—Therefore s. 44 of the Probate Courts Act, C. S. 1903, c. 118, which provides that no action shall be brought against an estate for a debt "until the same be certified by affidavit" applies to such set-off. *Kelley* v. *Ayer*, 41, p. 489.

County Court jurisdiction—To an action in the County Court on a promissory note for $300 the defendant pleaded the

general issue and gave notice of set-off of a claim greatly in excess of the jurisdiction of the Court in debt or *assumpsit*; alleging that he had to pay the amount on certain other promissory notes outstanding between them which the plaintiff had agreed to pay; and claimed judgment for the excess of the set-off over the plaintiff's claim to the amount of $400.—*Held*, that the judge of the County Court had no jurisdiction to entertain the set-off, no abandonment of any part of the defendant's claim having been made to bring the amount within the jurisdiction of the Court. *Windsor* v. *Young*, 43, p. 313.

Plea of set-off—Statutory form, C. S., c. 37, p. 286—A plea of set-off, which did not conclude with an offer to set-off defendant's claim against plaintiff's claim, was held bad on demurrer. *Fillmore* v. *Cartwright*, 33, p. 621.

Set-off accruing after writ issued—A defence by way of set-off, which accrued after the writ was issued in the original action, can not be set up as an answer to such action. *Windsor* v. *Young*, 43, p. 313.

Unliquidated damages—Sections 117 and 118 of the Supreme Court Act, C. S. 1903, c. 111, enable defendant to set off a claim for damages in the same way as an ordinary debt but only in cases where the law of set-off is applicable.—Therefore, where the plaintiff's claim was for unliquidated damages, *held*, defendant could not plead a set-off. *McDonough* v. *The Telegraph Pub. Co.* of *St. John*, 39, p. 515.

Warranty, Breach of—In an action for goods sold and delivered a breach of warranty may be set up by way of counterclaim or given in evidence under the general issue in reduction of damages without being specially pleaded. *Neil* v. *Balmain et al*, 41, p. 429.

In an action in the County Court on a promissory note given by the defendant to the plaintiff for the balance of the purchase money for a boat sold by the plaintiff to the defendant, the defendant pleaded the general issue and gave notice of two defences; (1) no consideration, (2) fraud and misrepresentation.—At the trial without a jury the judge found there was misrepresentation as to the age of the boat but that there was no fraud as defendant had protected himself by a warranty and did not rely upon the plaintiff's statement in respect to the boat's age; and held that under the pleadings the defendant could not avail himself of the breach of warranty in answer to the action on the note.—*Held*, that the trial judge having found that there was no fraud the verdict on the pleadings was right for the amount of the note and interest, and defendant's remedy was by cross action. *Losier* v. *Mallay*, 43, p. 364.

Warranty, Breach of—Privity of contract—Plaintiff sold a mill with a warranty to a company of which the defendants were directors, and took a promissory note made by the company and endorsed by the defendants in part payment. Subsequently defendants gave their individual note to the plaintiff in renewal of the company note. —In an action upon this renewal note, *held*, there was no privity of contract between the plaintiff and defendants as to the sale and warranty and therefore defendants could not set-off or counterclaim for a breach of the warranty, not amounting to failure of consideration. *Allis-Chalmer-Bullock, Ltd.* v. *Hutchings*, 41, p. 444.

4. DEMURRER.

Bad pleas—Insurance suit—To the two counts of a declaration upon a policy or certificate of life insurance defendants pleaded thirty-four pleas.—The first and eighteenth were alike and were as follows: "The defendants say that no demand of the said sum of two thousand dollars was made at the Association's office in Galesburg, Illinois, and by reason thereof and by the laws of the state of Illinois, the plaintiff cannot recover upon the said certificate." —The third and twentieth pleas were also alike and were as follows: "The defendants say that the death of the said August P. B. LeBlanc was from a cause exempted by the provisions and agreements contained in the said certificate."—An order was made by Landry J. in Chambers striking out these four pleas as being embarrassing. Upon a motion to rescind said order, *held* (1) that the first and eighteenth pleas were bad for not averring what the law of the state of Illinois was by reason of which the plaintiff could not recover, and (2) that the second and twentieth pleas were good, it being unnecessary to specify the particular cause relied upon by defendants as exempting them from liability, as reference could be made to the certificate to ascertain the exemptions therein contained. *LeBlanc* v. *Covenant Mutual Benefit Association*, 34, p. 444.

Bail bond—To a declaration for a breach of a limit bond given in a case wherein one of the defendants had been arrested upon an execution issued upon a judgment obtained in the City Court of Saint John, the defendants pleaded a fifth plea negativing the jurisdiction of the said Court by reason of the cause having been tried and the judgment entered on a day upon which the Court was not authorized by law to sit, of which trial and entry of judgment the defendant had no notice.—The point sought to be put in issue by the said plea being whether or not the Court should have sat on a day proclaimed by the Governor General in Council as a day for a general public thanksgiving, it being provided by statute that the Court should be held on Thursday in every week, provided that when Christmas Day or New Year's Day or any other legal holiday should fall on Thursday the Court

should be held on Friday in such week.—This plea having been struck out as embarrassing by order of a judge in chambers. *held*, that the order should be rescinded and the plea stand.—If the plea were bad in substance, the plaintiff should have demurred. *Dibblee* v. *Fry et al*, 35, p. 109.

By-Law, Alleging—By Act, the council of the town of Woodstock are empowered from time to time, at their discretion, to give encouragement to manufacturing enterprises within the town by exempting the property thereof from taxation for a period of not more than ten years.—A bill alleging that plaintiffs were entitled to exemption from taxation under a by-law passed by the defendants, held sufficient on demurrer without alleging that the by-law was authorized by statute. *The Carleton Woolen Co. Ltd.* v. *The Town of Woodstock*, 3 Eq., p. 138.

Company, alleging contract by incorporated—In an action for tolls for driving lumber by the assignee of a river driving company an allegation in the declaration that the company did by resolution of its board of directors, recorded upon the minutes of the company and containing apt words in that behalf, assign and transfer to the plaintiff a certain debt and chose in action arising therefrom is not a sufficient allegation of the assignment to satisfy the requirements of s. 155 of c. 111, of C. S. 1903, which provides that "every debt and any chose in action arising out of contract shall be assignable at law by any form of writing which contains apt words in that behalf," and is bad on demurrer. *Lynch* v. *William Richards Co. Ltd.*, 37 p. 549.

Conditions precedent — Guessing competition—The defendants, by public advertisements, offered a piano as a prize to the person who would guess most nearly the weight of a large block of soap, exposed for that purpose at a public exhibition. It was also a condition that the participants in the contest should buy and give defendants' soap a fair trial.—*Held*, that the general allegation of the performance of all conditions necessary to entitle the plaintiff to recover was, on demurrer, a sufficient averment of the performance of such conditions. *Dunham* v. *St. Croix Soap Mfg. Co.*, 34, p. 243.

Defamation—Defence of privilege—In an action for libel the declaration alleged that the defendant falsely and maliciously published a letter containing defamatory matter, and addressed and sent it to the plaintiff, and that this letter was dictated by the defendant to his stenographer who extended the notes and transcribed the same by a typewriter which transcribed copy was signed by the defendant and sent to the plaintiff.—The defendant by his pleas denied malice, and alleged that the letter was drafted by him and given to his typewriter to be copied; that the typewriter was his confidentia clerk, and as such was accustomed to deal with letters of a confidential nature, and that the typewriting of the letter in question was done in the performance of her duty as such confidential clerk, that no persons except the defendant and the typewriter saw the letter, and its contents were not disclosed to any person other than the plaintiff.—*Held*, on demurrer (*per* Tuck C. J., Landry, Barker and McLeod JJ., Hanington J. dissenting) that the pleas admit a publication and do not show that the occasion was privileged, and if proved, would not be an answer to the *prima facie* cause of action alleged in the declaration and were bad on demurrer.—*Held* (*per* Hanington J.), that as the publication was to a confidential clerk whose duty it was in the usual course of the defendant's business to copy letters of a confidential character, the occasion was privileged and there should be judgment for the defendant on the demurrer. *Moran* v. *O'Regan*, 38, p. 189.

False imprisonment — Judgment obtained—Where no defence was put in and no question raised as to infancy, the judgment stands and an execution issued out of a Magistrate's Court is a good answer to an action by an infant for false imprisonment under the execution. *McGaw* v. *Fisk*, 38, p. 354.

Foreign judgment—Plea and replication—The declaration charged that the defendant was indebted to the plaintiff in $326, by virtue of a judgment recovered in the Superior Court of the district of M. in the province of Q.—Plea, that the defendant was not personally served with the first process in the suit within the jurisdiction of the Court where the said judgment was obtained, and that the defendant was never indebted to the plaintiff in the claim on which the judgment was obtained.—Replication that the contract on which the judgment was recovered was made at M. within the jurisdiction of the Superior Court of the district of M., that the said Court had jurisdiction of the subject matter of the said suit, and the said judgment was regularly obtained according to the practice of the said Court, and that the sum mentioned in the said judgment and ordered to be paid is justly and truly due and payable by the defendant to the plaintiff.—Demurrer to the replication, and notice of objection to the plea.—*Held* (*per* Hanington, Landry, Barker and McLeod JJ., Gregory J. dissenting), that the plea as a defence that the enforcement of the judgment by this Court was contrary to natural justice was bad, as it did not negative the existence of all facts which, if proved, would render the judgment enforceable.—That it was not sufficient to enable the defendant to go into the merits of the original cause of action under C. S., c. 48, as it did not set out the cause of action.—That the replication was bad, as it did not join issue on the conclusion of the plea "Never indebted" and merely reiterated in another form the right to enforce

the judgment.—*Held* (*per* Gregory J.) that there should be judgment for the defendant, for, while the plea was defective for want of an averment that the original cause of action was one to which the plea of "never indebted" was applicable, the objection was not open to the plaintiff, as he had pleaded over, and the replication alleges a cause of action to which it must be assumed the plea was proper.—That replication was bad, being equivalent in this record to an averment that when parties enter into a contract within the jurisdiction of a Court that wherever they may go the Court has jurisdiction over them in relation to the contract. *Shearer & Co.* v. *McLean*, 36, p. 284.

Indebitatus counts—A County Court writ alleging that the defendant was indebted to the plaintiff in the sum of $400 for money payable by the defendant to the plaintiff for the use and hire of divers horses and divers carriages by the plaintiff let to hire to the defendant at his request, and containing the common counts, but which does not allege any promise to pay or conclude with the common breach and *ad damnum* clause is good on demurrer. *Dube* v. *Pond*, 37, p. 138.

Liability by statute alleged—The declaration alleged that under act 53 Vict., c. 60, a Court for the trial of civil causes was established in the city of M., that a commissioner of the said Court was to be appointed by the governor in council, that the salary of the said commissioner was to be fixed by the city council of the city of M. and paid out of their funds, that pursuant to the act the plaintiff was appointed commissioner and his salary was fixed by the city council at $600 per annum, that he had performed the duties of the office and was entitled to be paid the salary, but the defendant had refused to pay.—*Held*, on demurrer (*per* Hanington, Landry, Barker, McLeod and Gregory JJ.), that the declaration was good, as it alleged a statutory liability to pay the plaintiff out of the city funds.—*Kay* v. *The City of Moncton*, 36, p. 202.

Lord Campbell's Act—A declaration by executrices under Lord Campbell's Act, C. S. 1903, c. 79, claiming damages for negligence causing death and for expenses incurred and pecuniary loss sustained by deceased prior to his death and stating that the action is brought for the benefit of deceased's sisters is bad on demurrer, sisters not being beneficiaries under the Act. *Murray et al* v. *Miramichi Pulp and Paper Co. Ltd.*, 39, p. 44.

Multifariousness — Joining executors as well as heirs—G. died in 1902 leaving a will by which his property was bequeathed to his eight children, with a small annuity to his wife.—This suit is brought to compel the cancellation of a mortgage given by the plaintiff to G., and the reconveyance to the plaintiff of a certain life insurance policy and other property which was held by G. to secure certain monies advanced by G. to the plaintiff; and also to compel the conveyance of two lots of land which the plaintiff claims he purchased from G. under an agreement that G. was to give him the deed for them whenever he demanded it. —*Held*, overruling the demurrer, that it was by no means certain that the defendants (executors of G.) were not all necessary or proper parties, in regard to all the causes of action set out in the bill, or that they did not all have a common interest in them; but if that were not so, there are no special circumstances in this case which render it either difficult or impossible to deal fully and properly with all the causes of action, without causing inconvenience to anyone, and therefore, any discretion which this Court has, should be exercised in favor of continuing the suit in its present form. *Cummings* v. *Gibson et al*, 4 Eq., p. 55.

Multifariousness—The plaintiff, a shareholder of the Maritime Bank, by his bill set out that on the 14th of February, 1873, the directors of the Martiime Bank passed a by-law fixing the first Tuesday in June in each year thereafter, as the day of the annual meeting of the shareholders for the election of directors; that on the 26th of April, 1880, the directors passed another by-law fixing Friday, the 4th day of June next, for the then next annual meeting; that the Bank of Montreal was the owner of 1,070 shares of the Maritime Bank, upon all of which there were unpaid calls, and had appointed the defendant B. its attorney to attend and vote at the annual meeting of the Maritime Bank shareholders, called for the 4th of June.—The bill prayed for an injunction to restrain the Bank of Montreal and its attorney from voting at such annual meeting on the grounds: (1) that there were unpaid calls upon their shares; (2) that by Act 42 Vict., c. 45, s. 2 (D) one bank cannot hold stock in another bank; (3) that the bank of Montreal could only vote by its own officer and not by an attorney, also to restrain the Maritime Bank from permitting the bank of Montreal and its attorney to vote at the meeting and to restrain the Maritime Bank from holding the meeting on the ground that the powers to pass a by-law fixing a day for the annual meeting of the shareholders is vested in the shareholders.—The Maritime Bank was incorporated by Act 35 Vict., c. 58 (D).—No provision is made in the Act as to by-laws.—By section 6 it incorporates into its provisions the Bank and Banking Act, 34 Vict., c. 5 (D).—The 33rd section of the latter Act enacts: "That directors etc. shall have power to make such by-laws and regulations (not repugnant to the act or the laws of the Dominion of Canada) as to them shall appear needful and proper touching the management and disposition of the stock, property, estate and effects of the bank, and touching the duties and conduct of the officers, clerks and servants employed therein,

and all such matters as appertain to the business of a bank. . . . Provided always, that all by-laws of the bank lawfully made before the passing of this Act as to any matter respecting which the directors can make by-laws under this section . . . shall remain in full force until repealed or altered under this Act."—By the 30th section it is enacted that the directors shall be "elected on such day in each year as may be or may have been appointed by the charter, or by any by-law of the bank, and at such time of the day, and at such place where the head office of the bank is situate, as a majority of the directors for the time being shall appoint. —The 28th section enacts "That the shareholders in the bank shall have power to regulate by by-law the following matters, *inter alia*, incident to the management and administration of the affairs of the bank, viz.: the qualification and number of directors . . the method of filling up vacancies in the board of directors whenever the same may occur during the year, and the time and proceedings for the election of directors, in case of a failure of any election on the day appointed for it."—On an application by the defendants to dissolve an *ex parte* injunction obtained by the plaintiff, *held*, that the bill was multifarious by the joinder of grounds of complaint against the Maritime Bank and the Bank of Montreal and B. that were independent and distinct. *Busby* v. *The Bank of Montreal et al*, Eq. Cas., p. 62.

See also *Jones* v. *Brewer*, 1 Eq., p. 630.

Negligence by municipal corporation —In an action against the city of Saint John for damages sustained in an accident caused by an obstruction on one of the streets of the city, the declaration alleged that the defendants wrongfully and negligently allowed a side-walk in one of the streets to be obstructed by a pile of lumber, and wrongfully and negligently allowed it to remain there for an unreasonable time, without lights or other signals thereon, whereby the plaintiff was thrown down and sustained the injury complained of.—*Held*, that as the declaration did not allege that defendants had knowledge of the obstruction it disclosed a mere non-feasance, and was bad on demurrer. *Rolsten* v. *The City of Saint John*, 36, p. 574.

Practice—An objection, which is a ground of general demurrer, cannot be taken on a summary application to strike out or amend pleadings. *Babineau* v. *LaForest*, 37, p. 77.

Practice answering and demurring—A defendant may not answer and demur respectively to the whole bill, for thereby the demurrer is overruled, notwithstanding section 47 of Act 53 Vict., c. 4, consequently where a demurrer professed to be to a part and the answer professed to be to the residue of a bill, but the demurrer was extended to the whole prayer of the bill, it was held that unless the answers were withdrawn for which purpose leave of Court was given the demurrer should be overruled with costs but that if the answer were withdrawn the demurrer being successful on the merits should be allowed with costs. In an answer and demurrer the defendant ought to specify distinctly what part of the bill it is intended to cover by the demurrer.—The objection that an answer and demurrer are respectively to the whole bill is not waived by the plaintiff setting the demurrer down for argument under section 41 of Act 53 Vict. c. 4.—A defendant cannot demur *ore tenus* where there is no demurrer on the record as where the demurrer on the record is overruled by the answer. *Abell* v. *Anderson* 2 Eq. p. 136.

Practice—Demurrer after answer and amendment—A defendant who has answered a bill cannot demur to it after its amendment upon a ground of demurrer to which the bill was originally open. *Wiley* v. *Waite et al* 1 Eq. p. 31.

Practice—Pleading and demurring—Where a plaintiff has been served with a demand of replication, and has afterwards obtained an order allowing him to plead and demur at the same time to the defendant's pleas, he must do both within the time allowed by the demand.—If a replication is served within such time, and a demurrer after it has expired, the latter will be set aside. *MacMonagle* v. *Campbell*, 36, p. 468.

Principal and agent—Negligence and fraud of agent—In an action by the plaintiff company against the defendant the first count of the declaration alleged that the defendant was hired for the purpose of receiving and forwarding to the company applications for fire insurance yet the defendant not regarding his duty, so negligently and wrongfully received and forwarded to the company an application for insurance containing statements which he knew at the time to be false and material to the risk, and said company, relying upon the truth of the application accepted the risk and issued a policy thereon which became a claim and said company was put to great costs in defending an action at law. —The second count alleged the false statements were received and forwarded to the company by the defendant fraudulently and in collusion with the applicant against the company.—*Held* (*per* Tuck C. J., Landry, McLeod and Gregory JJ.), that both counts stated a cause of action and were good on demurrer.—*Held* (*per* Hanington J.), that the defendant's duty, under the contract, was to receive and forward all applications, whether the statements were true or false, and as the first count did not charge any duty beyond that or fraud, it was bad on demurrer; that he was in doubt as to the second count, because it did not allege that the damage suffered was directly caused by the fraud and collusion of the defendant

The Norwich Union Fire Insurance Society v. *McAlister*, 35, p. 691.

Public Health Act—Liability for bills of Local Board—See *Cruise* v. *City of Moncton*, 35, p. 249.

Res judicata—A bill is not demurrable on the ground of *res judicata*, unless it appears in the bill itself that the matters alleged in it were in controversy and were adjudicated upon in the former suit. *Smith* v. *Halifax Banking Co.*, 1 Eq., p. 17.

Statute of Limitations — Vagueness of pleadings—In a suit commenced in 1899, by a creditor to set aside as fraudulent under the Statute 13 Eliz., c. 5, a conveyance of land, the bill stated the debt arose upon two promissory notes, dated respectively in March and April, 1885, payable with interest three and twelve months after date, that the notes "were renewed and carried along from time to time by new or renewal or other notes, but have never been paid, but with interest thereon are still due to the plaintiff."—*Held*, that the allegations were too vague, general and uncertain to show a valid and subsisting debt, not barred by the Statute of Limitations at the time of the commencement of the suit, and that the bill was therefore demurrable. *Trites* v. *Humphreys*, 2 Eq., p. 1.

Summary application to strike out demurrable plea—A plea which is open to a general demurrer will not be struck out on a summary application made under section 133 of the Supreme Court Act; it must be demurred to. *Clark* v. *Miller*, 35, p. 42.

Trespass by domestic animal—In an action of trespass for an injury to the plaintiff's horse by the defendant's cow, the declaration is bad on demurrer if it allege neither negligence or a scienter of viciousness. *Elliott* v. *Doak*, 36, p. 328.

Trespass—Conclusion of law set out—A plea in an action of trespass by a tenant against his landlord alleging that it became lawful under a proviso in the lease for the landlord to re-enter for non-payment of rent, without setting out the proviso, is bad on demurrer as stating a conclusion of law. *Whittaker* v. *Goggin*, 38, p. 378.

Trespass, Counts in—Defence of legislative authority—The plaintiff, in the first count of his declaration, alleged that he was in possession of a lot of land adjoining Ludgate Lake in the parish of Lancaster, and that the defendants penned back the waters of the lake, thereby overflowing and flooding his land, destroying the trees and herbage on it, and otherwise injuring it and depriving him of its use. By act of assembly, 59 Vict., c. 64, the defendants were authorized to utilize the water of the lake for the benefit not only of the residents of Carleton, but for the use of the residents of Lancaster, and by act of Assembly, 61 Vict., c. 52, the defendants were given additional powers in reference to this water supply to meet certain public requirements.—The pleas allege that by certain acts of the legislature (without naming them) the defendants were authorized to take, hold and convey the water of Ludgate Lake and that water that might flow into the same to, into and through that part of the city of Saint John called Carleton and also to erect and maintain dams to raise and maintain the waters therein, and also to lay pipes necessary for the furnishing and supplying of water for that part of the city.—The pleas then go on to recite the provisions of 61 Vict., c. 52, and aver that the defendants published the notice required by section 6, and that they used the water and took the land as authorized by that act, and these are the trespasses complained of; that the plaintiff is entitled to compensation, but only to such compensation as may be given him by the tribunal created for the purpose by the act itself. —*Held*, on demurrer, that the second, third and fourth pleas to the first count were bad, and no answer to the said count, because it did not appear that the trespasses complained of (flooding, destroying trees, etc.) were committed by virtue of legislative authority for which compensation must be had by recourse to the special remedy provided.—The second and third counts of the declaration allege, as causes of action, damages resulting from acts alleged to have been done under and by virtue of certain acts of the legislature which entitle the plaintiff to compensation from the defendants.—*Held*, on demurrer that these counts were bad, as the damage for which compensation is claimed arose from lawful acts done by defendants by virtue of legislative authority, for the recovery of which compensation recourse must be had to the special remedy provided. *Rose* v. *The City of Saint John*, 37, p. 58.

Tender—Question of evidence not pleading—Where in a suit for specific performance of an agreement for the sale of land, the question whether the plaintiff had made a tender of the purchase money within the time limited by the agreement was one of evidence, a demurrer to the bill on the ground that it did not allege a tender in time was overruled. *Stewart* v. *Freeman*, No. 2, 2 Eq., p. 408.

Wife's separate estate—Husband joined as plaintiff—Demurrer—Where a husband is made a plaintiff with his wife in a suit relating to her separate estate, the objection that the suit should have been brought by the wife's next friend may be taken by demurrer. *Alward et al* v. *Killam*, Eq. Cas., p. 360.

III. The Reply.

Departure in pleading—A replication which impeaches the lessor's title to the demised premises, pleaded in answer to a

plea of *non cepit* in an action of replevin of goods illegally distrained is bad on demurrer (*per* Tuck C. J., Hanington and McLeod JJ.)—*Held* (*per* Barker and Gregory JJ.), the replication should have been objected to by an application to strike it out. *McLean* v. *Green*, 37, p. 204.

Equitable replication of mistake—No fraud alieged—A lessee cannot deny his lessor's title and set up title in himself in an equitable replication in an action brought by him against the lessor for an illegal distress for rent in arrear under the lease by alleging and proving (no issue of fraud being raised) that he did not understand the effect of the lease, and believed that in executing it he was completing an option of purchase of the demised premises given in a prior lease from the defendant's precedessor in title (*per* Hanington, McLeod and Gregory JJ., Tuck C. J. and Landry J. dissenting). *Sivret* v. *Young*, 38, p. 571.

See also under DEMURRER, supra.

IV. Exceptions.

Practice and pleading—Fraud, defence of—Where a suit is brought to enforce an agreement, an answer setting up that the agreement was made fraudulently cannot be excepted to on the ground that the defence of fraud can only be put forward in a cross bill to set the agreement aside.—The remedy of the plaintiff is by application to the court under section 72 of Act 53 Vict., c. 4 or to object at the hearing to evidence of fraud being given. *Barclay* v. *McAvity*, Eq. Cas., p. 468.

V. General Rules.

Married woman, Action against—In an action against a married woman on a contract it is not necessary under the Married Women's Property Act of 1895 to allege on the record, or prove on the trial as a fact, that either at the time the contract was made, or at the time the action was commenced she had or was possessed of separate property. *Johnson* v. *Jack et al*, 135, p. 492.

Multifariousness—The objection that a bill is multifarious should be raised by demurrer or in the answer, and cannot be taken at the hearing, though the Court itself may take the objection with a view to the regularity of its proceedings. *Busby* v. *The Bank of Montreal et al*, Eq. Cas., p, 62; *Ogden* v. *Anderson et al*, Eq. Cas., p. 395.

The objection of multifariousness set up by a defendant who is concerned only in a portion of the subject matter of the suit is a question of discretion to be determined by considerations of convenience, with regard to the circumstances of the case. *Dunlop* v. *Dunlop*, 1 Eq., p. 72.

Nonsuit—Failure to join issue—An application for a judgment, as in case of a nonsuit, was refused in a case where it appeared that the plaintiff had omitted to file a joinder of issue, though the same had been served. *Gallagher* v. *Wilson*, 35, p. 238.

Pleading incorporation—In an action in the County Court by a company, it is sufficient to describe the plaintiff as an incorporated company, and the mode of incorporation need not be stated.—*Waterous Engine Works Co.* v. *Campbell*, 22 N. B. R. 503, distinguished. *McLaughlin Carriage Co. Ltd.* v. *Quigg*, 37, p. 86.

VI. Amendments.

Adding count on motion for new trial—The declaration was in trespass and for conversion, and upon the argument of the motion for a new trial application was made to add a count for money had and received.—*Held* (*per* Hanington, Landry and Gregory JJ.), that as the only fact in dispute, namely, the existence of a tenancy between the parties had been passed upon by the jury in favor of the plaintiff, and as no possible injustice could be done to the defendants, the amendment should be allowed.—*Held* (*per* Barker and McLeod JJ.), that as the proposed amendment introduced a new form of action to which there were on the record no suitable pleas, and upon which there was no issue joined or damages assessed, the amendment proposed was improper and should not be allowed at that stage of the case. *Frederick* v. *Gibson et al, Executors etc. of Gibson*, 37, p. 126.
Followed in *Underfeed Stoker Co. Ltd.* v. *Ready*, 37 p. 505.

Amending bill—Facts subsequent to commencement of suit—The costs of an application by plaintiffs, who were in no default, for leave to amend their bill to introduce facts which occurred after the commencement of the suit, were ordered to be costs in the cause. *The Halifax Banking Co.* v. *Smith*, 1 Eq., p. 115.

Amending — Terms — Judicial discretion—Declaration for work and labour and on an account stated.—Pleas, payment and set-off, the particulars of which showed a considerable sum due defendants over and above what was claimed by the plaintiff's particulars, which were confined to the count for work and labor.—At the trial, where a verdict passed for the plaintiff, the set-off being entirely rejected, an application was made to amend the plaintiff's particulars by making a large addition to the time of the alleged work and labor and by giving particulars of the account stated.—The amendment was allowed without terms, although the defendants produced affidavits of one of themselves and their attorney and counsel, stating that they were unprepared to make their defence at the then circuit to the claim

for work and labor as set out in the amended particulars; that had the original particulars been served as amended they might have offered to suffer judgment and would have done so had they found plaintiff's claim was correct, that as no particulars had been served applicable to the count for an account stated the said count had not been regarded as *bona fide*, and in preparing for trial no consideration had been given to it that if the amendment was allowed defendants would be taken by surprise and were not prepared to make their defence and great injustice would be done to them.—On a motion for a new trial on the ground that the amendment should not have been allowed except on terms of postponement of the trial etc. *held* (*per* Tuck C. J., Hanington Landry, VanWart JJ., Barker and McLeod JJ. dissenting), that the defendants' affidavits showed that the amendment was of a character to materially prejudice the defendants, and should not have been allowed without such terms as would, as near as may be, place the defendants in the position they occupied when the original particulars were served.—*Held* (*per* Barker and McLeod JJ.), that the judge in the exercise of a judicial discretion having allowed the amendments, his discretion should not be reversed unless he was manifestly wrong and it appeared affirmatively that injustice had been done to the defendants. *Hicks* v. *Odgen et al*, 35, p. 361.

Defamation — Slander — In an action of slander the statement of claim must set out the words claimed to be defamatory with sufficient facts to enable the Court to say that they are capable of the defamatory meaning attributed to them, and it is not sufficient to set out words not actionable in themselves, alleging a defamatory meaning in an innuendo.—*Harris* v. *Clayton*, 21 N. B. R. 237, followed.—Where the statement of claim in an action of slander was defective by reason of not setting out sufficient facts to show that the words were defamatory, and it appeared that an amendment would not have affected the evidence to be given, and that the Court had all materials before it necessary for a final determination of the case, the Court, acting under O. 40, r. 10, ordered the statement of claim to be amended and refused a motion to set aside the verdict for the plaintiff and enter a verdict for the defendant or for a nonsuit or for a new trial, without costs. *Sonier* v. *Breau*, 41, p. 177.

Repetition — Unnecessary counts — The Court will not, on a summary application before trial, strike out counts of a declaration merely because there are more than are necessary to sustain the action, or are repetitions of other counts, but will leave it to the judge on the trial to compel the plaintiff to elect upon which count or counts he will take his verdict (*per* Tuck C. J., Landry, Barker and McLeod JJ., Gregory J. dissentiente). *Babineau* v. *LaForest*, 37, p. 77.

POWER OF ATTORNEY

See PRINCIPAL AND AGENT.

PRACTICE AND PROCEDURE

I. Accounts and Inquiries.
See ACCOUNTS, REFERENCE.
II. Appearance.
III. Motions.
IV. (a) PAYMENT INTO COURT.
(b) PAYMENT OUT OF COURT.
V. Process.
VI. Reference.
VII. Service.

General.

English decisions—English decisions as to procedure in Court are not binding in this province (*per* McLeod C. J.). *Robinson* v. *Haley et al*, 42, p. 657.

Over-ruling—It can very rarely happen that a Court may properly overturn a decision governing mere matters of procedure because certainty as to the mode of procedure is more important than the procedure itself (*per* White J.) *Simpson* v. *Malcolm*, 43, p. 79.

I. Accounts and Inquiries.

See ACCOUNTS.

See REFERENCE (VI *post*)

II. Appearance.

Appearance without objection.—The defendant, by appearing without objection, waives any defect in the procedure upon issuing the summons. *R.* v. *Kay, Ex parte Dolan*, 41, p. 95.

Equity practice—Appearance after notice of motion to take pro confesso—Where after notice of motion under section 28 of chapter 49, C. S. N. B. to take the bill *pro confesso* for want of a plea, answer or demurrer, the defendant files and serves an answer, he must offer to pay the costs of the motion up to the time of filing the answer or be subject to terms of payment of costs on being let in to defend. *Manchester et al* v. *White et al*, Eq. Cas., p. 59.

Equity practice — Appearance after proper time—Under section 29 of chapter 49, C. S. N. B., a defendant not appearing within one month after the filing of the bill, but seeking to appear before motion is heard to take the bill *pro confesso* for want of an appearance will only be allowed to do

so on offering to pay the costs of the notice of motion and undertaking to answer within the time he would have had had he properly appeared. *Arbuthnot* v. *The Coldbrook Rolling Mills Co.*, Eq. Cas., p. 51.

Infant defendant—An order for appearance of infant defendant will be granted at expiration of time for appearance mentioned in the summons where the bill is on file, though it has not been on file for the time referred to in section 29, c. 49, C. S. *Kennedy* v. *Case et al*, Eq. Cas., p. 242.

III. Motions.

Committee of estate of lunatic—On the death of the committee of the person and estate of a lunatic, the Court on an *ex parte* application appointed an interim committee. *In re Harriet Light, A Lunatic* 2 Eq., p. 96.

Dismissing bill after disclaimer and hearing—Defendant being asked by the plaintiff if he claimed any interest in certain machinery upon premises mortgaged to the defendant made use of equivocal language not amounting to a disclaimer.—Upon being made a party to a suit for the recovery of the machinery he disclaimed.—The plaintiff did not accept the disclaimer, and the cause proceeded to hearing.—*Held*, that the bill should be dismissed as against the defendant, but without costs. *Lame* v. *Guerette et al*, 1 Eq., p. 199.

Injunction, Notice of motion to commit for breach of—The notice of motion to commit for breach of an injunction prohibiting the defendant from trespassing on the plaintiff's property is a "commencement of proceedings" and not a step in the cause and should be indorsed under O. IV, rr. 1-4, with the name and address of the solicitor, but failure to do so is an irregularity which does not necessarily render the proceedings void, and under O. LXX, r. 1, may be condoned in the discretion of the Court. *Turnbull R. E. Co.* v. *Segee*, 42, p. 625.

Judicature Act, Order 30, r. 5—An order for directions was made in this action by the Registrar.—Subsequently plaintiff applied to a judge by fresh summons for an order for a commission to examine witnesses. —This order was granted and the commission issued.—On appeal, *held*, applications for directions subsequent to the general order for directions should be by notice under Order 30, r. 5, but the judge had jurisdiction to make the order appealed from, and the Court would not set it aside after commission issued, simply because the plaintiff was not compelled to pay costs of the application. —Appeal dismissed without costs. *Cluff* v. *Brown*, 41, p. 280

Non pros—An objection on a motion to dismiss for want of prosecution a bill by a shareholder and the company, which subsequently to the commencement of the suit went into liquidation, that the motion should have been for an order that, unless the plaintiff obtained leave to proceed within a limited time, the bill shold stand dismissed, overruled. *Partington* v. *Cushing*, 3 Eq., p. 322.

Notice of motion, Enlarging time for—An application for enlargement of the time for giving notice of motion against a verdict, etc., under C. S. 1903, c. 111, s. 372, on the ground that the transcript of the stenographic report of the trial had not been filed, should be supported by an affidavit showing that the transcript is necessary to enable counsel to prepare the notice. *McCutcheon* v. *Darrah*, 37, p. 1.

Pro confesso—Failure to produce certificate of clerk—Where plaintiff gave notice of motion under section 28 of c. 49, C. S. N. B. to take the bill *pro confesso* for want of a plea, answer or demurrer, and at the motion did not produce a certificate of the clerk that an answer had not been filed, though it appeared from a certificate produced by the defendant that an answer had not been filed until after the notice, the motion was refused. *Lloyd* v. *Girvan et al*, Eq. Cas., p. 164.

Pro confesso—Failure to serve clerk's certificate—A motion to take a bill *pro confesso* for want of a plea, answer or demurrer, will be dismissed if the defendant has not been served six days previously with a copy of the clerk's certificate of the filing of the bill, and that no plea, answer or demurrer has been filed. *MacRae* v. *MacDonald et al*, Eq. Cas., p. 498.

Pro confesso—A motion to take a bill *pro confesso* for want of a plea, answer or demurrer will be allowed though a copy of the clerk's certificate of the state of the cause has not been served upon the defendant. *MacRae* v. *MacDonald* N. B. Eq. Cas. 498 not followed. *Godefroi* v. *Paulin* 1 Eq. p 568.

Pro confesso, Motion to take—Answer filed after notice—Where after notice of motion under section 28 of Chapter 49 C. S. N. B. to take the bill *pro confesso* for want of an answer the defendant afterwards files an answer the motion cannot be granted but the plaintiff may apply either to have the answer taken off file or for the costs of the notice of motion. Where defendant files an answer without serving a copy the answer may be ordered to be taken off file. *Sayre* v. *Harris* Eq. Cas. p. 94.

Pro confesso—No cause of action disclosed—A bill may be taken *pro confesso* against a defendant though it does not disclose a cause of action against him. If a bill does not disclose a cause of action against a defendant he may apply to have his name struck off the record or apply at the hearing to have the bill dismissed. *MacRae* v. *MacDonald et al* Eq. Cas. p. 531.

Solicitor—Application to compel payment of money by—The Court will not on a summary application compel an attorney to pay over money the right to which is dependent on the existence of an agreement between the attorney and the client the terms of which are in dispute. *Ex parte Kierstead* 38 p. 463.

Stay of proceedings—On an application for a stay of proceedings on a verdict pending an appeal the stay was refused except on terms of payment of the amount of the verdict to the successful party and the taxed costs to his solicitor the former giving security for repayment in case of the appeal being successful or consenting that the amount be paid into Court and the latter giving an undertaking to repay the costs if so ordered by the Appeal Court. *Porter v. O'Connell* 43 p. 611.

Stay of proceedings—Unlicensed extra-provincial company—*See* COMPANY.

Transfer of case from K. B. D. to Chancery Division—See *Moses* v. *French et al* 43 p. 1.

IV (a) Payment into Court.

Decree. Default to—Execution against body—Where defendant made default in paying to the plaintiff under the decree of the Court a sum of money received by the defendant as a *donatio mortis causa* in favor of the plaintiff an order was granted under Act 53 Vict., c. 4, s. 114, as amended by Act 58 Vict., c. 18, s. 2, for an execution against his body.—An order made under the above Act for an execution against the body of a party making default to a decree of the Court for payment of a sum of money will not be granted where the Court is satisfied that the party in default has no means, and has not made a fraudulent disposition of his property, and that his arrest is sought for a vindictive purpose, or to bring pressure upon his friends to come to his assistance. *Thorne* v. *Perry*, No. 2, 2 Eq., p. 276.

Insurance company—Garnishee suit—The loss payable under a policy of fire insurance was assigned by the assured to the plaintiff with the consent of the insurers.—A loss occurring, a judgment creditor of the assured obtained an attaching order under Act 45 Vict., c. 17, against the insurers.—In a suit by the plaintiff for a declaration of his title to the insurance and to restrain the garnishee proceedings the insurance company appeared and expressed its willingness to pay into Court if so ordered, but claimed that it should not be asked to pay interest as it had always been ready and willing to pay to whomever was entitled to it.—Contention admitted by the Court and order made without interest. *Robertson* v. *Bank of Montreal et al*, Eq. Cas., p. 541.

Judgment creditor's claim on equity of redemption—A mortgage sale under power yielded a surplus of $320.29, out of which the mortgagee applied to pay into Court $246.89, being amount of a judgment against the mortgagor, which the judgment creditor sought by suit to have paid out of the surplus as against the owner of the equity of redemption in the mortgage.—*Held*, that on the mortgagee paying into Court the whole surplus, less the costs of his appearance and application, his name should be struck out of the suit. *Boyne* v. *Robinson*, 3 Eq., p. 57.

Mortgage — Restraining sale — Amount to be paid in—In a suit by the mortgagor to set aside a bill of sale, an interim injunction order to restrain a sale by the mortgagee was granted upon condition of the mortgagor paying into Court the amount due the mortgagee.—The bill of sale was collateral security for promissory notes, some of which had been indorsed over for value.—*Held*, that the amount to be paid into Court should not be reduced by the amount of such notes. *Petropolous* v. *F. E. Williams Co. Ltd.*, 3 Eq., p. 267.

(b) Payment out of Court.

(*No Cases.*)

V. Process.

Abuse of process—Second action on same cause—An action by the transferee of an overdue bill, upon which an action has been already brought by the transferor, wherein an offer to suffer judgment has been made and accepted, was stayed on an application to the equitable jurisdiction of the Court, the transferee having knowledge of the pendency of the first action. *Kennedy Co.* v. *Vaughan*; *Standard Bank of Canada* v. *Vaughan*, 37, p. 112.

See also *Babang* v. *Bank of Montreal*, Eq. Cas., p. 524; and *Alexander* v. *McAllister*, 34, p. 163.

Amending writ—The omission to properly endorse the writ as required by O. 3, r. 7, is an irregularity only, which may be amended upon application to a Court or a judge and such amendment may be made upon an application to set the writ aside (Order 69, r. 7) *per* Barry J. and McLeod J. *Gunns Ltd.* v. *Dugay* (2), 41, p. 402.

Amending writ in County Court—Reserving—In the notice at the end of a County Court summons the name of R. L. was by mistake inserted instead of that of the plaintiff.—The plaintiff signed judgment by default for want of an appearance and plea, issued a writ of inquiry, and gave notice of the execution thereof, when the defendants took out a summons calling upon him to show cause why the writ of inquiry, interlocutory judgment and the writ and the service thereof should not be set aside.—At the return of the summons the plaintiff

applied for leave to amend the writ of summons by inserting the plaintiff's name instead of that of R. L. and for leave to re-serve the same, when amended.—This application the learned judge of the County Court refused, although the Statute of Limitations would be a bar to the issuing of a new writ, and allowed that of the defendants.—On appeal, *held*, that the amendment should have been allowed and an order made for the re-service of the writ as amended. *Stewart* v. *Canadian Pacific Railway*, 35, p. 115.

Amending writ—Solicitor's privilege—See *Simonds* v. *Hallett*, 34, p. 216.

County Court—Form of capias—A writ of capias in the County Court will not be set aside because the words "and of the British Dominions beyond the seas" are omitted from the title of the king.—A County Court capias will not be set aside because it does not aver in the statement of the cause of action that it arose within the jurisdiction of the Court. *Rogers* v. *Dunbar*, 37, p. 33.

Date of issue of process—A writ is issued when the solicitor issuing it sends it to the proper officer to be served, not when it is tested.—The actual date of its issue may be established by evidence. *Amherst Boot and Shoe Mfg. Co.* v. *Sheyn*, 2 Eq., p. 236.

Equity practice—Summons—Section 16 of chapter 49, C. S., provides that all causes in Equity shall be commenced by summons, which shall include the names of all the parties, and disclose in a brief form the cause of action for which the bill is to be filed.—*Held*, that where a plaintiff is claiming in a representative character it should be so stated in the summons.—The title of the bill should be of the same parties and in the same character, and in accordance with the cause of action and relief stated in the summons, and the bill itself should be in accordance with the title.—Section 22 of chapter 49, C. S., provides that a bill shall conclude with a prayer for specific relief, under which, without a prayer for general relief, the plaintiff shall have any other relief to which the equities of his case may entitle him.—*Held* (1), that the prayer for specific relief must be substantially the same as the cause of action stated in the summons; (2) that relief to which the equities of a plaintiff's case entitle him under the above section must be consistent with the relief specifically prayed for. *Vernon* v. *Oliver*, Eq. Cas., p. 179; 23 N. B. R., p. 392; 11 S. C. R., p. 156.

Filing after time expired—No appearance—Where the bill was not filed within the time provided by Act 53 Vict., c. 4, s. 22, and defendants had not appeared, an order absolute was granted, giving leave to file bill, upon the terms of the order being served upon the defendants. *Fleming* v. *Hardine*, 1 Eq., p. 515.

Originating summons—An originating summons is a proper mode of procedure for determining the right of a party to participate in an estate, when the question of administration is not involved.—Order 55, r. 3 (a) and (b).—*Kennedy* v. *Slater*, 4 Eq., p. 339.

Process issued by solicitor in arrears for fees—Proceedings by an attorney who has not paid the fee required by C. S., c. 34, s. 4, are void, and the right to set the proceedings aside is not waived by the opposite party contesting the suit to judgment. *R.* v. *Sisk*; *Sisk* v. *Foley*, 35, p. 560.

Replevin, Writ of—Initials only—A writ of replevin, in which the defendant is described by the initial letter only of his Christian name is bad and will be set aside upon application being made to a judge in chambers. *Hubbard* v. *Young et al*, 34, p. 641.

Setting aside County Court writ—It is not necessary that a summons to set aside a writ in the County Court for irregularity should state the irregularity, nor is it necessary that the grounds should be served with the summons.—A writ of capias in the County Court will not be set aside because the words "and of the British Dominions beyond the seas" are omitted from the title of the king.—A County Court capias will not be set aside because it does not aver in the statement of the cause of action that it arose within the jurisdiction of the Court. *Rogers* v. *Dunbar*, 37, p. 33.

Setting aside writ—A writ of replevin brought to try the legality of an assessment for taxes and the execution issued thereon, both of which were claimed to be void for want of jurisdiction, will not be set aside on a summary application on the ground that at the time the goods were replevied they were in the custody of the law, unless the proof is satisfactory that all the conditions necessary to give jurisdiction have been fulfilled. *MacMonagle* v. *Campbell*, 35, p. 625.

Vexatious use of process—Injunction—The defendant was the holder of forty-eight promissory notes indorsed by the plaintiff, and had obtained judgment in the City Court of Moncton on thirteen of them in separate actions brought when all the notes were due.—Some of the notes were of such an amount that two of them could have been included in one action.—The plaintiff was arrested twice on executions on two of the judgments and was discharged on disclosure.—Immediately after his second discharge he was arrested on a third judgment, and was discharged by habeas corpus.—In a suit for an injunction to restrain the defendant from using the process of the City Court of Moncton for malicious or vexatious purposes.—*Semble*, that the injunction should go if it appeared that the defendant intended to further arrest the plaintiff for the malicious purpose of harrassing and punishing

him, and endangering his health and not for the purpose of obtaining payment of the debt. *Babang* v. *The Bank of Montreal* Eq. Cas., p. 524.

Writ of summons by unlicensed extra provincial company—A writ of summons issued by an unlicensed extra-provincial corporation on a contract made in part within New Brunswick contrary to sections 12 and 18 of the act "Respecting the imposition of certain taxes on certain incorporated companies and associations" (C. S. 1903, c. 18) may be set aside on summary application (*per* McLeod J. and Tuck C. J., Landry J. doubting and Hanington J. dissenting.). *The Empire Cream Separator Co. Ltd.* v. *The Maritime Dairy Co. Ltd.*, 38, p. 309.

VI. Reference.

Costs—Where exceptions to a referee's report were allowed in part, costs were refused to either party. *Lawton Saw Co. Ltd.* v. *Machum*, 2 Eq., p. 191.

Dower — Confirming commissioner's report—Affidavits upon questions of fact inquired of or relevant to an inquiry by commissioners to admeasure dower cannot be read on a motion to confirm their report. *In re Kearney*, 2 Eq., p. 264.

Estate assets available for legacy—W. by his will appointed his wife sole executrix, and left her the residue of his estate after payment of four legacies.—The executrix proved the will and paid two of the legacies.—She died intestate, and defendant took out letters of administration of her estate.—The plaintiff, who was one of the unpaid legatees under W.'s will, obtained letters of administration *de bonis non* of W.'s estate, and filed a bill against the defendant to have the estate administered in equity, an account taken of the unadministered assets received by the defendant, and payment of the same to the plaintiff. —There was no allegation in the bill that any of the legacies had been paid, and that this was an admission of assets for the payment of all of them.—Defendant in his answer claimed that there were no assets to pay the legacies, as W. at the time of his death was indebted to his wife for advances out of her own separate property which, with some other debts, exceeded the value of his estate.—*Held*, that the plaintiff was not entitled to a decree against the defendant for payment of her legacy without a reference being had and an account taken, when the bill did not charge that the testator's executrix had admitted assets and become personally liable by paying two of the legacies, and the defendant had expressly denied there were any assets for the payment of the legacies. *Walsh* v. *Nugent*, 1 Eq., p. 335.

Fees, Payment of—A referee having entered upon a reference is not entitled to payment of his fees from day to day as a condition of proceeding with the reference. —*Semble*, where special circumstances show a probability that the fees of a reference will not be paid, the Court will require that his fees be secured to him before ordering the reference to be proceeded with. *Ex parte Sweeney*, 2 Eq., p. 269.

Findings of fact—The finding of a referee upon questions of fact depending upon evidence taken *viva voce* before him will not be disregarded except in case of manifest error. *Thibideau* v. *LeBlanc*, 3 Eq., p. 436.

Guardianship, Re—Improper procedure and report—A motion to confirm report of a referee, on a reference for the appointment of a guardian, recommending the appointment of the father, was refused where the order of reference was not attached to the report as required by Act 53 Vict., c. 4, s. 170, and the evidence taken by the referee was not entitled in the matter or otherwise authenticated, was in lead-pencil writing, contained abbreviations impossible to understand, and it appeared that relatives of the infant, except her father, had not been notified of the hearing before the referee. *In re Turner, an Infant*, 2 Eq., p. 318.

Interest, Computing—See *Earle* v. *Harrison et al*, 4 Eq., p. 196.

Judge in K. B. D., Power of—In an action in the Kings Bench Division the presiding judge has, under section 18 of the Judicature Act, 1909, all the power and may exercise all the jurisdiction and apply all the procedure of the Chancery Division necessary to afford every kind of equitable relief claimed or appearing incidently in the course of the proceeding, but if a defendant raises an equitable defence he is bound by the equitable principles applicable to the circumstances of the case in their entirety (*per* Barry J. in King's Bench Division). *Duffy* v. *Duffy*, 43, p. 555.

A judge has the right to take an account, without a reference to a Master. *Id.*

Partnership—*See* PARTNERSHIP.

Proceeding with reference—By the practice of the Court, and by s. 160 of Act 53 Vict., c. 4, where a reference has been entered upon, a warrant to proceed may be taken out by either party.—*Semble*, on a failure to adjourn a reference, the referee has power under Act 53 Vict., c. 4, s. 160, to issue of his own motion a warrant for the parties to proceed. *Gallagher* v. *City of Moncton*, 2 Eq., p. 360.

Trust estates—*See* TRUSTS AND TRUSTEES.

VII. Service.

Affidavit of service of summons—It is not sufficient in an affidavit of service of

summons in a foreclosure suit to state that the defendant was served with a true copy without stating that it was indorsed with a true copy of the indorsement on the summons, *Jackson* v. *Humphrey*, 1 Eq., p. 341.

Disclosure by debtor, Order for—Service of the notice of disclosure on the wife at the husband's place of abode, he then being within the province, is good, and no order perfecting the service is required. *R.* v. *Straton, Ex parte Patterson*, 37, p. 376.

Failure to file—An application for a judgment as in case of a nonsuit was refused in a case where it appeared that the plaintiff had omitted to file a joinder of issue, though the same had been served. *Gallagher* v. *Wilson*, 35, p. 238.

Grounds of appeal from County Court—The Supreme Court Act, s. 366, does not apply to County Courts so on a motion against a verdict in the County Court, it is not necessary to serve the grounds of the motion and the authorities relied upon. *Miller* v. *Gunter*, 36, p. 330.

Incorporated company, Service on—Notice of intended action—In an action against a newspaper corporation for libel notice of the intended action served on a reporter on the staff of the paper in a room on the fourth floor of a building occupied by the defendant and used by it as a library, the third floor being occupied by persons employed in mechanical work connected with the issue of the paper and the second floor by the manager and office staff, is not a good service within the meaning of O. 9 r. 6, of the Judicature Act, 1909, providing that service may be made on the officers or agent of the corporation, or within the meaning of s. 80 of the New Brunswick Joint Stock Companies Act, C. S. 1903, c. 85, providing that service may be made by leaving it at the office of the company with any grown person in its employ. *Carter* v. *The Standard Ltd.*, 44, p. 1.

Order for review served out of province—Service of an order for hearing of a review on the opposite party out of the province is not sufficient to confer jurisdiction on the reviewing judge under C. S. 1903, c. 122 s. 6, and an order based on such a service will be quashed on certiorari. *R.* v. *Jonah, Ex parte Pugsley*, 43, p. 166.

Order to commit—Copy not endorsed—An order to commit for breach of an injunction will not be set aside on the ground that the copy of the decree served on which the notice of the motion for the order was based was not endorsed as is required by rule 3 of Hilary Term, 1875, and as the original decree filed in the Registrar's office is indorsed. *Turnbull Real Estate Co.* v. *Segee et al*, 42, p. 625.

Service of a copy of a decree over a month after breach is not such delay as will prevent it from being sufficient upon which to base a motion to commit where the breach complained of is a continuing trespass in breach of the injunction. *Id.*

Serving affidavits upon which rule is granted—Rule H. T. 1894—See *Ex parte Leighton*, 33, p. 606.

Service by posting—"Registry office"—Posting a copy of an election petition in the vestibule of a building owned by the county, part of which is occupied as the county registry office, and part as chambers of the County Court judge and part for other county purposes is not "posting in the registry office," although such vestibule is within the main walls of the building and was designated by the registrar of deeds as the place for posting notices to be posted in his office. *Owens* v. *Upham*, 39, p. 344.

Service out of the jurisdiction—On appeal from an order authorizing service abroad under clause (h) of O. 11, r. 1, of the Judicature Act, 1909, in an action against a foreign corporation on a contract made in this province, for a breach in the state of Maine.—*Held* (*per* White and Grimmer JJ., affirming the order of Barry J., Crocket J. dissenting), that the act in its scope and purpose is intended to affect procedure only and sub-s. 2 of s. 55 enacting that the repeal effected thereby should not affect any jurisdiction, established or confirmed by or under any act repealed thereby, the words "for any other matter" in clause (h) of O. 11, r. 1, must be construed to include any matter not covered by the preceding clauses of the rule in which the court had jurisdiction at the passing of the Act and as by C. S. 1903, c. 111, s. 52 and 53, service abroad might have been authorized in an action such as the one in question the judge had jurisdiction to make the order and the appeal should be dismissed.—*Held* (*per* Crockett J.), that notwithstanding the provisions of sub-s. 2 of s. 55, the words "for any other matter" in clause (h) must be construed as any other matter within the territorial jurisdiction of the Court and not provided for in the preceding clauses of O. 11, r. 1, and as the plaintiff's alleged cause of action did not arise within the territorial jurisdiction the judge had no jurisdiction to make the order and the appeal should be allowed.—*Held* (*per curiam*), where under clause (h) a judge in the exercise of his discretion on the facts decides that it is in the interest of justice that jurisdiction should be exercised and service abroad authorized, the Court on appeal will not interfere with the exercise of such discretion. *Roy* v. *The Saint John Lumber Co.*, 44, p. 88.

Summons to set down for hearing—An affidavit used on taking out a summons to set a cause down for hearing, returnable on the 24th of the month, was served on defendant's solicitor on the 18th instant.—The Supreme Court in Equity Act, 1890 (53 Vict., c. 4), s. 94, requires that affidavits

shall be served six days at least before the day the motion in which they are to be used is heard.—*Held*, that the service was insufficient and that the summons should be dismissed with costs. *Welsh* v. *Nugent*, 1 Eq., p. 240.

See also TIME.

PRINCIPAL AND AGENT.

1. **Agent's Commission on Goods.**
2. **Agent's Commission on Lands.**
3. **Authority of Agent.**
4. **Rights and Liabilities of Principal and Agent as against Third Persons.**
5. **Miscellaneous Cases.**

See COMPANY LAW, DIRECTORS.
See DAMAGES.
See INSURANCE.
See INTOXICATING LIQUORS.
See NEGLIGENCE.
See SCHOOLS, RE SCHOOL TRUSTEES.
See TRUSTS AND TRUSTEES.

1. Agent's Commission on Goods.

Auctioneer—Concealment of material facts—Duty of agent—An action of deceit will lie against an auctioneer, who being employed to effect the sale of a piece of property, concealed from his principal a material fact, by reason of which concealment the latter sold the property for a smaller sum than he could have obtained if he had been in possession of all the facts.—Such failure of duty on the part of the auctioneer towards his principal deprives him of any right to the compensation agreed to be paid to him upon the sale being effected. *Ring* v. *Potts*, 36, p. 42. Cf. *Lunt* v. *Perley*, 44, p. 439, C. D.

2. Agent's Commission on Lands.

General agency or special contract—Quantum meruit—Sale by principal to party introduced by agent at lower figure—In 1913 the defendant company employed the plaintiffs, brokers, to sell its lumber property at a minimum price of $110,000 and agreed to pay a commission of ten per cent. on the price obtained.—During that year and 1914, plaintiffs were working on this proposition or modified forms thereof, for which options had been given, but failed to effect a sale.—In 1915 the selling price was reduced to $75,000.—On December 6th, 1915, one of the plaintiffs wrote the company's manager as follows: "I had a conversation with my friend today who will probably handle the sale of the Prescott property for us. While Mr. J. and I are perfectly satisfied with your verbal assurance as to the price when dealing with outside parties they want it confirmed by writing. Would you be kind enough to write me stating the price $75,000. If you can give us a commission of ten per cent. off this, please state it in your letter."—On December 7th, 1915, the company's manager replied: "Your favor of the sixth instant to hand regarding price for our property. We will accept $75,000 for same, your commission must be a consideration above that amount."—On Feb. 9th, 1916, one of the plaintiffs wrote the company's manager: "I am in communication with parties who are interested in your property, one of whom resides in this province and is willing to cruise the property as soon as snowshoeing is good. Your lowest price to me is $75,000 without commission. The parties are close buyers, and in the event of the cruise being satisfactory they will probably make an offer. In this event I want to be assured of my commission in case I may have to turn them over to you. Please reply at your earliest convenience."—On Feb. 12th, the manager replied: "Your favor of the ninth instant to hand. In regard to your commission, I will have to consult Mr. George D. Prescott before giving you a definite answer on this. Have already written him about it and will advise you on reply."—No further communication took place between the parties.—About March 6th, 1916, the defendant company sold to a purchaser introduced by the plaintiffs for $65,000.—*Held* (*per* White and Grimmer JJ.), in an action claiming $6,500 commission, or in the alternative damages for not permitting plaintiffs to complete the sale and earn their commission and on the *quantum meruit*, that construing the letters with regard to the circumstances within the knowledge of both parties at the time they were written and the sale was made, the agency to sell was general and not special or limited and a verdict for the plaintiffs equal to ten per cent. of the purchase price would not be disturbed on the ground that the jury in considering the value of the services rendered had taken into account all the services performed and had not been confined to those rendered subsequent to the reduction of the selling price to $75,000.—*Held* (*per* White J.), admitting that there had been as contended three successive agreements, it is clear that each of the first two was abrogated in consideration of the one that took its place.—When, therefore, the defendant company by its act of selling to a purchaser supplied by the plaintiffs, placed it beyond the power of the plaintiffs to carry out the contract as it stood at the time of the sale without allowing them a reasonable time—having regard to the relation of the parties and the character of the property—to effect a sale, the plaintiffs were entitled to recover either for damages for such breach, or upon a *quantum meruit* for all services rendered in connection with

the sale.—*Held* (*per* McLeod C. J.), that the letters of December 1915 and February 1916, must be taken as exclusively embodying the arrangement between the parties, yet as the defendant company had availed itself of the plaintiffs' services in bringing about the sale the plaintiffs are entitled to recover on the *quantum meruit* for such services and the jury having found that ten per cent. of the purchase price was a reasonable compensation the finding should not be disturbed on appeal.—*Held* (*per curiam*), the admission of a letter written by one of the plaintiffs to the defendant company after the sale notifying it that the sale was made through the efforts of the plaintiffs and claiming a commission under an alleged verbal promise made in December 1914 was not a ground for a new trial.—*Gilbert* v. *Campbell* (1869), 12 N. B. R. 471 distinguished. *Jardine et al* v. *The Prescott Lumber Co. Ltd.*, 44, p. 505.

3 Authority of Agent.

Agent to solicit orders subject to acceptance by principal—The respondents, grocers in St. John, on Oct. 21, 1916, ordered canned goods from the appellant through its agent in St. John, requesting the agent to wire the order to his principal at Montreal. —The agent did not wire but mailed the order that day.—The order reached the appellant on the morning of Oct. 22.—On Oct. 21, the appellant had sent a night message to its agent in St. John advising an advance in prices and requesting him to put the advance into effect at once, and on receipt of the respondent's order on Oct. 22, wrote the agent declining to accept respondents' order at the old price.—This letter was received by the agent on Saturday, Oct. 23, after one o'clock in the afternoon. —The agent made no effort to communicate with the respondents personally on that day, but mailed them a copy of his principal's letter which reached them on Monday Oct. 25, too late to place the order with other dealers at the old prices.—The respondents knew of a notice given by the appellant to the trade informing it that orders taken by agents were subject to acceptance and prices were subject to change without notice.—*Held*, on appeal, reversing the judgment of the judge of the St. John County Court, that the agent had no authority to make a sale binding on his principal, and the appellant company was not estopped, by laches of itself or its agent in communicating its refusal to accept the order, from setting up its refusal in answer to a counter-claim for damages in an action by the appellant company against the respondents for goods previously sold. *W. Clark Ltd.* v. *Baird & Peters*, 44, p. 413.

Banks—Scope of agency for customer —A payee of a promissory note discounted it at a bank where he was a customer and, the note having been dishonoured, paid it the day after maturity.—Later on the same day, the maker deposited the amount of the note in the bank and the money was placed to the credit of the payee but the note was not surrendered.—Without knowledge of this payment, the payee issued a writ, and, after receiving notice of the payment from the bank, signed judgment for the full amount of the note with costs.—*Held*, the payee was entitled to judgment as the bank had no authority to act as his agent and accept the money on his behalf after the note had been retired; rather was the bank the agent of the promissor with authority to pay the note, which it had not done. *McMennamin* v. *Evans*, 41, p. 481.

Banks—Scope of authority of branch manager—C., the manager of a branch of the defendant bank, was engaged in stock speculating, having an account with the plaintiffs, a firm of stock brokers, in his own name, and also an account in the name of himself and another.—There was evidence that he had no interest in the joint account, but handed it merely as an agent.—In connection with the joint account C. delivered to the plaintiffs certain bonds as collateral together with an agreement which he signed on behalf of the defendant bank agreeing "to redeem them at eighty any time you may wish to call them," and also gave the plaintiffs the cheque of a third party on C's branch certified "good" by C.—At the time the cheque was certified the drawer thereof had a large overdrawn account.—The learned trial judge found that C. had an interest on the joint account, to the knowledge of the plaintiffs, and gave judgment for the defendant.—On appeal, *held*, affirming the judgment of the trial judge, that C. the branch bank manager, had no apparent authority to act for any one other than the bank in a matter in which the bank was interested, and the plaintiffs having knowledge that he was acting either for himself or someone other than the bank in his dealings with them, were put on enquiry as to his actual authority to sign the agreement to redeem the bonds and to certify the cheque, and that C. had no such authority. *MacKintosh* v. *Bank of New Brunswick*, 42, p. 152.

Broker—Statements in prospectus— Where a broker employed by a company to sell shares in its capital stock, issues, though without the knowledge or authority of the company, a prospectus containing untrue material statements, on the strength of which shares are purchased, the purchase money being paid to the company, the purchaser may rescind the contract as against the company, the broker's statements being binding on his principal as made within the scope and course of his employment. *Farrell* v. *Portland Rolling Mills*, 3 Eq., p. 508; 40 S. C. R., p. 339.

Exhibition—Power of general manager —Where the executive of an agricultural society adopted a resolution to award medals ro all displays of merit or excellence of goods on exhibition, the awards to be made by regularly appointed judges; and the general,

manager of the exhibition, who was vice-president of the executive, and a member of a committee of three to appoint judges, thereupon arranged a competition, and with a co-member of the committee to select judges, named the judges for the competition, it was *held* that the competition must be taken to have been instituted by the society and the winner was entitled to a medal. *Peters* v. *Agricultural Society, District No.* 34, 3 Eq., p. 127.

Husband's authority to accept surrender of lease of wife's property—Authority to accept surrender of a lease will not be implied from the fact that a husband living with his wife has collected the rents of the property and looked after repairs made. *R.* v. *Forbes, Ex parte Bramhall*, 36, p. 333.

Husband and wife—Brokerage promised by husband on behalf of wife—The burden of proof is on the person dealing with any one as an agent, through whom it is sought to charge another as principal and it must be shown the agency did exist and that the agent had the authority he assumed to exercise, therefore, authority of a husband to make a contract on behalf of his wife to pay brokerage commission for procuring a lessee of her property will not be implied from the fact that he lived with his wife and managed her hotel and had on a previous occasion leased the same and sold some of her furniture through a broker who had been paid a commission, and a lease had subsequently been made by the wife to the person introduced by the plaintiff, even though the wife is not called on the trial and no evidence is adduced to rebut the alleged authority. *McCormack* v. *Gallagher*, 44, p. 630.

Implied authority from course of dealing—Estoppel—The plaintiffs who were the owners of a quantity of logs, upon being asked by the defendant if they were for sale replied in the negative, adding that they had already been sold to one M.—The defendant thereupon bought a portion of said logs from M. who was in possession and had all the *indicia* of title to the same, and paid M. in cash for them.—As a matter of fact the sale to M. was subject to the condition that no property in the logs was to vest in M. until they were paid for, of which condition the defendant had no knowledge.—In an action of trover brought to recover the value of the logs so purchased from M. by the defendant, *held* (*per* Tuck C. J., Hanington and Barker JJ, Landry J. dissenting) that the plaintiffs were estopped by their declaration as to the sale to M. from setting up that the title was not in him, and that a verdict ought, therefore, to be entered for the defendant.—*Held* (*per* McLeod J.) that the evidence showed an intention on the part of the plaintiff to abandon the conditional element of their contract with M. and that he was clothed by the plaintiffs with authority to sell the logs accounting to them for the proceeds.—*Held* (*per* Gregory J.), that the circumstances were such that the defendant could not reasonably have had any doubt as to the right of M. to sell, and, as the plaintiffs had put M. in a position to practise a fraud on the defendant, they must suffer the loss.—Further, it being apparent from the evidence that the plaintiffs intended that M. should dispose of the logs in the usual course of his business, he of necessity had an implied authority to sell and pass the title. *The People's Bank of Halifax* v. *Estey*, 36 N. B. R., p. 169; 34 S. C. R., p. 429.

Insurance company—Power of agent to waive forfeiture of policy caused by breach of condition.—See *Torrop* v. *Imperial Fire Insurance Co.*, 34 N. B. R., p. 113; 26 S. C. R., p. 585.

See also *LeBell* v. *The Norwich Union Fire Insurance Society*, 34, p. 515.

Malicious prosecution—In an action for malicious prosecution and false imprisonment, it was proved on the trial that the plaintiff and one L. were fellow-passengers on the defendants' road.—L. complained to an officer of the company that a revolver had been stolen from his valise.—The plaintiff had been seen by an official of the defendant company at one of the stations to take something from L.'s valise.—L. made a charge of theft against the plaintiff, and he was arrested by a constable appointed by the government on the recommendation of the defendants, and employed by them for duty on their road and paid by them.—The prosecution was carried on by L. but at the instance and with the assistance of the officer making the arrest and other constables in the employment of the defendants.—After an investigation by a magistrate the plaintiff was discharged.—*Held* (*per* Tuck C. J., Hanington, Landry, Barker, McLeod and Gregory JJ.), that the evidence showed probable cause for the arrest and prosecution and defendants were not liable; that (Landry J. doubting) if there was want of probable cause the evidence failed to connect the defendants with the prosecution and imprisonment so as to make them responsible. *Dennison* v. *The Canadian Pacific Railway*, 36, p. 250.

Malicious prosecution, Ratification of—Estoppel—In an action for false arrest and malicious prosecution, it appeared that one Cox, acting as cashier for the defendant company, believing that he had overpaid the plaintiff, an employee of the defendant company, caused him to be arrested by the defendant company in an action in the County Court.—The defendant company charged Cox with the shortage and made no demand upon the plaintiff for the amount and while it did not authorize Cox to issue the capias, it permitted the action to proceed and paid the costs on judgment being given for the present plaintiff.—*Held* (*per curiam*), that the defendant company, by

permitting its name to be used in the action in the County court, was estopped from setting up that it did not authorize the action and arrest. *Landry* v. *The Bathurst Lumber Co. Ltd.*, 44, p. 374.

Municipal corporation—Police officer—A city is not liable for the act of a police officer who unlawfully broke and entered the premises of the plaintiff and carried away therefrom certain intoxicating liquors there kept for sale by the plaintiff contrary to the provisions of the Canada Temperance Act although such officer had been specially appointed to see that the said Act was enforced therein.—Where the servant of a municipal corporation does an act in which the corporation has no peculiar interest, and from which it derives no benefit in its corporate capacity, but which is done in pursuance of some statute for the general welfare of the inhabitants of the community, such servant cannot be regarded as the agent of the corporation for whose wrongful acts it would be liable, and the doctrine of *respondeat superior* does not apply. *McCleave* v. *City of Moncton*, 35 N. B. R., p. 296; 32 S. C. R., p. 106. Followed in *Woodforde* v. *Town of Chatham*, 37, p. 21.

Overseers of the poor—Authority of individual overseer—A physician who, by the direction of one of the overseers of the parish, renders professional services to an indigent person injured while a resident of the parish, can maintain an action for such services against the overseers of the parish in their corporate name.—While the overseers of the poor are a corporate body by statute it like other corporations must act through agents, and an agency to act in an emergency must be implied from the very nature of the duties imposed. *Irvine* v. *Overseers Parish of Stanley*, 37, p. 572.

Petition for relief from taxes—Where a petition is made and signed by the agent of the applicant, there ought to be evidence in the petition itself sufficient to satisfy the judge of the authority of the agent to sign the petition, for without that there is nothing to show that the petition is really that of the person named as petitioner (*per* Barker J.). *R.* v. *Wilkinson, Ex parte Restigouche Salmon Club*, 35, p. 549.

Power of attorney to receive surplus from foreclosure sale—Pending a suit for the foreclosure of a mortgage and sale of the mortgaged premises, the mortgagor executed and delivered a writing in favor of a creditor authorizing him to collect, recover and receive, and apply on account of his debt, any surplus from the sale, and declaring that the power might be exercised in the name of the grantor's heirs, executors and administrators, and should not be revoked by his death.—The sale resulted in a surplus.—Before the sale the mortgagor died.—*Held*, that the writing was not an equitable assignment, but a power of attorney revocable by the grantor's death. *Ex parte Welch*, 2 Eq., p. 129.

Railway station agent—Signing warehouse receipts—The Canadian Pacific Railway Co. allowed shippers over its road to store freight intended for shipment in its warehouse at St. Andrews free of charge, whether in transit, or pending sale and distribution. McDonald, a packer of fish, had stored in the warehouse a large number of cases of sardines and clams for which he received negotiable warehouse receipts from the company's station agent.—These receipts McDonald, with the knowledge of the agent, hypothecated to the Canadian Bank of Commerce to secure advances.—It was arranged between the bank and the agent that none of the goods covered by these receipts should be shipped out without the release of the bank.—The agent, however, at the instance of McDonald, allowed a large number of these cases to be shipped out without the knowledge or release of the bank.—In an action by the bank against the railway company (in which McDonald had been added as a third party on the application of the company) for the shortage of the goods warehoused.—*Held* (*per curiam*), affirming the judgment of McKeown J. that the issue of the negotiable warehouse receipts was *intra vires* the railway company in the conduct of its business and that the station agent was acting within the scope of his apparent authority in giving them. *Canadian Pacific Railway Co.* v. *Canadian Bank of Commerce*, 44, p. 130.

Ratification based on knowledge—A city cannot make itself liable for the illegal act of a police officer unless it ratify and adopt the Act with a full knowledge of its illegality.—(*per* Tuck, Barker and Gregory JJ., Hanington and Landry JJ. dissenting.) *McCleave* v. *City of Moncton*, 35, p. 296, confirmed 32 S. C. R., 106; *Woodford* v. *Town of Chatham*, 37, p. 21.

See also *Foreman* v. *Seeley*, 2 Eq., 341 post.

Solicitor acting for both parties—Scope of each agency—Defendant employed a solicitor to search the title to land he wished to acquire.—He afterwards opened negotiations with the plaintiff for its purchase.—These negotiations were carried on through C., a mutual friend of the parties, to whom the defendant agreed to give a commission, in case the sale was completed.—An agreement for the sale of the property was drawn up by C. and executed by the plaintiff.—C. then employed the solicitor who had previously made the search to prepare the necessary conveyance.—Defendant paid for the property by giving the plaintiff an order for money due him by a municipality.—This order was drawn by the same solicitor at the request of the defendant and was afterwards taken by the solicitor to the plaintiff who endorsed it.—The solicitor then took the order to the secretary of the municipality who gave him a cheque payable to the plaintiff's order.—He took the cheque

to the plaintiff, obtained her endorsement and appropriated the proceeds.—*Held*, that the evidence showed that the solicitor was acting for the plaintiff and she must bear the loss.—*Held*, that if any agency existed between the solicitor and the defendant, it came to an end when the order given by the defendant to the plaintiff was endorsed by her and delivered to the municipality; this order was an equitable assignment, which removed all control of the fund from the defendant and vested it in the municipality as trustee for the plaintiff. *Cheeseman* v. *Corey et al*, 42, p. 409, C. D.

Solicitor and client—Scope of authority—Ratification—Land subject to mortgage to secure a loan arranged through the mortgagee's solicitor was purchased by plaintiff.—On mortgagee's death certain moneys of her estate were left by her administrator with the solicitor for investment, and the solicitor opened up in his books an account with the estate.—The solicitor, without the knowledge or authority of the administrator, required plaintiff to pay the mortgage.—To raise the money plaintiff gave a mortgage to one J. who paid the money to the solicitor, who credited the payment in the accounts of the estate in his books. —The money was never paid or accounted for to the administrator.—Some months afterwards he instructed the solicitor to get in the mortgage.—The solicitor died insolvent.—*Held*, that the relation of solicitor and client between the administrator and the solicitor did not authorize the latter to receive payment of the mortgage; that an express authority for the purpose or an authority implied from a course of dealing between the parties, neither of which existed here, was necessary; that the subsequent authority did not operate as a ratification of the payment, for ratification must be based on knowledge and that the plaintiff must bear the loss. *Foreman* v. *Seeley*, 2 Eq., p. 341.

Solicitor and client—Power to demand costs on behalf of client.—See *R.* v. *Borden, Ex parte Kinnie*, 43, p. 299.

Warranty—Authority of agent to give—An agent of an incorporated company employed to sell farm machinery, carriages and harness, who during the term of his agency—a period of about two and a half years—sold two or three horses for his principal, is not authorized on a sale of a horse for his principal to give a warranty, and a verdict founded on an implied authority to give the alleged warranty was set aside. —A verdict for damages for breach of a warranty cannot be sustained on the ground that the jury might have assessed the like damage on the evidence adduced in an action of deceit. *Gallant* v. *The Lounsbury Co. Ltd.*, 44, p. 225.

4. Rights and Liabilities of Principal and Agents as against Third Persons.

Admissions by agent—How far binding on principal—Where on a time contract the agents of both parties checked up the time and agreed thereon, but included periods for which there was no obligation to pay under the contract, the admission by the agent could not create a liability against his principal (*per* Barker J.). *Connolly* v. *The City of Saint John*, 36, p. 411 at 419.

Estoppel—Question for finding by jury—The jury found that the plaintiff made a contract with one F. as agent of the defendant, and also made the following finding: "Did defendant knowingly permit F. to so deal with the public as to lead the plaintiff to infer that he (F) had authority to make contracts binding on the defendant? —Yes."—*Held*, insufficent to constitute an estoppel and that evidence did not warrant the finding that the contract was made with F. as agent and not as principal. *Giberson* v. *The Toronto Construction Co. Ltd.*, 40, p. 309.

Insurance company—Whether company can be fixed with knowledge of agent as to nature of risk and value of insured property. See *Guimond* v. *Fidelity Phenix Fire Ins. Co.*, 41, p. 145.

Insurance company—Knowledge of agent re ownership of land on which insured building stands—See *LeBell* v. *The Norwich Union Fire Insurance Society*, 34, p. 515.

Liability for criminal act of agent—The principal may be convicted under the Canada Temperance Act for selling liquor although his agent who actually made the sale is unknown, and therefore cannot be convicted. *Ex parte Johnson*, 39, p. 73.

See also title INTOXICATING LIQUORS.

5. Miscellaneous.

Accounting to principal—Refusal of agent—Interest—Costs—An agent refusing to give an account and pay over balance is chargeable with interest —Costs disallowed to an estate agent of preparing a receipt containing schedule of leases and securities delivered up to the principal.—Costs of suit against an agent for an account ordered to be paid by him where he had disregarded requests for an account, and had filed an improper account in the suit. *Simonds* v. *Coster*, 3 Eq., p. 329.

Accounting—Remittances by registered mail—Upon a plea of payment to a count for money had and received the burden of proof is on the defendant and the payment must be proved beyond a reasonable doubt. —Money actually sent by registered mail would, in the absence of instructions to the contrary, be a discharge to the agent in making remittances to his principal, though the money was lost in transit. (*Per* Barker C. J. at 548). *Massey Harris Co. Ltd.* v. *Merrithew*, 39, p. 544.

Agents right of indemnity for illegal act—The plaintiff agreed, subject to the general control of defendant, to act as manager of defendant's hotel, situate in the city of M. where the Canada Temperance Act is in force.—At the request of defendant, plaintiff purchased in his own name in the city of Saint John, intoxicating liquor to be supplied to the hotel guests and sold at the bar.—There was no proof that the vendor knew that the Canada Temperance Act was in force in M.—*Held*, that having knowledge that the liquor was to be disposed of contrary to law, the plaintiff could not recover from defendant on her promise, express or implied, to pay or indemnify him against payment for the liquor. *Wilkins* v. *Wallace*, 38, p. 80.

Director of company—Action by, against company—The right of the principal to bring a bill against the agent rests upon the trust and confidence reposed in the agent, but the agent puts no such trust or confidence in the principal.—Therefore a director of a company cannot file a bill against the company for an accounting of moneys received by the company unless special circumstances are shown.—*Pugsley* v. *The New Brunswick Coal & Railway Co. et al*, 4 Eq., p. 327; 40 N. B. R., p. 515.

Express company—Liability of agent personally for offences against Canada Temperance Act—The agent of an express company in the county of W. where the Canada Temperance Act was in force, in the ordinary course of business, delivered a parcel containing intoxicating liquor to the person to whom it was addressed, and collected from him the price thereof, the liquor, by the buyer's instructions, having been sent to him by express C. O. D.—The sale of the liquor was effected at a place outside of the county of W.—*Held* (*per* Tuck C. J., Hanington, Barker and McLeod JJ., Landry J. dubitante), that the agent could not be convicted of selling intoxicating liquor contrary to the provisions of the said act. *R.* v. *Cahill, Ex parte Trenholm*, 35, p. 240.

Extra provincial company—"Resident agent"—The plaintiff company, an unlicensed extra provincial corporation, sold absolutely to the defendant, a corporation within New Brunswick, at Bloomfield in the state of New Jersey, two car loads of its Empire cream separators to be delivered F. O. B. at Sussex and Saint John.—Defendant company to have the exclusive right of sale in certain named counties and undertaking not to sell or handle any other separators in said counties.—The defendant company advertised itself in New Brunswick as the sole agent of the separators, with the consent and at the expense of the plaintiff. —*Held* (*per* Tuck C. J. and McLeod J., Landry J. doubting and Hanington J. dissenting), that the defendant was the resident agent of the plaintiff in New Brunswick. *The Empire Cream Separator Co. Ltd.* v. *The Maritime Dairy Co. Ltd.*, 38, p. 309.

Guarantee of rent by agent—Consideration for—Defendant acting as plaintiff's agent in renting a farm, leased farm to tenant for three years, the rent being payable at the end of each half year.—Plaintiff's instructions to defendant were that the rent should be payable in advance. —Defendant subsequently guaranteed the payment of the rent.—*Held*, defendant not liable for the rent in default, there being no consideration for his guarantee, as plaintiff failed to prove that the guarantee was given to induce him to accept the tenancy thus created, or that he had accepted the same in consequence of defendant's guarantee. *Lunt* v. *Perley*, 44, p. 439, C. D.

Sale by principal to agent—Concealment by agent of material facts—An agent for sale being in a position of trust, cannot himself purchase from his principal without first communicating to his employer all facts within his knowledge which he should reasonably expect would influence his principal if aware of them in either deciding not to sell to the agent, or in determining the price at which he would sell. —Defendant was acting as plaintiff's agent for the sale of certain timber.—Defendant withheld from plaintiff an offer of $350, which he had received for the timber.—Plaintiff offered to sell the timber to defendant for $225.00.—Defendant made counter offer of $200.00 stating that this was the best offer he had had in the past for it.—Plaintiff then accepted defendant's offer.—Defendant resold the lumber some three years afterwards for $500—*Held*, that the defendant was bound to account to the plaintiff, for difference between the amount paid for the lumber and the amount for which it was sold, on the ground that the agent had not disclosed to his principal all the facts within his knowledge that might have influenced the principal in selling. *Lunt* v. *Perley*, 44, p. 439, C. D.

PRINCIPAL AND SURETY.

Composition deed—The plaintiff's creditors under a composition deed sought to recover from the sureties of the compounding debtor an instalment based on the debt signed for, which was greater than the debt they were entitled to rank for according to the schedule of creditors attached to the composition deed.—*Held*, that the plaintiffs were not precluded from recovering on the ground that there had been a variation of the contract. *Sellick et al* v. *Grosweiner et al*, 38, p. 73.

Consideration for guaranty—Defendant acting as plaintiff's agent in renting a farm, leased farm to tenant for three years, the rent being payable at the end of each half year.—Plaintiff's instructions to defendant were that the rent should be payable in advance.—Defendant subsequently guaranteed the payment of the rent.—*Held*, defendant not liable for the rent in default,

there being no consideration for his guarantee, as plaintiff failed to prove that the guarantee was given to induce him to accept the tenancy thus created, or that he had accepted the same in consequence of defendant's guarantee. *Lunt* v. *Perley*, 44, p. 439.

Endorser of Promissory Note—Notice of dishonor.—See BILLS OF EXCHANGE.

Guarantor or Principal Debtor — See *W. H. Thorne & Company, Limited* v. *Bustin*, 37, N. B. R. p. 163; 37 S. C. R., p. 532.

Letter of guarantee—Conditional sale thereunder—Failure to file lien—The defendants wrote the plaintiff the following letter: "As the C. Co. of W. New Brunswick, desires to make purchases from you, therefore to open a line of credit with you, we declare that in consideration of your complying with their request we hereby bind and oblige ourselves, jointly and severally, as principal debtors with them towards you to the amount of $1,000 for purchases they may now make from you at any time, as also for any notes given in settlement thereof by them or for any balance due thereon to the extent of the aforesaid sum of $1000. —*Held*, (1) that this was a guarantee and not a mere offer to guarantee, and the defendants were liable thereon to the extent of $1,000 but not for interest beyond the sum of $1,000; (2) that it imposed no limit on the amount of credit which the plaintiff should give to the C. Co.—In the agreement for sale it was stipulated that the "title, ownership or right of possession" of the goods should remain with the plaintiff until fully paid for in money.—It was understood, however, that the C. Co. should sell the goods and could give a good title to them. —*Held*, that this was a sale within the guarantee and that the C. Co. was not acting as the agent of the plaintiff and the fact that the agreement of sale had not been filed under the Act respecting Conditional Sales of Chattels, C. S. 1903, c. 143 was no defence to an action on the guarantee, the defendants not having been damaged by failure to file. *E. N. Heney & Co. Ltd.* v. *Birmingham et al*, 39, p. 36.

Voluntary conveyance from father to sons—Father not in debt but liable as surety—In 1891, E. S., a farmer, deceased, agreed with two of his sons, in consideration of their remaining on the farm and supporting him and their mother, and paying to their two sisters $1,000 each, that the farm and his personal propery should be theirs— The farm consisted of adjoining pieces of land, each worth about $3,200.—Subsequently the sons paid about $3,000 in paying off balances of purchase money due on the farm, paid $2,000 to the sister, supported the father and mother.—On July 9, 1899, the father, in performance of the agreement, conveyed the farm to the sons for an expressed consideration of one dollar. —At that time he was not in debt, but he was surety with others for loans amounting to $14,000 to a company, of which he and they were directors, the last loan being for $3,000, and made June 7, 1899.—On May 3, 1901, the company went into liquidation, and the amount for which the directors were sureties was paid by them except E. S.— In a suit by them to set aside the conveyance as fraudulent, and void under the Stat. 13 Eliz., c. 5, *held* that the bill should be dismissed. *Baird* v. *Slipp*, 3 Eq., p. 258.

PRIVILEGE.

Judge of the Supreme Court—A judge of the Supreme Court has no privilege against an attachment for any contempt which is of a criminal and not of a civil kind.—The process of attachment which may be issued under the provisions of sec. 36 of 59 Vict., c. 28, against a judgment debtor for contempt of an order calling upon him to appear and be examined orally as to any and what property he has which by law is liable to be taken in execution, is punitive or criminal in its nature, therefore a judge of the Supreme Court can not protect himself by his privilege against an attachment issued against him for refusing to obey such an order.— (*Per* Tuck C. J., Landry and Barker JJ.) *Ex parte VanWart*, 35, p. 78.

Officer of Superior Court—The arrest of a person having privilege by reason of his being an officer of a Superior Court, under an execution issuing out of the City Court of S. is not void, nor does such privilege afford any defence in an action on a limit bond entered into by such officer in order to obtain his discharge. *Dibblee* v. *Fry*, 35, p. 282.

Solicitor—See SOLICITOR.

QUO WARRANTO.

Alderman disqualified by Act of Incorporation—The City of Moncton Incorporation Act, 53 Vict., c. 60, s. 6, provides that no person shall be qualified to act as alderman "who has any interest in any contract made with the council," and where an alderman of the city was shown to be a member of a firm occupying a market stall owned by the city and holding a butcher's license from the city, which license could be cancelled by the City Council for violation of the market by-laws, the Court granted a writ of *quo warranto* calling on the alderman to show by what authority he exercised his office. *Ex parte Gallagher*; *In re Fryers*, 41, p. 545.

Pilots, Restraining—The pilots for the district of Miramichi having resigned, the defendants were appointed pilots for the district by the pilotage commissioners.—An injunction was sought to restrain the defendants from acting as pilots under licenses granted to them by the commissioners, on the grounds (1) that their appointments

were not made by by-law confirmed by the Governor General in Council, and published in the Gazette as required by the Pilotage Act, R. S. C., c. 80, s. 15 (d); (2) that under that Act the commissioners fixed by regulation a standard of qualification for a pilot, and that the defendants were not examined as to their competency; (3) that the defendants were not appointed at a regularly called meeting of the commissioners, or by the commissioners acting together as a body. —A pilot appointed under the Act is appointed during good behaviour for a term not less than two years.—*Held*, that the office of pilot being a public and substantive independent office, and its source being immediately, if not mediately, from the Crown, and as the objections related to the validity of the defendants' appointments, and as there was no pretence that the appointments were made colorably and not in good faith, the remedy, if any, was not by injunction but by information in the nature of a *quo warranto*. *Atty General* v. *Miller*, 2 Eq., p. 28.

Practice, Order 52—An information in the nature of a *quo warranto* at the instance of a private relator is an "action" within the meaning of O. LII, of the Judicature Act, 1909, and a motion for a rule must be made to the Court on previous notice to the parties affected thereby, and not by an *ex parte* application for a rule *nisi*.—A judge at chambers has no power to grant an order *nisi* for an information in the nature of a *quo warranto*. *Ex parte Murchie*, *Re Levesque*, 42, p. 541.

Remedy, Different, Provided by by-law —The Court will not grant a rule for a *quo warranto* calling upon county councillors to show by what authority they exercise the office of councillors of a parish on the ground of fraudulent and improper practices in making up the voters' list and in receiving and counting the ballots where the by-laws of the county provide that such matters may be investigated and determined on petition to the council. *Ex parte Nadeau*, 42, p. 473.

RAILWAYS

Animals Killed on Track.

See NEGLIGENCE.

Injuries to Passengers, Servants, etc.

See NEGLIGENCE.

Accident—Quantum of Damages—A railway company is liable to an action at the suit of one injured in an accident while a passenger in the company's train for damages and pecuniary loss consequent upon a fright resulting in a shock to the nervous system causing physical injury if the fright was the result of the accident and was reasonable and natural. *Kirkpatrick* v. *The Canadian Pacific Rwy. Co.*, 35, p. 598.

Board of Railway Commissioners—See *Meagher* v. *C. P. R.*, 42, p. 46, *post* (*Siding.*)

Canadian Government Railways — Freight—Action—W. shipped two trunks by the Intercolonial Railway and received a bill of lading in which she was named as consignee.—The railway agent delivered the trunks to another party on demand and without presentation of the bill of lading. —W. sued the Government Railways managing board in a County Court, under 9-10 Edw. VII, (Dom.), c. 26, for damages caused by the loss of the trunks, alleging negligence and recovered judgment. On appeal *Held*, there was sufficient evidence of negligence on the part of the railway agent. The cause of action was the breach of duty by negligently misdelivering plaintiff's goods, and therefore plaintiff was entitled to sue in a County Court, under 9-10 Edw. VII, (Dom.) c. 26.—While the Crown in its operation of the Intercolonial Railway is not subject to the common law in regard to carriers, it is made liable for negligence of its servants on the Intercolonial Railway, resulting in loss of goods, by the Government Railway Act, R. S. C. 1906, c. 36, and the Act 9-10, Edw. VII, (Dom.) c. 19, s. 1, amending the Exchequer Court Act, R. S. C. 1906, c. 140. —(*Per* White J.), this was a case of negligent misfeasance and the cause of action could be maintained without relying on or proving a contract. *The Government Railways Managing Board*, v. *Williams*, 41, p. 108.

Canadian Government Railways—Handcuffing passengers—In order to justify a conductor under rule 136 of the "Rules and Regulations for Government Railways" in arresting a passenger, there must be evidence that he was annoying other passengers and abusive language to the conductor is not in itself evidence of such annoyance.—The circumstances of this case did not justify the defendant handcuffing the plaintiff. —*Held* (*per* Barry and McKeown JJ.), a conductor may handcuff only when a prisoner has attempted to escape, or it is necessary in order to prevent him doing so.—*Held* (*per* Barker C. J., Landry and White JJ.), a conductor might be justified in using handcuffs for the protection of passengers. *McAllister* v. *Johnson*, 40, p. 73.

Constable, False arrest by—Liability of company—In an action for malicious prosecution and false imprisonment, it was proved on the trial that the plaintiff and one L. were fellow passengers on the defendants' road.—L. complained to an officer of the company that a revolver had been stolen from his valise.—The plaintiff had been seen by an official of the defendant company at one of the stations to take something from L.'s valise.—L. made a charge of theft against the plaintiff, and he was arrested by a constable appointed by the government on the recommendation of the defendants, and employed by them for duty on their road and paid by them.—The prosecution was carried on by L. but at the instance and with the assistance of the officer making the arrest and other constables in the employment of

the defendants.—After an investigation by a magistrate the plaintiff was discharged. —*Held* (*per* Tuck C. J., Hanington, Landry, Barker, McLeod and Gregory JJ.), that the evidence showed probable cause for the arrest and prosecution, and defendants were not liable.—That (Landry J. doubting) if there was want of probable cause the evidence failed to connect the defendants with the prosecution and imprisonment so as to make them responsible. *Dennison* v. *The Canadian Pacific Railway*, 36, p. 250.

Construction, Damage from—Defendants were contractors engaged in building a portion of the National Transcontinental Railway in New Brunswick.—In the course of their work a locomotive was used and sparks escaping from it set fire to the plaintiff's timber lands.—These lands were held under license from the Crown.—In an action for damage to the timber the jury found negligence on the part of the defendants in not providing proper apparatus to prevent escape of sparks.—*Held*, (1) plaintiff as licensee could maintain an action for damage to the timber; (2), this damage was caused by reason of the construction of a railway and s. 306 of the Railway Act providing "that all actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year" applies. *West* v. *Corbett et al*, 41, p. 420.

Construction of railways—Diverting highways—By section 5, sub-section 7 of the Government Railways Act, 44 Vict., c. 25, (D), the minister of railways has full power and authority "to make or construct in, upon, across, under or over any land, streets, hills, valleys, roads, railways or tramroads, canals, rivers, brooks, streams, lakes or other waters, such temporary or permanent inclined planes, embankments, cuttings, aqueducts, bridges, roads, sidings, ways, passages, conduits, drains, piers, arches or other works as he may think proper."—And by sub-section 8, "to alter the course of any river, canal, brook, stream or water course, and to divert or alter as well temporarily as permanently the course of any such rivers, streams of water, roads, streets or ways, or raise or sink the level of the same, in order to carry them over or under, on the level of, or by the side of, the railway, as he may think proper, but before discontinuing or altering any public road, he shall substitute another convenient road in lieu thereof, and the land theretofore used for any road, or part of a road, so discontinued, may be transferred by the Minister to, and shall thereafter become the property of the owner of the land of which it originally formed a part".—Section 49 of the Act provides that "The railway shall not be carried along an existing highway, but merely cross the same in the line of the railway, unless leave has been obtained from the proper municipal or local authority therefor, and no obstruction of such highway with the works shall be made without turning the highway so as to leave an open and good passage for carriages, and on the completion of the works, replacing the highway; but in either case, the rail itself, provided it does not rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction.—Provided always, that this section shall not limit or interfere with the powers of the minister to divert or alter any road, street or way, where another convenient road is substituted in lieu thereof, as provided in the eighth sub-section of section five."—*Held*, that by section 5, sub-sections 7 and 8, power is given to construct a railroad on, along and over a highway to the extent of occupying the whole of it and not merely alongside of it, and that section 49 does not limit this power. *Attorney General N. B.* v. *Minister of Railways and Canals et al*, Eq. Cas., p. 272.

Freight—See *The Government Railways Managing Board* v. *Williams supra* (*Can. Govt. Rwys.*)

Lease of railway—Breach of conditions —Remedy—By an agreement the plaintiffs were to lease their line of railway to the defendants upon the condition, *inter alia*, that the defendants would run a passenger train each way each day between stations A. and B.—The lease was not executed, but the defendants went into possession of and operated the line.—The plaintiffs alleged in their bill that at the time of the agreement, as was known to the defendants, they were under contract with the government of New Brunswick to run a passenger train each way each day between A. and B., but the contract was not set out in full.—In 1897 a lease was executed by the plaintiffs and defendants by which it was provided that the defendants would run a passenger train one way each day between A. and B., "and if and whenever it may be necessary to do so in order to exonerate the (plaintiffs) from its liability to the government of New Brunswick then the (defendants) will run at least one train carrying passengers each way each day."—On July 31, 1899, the Attorney-General of New Brunswick gave notice to the plaintiffs that their contract with respect to running a passenger train each way each day between A. and B. must be enforced, but no further proceedings with respect to the matter were taken by the government, though the defendants continued to run a passenger train but one way each day.—It did not appear whether the notice of the Attorney-General might not have been given at the plaintiffs' instance.—On a motion for an interlocutory mandatory injunction in this suit which was brought to compel the defendants to run a passenger train each way each day between A. and B., *held*, that no case was made out for relief by mandatory injunction, which will only be granted where necessary for the prevention of serious damage, and that the question raised was merely one of pecuniary damages between

the plaintiffs and defendants, for which the defendants were well able to account to the plaintiffs, and which by the lease of 1897 the plaintiffs had agreed to accept in event of their liability, if any, to the government and that it did not appear that such liability had arisen. *Tobique Valley Railway Co.* v. *Canadian Pacific Railway Co.*, 2 Eq., p. 195.

National Transcontinental Railway—The commissioners acting under the National Transcontinental Railway (3 Ed. VII, c. 71) are entitled to apply for and obtain under the Expropriation Act (R. S. C. 1906, c. 143, s. 21) a warrant for the possession of land expropriated for the purposes of the railway, irrespective of whether the damages have been paid or not. *In re the National Transcontinental Railway, Ex parte Bouchard*, 38, p. 346.

Railway Act (Dom). 1903, not retroactive—The Railway Act, 1888 (D), after providing that a railway may secure its debentures by a mortgage upon the whole of such property, assets, rents and revenues of the company as are described in the mortgage, provides that such rents and revenues shall be subject in the first instance to the payment of the working expenditure of the railway.—By the Railway Act, 1903 (D.), the lien is enlarged to apply to the property and assets of the company, in addition to its rents and revenues.—A mortgage by the defendants, made in 1897, was foreclosed and the property sold, the proceeds being paid into Court.—In a claim for a lien thereon in priority to the mortgagee for working expenditure made after the commencement of the Act of 1903, *held*, that the lien under the Act of 1903 was not retroactive, and that as the mortgage was given under the Act of 1888, the lien was limited to rents and revenues, and did not apply to the fund in Court. *Barnhill* v. *The Hampton and Saint Martins Railway Co.*, 3 Eq., p. 371.

Railway Act (N. B.), C. S. 1903, c. 91—Arbitrator, Appointment of sole—A judge of the County Court alone has jurisdiction to appoint a sole arbitrator to determine the value of lands taken or required under the provisions of the New Brunswick Railway Act, except when he is personally interested in the lands, in which case a judge of the Supreme Court has such jurisdiction. —When an owner of land omits to name an arbitrator in expropriation proceedings after notice is served on him as required by the New Brunswick Railway Act, a sole arbitrator cannot be appointed by any judge until notice of the intended application for such appointment has first been given to the land owner. *Saint John and Quebec Rwy. Co.* v. *Anderson*, 43, p. 31, C. D.

Railway Act (N. B.), C. S. 1903, c. 91—Award by arbitrators—In an application under O. XIV of the Judicature Act for leave to enter final judgment in an action on an award for the value of land expropriated by a railway company pursuant to the Railway Act, C. S. 1903, c. 91, it was objected that the award was bad, because the arbitrators had not been sworn by a justice of the peace for the county in which the lands lie as required by s. 17 (7) of the Act.—They had been sworn by a person, who was not in fact a justice, but was a commissioner for taking affidavits.—At the commencement of the proceedings before the arbitrators it was stated in good faith that the arbitrators had been properly sworn before a justice for the county, and that statement was dictated by the counsel for the company to the stenographer, and, with the consent of the counsel for the other side, entered on the record.—*Held* (*per* White and Crockett JJ.), that the statutory provision requiring the arbitrators to be sworn might be waived and the defendant company is estopped or precluded from objecting on that ground by what took place before the arbitrators.—*Held* (*per* Barry J.), that the statutory provision requiring the arbitrators to be sworn is a condition precedent to their jurisdiction, and want of jurisdiction can not be waived by admission, nor can jurisdiction be conferred by estoppel. —*Held* (*per* White J.), that an appeal having been taken from the award and the parties on the hearing having agreed that if the judge on appeal should come to the conclusion that the award ought to be set aside he should make a new award on the evidence before him, an award made on this agreement is binding even though the award of the arbitrators is a nullity.—*Held* (*per* Barry J.), that the original award, having been made by a tribunal without jurisdiction, there was no legal evidence upon which the judge on appeal could base an award. —*Held* (*per* White J.), that under s. 8 (28) of C. S. 1903, c. 1, it is sufficient if the oath required by the Railway Act is administered by any of the persons authorized by that sub-section.—*Held* (*per* Barry J.), that as the legislature has expressly or by clear inference provided that the oath should be administered by a designated person, no other person had authority to administer it.—*Held* (*per* White J.), where the defence disclosed in answer to an application for leave to enter final judgment under O. XIV, is a pure question of law, it is proper under the conditions existing in this province for a judge at chambers to decide the question and avoid the delay and expense of a trial. *Turney* v. *The Saint John and Quebec Railway Co.*, 42, p. 557.

Railway Act (N. B.), C. S. 1903, c. 91—Awards—There is no appeal from a decision of a judge sitting on appeal from an award under s. 17 (20) of the New Brunswick Railway Act, C. S. 1903, c. 91. *Saint John and Quebec Railway Co.* v. *Bull*, 42, p. 212.

Railway Act (N. B.), C. S. 1903, c. 91—Mortgagee's interests—An agreement by a mortgagor to convey lands under s. 14

of the New Brunswick Railway Act, C. S. 1903, c. 91, does not bind the mortgagee of such lands.—Landry J. doubting.—Proceedings based on a notice under s. 17, sub-s. 27, of the New Brunswick Railway Act, which has not been served on a mortgagee as ordered by the Court, will be set aside on application of the mortgagee. *In re Reardon and The Saint John and Quebec Railway, Ex parte Shea*, 42, p. 244.

Railway Act (N. B.), 4 Geo. V., c. 32—Award—On an appeal from an award made under the New Brunswick Railway Act, C. S. 1903, c. 91, as amended by 4 Geo. V., c. 32 (1914), awarding the respondent $16,500 for land taken for appellant's right of way through respondent's property, known as the Victoria Mill property, in the city of Fredericton, and as compensation for damages.—The appellate company in January, 1912, located its right of way through the property, and in the latter part of June, or early in July of that year, began work and filed its plans and book of reference and published the notice required by the Act.—At this time and for a number of years prior thereto the Scott Lumber Company, subject to a lien of the Bank of Nova Scotia, was the owner of the property.—The milling business upon the property had been suspended or discontinued and the lumber company and the bank were seeking to sell the property to satisfy the bank's claim.—On July 17th, 1912, the respondent obtained an option on the property and ultimately on December 12th of the same year purchased it with knowledge of the expropriation.—In 1913 the respondent made substantial changes in the mill, discarding much of the machinery and erected practically a new mill with a different equipment, increasing its capacity from ten million feet to fifteen million feet per season and greatly improved and enhanced the value of the property in other respects.—The appellant gave evidence before the arbitrators, placing the market value of the mill property and site at the time of the purchase by respondent at $10,000.—The respondent gave no evidence of the value of the property before or at the time of the purchase, but claimed and gave evidence of the value of the land taken and damages for the injury suffered amounting to $77,000.—The arbitrators in their award gave no reasons for their award and did not show how the amount awarded was arrived at.—*Held*, that the principle upon which the compensation and damage should have been awarded would be the market value, including the practical potential value of the land taken, to the Scott Lumber Company at the time of the filing of the plans and book of reference, and reasonable compensation for damage caused without taking into consideration—as the arbitrators must have done—values and elements of compensation to the owners incident to the property at the time of the award; and the award must be reduced to $5,500.—The Court on an appeal from an award will not hear the reasons or principles by which the arbitrators were guided or governed in making the award where the award contained no reasons and none were deposited with the award or given to the parties at the time it was signed or delivered. *The Saint John and Quebec Railway Co.* v. *Fraser Ltd.*, 43, p. 388.

Railway Act (N. B.), 4 Geo. V., c. 32—Award, appeal from—The time allowed for appealing from an award under 4 Geo. V., c. 32 (An Act to amend the New Brunswick Railway Act, C. S. 1903, c. 91) may be enlarged on an application made after the expiration of the time allowed by the Act, under O. 64, r. 7, but such application should be on notice under O. 52, r. 3, and not *ex parte*. *In re The New Brunswick Railway Act*, 43, p. 188.

Receiver's certificate made first lien on property—In a debenture-holders' suit to enforce their security which was against all the property of a railway company, receivers appointed to operate and manage the railway and business of the company, and maintain the road and rolling stock were empowered to borrow a limited sum on receivers' certificates made a first charge on the company's property, in priority to the debenture security, to pay expenses incurred by them in necessary repairs, and in operating the road. *Sage* v. *The Shore Line Railway Co.*, 2 Eq., p. 321.

Right of way, Agreement re—Construction—Specific performance—A railway company started expropriation proceedings to acquire a right of way across an intervale farm owned by the plaintiffs; subsequently the parties came to a verbal agreement, that the proceedings would be abandoned and the plaintiffs would convey to the company the land required for five hundred dollars, provided it would construct a culvert in the railway embankment where it crossed the plaintiff's interval, in order that the spring freshets might continue to freely overflow the same.—In case the company did not care to construct the culvert, the plaintiffs asked one thousand dollars more for their land.—The location of the culvert was to be selected by the plaintiffs.—The company's agent visited the farm and set out stakes where the plaintiffs wanted the culvert located. Nothing was said as to the kind of culvert except that it was to be big enough to let the water flow through, and no arrangement was made about its maintenance.—The plaintiffs executed a deed for the right of way in which the consideration was stated to be one dollar, and were paid the five hundred dollars agreed upon.—The embankment was constructed across the interval but an opening left at the space marked for the culvert.—Later the company decided not to build the culvert but fill in this space.—On an action for specific performance, *held*, that the agreement was sufficiently certain to allow a decree to be made; that the defendant should construct and maintain the culvert; that

adequate relief could not be given the plaintiffs by awarding damages; that the defendant would be given the option of paying one thousand dollars in lieu of the performance of the contract, as this was the amount asked for by the plaintiffs if the culvert was not constructed.—After agreement was entered into between plaintiffs and defendant for the construction of a culvert in a proposed railway embankment where it crossed the plaintiff's farm, the plaintiffs executed a deed of the right of way which contained the following clause: "And the grantors further release the railway company from all claims and demands for severance and depreciation arising out of the taking or expropriation by the railway company of the said lands, and the construction, maintenance and operation thereon of a line of railway and other works." —The company claimed that it was released from any claim which might arise from its failure to construct the culvert by this clause in its deed.—*Held*, that the effect of this clause was to release the company from such damages only as were necessarily consequent upon the authorized severance, and that the damage complained of was unnecessary and could be avoided by the defendant carrying out its agreement for the construction of the culvert. *Whitcombe* v. *Saint John and Quebec Railway Co.* 43, p. 42, C. D.

Right of way—Presumption re expropriation—The Woodstock Railway Company was incorporated by 27 Vict., c. 57, by which Act it is given power to expropriate land for a right of way of ninety-nine feet in width and provision is made for the assessment and payment of damages.—In 1871, the company built their main track on a strip fourteen feet in width but there was no evidence that any damages had been assessed or paid.—The defendant company acquired the rights of the Woodstock Railway Company and in 1892 laid side tracks adjoining the fourteen foot strip and within the ninety-nine feet allowed by the Act 27 Vict., c. 57.—In May, 1911, the plaintiff brought an action of trespass for laying the side tracks on this land.—*Held*, the Court would not presume from the occupation of the fourteen foot strip that the Woodstock Railway Company took possession of the whole width of ninety-nine feet which it was entitled to expropriate.—Trespassing on the plaintiff's land by putting tracks thereon is not an injury or damage "sustained by reason of the construction or operation of the railway," and therefore the limitation of one year for bringing action provided by s. 306 of the Railway Act, R. S. C. 1906, c. 37, does not apply. The damage by such trespass is continuous and therefore the plaintiffs are entitled to recover damages, for six years previous to bringing the action under s. 306 of the Railway Act. *Carr et al* v. *Canadian Pacific Rwy. Co.*, 41, p. 225 Affirmed 15 D. L. R. 295.

Right of way—Trespass—Statute of Limitations—The defendant company in the year 1890, took possession of a piece of land claimed by plaintiff and built its line of railway across it, and fenced it on both sides of the track, and immediately thereafter began running its trains over the said track, and have continued to do so ever since.—The plaintiff saw what was going on and assisted in the building of the railway, but made no objection to its construction or the running of the trains until 1905, when this action was brought.—*Held* (*per* Hanington, Landry and Gregory JJ.), that the defendant in running its trains across the land was committing a continuing trespass and the plaintiff was entitled to recover for the damage sustained for the six years preceding the commencement of the action. —*Held* (*per* McLeod J.), that the trespass, if any, was not a continuing trespass but was completed when the road was built in 1890, when and within six years the plaintiff might have recovered all the damages incident to the trespass which was now barred by the Statute of Limitations.—*Held* (*per* Tuck C. J.), that the evidence showed no possession in the plaintiff, or, if it did, plaintiff was bound by his acquiescence and could not maintain trespass.—(On appeal, 38 S. C. R. 230, Tuck C. J. upheld.) *Clair* v. *The Temiscouata Railway Co.*, 37, p. 608.

"Right of way clearing"—Evidence of meaning—A contract in writing made for clearing the right of way of a railway contained a clause under which the plaintiff agreed "to do and complete all the right of way, clearing between stations 490 and 714 in conformity with the specifications" for thirty dollars per acre.—*Held*, that extrinsic evidence was properly admitted to show that amongst railway contractors and on railway construction work the words "right of way clearing" had acquired a special and technical meaning, and applied only to land requiring to be cleared and not to the full area of the right of way. *Laine et al*, v. *Kennedy et al*, 43, p. 173.

Siding, Prescriptive right to use of—Plaintiff shipped produce direct from his warehouse over defendant's public siding for thirty-five years.—In order to provide increased accommodation, defendant in September, 1910, moved the siding some thirty feet away.—Plaintiff applied to the board of railway commissioners for Canada to compel the defendant to provide a siding to his warehouse, and a consent order was made by the Board that the defendant move plaintiff's warehouse to a site near the siding in its new position.—This was done in May, 1911. —In an action for damages for depriving plaintiff of reasonable facilities between September and May; after verdict for the plaintiff, *held*, plaintiff could not acquire a prescriptive right to the use of the siding. —*Held* (*per* Barker C. J., McLeod and White JJ, Landry and Barry JJ. dissenting), the board of railway commissioners has exclusive jurisdiction to determine whether a railway has provided reasonable accom-

modation and facilities for traffic as required by ss. 284 and 317 of the Railway Act, R. S. C. 1906, c. 37, and there being no finding of the board that the plaintiff had been wrongfully deprived of such accommodation or facilities he cannot recover in this action —*Canadian Northern Railway Co.* v. *Robinson* (1911) A. C. 739 distinguished.—*Held* (*per* Barker C. J. and White J.), there is no finding and no evidence to support a finding by the jury that defendant wrongfully refused or neglected to provide plaintiff with reasonable facilities for his traffic.—A consent order represents the agreement of the parties thereto and not the judgment of the Court making the order.—*Held* (*per* Landry and Barry JJ.), the costs of application to the board of railway commissioners having been refused by the board cannot be recovered in any other Court. *Meagher* v. *Canadian Pacific Rwy. Co.*, 42, p. 46.

Station agent, Powers of—Warehouse receipt—The appellant allowed shippers over its road to store freight intended for shipment in its warehouse at St. Andrews free of charge, whether in transit, or pending sale and distribution.—McDonald, a packer of fish, had stored in the warehouse a large number of cases of sardines and clams for which he received negotiable warehouse receipts from the company's station agent. —These receipts McDonald, with the knowledge of the agent, hypothecated to the Canadian Bank of Commerce to secure advances.—It was arranged between the bank and the agent that none of the goods covered by these receipts should be shipped out without the release of the bank.—The agent, however, at the instance of McDonald, allowed a large number of these cases to be shipped out without the knowledge or release of the bank.—In an action by the bank against the railway company (in which McDonald had been added as a third party on the application of the company) for the shortage of the goods warehoused, *held* (*per curiam*), affirming the judgment of McKeown J., that the issue of the negotiable warehouse receipts was *intra vires* the railway company in the conduct of its business and that the station agent was acting within the scope of his apparent authority in giving them.—That the railway company was entitled to claim against McDonald for contribution to the amount recovered by the bank against it for the value of any goods shipped out at the request of McDonald, warehoused subject to the receipts endorsed to the bank by McDonald. *Canadian Pacific Rwy. Co.* v. *Canadian Bank of Commerce*, 44, p. 130.

Valley Railroad, 4 Geo. V., c. 10, s. 18, Construction of—All that part of s. 18, of 4 Geo. V., c. 10, "An Act providing further aid for the construction of a line of railway along the valley of the Saint John river" which precedes the last eight lines, apply only to monies obtained from the sale of bonds under the said Act, and the provincial treasurer is only required under s. 18 of the said Act to retain out of such monies in respect of indebtedness of the company authorized to construct and complete the railway and the authority of the treasurer to retain does not extend to indebtedness of sub-contractors and others due or accruing due at the passing of the Act for which the company is not liable notwithstanding that such indebtedness was for actual work of construction and for wages, materials and supplies that have gone into the construction. *The Saint John and Quebec Rwy. Co.* v. *The Hibbard Co. Ltd. et al*, 43, p. 508.

Warehouse receipts—See *Canadian Pacific Rwy. Co.* v. *Canadian Bank of Commerce*, 44, p. 130, supra (*Station Agent.*)

Workmen's Compensation Act, C. S. 1903, c. 146—"Quarrying"—Making a rock cutting in the construction of a railway road bed is not "quarrying" within the meaning of the Workmen's Compensation Act, C. S. 1903, c. 146, even though the rock removed is used to build the road bed. *Henry* v. *Malcolm*, 39, p. 74.

RECEIVER

Commission allowed—While, as a general rule, a commission of five per cent, on receipts is allowed to a receiver appointed by the Court, the allowance will be increased where unusual work is required, or diminished where the receipts are large or the trouble in their collection is insignificant. *Hall* v. *Slipp, Ex parte Stephen B. Appleby, Receiver*, 1 Eq., p. 37.

Company winding up—Dispute with liquidator—Where debenture-holders in a suit against a company to enforce their mortgage security obtained the appointment of a receiver before, but subsequently to an application for, an order to wind up the company, and there was a dispute between the receiver and the liquidator in the winding-up as to what property was conveyed by the mortgage, and the liquidator obtained liberty to dispute in the suit the validity of the mortgage, the Court declined to discharge the receiver, or to appoint the liquidator receiver in his place.—Order appointing receiver in a debenture-holders' suit varied by limiting property to be received by him to property conveyed by their mortgage security. *Bank of Montreal* v. *The Maritime Sulphite Fibre Co. Ltd.*, 2 Eq., p. 328.

Fraudulent conveyances—See *Black* v. *Moore*, 2 Eq., p. 98.

Loan by receiver, Priority of—In a debenture-holders' suit to enforce their security, which was against all the property of a railway company, receivers appointed to operate and manage the railway and business of the company, and maintain the road and rolling stock, were empowered to borrow a limited sum on receivers' certificates made a first charge on the company's property,

in priority to the debenture security, to pay expenses incurred by them in necessary repairs, and in operating the road. *Sage* v. *The Shore Line Rwy. Co.*, 2 Eq., p. 321.

REFERENCE

See PRACTICE.

REGISTRY LAWS

Assignment of mortgage. Whether registry notice of—A. gave B. a mortgage on land to secure payment of A.'s bond held by B.—Subsequently A. sold the equity of redemption to C. and B. assigned the bond and mortgage to the plaintiff by a registered transfer.—Afterwards C. obtained an advance of money from D. by a mortgage of the equity of redemption, the money being applied by D. to paying B. the amount of the original mortgage, and B. discharged the mortgage on the records.—Neither C. nor D. had notice of the assignment of the bond and mortgage to the plaintiff.—In a suit by the plaintiff for the foreclosure and sale of the mortgaged premises, *held*, that payment by A. or his assigns to B. of the indebtedness owing upon the bond without notice of the assignment of the bond and mortgage to the plaintiff entitled A. or his assigns to a reconveyance of the mortgaged premises, and that the registration of the assignment of the mortgage did not affect A. or his assigns with notice. *Lawton* v. *Howe et al*, Eq. Cas., p. 191.

Bond to Crown—A bond given by a county secretary-treasurer to the Queen for the due performance of his duties as such officer, is a first lien on all the real estate of the obligor from the date of the execution of the bond, and takes precedence of executions and mortgages issued or executed respectively at a date or dates subsequent to that of the bond.—The rights and remedies of mortgagees and execution creditors, whose mortgages, judgments or executions were executed, signed, issued, or handed to the sheriff respectively after the making of or breach of said bond, are postponed until all moneys due by virtue of the bond and in consequence of a breach have been fully paid and satisfied. *R.* v. *Sitewright*, 34, p. 144.

Certified copy of ante nuptial contract not capable of registration—By an ante-nuptial contract entered into in Quebec, the intending husband endowed his future wife in a sum of money as a dower prefixed chargeable at once upon his property in New Brunswick.—The contract was executed in Quebec before a notary.—A copy of the contract certified to by the notary was registered in Madawaska County.—Subsequently to its registration, a mortgage by the husband of his real estate in Madawaska county to the plaintiff was registered in that county.—The plaintiff was a purchaser for value and had no notice of the ante-nuptial contract.—*Held*, that as the Registry Act, c. 74, C. S., provides only for the registration of an original instrument, except in certain cases, the copy of the marriage contract was improperly on the records and the marriage contract was not entitled to priority over the plaintiff's mortgage. *Murchie* v. *Theriault*, 1 Eq , p. 588.

Crown land license. Interest in—In 1893, one M. purchased at a public crown land sale a license to cut lumber on a block of land, and a license was issued to him dated September 1st, 1893, to remain in force until August 1st, 1894.—By the crown land regulations incorporated in the license, the license might be assigned by writing, the assignor to give notice thereof to the surveyor-general and the assignment to take effect from the date at which such notice should be received at the Crown Land office.—Licensees who paid their stumpage dues by August 1st in each year were entitled to annual renewals for such part of the ground held by them as might at the first day of July in each year be vacant and unapplied for, on payment of the mileage thereon on or before the first day of August, and such renewals could be for 24 years from August 1st, 1894.—Previous to the above sale, one L. being desirous of securing certain lumber privileges in a part of the area included in the license to M. entered into an agreement with him that he (M.) should buy in the block, and afterwards secure these privileges to L.—*Held*, that the license purchased by M. did not convey an interest in land and therefore it could be assigned without an instrument under seal registered in the county where the land was situate. *Lauchlan* v. *Prescott*, 1 Eq., p. 406.

Defective acknowledgment to execution—See *The Tobique Salmon Club* v. *McDonald*, 36, p. 589.

Lien—Registry is not necessary to perfect a lien as between the parties themselves. *Good* v. *The Nepisiguit Lumber Co. Ltd.*, 41, p. 57.

Memorial of judgment—A memorial of judgment when registered, or a writ of execution when filed with the sheriff, only affects such interest in land as the debtor then has, and therefore does not postpone the title of a trustee thereto under a creditors' deed previously executed by a number of the creditors, though not registered.—Property, including a lot of land, was conveyed by A. to B. by deed in trust for the former's creditors.—The deed was executed by some of the creditors and was then registered.—It was subsequently discovered that the certificate of acknowledgment was defective, and a new certificate was endorsed on the deed.—Between the date of registration and the endorsement of the second certificate a creditor obtained and registered a judgment against the debtor, and seized the land under a writ of *fi. fa.*—A sale of the land being advertised by the sheriff, the

trustee filed a bill praying for a declaration of his title, and as consequential relief for an injunction.—*Held*, that the trustee's title to the land was not displaced by either the registered judgment or the writ of execution, and that he was entitled to the declaration prayed for. *Trueman* v. *Woodworth et al*, 1 Eq., p. 83.

Mortgage on ungranted land—Effect of registering—A squatter upon Crown land, which he had partly cleared, and upon which he had built a house, gave a registered mortgage of it in 1874 for value, and in 1881 conveyed the equity of redemption by registered deed to the mortgagee, remaining in occupation of the land as tenant.—In 1898 a son of the squatter, having no knowledge of the mortgage or deed, or that his father occupied the land as a tenant, obtained a grant of the land from the Crown.—*Held*, that he should not be declared a trustee of the land for the purchaser from the father.—*Semble*, that s. 69 of the Registry Act, 57 Vict., c. 20 (C. S. 1903, c. 151, s. 66) by which it is provided that "the registration of any instrument under this Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration" does not apply to an instrument not properly on the registry, such as a conveyance of Crown land by a squatter. *Robin, Collas & Co. Ltd.* v. *Theriault*, 3 Eq., p. 14.

Also that the Registry Act of 1894 was not retroactive, and as the instruments claimed under had been registered in 1874 and 1881 respectively they could not claim the benefits of an act not then in force. *Id.*

Notice—Section 69 of the Registry Act, 57 Vict., c. 20, providing that the registration of any instrument under the Act shall constitute notice of the instrument to all persons claiming any interest in the land subsequent to such registration, notwithstanding any defect in the proof for registration does not apply where the registration is a nullity, as where the proof of the execution required by the Act is wanting. *Murchie* v. *Theriault*, 1 Eq. p. 588.

Notice — Unregistered deed, but reference in registered mortgage—A part of a lot of land was sold to the plaintiff by M. by deed, which the plaintiff neglected to register.—Subsequently M. mortgaged by registered conveyance the remainder of the lot to S.—The description in the mortgage of the land followed the original description of the whole lot, but excepted the portion sold and conveyed by the said M. to C. (the plaintiff).—Subsequently M. sold and conveyed by registered deed for valuable consideration the whole lot of land to the defendant, who had notice of the mortgage, but not of its contents.—By Act 57 Vict., c. 20, s. 29, an unregistered conveyance shall be fraudulent and void against a subsequent purchaser for valuable consideration whose conveyance is previously registered.—By section 69 of the Act the registration of any instrument under the Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration.—*Held*, that by the act the registration of the mortgage constituted actual notice of its contents to the defendant, whose title therefore should be postponed to the plaintiff's. *Carroll* v. *Rogers*, 2 Eq., p. 159.

Followed in *Robin Collas & Co. Ltd.* v. *Theriault*, 3 Eq., p. 14.

Priority of equities—A married woman owning leasehold land as her separate estate, agreed by parol with A. that in consideration of his building a house thereon, she would secure him by a mortgage of the premises, and the house was accordingly built.—Subsequently she became indebted to the plaintiffs and they obtained a decree charging her separate estate with their debt.—The decree was never registered.—After the decree, she gave a mortgage to A. in accordance with her agreement with him, and the mortgage was duly registered.—In a petition by A. to have the mortgage declared a valid charge upon the property in priority to the plaintiffs' decree, *held*, that the plaintiffs decree must be postponed to the equities existing against the property in favour of A. at the time of the decree. *In re The Petition of William G. Bateman, Chute et al* v. *Amelia Gratten et al*, Eq. Cas., p. 538.

Priority of registration — Innocent purchaser—It is not a deed of quit-claim where the grantor remises, releases, and quit-claims unto the grantee, his heirs and assigns, a lot of land, and covenants that the land is free from incumbrances made by him, and that he will warrant and defend the same to the grantee, his heirs and assigns, against the demands of all persons claiming by or through the grantor; and the grantee under such a deed, if registered, will not be postponed under the Registry Act, 57 Vict., c. 20, to the equities of a prior purchaser, of which he had no notice. *Bourque* v. *Chappell*, 2 Eq., p. 187.

Unrecorded deed—See *Cairns* v. *Horsman*, 35, p. 436.

REPLEVIN

Affidavit on behalf of incorporated company—In an action for the recovery of personal property the affidavit made by the manager of an incorporated company under O. 63, r. 1, as amended by 3 Geo. V., c. 23, s. 15 (Acts of 1913) under which the sheriff seized the property, which stated that he had personal knowledge of the facts deposed to, is sufficient without stating his means of knowledge.—*The Halifax Banking Co.* v. *Smith* (1886) 25 N. B. R. 610 followed. *The Dalhousie Lumber Co. Ltd.* v. *Walker*, 44, p. 81.

Assignment of bond—An assignment of a replevin bond must be under seal.—*Semble*, a new trial will not be granted to the plaintiff in an action on a replevin bond where the breach is that the replevin suit was not prosecuted with effect and without delay, since only nominal damages could be recovered, the goods not having been removed. *Landry* v. *Sivret et al*, 39, p. 356.

Chattel unlawfully detained — Counterclaim—In an action under O. 63 for the recovery of a piano unlawfully detained the defendant counter-claimed for damages for breach of contract.—The judge directed the jury that the subject matter of the counter-claim was *res judicata* and was not to be considered, and directed a general verdict for the plaintiff.—Notwithstanding this direction the jury found a verdict for the defendant for $300.—*Held*, that the trial judge was right in disregarding the verdict and in ordering a verdict to be entered for the plaintiff for the return of the piano and on the counter-claim. *Amherst Pianos Ltd.* v. *Adney*, 44, p. 7.

Claim of property—Canada Temperance Act—Liquor consigned to McK. was seized under a search warrant issued under part II of the Canada Temperance Act, R. S. C. 1906, c. 152, s. 136, on information of a liquor license inspector and given into C.'s custody for safe keeping.—The warrant was issued by the proper officer and was regular and valid on its face.—McK. replevied the goods from C. who put in a claim of property under C. S. 1903, c. 111, s. 361. —*Held*, reversing the judgment of the County Court judge, that C. was entitled to retain possession of the liquor until it should be disposed of according to law, such possession being necessary to the carrying out of the act.—*Semble*, an appeal lies direct to the Supreme Court from the judgment of a County Court judge on a claim of property under C. S. 1906, c. 111, s. 361. *McKeen* v. *Colpitts*, 39, p. 256.

Claim of property—The defendant, out of whose possession goods are replevied, is entitled to succeed on a claim of absolute property under the Supreme Court Act, C. S. 1903, c. 111, s. 361, where no evidence of possession or property is given by the plaintiff. *Mitchell* v. *Davis*, 39, p. 486.

The fact that the goods are *in custodia legis* when replevied cannot be urged by the plaintiff as an objection to the defendant putting in a claim of property under s. 361, the plaintiff having caused the writ to issue. *Id.*

Execution for taxes—"In custodia legis"—A writ of replevin brought to try the legality of an assessment for taxes, and the execution issued thereon, both of which were claimed to be void for want of jurisdiction, will not be set aside on a summary application on the ground that at the time the goods were replevied they were in the custody of the law, unless the proof is satisfactory that all the conditions necessary to give jurisdiction have been fulfilled. *MacMonagle* v. *Campbell*, 35, p. 625.

Logs of property of which deed had been given as security—The defendant applied to the Crown Land Department for a grant of lot No. 50, range 1 in the Blue Bell Tract (so called) in the County of Victoria under the regulations of the Department as applied to that tract. Being in possession and having complied with most of the regulations he agreed in writing with the plaintiff to cut and deliver to him 100,000 superficial feet of lumber during the logging season of 1914 off the said lot under terms set out in the contract. One clause provided that "all logs cut by the defendant or that he may have cut for him to apply to this contract."—Defendant also gave plaintiff a quit claim deed of the lot to secure him for any supplies furnished or cash advanced, and plaintiff gave defendant a written memorandum agreeing to recall the quit claim deed providing satisfactory arrangements were made to cover defendant's indebtedness.—Another clause in the contract provided if the contract was not progressing satisfactorily to the plaintiff he might, on forty-eight hours notice to the defendant, take over the operation and complete it.—The defendant, having contracted with Donald Fraser Jr. to get for him 50,000 feet of lumber off said lot 50 and having cut a quantity of lumber in pursuance of this contract, the plaintiff replevied the lumber cut for Fraser and took over the operation under defendant's contract with him, claiming (a) That as against the defendant he was entitled as the absolute owner of the land to everything on it and defendant had no right to dispose of any of the lumber to third parties; (b) that even if he did not own the land, that under the terms of his contract with the defendant he was entitled to all the lumber the defendant cut off lot 50 during the season of 1914, at the price agreed upon.—*Held*, on appeal affirming the judgment of McKeown J., that the quit claim deed and memorandum given therewith must be taken together and constituted in effect a mortgage to secure any indebtedness from the defendant to the plaintiff on the completion of the contract, and as the defendant had tendered the amount due any lien the plaintiff had by reason thereof was extinguished. That under the contract the defendant was bound to supply lumber only to the extent of 100,000 superficial feet cut to the plaintiff's contract, and plaintiff was not entitled to the Fraser logs. *McLaughlin* v. *Tompkins*, 44, p. 249.

Pleading — Impeaching landlord's title—A replication which impeaches the lessor's title to the demised premises, pleaded in answer to a plea of *non cepit* in an action of replevin of goods illegally distrained is bad on demurrer.—*Held* (*per* Tuck C. J., Hanington and McLeod JJ.)—*Held* (*per*

Barker and Gregory JJ.), the replication should have been objected to by an application to strike it out. *McLean* v. *Green*, 37, p. 204.

Practice—A writ of replevin, in which the defendant is described by the initial letter only of his Christian name is bad and will be set aside upon application being made to a judge in chambers.—The writ will likewise be set aside where the replevin bond has been executed by one surety only.—*Semble*, that a replevin bond that does not follow the form prescribed by the Statute is bad.—(*Per* Tuck C. J., Hanington, Landry and McLeod JJ., VanWart J. dissenting.) *Hubbard* v. *Young et al*, 34, p. 641.

Practice—Time for reply—In replevin the time for the plaintiff to reply to the defendants' plea is ten and not twenty days. *MacMonagle* v. *Campbell*, 36, p. 468.

See also LANDLORD AND TENANT, RENT AND DISTRESS.

REVENUE

Penalties — Ownership — A penalty imposed by the police magistrate of the City of Saint John for harbouring smuggled goods under section 197 of the Customs Act (R. S. C., c. 32) forms part of the consolidated revenue of Canada, and is payable to the receiver-general, and not to the chamberlain of the city of Saint John under 52 Vict., c. 27, s. 50.—The local legislature would have no power to deal with this matter nor do they profess to do so. *R.* v. *McCarthy*, 38, p. 41.

RULES OF COURT

Michaelmas Term, 1837, rr. 6, 7 and 8—*In Re Clifford B. Deacon*, 36, p. 3.

Hilary Term, 1848—In the jurat of an affidavit of a marksman, upon which a rule has been obtained, instead of the words "he (or who) seemed perfectly to understand the same," were the following: "seemed fully to understand the same."—*Held*, sufficient. *Ex parte Allain*, 35, p. 107.

Hilary Term, 1875—An order to commit for breach of an injunction will not be set aside on the ground that the copy of the decree served on which the notice of the motion for the order was based was not indorsed as is required by rule 3 of Hilary Term, 1875, and as the original decree filed in the Registrar's office is indorsed. *Turnbull Real Estate Co.* v. *Segee et al*, 42, p. 625.

Easter Term, 1887—In the matter of an election petition under the Dominion Controverted Elections Act, *held*, (1) that the failure to file for the petitioner a copy of the preliminary objections to the petition (R. S. C., c. 9, s. 12, N. B. General Rules of the Election Court, Easter Term, 1887, 12) was waived by the taking of subsequent proceedings before raising the question, but, in any case, it was only an irregularity that could be amended, and the respondent was allowed to file such copy *nunc pro tunc*. *Alexander* v. *McAllister*, 34, p. 163.

Hilary Term, 1894—An application for judgment, as in case of a nonsuit for not proceeding to trial according to notice was refused on the usual terms, though the affidavit in answer had not been served pursuant to the rule of Hilary term, 1894. *Frederick* v. *Gibson*, 36, p. 364.

Michaelmas Term, 1899, r. 7—The specific grounds upon which a certiorari is granted must, under rule 7 Mich 1899, be stated, and a general statement, i. e. "also all other grounds taken at the hearing in the Court below" is objectionable.—(*Per* Hanington, Landry, Barker, McLeod and Gregory JJ.) *R.* v. *Wilkinson, Ex parte Restigouche Salmon Club*, 35, p. 538.

The Court may allow new grounds to be added on showing cause against an order *nisi* to quash an order dismissing an appeal from a conviction under the Criminal Code granted under the rule of Court of Michaelmas term, 1899, although the rule requires the ground to be stated in the order. *R.* v. *Wedderburn, Ex parte Sprague*, 36, p. 213.

An order *nisi* granted by a single judge under rule 7 of the General Rules of Michaelmas term, 1899, if not entered to show cause will on proof of service be made absolute, and the Court will not consider and determine the sufficiency of the grounds on which the order was granted. *R.* v. *Ritchie, Ex parte Sandall*, 37, p. 206.

Michaelmas Term, 1899—Quaere, whether the stay of proceedings in the form of order given by Rules of Court, Michaelmas Term, 1899, for a certiorari expires on the return of the rule *nisi* to quash. *Ex parte Melanson*, 39, p. 8.

An order for certiorari granted under Rules of Court, Michaelmas Term, 1899, must make the writ returnable at the term of the Court next following the date of the order. *Ex parte Kay. In re Hogan et al*, 39, p. 54.

Under the rule of Michaelmas term, 1899, the grounds for certiorari must be stated specifically so that the other party may know the exact points relied on.—(*Per* Barker C. J.) *R.* v. *Kay, Ex parte Stevens* 39, p. 2.

See also *R.* v. *Forbes, Ex parte Dean*, 36, p. 580.

The Court refused to discharge a rule *nisi* to quash an order for review removed by certiorari granted in term on objection that it did not as required under the rules of Michaelmas term, 1899, direct within what time and upon whom the rule and affi-

davits upon which it was granted should be served. (McLeod J. dissenting.) *R. v. Wilson, Ex parte Burns*, 37, p. 650.

Rules of 1909—On the hearing of a petition under the Workmen's Compensation Act, the judge may, in the exercise of his discretion, apply any of the rules of the Supreme Court, 1909, which he may consider applicable to the circumstances of the case and is not confined to rules *eiusdem generis* with the subjects dealt with by the rules specially referred to in the Act. *In re Merritt v. The Saint John Street Railway*, 42, p. 667.

County Court—See *Brenan v. Hopkins et al*, 39, p. 236.

Value of opinion given by Court questioned, if rules not adhered to—See *The Municipality of the City and County of Saint John v. The Board of Valuators for the City and County of Saint John*, 43, p. 369.

SALE OF GOODS

1. Action for Price.
2. Auction Sales.
3. Conditional Sales.
4. Contract.
5. Delivery.
6. Description of Goods.
7. False Representations.
8. Property Passing.
9. Rescission of Contract.
10. Specific Articles.
11. Statute of Frauds.
12. Title to Goods.
13. Warranty.
14. Weights and Measures.

Authority of Agent—*See* PRINCIPAL AND AGENT.

Prescription — *See* LIMITATION OF ACTIONS.

Principal and Agent — *See* PRINCIPAL AND AGENT.

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1. Action for Price.

Contract partially carried out—Quantum meruit—Damages for breach—E. agreed to sell to W. a complete bottling plant, consisting of machinery and a certain number of bottles for $900.00.—The machinery and a small part of the bottles were delivered and some of the machinery was affixed to W.'s building.—W. paid E. $500. —In an action by E. to recover the balance of the purchase price, the trial judge held that the contract was entire and failure to deliver substantially the full number of bottles would prevent E. from recovering anything.—He entered a verdict for W. but disallowed W.'s set off for breach of contract. —*Held*, E. was entitled to recover the value of the machinery and bottles delivered and W. was to recover damages, if any, for non-completion of the contract, and, as there were no findings on either point, there should be a new trial. *Emack et al v. Woods et al*, 39, p. 111.

Findings by jury—In an action involving issues of warranty on a sale of chattels, failure of consideration and fraudulent misrepresentations, where the questions submitted to the jury did not cover all the material issues raised by the pleadings and the answers of the jury to those submitted were unsatisfactory, and where the plaintiff must have failed in part but for an amendment allowed on the motion to set aside the verdict entered for the defendant and enter a verdict for the plaintiff, a new trial was granted without costs. *Robertson v. Norton*, 44, p. 49.

Implied sale—Rendering bill—Conversion of goods without protest by owner—Estoppel. The plaintiff agreed to sell 40 feet of curbing stone to one P. who had a contract to place curb stones in the town of W.—Prior to this agreement, the town, with the plaintiff's knowledge, but without any authority or permission on his part except such as can be implied from the fact that he saw the town's servants taking the stone and made no protest or objection, had taken away and made use of 174 feet of plaintiff's curbing stone.—The plaintiff sent a bill for all the stone to P. but P. refused to pay the plaintiff for more than 40 feet.—The plaintiff then sued the town in trover for conversion of 174 feet of stone.—*Held*, that the bill rendered P. could not establish a sale to him in the face of the evidence that his purchase was for 40 feet only and that he did not consent directly or impliedly to the taking and using of the additional amount, therefore a verdict was ordered for the value of 134 feet. *Fisher v. Town of Woodstock*, 39, p. 192.

Oak timber, Contract for — Whether warranted or not—On April 19, 1907, defendants wrote plaintiffs asking the price of oak timber of certain specifications stating: "we want this for heavy engine foundation work, must be well seasoned, free from wane, shakes and dry rot."—April 22, plaintiffs replied: "price of $60 per M., purchaser paying for the full survey.—Will saw it and charge for time it takes.—If you have a rotary, think you would do better to cut it yourself."—On the same day defendants sent plaintiffs specifications for an additional lot and on April 24th sent an order for one piece for a boat keel and order No. 1120 for 51 pieces "to be well seasoned and free from wanes, shakes and dry rots, and to be well and evenly sawn"; also wrote a letter asking for new quotation of price

including sawing, and stated "presuming you will quote a price in this manner we are enclosing order for the first lot enquired for. . . ."—April 27, the defendants sent another order No. 1149 for 67 pieces to be "well and evenly sawn, and free from shakes and wane, suitable for car repairs."—April 29, the plaintiffs wrote: "Will cost you $60 per M. full survey of what is in the timber.—Will saw it and charge for the time it takes.—The only way we will sell this oak is for the purchaser to take all risks of it turning out good or bad in sawing."—April 30, the defendants wrote plaintiffs to saw up two or three of the large sticks into sizes on the first order and then advise what the loss was and the cost of re-sawing.—The plaintiffs sawed two logs and shipped the pieces to the defendants May 4th.—The cost proved to be about $105 per M.—On May 11 a telephone conversation took place in which, according to evidence for the plaintiffs it was stated that the oak sawn was good, and that the rest would run about the same, but no guarantee of quality was made, while, according to the evidence for the defendants, the plaintiffs stated that the logs sawn were of good quality and that they would be a fair average of all the oak, and the defendants told the plaintiffs to go ahead with the orders on that basis.—On the same day the defendants wrote "confirming our conversation of this morning please go ahead with our orders Nos. 1120 and 1149."—There was evidence that the plaintiffs requested the defendants to send a man over to inspect the oak timber, and also that it is impossible by inspecting oak in the square to tell whether it is good or bad inside.—The plaintiffs sawed the oak to the dimensions ordered and shipped it, but all excepting the piece for the boat keel was rejected by the defendants on the ground that it was unsuitable for the purposes for which it was ordered and was not free from wane, shakes and dry rot.—*Held*, sustaining the judgment of the trial judge, that the defendants bought the oak in the stick, agreeing to pay $60 per M. for it, and the cost of sawing; that there was no warranty of quality by the plaintiffs, and that the plaintiffs were entitled to recover the purchase price. *F. E. Sayre & Co. Ltd.* v. *Rhodes Curry & Co. Ltd.*, 39, p. 150.

Pleading — Misrepresentation — Remedy on warranty—In an action in the County Court on a promissory note given by the defendant to the plaintiff for the balance of the purchase money for a boat sold by the plaintiff to the defendant, the defendant pleaded the general issue and gave notice of two defences: (a) no consideration; (b) fraud and misrepresentation.—At the trial without a jury the judge found there was misrepresentation as to the age of the boat but that there was no fraud as defendant had protected himself by a warranty and did not rely upon the plaintiff's statement in respect to the boat's age; and held that under the pleadings the defendant could not avail himself of the breach of warranty in answer to the action on the note.—*Held*, that the trial judge having found that there was no fraud, the verdict on the pleadings was right for the amount of the note and interest, and defendant's remedy was by cross action. *Losier* v. *Mallay*, 43, p. 364.

Setting up breach of warranty—In an action for goods sold and delivered a breach of warranty may be set up by way of counterclaim or given in evidence under the general issue in reduction of damages. *Neil* v. *Balmain et al*, 41, p. 429

Test re warranty — Conditions precedent to action—Pleading—During negotiations for the sale of two standard stokers for use in the defendant's brewery, warranted to give certain results in the saving of fuel, etc., a contract was submitted to the defendant in which a particular test called the evaporation test was specified to be applied to determine whether the stokers would produce the guaranteed results.—The defendant refused to be bound by the specified test, and the proviso was struck out and the contract signed, making a proviso for the test as follows: "To determine that these guarantees are lived up to and the same quality of coal is used and the same load is being carried, tests are to be made under ordinary running conditions on hand and stoker fired boilers."—The stokers were installed and defendant refused to pay for them, alleging that they did not fulfil the guarantee.—Plaintiffs brought this action declaring on the common counts for goods sold and delivered, etc.—The pleas were never indebted, and a special plea that the stokers did not fulfil the guarantees.—Defendant made two tests without reference to the plaintiffs and the result according to these was that no such economy in fuel was effected as the contract required.—He refused to allow the plaintiffs to make the evaporation test, claiming that test was excluded from the contract.—In answer to questions the jury found that the defendant's tests were not fair and proper under the contract, and that the tests that the plaintiffs apply were better tests than the defendant's, and that no proper tests were ever made.—In answer to other questions they say they are unable to answer whether the test spoken of in the contract was to be by evaporation, as claimed by the plaintiffs, or by weighing the coal, as claimed by the defendant.—On these answers a verdict was entered for the defendant.—*Held* (*per* Tuck C. J., Landry and Barker JJ.), that the verdict was improperly entered; that while all the findings are in favor of the plaintiffs, no verdict can be entered for them on the pleadings, as there is no allegation of waiver or proof that the conditions precedent to payment had been performed, and there must be a new trial.—*Held* (*per* Hanington J.), that under the contract as executed it was open to the parties to apply any efficient test, and the proper question for the jury was "was the test which the plaintiffs intended to apply

an efficient test to determine the results guaranteed," and, as this question was not left, the case was not fully tried and it should be sent down for another trial.—*Held*, (*per* McLeod J.), that the conditions precedent were not shown to have been performed, and no waiver of performance having been alleged the plaintiffs could not recover on the pleadings and the verdict should stand. *Underfeed Stoker Co. Ltd.* v. *Ready*, 37, p. 505.

(Appealed but settled out of Court.)

3. Conditional Sale of Chattels.

Agreement whether promissory note or not—A writing in the form of a promissory note, but which had the conditions attached that it was to become payable forthwith if promisor disposed of his land or personal property, and that the title of the goods for which the note was given as security should remain in the payee until the note was paid and that the goods in the meantime were only on hire, etc., was held to be a special agreement and not a promissory note. *Prescott* v. *Garland*, 34, p. 291.

Authority to resell and give title—The plaintiffs, who were the owners of a quantity of logs, upon being asked by the defendant if they were for sale replied in the negative, adding that they had already been sold to one M.—The defendant thereupon bought a portion of said logs from M. who was in possession and had all the *indicia* of title to the same, and paid M. in cash for them.—As a matter of fact the sale to M. was subject to the condition that no property in the logs was to vest in M. until they were paid for, of which condition the defendant had no knowledge.—In an action of trover brought to recover the value of the logs so purchased from M. by the defendant, *held* (*per* Tuck C. J., Hanington and Barker JJ., Landry J. dissenting), that the plaintiffs were estopped by their declaration as to the sale to M. from setting up that the title was not in him, and that a verdict ought therefore to be entered for the defendant.—*Held* (*per* McLeod J.), that the evidence showed an intention on the part of the plaintiff to abandon the conditional element of their contract with M. and that he was clothed by the plaintiffs with authority to sell the logs accounting to them for the proceeds.—*Held* (*per* Gregory J.), that the circumstances were such that the defendant could not reasonably have had any doubt as to the right of M. to sell, and as the plaintiffs had put M. in a position to practise a fraud on the defendant, they must suffer the loss.—Further, it being apparent from the evidence that the plaintiffs intended that M. should dispose of the logs in the usual course of his business, he of necessity had an implied authority to sell and pass the title. *People's Bank of Halifax* v. *Estey*, 36 N. B. R., p. 169; 34 S. C. R., p. 429.

Conditional sale prior to 1903—License to take possession—Plaintiffs in 1898 agreed to supply M. & S. with goods under an agreement in writing that such goods should remain the plaintiffs' property, and that should the plaintiffs at any time consider that the business of M. & S. was not being conducted in a proper way or to the plaintiff's satisfaction, plaintiffs should be "at liberty to take possession of our stock, book debts and other assets, and dispose of the same, and after payment in full of any amount then owing to you by us, whether due or to become due, the balance of the proceeds shall be handed to us."—The agreement was not filed under the Bills of Sale Act, C. S. 1903, c. 142.—Goods were supplied from time to time under the agreement.—On Feburary 17, 1905, the business not being conducted to the plaintiff's satisfaction, and M. & S. being insolvent, plaintiffs entered the store of M. & S. by force and took possession of all the stock and effects on the premises, and of the books of account.—The stock seized was made up of goods supplied by the plaintiffs of the value of $5,000, and of goods supplied by other unpaid creditors of the value of upwards of $10,000.—The account books showed debts due M. & S. of the estimated value of $2,000.—Later on the same day M. & S. made an assignment for the general benefit of their creditors.—*Held*. (1) that plaintiffs were not limited to taking possession of goods supplied by themselves; (2) that as to the goods supplied by the plaintiffs as the property therein did not pass to M. & S., the agreement was not within the Bills of Sale Act, and that as to goods not supplied by plaintiffs as the agreement was not intended to operate as a mortgage but as a license to take possession, the Act did not apply; (3) that while the license in the agreement to take possession of the book debts did not amount to an assignment, and the powers given by it had not been exercised by notice to the debtors, plaintiffs were nevertheless entitled to them as against M. & S.'s assignees, *The Gault Brothers Co. Ltd.* v. *Morrell*, 3 Eq., p. 453.

Failure to file lien—Chattel affixed to realty—Mortgage for valuable consideration without notice—The Port Elgin Woollen Company purchased from the plaintiffs, on the instalment plan, a steam engine under an agreement in writing which provided that it should not become the property of the vendee until the payment of all the instalments, and should be removable by the vendor on failure of the vendee to pay as agreed.—The engine was affixed to the freehold of the vendee by bolts and screws to iron plates embedded in concrete to prevent it from rocking and shifting, and might have been removed at any time without injury to the freehold.—It was used for driving the machinery in the factory of the vendee.—Default having been made in the payment of the instalments, the engine was claimed by the vendor and also by the defendant, a mortgagee of the land on which

the mills were situate and all the mill plant, engines, etc., who took his mortgage after the engine had been installed and without notice of the plaintiff's claim, the agreement not having been registered. The mortgage was foreclosed by the defendant and the mortgaged property was bought in by him under a sale by a referee in equity for an amount less than the mortgage debt.—The plaintiffs were not parties to foreclosure proceedings, but were aware of the pendency of the same.—No report of the sale or motion to confirm was made.—*Held* (*per* Tuck C. J., Hanington, Landry, McLeod and Gregory JJ.), that the engine was sufficiently annexed to the land to become part of the freehold, and passed to the defendant under his mortgage; that by the mortgage to the defendant the engine passed as part of the realty, and on his taking possession, if not by virtue of the mortgage alone, all right in the plaintiffs to retake it was put an end to; that the act 62 Vict., c. 12, s. 8, sub-s. 2, which provides that where goods or chattels are sold on the instalment or hire and purchase system, and the property is not to pass until payment, the right of the owner shall not be affected by such goods or chattels being affixed to the realty, does not apply to past transactions where the goods had been affixed to, and become part of the realty before the passing of the act. *The Goldie & McCulloch Co. Ltd.* v. *Hewson*, 35, p. 349.

Failure to file lien—Machinery affixed to realty—W. and C. each supplied machinery for a new mill under agreements that title should remain in the vendors until full payment was made, but these agreements were never filed under the Conditional Sales Act, C. S. 1903, c. 143, and the mortgagees had no notice of them.—The machinery was installed and affixed to the realty.—The realty was subject to two mortgages, one a trust mortgage in favor of bondholders, the other having been given to the vendors of the property to secure part of the purchase price.—It had further been agreed with the vendors that the mill on the property at the time of sale might be torn down on condition that another be erected and equipped with machinery affixed to the realty, free of all liens.—The company operating and owning the mill having gone into liquidation, W. and C. applied to remove their machinery.—*Held* (*per* Barker, C. J., McLeod, Barry and McKeown JJ., Landry J. dubitante), that section 8 of the Conditional Sales Act applies only when the agreements have been filed under section 2 and the machinery in this case had become part of the realty and was covered by the mortgages.—*Held* (*per* White J.), section 8 is not limited in its application to agreements filed under section 2 and the machinery did not become part of the realty, but the mortgagees are entitled thereto as against W. and C. because they are mortgagees for valuable consideration under the agreement whereby machinery was to be affixed to the realty and pass to them free from all liens. *Harrison, Trustee, Etc.* v. *The Nepisiguit Lumber Co. Ltd. in Liquidation et al*, 41, p. 1.

Infant, Default in payment by—An infant can not maintain trespass for taking property held by him under a contract of sale with the defendant which stipulated that the property should not pass until payment, where there has been a default in payment of part of the purchase money. *McGaw* v. *Fisk*, 38, p. 354.

Lien released by taking judgment—A. purchased goods from B. and gave an acceptance for the price.—Across the end of the acceptance was printed the usual lien clause reserving property in the vendor till payment.—The acceptance was not paid at maturity, and subsequent to maturity A. sold the goods to C. who purchased for value without notice.—After the sale to C., B. sued A. on his acceptance, recovered judgment and placed a *fi. fa.* in the sheriff's hands, but nothing was realized on the execution.—In an action by B. against C. for conversion, *held*, that the recovery of judgment by B. against A. on the acceptance was an election to treat the contract completed, and passed the property, and that B. could not recover against C. *Purtle* v. *Heney*, 33, p. 607.

"Purchases"—Whether a conditional sale was a purchase within the terms of a guarantee—The defendants wrote the plaintiff the following letter: "As the C. Co. of W., New Brunswick, desires to make purchases from you, therefore to open a line of credit with you, we declare that in consideration of your complying with their request we hereby bind and oblige ourselves, jointly and severally, as principal debtors, with them towards you to the amount of $1,000 for purchases they may now make from you at any time, as also for any notes given in settlement thereof by them or for any balance due thereon to the extent of the aforesaid sum of $1,000.—In the agreement for sale it was stipulated that the "title, ownership or right of possession" of the goods should remain with the plaintiff until fully paid for in money.—It was understood, however, that the C. Co. should sell the goods and could give a good title to them. —*Held*, that this was a sale within the guarantee and that the C. Co. was not acting as the agent of the plaintiff and the fact that the agreement of sale had not been filed under the Act respecting Conditional Sales of Chattels, C. S. 1903, c. 143, was no defence to an action on the guarantee, the defendants not having been damaged by failure to file. *E. N. Heney & Co. Ltd.* v. *Birmingham et al*, 39, p. 336.

Return of the goods, Right to—The vendor has the right to specific performance of the return of the goods, even if the vendee has a claim for damages for delay in delivery and for warranty. *Lame* v. *Guerette*, 1 Eq., p. 199.

4. Contract.

Locus of—The plaintiff company sold absolutely to the defendant, a corporation within New Brunswick, at Bloomfield in the state of New Jersey two car loads of its Empire Cream Separators to be delivered F. O. B. at Sussex and Saint John to be paid for by promissory notes to be given on delivery.—*Held*, that this was a doing of business in New Brunswick. *The Empire Cream Separator Co. Ltd.* v. *The Maritime Dairy Co. Ltd.*, 38, p. 309.

Offer to extend contract—Delay in accepting or exercising option—The plaintiffs and defendant on May 30th, 1902, entered into a written contract by which the defendant was to ship 20,000 box shooks from St. John, N. B., to Liverpool, England, as quickly as possible after receipt of specifications and "buyers to have the option to extend the contract for 12 monthly shipments of 20,000 to 30,000 boxes after receipt of this sample shipment."—The 20,000 shooks were shipped in two cargoes, arriving at Liverpool on September 9th and October 3rd or 4th respectively.—On November 8th the plaintiffs wrote asking for the 12 monthly shipments.—The defendant on November 12th replied declining to fill the order on the ground that there was an unreasonable delay on the part of the plaintiffs in exercising their option.—*Held*, reversing the judgment of Landry J., that this was an absolute contract to deliver the monthly shipments if requested to do so, and in the absence of notice or some other action by the defendant the plaintiffs were not bound to exercise the option within a reasonable time. *Jones et al* v. *Cushing*, 39, p. 244. —Confirmed S. C. of C.

7. Delivery.

Time of delivery when order silent—Where a written order for goods is silent as to time of delivery, delivery within a reasonable time is sufficient. *Moore et al* v. *Canadian Fairbanks Co. Ltd.*, 41, p. 485.

8. Property Passing.

Conditional sale perfected by taking judgment—A. purchased goods from B. and gave an acceptance for the price.—Across the end of the acceptance was printed the usual lien clause reserving property in the vendor till payment.—The acceptance was not paid at maturity, and subsequent to maturity A. sold the goods to C. who purchased for value without notice.—After the sale to C., B. sued A. on his acceptance recovered judgment and placed a *fi. fa.* in the sheriff's hands, but nothing was realized on the execution.—In an action by B. against C. for conversion, *held*, that the recovery of judgment by B. against A. on the acceptance was an election to treat the contract completed, and passed the property, and that B. could not recover against C. *Purtle* v. *Heney*, 33, p. 607.

When property passes—Option or sale—W. delivered a horse to P., receiving in exchange the following agreement in writing signed by P.: "January 8th, 1909.—Twenty-five days after date I promise to pay to the order of W. the sum of $55.00 for value received or return with $5.00 hire."—P. kept the horse until February 15th following, when he assigned it with other property to secure a loan of $600 repayable in one year. —In an action by W. against the assignee for conversion, *held*, (1) that the title to the horse passed on delivery to P. with an option in him to return at the expiry of twenty-five days; (2) even if the agreement was one of "sale or return" the retention of the horse beyond twenty-five days would operate to pass the title to P. and in either case W. could not recover in this action. *Ward* v. *Cormier*, 39, p. 567.

13. Warranty.

Action on warranty—Rejection of evidence—Order 39, r. 9—In an action in a County Court for breach of warranty of the soundness of a horse, tried with a jury, upon a plea of the general issue, the trial judge rejected evidence of one witness tending to show that the horse was sound prior to the time of the sale.—After verdict for the plaintiff the County Court judge refused a new trial.—On appeal, *held*, the evidence was admissible but there was no substantial wrong as the defendant admitted that when he sold the horse he knew it was subject to the attacks which eventually caused its death, though he did not believe them to be serious. *Tompkins* v. *Hale*, 41, p. 269.

Authority to give warranty—An agent employed to sell farm machinery, carriages and harness, who, during the term of his agency—a period of about two and a half years—sold two or three horses for his principal, is not authorized on a sale of a horse for his principal to give a warranty, and a verdict founded on an implied authority to give the alleged warranty was set aside. *Gallant* v. *The Lounsbury Co. Ltd.*, 44, p. 225.

Breach of warranty — Remedy — Absence of fraud—Where a chattel sold with a warranty is delivered as agreed upon and is not up to the warranty, that fact, in the absence of fraud, affords no grounds for rescinding the contract, but the remedy is for breach of warranty. *Finn* v. *Brown*, 35, p. 335.

Evidence of warranty—The fact whether a vendor assumed to state a fact of which the buyer is ignorant or merely to state an opinion upon a matter of which he had not special knowledge, may be a criterion of value in coming to a decision whether or not a warranty was intended, but it is not a decisive test, and the question whether the

parties intended the affirmation to form part of the contract can only be deduced from the totality of the evidence, and the presence or absence of special features cannot as a matter of law be conclusive of the intention of the parties. *Robertson* v. *Norton*, 44, p. 49.

Implied warranty of specific article—There is no implied warranty of fitness of a specific ascertained article not manufactured by the seller sold for a specific purpose if the buyer has inspected the article before purchase.—In the absence of fraudulent concealment the maxim *caveat emptor* applies. *Robertson* v. *Norton*, 44, p. 49.

Privity of contract — Promissory note —Partial failure of consideration—Plaintiff sold a mill with a warranty to a company of which the defendants were directors, and took a promissory note made by the company and endorsed by the defendants in part payment.—Subsequently defendants gave their individual note to the plaintiff in renewal of the company note.—In an action upon this renewal note, *held*, there was no privity of contract between the plaintiff and defendants as to the sale and warranty and therefore defendants could not set-off or counterclaim for a breach of the warranty not amounting to failure of consideration. *Allis-Chalmers-Bullock Ltd.* v. *Hutchings*, 41, p. 444.

Returning chattel for breach of warranty—While the rule that in absence of agreement the purchaser of a specific chattel cannot return it on breach of warranty may not apply to a sale providing that the property shall not pass until payment of the purchase price, it will apply in a case where the vendee in addition to keeping the chattel a longer time than reasonable or necessary for trial, has exercised the dominion of an owner over it, as by giving a chattel mortgage of it to the vendor. *Petropolous* v. *F. E. Williams Co. Ltd.*, 3 Eq., p. 346.

Sale for specific purpose—Caveat emptor—In a sale of a specific ascertained article by one who is not a producer or manufacturer, for a particular purpose, known to the vendor at the time of sale, there is no implied warranty on the part of the vendor that the article is reasonably fit for the purpose for which it is intended, if the vendee has inspected, or has had the opportunity of inspecting it before purchasing.—(*Per* Landry, Barker, McLeod and Gregory JJ., Tuck C. J. dissenting and Hanington J. dubitante.) *Jordan et al* v. *Leonard et al*, 36, p. 518.

SCHOOLS

Debenture issued by school trustees—A debenture of the defendants, payable to bearer, sealed with their corporate seal and signed by their chairman and secretary, was allowed to get into circulation without the authority or knowledge of the defendants, and without their receiving any value therefor.—It was finally purchased by the plaintiff before maturity, who took it in good faith and gave full market value for it.—In an action brought upon two of the interest coupons attached to the debenture, the learned judge who tried the cause asked the jury the two following questions *inter alia*, which were answered in the affirmative: "Did the bond come into the hands of the plaintiff as an innocent holder for value through the carelessness and neglect of the defendants, or those of their officers whose duty it was to have the bonds properly executed and issued, and in whose hands or custody the bonds should be detained until delivered to *bona fide* purchasers?"—"Do you find that the board of school trustees or their officers, were guilty of such negligence in connection with this bond as that in your opinion it would be equitable and unjust that the defendants should be permitted as against the plaintiff to set up a defence that the bond was not duly executed, or the issue thereof authorized by the board?"—A verdict was thereupon entered for the plaintiff.—*Held*, that the verdict was rightly so entered. *Robinson* v. *The Board of School Trustees of Saint John*, 34, p. 503.

Mechanics lien on school building—Property held by trustees for school purposes under the provisions of the Schools' Act, C. S. 1903, c. 50, is not Crown property and therefore not exempt from the operation of the Mechanics' Lien Act, although such property is not liable to be sold under execution.—An order for the payment of money under the Mechanics' Lien Act can be enforced in the same way as a judgment by compelling the school trustees to make an assessment. *Trustees School District No. 8, Parish of Havelock* v. *Connelly et al*, 41, p. 374.

Right to attend school—M. owning and working a farm in School District No. 10 moved his family to District No. 8 and took up his residence there, although occasionally spending a part of his time at the farm.—The trustees of District No. 8 refused to allow his children to attend school, although the applicant had notified them of his change of residence, and had asked to be assessed for school purposes.—*Held*, that a mandamus should issue to compel the trustees to allow his children to attend school. *Ex parte Miller*, 34, p. 318.

Sectarian education—It is not a violation of the provisions of the Common Schools' Act of New Brunswick against sectarian education in the public schools for school trustees to employ as teachers sisters of a religious order of the Roman Catholic Church and permit them while teaching to wear the garb of their order.—The fact that such teachers contribute all their earnings beyond what they use for their support to the treasury of their order for religious purposes does not affect their right to be employed in the public schools of the province.—The holding in a school room after and before

school hours of Roman Catholic religious exercises by a teacher who is a sister of a religious order of the Roman Catholic Church for the benefit of Roman Catholic scholars does not render such school sectarian. *Rogers et al* v. *Trustees School District No. 2, Bathurst*, 1 Eq., p. 266.

Teacher — Contract — Rate of payment — Plaintiff by parol agreed with defendants in January 1902, to teach a school, beginning February 1st, for the remainder of the school term then current. —On February 4th a written contract was signed by the parties providing that plaintiff should teach the unexpired portion of the term ending June 30th, 1902, for $75.00. —The term contained 121 days of which plaintiff's contract covered 100.—Clause 4 provided "that for a term or any part of a school year the teacher is to receive such proportion of the salary stated in the contract as the number of days actually taught bears to the whole number of teaching days in the unexpired portion of the term." —The regulations of the Board of Education, which have the force of law, provide that each teacher before entering on duty shall make a written agreement with the trustees according to a prescribed form.—In the 4th clause the prescribed form says "for a term or any part of a school year the teacher is to receive such a portion of the yearly salary stated in the contract, as the number of days actually taught bears to the whole number of teaching days in the school year." —Clause 5 provides that "in default of written notice the contract shall continue in force from school year to school year."—Plaintiff taught the unexpired portion of the term and was paid the agreed salary and continued teaching the next term which began on July 1st and ended December 31st following, but which in consequence of holidays under the regulations of the board of education, contained only 92 teaching days. —The returns sent to the chief superintendent by the teacher and trustees, as required by the school law, stated the salary to be $180 per year.—These returns were sworn to by two of the trustees.—The trustees refused to pay the plaintiff for the short term more than $69.00, claiming she was only entitled to the same rate per day as the first term, viz.: 75c. per day.—In an action in the York County Court for the balance of salary claimed, evidence of the parol agreement of January, 1902, and the school returns were admitted to explain the written contract in its application to the second term upon the ground that the terms were ambiguous because of the use of the expression "the unexpired portion of the term" when it came to be applied to the subsequent term under the operation of clause 5.—And the County Court judge, reading the written agreement and the parol evidence together, held that the plaintiff was entitled to $90 for the short term.—*Held* (*per* Tuck C. J., Hanington and McLeod JJ., Barker J. taking no part, Landry and Gregory JJ. dissenting), that the finding of the County Court judge was right and the appeal should be dismissed. —*Held* (*per* Landry and Gregory JJ.), that the plaintiff was only entitled to 75c. per day for the days actually taught under the extended term.—That there was no ambiguity and evidence of the parol agreement, and the school returns should not have been received. *Trustees of School District No. 9* v. *Haines*, 36, p. 617.

Teacher, Contract with unlicensed—Ultra vires—The plaintiff, an unlicensed teacher, was employed to teach in a school district for one term under a written contract purporting to be made by the defendants, who are school trustees incorporated under the Schools' Act, C. S. 1903, c. 50.—The contract was signed by two out of the three trustees but the corporate seal was not affixed to it and no meeting of the trustees was held to authorize the contract.—Under this contract the plaintiff taught for one full term.—In an action to recover the amount agreed to be paid to her, *held*, (1) that the contract was made by the school trustees as a corporation and not as individuals; (2) the contract is unenforceable because under the Schools' Act, C. S. 1903 c. 50, it is *ultra vires* of the school trustees to employ an unlicensed teacher; (3) the defendants are not liable on a *quantum meruit* for the services of the plaintiff because (a) the employment of the plaintiff was *ultra vires* being outside the scope of their duties and powers and no tax could be assessed to raise money for the payment of an unlicensed teacher, and (b) there was no completed work which the trustees could accept or reject, i. e. restore. *Trustees School District No. 7½* v. *Yerxa*, 40 p. 351.

Trustees a corporate body—School trustees appointed under the provisions of C. S. c. 65 are a corporate body and must act together and as a board; therefore, a notice of dismissal signed by two out of three of them, of a teacher engaged under a written contract, which notice was not the result of deliberation in their corporate capacity, was held insufficient. *Robertson* v. *School Trustees of Durham*, 34, p. 103.

SHERIFF AND BAILIFF

Deputy sheriff — Residence — Taxes — The deputy sheriff of York county is also county gaoler, and as such occupies apartments with his wife in the county gaol at Fredericton.—He made affidavit that he had been for thirty years and still was an inhabitant and resident of the parish of Q. where he owns a farm and pays taxes, including a poll tax, and that he was in Fredericton only to discharge his duties.—Upon an application to quash an assessment of the city of Fredericton against the deputy sheriff, on the ground that he was a non-resident, *held*, he was in fact a resident of the city of Fredericton and liable to be assessed as such under the City of Fredericton Assessment Act, 1907. *R.* v. *Assessors Fredericton, Ex parte Timmins*, 41, p. 577.

Fees—Where the attachments under "The Woodmen's Lien Act, 1894," for three claims are served by the sheriff at the same time and place, the sheriff is entitled to full fees, including mileage, on each writ. *Murchie et al* v. *Fraser et al*, 36, p. 161.

Jury—Disqualification of sheriff—See *R.* v. *McGuire*, 34, p. 430.

Money paid to sheriff, Interest upon—Money paid to a sheriff by the defendant upon arrest for debt under the provisions of C. S. 1903, c. 30, s. 5, is held by the sheriff as a statutory trustee and the interest, if any, upon such money must be accounted for by him in the same way as the principal. *Mc Kane* v. *O'Brien*, 40, p. 392.

Residence for purposes of taxation—Sheriffs are required by law to reside in the shiretown of their county unless otherwise permitted under C. S. 1903, c. 60, s. 8.—The sheriff of York County has an office in the city of Fredericton, the shiretown, where he spends a considerable portion of his time in the discharge of his duties, boarding at the county gaol when there.—His wife and family reside at his farm in the parish of S. where the sheriff also spends a large part of his time.—He pays taxes in the parish of S. including poll tax, and swore that his residence and domicile were there.—For two years he paid without objection taxes levied on him as a resident in the city of Fredericton, and in his affidavits of service he described himself as "of the city of Fredericton.' —Upon an application to quash an assessment of the city of Fredericton against the sheriff, on the ground that he was a non-resident, *held*, that the sheriff was in fact a resident of the city of Fredericton and liable to be assessed as such under the City of Fredericton Assessment Act, 1907.—*Held*, also, that the sheriff if a non-resident, does not come within the exemption of s. 3 (11) of the City of Fredericton Assessment Act, 1907, extended to non-residents, "employed in the city of Fredericton in government or county offices whose duties are necessarily performed in Fredericton." *R.* v. *Assessors Fredericton, Ex parte Howe*, 41, p. 564.

Sheriff's deed, Evidence of—Quaere: Is it necessary for a person claiming title under a sheriff's deed to give any evidence of the execution under which levy and sale took place? *Ross* v. *Adams*, 34, p. 158.

See EXECUTION.

SHIPPING AND NAVIGATION

Negligence—*See* NEGLIGENCE.

Accounts between co-owners—The jurisdiction of the Court in Equity in a suit for account between co-owners of a ship has not been taken away by Act 54-55 Vict., c. 29 (D), which confers a like jurisdiction upon the Exchequer Court in Admiralty; any discretion the Court of Equity may have as to the exercise of its jurisdiction must depend upon the circumstances of each suit. *Penery* v. *Hanson*, 2 Eq., p. 233.

Agreement re rates—An agreement between steamship companies fixing rates for freight and passengers for one season is not void as against public policy if the rates are proper and reasonable and the contract in fact beneficial to the public. *Saint John River Steamship Co. Ltd.* v. *The Star Line Steamship Co.*, 40, p. 405.

Charter party—Notice "ready to receive cargo"—Customary despatch—By charter party a vessel was to proceed to the port of St. John and load lumber; the vessel was to haul to loading berth as required by charterer; cargo was to be furnished at customary despatch; lay days were to commence from the time the vessel was ready to receive cargo, and written notice was given to the charterer; bills of lading were to be signed as presented without prejudice to the charter party, and vessel was to have an absolute lien on cargo for demurrage.—On arrival the vessel proceeded to the ballast wharf when the master was notified by charterer that cargo would be furnished at the government wharf.—On August 28th, the master mailed a notice to the charterer that vessel was at loading berth and would be ready to receive cargo on the 29th.—When notice was sent vessel was not at loading berth.—The cargo was brought to the berth by the Intercolonial railway, but owing to pressure of traffic the railway was unable to commence forwarding cargo until a number of days after vessel was at berth, or to forward cargo thereafter on a number of days, and during which no loading took place.—A claim for demurrage was made by the master, and he refused to sign the bills of lading until the claim was settled or notice thereof was inserted in bills of lading. —An injunction having been obtained restraining the vessel from proceeding with the cargo to sea it was agreed that all questions in dispute between the shipowner and charterer should be determined in the injunction suit.—*Held*, (1) the notice to be given is of an existing fact—that the vessel is at her berth and is there ready to receive her cargo; and until that is the fact and the notice of it given lay days do not commence; (2) the evidence failed to establish that there was in the lumber trade at Saint John a recognized custom to furnish cargo at any particular rate; (3) that the words "customary despatch" mean the usual and customary rate at which under ordinary circumstances cargoes of the description mentioned in the charter-party are delivered to the ship at the particular port at which she is loading.—In this case that rate was found to be 35M per weather-working day, any substantial work to count as half a day; (4) that delay in furnishing cargo was to be borne by charterer; (5) that Master should have signed bills of lading and that the injunction was properly granted. *Cushing* v. *McLeod*, 2 Eq., p. 63.

Charter party—"Full and complete cargo"—Detention—The defendant chartered from the plaintiff the steamer "Helen" of 635 tons net register, to carry a cargo of resawn yellow pine lumber from Florida to Saint John.—The plaintiff agreed that the ship should be tight, staunch, strong and in every way fitted for the voyage and to receive on board a full and complete cargo, both under and upon deck of resawn yellow pine lumber; and defendant agreed to furnish such a cargo.—The defendant tendered for shipment a sufficient quantity of resawn yellow pine lumber to furnish a full and complete cagro, but a considerable portion of it was of such lengths that it could not be stowed owing to the fact that the steamer had been constructed as a fruit carrier; she had to sail with considerable broken stowage. —This action was brought to recover dead freight and damages for detention at the ports of loading and of discharge.—On the trial before McKeown J. without a jury it was held that the charterer, having tendered for shipment a sufficient quantity of the class of freight specified in the charter party, of a character and dimensions commonly used and accepted at the port of loading and freighted by vessels of the tonnage of the "Helen" to fill the steamer to her full capacity, was not liable for dead freight, although she could have carried a full cargo of lengths suitable to her construction; that the delay in loading and discharging was caused by the steamer being constructed and equipped in a manner not reasonably fit for the trade for which she was chartered, and the charterer was not liable on the claim for demurrage.—*Held*, on appeal, reversing the judgment of McKeown J. (*per* McLeod C. J. and Grimmer J., Barry J. dissenting), that the steamer chartered being capable of receiving a full cargo of resawn yellow pine lumber of suitable lengths, the charterer was bound under the contract to furnish such a cargo and was liable on the claim for dead freight for not having done so; that the delay at the port of loading was caused by the charterer having supplied a cargo of unsuitable lengths, and at the point of discharge by the charterer not having provided a suitable berth from which the steamer could discharge on the dock within reach of her own tackle as contracted for, and defendant was liable for demurrage at both ports.—*Held* (*per* Barry J.), that the trial judge having found on sufficient evidence that the steamer "Helen" was not reasonably fit, owing to her construction and equipment, of loading a full and complete cargo of lumber of sizes and lengths recognized at the port of loading as within the class of resawn yellow pine lumber freighted from that port in ships of a like tonnage as the "Helen", and that the charterer had tendered such a cargo for shipment, and that the delay at both the port of loading and discharge was caused by the steamer being unable to load a full cargo of the class of freight which she was chartered to carry, the appeal should be dismissed.—*Semble*, if a consignee is bound to begin to take delivery on a broken day under a charter providing that the lay days for loading and discharging shall commence from the time that the Master reports himself ready to receive or discharge cargo. *Duckett* v. *Likely*, 44, p. 12.

McKeown J. upheld in Supreme Court of Canada.

Customary despatch—By charter party a vessel was to proceed to the port of St. John and load lumber: the vessel was to haul to loading berth as required by charterer; cargo was to be furnished at customary despatch.—*Held*, that the words "customary despatch" mean the usual and customary rate at which under ordinary circumstances cargoes of the description mentioned in the charter party are delivered to the ship at the particular port at which she is loading. —In this case that rate was found to be 35M per weather-working day, any substantial work to count as half a day. *Cushing* v. *McLeod*, 2 Eq., p. 63.

Custom of port—Lumber trade at St. John—See *Cushing* v. *McLeod*, 2 Eq., p. 63.

Custom of port—The fact that the berths at the port of St. John are under the control of the Harbor Master solely, is no answer to a claim for damages for not receiving a berth according to express covenant in the charter party. *Duckett* v. *Likely*, 44, p. 12.

Harboring deserters—Seamen's Act, R. S. C., c. 74—The Seamen's Act (R. S. C., c. 74, s. 104) is not *ultra vires* the Canadian Parliament and a conviction under section 104 for harboring seamen knowing them to be deserters engaged to serve on a foreign ship, then in a Canadian port, made against a resident of Canada on the information of a person also a resident, the party charged or the informant not being in any way connected with the foreign ship is good.—It is not necessary that the prosecutor should obtain the consent of the consular officer representing the nationality of the ship, under section 129. *R.* v. *Martin*, 36, p. 448.

Lay days—The notice to be given that vessel is at loading berth and ready to receive cargo is of an existing fact—that the vessel is at her berth and is there ready to receive her cargo; and until that is the fact and the notice of it given, lay days do not commence. *Cushing* v. *McLeod*, 2 Eq., p. 63.

Semble: If a consignee is bound to begin to take delivery on a broken day under a charter providing that the lay days for loading and discharging shall commence from the time that the Master reports himself ready to receive or discharge cargo. *Duckett* v. *Likely*, 44, p. 12.

Mortgagee in possession—The mortgagee of a vessel took possession of her and transferred her to a clerk in his employ, who immediately re-transferred her to the

mortgagee.—The consideration expressed in both instances was $2,000.—The mortgagee retained the management and possession of the vessel until her loss, without making an effort to sell her, though she was not paying expenses, and was depreciating in value from age, and the market demand for vessels of her class was declining.—In a suit to redeem a mortgage on land given as collateral security with the mortgage on the vessel, *held*, that there had not been a valid exercise of the power of sale vested in the mortgagee, and that he was chargeable with the value of the vessel at the time he took possession.—In the above suit a balance was found due the mortgagor by the mortgagee.—*Held*, that the mortgagee should pay the costs of the suit. *Kennedy* v. *Nealis et al*, 1 Eq., p. 455.

Ownership, Proof of—An extract purporting to be taken from the Registry Book of the Registrar of Shipping, Custom House, Glasgow, dated December 9, 1915, certifying the names, residence and description of the owners of the "Marina" to be "The Donaldson Line, Limited, of 58 Bothwell Street, Glasgow," and further certifying the extract to be a true extract from the Registrar Book in the custody of the person certifying made pursuant to sections 64 and 695 of the Merchant Shipping Act, 1894 (Imp.) and signed "C. F. Tallach, Asst. Registrar" is proper evidence in proof of ownership in an action in this province for damages for an accident causing the death of an employee under section 39 of the Evidence Act, C. S. 1903, c. 127, providing for proof of register of or declaration respecting British ships by production of the original or an examined or certified copy.—*Semble*, that the certificate is admissible under the Merchant Shipping Act, 1894, 57 and 58 Vict. (Imp.), c 60, ss. 64 and 695.—Merely proving that a vessel was managed by persons other than the registered owners does not of itself rebut the presumption that it was managed for the registered owners as the owners' agents. *Boddington Adm.* v. *Donaldson et al*, 44, p. 290.

Pilotage dues wrongfully collected—Barges used in transporting coal from Parrsboro to Saint John, registered as schooners, having a crew on board and masts rigged with sails so as to be capable under favorable circumstances of being navigated by sailing, but which are in fact navigated by being towed by tugs, are exempt from pilotage dues under section 59 of the Pilotage Act (R. S. C., c. 80) as "ships propelled wholly or in part by steam."—The pilot commissioners are liable in their corporate capacity in an action for money had and received for pilotage dues illegally collected. —Payment of such dues, under protest, is not a voluntary payment, and may be sued for, though they have been paid over to the pilots, and the commissioners have no funds or resources to satisfy a judgment. *The Cumberland Railway and Coal Co.* v. *The Saint John Pilot Commissioners.*, 37 N. B. R., p. 406; 38 S. C. R., p. 169.

Pilots—The pilots for the district of Miramichi having resigned, the defendants were appointed pilots for the district by the pilotage commissioners.—An injunction was sought to restrain the defendants from acting as pilots under licenses granted to them by the commissioners, on the grounds: (1) that their appointments were not made by by-law confirmed by the Governor General in Council, and published in the Gazette as required by the Pilotage Act, R. S. C., c. 80, s. 15 (d); (2) that under that Act the commissioners fixed by regulation a standard of qualification for a pilot, and that the defendants were not examined as to their competency; (3) that the defendants were not appointed at a regularly called meeting of the commissioners, or by the commissioners acting together as a body.—A pilot appointed under the Act is appointed during good behaviour for a term not less than two years.—*Held*, that the office of pilot being a public and substantive independent office, and its source being immediately, if not mediately, from the Crown, and as the objections related to the validity of the defendants' appointments, and as there was no pretence that the appointments were made colorably and not in good faith, the remedy if any was not by injunction, but by information in the nature of a *quo warranto*. *Attorney General* v. *Miller*, 2 Eq., p. 28.

Pilots—Use of boat "attached" to pilot boat—Under the provisions of the Canada Shipping Act, R. S. C., 1906, c. 113, and the by-laws of the St. John Pilot Commissioners, a licensed pilot at the port of St. John may speak vessels from a gasoline launch, or from a row boat used in connection with the launch, provided that such launch and row boat are attached to a licensed pilot boat.—Such launch may be "attached" to a licensed pilot boat, although used by pilots to speak vessels independently of the pilot boat and at a distance of several miles from it.—*Held* (*per* Landry and Barry JJ.), a licensed pilot may speak vessels from a gasoline launch or any other boat, flying the pilot signals requires by s. 502 of the Canada Shipping Act, even though such launch or boat is not attached to a licensed pilot boat. *Spears* v. *St. John Pilot Commissioners*, 39, p. 495.

Seaman's expenses under Merchant Shipping Act, 1854, s. 213—"Owner for time being"—Evidence—By section 213 of the Merchant Shipping Act, 1854, it is provided that the Board of Trade, in the name of Her Majesty, may sue for and recover from the person who is the owner of the ship for the time being the expenses of any seaman discharged or left behind at any place out of the United Kingdom without full compliance on the part of the master with all the provisions in that behalf in the Act contained, who becomes distressed and is relieved under the provisions of the Act. —Section 227 of the same Act provides that if any such expenses in respect of the illness,

injury, or hurt, of any seaman as are to be borne by the owner are paid by any consular officer or other person on behalf of Her Majesty, etc., etc., in any proceeding for the recovery thereof, the production of a certificate of the facts signed by such officer or other person shall be sufficient proof that the said expenses were duly paid by such consular officer or other person.—And by section 107 thereof it is provided that every register of a declaration made in pursuance of the second part of the Act may be proved in any court of justice, etc., etc., by a copy thereof purporting to be certified under the hand of the registrar or other person having charge of the original.—In an action brought before the Police Magistrate of the city of Saint John to recover hospital fees, board and cost of conveying from Hong Kong to London a seaman of the ship Troop, a certificate of the payment of the said expenses by the Board of Trade, signed by the assistant secretary of the Board, was put in evidence.—The present ownership of the ship was proved by a copy of the registry certified under the hand of the Registrar General at London, the ship being registered at Liverpool.—The expenses for which the action was brought were incurred in 1891, and the defendants did not become owners of the ship until 1892.—The plaintiff had a verdict for the full amount claimed.—A rule *nisi* for a certiorari having been obtained to bring up the finding and judgment of the magistrate with a view of quashing the same, upon the return thereof it was *held*, (1) that the words "owner for the time being" mean the person who is owner when the action is brought, and not him who was owner when the expenses were incurred (affirmed on appeal); (2), that the payment of the expenses, etc., was sufficiently proved by the certificate of the assistant secretary of the Board of Trace (affirmed on appeal); and (3) that the certificate of the Registrar General was insufficient to prove the ownership, there being nothing to show that he had charge of the original registry (reversed on appeal, 29 S. C. R., p. 662, on ground that proof of ownership might be given by above mode provided for in Act of 1894, which repealed Act of 1854). *Ex parte The Troop Sailing Ship Co. Ltd.*, 34, p. 449.

Seamen's wages, Suing for—Under R. S. C., c. 74, s. 52, to enable a seaman to sue for and recover his wages the complaint must show all the facts and circumstances which under the statute give the Court jurisdiction and unless such complaint does disclose all things necessary to give jurisdiction it cannot be supplemented by evidence and the judgment will be set aside. *Ex parte Andrews*, 34, p. 315.

"Ships propelled by steam"—Barges under tow—Barges used in transporting coal from Parrsboro to Saint John, registered as schooners, having a crew on board and masts rigged with sails so as to be capable under favorable circumstances of being navigated by sailing, but which are in fact navigated by being towed by tugs, are exempt from pilotage dues under section 59 of the Pilotage Act (R. S. C., c. 80) as "ships propelled wholly or in part by steam." *The Cumberland Railway and Coal Co.* v. *The Saint John Pilot Commissioners*, 37 N. B. R., p. 406; 38 S. C. R., p. 169.

Survey of hatches—Port wardens appointed by the city of Saint John have no exclusive right to examine hatches of incoming vessels, so as to entitle them to fees for the service paid to an outside person. *Port Wardens of Saint John* v. *McLaughlan*, 3 Eq., p. 175.

SOLICITOR AND BARRISTER

Advice of counsel no defence to action of malicious prosecution—In an action for malicious prosecution for charging the plaintiff with keeping a bawdy house the fact that the defendant acted *bona fide* and under the advice of the clerk of the peace and of counsel is not of itself enough to afford a good defence. It is simply one element from which to decide the question of reasonable and probable cause. *Crocker* v. *Storey*, 43, p. 69.

Agreement between counsel—At the hearing of an information under the Canada Temperance Act the magistrate adjourned his Court from December 14th, 1910 to January 5th, 1911, at 10 a. m.—Subsequently the counsel on both sides agreed on account of convenience of train service, that the trial should not proceed until 2.30 p. m. —When the Court met at 10 a. m., the magistrate was informed of the agreement but he proceeded with the trial, counsel for prosecutor being present and the defendant and his counsel absent.—The defendant's counsel refused to take further part in the proceedings and the defendant was convicted.—Upon certiorari, *held*, the magistrate did not lose his jurisdiction by reason of the agreement between counsel. *R.* v. *Allen, Ex parte Gorman*, 40, p. 459.

A judgment obtained in an undefended action will not be set aside merely on the ground that it was obtained contrary to some loose understanding between counsel that the trial should be postponed to a later day. —*Moore* v. *May*, 19 N. B. R. 506; *Knox* v. *Gregory*, 21 N. B. R., 196, approved. *Ferguson* v. *Swedish-Canadian Lumber Co. Ltd.*, 41, p. 217.

Attorneys should carry on their business according to the established rules of practice, rather than by understandings which generally lead to disputes. *Id.*

An agreement between solicitors that the hearing of a motion to continue an injunction should be postponed to a date convenient to both, does not amount to an extension of the injunction beyond the date fixed by the Court. *Snowball* v. *Sullivan*, 42, p. 318, C. D.

Authority of solicitor—Scope of agency—Land subject to mortgage to secure a loan arranged through the mortgagee's solicitor was purchased by the plaintiff.—On the death of the mortgagee certain monies of her estate were left by her administrator with the solicitor for investment, and the solicitor opened up in his books an account with the estate.—The solicitor, without the knowledge or authority of the administrator, required the plaintiff to pay off the mortgage.—To raise the money the plaintiff gave a mortgage to one J., who paid the money to the solicitor, and he credited the payment of the mortgage in the accounts of the estate in his books.—The money was never paid or accounted for to the administrator.—Some months afterwards he instructed the solicitor to get in the mortgage.—The solicitor died insolvent.—*Held*, that the relation of solicitor and client between the administrator and the solicitor did not authorize the latter to receive payment of the mortgage; that an express authority for the purpose or an authority implied from a course of dealing between the parties, neither of which existed here, was necessary; that the subsequent authority did not operate as a ratification of the payment, and that the plaintiff must bear the loss. *Foreman* v. *Seeley*, 2 Eq., p. 341.

In the absence of legal proceedings taken for the purpose of enforcing a mortgage security, there is nothing in the mere relation of solicitor and client which carries with it any authority to the solicitor to receive payment of either interest or principal due his client on a mortgage.—(*Per* Barker J.) *Id.*

See also *R.* v. *Borden, Ex parte Kinnie*, 43, p. 299 post.

Authority of solicitor—Termination of agency—Defendant employed a solicitor to search the title to land he wished to acquire.—He afterwards opened negotiations with the plaintiff for its purchase.—These negotiations were carried on through C., a mutual friend of the parties, to whom the defendant agreed to give a commission in case the sale was completed.—An agreement for the sale of the property was drawn up by C. and executed by the plaintiff.—C. then employed the solicitor, who had previously made the search, to prepare the necessary conveyance.—Defendant paid for the property by giving the plaintiff an order for money due him by a municipality.—This order was drawn by the same solicitor at the request of the defendant and was afterwards taken by the solicitor to the plaintiff who endorsed it.—The solicitor then took the order to the secretary of the municipality who gave him a cheque payable to the plaintiff's order.—He took the cheque to the plaintiff, obtained her endorsement and appropriated the proceeds.—*Held*, that the evidence showed that the solicitor was acting for the plaintiff and she must bear the loss; that if any agency existed between the solicitor and the defendant, it came to an end when the order given by the defendant to the plaintiff was endorsed by her and delivered to the municipality; this order was an equitable assignment, which removed all control of the fund from the defendant and vested it in the municipality as trustee for the plaintiff. *Cheeseman* v. *Corey et al*, 42, p. 409, C. D.

Costs against solicitor personally—An order for costs against a solicitor personally will not be made (in the absence of proof of misconduct) on the ground that nothing was involved in the appeal except costs of the appeal. *R.* v. *Gerow, Ex parte Gross et al*, 43, p. 352.

Demand by attorney not in position to give legal discharge—The Court refused to grant an attachment for non-payment of costs ordered on an appeal from a judge's order on review from a magistrate's Court where the demand was made by the attorney acting for the party entitled, without a power of attorney authorizing him to demand and receive the costs and to give a legal discharge therefor. *R.* v. *Borden, Ex parte Kinnie*, 43, p. 299.

Lien for costs—Plaintiffs recovered a judgment in debt in the Supreme Court against R.—Two days previously R. executed a bill of sale of all his property to B and the plaintiffs brought suit to have the bill of sale set aside as a fraudulent preference.—A settlement was made by B.—R. being in insolvent circumstances and leaving the province after the commencement of the suit, no further step after the filing of the bill was taken by the plaintiffs against him.—An application by R.'s solicitor to dismiss the suit for want of prosecution was granted with costs.—The plaintiffs now applied to set off their judgment against such costs.—*Held*, that the lien of R.'s solicitor for his costs was paramount to the equities between the parties, but under the circumstances the application should be refused without costs. *Worden et al* v. *Rawlins et al*, 1 Eq., p. 450.

Lien for costs on general result only—A defendant is entitled to set off interlocutory costs in the same cause, payable to him by the plaintiff, against the damages and costs recovered against him in the final result of the cause, notwithstanding the objection of the plaintiff's attorney's lien which only attaches on the general result of the action. *Anderson* v. *Shaw*, 35, p. 280.

Mistake of solicitor no excuse for client—Upon the death of one of several defendants to a suit in the Supreme Court in Equity, the plaintiff may continue the suit by applying for administration *ad litem* or by application to the Equity Court under s. 116 or s. 119 of the Supreme Court

in Equity Act, C. S. 1903, c. 112, and therefore where one of several defendants died after judgment of the Supreme Court en banc confirming a decree of the Equity Court dismissing the plaintiff's bill with costs, and the plaintiff delayed his appeal to the Supreme Court of Canada for eight months thereafter on the ground that no administration had been taken out. —*Held*, this was no excuse for the delay and the judgment of McLeod J. refusing to allow the appeal under s. 71 of the Supreme Court Act, R. S. C., 1906, c. 139, was confirmed. —*Held*, that the mistake of the solicitor as to the procedure on defendant's death, even though supported by opinion of counsel, was not a sufficient excuse. *Harris et al* v. *Sumner et al*, 39, p. 456.

Money in attorney's hands—The Court will not on a summary application compel an attorney to pay over money, the right to which is dependent on the existence of an agreement between the attorney and the client, the terms of which are in dispute. *Ex parte Kierstead*, 38, p. 463.

Negligence, Action for, against solicitor—The Court refused to disturb a verdict for the defendant in an action by a client against his attorney for negligence and want of skill in the conduct of a suit in which the attorney had caused an illegal arrest, in consequence of which the client was mulct in damages at the suit of the party arrested, the client having insisted that the arrest be made after being advised by the attorney that it would be irregular and illegal. *Kenen* v. *Hill*, 38, p. 342.

Practicing fee, Failure to pay—Proceedings by an attorney who has not paid the fee required by C. S., c. 34, s. 4, are void and the right to set the proceedings aside is not waived by the opposite party contesting the suit to judgment. *R.* v. *Sisk*; *Sisk* v. *Foley*, 35, p. 560.

Privilege—An attorney of the Supreme Court has no privilege to maintain his personal action in the County Court when the City Court of Saint John has jurisdiction. *Simonds* v. *Hallett*, 34, p. 216.

Readmission after abandoning practice—*In re Clifford B. Deacon*, 36, p. 3.

Solicitor, Knowledge of, notice to client—"It is unreasonable to suppose that a solicitor is to recollect all that he sees in the conveyance he draws, and more unreasonable still to hold a subsequent client bound by notice to his solicitor when acting for some one else in a different employment and in a different transaction altogether.—(*Per* Barker J.) *Carroll* v. *Rogers*, 2 Eq., p. 171.

Solicitor on the record, Re powers of—See *Turnbull Real Estate Co.* v. *Segee et al*, 42, p. 625.

Woman, Admission to practice of—At common law a woman could not be admitted to practice as an attorney; and this disability has not been removed either by C. S. 1903, c. 68, by rule of Court, or by the regulations of the Barristers' Society. *In re Mabel P. French*, 37, p. 359. (1905).

STATUTES

Construction of—The provision in the table of fees of the Supreme Court in Equity, C. S., c. 119, that for services not therein provided for, the fees are to be "the like fees as are allowed to attorneys on the Common Law side of the Supreme Court," applies to the table of fees in the Supreme Court Act, 60 Vict., c. 24.—A statute is supposed to be always speaking and the words "as are allowed" refers to at the time of taxation. *McPherson* v. *Glasier*, 1 Eq., p. 649 (A. D. 1899).

STREET RAILWAYS

Negligence -*See* NEGLIGENCE, 5, 12, 13

Rails—Civic right to order new pattern. of rails for old work—The plaintiff company, under the provisions of its charter, constructed a line of railway in the city of Saint John over and upon streets agreed upon between the city and the company. The company laid its rails of a pattern and description approved of by the city at the time of the laying thereof, and laid and placed them to the satisfaction of the city engineer for the time being.—The city in the exercise of its right to take up the rails and open up the streets traversed by the railway for the purpose of altering the grade or any other purpose, removed the rails and changed the grade at the intersection of certain streets and notified the plaintiff company that it would be necessary for it to raise its rails to the altered grade and replace the rails removed with grooved rails instead of the "T" rails removed.—*Held*, in answer to questions submitted in a stated case, (a) that the city having removed the rails temporarily for a specific purpose had no authority to order the company to replace them with rails of a different pattern; (b) that it had the right to require the company to keep its track level with the altered grade of the street on a sufficient foundation to keep it at the required level, but had no right to require the use of any particular foundation. *The Saint John Railway Co.* v. *City of Saint John*, 43, p. 417.

SUCCESSION DUTY

Abatement of legacies—*Semble*, where legacies are abated, succession duty is payable only in respect to the amount as abated. *Receiver General of N. B.* v. *Buttimer et al*, 39, p. 312.

Aggregate value—In order to arrive at the aggregate value of the property of a deceased person under section 4, 59 Vict. c. 42 (The Succession Duty Act, 1896) the debts due by the estate should be deducted. *Receiver General of N. B.* v. *Hayward*, 35, p. 453.

The aggregate value of the estate under clause (a) of s. 5 of the Act is all the property owned by the deceased at the time of his death, and such aggregate value and not the aggregate value of his property liable to succession duty is the basis upon which the rate of taxation is to be computed and fixed. *Receiver General of N. B.* v. *Rosborough*, 43, p. 258.

Assets within the province of testator domiciled without the province—By New Brunswick Succession Duty Act, 1896, s. 1 (5) all property situate within the province is liable to succession duty whether the deceased was domiciled there or not; such duty being assimilated by other provisions of the same Act to a probate duty payable for local administration.—The testator, resident and domiciled in the province of Nova Scotia, at the date of his death was possessed of $90,351, deposited in the St. John, N. B. branch of the Bank of British North America, the head office of which is in London; and the amount was paid to his executors after they had obtained ancillary probate in New Brunswick—Privy Council held that the executors were liable to pay succession duty—The property consisted of simple contract debts, the obligation to pay being primarily confined to the New Brunswick branch of the bank, and these debts for the purpose of legal representation, of collection, and of administration as distinguished from distribution are governed by the law of New Brunswick, where they were locally situated.—Judgment of the Supreme Court of Canada, 43 S. C. R. 106, reversed; judgment of Supreme Court of New Brunswick, 37 N. B. R. 558, restored. *R.* v. *Lovitt* (1912) A. C. 212.

Assets without the province—Succession duty is not payable on debenture stock of the city of Halifax transferable and redeemable at the office of the city treasurer of Halifax and not elsewhere, nor on money deposited at the Halifax branch of the Royal Bank of Canada for which the testator held a deposit receipt, nor for money on deposit in the said branch bank on current account for which the testator held a pass-book. *Receiver General of N. B.* v. *Rosborough*, 43, p. 258.

Grandchild beneficiary—Property passing to the grandchild of the deceased where the aggregate value of the estate is over $10,000 but under $50,000 is not liable to pay succession duty under the Succession Duty Act, C. S. 1903, c. 17, ss. 4 and 5. *Receiver General of N. B.* v. *Buttimer et al*, 39, p. 312.

Specialty debts—Mortgages—Specialty debts secured by bond and mortgage of real estate situate in the city of Halifax, in the province of Nova Scotia, the mortgagors being also domiciled in the said province, and the bonds and mortgages being in possession of the testator in this province at the time of his death are liable to duty under the Succession Duty Act, C. S. 1903, c. 17. *Receiver General of N. B.* v. *Rosborough*, 43, p. 258.

Transfers during lifetime—Evading duty—Shares in an incorporated company transferred by the deceased in his life-time to different members of his family, but not for the purpose of evading the payment of succession duties are not liable for the payment of such duties under the Act 59 Vict., c. 42. *Receiver General of N. B.* v. *Schofield et al*, 35, p. 67.

SUNDAY

Search warrant under Canada Temperance Act—A search warrant under the Canada Temperance Act cannot be executed on Sunday. *R.* v. *Lawlor, Ex parte Willis*, 44, p. 347, (Chambers).

Sunday observance—Provincial legislation re profanation of the Lord's day—62 Vic., c. 11 (N. B.)—Section 1 of 62, Vict., c. 11, whereby the sale of real or personal property or the exercise of any worldly business or work on Sunday is prohibited is within the authority of the legislature of New Brunswick.—Therefore, where G. was convicted under the above section before the police magistrate of S. of selling cigars on Sunday, a rule *nisi* for a certiorari to bring up the conviction in order to quash the same was discharged—The fact that the Parliament of Canada can make the doing of such an act on Sunday a crime, and prohibit it under the general criminal law, does not necessarily show that the local legislature has no jurisdiction to deal with it under its powers to make regulations of a police or municipal nature.—A subject matter of legislation, though falling within some of the classes entrusted to the federal parliament by section 91 of the British North America Act, may likewise, when looked at from another point of view, come within some of the classes, over which, by section 92 of the same act, the provincial legislatures have exclusive jurisdiction. *Ex parte Green*, 35, p. 137.

See also CRIMINAL LAW.

TELEGRAPH—TELEPHONE

Easement for telegraph and telephone wires—The Acts 63 Vict., c. 59; 1 Edw. VII, c. 55; and 5 Edw. VII, c. 59, empowering the City of St. John to expropriate either land or an easement to lay and maintain water pipes, do not empower it to expro-

priate an easement to erect and maintain telegraph and telephone lines upon the land. *Chittick* v. *The City of Saint John*, 38, p. 249.

Exclusive right to erect and maintain telegraph lines—The E. & N. A. Railway Co. were incorporated in 1864 under the laws of New Brunswick and in 1869 owned a line of railroad from Fairville, N. B., to Vanceboro, on the boundary of the state of Maine.—In that year they entered into an agreement with the plaintiffs, a company incorporated in the state of New York, giving the latter the exclusive right to erect and maintain upon the land of the railroad, lines of telegraph which should be the exclusive property of the plaintiffs. The E. & N. A. Rwy. Co. agreed to transport gratis employees of the plaintiffs, and materials used by the plaintiffs in erecting and maintaining the lines, and not to transport the employees and materials of any other telegraph company at less than the usual rates.—The plaintiffs were to maintain one wire for the use of the railroad, and to furnish telegraphic facilities and supplies at a number of stations on the road.—The plaintiffs constructed lines of telegraph, and connected them with their system in the state of Maine. —In 1878 the E. & N. A. Rwy. Co.'s road was sold under a decree of the Supreme Court in Equity to the St. J. & M. Rwy. Co. by whom it was run until 1883, when it was leased to the N. B. Rwy. Co. for 999 years —Both of these companies had notice of the agreement and acted upon it.—In 1888 the C. P. Rwy. Co. obtained running powers over the line, from the N. B. Rwy. Co. and permission to construct a line of telegraph along the railroad.—To prevent the construction of the line of telegraph, as being in breach of the agreement of the E. & N. A. Rwy. Co. with them, the plaintiffs obtained an *ex parte* injunction order, which it was now sought to dissolve.—*Held*, (1) that the agreement of the E. & N. A. Rwy. Co. with the plaintiffs was not void as an agreement in restraint of trade, or as creating a monopoly, and being contrary to public policy; (2) that the agreement in respect to the transportation of employees and materials was not invalid under section 240 of 51 Vict., c. 29 (D); (3) that the plaintiffs, though incorporated in the state of New York, could validly contract with the E. and N. A. Rwy. Co. and enforce the agreement by a suit brought in this country; (4) that the agreement was not invalid under section 92, sub-section 10 (a) of the B. N. A. Act, 1867; (5) that the N. B. Rwy. Co., having leased the road with notice of the agreement, and having acquiesced in it, were bound by it. *Western Union Telegraph Co.* v. *N. B. Rwy. Co., C. P. Rwy. Co. and St. John & Maine Rwy. Co.*, Eq. Cas., p. 338.

Telephone rights—Amalgamation of companies—*See New Cumberland Telephone Co. Ltd.* v. *Central Telephone Co. Ltd.*, 3 Eq., p. 385.

TENDER

Account stated—If a creditor holding a security absolute on its face furnishes the debtor with a statement of the amount alleged to be due, a tender of that amount is binding, notwithstanding it subsequently appears on taking an account between the parties that the tender was for less than the amount actually due. *McLaughlin* v *Tompkins*, 44, p. 249.

Bank notes—A tender in bank notes, not legal tender, is good if not objected to on that account. *Stewart* v. *Freeman*, 2 Eq., p. 451.

Mortgage, Balance of—Condition attached—In a mortgage of real estate, the proviso for payment was that the principal should be paid in five equal annual instalments, with interest semi-annually at eight per cent.; and five promissory notes with interest at that rate were given.—*Held*, that a demand for a discharge of the mortgage and release of the debt, accompanying a tender by the mortgagor, made the tender a conditional one, the amount actually due being in dispute. *McKenzie* v. *McLeod et al*, 4 Eq., p. 72; 39 N. B. R., p. 230.

Promissory note—Writ issued—A payee of a promissory note discounted it at a bank where he was a customer and, the note having been dishonoured, paid it the day after maturity.—Later, on the same day, the maker deposited the amount of the note in the bank and the money was placed to the credit of payee.—Without knowledge of this payment the payee issued a writ and, after receiving notice of the payment from the bank, signed judgment for the full amount of the note with costs.—*Held*, the payee was entitled to judgment, the bank having no authority to place the money to his credit after the note had been retired, and no proper tender with costs to date having been made. *McMennamin* v. *Evans*, 41, p. 481.

TIMBER

Contract—Sale of oak timber—Warranty—On April 19, 1907, the defendants wrote to the plaintiffs asking the price of oak timber of certain specifications stating "We want this for heavy engine foundation work, and must be well seasoned, free from wane, shakes and dry rot."—April 22, the plaintiffs replied, "the price is $60 per M., the purchaser paying for the full survey.—Will saw it for you and charge for time it takes.—If you have a rotary, think you would do better to cut it yourself."—On the same day the defendants sent the plaintiffs specifications for an additional lot and on April 24th sent an order for one piece for a boat keel and order No. 1120 for 51 pieces "to be well seasoned and free from wane, shakes and dry rot, and to be well and evenly sawn" and also wrote a letter

asking for a new quotation of price, including the sawing and stated "presuming you will quote a price in this manner we are enclosing order for the first lot enquired for."—April 27, the defendants sent another order No. 1149 for 67 pieces to be "well and evenly sawn, and free from shakes and wane, suitable for car repairs."—April 29, the plaintiffs wrote, "will cost you $60 per M. full survey of what is in the timber.—Will saw it and charge for the time it takes.—The only way we will sell this oak is for the purchaser to take all risks of it turning out good or bad in sawing."—April 30, the defendants wrote plaintiffs to saw up two or three of the large sticks into sizes on the first order and then advise what the loss was and the cost of re-sawing.—The plaintiffs sawed two logs and shipped the pieces to the defendants, May 4th.—The cost proved to be about $105 per M.—On May 11 a telephone conversation took place in which, according to evidence for the plaintiffs it was stated that the oak sawn was good, and that the rest would run about the same, but no guarantee of quality was made, while, according to the evidence for the defendants, the plaintiffs stated that the logs sawn were of good quality and that they would be a fair average of all the oak, and the defendants told the plaintiffs to go ahead with the orders on that basis.—On the same day the defendants wrote "confirming our conversation of this morning please go ahead with our orders Nos. 1120 and 1149."—There was evidence that the plaintiffs requested the defendants to send a man over to inspect the oak timber, and also that it is impossible by inspecting oak in the square to tell whether it is good or bad inside.—The plaintiffs sawed the oak to the dimensions ordered and shipped it, but all excepting the piece for the boat keel was rejected by the defendants on the ground that it was unsuitable for the purposes for which it was ordered and was not free from wane, shakes and dry rot.—*Held*, sustaining the judgment of the trial judge, that the defendants bought the oak in the stick, agreeing to pay $60 per M. for it, and the cost of sawing; that there was no warranty of quality by the plaintiffs, and that the plaintiffs were entitled to recover the purchase price. *F. E. Sayre & Co. Ltd.* v. *Rhodes Curry & Co. Ltd.*, 39, p. 150.

Contract to cut—Advances against logs—Identifying logs under lien—It was agreed that E. should sell and M. should buy three million superficial feet of deals to be manufactured at E.'s mill M. to have a lien for advances on the deals and also on "the logs from which the said deals are being manufactured."—Afterwards E. by representing to M. that he had cut a number of logs on the T. river for the purpose of this contract and required advances to cut more, and that the logs would be a sufficient security for all advances he might make, obtained advances from M. from time to time.—E. had in fact some seven million feet of logs cut on the T. river, but none were marked for M. and part were got out for another.—E. then assigned for the benefit of his creditors.—*Held*, the logs intended for M. were not sufficiently identified and no lien would attach for his advances. *McKean* v. *Randolph et al*, 39, p. 37.

Contract to cut and deliver pulpwood—Oral evidence to explain uncertainty re scale—Interest on deferred payment—The plaintiff and defendant entered into a written contract by which the plaintiff agreed to cut, haul and deliver a quantity of logs to be used as pulpwood.—The contract contained the following printed clauses: The plaintiff "agrees to haul none but good, sound, merchantable logs," and "all logs hauled by plaintiff to be scaled by ..... or by some other competent person to be appointed" by defendant "whose scale shall be final between the parties to this instrument," and a typewritten clause as follows: "Logs to be scaled by scaler equal to what in his judgment will make good merchantable lumber."—The plaintiff offered evidence of a collateral oral agreement that the scaler should use a certain scale, and the jury found the contract was made relying on this oral agreement.—*Held*, (1) in construing the contract the typewritten clause controls the printed clauses (*Glynn* v. *Margetson*, 1893, A. C. 351 followed); (2) the contract contemplated some particular method of scaling to ascertain what was "merchantable lumber" for pulpwood, but was doubtful and uncertain in not specifying this method, and inasmuch as there is no usage in this province as to scaling pulpwood which could be read into the contract, oral evidence is admissible to explain what scale was intended by the parties.—Under the contract the plaintiff was to pay interest on advances until payment on his logs became due "which will be in August after delivery of logs."—In an action to recover amount due for lumber delivered under contract, *held*, plaintiff was entitled to interest on the contract price from September 1, at five per cent. *Mann* v. *The St. Croix Paper Co.*, 41, p. 199.

Contract to cut—Survey—A written contract, under which L. was to cut logs for P. at a stated sum per thousand, contained a clause providing that the logs were to be surveyed by any surveyor P. might have in his employ, said survey to be final.—*Held*, that a survey made by two surveyors employed by P. who surveyed about one-third of the logs, counted the balance and made an estimate of the count on the basis of the survey, may be a good survey under the contract. *Patterson* v. *Larsen*, 37, p. 28.

Contract to cut etc.—Survey—Name of scaler left blank—Evidence of scale—A contract in writing, whereby the plaintiff agreed to cut and haul for Charles Miller, the intestate of the defendants, a certain quantity of logs at a fixed price per thousand, contained a clause providing that "All logs

shall be paid for according to the count and scale of ..... which scale shall be final and binding and conclusive between the parties hereto, and the expenses of said scaler shall be paid for by said Charles Miller."—*Held*, in an action for the balance due on the contract, that no scaler having been named in the contract the plaintiff was not bound by the scale of a scaler appointed by Miller or the defendants, and evidence of a scaler appointed by the plaintiff was properly received; and the jury could properly consider the evidence of both scalers and determine the quantity of logs to be paid or.—The defendants counter-claimed for a breach of the contract but furnished no particulars and offered no proof of damage. —The jury, however, found that there had been a breach by the plaintiff and assessed the damages at $200.—They also found the defendants had accepted what the plaintiff did as a fulfilment of the contract.—*Held*, that the trial judge was right in refusing to deduct the $200 from the verdict found for the plaintiff as the balance due on the contract. *Blue* v. *Miller et al*, 43, p. 307.

Contract to cut specified amount—Quit claim deed to secure supplies—Additional cut for other parties—Replevin—Defendant applied to the Crown Land Department for a grant of lot No. 50, range 1 in the Blue Bell Tract under the regulations as applied to that tract.—Being in possession and having complied with most of the regulations, he agreed in writing with the plaintiff to cut and deliver to him during the logging season of 1914, 100,000 or more superficial feet of lumber off the said lot under terms set out in the contract.—One clause provided that "all logs cut by the defendant or that he may have cut for him to apply to this contract."—Defendant also gave plaintiff a quit claim deed of the lot to secure him for any supplies furnished or cash advanced, and plaintiff gave defendant a written memorandum agreeing to recall the quit claim deed providing satisfactory arrangements were made to cover defendant's indebtedness.—Another clause in the contract provided if the contract was not progressing satisfactorily to the plaintiff he might on forty-eight hours notice to the defendant, take over the operation and complete it.—The defendant, having contracted with Donald Fraser Jr. to get for him 50,000 feet of lumber off said lot 50 and having cut a quantity of lumber in pursuance of this contract, the plaintiff replevied the lumber cut for Fraser and took over the operation under defendant's contract with him, claiming (a) that as against the defendant he was entitled as the absolute owner of the land to everything on it and defendant had no right to dispose of any of the lumber to third parties; (b) that even if he did not own the land, that under the terms of his contract with the defendant he was entitled to all the lumber the defendant cut on lot 50 during the season of 1914 at the price agreed upon.—*Held*, on appeal affirming the judgment of McKeown J., that the quit claim deed and memorandum given therewith must be taken together and constituted in effect a mortgage to secure any indebtedness from the defendant to the plaintiff on the completion of the contract, and as the defendant had tendered the amount due any lien the plaintiff had by reason thereof was extinguished.—That the defendant was bound to supply lumber only to the extent of 100,000 superficial feet cut on lot 50 under the plaintiff's contract, and plaintiff was not entitled to the Fraser logs. *McLaughlin* v. *Tompkins*, 44, p. 249.

Contract to haul bark—Estimated quantity—Basis of scale—Failure to sell and make final scale—A written contract wherein A. agreed to haul certain bark belonging to B. for $1.87 per cord, contained a clause to the following effect: The survey to be made by buyer or his agent, and the owner or his agent, who, failing to agree shall choose a man who shall choose a third whose scale shall be considered final reckoning, 128 feet per cord.—Bark to be estimated by agent of owner as soon as finished hauling, and paid for accordingly; account to be balanced as soon as bark is sold.—When the hauling was finished B.'s agent estimated the number of cords hauled on the basis of 140 feet to the cord, and the hauling was paid for on that basis.—The bark was not sold, and no final survey was made or account balanced as provided in the contract.—In an action by A. against B. claiming a balance due on the contract, the judge directed the jury that in construing the contract (as to that part which provided for a payment on an estimate) the words "the estimate to be based on basis of 128 cubic feet to the cord and paid accordingly," should be read into the contract.—*Held*, on appeal (*per* Tuck C. J., Hanington and Landry JJ., Barker and McLeod JJ. taking no part, and Gregory J. dissenting), that the direction was right that the sale of the bark and survey provided by the contract were not conditions precedent to payment, and the plaintiff might recover on the contract, and was not put to an action for a breach in not selling. —*Held* (*per* Gregory J.), that the construction of the clause of the contract which provided for payment on an estimate was an erroneous construction, and the appeal should be allowed and a new trial granted. *Shaw et al* v. *Stairs*, 37, p. 593.

Crown Land licenses—*See* CROWN.

Fire — Negligence — Statutory liability—In an action brought by the owner of a lot of woodland adjoining defendant line of railway to recover damages alleged to have been caused by a fire negligently started by defendants' servants and allowed to extend to plaintiffs' land, it appeared in evidence that N., a section foreman of the defendants' railway, set fires to burn up some piles of sleepers and rubbish on the railway

line.—The weather had been very dry for a long time, and forest fires were burning all over the country.—Witnesses, on behalf of the plaintiff, testified that they saw fire on the railway line at this time, and traced its course through the fence to the plaintiff's land.—N. swore that the fires which he started were all burnt out before the fire was seen on the plaintiff's property, and other evidence was given to the same effect. —The jury found that the fire spread from the fire set by N. and that N. negligently and unreasonably allowed it to extend.—A verdict was entered for the plaintiff for $500. —*Held*, that there was sufficient evidence to justify the verdict.—*Held* (*per* Tuck C. J. and McLeod J.), that the acts 48 Vict., c. 11, and 60 Vict., c. 9 (to prevent the destruction of forests and other property by fire) are not *ultra vires* of the local legislature.—*Held* (*per* McLeod J.), that the defendants having brought on their land a dangerous element, not naturally there, did so at their peril, and, if it caused injury, they were liable, though no negligence was proved.—The provision of said acts declaring that a person starting a fire, except for certain purposes specified, between May 1st and December 1st is guilty of negligence, applied to the defendants, and they were, therefore, liable under the acts as well as at common law. *Grant* v. *Canadian Pacific Rwy. Co.*, 36, p. 528.

Fire, Protection from—Evidence for jury—Negligence—In an action for negligence in starting a fire in June without notice, contrary to the Act respecting Protection of Woods from Fire, C. S. 1903, c. 94, tried before a judge without a jury, plaintiff proved that defendant had a number of brush piles on his land thirty or forty feet apart, that defendant was seen going towards these piles, and twenty minutes afterwards smoke arose and defendant was found near the piles, fifteen of which were burning.—There was also evidence of a statement by defendant that tobacco dropped out of his pipe and set the fire.—A wind was blowing at the time towards plaintiff's land and plaintiff's woodland was burned.—Plaintiff having been nonsuited, *held* (*per curiam*), the nonsuit should be set aside.—*Held* (*per* White J.), in the absence of contradiction the evidence entitled the plaintiff to a verdict and therefore the nonsuit should be set aside.—*Held* (*per* Barry J.), a nonsuit should not be granted where there is sufficient evidence for the plaintiff to submit to a jury. —*Held* (*per* Barry J.), section 20 of the Act does not apply to cases of inevitable accident. It must be proved that defendant started the fire intentionally or negligently. *Cochran* v. *Lloyd*, 42, p. 112.

Hypothecation to bank—Payment applied to previous loans—A firm of lumber operators hypothecated under the Bank Act their season's cut of lumber to a bank to secure future advances.—A member of the firm, without the knowledge of his co-partner, sold the lumber and applied part of the proceeds in paying a past indebtedness of the firm to the bank, and, with the consent of the bank, applied a portion of the remainder in paying other debts of the firm. —*Held*, that he had power to do so, though the partnership had then been dissolved, and that his co-partner was not entitled to have the money so appropriated, charged in reduction of the secured indebtedness to the bank. *Hale* v. *The People's Bank of Halifax*, 2 Eq., p. 433.

Laths, Manufacture of — Payment —Lien for price—Under a contract by which the plaintiff was to manufacture laths, etc., out of defendant's lumber at a certain price per 1,000 feet, it was provided that the plaintiff was to deliver the laths, etc., as fast as defendant could take them "and settlements to be made the tenth day of each month for the preceding month's saw bill."—*Held*, defendant was entitled to delivery of the laths before payment therefor; that this agreement was inconsistent with a right of lien for the price of sawing and the plaintiff was therefore not entitled to a lien. *Bathurst Lumber Co. Ltd.* v. *Nepisiguit Lumber Co. Ltd.*, 41, p. 41.

Log driving companies—*See* COMPANY LAW, 1; CONTRACTS, 8.

Log driving—Damage to dam of riparian owner—The plaintiff, as owner of the alveus of a navigable river and of the land on both sides of it upon which a dam stands, has an absolute right to maintain it for the purpose of operating his mill by the use of the flowing water, and he has this right as an incident to the ownership of the property.—Such right must be exercised subject to the rights of other riparian proprietors to a reasonable use of the water, and to the public right of passage.—The public right is not a paramount right, but a right concurrent with that of the riparian owners; and if, in the exercise of their public right, the defendants in driving their logs down the river, injured the plaintiff's dam the onus is upon them to show that they adopted all reasonable means and used all reasonable care and skill in order to avoid the injury. —(*Per* Barker J.) *Roy* v. *Fraser*, 36, p. 113.

Log driving — Obstructions — Injunction — Removal before hearing — Defendant, owner of a saw mill on a floatable river, erected booms in connection therewith, which with his logs impeded the passage of plaintiff's logs.—The obstructions were removed before the hearing, but after notice of motion had been given for an interim mandatory injunction, which was granted, *Held*, that the bill should be dismissed, but without costs, and with costs to the plaintiff of the taking out and service of the injunction order. — An injunction to perpetually restrain defendant from closing or obstructing the river refused.—The owner of land on a floatable river is entitled to erect booms and piers necessary for reasonable use of

the river in operating a saw mill. *Watson* v. *Patterson*, 2 Eq., p. 488.

Logs and timber—The words "logs and timber" as employed in the Woodmen's Lien Act, 1894, s. 2 (1) were not intended to include deals or other manufactured lumber. —(*Per* Hanington and Landry JJ., Tuck C. J. dissenting.) *Baxter* v. *Kennedy*, 35, p. 179.

Logs mixed in a jam—Agreement re sawing and accounting—Plaintiffs owned a lumber mill, situate on the Canadian side of the Saint John river, about twenty miles below the mouth of Little Black River and defendants a mill about sixty miles below the same river on the American side of the Saint John.—The logs of both parties became mixed in a jam at the mouth of Little Black River and it was agreed that the jam should be broken and the logs allowed to float down the Saint John to the booms of the plaintiffs and defendants, each party having the right to saw all the logs that came into their respective booms irrespective of marks.—An account was to be kept and the excess of the cut of one party's logs over the other was to be paid for at the end of the season at a rate per thousand agreed upon.—It was further agreed that the defendants were to have a man at plaintiff's mill to check the count of defendants logs sawed, and plaintiffs had the right to have a man at defendant's mill to check the count of their logs.—Plaintiffs sawed a portion of defendant's logs without notice to them and without affording an opportunity of having a man present to check the count.—In a claim by the plaintiffs for the excess of their logs sawn by the defendants, the defendants claimed that the checking of the count at the plaintiffs' mill by their representative was a condition precedent, and as they were prevented from doing so by the default of the plaintiffs there was no liability.—At the trial without a jury, the judge found upon the evidence that the defendant's right to have a man at the plaintiff's mill to check the count of the cut was not a condition precedent and plaintiffs were entitled to recover on the basis of an account kept by their own servants for the excess of their logs cut at the defendant's mill over defendant's logs cut at their mill.—*Held*, that there was evidence upon which the judge might find as he did. *Kennedy Island Mill Co. Ltd.* v. *The St. John Lumber Co.*, 38, p. 292.

Pulpwood contracts—The act relating to the survey and exportation of lumber, C. S. p. 1038; (R. S., c. 96), does not apply to contracts for small lumber such as is used for pulp wood, but such lumber should be scaled by actual measurement. *Rose* v. *Saint George Pulp & Paper Co. Ltd.*, 37 N. B. R., p. 247; 37 S. C. R., p. 687.

Surveyor—Whether he must be qualified under R. S., c. 96, s. 2—Where a contract provided that logs were to be surveyed by any surveyor the vendee might have in his employ, *held*, such surveyor need not be a properly sworn and qualified surveyor under R. S., c. 96, s. 2. *Patterson* v. *Larsen*, 36, p. 4.

Woodmen's lien—Collusion—Demand of amount due—Sheriff's fees—In proceedings under the Woodmen's Lien Act, 1894, an order allowing the claimants' lien will be set aside if the evidence discloses an attempt on the part of the claimants acting in collusion with the defendant to defraud the owners, notwithstanding that the judge in the Court below has found that the evidence established the claimants' lien. —Under section 9 of the act that there must be a demand of the specific amount due before the issue of the attachment.—Where attachments for three claims were served by the sheriff at the same time and place, the sheriff is entitled to full fees, including mileage, on each writ. *Murchie et al* v. *Fraser et al*, 36, p. 161.

Discussed in *Olsen* v. *Goodwin*, 43, p. 449.

Woodmen's Lien Act Demand—The demand required by the Woodmen's Lien Act before the writ attaching the property issues need not be of the specific amount due. *Olsen* v. *Goodwin*, 43, p. 449.

Woodmen's lien—Last day of labor—B. and others were employed by the month to work in the woods.—They began operations in November, 1894, and voluntarily quitted on January 25th, 1895.—On March 14th of the same year, though not requested to do so, they returned, and after working two days, again stopped.—They then filed a claim under the provisions of the Woodmen's Lien Act, 1894, s. 6.—*Held*, that the returning to work on March 14th, was not a *bona fide* continuation of the work, and the right to enforce a lien was gone by reason of lapse of time. *Guimond et al* v. *Belanger et al*, 33, p. 589.

Woodmen's lien—Lumber manufactured into deals not attachable—Contractor not within class of persons benefitted—Appellant under a contract in writing made with respondent for an agreed price per thousand, cut upon the land of respondent a quantity of logs and hauled them to a portable mill upon the land, where they were manufactured into deals, planks, etc. —The work was performed in part by appellant himself with his team, though there was no stipulation to that effect between the parties, but chiefly by labourers and teams, by the terms of the contract hired and paid by the appellant.—A portion of the amount due to the appellant under the agreement being unpaid he caused an attachment to be placed upon the above mentioned deals, planks etc., claiming a lien thereupon by virtue of the Woodmen's Lien Act, 1894. —This attachment was set aside by the County Court judge.—Upon appeal, *held* (*per* Hanington and Landry JJ., Tuck C. J.

dissenting), that the words "logs and timber" as employed in sub-section 1 of section 2 of the above act, were not intended to include deals or other manufactured lumber; also *held* (*per* Hanington, Landry, Barker and McLeod JJ., Tuck C. J. dissenting), that the evidence showed appellant to be a contractor and not within the class of persons for whose benefit, by section 3 of the act, liens were established; also *held* (*per* Hanington J.), that the respondent, by giving a bond in order to secure the payment of the amount claimed if the lien should prove effectual, and thus obtaining a release of the deals, etc., attached, did not estop himself from disputing the validity of the lien. *Baxter* v. *Kennedy*, 35, p. 179.

Woodmen's lien not available to wife of contractor acting as cook—A contract by a married woman with her husband to cook in the lumber woods for a crew of men, whom her husband had engaged to get lumber for a third person under an agreement at a fixed price per thousand off the land of the third person, who was to furnish the supplies, is not a valid contract under the Married Women's Property Act, C. S. 1903, c. 78, and can not be enforced as a lien under the Woodmen's Lien Act, C. S. 1903, c. 148. *Patterson* v. *Bowmaster*, 37, p. 4.

Woodmen's lien—When attaches—Owner company in liquidation—Plaintiffs were woodmen employed by contractors who were engaged in cutting and getting out lumber for the defendant company.—The defendant having gone into liquidation under the Winding Up Act, R. S. C., 1906, c. 144, the plaintiffs, after the winding up, but before the time had expired for filing claims under the Woodmen's Lien Act, C. S. 1903, c. 148, applied for leave to file and enforce their claims against the company's logs for work done prior to the winding up.—McLeod J. held that plaintiffs were entitled to the benefit of the Woodmen's Lien Act, but that their lien did not arise until the claims were filed under s. 4 of that Act, and no lien could be created or put in force after the winding up, under ss. 23 and 84 of the Winding Up Act. —On appeal, *held*, sections 23 and 84 of the Winding Up Act apply to creditors only and do not alter the rights of the plaintiffs, who are third parties.—Under the Woodmen's Lien Act the plaintiff's lien arose at the time the work was done and therefore existed at the time of the winding up order and they were entitled to an order allowing them to proceed to enforce their claims.—Section 23 of the Winding Up Act does not apply to the mere filing of a claim of lien.—Section 84 of the Winding Up Act applies to the creation and not to the enforcement of a lien. *Good et al* v. *Nepisiguit Lumber Co. Ltd.*, 41, p. 57.

Woodmen's Lien Act, C. S. 1903, c. 148—Writ of attachment—An affidavit and statement of claim in form 1 of the Act is sufficient to obtain an order for a writ of attachment under s. 9 of the Act, and such order will not be set aside although the defendant was solvent and had been held to bail for the same cause of action, and these facts were not disclosed to the judge on the application for the attachment.—The merits of the claim will not be inquired into on an application to set aside the attachment. *Day et al* v. *Crandall*, 39, p. 289

TIME

"Consecutive days"—Publication of an election petition in three consecutive issues of a weekly paper is not publication "for three consecutive days" and, therefore, not sufficient under s. 81 of the New Brunswick Controverted Elections Act, C. S. 1903, c. 4.—*Herbert* v. *Hanington*, 14 N. B. R., 324, followed. *Owens* v. *Upham*, 39, p. 198.

Date of month v. day of week—Incorrect summons—Where a party is summoned to answer a charge of selling liquor contrary to the Liquor License Act on a certain day of the month and on a day of the week which would not be the day of the month named, he is bound to attend on the day of the month named, disregarding the day of the week, and may be properly convicted in default of appearance. *Ex parte Tompkins*, 37, p. 534.

Forthwith—Publication of an election petition by posting made by the sheriff thirty-five days after receipt of the copy of the petition from the clerk of the pleas is bad under s. 6 of the Controverted Elections Act (N. B.), requiring the petition to be published "forthwith." *Owens* v. *Upham*, 39, p. 344.

"Four days' notice"—Under section 8 of the Winding Up Act, R. S. C., c. 129, which directs that a creditor may, after four days' notice of the application to the company, apply by petition for a winding up order, a notice given on the first of the month for a hearing on the fifth is sufficient. —(*Per* Barker, McLeod and Gregory JJ., Tuck C. J. dissenting, Hanington J. dubitante.) *In re Maritime Wrapper Co. In re Dominion Cotton Mills Co.*, 35, p. 682

Legal holiday—Easter Monday—Easter Monday is not a non-juridical day and the Court refused to set aside a conviction made on that day for an offence against the Canada Temperance Act. *R.* v. *Kay, Ex parte Henry Cormier*, 38, p. 231.

Legal holiday — Proclamation — Where a Court was by statute bound to sit on a certain day in each week unless Christmas Day, New Year's Day, or any other legal holiday should fall upon such day, *held*, that a day proclaimed by the Governor General and the Lieutenant Governor as a holiday for a general public thanksgiving

was a legal holiday within the meaning of the act, and that the Court was not bound to sit upon such a day (Landry J. dubitante). *Dibblee* v. *Fry*, 35, p. 282.

"Six days at least'—An affidavit used on taking out a summons to set a cause down for hearing, returnable on the 24th of the month, was served on defendant's solicitor on the 18th instant.—The Supreme Court in Equity Act, 1890 (53 Vict., c. 4) s. 94, requires that affidavits shall be served six days at least before the day the motion in which they are to be used is heard.—*Held*, that the service was insufficient and that the summons should be dismissed with costs. *Welsh* v. *Nugent*, 1 Eq., p. 240.

Time of offence—Where an information was laid on the 11th of March, 1908, and the defendant was convicted for an offence committed between the 8th and 11th days of that month, it was held that the conviction was not bad for uncertainty as to whether the offence had been committed before the information was laid. *R.* v. *Kay, Ex parte Wilson*, No. 2, 38, p. 503.

TRADE MARKS AND TRADE NAMES

Trade mark, Assignment of—In March, 1894, the firm of G. S. DeF. & S., consisting of the defendant, H. W. DeF., and his brother C. W. DeF., registered a trade mark for a certain blend of tea known as "Union Blend," which was prepared under a formula made by the defendant.—In May, 1901, C. W. DeF. assigned his interest in the trade mark to the defendant and shortly after seems to have retired from the business. —In May 1908, the business was put into a joint stock company in which the defendant was by far the largest stock holder, he paying for his stock by assigning to the company all his interest in the business, which he valued at $50,000.—This assignment, dated June 29th, 1908, after particularly setting out the real estate and chattels personal, contained the following: "and all personal property of whatsoever nature and description owned by the said H. W. DeF. in connection with the business of the said H. W. DeF."—There was also a covenant in the assignment that the defendant would execute and deliver all papers necessary to give a perfect title to the property.—The trade mark itself was not specifically mentioned in the assignment. —The defendant was elected president of this company and for two years this trade mark was used and the business carried on, chiefly under his management—In May 1910, the company, being insolvent, assigned to the plaintiff under C. S. (1903), c. 141,—On investigation the plaintiff found that there was no specific assignment of the trade mark to the company which could be used for registry under the Trade Mark Act.—*Held*, that the words used in the assignment ("assets," "property," "goodwill") are amply comprehensive to pass the trade mark, and that the defendant is bound to execute a specific assignment of it to the plaintiff as assignee of the company. *Tilley Assignee of DeForest* v. *DeForest et al*, 4 Eq., p. 343.

Trade Mark, Resemblance to—Injunction—Plaintiff was a manufacturer of lime at Greenhead, and sold it in barrels marked "Greenhead Lime" and it had a market value and reputation as such.—The defendants manufactured lime at the same place, and were restrained by injunction from using the plaintiff's trade mark, or any colourable imitation thereof. Subsequently the defendants marked their lime as "Extra No. 1 Lime manufactured by Raynes Bros. at Greenhead."—The general appearance of the defendants' mark resembled the plaintiff's.—*Held*, that there had been a breach of the injunction. *Armstrong* v. *Raynes et al.* Eq. Cas., p. 144.

Trade name, Imitating—Fraud on public—A right to the use of a name to denote a place of business carried on by a particular person will be protected where it would be a fraud upon that person and the public for another person to make use of it in such a way as to deceive the public into believing that they were dealing with the person who originally used it.—(Case of "Victoria Hotel" and "New Victoria Hotel.") *McCormick* v. *McCoskery*, Eq. Cas., p. 332.

TRADE UNION

Trade Union—*See In re Industrial Disputes Investigation Act*, 1907, and *In re Dispute between the Longshoremen of the Port of Saint John, Employees and The Robert Reford Company, Limited et al, Employers*, 42, p. 434.

TRESPASS

I. To the Person.—*See* ASSAULT—MALICIOUS PROSECUTION.

II. To Lands. — *See* LANDLORD AND TENANT—EASEMENT—WAY.

Acquiesence a bar to an action for trespass—The defendant company in the year 1890, took possession of a piece of land claimed by plaintiff and built its line of railway across it, and fenced it on both sides of the track, and immediately thereafter began running its trains over the said track, and have continued to do so ever since.—The plaintiff saw what was going on and assisted in the building of the railway but made no objection to its construction or the running of the trains until 1905, when this action was brought.—*Held* (*per*, Hanington, Landry and Gregory JJ.), that the defendant in running its trains across

the land was committing a continuing trespass and the plaintiff was entitled to recover for the damage sustained for the six years preceding the commencement of the action. —*Held* (*per* McLeod J.), that the trespass, if any, was not a continuing trespass but was completed when the road was built in 1890, when and within six years the plaintiff might have recovered all the damages incident to the trespass which was now barred by the Statute of Limitations.—*Held* (*per* Tuck, C. J.), that the evidence showed no possession in the plaintiff, or, if it did, plaintiff was bound by his acquiescence and could not maintain trespass. *Clair* v. *Temiscouata Rwy. Co.*, 37, p. 608.

On appeal, 38 S. C. R. 230, Tuck C. J. upheld.

Adverse possession against grantee from Crown—Acts 3 Edw. VII, c. 19 and 4 Geo. V, c. 36—The period that one adversely holds Crown lands will not enure against the grantee of the Crown; and the possessory claim of one seeking to establish title by adverse possession will not begin to run until the date of the grant to the Crown's grantee.—*Semble*, that the Act of Assemby, 4 Geo. V, c. 36, coupled with the provisions of the Act 3 Edw. VII, c. 19, notwithstanding any previous claims that might have existed on the part of any person or persons to the land designated in such Act 4 Geo. V., authorized and empowered the Minister of Lands and Mines to sell any part of such land, in accordance with the schedule to such Act, 4 Geo. V., and to issue to the purchaser thereof a Crown grant, which would be perfectly good and conclusive against all the world, and even a prescriptive title would not avail against such grant from the Crown under these special acts. *Ouellet* v. *Jalbert*, 43, p. 599.

Adverse possession by trespasser—A person in possession under a deed of lands described by metes and bounds has a colorable title and is deemed to be in possession of all the lands within the boundaries of the deed although not enclosed.—A trespasser to acquire a statutory title against him must not only take possession so as to disseize the owner, but such possession must be continuous, exclusive, open, visible, and notorious for the statutory period and of all the land to which adverse title is claimed. *Gooden* v. *Doyle*, 42, p. 435.

Conventional line—Where adjoining occupiers of land, fully cognizant of the dispute as to the location of the line dividing their properties, agree upon a line as a division line and occupy up to and recognize such chosen line as a common boundary of their respective holdings, the successors in title of each of the parties so agreeing—in the absence of fraud—are bound by the line whether it be the true boundary line or not. *Philips* v. *Montgomery et al*, 43, p. 229.

See also *McIntyre* v. *White*, 40, p. 591.

Evidence—Onus of proof—In construing documents of title giving the length of a course in feet or other denomination with the addition "or until it comes to an object" that object, be it less or more than the length given, is the boundary.—Therefore where a town justified a trespass, on the ground that the act complained of was to remove or prevent an encroachment on R. street, the western boundary of the plaintiff's property, the burden of proving the street boundary is on the town, though the point to which the plaintiff claims is some five feet beyond the number of feet given in the plaintiff's deed as the distance from the starting point to R. street. *Milmore* v. *The Town of Woodstock*, 38, p. 133.

Illegal distress—*See* LANDLORD AND TENANT.

Jurisdiction of Courts—Private Act of Parliament—An arbitration clause in a private act of parliament will not oust the jurisdiction of the Court, and an action for damages will lie, unless the necessary steps are taken under the act to vest the power to exercise the rights or to do the thing for which compensation would be due under the Act. *Barter* v. *Sprague's Falls Mfg. Co.*, 38, p. 207.

Landlord and tenant—Abandonment by tenant—Re-entry by landlord—New trial—Where a tenant, before the end of the term, abandoned the premises leased without any intention of returning to them and his landlord took possession with intent to put an end to the term, *held*, this was a surrender of the term by operation of law, and in any event the tenant, having abandoned possession, could not maintain an action of trespass.—In an action of trespass to land the Court will not grant a new trial to enable the plaintiff to recover nominal damages. *Whittaker* v. *Goggin*, 39, p. 403.

Pleading — Defence — License — As a mother can now inherit from her children, she is no longer capable of acting as their guardian in socage.—Leave or license by the mother is therefore no defence to an action of trespass brought in the name of the infant heirs. *Hopper et al* v. *Steeves*, 34, p. 591.

Possessory title except against Crown —Right of action—The plaintiff owned a milling property on the south side of the Miramichi river.—In connection therewith he and his predecessors in title had (prior to any occupation by the defendant Sullivan or his predecessors in title) actual occupation of a wharf built by certain predecessors in title of the plaintiff out into the river, which not only extended along the front of the plaintiff's property, but continued down stream across the defendant's (Sullivan's) lot or part thereof.—The wharf in question was built on land vested in the Crown.—The defendant Sullivan claimed as against

the plaintiff to be entitled to the possession of that part of the wharf which fronted on his land.—*Held*, on appeal, affirming the judgment of McLeod C. J., in the Chancery Division, that the plaintiff had a possessory title good against every one but the Crown, and was entitled to recover damages against the defendants in trespass. *Jones* v. *Sullivan et al*, 43, p. 208.

Railway — Continuing trespass — Limitation of action—The Woodstock Railway Company was incorporated by 27 Vict., c. 57, by which Act it is given power to expropriate land for a right of way of ninety-nine feet in width and provision is made for the assessment and payment of damages.—In 1871 the company built their main track on a strip fourteen feet in width but there was no evidence that any damages had been assessed or paid.—The defendant company acquired the rights of the Woodstock Railway Company and in 1892 laid side tracks adjoining the fourteen foot strip and within the ninety-nine feet allowed by the Act 27 Vict., c. 57.—In May, 1911, the plaintiff brought an action of trespass for laying the side tracks on this land.—*Held*, the Court would not presume from the occupation of the fourteen foot strip that the Woodstock Railway Company took possession of the whole width of ninety-nine feet which it was entitled to expropriate. —Trespassing on the plaintiff's land by putting tracks thereon is not an injury or damage "sustained by reason of the construction or operation of the railway," and therefore the limitation of one year for bringing action provided by s. 306 of the Railway Act, R. S. C. 1906, c. 37, does not apply.—The damage by such trespass is continuous and therefore the plaintiffs are entitled to recover damages for six years previous to bringing the action, under s. 306 of the Railway Act. *Carr et al* v. *C. P. Rwy. Co.*, 41, p. 225. Affirmed 15, D. L. R. p. 295.

Cf. *Clair* v. *The Temiscouata Rwy. Co.*, 37, p. 608, supra.

Remedy — Damages — Injunction — In an ordinary case of trespass where there is an adequate legal remedy in the nature of damages, an injunction will only be granted by a Court of Equity when special circumstances are shown. *Godard* v. *Godard*, 4 Eq., p. 268.

Reversioner, Claim by—Form of action—A tenant for years, not in possession, cannot maintain trespass against a defendant who enters upon the land without objection on the part of the subtenants actually in possession; nor can he recover in case, unless there is evidence of an act necessarily injurious to his reversion or in denial of his right.—Where the declaration is in trespass and the plaintiff on the trial relies upon and directs all his evidence to proving injury to his possession, the attention of the trial judge not being in any way called to the fact that he was proceeding for injury to the reversion, he cannot afterwards, upon a motion to set aside a non-suit and enter a verdict for himself, claim the right under 60 Vict., c. 24, s. 95, to have a verdict entered for him in case as if he had declared for and proved damages to his reversionary interest. *McDougall* v. *The Campbellton Water Supply Co.*, 34, p. 467.

Reversioner, Claim by—Where premises have been let, and the tenant is in possession, the landlord cannot maintain trespass against a stranger for taking down fences to make a road and hauling logs across the land where there has been no injury of a permanent character to the fences or land in question. *Crawford* v. *Clowes*, 43, p. 199.

Tenants in common—One tenant in common can sue another for trespass if there has been an actual ouster. *Wathen* v. *Ferguson et al*, 41, p. 448.

Title to land — Deed by metes and bounds—Possession by predecessors in title of adjoining property—P. petitioned the Crown for a grant of land in the parish of St. Martins, and on the 24th of July, 1834, the Crown gave him a ticket of possession of a tract called lot B. of 200 acres, more or less, describing the tract as bounded on the north by the grant to I. and D. S., on the east by lot C., on the south by vacant land, and on the west by lot A.—P. went into possession under the ticket of lot B.— In 1837 the Crown granted to B. lot A., describing it by metes and bounds, and stating that it contained 300 acres, more or less.— In 1838 the Crown, having ascertained that there were not 200 acres between Lots A. and C., issued a grant of lot B. to P. describing it by metes and bounds, and stating that it contained 134 acres, more or less. —The plaintiff acquired the title to Lot B. by mesne conveyances from P., referring to the grant and describing the lot by metes and bounds as therein described.—In an action of trespass by the plaintiff against the defendant the successor in title of lot A. where the question in dispute was the location of the eastern boundary of lot A. and the western boundary of lot B.—*Held* (*per* Landry, Barker and McLeod JJ.), that as the title of the plaintiff was by conveyance describing the lot by metes and bounds as given in the grant, the possession of her predecessors in title under the ticket of possession, or otherwise, outside of the bounds of the grant would not enure to her benefit. *Ingram* v. *Brown*, 38, p. 256.

Verdict upheld—A verdict in an action for trespass to land recovered against a defendant in possession for the expulsion and exclusion of the plaintiff and for profits will not be disturbed on the ground that the count on which it was obtained was in the form of an action for mesne profits. *Smith* v. *Smith*, 37, p. 7.

TRIAL.

I. Notice of.
II. Entry for Trial.
III. Postponement of Trial.
IV. Jury Trial.
1. WHEN GIVEN.
2. JUDGE—HIS DUTIES.
3. THE JURY.
4. EVIDENCE—*See* EVIDENCE.
5. VERDICT.
V. New Trial.
1. MISDIRECTION, NON-DIRECTION, NONSUITS, ETC.
2. ADDRESS.
3. DAMAGES.
4. GENERAL.
See APPEAL and EVIDENCE.
VI. General.

I. Notice of Trial.

(*No Cases.*)

II. Entry for Trial.

Equity practice—Cause at issue—Setting down for hearing—The plaintiff answered defendant's interrogatories on November 28th and on December 12th took out a summons to set the cause down for hearing. —The defendant objected that the cause was not at issue, claiming that he had two months in which to except to the answer.—*Held*, that under section 31 of chapter 49, C. S. and Act 45 Vict., c. 8, s. 2, the remedy of a defendant upon an insufficient answer is not to except thereto, but to move within a reasonable time to dismiss the bill upon fourteen days notice of motion, and that a reasonable time having here elasped, and the defendant not now desiring to have the bill dismissed, the cause should be set down for hearing. *Dowd* v. *Dowd*, Eq. Cas., p. 388.

Equity practice—Time for hearing—An application to set a cause down for hearing cannot be made until fourteen days after the replication is filed, the defendant having that time, under sections 31 and 37, chapter 49, C. S. N. B., in which to file interrogatories. *Chase* v. *Briggs*, Eq. Cas., p. 53.

III. Postponement of Trial.

Adjournment—Recommencing trial—When the hearing of a case before a Justice is adjourned, the Justice is not bound to commence the trial at the hour of adjournment, but may postpone the hearing until a later hour in the day; nor is the Justice bound to be at the place of hearing continuously from the hour of adjournment until the commencement of the hearing. *Ex parte Card*, 34, p. 11.

Imposing condition—Where a party to a suit is entitled to the postponement of the trial on the ground of the absence of a material witness, it is improper to impose as a condition to granting the order that he consent to a change of venue. *The Royal Bank of Canada* v. *Hale*, 36, p. 471.

Postponement, Terms of—Affidavit—The Court refused a motion for judgment quasi nonsuit upon a first default where the plaintiff produced an affidavit showing absence of a material witness—although the affidavit did not state the residence of the witness or what had been done to procure his attendance—upon an understanding by the plaintiff to go down to trial at the next circuit and upon payment by him of costs of the day and costs of the motion. *Rourke* v. *Tompkins*, 40, p. 288.

Postponement, Terms of, after notice of trial—An application for judgment, as in case of a nonsuit for not proceeding to trial according to notice, due to the absence of a material witness, was refused on plaintiff giving a peremptory undertaking to go to trial at the next circuit and on payment of costs of the motion. *Frederick* v. *Gibson*, 36, p. 364.

Postponement, Terms of—Peremptory undertaking—Costs—The practice on refusing a rule for judgment as in case of a non suit, for not proceeding to trial according to notice, on plaintiff giving a peremptory undertaking, is to impose costs of the day as a condition. *Jones* v. *Miller*, 37, p. 585.

Review of judge's discretion re terms—If a trial judge refuse, except upon unusual and onerous terms, to postpone a trial on the ground of the absence of a material witness the Court will review the exercise of his discretion and grant a new trial.—(*Per* Tuck C. J., Hanington, Barker, McLeod and Gregory JJ., Landry J. dissenting.) *Hale* v. *Tobique Manufacturing Co.*, 36, p. 360.

See also *Hicks* v. *Ogden et, al*, 35, p. 361)col. 35-6.)

IV. Jury Trial.

1. WHEN GIVEN.

Jury, Application for—An application for a jury under Consolidated Statutes, c. 60, s. 31, must be made one clear day previous to the trial; and a demand made after a trial had been commenced, and adjourned at the request of the defendant before any substantial progress had been made, is too late. *Temperance and General Life Assurance Co.* v. *Ingraham*, 35, p. 558.

Jury, Trial by or without—Order 36, rr. 4 and 6—Where the question whether or

not any cause, matter or issue requires any prolonged examination of documents or accounts, or any scientific or local investigation which cannot conveniently be tried with a jury, is, under Order 36, r. 4, in the discretion of the judge directing the mode of trial, the exercise of this discretion will not be interfered with on appeal, except in case of gross error. *Clark* v. *The Saint Croix Paper Co.*, 43, p. 225.

Semble, If under Order 36, r. 6, the trial judge would be justified in disregarding an order made under r 4. for trial without a jury and direct a trial with a jury. *Id.*

2. THE JUDGE.

(*No Cases.*)

3. THE JURY.

Damages — Assessment of damages is peculiarly the province of the jury, hence the Court of Appeal will not correct an erroneous assessment but will send the case down for a new trial. *Edmondson* v. *Allen*, 40, p. 299.

Estoppel—Question for jury—To constitute an estoppel *in pais*, there must be a representation made with the intention that it should be acted upon, which representation is acted upon by the party to whom it is made, in the belief that it is true and by which he is prejudiced.—The jury found that the plaintiff made a contract with one F. as agent of the defendant, and also made the following finding: "Did defendant knowingly permit F. to so deal with the public as to lead the plaintiff to infer that he (F.) had authority to make contracts binding on the defendant?—Yes."—*Held*, that the question as framed was insufficient to constitute an estoppel. *Giberson* v. *The Toronto Construction Co. Ltd.*, 40, p. 309.

False imprisonment — Questions for jury—In an action for false imprisonment the defendant, acting as a peace officer under the criminal code, is entitled to notice of action under section 976, if he honestly believed the plaintiff had committed a felony.—The *bona fides* of the defendant's belief is a question of fact, and must be submitted to the jury, if any facts exist which could give rise to an honest belief.—The reasonableness of the belief is not material.—(*Per* Hanington, Landry, Barker and McLeod JJ., Tuck C. J. dissenting.) *White* v. *Hamm*, 36, p. 237.

Failure of jury to answer questions—Upon the trial of an action for negligently setting fire to plaintiff's timber land the judge submitted certain questions to the jury under C. S. 1903, c. 111, s. 163.—The jury did not answer the questions but brought in a general verdict which the judge accepted without objection by either party.—*Held*, that as no objection was raised at the trial the judge had a right to accept the verdict. —*Held* (*per* McLeod, Barry and McKeown JJ.), if counsel had objected it would have been the judge's duty to send the jury back to answer the questions. *Sullivan* v. *Crane*, 39, p. 438.

Juror, Bias of—A new trial will not be granted on the ground that one of the jurors was disqualified, his wife being a first cousin to the plaintiff's wife, if the defendant knew before the trial commenced of the alleged disqualification and failed to raise the objection. *Duffy* v. *Reid*, 44, p. 407.

Juror, Disqualification of—The fact that jurors are related within the ninth degree is not of itself a ground for a new trial.—It must be shown that the relationship is such as would create a bias or prejudice in the jurors' minds. *Peck* v. *Peck*, 35, p. 484.

The fact that a juror was related to the plaintiff's wife, which was not known to either party or their attorney at the time of the trial; and that two other jurymen were open to challenge on the ground that they had not the necessary property qualification are not grounds for a new trial. *Lloyd* v. *Adams*, 37, p. 590.

The age limit provided for by section 1 of the act respecting juries (C. S. 1903, c. 126), operates as a disqualification and not merely as an exemption. *Moran* v. *O'Regan*, 38, p. 399.

Juror, Treating—Treating one of the jurors during the progress of the trial by the attorney of one of the parties is ground for a new trial. *Nadeau* v. *Theriault*, 37, p. 498.

Jury, Challenging the array—It is no ground for a challenge to the array that the jury was summoned by a coroner who was also deputy to the sheriff of the county who was disqualified by reason of being a ratepayer in the town that was the defendant in the action; or that the coroner summoned the jury under a notice by the clerk of the circuits, pursuant to C. S. 1903, c. 126, s. 18, and no venire was issued. *Milmore* v. *Town of Woodstock*, 33, p. 133.

Jury—County Courts, 60 Vict., c. 24, s. 158 applicable to—Section 158 of 60 Vict., c. 24 (Supreme Court Act) authorizing the judge on the trial of a cause to direct the jury to answer questions submitted and enter a verdict on the answers given, applies to the County Courts.—When this course is adopted it is the judge's duty to enter the verdict for the party in whose favor the questions are answered. *Steeves* v. *Dryden et al*, 35, p. 555.

Jury, Powers of—It is the privilege of any juror to ask any question he likes upon the trial—if it is irrelevant, let counsel object to it (*per* Hanington J.). *Ingram* v. *Brown*, 38, p. 256.

A juror cannot object to a witness being called, nor charge him with interest or partiality (*per* McLeod J.). *Ingram* v. *Brown*, 38, p. 256.

Jury, Refreshing memories of—"If juries wish to have their memories refreshed as to some part of the evidence, they should come into Court for the purpose where counsel, if they wish, can request the judge to read to the jury at the same time other evidence bearing on the same point" (per Barker, C. J., and McLeod, J.) *Miles Bros. Inc.* v. *Bell*, 40, p. 158

See also *Royal Bank of Canada* v. *Hale*, 37, p. 47.

Jury—Summoning additional jurors—Where the jury panel has been exhausted by reason of some of the jurors being out in another case the presiding judge may direct talesmen to be summoned. *Nadeau* v. *Theriault*, 37, p. 498.

Jury, Tampering with—Where one of the grounds in support of a motion for a new trial was that some of the jury had been tampered with, and the charge included the defendant's attorney, an officer of the Court, and a number of affidavits very contradictory and of an entirely irreconcilable nature were read, under the special circumstances of the case an order was made that the deponents should appear before the Court to be examined *viva voce* touching the matters in question. *Wood* v. *LeBlanc*, 36, p. 47.

Malicious prosecution—Question for jury—In an action for malicious prosecution the question of malice is for the jury exclusively. *Dugay* v. *Myles*, 42, p. 265.

The question of reasonable and probable cause is for the judge to determine, but if the facts are in dispute they must be found by the jury, and one essential fact for the determination of this question is as to the belief of the prosecutor in the guilt of the accused. *Id.*

Negligence — Lord Campbell's Act — Question for jury—In an action under the Statute, C. S. 1903, c. 79 (Lord Campbell's Act), the jury should be asked simply if the defendant was guilty of negligence causing the death, and if so, in what did such negligence consist? (*Per* Barker J.) *Collins Administrator etc.* v. *The City of Saint John*, 38, p. 86.

Questions—Submitting at request of counsel—A judge is not bound on the request of counsel to submit questions to the jury under C. S. 1903, c. 111, s. 163, and c. 116, s. 78.—He may refuse to do so and ask for a general verdict. *Shaw et al* v. *Stairs*, 37, p. 593.

See also *W. H. Thorne & Co. Ltd.* v. *Bustin*, 36, p. 163 (Barker, McLeod and Gregory, J.J.), and *Sonier* v. *Breau* 41, p. 177.

Questions for jury—Consolidated Statutes 1903, c. 111, s. 163, providing that the judge, instead of directing the jury to give either a general or special verdict may submit questions of fact and enter a verdict on the questions anwered, applies to the County Courts. *Read* v. *McGivney*, 36, p. 513.

Slander—Questions for jury or general verdict—In actions of slander the judge may submit questions to the jury instead of taking a general verdict, but if he instructs the jury to bring in a general verdict he is not obliged to submit questions at the request of counsel.—(*Toronto Railway Co.* v. *Balfour*, 32 S. C. R. 239. *Furlong* v. *Carroll*, 7 A. R. Ont. 145, 154, specially referred to.) *Sonier* v. *Breau*, 41, p. 177.

5. VERDICT.

Amount of verdict—Payments after action brought—The M. Company owed the plaintiff $4,000, for which he held as collateral security the defendant's note for $3,000, made for the accommodation of the company, and some other collateral. After action brought on the note, the plaintiff received a dividend from the company, which had gone into liquidation, and realized on some of the other collateral, but these facts were not pleaded. Verdict having been entered for the full amount of the note, *held*, that the plaintiff was entitled to judgment for the full amount of the note, but the amount realized upon the collateral and some portion of the dividend should be credited upon the execution. *Gorman* v. *Cope*, 39, p. 309.

Assault — No damage — Verdict for defendant—Costs—In an action for an assault the jury found the defendant guilty, and that the plaintiff had not suffered any damage and returned a verdict for the defendant.—A subsequent application to the judge of the County Court who had tried the cause to set aside the verdict and grant a new trial, or failing that, to enter a verdict for the plaintiff for nominal damages was refused.—*Held*, on appeal (*per* Tuck C. J., Hanington, Landry and Gregory JJ., McLeod J. dissenting), that the Court had no power to set aside the verdict for the defendant and enter a verdict for the plaintiff, and that a new trial will not be granted merely for the purpose of enabling a plaintiff to obtain nominal damages, where no right is affected except a question of costs. *Murphy* v. *Dundas*, 38, p. 563.

Breach of contract—Damages—Where defendants counterclaimed for a breach of the contract but furnished no particulars and offered no proof of damage, the jury found that there had been a breach by the plaintiff and assessed the damages at $200. —They also found the defendants had accepted what the plaintiff did as a fulfilment of the contract.—*Held*, that no evidence of damage having been given on

the trial the question as to damages was unnecessarily left to the jury and the defendants could derive no benefit from its findings. *Blue* v. *Miller et al Adm'x etc.*, 43, p. 307.

Ejectment—Equitable defence—In an action of ejectment where the defendant pleads he is entitled to possession on equitable grounds under an agreement of purchase which he is ready to carry out, and the judge trying the case without a jury finds that the plea is proved, it is proper under C. S. 1903, c. 111, s. 134, to order a verdict for the defendant, although the legal title and right to possession is in the plaintiff, and the effect of verdict is to deprive the plaintiff of the costs of the ejectment. *Souci* v. *Ouillette*, 37, p. 393.

Finding of jury—Where each party is seeking to make a title for himself by possession the Court will not interfere with the findings of the jury unless the verdict was one which, the whole of the evidence being reasonably viewed, could not properly have been found.—(*Per* Tuck C. J., Barker, McLeod and Gregory JJ.) *Wood* v. *LeBlanc*, 36, p. 47.

General verdict—Failure to answer questions—Upon the trial of an action for negligently setting fire to plaintiff's timber land the judge submitted certain questions to the jury under C. S. 1903, c. 111, s. 163.—The jury did not answer the questions but brought in a general verdict which the judge accepted without objection by either party.—*Held*, that as no objection was raised at the trial, the judge had a right to accept the verdict. *Sullivan* v. *Crane*, 39, p. 438.

Negligence, Findings re—New trial refused—While B. was carrying a bag out of the defendant's grist mill by an ordinary means of exit he passed near a vertical shaft which was in motion, and in some way his overcoat was caught by the shaft and he was whirled around and instantly killed.—Between the shaft and the smutter, where B. tried to pass, was a passage of about six feet in width.—The shaft, which was unguarded, was three inches in diameter, and had been mended some years before with a chain and some wire to secure a coupling.—This increased its diameter by several inches, and there was evidence that a hook on the end of the chain and a piece of the wire was left protruding, though this was contradicted.—There was no witness of the accident, and the jury found that there was no negligence on the part of the defendant and that there was contributory negligence on the part of B.—*Held*, that the verdict was such as the jury, reasonably viewing all the evidence, might properly find. *Berthelot* v. *Sallesses*, 39, p. 144.

Perverse verdict—In an action under O. 63 for the recovery of a piano unlawfully detained, the defendant counter-claimed for damages for breach of contract.—The judge directed the jury that the subject matter of the counter-claim was *res judicata* and was not to be considered, and directed a general verdict for the plaintiff.—Notwithstanding this direction the jury found a verdict for the defendant for $300.—*Held*, that the trial judge was right in disregarding the verdict and in ordering a verdict to be entered for the plaintiff for the return of the piano and on the counter-claim. *Amherst Pianos Ltd.* v. *Adney*, 44, p. 7.

See *Giberson* v. *The Toronto Construction Co. Ltd.*, 40, p. 309.

See also NEW TRIAL (4).

See also Title "APPEAL"

V. New Trial.

1. MISDIRECTION, NONDIRECTION, NONSUIT, ETC.

Accounts—On the trial of an action involving disputed accounts it is not a ground for a new trial that the judge told the jury they might draw inferences favorable or unfavorable to the plaintiff's case from the fact that he refused to produce, under notice, documentary evidence in his possession, which it was admitted contained some account of the transaction in dispute. *Hale* v. *Leighton*, 36, p. 256.

Alibi—Where the defence to a criminal charge is an alibi, it is misdirection to tell the jury that the onus is on the prisoner to prove it to their entire satisfaction, and to show beyond all question or reason that he could not have been present at the commission of the crime. *R.* v. *Myshrall*, 35, p. 507.

Application of law to the facts—In a case requiring a direction upon the law to the jury it is misdirection to give a general statement of the law without pointing out its application to the facts of the particular case.—*Prudential Assurance Co.* v. *Edmonds*, 2 A. C. 487, followed. *Guimond et al* v. *Fidelity-Phenix Fire Insurance Co.*, 41, p. 145.

Assault—Damages—In an action for assault the judge misdirected the jury in favor of the plaintiff on matters which might affect the question of damages, and a verdict was rendered for the plaintiff for $135.—On appeal upon the grounds of misdirection and excessive damages, *held*, that although the damages were not excessive, yet the misdirection caused a substantial wrong or miscarriage entitling defendant to a new trial, inasmuch as the jury might have been influenced by it in assessing damages. *Edmondson* v. *Allen*, 40, p. 299.

Case withdrawn from jury—The acts of a person assuming to exercise the functions

of an office to which he has no legal title, may be, as regards all persons except the holder of the legal title to the office, legal and binding; a new trial was ordered in an action to recover the purchase money paid for a carload of potatoes sold under a contract which required them to be inspected by an officer under the Destruction Insect and Pest Act (9 and 10 Edw. VII, c. 31, Dom.) where the trial judge withdrew the case from the jury and ordered judgment for the plaintiff on the ground that the person who made the inspection while acting *de facto* as an officer under the act was not in fact a properly appointed officer under the act and therefore the buyer had a right to rescind the contract and recover back the purchase money. *Fawcett* v. *Hatfield et al*, 44, p. 339.

Where there is evidence of an express promise to pay an arbitrator for his services as such, founded on good consideration, it is misdirection to withdraw the same from the consideration of the jury. *Pinder* v. *Cronkhite*, 34, p. 498.

Charge as a whole fair—Verdict not unjust—The Court of Equity in the exercise of its discretion will not grant a new trial on the ground of misdirection, if it is of such a nature, in view of all the circumstances and the charge as a whole, that it ought not properly to have influenced the jury and their finding is the same that ought to have been made had there been no misdirection, and the Court is satisfied that justice has been done. *Bradshaw* v. *Foreign Mission Board of Baptist Convention of Maritime Provinces*, 1 Eq., p. 346.

Charge as a whole—A new trial will not be granted on the ground of misdirection if the charge taken as a whole fully and fairly leaves the facts to the jury, notwithstanding it contains objectionable isolated expressions or statements. *Porter* v. *O'Connell*, 43, p. 458.

A statement in a charge to a jury which states the law too broadly as applied to the case under consideration is not a misdirection for which a new trial will be granted if the charge taken as a whole leaves all the facts correctly and fairly to the determination of the jury. *Duffy* v. *Reid*, 44, p. 407.

Contract, Inference of breach of—An agreement between steamship companies fixed rates for freight and passengers for one season.—The plaintiffs proved one breach of the contract by the defendants and the Court directed the jury that in the absence of evidence to the contrary they might consider whether other breaches had not been committed.—*Held*, the direction was right inasmuch as the defendants knew and could have given evidence as to whether or not other breaches had been committed and such knowledge was not in the plaintiff's power. *St. John River S. S. Co. Ltd.* v. *The Star Line S. S. Co.*, 40, p. 405.

Contract in writing—Interpretation—Plaintiff contracted with the defendants for three hundred and thirty hours dredging in the harbour of Saint John with a specific dredge and appliances, and for so much longer as the city might require on giving notice at the expiration of that period, to be paid for at the rate of $400 per each eleven hours, subject to deductions and allowances agreed upon for time lost (1) when the dredge was unable to work by reason of injury to the plant or machinery; and (2) where the work could not go on by reason of stormy weather.—The water was too deep at high tides for the dredge to work, and there was, therefore, delay caused in this way.—Both parties were aware at the time the contract was made that the high tides would interfere with the work, but there was no provision for any deduction or allowance on that contract.—*Held*, that a verdict for the plaintiff, ordered on a construction of the contract that there was an implied covenant that the defendants should pay for the time lost by reason of the high tides, was erroneous, and should be set aside and a new trial granted. *Connolly* v. *The City of Saint John*, 36, p. 411. Confirmed 35 S. C. R., p. 186.

Damages—In an action brought to recover damages from the owner of a dog, which had bitten the plaintiff, a child a little over five years of age, the learned judge, in charging the jury, told them that if they thought the scars on the plaintiff's face, caused by the bite, were likely to be permanent, and that such lasting disfigurement might affect her prospects of making a good marriage, they might consider such possible loss of marriage in assessing the damages.—*Held*, misdirection, as such damages were too speculative and remote.—The jury were further directed that in assessing the damages they might take into consideration the financial position of the defendant and the condition in life of the plaintiff.—*Held*, as before, misdirection. *Price* v. *Wright*, 35, p. 26.

If, in charging the jury, the judge makes a statement calculated to unnecessarily magnify the importance of the matter in dispute, and suggest excessive damages, a new trial will not be granted, even though the judge was in error in making the statement, if it appears from the verdict found that the jury, in assessing the damages, were not influenced by the charge. *Cormier* v. *Boudreau*, 35, p. 645.

On the trial of an action against a street railway company to recover damages for personal injuries, the vice-president of the company, called on the plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel on opening to the jury having stated that the company were making large sums of money out of the road.—In re-examination the plaintiff's counsel interrogated him at length as to the selling price of the shares

on the Montreal exchange, and proved that they sold at about 50 per cent. premium.—The judge in charging the jury directed them to assess the damages "upon the extent of the injury plaintiff received, independent of what these people may be, or whether they are rich or poor."—The plaintiff obtained a verdict with heavy damages.—*Held*, that in view of the amount of the verdict it was quite likely that the general observation of the judge in his charge did not remove the effect on the jury as to the financial ability of the company to respond well in damages.—The injury of which the plaintiff complained was the crushing of his foot and on the day of the accident the medical staff of the hospital where he had been taken held a consultation and were divided as to the necessity for amputation.—Dr. W. who thought the limb might be saved, was four days later appointed by the company, at the suggestion of the plaintiff's attorney, to co-operate with the plaintiff's physician.—Eventually the foot was amputated and the plaintiff made a good recovery.—On the trial the plaintiff's physician swore to a conversation with Dr. W. four days after the first consultation and three days before the amputation, when Dr. W. stated that if he could induce the plaintiff's attorney to view it from a surgeon's standpoint and not use it to work on the sympathies of the jury, he might consider more fully the question of amputation.—The judge in his charge referred to this conversation and told the jury that it seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when it should have been taken off and that he thought it very reprehensible.—*Held* (Strong C. J. and Gwynne J. dissenting), that as Dr. W. did not represent the company at the first consultation when he opposed amputation; as others of the staff took the same view and there was no proof that amputation was delayed through his instrumentality; and as the jury would certainly consider the judge's remarks as bearing on the contention made on plaintiff's behalf that amputation should have taken place on the very day of the accident, it must have affected the amount of the verdict.—To tell the jury to ask themselves: "If I were plaintiff how much ought I to be paid if the company did me an injury?" is not a proper direction. *Hesse* v. *The Saint John Rwy Co.*, 35 N. B. R., p. 1; 30 S. C. R. p. 218.

Damages, Reduction of—The Court has no jurisdiction without the defendant's consent to make a new trial dependant upon the consent of the plaintiff to reduce the damages. *Barter* v. *Sprague's Falls Mfg. Co.*, 38, p. 207.

Evidence—On the trial of an action brought to recover damages for injuries caused to the plaintiff by the negligence of the servants of the defendants while he was being carried as a passenger upon a car of the defendant company, the vice-president of the company, a witness for the plaintiff, who had gone to P., the plaintiff's place of residence, in order to pursue some inquiries as to the plaintiff's earning capacity and income, was asked what had been told him in reference thereto by one E.—Upon objection by the defendants' counsel the question was ruled out.—In charging the jury the learned judge, referring to the rejected evidence, told them that they might assume that if the witness had heard anything unfavourable to the plaintiff he would have told it, and that it was material which they might consider when they were endeavouring to arrive at the earning capacity and income of the plaintiff.—At the instance of the defendants a commission was issued to take the evidence of certain persons at P.—The commission, though executed, was never returned to the Court, and a copy of the evidence of one of the witnesses being tendered in evidence on behalf of the plaintiff, was upon objection by the defendants' counsel rejected.—The learned judge told the jury that the conduct of the defendants in not having the commission returned was an element which might fairly be considered by them in determining the credibility of the plaintiff, although the defendants' counsel had offered to allow copies of all the evidence taken under the commission to be used as if it had been returned into Court, which offer was refused.—*Held*, misdirection in both instances (*per* Tuck C. J., Hanington and McLeod JJ., VanWart J. dissenting).—B., a medical witness, swore that W., a surgeon who had been employed by the defendants to watch the plaintiff after he had been injured, told him that he would consent to an amputation of the plaintiff's foot if the plaintiff's attorney would not use it as a means of increasing the damages.—The learned judge commented severely upon this to the jury.—*Held*, misdirection, as it was not a matter for which the defendants could be held liable (*per* Tuck C. J., Hanington and McLeod JJ., VanWart J. dissenting). *Hesse* v. *St. John Rwy. Co.*, 35, p. 1.

Failure of counsel to ask—A new trial will not be granted on the ground of non-direction if the counsel of the party complaining was afforded an opportunity at the trial to call the judge's attention to the particular point on which he desired a direction, or a more specific direction, and failed to do so. *Phillips* v. *Montgomery et al*, 43, p. 229; *Porter* v. *O'Connell*, 43, p. 458. *Robinson* v. *Haley et al*, 42, p. 657.

Lord Campbell's Act—In an action under Lord Campbell's Act the jury should be asked simply if the defendant was guilty of negligence causing the death, and if so, in what did such negligence consist?—If irrelevant and unnecessary questions are asked, and the judge's charge in respect to them is not warranted by evidence relevant to the issue, a new trial will not be granted unless the effect thereof is to prejudice the minds of the jury as to the real question

to be tried (*Per* Barker J). *Collins Administrator etc.* v. *The City of Saint John*, 38, p. 86.

Murder—The prisoner, who was tried and convicted of murder, although he had ample time and opportunity to tell all he knew concerning the crime both to the authorities and others, maintained a complete silence respecting it, with the exception of some bald assertions of his innocence, until he went upon the witness stand at the trial to give evidence on his own behalf, when he admitted being present at the doing of the deed, but charged it upon one G., a young companion, who was with him, and who before and at the trial, had alleged the prisoner's guilt.—The learned judge, in charging the jury, told them that they were entitled to take this continued silence of the prisoner into consideration, and after deciding whether or not such silence proceeded from a consciousness of guilt and a desire to spring a defence upon the Crown, which it might not be able to meet, they might therefrom draw an inference as to his guilt or innocence.—He further instructed them that this continued silence of the prisoner was an element that might assist them in determining the amount of credence that ought to be given to the story told by the prisoner in the witness box.—*Held* (*per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ., Gregory J. dissenting), that the charge was correct in both respects. —*Held* (*per* Gregory J.), in so far as the charge directed the attention of the jury to the silence of the prisoner as one of the means of testing his credibility it was correct; but when the learned judge went beyond that and instructed the jury that they were entitled to draw inferences of the prisoner's guilt or innocence from his silence, it was error.—*Held* further (*per* Tuck C. J., Hanington, Landry, Barker and McLeod JJ. Gregory J. dissenting), that even if the charge were erroneous in the respect complained of, as in the opinion of the Court no substantial wrong or miscarriage had been occasioned thereby, such error was cured by proviso (f) of section 746 of the code. *R.* v. *Higgins*, 36, p. 18.

On a trial for murder, where the evidence is circumstantial, and some of the material facts proved are of such a character that it is possible to draw from them inferences bearing either for or against the defence set up, it is the province of the jury to draw the inferences, and it is misdirection for which a new trial will be granted for the trial judge to tell the jury that the only inferences that should be drawn are those tending to establish the guilt of the prisoner. *R.* v. *Collins*, 38, p. 218.

Negligence—In an action for damages for an injury caused by alleged negligence the verdict will not be set aside on the ground that the trial judge failed to instruct the jury as to what would, and what would not, constitute negligence, if counsel on the trial neglected to ask the judge to so instruct them. *Robinson* v. *Haley et al*, 42, p. 657.

Nonsuit improperly granted—By the terms of a life insurance policy the defendant agreed to pay at its head office at the city of Hamilton in the province of Ontario. —*Held* (*per* Tuck C. J.), that a nonsuit should not be granted on the ground that the plaintiff had failed to prove a demand at the head office, or on the ground that no ancillary probate had been taken out in Ontario before action brought. *Seery et al Exec.* v. *Federal Life Assurance Co.*, 38, p. 97.

In an action for negligence in starting a fire in June without notice, contrary to the Act respecting Protection of Woods from Fire, C. S. 1903, c. 94, tried before a County Court judge without a jury, plaintiff proved that defendant had a number of brush piles on his land thirty or forty feet apart, that defendant was seen going towards these piles, and twenty minutes afterwards smoke arose and defendant was found near the piles, fifteen of which were burning.—There was also evidence of a statement by defendant that tobacco dropped out of his pipe and set the fire.—A wind was blowing at the time towards the plaintiff's land and plaintiff's woodland was burned. —Plaintiff having been nonsuited, *held*, the nonsuit should be set aside.—*Held* (*per* White J.), in the absence of contradiction the evidence entitled the plaintiff to a verdict and therefore the nonsuit should be set aside.—*Held* (*per* Barry J.), a nonsuit should not be granted where there is sufficient evidence for the plaintiff to submit to a jury. *Cochran* v. *Lloyd*, 42, p. 112.

Order 39, r. 6—A new trial is not granted on the ground of misdirection unless in the opinion of the Court some substantial wrong or miscarriage has been occasioned thereby.—Order 39, r. 6. *Markey* v. *Sloat et al*, 41, p. 235; *Simpson* v. *Malcolm*, 43, p. 79.

Slander—In an action for slander, it was *held*, misdirection to tell the jury that if the defendant believed he was a constable and was making the enquiries *bona fide* and discreetly in the discharge of his duty as an officer of the law endeavouring to ferret out a crime, he was not guilty whether he was a constable or not. *Trafton* v. *Deschene*, 44, p. 552.

Theft—The mere fact of a person converting to his own use goods found by him does not of itself as a matter of law make him guilty of theft.—Where, on a trial of a charge of theft, the jury after retiring asked the question: "Does raising a temporary loan on anything found constitute theft?" and the judge answered "Yes."—*Held*, that the answer was equivalent to a direction that as

a matter of law the accused was guilty and was a misdirection. *R.* v. *Slavin*, 35, p. 388.

Trespass—Where premises have been let, and the tenant is in possession, the landlord cannot maintain trespass against a stranger for taking down fences to make a road and hauling logs across the land where there has been no injury of a permanent character to the fences or land in question. —Therefore a general charge that the defendant would be liable if any damage were done to any of the fences would be a misdirection. *Crawford* v. *Clowes*, 43, p. 199.

Trover—L. and P. each carried on business in Saint John, buying and selling fruit. —P. was a licensed auctioneer.—To avoid competition between the parties it was agreed that P. was to buy all the apples handled by either in the market square, L. to furnish the money when apples were purchased.—All commissions on commission sales, and net profits on sales of apples purchased were to be equally shared.—Under this agreement P. purchased the cargo of the schooner C., some 342 barrels.—After a part had been sold the sheriff under an execution in the suit of R. against P. seized and, without removing any of them, sold 62 barrels.—At the sale the sheriff in answer to a bidder, stated that he was selling P.'s interest only, and would guarantee nothing, and he did not deliver the barrels sold to the purchaser.—In an action of trover in the Saint John County Court against the sheriff for a conversion of the 62 barrels, the judge told the jury that if they found that the apples were purchased under the agreement on the joint account of L. and P. there was a conversion, and, the verdict should be for the plaintiff.—*Held*, on appeal, that the direction was wrong, that the sheriff had a right to sell any interest P. had, and the question for the jury was: "Did the goods belong to P., or did he have an interest in them?" *Ritchie* v. *Law*, 37, p. 36.

Warranty—Where in an action involving issues of warranty on a sale of chattels, failure of consideration and fraudulent misrepresentations, the questions submitted to the jury did not cover all the material issues raised by the pleadings and the answers of the jury to those submitted were unsatisfactory, and where the plaintiff must have failed in part but for an amendment allowed on the motion to set aside the verdict entered for the defendant and enter a verdict for the plaintiff a new trial was granted without costs. *Robertson* v. *Norton*, 44, p. 49.

A policy of accident insurance contained a warranty that the applicant had not withheld any information which was calculated to influence the decision of the directors as to the applicant's eligibility for insurance, and also a warranty that no application ever made by the applicant for accident insurance had been declined and no accident policy issued to him had been cancelled by any company.—The plaintiff had effected previous insurance which on a settlement of a disputed claim was put an end to during its currency with the consent of the plaintiff, but at the request of the company, the unearned premiums being returned.—*Held*, that the proper question for the jury was whether the withholding of this information was in fact material, and it was misdirection to tell the jury that they were to consider whether the plaintiff believed it material. *Smith* v. *The Dominion of Canada Accident Insurance Co*, 36, p. 300.

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2. ADDRESS.

Alluding to outside opinions—Allusions made by counsel in his address to the jury to the opinion of a judge of the Supreme Court who had acted for the defendant prior to his appointment to the bench, are improper, though not necessarily ground for a new trial. *Massey-Harris Co. Ltd* v. *Merrithew*, 39, p. 544.

Reading judgment in former trial—At the trial the plaintiff's counsel was allowed, subject to objection, to read as a part of his closing address a judgment on a former motion for a new trial in this cause delivered in the Supreme Court of N. B., and also a judgment delivered on appeal in the Supreme Court of Canada. —These were both dissenting judgments they dealt with the same facts and expressed opinions on the facts but covered a wider range of questions than those on which this jury was asked to find.—The trial judge expressed his opinion that the jury could not have been biased by the reading of these judgments, this was the third trial of the cause and at each trial the plaintiff had a verdict, and the weight of evidence was in favor of the findings of the jury.—*Held*, that while it was improper to allow the judgments to be read, yet under the special circumstances this was not a ground for a new trial.—*Held*, also that the objection was cured by section 376 of the Supreme Court Act, (C. S. 1903, c. 111,) as no substantial wrong or miscarriage of justice had been thereby occasioned. *Harris* v. *Jamieson*, 39, p. 177.

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3. DAMAGES.

Excessive Damages — Where the jury in assessing damages apparently took into consideration the plaintiff's costs of the first trial which had been set aside, this was considered sufficient grounds for setting aside the verdict. *Ingram* v. *Brown*, 38, p. 256.

Excessive damages — Reducing or New Trial See *Barter* v. *Sprague's Falls Mfg. Co.* 38, p. 207.

Excessive—In an action for breach of contract to supply water power for one year and from year to year as the plaintiff required, it was proved that the water supply

was cut off in the middle of the second year, and the plaintiff proved a loss of profit, up to the termination of the second year, amounting to $660.—He also claimed future damages and special damage by reason of the terms of his lease which required that water power—which could be procured only from the city—should be used on the premises, but there was no allegation of special damage in the declaration, and an application at the trial to amend by adding such allegation was refused.—Under a direction to find damages up to the termination of the second year, the jury allowed $1,500. —*Held*, that the damages were excessive and ground for a new trial. *Crockett* v. *The Town of Campbellton*, 39, p. 160.

Insufficient damages — A new trial on the ground of the insufficiency of the damages will not be granted unless it appears clearly to the Court that the smallness of the damages has arisen from mistake upon the part of either the Court or jury, or from some unfair practice on the part of the defendant.—A verdict will not be set aside on the ground that it is a compromise verdict if it can be justified upon any hypothesis presented by the evidence. *Currie* v. *The St. John Rwy. Co.*, 36, p. 194.

Misdirection re damages—*See* 2 MISDIRECTION.

Nominal—*Semble*: A new trial will not be granted to the plaintiff in an action on a replevin bond where the breach is that the replevin suit was not prosecuted with effect and without delay, and only nominal damages could be recovered. *Landry* v. *Sivret et al*, 39, p. 356.

Reducing damages—New trial—The power of ordering a new trial unless the plaintiff consents to a reduction of the damages, is vested in the judges of the County Courts under section 68 of the County Court Act. *Vanbuskirk* v. *VanWart*, 36, p. 422.

See also Title "DAMAGES."

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4. GENERAL.

Case called out of turn—It is a ground for a new trial that a case is called on out of its turn on the docket and tried against the protest of one of the parties. *Milligan* v. *Crockett*, 36, p. 351.

Conditional order for new trial—The Court has no jurisdiction without the defendant's consent to make a new trial dependent upon the consent of the plaintiff to reduce the damages. *Barter* v. *Sprague's Falls Mfg. Co.*, 38, p. 207.

Defence not availed of—If the defendant on the trial of a cause neglects to avail himself of a defence of which he was apprised, and which he could have then made if he had wished, it is not open to him to move for a new trial in order to make such defence. *The Kennedy Island Mill Co.* v. *McInerney*, 36, p. 612. Confirmed S. C. of C., No. 2455, unreported.

Ejectment—In an action of ejectment, where the verdict is for the defendant, the Court will not ordinarily grant a new trial unless special circumstances exist which prevent the plaintiff from bringing another action.—(*Per* Hanington, Landry, Barker, McLeod and Gregory JJ.) *Tobique Salmon Club* v. *McDonald*, 36, p. 589.

Findings by jury—Precise point not submitted—Where the issue submitted to and found by the jury involves, and as a necessary sequence determines, the issue raised by the pleading, a new trial will not be granted, though the precise point was not submitted. *Porter* v. *Tibbits*, 37, p. 25. *W. H. Thorne & Co. Ltd.* v. *Bustin*, 37, p. 163. (Tuck C. J., Hanington and Landry JJ.)

Findings by jury inconsistent—Condition precedent unfulfilled—The plaintiffs agreed to build for the defendants in a specified time two hundred racks according to specifications furnished, and subject to the approval of the inspector of the defendants.—At the time the plaintiffs made the offer to build the racks they asked that in the event of their offer being accepted they be furnished with a sample rack, which the defendants accordingly did.—After considerable delay on the part of the plaintiffs, and urging on the part of the defendants, the plaintiffs notified the defendants that they had forty-eight racks completed, and all the materials ready to put the remaining one hundred and fifty-two together.—Defendants' inspector condemned all the racks manufactured and in process of manufacture as not in accordance with the specifications.—In an action for damages for breach of the contract the jury found, in answer to questions submitted by the judge, that the racks were not in accordance with the contract and specifications, but were in accordance with the sample rack furnished; they also found that the defendants employed a competent inspector and he acted in good faith, and they assessed the damages at $831.70, for which amount a verdict was entered for the plaintiffs.—*Held*, on a motion to set aside the verdict and enter a verdict for the defendants, that in view of the findings that the inspector acted in good faith, and that the racks were not manufactured according to the contract and specifications, there must be a new trial. *Lawton Co. Ltd.* v. *The Maritime Combination Rack Co. Ltd.*, 36, p. 604.

Findings by jury incomplete—T. & Co. under an arrangement made with B. in 1900, agreed to supply S. with materials to be used in building and repairing houses owned or managed by B.—The materials were charged direct to B., and supplied upon his credit.—This arrangement continued down to November 8th, 1902, without any dispute between the parties.—T. & Co. claim that about that time B. requested

them for his convenience to change the account and charge all materials got under the arrangement between them to S. to prevent the account from getting mixed up with his private account with T. & Co., with which S. had nothing to do, and the account was changed in the books accordingly, but without any intention on the part of T. & Co., to alter the liability of B.—This arrangement and request is denied by B., and he says on the other hand that about the 8th of November, 1902, he gave T. & Co., a written notice that he would no longer be liable for goods supplied to S. and that the arrangement between them to that effect was terminated.—On the trial of an action by T. & Co., against B. for goods sold and delivered after November 8th, 1902, the jury were asked "after the 8th of November, 1902, to whom was credit given by T. & Co., to B. or S." and they found to B.—They were also asked whether the goods were sold upon the credit of B. or S. and they found upon the credit of B.—They also found, in answer to a question, that B. agreed to become liable for the goods supplied subsequent to the 8th of November, 1902, and charged in T. & Co.'s books to S.—On these findings a verdict was entered for the plaintiffs for the amount claimed.—*Held* (*per* Tuck C. J., Hanington and Landry JJ.), that these findings were in effect findings that the change in the account was made under the circumstances alleged by T. & Co. at the request of B., and that the notice alleged to have been given by B. terminating his liability was not given, and it is no ground for a new trial, that no distinct questions were left, or findings asked on these issues.—*Held* (*per* Barker, McLeod and Gregory JJ.), that as the questions submitted did not necessarily involve findings upon the issues between the parties, and, upon which the defendant's liability must depend, there should be a new trial. —That under sec. 163 of C. S. 1903, c. 111, counsel have the right to require the judge to submit questions to the jury, and if they are pertinent to the issue it is the duty of the judge to instruct the jury that they must answer them if they can.—On appeal to Supreme Court of Canada, 37 S. C. R., p. 532, new trial ordered on ground of misdirection and bias of trial judge. *W. H. Thorne & Co. Ltd.* v. *Bustin*, 37, p. 163.

Defendant, a farmer, executed a chattel mortgage to M., whereby he assigned to M. all the goods, chattels and property mentioned in a schedule thereto annexed, and also any and all the property that might thereafter be brought to keep up the same, in lieu thereof and in addition thereto either by exchange or purchase. The instrument also contained a proviso that the defendant should remain in possession of the mortgaged property until default with power to use the same in the ordinary way while so in possession, but with full power, right and authority to M. to enter and take possession of the property in case of default of payment, or on the death of the defendant, or in the event of the seizure of the property at the suit of any creditor, or in the event of the defendant disposing of or attempting to dispose of or make away with said property or any part thereof without the written consent of M. Included in the property mortgaged was a stallion which a few months after the execution of the mortgage and before any default on the part of the defendant, but without the written consent of M., he exchanged with the plaintiff for a horse belonging to him. After the exchange the plaintiff having discovered that the stallion was covered by the mortgage, attempted to avoid the transaction, sending the stallion back to the defendant and demanding the return of his own horse, which the defendant refused to deliver up.—The plaintiff thereupon replevied his horse, and a claim of property having been put in by the defendant, the same was decided in his favor by the County Court judge, who relied upon a verbal license that had been given to the defendant before the execution of the mortgage by the agent of M. whereby the defendant was authorized in general terms to use the mortgaged property in the way he had. Upon an appeal being taken from this decision, it was *held*, (per Landry, Barker, VanWart and McLeod JJ., Tuck C. J. and Hanington J. dissenting), that it was clearly a condition of the mortgage and the intention of the parties thereto that the defendant should be allowed to sell or exchange the mortgaged property, provided such sale or exchange was in the ordinary course of the defendant's business, and as to whether this exchange had been in the ordinary course of the defendant's business or not was a question of fact, which had not been passed upon by the Court below, there should be a new trial in order to have the point determined. *McPherson* v. *Moody*, 35, p. 51

During negotiations for the sale of two standard stokers for use in the defendant's brewery, warranted to give certain results in the saving of fuel, etc., a contract was submitted to the defendant in which a particular test called the evaporation test was specified to be applied to determine whether the stokers would produce the guaranteed results.—The defendant refused to be bound by the specified test, and the proviso was struck out and the contract signed, making a proviso for the test as follows: "To determine that these guarantees are lived up to and the same quality of coal is used and the same load is being carried, tests are to be made under ordinary running conditions on hand and stoker fired boilers."—The stokers were installed and defendant refused to pay for them, alleging that they did not fulfil the guarantee.—Plaintiffs brought this action declaring on the common counts for goods sold and delivered, etc.—The pleas were never indebted, and a special plea that the stokers did not fulfil the guarantees.—Defendant made two tests without reference to the

plaintiffs and the result, according to these was that no such economy in fuel was effected as the contract required.—He refused to allow the plaintiffs to make the evaporation test, claiming that test was excluded from the contract.—In answer to questions the jury found that the defendant's tests were not fair and proper under the contract, and that the tests that the plaintiffs apply were better tests than the defendant's, and that no proper tests were ever made.—In answer to other questions they say they are unable to answer whether the test spoken of in this contract was to be by evaporation, as claimed by the plaintiffs, or by weighing the coal, as claimed by the defendant.—On these answers a verdict was entered for the defendant.—*Held* (*per* Tuck C. J., Landry and Barker JJ.), that the verdict was improperly entered; that while all the findings are in favor of the plaintiffs no verdict can be entered for them on the pleadings, as there is no allegation of waiver or proof that the conditions precedent to payment had been performed, and there must be a new trial.—*Held* (*per* Hanington J.), that under the contract as executed, it was open to the parties to apply any efficient test, and the proper question for the jury was "was the test which the plaintiffs intended to apply, an efficient test to determine the results guaranteed," and, as this question was not left, the case was not fully tried, and it should be sent down for another trial.—*Held* (*per* McLeod J.), that the conditions precedent were not shown to have been performed, and no waiver of performance having been alleged the plaintiffs could not recover on the pleadings and the verdict should stand.—If the plaintiffs were allowed to amend and add a count for waiver a new trial should only be granted on payment of costs.—An application to amend ought to be acceded to as a matter of course, even after the trial, when the question really in dispute has been fully tried out.—*Murray* v. *Duff* (33 N. B. R. 426), *Frederick* v. *Gibson* (37 N. B. R. 126) followed. *Underfeed Stoker Co. Ltd.* v. *Ready*, 37, p. 505.

In an action for professional services rendered by a physician to an indigent person by direction of one of the overseers of the parish, the question whether the person relieved is a pauper or not is a question of fact for the jury, and if not passed upon by them a new trial will be granted to have the question determined. *Irvine* v. *Overseers Parish of Stanley*, 37, p. 572.

In an action against an insurance company on a life policy a verdict was entered for the plaintiff on answers of the jury to questions submitted by the court and counsel.—Some of the answers on material issues were inconsistent and unsatisfactory and some pertinent and relevant questions were not answered.—*Held*, that there should be a new trial on the ground that the findings were incomplete, unsatisfactory and inconsistent. *Seery et al* v. *Federal Life Assurance Co.*, 38, p. 96.

E. agreed to sell to W. a complete bottling plant, consisting of machinery and a certain number of bottles for $900.—The machinery and a small part of the bottles were delivered and some of the machinery was affixed to W.'s building.—W. paid E. $500.—In an action by E. to recover the balance of the purchase price the trial judge held that the contract was entire and failure to deliver substantially the full number of bottles would prevent E. from recovering anything.—He entered a verdict for W. but disallowed W.'s set off for breach of contract.—*Held*, E. was entitled to recover the value of the machinery and bottles delivered and W. to recover damages, if any, for non-completion of the contract, and, as there were no findings on either point, there should be a new trial. *Emack et al* v. *Woods et al*, 39, p. 111.

The omission of a jury to answer material questions submitted to them under C. S. 1903, c. 111, s. 163, is a ground for a new trial.—In an action for beach of contract the defendant alleged that the contract was conditional and the following question was submitted to the jury: "If such an agreement existed, was it a conditional one?" to which the jury answered: "No satisfactory proof that it was."—*Held*, that this was not an answer to the question. *Crockett* v. *Town of Campbellton*, 39, p. 160.

In an action for negligence in failing to properly guard a shaft or belt in defendant's mill by which plaintiff's intestate was caught and killed, defendant pleaded contributory negligence (1) by deceased attempting to pass this shaft; (2) in attempting to step over instead of under the shaft; (3) in wearing an apron when passing the shaft.—No one saw the accident, but there were sufficient facts from which the jury could infer how the accident occurred.—The jury found there was no contributory negligence, but to the question "In what way did the accident to the deceased occur and how did the deceased come in contact with the shaft or belt?" replied: "We do not know."—After verdict entered for the plaintiff, *held*, defendant was entitled to a new trial in order that the jury might find the facts necessary to determine the question of contributory negligence. *McGowan* v. *Warner*, 41, p. 534.

In an action of trespass to land, brought to try title, both parties claimed title by possession.—The jury found the plaintiff had twenty years' adverse, exclusive, continuous and uninterrupted possession, but were not asked to find as to defendant's title.—On motion by defendants to set aside the verdict, *held* (*per* Barry and Landry JJ.), there was evidence sufficient to support the verdict.—*Held* (*per* McLeod and White JJ.), the evidence was not sufficient to support the verdict and as there was no finding on defendant's title there should be a new trial.—*Held* (*per* White J.), it was the defendants' duty to submit a question as to their title and not having done so, they should pay the costs of the trial and

of the motion to set aside the verdict.—*Held* (*per* Barry J.), it was the defendant's duty to submit a question as to their title, and not having done so when an opportunity was given, they are not entitled to a new trial in order to submit such questions *Miller et al* v. *Rundle et al*, 41, p. 591. Affirmed S. C. of C.

Jury view—Interference—On a motion for a new trial in an action of trespass involving the location of a line, the Court will hear affidavits of jurors in answer to affidavits stating that one of the parties interfered with the jury while viewing the *locus in quo*. *Hanson* v. *Ross*, 42, p. 650.

Lost record—In a case tried at circuit a verdict was entered for the defendant on a declaration amended on the trial, subject to the defendants' objection.—The plaintiff entered the cause on the special paper to move for a new trial and the defendant to move for a nonsuit pursuant to leave, in case the Court should be of the opinion that the verdict should not stand; the motions could not be argued owing to the stenographer not filing any record of the trial; the Court ordered a new trial without costs, and that the case be brought down for a new trial as if no order to amend the record had been made. *Bourque* v. *Record Foundry and Machine Co.*, 38, p. 239.

Mistake of counsel—Undefended case—Where an action is undefended a new trial will not be granted on the ground that the evidence does not support the statement of claim if the statement of claim could have been amended at the trial to meet such objection.—A judgment obtained in an undefended action will not be set aside merely on the ground that it was obtained contrary to some loose understanding between counsel that the trial should be postponed to a later day.—*Moore* v. *May*, 19 N. B. R., 506; *Knox* v. *Gregory*, 21 N. B. R., 196, approved.—Where plaintiff obtained judgment in an undefended action, the defendant not being present or represented at the trial on account of the mistake or misapprehension of counsel, and the merits of the defence were shown, the Court in its discretion ordered a new trial upon defendant paying the costs of the undefended trial and of opposing the motion for a new trial and giving security for the payment of any judgment that might be recovered upon a new trial.—*Dickenson* v. *Fisher*, 3 T. L. R., 459; *Holden* v. *Holden*, 102 L. T., 398, and *Trueman* v. *Wood*, 18 N. B. R. 219 followed. *Ferguson* v. *Swedish-Canadian Lumber Co. Ltd.*, 41, p. 217.

Verdict against evidence—On the trial of an action of ejectment where the plaintiff claimed title by adverse possession, the judge in charging the jury told them that if what the plaintiff stated was true it would be difficult for them to find the defendant's holding to be open and adverse to the plaintiff.—The jury, however, found that the defendant had title by adverse possession. —*Held*, that the verdict was not perverse, but there should be a new trial, as it was against evidence. *Porter* v. *Brown*, 36, p. 585.

A new trial will not be granted on the ground that the verdict was against the weight of evidence if the verdict was one which the jury acting as reasonable men could have found. *McLeod* v. *White*, 39, p. 32.

In a declaration for assault against a police officer appointed under the Campbellton Incorporation Act, the first count contained an allegation that the acts were done by the defendant as a police officer and the second count omitted this allegation.—The jury found that the defendant was not acting as a police officer when he committed the assault, and that he did not honestly believe in the existence of a state of facts which if it had existed would have justified him in arresting the plaintiff. —*Held* (1) that a verdict should be entered for the defendant on the first count, no notice of action having been given; (2) that the verdict on the second count was against evidence and a new trial was ordered on the second count only. *Poirier* v. *Crawford*, 39, p. 444.

By the Act 60 Vict., c. 58, the town of Campbellton was authorized to provide for said town a good and sufficient supply of water for domestic, fire and other purposes and to do all things necessary therefor.—The town accordingly put in a water system and supplied water to the inhabitants of the town for all purposes.—The plaintiff obtained water to run a motor in his printing establishment but the town council cut off his supply owing to scarcity of water.—They continued, however, to supply some other industrial establishments which gave employment to more men and used less water than the plaintiff.—*Held*, that under the Act the town was not bound to supply water to the plaintiff for industrial purposes at any and all times but had the right to cut off such supply whenever in the *bona fide* exercise of their discretion, the town council deemed it best in the interests of the town.—*Held*, also, that the findings of the jury (1) as to the conditions upon which the plaintiff received his water supply; (2) that the plaintiff had a contract from year to year; (3) that the defendant was guilty of negligence in not supplying the plaintiff with water; (4) that the defendant acted maliciously in not supplying the plaintiff with water, were against evidence. —In the absence of power to amend the verdict, new trial ordered. *Crockett* v. *The Town of Campbellton*, 39 N. B. R., p. 573; 40 S. C. R., p. 606.

A verdict will not be set aside as perverse, although contrary to the weight of evidence, and to the opinion expressed by the trial judge in his charge, unless the jury have

disregarded the ruling of the judge on questions of law. *McAllister* v. *Johnson*, 40, p. 73.

In an action for negligently driving a street car whereby deceased was struck and killed, the jury found that the defendant was negligent on account of the motorman being incompetent and not applying the emergency brake when he saw or should have seen deceased, and that the motorman had the last chance to avoid the accident. —The jury also found that there was contributory negligence on the part of the deceased in not taking proper precaution to notice whether the car was coming or not and that, after deceased stepped on the track, the motorman could not have stopped the car in time to have avoided the accident.—After verdict for the plaintiff, *held*, the findings that the motorman was incompetent and did not apply the emergency brake were against evidence.—Under the findings of the jury the deceased had the last chance to avoid the accident and a verdict should be entered for the defendant. *Ryder* v. *Saint John Railway Co.*, 42, p. 89.

Verdict — Compromise — Damages — A new trial on the ground of the insufficiency of the damages will not be granted unless it appears clearly to the Court that the smallness of the damages has arisen from mistake upon the part of either the Court or jury, or from some unfair practice on the part of the defendant.—A verdict will not be set aside on the ground that it is a compromise verdict if it can be justified upon any hypothesis presented by the evidence. *Currie* v. *Saint John Railway Co.*, 36, p. 194.

VI. General.

Judgment by default—Offer to suffer—Practice—An offer to suffer judgment by default, under Act 53 Vict., c. 4, s. 130, is not applicable to a suit for the foreclosure of a mortgage and sale of the mortgaged premises.—One of several defendants cannot offer to suffer judgment by default. *Jeffries* v. *Blair et al*, 1 Eq., p. 420.

TROVER

See CONVERSION AND TROVER.

TRUSTS AND TRUSTEES

See BANKRUPTCY, COMPANY LAW, WILLS.

Accounting for trust estate—Plaintiff alleged that defendant had purchased with part of $12,083.04 that had been entrusted for safekeeping by plaintiff to her, a freehold property, and that at the time of the purchase defendant had assured plaintiff that she had purchased the property for plaintiff. —Plaintiff asked that the property so purchased be conveyed to her; she also asked for an accounting.—Defendant admitted having received the money from plaintiff for safekeeping, but claimed that it was with plaintiff's consent that she had used part of it to pay for the property and that she had given plaintiff a mortgage on the property as security.—Plaintiff had this mortgage among her papers and collected interest on it for two and one half years.—*Held*, that the defendant must account to the plaintiff for the $12,083.04 but that no order would be made conveying the property to plaintiff. *Beamish* v. *Lawlor*, 43, p. 426, C. D.

Accounting to cestui qui trust—Limitation of action to account—Where defendant received the rents of a property for a period of twenty-five years without during that time accounting to plaintiff, it was held that the right to an account was not barred by the lapse of time, defendant having taken possession of the property under an agreement with plaintiff, which had never been terminated, to hold the property for him and to account to him for it. *Pick* v. *Edwards*, 3 Eq., p. 410.

Advice by Court of Equity—Rights of parties—The Court will not as a rule under section 212 of the Supreme Court in Equity Act, 1890 (53 Vict., c. 4) determine the rights of competing parties to a fund in the hands of trustees.—The section is intended to enable the Court to advise executors and trustees in matters of discretion vested in them. *In re M. A. Foxwell's Estate*, 1 Eq., p. 195.

Church. Deed to use of certain—In 1810 the Crown granted to the rector church wardens and vestry of Christ Church in the parish of Fredericton, and their successors, a lot of land "for the use and benefit of the said church forever, and to and for none other use, interest or purpose whatever."—The church was organized on the formation of the Province of New Brunswick under authority from the parent Church of England, in England, to certain persons in New Brunswick to establish churches in New Brunswick in connection with and to be a part of the Church of England in England, and under its ecclesiastical authority.—*Held*, that the grant was to Christ Church as it existed at the time of the grant and while it remained in connection with the Church of England and adhered to its faith, creed, doctrines, forms of worship and discipline as then established. *Bliss* v. *The Rector etc. of Christ Church Fredericton* Eq. Cas., p. 314.

Commission allowable—No fixed rule can be laid down as to the commission trustees will be allowed by the Court, as each case must be governed by its own circumstances, and by a consideration of the trouble experienced in the management of the estate.—Where trustees of an estate consisting of stocks and mortgages received under the deed of trust a commission of

5 per cent. on income, a commission on the whole trust estate was refused, but a commission of 1 per cent. was allowed on investments made by them. *In re Wiggins' Estate*, 2 Eq., p. 123.

See also *In re Eaton's Estate*, 1 Eq., p. 527; *In re VanWart*, 2 Eq., p. 320.

Construction of trust deed—Grant to issue—A trust deed provided that upon the death of F. the estate should be divided to and between all the daughters of the donor, who should survive him, and the issue of any daughter who might have died before him leaving issue, in equal shares, but so that the issue of any daughter who might so die leaving issue should only take the share their deceased mother would have taken had she survived the donor, and been living at the time of distribution, and that if any daughter who might survive the donor, died before the said F. leaving issue, then the issue of such deceased daughter should take and receive the share their mother would have taken had she been living at the time of distribution, and that if any daughter survived the donor, and died before the said F. without issue, then the share of the daughter so dying should go and be divided equally among her surviving sisters or sister and the issue of any deceased sister; such issue, however, to take only the share their deceased mother would have taken had she been one of the surviving sisters; that the share of each of the said daughters who might be living at the time of the distribution, should be paid to them as each of them came of age, but that the share coming to the issue of any deceased daughter might be paid, notwithstanding such issue might not at the time of the distribution be of age. —One of the daughters died in the lifetime of F., leaving two children, one of whom predeceased F.—*Held*, that the surviving child took the whole of his mother's share. *Gilbert* v. *Duffus et al*, Eq. Cas., p. 423.

Public trust. Disclaiming—In the case of a public office with duties attaching to it involving public trusts, such as the office of sheriff, the holder of the office cannot disclaim and so evade responsibility. (*per* Barry J.). *McKane* v. *O'Brien*, 40, p. 392.

Public trust—Municipal—Act re—The Incorporation Act of the town of Portland 34 Vict., c. 11, s. 9, provides that no person shall be qualified to be elected to serve in the office of chairman or councillor, or being elected shall serve in either of the said offices, so long as he shall hold the office of police magistrate or sitting magistrate of the said town, or any office or place of profit in the gift or disposal of the Council. —By Act 45 Vict., c. 61, the name of the town of Portland was changed to "The City of Portland" and it was provided that instead of a chairman annually elected by the councillors there should be a mayor. —By Act 51 Vict., c. 52, provision was made for the appointment of a commission of three persons to prepare a scheme for the union of the city of Saint John and the city of Portland.—The Act provided that one of the commissioners should be appointed by the council of the city of Portland, that each commissioner should be paid a specified sum for his services, besides expenses, and that the cost of the commission should be borne by both cities.—The council of the city of Portland appointed the defendant C. who was then mayor of the city, its commissioner.—At a meeting of the council held shortly after, presided over by C. as mayor, certain accounts were ordered to be paid, and estimates for the year were approved, and an assessment ordered therefor.—The plaintiff, a ratepayer, brought this suit on behalf of himself and all other ratepayers who should come in and contribute to the expense of the suit, to restrain C. from signing orders for the payment of the accounts ordered to be paid by the council, and the defendant W., the chamberlain of the city, from paying them on orders, signed by the defendant C. and for a declaration that C. was incapacitated from acting as mayor.—*Held*, that the suit should be by information by the Attorney-General on the relation of all or some of the ratepayers, the plaintiff not having sustained, or likely to sustain, any injury not common to all the ratepayers.—Where a bill is demurrable the objection may be taken as a ground to dissolve an *ex parte* injunction. *Merrit* v. *Chesley et al*, Eq. Cas., p. 324.

Removal of trustee—Costs of application—Trustees applying to be removed on a ground satisfactory to the Court, and not from mere desire or caprice, will be allowed the costs of their application out of the trust estate. *In re Charles Merritt's Trusts*, 1 Eq., p. 425.

Resulting trust—Crown land lumber license—Evidence—An agreement under which a Crown land lumber license was bid in at public sale at the up-set price by the defendant, in whose name the license was issued, for the plaintiff who had paid to the defendant the up-set price previous to the sale, does not relate to an interest in land within the Statute of Frauds, and if it does, as the purchase money for the license was paid by the plaintiff, and a trust thereby resulted in his favor by construction of law, it can be established by parol evidence under the Statute of Frauds, C. S., c. 76, s. 9. *McGregor* v. *Alexander*, 2 Eq., p. 54.

Resulting trust—Gift—Husband and wife—Onus of proof—Where a husband in the management of his wife's property, of which he was receiving the benefit, purchased certain freehold lots with his own money, with a view of improving his wife's estate, and took the conveyance in her name, the purchase money is not a charge upon the property, and so between husband and wife the presumption is that a gift was intended, unless displaced by evidence necessary to establish a resulting trust in

his favor.—The onus is upon the husband of establishing a resulting trust in his favor in land purchased by him in the name of his wife. *DeBury* v. *DeBury*, 36, p. 57.

Resulting trust—Husband and wife—Where land purchased by a husband as a home for himself and wife was by his direction conveyed to her and a house was built thereon with his money, but the facts and surrounding circumstances established an intention that it was to be held by her for him, it was held that there was a resulting trust in the husband's favor.—Where, in such a case the wife claims that the money with which the property in question was purchased, and the house built, was her money, the burden of proof to the contrary is upon the husband. *Palmer* v. *Palmer*, 42, p. 23, C. D.

Resulting trust—Mother and child—Advancement—Where a mother makes a purchase in the name of her child, there is no presumption that an advance was intended.—In such a case, it is a question of evidence whether there was an intention to advance. *Moore* v. *Moore*, 1 Eq., p. 204.

Resulting trust—Nudum pactum—Upon information supplied by the plaintiff, the defendant purchased certain property held by a bank as security for advances to the plaintiff's father, which re-sale yielded a surplus after meeting a liability the defendant had assumed for the benefit of plaintiff's father.—The defendant promised the plaintiff that in the event of there being a surplus it should belong to him.—*Held*, that the plaintiff and defendant were not partners, entitling the plaintiff to share in the profits from the re-sale of the property, and that the defendant's promise, which was not a declaration of trust, was *nudum pactum*. *Leighton* v. *Hale*, 3 Eq., p. 68; 37 N. B. R., p. 545.

Resulting trust—Sale of lands in breach of verbal agreement—Accounting—On September 7th, 1907, a written agreement was entered into between the plaintiff D. D. and the defendants C. McM. and L. McM., for the sale of certain lands, the title to which was vested in the defendants for the sum of $200.—At the time there was a verbal understanding between the parties to the agreement and S. D., the mother of the plaintiff, that the agreement was only to be used to raise money to pay the creditors of the plaintiff and S. D., and was not to be used for any purpose until the assent of R. C. D., the father of the plaintiff, had been obtained.—The agreement was never used for the purpose of paying the creditors and the assent of R. C. D. to it was never obtained.—*Held*, that the agreement was valid, although the assent of the plaintiff's father was never obtained, and that the verbal agreement not to use was only a collateral agreement, and did not affect the validity of the agreement itself.—*Held*, also, that the defendants are liable to account to the plaintiff for the moneys received by them on the sale of the property, subject to the trust that such moneys be held for the benefit of the creditors of the plaintiff and his mother. *Donald* v. *McManus et al*, 4 Eq., p. 390.

Resulting trust—Transfer to holding company to facilitate sale—S. and R. were associated in matters connected with mining in New Brunswick prior to the transaction over which this suit arose, both in promoting and developing coal mines, and their transactions had been for the benefit of both.—S. was in a position to interest capitalists and R. was a practical man and spent the greater part of his time superintending the work at the mines, and in obtaining concessions and licenses from the government at Fredericton.—Their first transaction was in reference to the C. mine. —In June, 1908, R. sold this property to the Canadian Coal Co., a different company from the plaintiff in this suit.—R. owned this property and S. found the purchasers, and was paid a percentage for his services. —S. also held a number of bonds of the company belonging to R., as part of the purchase price, which he was to dispose of for R.'s benefit.—On September 12th, 1908, R. executed an absolute assignment of certain applications for license to work to the plaintiff, the Canadian Coal Lands Ltd. —On the same day he was paid the sum of $1,000 by S.—Previously R. had received money from S. to cover expenses in connection with procuring the licenses mentioned above.—The Canadian Coal Lands, Limited, was not an active organization, but what is called a "holding company".—It had only five members, each holding one share, and on January 4th, 1910, after this dispute had arisen, it assigned its interest in these areas to S.—*Held*, that the assignment to the plaintiff company by R. was made for the sole purpose of enabling S. to sell the mining rights for the joint benefit of himself and R., and that it was not an absolute sale to the plaintiff company. *Shaw et al* v. *Robinson et al*, 4 Eq., p. 286.

Sale of land held for two infants—Practice—The Court has not power under section 213 of the Supreme Court in Equity Act, 1890, to order the sale or disposal of land held in trust for two infants to pay for past expenditures upon the trust property nor can it consider a petition which does not recognize the separate rights of each infant. *In re Steen's Estate*, 1 Eq., p. 261.

Specific trust attached to deposit in bank—Attaching by creditor—A sum of $800 was deposited in a bank by A. G. to the credit of T. G. for the specific purpose of satisfying a distress warrant for $750 levied against T. G. by S., which warrant A. G. had agreed with S. to pay.—*Held*, the $800 was held by T. G. in trust and that no part of that sum was liable to attachment by his judgment creditor. *R.* v. *McLatchy, Ex parte Gorman*, 39, p. 374.

Statute of Limitation of Actions—Adverse holding by cestui qui trust—J. purchased and went into possession of the property in dispute in 1878, in 1879 he mortgaged it, and in 1880 conveyed the equity of redemption to B. without consideration.—In 1887 (within twenty years of the commencement of this action) at the request of, and for the benefit of J., the plaintiff paid and took an assignment of the mortgage, and B., also at the request of J., conveyed the equity of redemption to the plaintiff J. and the defendant continued in possession down to the bringing of the action, and never paid any rent or anything on account of the mortgage.—*Held*, in an action of ejectment against the defendant, the successor in title of J., that as B. was trustee for J., J.'s possession was not adverse to him, therefore the action was not barred by the Statute of Limitations and plaintiff was entitled to recover. *Stevens* v. *Jeffers*, 38, p. 233.

Trust estate — Following — Accounting—Injunction was granted preventing a bank from paying to the defendant money deposited by her, as plaintiff alleged that the money so deposited was part of $5,500 that had been entrusted for safekeeping by plaintiff to defendant and that the latter had appropriated it to her own use.—The defendant denied that she held the money in trust for plaintiff and claimed it as her own.—*Held*, that the evidence showed that plaintiff had given the money to defendant for safe keeping and the latter was ordered to account for it. *Beamish* v. *Lawlor*, 43, p. 426, C. D.

VENDOR AND PURCHASER.

1. Agent's Transactions.
2. Covenants.
3. Fraud and Misrepresentation.
4. Options.
5. Possession.
6. Purchase Money.
7. Specific Performance.
8. Statute of Frauds.
9. Title.
10. Miscellaneous Cases.

1. Agent's Transactions.

Option—Commission due agent on sale after modification—An option was held by R. upon property of defendant company.—By agreement dated August 7, 1903, reciting the option and that the company had arranged through R. to execute an option to P. and C. for $640,000, it was witnessed that if the property was purchased in accordance with such option, "or mutual modification of the same," the company would pay to R. or his assigns, any excess realized above the option price of $562,586.—R. immediately afterwards assigned a one-half interest in the agreement to the plaintiff.—By agreement of same date, the company gave an option on the property to P. and C. for $700,000, who in case of a sale by them under that option or any mutual modification thereof, were to be allowed $60,000.—This option expired March 1, 1904.—On October 27, 1904, a new option was given by the company to P. and C. and this by subsequent agreement was extended to June 15, 1905.—On June 10, P. and C. agreed to sell the property to I. P. Co. for $725,000. —This agreement fell through.—On October 2, 1905, a sale was made to I. P. Co. for $675,000.—By agreement of the same date the defendant company agreed to pay P. and C. $100,000 for their services in connection with the sale, leaving $575,000 as the net amount to the company for the sale. —Prior to the sale the company, having no notice of the assignment by R. to the plaintiff, had agreed with R. that his option should be for $580,000.—The plaintiff claimed one-half of the difference between the sum realized by the company from the sale and $562,586.—*Held*, that under the circumstances the option given after the expiry of the first option to P. and C. was a modification of it within the meaning of the agreement with R., but that the company, having no notice of plaintiff's assignment, were free to deal with R., and that consequently the change made by R. in his agreement with the company was binding on the plaintiff, to whom therefore there was nothing coming. *Winslow* v. *The Wm. Richards Company, Limited*, 3 Eq., p. 481.

Power of trustees to sell—See *Smith et al* v. *Robertson et al*, 4 Eq., p. 139; *Fenerty* v. *Johnson*, 4 Eq., p. 216.

Purchase by agent—Concealment of material fact—An agent for sale being in a position of trust, cannot himself purchase from his principal without first communicating to his employer all facts within his knowledge which he should reasonably expect would influence his principal, if aware of them, in either deciding not to sell to the agent, or in determining the price at which he would sell. —Defendant was acting as plaintiff's agent for the sale of certain timber.—Defendant withheld from plaintiff an offer of $350 which he had received for the timber.—Plaintiff offered to sell the timber to defendant for $225.—Defendant made counter offer of $200, stating that this was the best offer he had had in the past for it.—Plaintiff then accepted defendant's offer.—Defendant resold the lumber some three years afterwards for $500.—*Held*, that defendant was bound to account to plaintiff for difference between amount paid for the lumber and amount for which it sold, on the ground that he had not disclosed to his principal all the facts within his knowledge that might have influenced the principal in selling. *Lunt* v. *Perley*, 44, p. 439, C. D.

2. Covenants.

Maintenance—Failure to perform—Lien—Specific performance—A farm was conveyed by an aged couple to their daughter, and on the same day she and her husband entered into a written agreement with the vendors to board them on the farm and to pay them an annuity in consideration of the conveyance.—*Held*, (1) that the vendors had a lien on the land for the performance of the agreement; (2) that the Court could not decree specific performance of the agreement. *Cunningham* v. *Moore*, 1 Eq., p. 116.

3. Fraud and Misrepresentation.

Misrepresentation re acreage — No fraud—Deed by metes and bounds—An agreement for the sale of a farm made between plaintiff and defendant bearing date May 9, 1914, described the property as containing eighty-six acres more or less.—By deed, bearing date June 20th, 1914, the plaintiff and his wife conveyed to the defendant and his wife for the sum of $4,800 the farm in question and by indenture of mortgage, bearing even date therewith, the defendant mortgaged the property to the plaintiff to secure payment of the balance of the purchase price $2,400.—The deed contained no statement of warranty as to acreage of the land thereby conveyed.—In an action for foreclosure of the mortgage, defendants set up that they were induced to purchase the farm by misrepresentations and false statements of plaintiff and his agent that the farm contained eighty-six acres, whereas in reality the farm contained only sixty-six acres and a fraction of an acre.—Defendants by their answer asked to have the deed and mortgage set aside, the part payment of $2,400 repaid with interest and to be recouped for disbursements made by them for improvements.—*Held*, that the representation that the farm contained eighty-six acres more or less, being both material and false, defendants would have been justified in refusing to accept conveyance of property, but not being fraudulent, and the defendants having accepted the deed and consequent possession of the property, without requiring or receiving in the deed any covenant or warranty as to the acreage, and the agreement under which the deed was executed containing no stipulation that the plaintiff should make compensation for any shortage in area, the defendants are without remedy.—*Joliff* v. *Baker* (1883) 52 L. J. Q. B. 609 followed.—*Palmer* v. *Johnston* (1884) 53 L. J. Q. B. 348, discussed and distinguished. *Hand* v. *Warner*, 44, p. 331.

4. Options.

Sale of land—Time is of the essence of a unilateral agreement, such as an option to purchase land. *Freeman* v. *Stewart*, 2 Eq., p. 365.

5. Possession.

Ejectment — Summary Ejectment Act—W. went into possession of a lot of land under an instrument of purchase in writing whereby it was agreed that the purchase money was to be paid in four equal installments in six, twelve, eighteen and twenty-four months.—It was also agreed that W. was to be tenant at will, and that he should remain in possession until default in the payment of any of the installments.—*Held*, that W. was not a tenant at will, nor a tenant for a fixed term so as to be subject to the provisions of the Summary Ejectment Act, C. S., c. 83, or amending acts. *Winslow* v. *Nugent*, 36, p. 356.

Ejectment — Equitable defence — Verdict—In an action of ejectment where defendant pleads he is entitled to possession on equitable grounds under an agreement of purchase which he is ready to carry out, and the judge trying the case without a jury finds the plea is proved, it is proper under C. S. 1903, c. 111 (Supreme Court Act), s. 134, to order a verdict for defendant, although the legal title and right to possession is in the plaintiff, and the effect of verdict is to deprive plaintiff of the costs of ejectment. *Souci* v. *Ouillette*, 37, p. 393

Statute of Limitations—Vendor practically a mortgagee—A verbal admission by a person holding under an agreement to purchase that he is holding as tenant at will to the vendor, will not prevent the statute running against such vendor.—As between the vendor and a vendee in possession under an agreement to purchase, the vendor is substantially a mortgagee entitled to the rights and privileges secured to a mortgagee under C. S. 1903, c. 139, s. 30, and is also as a mortgagee within the exception provided by section 8 of the statute, and the right of entry of the vendor and his representatives would not be extinguished for 20 years after the last payment of principal or interest. *Anderson* v. *Anderson*, 37, p. 432.

See also TRESPASS.

6. Purchase Money.

Statute of Limitations—Payment of part of the purchase money by a person in possession of land under an agreement to purchase is a renewal of the tenancy at will, and the Statute of Limitations begins to run from such payment. *Anderson* v. *Anderson*, 37, p. 432.

7. Specific Performance.

Agreement of purchase—Injunction restraining ejectment of vendee—On an application for an injunction order, in a suit for the specific performance of an agreement for the sale of land, to restrain an action of ejectment by the vendor to

recover possession of the land, the Court ordered that on the defendant confessing the action of ejectment the plaintiff should be restrained until further order from taking possession; otherwise the application should be dismissed.—*Semble*, that relief by specific performance cannot be obtained under s. 283 of Act 60 Vict., c. 24 (Supreme Court Act). *Freeman* v. *Stewart*, 2 Eq., p. 365.

Agreement to construct culvert through right of way—A railway company started expropriation proceedings to acquire a right of way across an intervale farm owned by the plaintiffs; subsequently the parties came to a verbal agreement that the proceedings would be abandoned and the plaintiffs would convey to the company the land required for five hundred dollars, provided it would construct a culvert in the railway embankment where it crossed the plaintiff's intervale, in order that the spring freshets might continue to freely overflow the same.—In case the company did not care to construct the culvert, the plaintiffs asked one thousand dollars more for their land.—The company's agent visited the farm and set out stakes where the plaintiffs wanted the culvert located.—Nothing was said as to the kind of culvert, except that it was to be big enough to let the water flow through, and no arrangement was made about its maintenance.—The plaintiffs executed a deed for the right of way in which the consideration was stated to be one dollar, and were paid the five hundred dollars agreed upon.—The embankment was constructed across the intervale but an opening left at the space marked for the culvert.—Later the company decided not to build the culvert but fill in this space.—On an action for specific performance, *held* (1) that the agreement was sufficiently certain to allow a decree to be made; (2) that the defendant should construct and maintain the culvert; (3) that adequate relief could not be given the plaintiffs by awarding damages; (4) that the defendant would be given the option of paying one thousand dollars in lieu of the performance of the contract, as this was the amount asked for by the plaintiffs if the culvert was not constructed. *Whitcombe* v. *St. John & Quebec Rwy. Co.*, 43, p. 42, C. D.

Agreement to convey road, site not specified—Reasonable exercise of option by grantee—A contract between the owner of land and a railway company, partly printed and partly written, provided in the printed part that the company might locate, build and operate its line of railway over the owner's farm, and contained a covenant to convey to the company at its request all and so much of the land, not exceeding the width required by law, as it might require for its right of way, and in the meantime so far as the title to the land selected for the right of way might remain in the owner, he agreed to hold the same in trust for the company.—The written part included land for a station and land for a road from the highway to the station, but did not locate the site of the station, or the road from the highway to the same.—In an action for specific performance of the contract to convey the land for a road from the highway to the station, *held* (*per curiam*), affirming the judgment of McLeod J., that the effect of the contract was to give the company the right to select the location of the road, and the right having been exercised in a reasonable manner so as not to cause the owner unnecessary inconvenience in the use of the remainder of his land, the contract should be specifically performed.—*Held* (*per* Barker C. J.), that the effect of the agreement was an equitable transfer to the company of the land required for a right of way and for a station and a roadway from the highway to the station, and specific performance was properly ordered. *The Fredericton and Grand Lake Coal and Railway Co.* v. *Harding et al*, 42, p. 363.

Conflict of evidence—Introducing foreign matters—Costs—Plaintiff purchased leasehold property from defendant for $340.50 and has paid $300.00 on account.—Plaintiff alleged that property was sold free of all unpaid rent and taxes, and refused to pay balance of purchase money unless defendant contributed towards unpaid rent which was due at the time of the sale.—Defendant alleged that no such agreement as to unpaid rent and taxes was made, and was willing to execute conveyance on payment of the true balance, but refused to entertain any proposition for settlement unless certain other dealings between the parties were adjusted at the same time.—*Held*, that the plaintiff was entitled to a decree for specific performance.—*Held*, also, that as the evidence failed to establish the plaintiff's contention as to the agreement for sale and the unpaid balance; and that as the defendant had acted wrongfully in attempting to make the settlement of this matter contingent upon the settlement of other dealings between the parties which were distinctly foreign, there should be no order as to costs. *Edgecombe* v. *McLellan*, 4 Eq., p. 1.

Contract in writing — Construction — Oral evidence — By a written offer made by the plaintiffs, and accepted by the defendant, the plaintiffs leased from the defendant a store for a term of years.—This offer further provided that the plaintiffs had the option, during the term, of buying the building in which the store was situate "for not less than $10,000."—On an action for specific performance of the agreement, the defendant alleged that he refused to accept the plaintiffs' offer of an option, but made a counter offer to them to the effect that he would give them a preference over any other purchaser, in case he decided to sell during the term.—This counter offer, he alleged, was accepted by the plaintiffs and he signed the agreement on the express understanding that, as far as it related

to buying the building, it should operate only to the effect that the defendant should, in case he decided to sell the building, sell to the plaintiffs in preference to any other purchaser who might offer the same price. —Neither fraud nor misrepresentation was charged against the plaintiffs.—*Held*, that the intention of the parties must be collected from the written instrument and no evidence *aliunde* could be received to give a construction to the agreement contrary to its plain import.—*Held*, that the offer to sell for "not less than $10,000" was an offer to sell for that sum.—*Held*, that the agreement to sell the building which covered practically all the lot on which it stood, was an agreement for the sale of the land and building, and not of the building alone. *Hunter* v. *Farrell*, 42, p. 323, C. D.

Deed in performance of agreement by deceased—Where a testator had agreed to sell land, but had not executed a conveyance of it, and died leaving a will by which he gave several pecuniary legacies to certain relatives, to be abated proportionately in the event of his estate being insufficient to pay them, and then gave all the rest of his estate to the children of A., the real estate not being given to the executors, *held*, that the conveyance of the land in question should be made by the residuary legatees, and the heirs at law of the testator. *In re Fairley Estate*, 1 Eq., p. 91.

Evidence—What is necessary—In a suit for specific performance the evidence must satisfactorily show that the agreement is substantially what it is alleged to be by the plaintiff.—If the agreement is denied on oath by the defendant, the Court will not decree specific performance of it unless the plaintiff's evidence is so corroborated by witnesses or by the surrounding circumstances as to leave no substantial doubt that the defendant is in error. *Calhoun* v. *Brewster*, 1 Eq., p. 529.

Jurisdiction—The exercise of the jurisdiction of Equity as to enforcing specific performance of agreements is not a matter of right in the party seeking relief, but of discretion in the Court to be exercised in accordance with fixed rules and principles. *Calhoun* v. *Brewster*, 1 Eq., p. 529.

Misdescription of property—The defendant purchased from plaintiff at auction, a property described in the advertisement of sale as "No. 171 Chesley street" and signed a bidding paper containing a similar description.—Defendant supposed the property fronted on Chesley street.—As a matter of fact it was distant about one hundred feet from Chesley street, had no access thereto, and fronted on an alley.—Chesley street had a civic water supply.—The alley had no water supply.—It appeared that the plaintiff's agent had represented to the auctioneer that the house was on Chesley street, and to get the number of the house thereon for the advertisement they had consulted the street directory and found that the address of a tenant on the premises was there given as "171 Chesley".—No other evidence was offered to show that the premises were known as "No. 171 Chesley street." —In an action for specific performance, *held*, that the property did not answer the description of the property the defendant had contracted to buy, and the defendant could not be compelled to accept it. *Porter* v. *Rogers*, 42, p. 82, C. D.

Misdescription of property—Material error—Defendant entered into negotiations with plaintiff's agent, for the sale of a freehold property and was furnished with printed particulars which read: "Size of lot 73 Queen by 60."—Later defendant made a contract with plaintiff for the purchase of the property, in which it was described as "having a frontage on Queen street of approximately 73 feet, extending at right angles along Carmarthen street for the distance of about 60 feet."—As a matter of fact the lot had a frontage of 70 feet on Queen street.—In an action for specific performance, *held*, that there was a misdescription materially affecting the value of the subject matter of the contract and decree was refused. *Floyd* v. *Hanson*, 43, p. 339, C. D.

Mutual mistake—No consensus ad idem—Allowance for improvements—Under a verbal agreement for the sale of a piece of land by the defendant to the plaintiff, the plaintiff, with the consent of the defendant, entered upon the property and erected a barn and planted fruit trees. —On an action for specific performance, *held*, that the evidence failed to show that the parties were *ad idem* and, on that ground, the order was refused; that as no completed contract existed, the plaintiff was not entitled to damages under the Judicature Act, although since the passing of this Act damages may be awarded for the breach of an agreement, where the Court finds the plaintiff is not entitled to specific performance; that compensation should be allowed the plaintiff for the barn and fruit trees in the possession of the defendant, on the ground that a mutual mistake had been made by the parties, in believing a contract existed. *Kerr* v. *Cunard et al*, 42, p. 454, C. D.

No consensus ad idem—In a suit for specific performance of an alleged parol agreement for the sale to the plaintiff by the defendant of a piece of land, the bill alleged the agreement to be that the plaintiff should take the land subject to a mortgage on payment to the defendant of $100.00.—The plaintiff's evidence proved the agreement to be that the amount payable to the defendant was to be secured to him by a second mortgage on the land.—The defendant's evidence proved that the plaintiff was to pay off the mortgage then on the land, and give the defendant a mortgage for amount payable to him.—*Held* that there was no concluded agreement between the parties

and that the bill should be dismissed, but under the circumstances without costs. *Calhoun* v. *Brewster*, 1 Eq., p. 529.

See also STATUTE OF FRAUDS

8. Statute of Frauds.

Auction sale—Verbal statements by auctioneer—In an action for specific performance of an agreement to purchase where the defence was material misdescription of the premises by the auctioneer selling, the plaintiff offered evidence to show that before the bidding commenced the auctioneer in reply to an inquiry from the defendant, referred the defendant to the city directory for the address.—*Held*, oral evidence of this nature to alter or qualify the contract of sale was not admissable; and further, the plaintiff would be relying on a new contract which, not being in writing, did not satisfy the requirements of the Statute of Frauds. *Porter* v. *Rogers*, 42, p. 82, C. D.

Improvements made by purchaser due to misunderstanding—In a suit for specific performance of a verbal agreement for the sale of a piece of land by the defendant to the plaintiff, where the plaintiff, with the consent of the defendant, had entered upon the property and erected a barn and planted fruit trees, the defendant pleaded the Statute of Frauds. *Kerr* v. *Cunard et al*, 42, p. 454, C. D. (Supra.)

Part performance—When a contract, resting on parol, or partly on parol, has been partly performed by the purchaser, the vendor will be precluded from setting up the Statute of Frauds, and specific performance will be decreed if the contract is proved; so where the Court found that the plaintiffs had entered into an agreement with the defendants, which was not entirely in writing, for the sale of a leasehold property, and had put them in possession and the defendants had paid part of the purchase price, made repairs to the property and collected the rents, specific performance was decreed. *Moses* v. *French et al*, 43, p. 1, C. D.

Sufficiency of proof—In December, 1907, negotiations were entered into by the defendant J. and W. T. H. F., acting for and with the consent of his co-trustee, for the sale and purchase of real estate devised to the trustees.—An agreement was made, and a memorandum containing its terms was drawn up by J. and signed by him and W. T. H. F.—There was only one copy of this memorandum, which was retained by J. and later destroyed by him when he determined not to go on with the purchase. —This memorandum as stated by the plaintiff W. T. H. F. was as follows: "December 13th, 1907. Johnston to purchase from Fenety estate property on Brunswick street 76 x 185, 25 feet to be clear on upper side 15 feet on lower side; estate to give an unencumbered title; Johnston to hand the estate 25 shares of Toronto Street Railway and 10 shares Fredericton Gas Stock, all furniture, including that belonging to Mrs. Roberts, to be removed from the premises. Stock not to be transferred before January 2nd, 1908. L. W. Johnston. Wm. T. H. Fenety."—It contained the name of the vendor and purchaser, the property to be sold, and the price to be paid.—*Held*, that there was a valid agreement for purchase and sale; that the memorandum was amply sufficient to satisfy the Statute of Frauds, and was capable of being enforced. *Fenety et al* v. *Johnston*, 4 Eq., p. 216.

9. Title.

Notice of agreement by predecessor in title to exchange lands—Agreement cancelled by inability of other party to perform—In 1902, defendant, being in possession of a property under a parol agreement for purchase, made another parol agreement with Mrs. M., plaintiff's predecessor in title, whereby defendant was to receive a conveyance of the property on paying Mrs. M. a certain sum of money and conveying to her another property, known as the R. lot.—Subsequently the defendant carried on lumbering operations for Mrs. M. on adjacent lands and purchased supplies from her, it being agreed that the amount due defendant for his services after deduction therefrom of the amount owing for supplies, should be credited on account of the purchase money and in this way defendant became entitled to some credits, but the accounts between the parties were in dispute.—In 1904 defendant demanded a conveyance but was informed that he could not have it, until he paid the balance of the purchase money and conveyed to Mrs. M. the R. lot.—As a matter of fact, the defendant shortly after the agreement to convey to Mrs. M. the R. lot, had conveyed it to a third party. —Accounts between the defendant and Mrs. M. remained in dispute, and in 1911 Mrs. M. sold the property to the plaintiff, who had notice of the defendant's claims. —*Held*, in an action for a declaration of rights and title, that plaintiff was entitled to possession, and that defendant, as between himself and the plaintiff, was not entitled to an accounting as to what was due under the lumbering agreements, because after conveying away the R. lot, he was not in a position to carry out his part of the contract of sale. *Smith* v. *Kilpatrick*, 42, p. 103, C. D.

Possessory title of eight years holding only—V., desirous of purchasing land in possession of F., was negotiating with him but no agreement of purchase had been arrived at.—W., a dealer in cattle, went to V. and offered to purchase from him two head of cattle.—He refused to sell, stating that he wished to exchange them with F. for the land. —W. then went to F. and agreed to extinguish a debt of $79 that he had against him, if he would convey the land to V.—W. went

again to V. and offered him the land in exchange for the two head of cattle and his note of $20.—This offer V. accepted and F. gave V. a warranty deed of the land and V. gave W. his note for $20.—W. selected the cattle, asked V. to turn them out and said he would come again and take them away. —V. recorded the deed, but discovering that F. had no title on the records told W. he could not have the cattle.—W. afterwards went and took the cattle from V.'s pasture without his consent.—V. alleged that W. told him that F. had a good title and agreed to give him a good title and if he did not do so the bargain was to be off.—W. denied that he told V. that F. had a good title or that he agreed to give V. a good title.—In an action of trover in the County Court to recover the cattle and note, the judge told the jury that if they believed V.'s version of the transaction, the title in the cattle did not pass, and there was evidence upon which they might find for the plaintiff. —The jury found for the plaintiff.—*Held*, on appeal (*per* Landry, Barker, McLeod and Gregory JJ.), that V. having accepted and registered the deed under the contract, the consideration had not entirely failed and V. could not rescind the contract and sue in trover for the cattle and note without reconveying or offering to reconvey the land, and that the appeal should be allowed and a nonsuit entered.—*Held* (per Tuck C. J. and Hanington J.), that under the finding of the jury the consideration for the contract entirely failed, and the title to the cattle did not pass to W. and V. was entitled to recover in trover *Vanbuskirk* v. *Van-Wart*, 36, p. 422.

Registry—Deed of land, part previously sold and excepted in a prior mortgage —A part of a lot of land was sold to the plaintiff by M. by deed, which the plaintiff neglected to register.—Subsequently M. mortgaged by registered conveyance the remainder of the lot to S.—The description in the mortgage of the land followed the original description of the whole lot, but "excepted the portion sold and conveyed by the said" M. to C. (the plaintiff).—Subsequently M. sold and conveyed by registered deed for valuable consideration the whole lot of land to the defendant, who had notice of the mortgage, but not of its contents.—By Act 57 Vict., c. 20, s. 29, an unregistered conveyance shall be fraudulent and void against a subsequent purchaser for valuable consideration whose conveyance is previously registered.—By section 69 of the Act the registration of any instrument under the Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration.—*Held*, that by the act the registration of the mortgage constituted actual notice of its contents to the defendant, whose title therefore should be postponed to the plaintiff's. *Carroll* v. *Rogers*, 2 Eq., p. 159.

"Title by possession," Meaning of —A contract for the sale of a freehold property contained the following provision: "A title by possession shall not be deemed a satisfactory title unless the purchaser so elects."—The vendor established a documentary title dating from a quit claim deed made in 1842.—The land had been granted in 1784, but there was no documentary title connecting the original owner with the grantor in the deed of 1842.—The purchaser claimed that the vendor's title was a title by possession.—*Held*, that the title was not one by possession within the meaning of the contract. *Floyd* v. *Hansen*, 43, p. 339, C. D.

10. Miscellaneous.

Lunatic, Sale of lands of—Land belonging to a lunatic cannot be sold by her committee under C. S., 49, sections 137 and 138, except by public auction. *In re Harriet Light, a lunatic*, Eq. Cas., p. 392.

Sheriff Sale—A purchaser at sheriff's sale is not a purchaser for valuable consideration within C. S., c. 74, s. 4. *Trueman* v. *Woodworth et al*, 1 Eq., p. 83.

VENUE

County Courts—Changing venue—On an application by a defendant for an order changing venue as against a non-resident plaintiff, under s. 48 of the County Court Act, (C. S. 1903, c. 116), it is necessary to satisfy the judge that the cause can be more conveniently or fairly tried in another county and also to prove by affidavit that the defendant has a good ground of defence (s. 47).—The Court refused to interfere with the discretion of the County Court judge in ordering a change of venue upon such an application though the affidavit before the judge contained no direct statement that the defendant had a good defence and the grounds of the defence were not set out.—*Semble*, that no appeal lies from the order of a County Court judge changing venue. *Canadian Fairbanks Co. Ltd.* v. *Edgett*, 40, p. 411.

Practice—Powers of judge—Venue— A judge has large discretionary powers in fixing the place of trial, upon a summons for directions.—Here the Court refused to change the judge's order. *Windsor Lumber Co.* v. *Rundle et al*, 40, p. 522.

Trial—Postponement of—Where a party to a suit is entitled to the postponement of the trial on the ground of the absence of a material witness, it is improper to impose as a condition to granting the order that he consent to a change of venue. *Royal Bank of Canada* v. *Hale*, 36, p. 471.

WAIVER

Appearance by defendant curing defects in process—*See* INTOXICATING LIQUORS.

Bill of Exchange—Presentment—An offer made after its maturity by an endorser of a promissory note to pay the amount of the same by installments, will not operate as a waiver of presentment in the absence of evidence that at the time of the offer he knew there had been default in presentment *Ayer* v. *Murray*, 39, p. 170.

Insurance company—Power of agent to waive forfeiture of policy caused by breach of condition. See *Torrop* v. *Imperial Fire Insurance Co.*, 34 N. B. R., p. 113; 26 S. C. R., p. 585.

Insurance policy, Conditions of—A policy of insurance contained a condition requiring the assured, in case of loss, to procure a certificate as to the matters contained in the statement of loss under the hands of two magistrates most contiguous to the place of the fire.—A further condition provided that no condition should be deemed to have been waived unless the waiver was expressed in writing indorsed on the policy.—*Held* (*per curiam*), that if there could be a waiver under the condition without endorsement on the policy, the acceptance of the proofs of loss by the company, without objection, was not such a waiver. *LeBlanc* v. *The Commercial Union Insurance Co.*, 35, p. 665.

The fact that an insurance company sent an adjuster to inspect a loss, who made inquiries as to the origin of the fire and other matters mentioned in the proofs of loss does not establish a waiver of such proofs. —*Held* (*per* Barker C. J., Landry and McKeown JJ.), mere retention of proofs of loss by an insurance company for a long time without objection does not constitute a waiver of defects in such proofs.—*McManus* v. *The Aetna Insurance Co.*, 11 N. B. R. 314, followed.—*Imperial Fire Insurance Co.* v. *Bui*, 15 A. R. (Ont.) 421, affirmed 18 S. C. R. 697 distinguished. *Guimond et al* v. *Fidelity-Phenix Fire Insurance Co.*, 41 N. B. R., p. 145. Affirmed 47 S. C. R., p. 218.

Jurisdiction of Superior Court in criminal matter—The appearance of counsel merely to object to the jurisdiction of the Court does not operate as a waiver. *R.* v. *Murray, Ex parte Copp*, 40, p. 280

Landlord and tenant—Covenant to repair—The plaintiff, a physician in large practise at S., being about to leave the province temporarily, leased to the defendant, who was also a physician, a part of his house for two years from July then next at an annual rental.—By a covenant in the lease the defendant agreed at the expiration of the lease either to purchase the whole property for a price named, or to forthwith leave and depart from S. and not to reside there, or practise thereat, or within ten miles thereof, for at least three years.—The plaintiff covenanted to repair the roof of the house on or before the said first of July, and not to practise in S. during said two years.—Nothing was done towards the repairs up to July 1st, as had been agreed; in fact the roof was not put in a satisfactory condition until the fall of 1895 when an entirely new roof was put on.—This breach was not wilful on the part of the plaintiff, and the defendant made no complaints as to the non-repair during the two years he occupied the premises.—It was admitted that except as to the repairs the plaintiff had performed all the covenants entered into by him.—At the end of the two years the defendant refused either to purchase or to leave S. and refrain from practising there. —The judge in Equity restrained the defendant from residing or practising in S according to the terms of his covenant.—*Held*, affirming the judgment of the Court below, that whatever rights had accrued to the defendant by the breach of the covenant to repair had been waived by his entering into possession of the premises and remaining there during the term without complaint; (2) that the covenant to repair was an independent covenant, and its performance was not a condition precedent to the maintenance of this suit *Mc Nichol* v. *Ryan*, 34, p. 391.

N. B. Railway Act, Award under—The statutory provision requiring the arbitrators to be sworn before a justice of the peace may be waived (*per* White and Crockett JJ.). *Turney* v. *St John & Quebec Rwy. Co.*, 42, p. 557.

Pleading, Waiver of conditions precedent—See *Underfeed Stoker Co. Ltd.* v. *Ready*, 37, p. 505.

Procedure, Irregularity in—In the matter of an election petition under the Dominion Controverted Elections Act, *held*, that the failure to file for the petitioner a copy of the preliminary objections to the petition was waived by the taking of subsequent proceedings before raising the question. *Alexander* v. *McAllister*, 34, p. 163.

Trespass—Acquiescence—The defendant company, in the year 1890, took possession of a piece of land claimed by plaintiff and built its line of railway across it, and fenced it on both sides of the track, and immediately thereafter began running its trains over the said track, and have continued to do so ever since.—The plaintiff saw what was going on and assisted in the building of the railway, but made no objection to its construction or the running of the trains until 1895, when this action of trespass was brought.—*Held*, that the evidence showed no possession in the plaintiff, or, if it did, plaintiff was bound by his acquiescence and could not maintain trespass. *Clair* v. *The Temiscouata Railway Co.*, 37 N. B. R., p. 608; 38 S. C. R., p. 240.

WARRANTY

See SALE OF GOODS—VENDOR AND PURCHASER.

WATER AND WATER COURSES

Legislative authority to take water—Where plaintiff was authorized by Act to take a specified quantity of water per day from a lake for, among other purposes, the domestic use of its citizens, it was held that it was entitled to enjoin the pollution of the lake by a riparian owner. *The City of St. John* v. *Barker*, 3 Eq., p. 358.

See also ARBITRATION AND AWARD.

Riparian owner—Diversion of channel—A diversion of a natural stream from its natural channel in front of the land of a riparian proprietor is actionable at his instance without proof of actual or probable damage.—A mandatory injunction will not be granted except in cases where extreme or very serious damage will ensue if the injunction is withheld. *Saunders* v. *William Richards Co. Ltd.*, 2 Eq., p. 303.

Riparian owner, Rights of—See judgment of Barker C. J. in *Seely* v. *Kerr*, 4 Eq., p. 194.

Riparian owner, Rights to erect booms, etc.—The owner of land on a floatable river is entitled to erect booms and piers necessary for reasonable use of the river in operating a saw mill. *Watson* v. *Patterson*, 2 Eq., p. 488.

Riparian owner—Right to maintain dam—The owner of the alveus of a navigable river and of the land on both sides of it upon which a dam stands has an absolute right to maintain it for the purpose of operating his mill by the use of the flowing water, and he has this right as an incident to the ownership of the property.—Such right must be exercised subject to the rights of other riparian proprietors to a reasonable use of the water and to the public right of passage.—The public right is not a paramount right, but a right concurrent with that of the riparian owners; and if, in the exercise of their public right, the defendants in driving their logs down the river injured the plaintiff's dam, the onus is upon them to show that they adopted all reasonable means and used all reasonable care and skill in order to avoid the injury (*per* Barker J.). *Roy* v. *Fraser et al*, 36, p. 113.

Riparian owner—Right to water—The pollution of a river by a riparian owner will be enjoined at the instance of a riparian owner lower down without proof of actual damage.—Generally speaking, one not a riparian owner is not entitled to complain of the pollution of the river and a grant or license from a riparian owner to use the water does not entitle the grantee or licensee to complain of its pollution by another riparian owner. *City of St. John* v. *Barker*, 3 Eq., p. 358.

Riparian owner—Right to water—Right of user—A riparian owner has a right to have the water flow to his land in its natural channel without material diminution in its volume or sensible change in its quality; and to use it for all ordinary and domestic purposes; he has also a right to the reasonable use of it for commercial or other extraordinary purposes incident to the enjoyment of his property, provided he does not cause material injury or annoyance to other riparian owners—A prescriptive title to the uninterrupted use of the water of a river will not be obtained by a riparian owner who has made no use of the water different from that to which he was entitled as a riparian owner.—Defendants, an electric lighting company, owning lands on both sides of a river and having power by their Act of Incorporation to build and maintain dams on the river erected a dam thereon in connection with their power house.—Plaintiff is the owner of a water grist and carding mill, situate lower down on the same river.—Defendants ran their machinery at night time, and in the morning it was their practice, without having regard to the length of time required for the purpose, to store the water until the dam was again full.—In consequence the plaintiff was deprived of water, and his mills were forced to shut down for a long number of days at a time.—*Held*, that defendant's use of the water was unreasonable, and should be restrained. *Brown* v. *Bathurst Electric and Water Power Co. Ltd.*, 3 Eq., p. 543.

Riparian owner—Right to water—A riparian owner has the right to the full flow of the water in its natural state, without diminution or pollution, so, where it is shown that the defendant was polluting the water by operating an iron mine and thereby injuring the fishing rights of the plaintiff, an injunction was granted; but, as the works of the defendant were important, the Court ordered that the injunction should not become operative for over three months, in order that the defendant might have an opportunity to prevent the pollution by alterations to its plant. *Nepisiquit Real Estate & Fishing Co. Ltd.* v. *Canadian Iron Corporation*, 42, p. 387, C. D.

Riparian owner—Stream driving—A dam was constructed above the female plaintiff's land by the defendants for the purpose of driving their logs, with the result that the stream widened its banks where it flowed through the plaintiff's property and caused injury to it. The plaintiff's husband had assisted in the building of the dam as an employee of the defendants, and at the time was the owner of the land now owned by the plaintiff.—*Held*, that the plaintiffs were not estopped from seeking

to restrain by injunction further injury to the property and claiming damages for the injury done.—The circumstances under which the owner of a legal right will be precluded by his acquiescence from asserting it considered. *Mitten* v. *Wright*, 1 Eq., p. 171. 34 N. B. R. p. 14

Water lots in St. John harbour, Lessee of—S. is a lessee under lease from the city of Saint John of a water lot in the harbour; the F. K. Co. are lessees of the next lot to the south and there are other lots to the south between that of S. and the foreshore of the harbour.—By his lease S. has a right of access to and from his lot on the east and west sides.—*Held*, that S. was not a riparian owner and had no rights in respect to the water lot other than those given him by his lease.—Hence he could not restrain the F. K. Co. from erecting a wharf on the adjoining lot which would prevent access to his from the south, a right of access not provided for in his lease.—Judgment of the Supreme Court of New Brunswick (40 N. B. R. 8) maintaining the decree of the judge in equity (4 N. B. Eq. 184 and 261 reversed.—(Idington J. dissenting.) *The Francis Kerr Co.* v. *Robert Seely*, 44 S. C. R., p. 629.

WATERWORKS

See MUNICIPAL LAW, X.

WAY

1. Dedication of Highway.
2. Obstruction of Highway.
3. Opening and Closing of Highway.
4. Other cases Respecting Highways.
5. Private Ways.

1. Dedication.

Highway, What constitutes a—Not contract but dedication by owner of fee and user by the public, i. e. when individuals have passed over it in the ordinary way. See Tuck C. J. in *Woodstock Woolen Mills Co., Ltd.*v. *Moore et al*, 34, p. 475.

To establish dedication of land for a road by user, it is essential to prove an intention to dedicate; and to determine whether the user shown in a particular case establishes the necessary *animus dedicandi*, regard should be had to the situation and character of the land in question.—The fact that the owner of uncultivated land in the country permitted the user for a road by teams and foot passengers is not in itself conclusive proof of such animus. *Campbell* v. *Bond et al*, 44, p. 357 (K. B. D.).

Plan of sub-division—Description in deed—The successor in title of the owner of a block of land containing twenty-five acres, which had been laid out on a plan in lots with intended streets running through it, is estopped from denying that a purchaser of a lot described as abutting on one of the intended streets is entitled to use it as a right of way, although it is not used as a street and nothing has been done to it with the intention of making it a public street. *Budd* v. *Johnston*, 42, p. 485.

Width of road—Sub-section 1 of s. 34 of 8 Edw. VII (1908) c. 34 providing that "All existing highways, except those heretofore laid out and recorded as two rod highways, shall, until the contrary be proved, be deemed to have been laid out four rods in width, and all highways hereafter to be established shall be laid out not less than four nor more than six rods wide.—All highways shall be worked out to such width as the commissioners in their respective districts shall consider necessary," does not operate to make a road upon which public money has been expended and statute labor performed a four rod highway when such road had been dedicated and accepted of a less width and along the side of which an adjoining proprietor had erected his fence on to which he has held possession. *Grounwater* v. *Waterman*, 42, p. 396.

See also Fairweather v. *Robertson*, 2 N. B. Eq. 412. Confirmed by Privy Council (post section 5).

2. Obstruction.

Bricks piled on highway insufficiently lighted—Action for damages caused by negligence in leaving a pile of bricks on a highway insufficiently lighted whereby plaintiff drove into the bricks and sustained injuries to himself and carriage. See *Turnbull* v. *Corbett*, 41, p. 284.

Conviction for destroying a line fence where it crossed an alleged highway—See *R.* v. *O'Brien, Ex parte Roy*, 38, p. 109

Dispute as to location—Plans—User—In an action for obstructing a highway there was conflicting evidence as to its location and user by the public.—Part of the defendants' title were a lease and an assignment thereof, both of which had a plan attached exhibiting the highway as located where the plaintiffs claimed it to be.—Neither the lease nor the assignment made any reference to the plans.—The defendant's evidence showed the highway as actually used in a location differing from that shown by the plans.—The jury found in favor of the defendants, both as to location and user.—The learned judge who tried the cause held, that as the deeds and plans must be read together, the defendants' were estopped from disputing the location of the highway, and, disregarding the findings of the jury as to its location and user, ordered a verdict to be entered for the plaintiffs. —*Held*, that the verdict was properly so entered.—(Reversed on appeal, 29 S. C. R. 627). *Woodstock Woollen Mills Co. Ltd.* v. *Moore et al*, 34, p. 475.

Pleading—Obstruction on street—See *Rolsten* v. *City of St. John*, 36, p. 574.

Removing obstruction—Highway Act, 1896—Authority under the Highway Act, 1896, (59 Vict. c. 21,) s. 22 to sell the work of removing an obstruction upon a public road is not limited to a case where the owner of the obstruction is unknown. *Winslow* v. *Dalling*, 1 Eq., p. 608.

3. Opening and Closing Highway.

Altering course of highway—Highway commissioners altering the course of a highway are held to an exact compliance with their statutory authority. *Winslow* v. *Dalling* 1 Eq., p. 608.

Changing level of road—By the charter of the city of St. John, the corporation were given power, not only to establish, appoint, order and direct, the making and laying out all other streets . . . heretofore made, laid out or used or hereafter to be made, laid out and used, but also the altering, amending and repairing all such streets heretofore made, laid out, or used or hereafter to be made, laid out or used in and throughout the said city of St. John and the vicinity thereof. . . So always as such . . . street so to be laid out do not extend to the taking away of any person's right or property without his, her or their consent, or by some known laws of the said province of New Brunswick, or by the law of the land."—The charter is confirmed by 26 Geo. III, c. 46.—By Act 41 Vict., c. 9, intituled "An Act to widen and extend certain public streets in the city of St. John," it was provided that Dock street should be opened to a width of sixty-two feet by taking in twelve feet on its easterly side, and carrying the north-eastwardly line twelve feet to the eastward through its entire length from Market Square to Union street and that Mill street should be opened to the same width from Union street to North street by widening its eastwardly line.—The effect of widening Dock street made it necessary either that Union street should be lowered and graded to its level, or that Dock street should be graded up to its level, and that if Union street was lowered, George street, opening off it, should also be lowered.—The corporation in January 1878, decided to excavate and lower Union street to the extent of twelve or thirteen feet after hearing the report of the city surveyor and the petitions of citizens for and against the cutting down of Union street, and immediately thereafter entered upon the work by contractors.—The plaintiffs were owners of a lot on the corner of Union and George streets upon which they had erected expensive business premises, and which, by the lowering of the streets, would be twelve or thirteen feet above them.—When the work of cutting down Union street was about two-thirds done, and approaching the plaintiffs' premises, and after several months had elapsed from the time it was entered upon, the plaintiffs being unable to obtain compensation from the corporation, brought this suit for an injunction to restrain the continuance of the work.—*Held*, (1) that the corporation, was unauthorized to cut down Union street, and that the plaintiffs were entitled to compensation for which they had a remedy at law, but (2) that the injunction should be refused on the ground of delay in the application. *Yeats* v. *The Mayor etc. of St. John*, Eq. Cas., p. 25.

Government Railways Act.—By section 5, sub-section 7 of The Government Railways Act, 44 Vict., c. 25 (D) the minister of railways has full power and authority, . . . "to make or construct in, upon, across, under or over any land, streets, hills, valleys, roads, railways or tramroads, canals, rivers, brooks, streams, lakes or other waters, such temporary or permanent inclined planes, embankments, cuttings, aqueducts, bridges, roads, sidings, ways, passages, conduits, drains, piers, arches or other works as he may think proper. —And by sub-section 8: "To alter the course of any river, canal, brook, stream or water course, and to divert or alter as well temporarily as permanently the course of any such rivers, streams of water, roads, streets or ways, or raise or sink the level of the same, in order to carry them over or under, on the level, or by the side of, the railway, as he may think proper, but before discontinuing or altering any public road, he shall substitute another convenient road in lieu thereof, and the land theretofore used for any road, or part of a road, so discontinued, may be transferred by the minister to, and shall thereafter become the property of the owner of the land of which it originally formed a part."—Section 49 of the Act provides that: "The railway shall not be carried along an existing highway, but merely cross the same in the line of the railway, unless leave has been obtained from the proper municipal or local authority therefor, and no obstruction of such highway with the works shall be made without turning the highway so as to leave an open and good passage for carriages, and on the completion of the works, replacing the highway; but in either case, the rail itself, provided it does not rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction.—Provided always, that this section shall not limit or interfere with the powers of the minister to divert or alter any road, street or way, where another convenient road is substituted in lieu thereof, as provided in the eighth subsection of section five."—*Held*, that by section 5, sub-sections 7 and 8, power is given to construct a railroad on, along and over a highway to the extent of occupying the whole of it and not merely alongside of it, and that section 49 does not limit this power. *Atty. General for N. B.* v *Pope et al*, Eq. Cas., p. 272

Highway Act, 1876—Expenditure of public money—The expenditure of public

money on a road without the consent, knowledge or acquiescence of the owner of the land, does not make the road a highway under the provisions of the Highway Act (Con. Stat. 1876, c. 68, s. 9) providing that "all roads not recorded, upon which public money has been expended are hereby declared public roads or highways although less than four rods wide." *Campbell* v. *Pond et al*, 44, p. 357 (K. B. D.).

Highway Act, 1904—Expenditure of public money—The Court refused to set aside the findings of the trial judge in an action of trespass to land, to the effect that public money had been spent on a road over plaintiff's lands under circumstances which created it a public highway, under the provisions of the Highway Act, 1904, (4 Edw. VII, c. 6,) s. 3. *Rideout* v. *Howlett*, 42, p. 200.

Non user by public—The right of the public to the use of land dedicated by the owner as a public highway and used by the public as such for a number of years, cannot be extinguished by act of the owner, nor can such right be lost by the public by non-user of the highway. *Winslow* v. *Dalling* 1 Eq., p. 608.

4. Other Cases.

Highways Act, 1908—Notice of action—A notice of action which reads: "Notice is hereby given that I will, after the expiration of thirty days from the date of service of this notice, enter an action" etc. etc. and which was served more than a month before action brought is a sufficient notice of action against an official for an official act under clause (2) of s. 97 of 8 Edw. VII, c. 34, providing that no such action shall be brought until after one month's notice. *Campbell* v. *Pond et al*, 44, p. 357 (K. B. D.).

Right of passage on navigable river—See *Roy* v. *Fraser et al*, 36, p. 113.

Rules of the road—See *Stout* v. *Adams*, 35, p. 118.

5. Private Ways.

Right of way for certain purpose, not for all purposes—Plaintiff claimed a right of way over a private road of several hundred feet in length, in part on land of defendant adjoining plaintiff's land, and leading from a public highway to lots comprised in part by defendant's land, sold by defendant's predecessor in title, B., under a conveyance reserving to the grantees the use in common of the road.—The evidence of plaintiff's predecessor in title, K., was that shortly after the sale of these lots he moved back on his land his farm house and fence to widen the entrance of the private road at its junction with the highway, under an agreement with B., concurred in as he believed by the owners of the lots, that he, K., should have for so doing, a right of way with them over the road.—B. denied that an agreement was concluded and his evidence was corroborated by H., a former owner of the lots, and by drafts of an agreement containing alterations indicating that the parties were merely in treaty, and providing for the maintenance of the road by K., in common with the owners of the lots, an obligation disclaimed by plaintiff, and for a conveyance by K., of the part of his land to be used for widening the entrance—This conveyance was never made, and the land was included in the conveyance to the plaintiff.—The road had been used from the time of the alleged agreement, by K. and plaintiff in connection with the farm house, situate about two hundred feet from the public highway, until it was torn down, and plaintiff had used, but not without interruption, the road for about 15 years for a considerable part of its length.—Shortly after the date of the alleged agreement, fences, with gates, crossing the road at separate points a considerable distance from its entrance, were erected by H. without objection by K.—*Held*, that the plaintiff's bill for an injunction to restrain defendant from obstructing plaintiff in the use of the road should be dismissed. *Fairweather* v. *Robertson*, 2 Eq., p. 412. Reversed, 36 N. B. R., p. 548, but restored by Privy Council.

WILLS

1. Charitable Uses and Mortmain Act.
2. Codicils.
3. Construction.
4. Execution.
5. Holographic.
6. Interest of Witness.
7. Legacies and Devises.
8. Noncupative.
9. Probate Establishments and Amendment.
10. Promise to Devise or Bequeath.
11. Proof of Wills.
12. Registration of Wills.
13. Residue.
14. Restraint on Alienation.
15. Revocation and Revival.
16. Testamentary Capacity and Undue Influence.
17. Validity of Conditions.
18. Widow's Election.
19. Miscellaneous Cases.

Administration and Distribution of Estates—*See* EXECUTORS AND ADMINISTRATORS.

1. Charitable Uses and Mortmain Act.

(*See "Uncertainty of Bequests" Col. 793 et Seq.*)

2. Codicils.

Codicil, Effect of—Testator by his will devised to his daughter "the homestead farm on which I reside," and made no devise of the residue of his real estate, except a life estate therein to his wife.—After the date of the will he acquired other real estate, including land known as lot A., to which he removed from the homestead farm, and where he resided at the time of his death.—The will was confirmed by codicil executed after the testator had removed to lot A.—By C. S. N. B., c. 77, s. 19, "every will shall be construed with reference to the real and personal estate comprised therein, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."—*Held*, that lot A. was not included in the devise to the daughter. *Ayer* v. *Estabrooks*, 2 Eq., p. 392.

In the case of a specific devise, a codicil will not operate to extend the gift to property which the gift did not originally embrace, even though it might extend it to a new estate in the same property.—(*Per* Barker J.) *Id.*

A testator directed a sum of money to be set apart by his trustees and the income paid to A. for life, and that after A.'s, death the capital should be divided among A.'s children in certain shares.—The testator further directed that in the event of A. dying while any of his children should be under the age of twenty-five years, the income of the fund should be paid to their mother while such children respectively should be under that age" for the maintenance and education of such child or children respectively while he or she shall be under that age."—By a codicil the testator revoked the "legacy and annuity" to A.—*Held*, that the gift to the children was not revoked but accelerated, and vested on the testator's death, and that the share of each child in the capital was payable on his attaining the age of twenty-five years. *Lewin* v. *Lewin*, 2 Eq., p. 477.

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3. Construction.

Amount passing under will—Donatio mortis causa or delivery for safekeeping—A person on his death-bed handed to his wife out of a satchel which he kept in a closet of his bedroom $2,000 in bonds and $1,550 in cash, telling her to "take them and put them away; wrap them up and lock them up in your trunk."—At the same time he handed to her a pocket book containing $150, saying that it was for present expenses.—A few minutes later he handed to his business partner the remaining contents of the satchel, consisting of $1,000 belonging to the firm.—Subsequently he made a will bequeathing to his wife $3,000, a horse, two carriages, and all his household effects; to his partner his interest in partnership property: to two grand-nephews $500 each; and to nieces and nephews the residue of his estate.—His private estate was worth $7,500.—When giving directions for the drafting of his will, on the amount of the legacies to his wife and grand nephews being counted up, he said, "there is more than that."—*Held*, that there was not a *donatio mortis causa* to the wife, the deceased intending no more than a delivery for safe-keeping. *The Eastern Trust Co.* v. *Jackson*, 3 Eq., p. 180.

Amount of estate—Gift or declaration of trust during life—J. A. C., the testator, died April 15, 1907.—In his will, which was dated March 13th, 1906, there was the following residuary clause: "All the rest and residue of my estate, real and personal, excepting only such personal property as may be found in my private cash box or in my box in the vaults of the Bank of New Brunswick St. John, and which I had already given to my daughter Hannah Gertrude, to meet the immediate personal necessities of herself and her sister Jean, I give in trust to my executors, etc."—On or before April 11th, 1905, the testator gave to J. S. C., one of the executors afterwards named in his will, an envelope which J. S. C. believed to contain securities, and which the testator at that time stated he had given to his daughter, H. G. C., and requested J. S. C. to take the envelope and deposit it in a vault box in the Bank of New Brunswick.—J. S. C. leased a vault box as directed, in the names of J. A. C. and H. G. C., either to have access, and gave both the keys of the box to J. A. C.—After J. A. C.'s death a number of securities were found in the private cash box, and in the vault box an envelope containing securities was found, addressed "Revd. John A. Clark, Hannah Gertrude Clark," and also a number of loose securities.—*Held*, that in respect to the other securities there was no valid declaration of trust by the testator in favor of H. G. C.; and that the securities were a part of the testator's residuary estate. *Clark* v. *Clark et al, Exec.*, 4 Eq., p. 237.

Construction determined by written document—Where a clause in a will, drafted by testator's solicitor, had a legal effect contrary to the testator's instructions and contrary to the explanation given by the solicitor when he read the will to the testator, *held*, in the absence of fraud, that the testator by his assent adopted the clause as written, although he had been misled as to its effect, and the will, including this clause, was admitted to probate. *In re Estate William John Davis*, 40, p. 23.

Cf. *Est. Mary B. Gilbert*, 39, p. 285.

Devise in trust for married daughter—"I give and devise all my real and personal estate unto J. as executor and trustee, his heirs and executors, to hold the same to

the sole use of my daughter during her natural life and after her decease, unto the use of her heirs and I hereby will and devise that my said executor and trustee shall sell and dispose of any real or personal estate that I may die seised or possessed of, and after payment of my just debts and funeral and testamentary expenses, invest the proceeds in such securities as he may think fit, and he shall annually or semi-annually pay the interest accruing on such securities to my said daughter, and in case of her death to her children."—The daughter survived the testatrix.—*Held* (1) that the daughter took an absolute interest; (2) that the trust continued during the daughter's marriage. *Nealis* v. *Jack*, Eq. Cas., p. 426.

Distribution, Period of—Testator, by his will bequeathed to his niece for life the interest on a sum of money directed to be invested in the name of her son A., or any more issue of hers there might be;" and in case of the death of the said (niece) or her son (A.) leaving more issue, the (principal) to be equally divided among them and in case of the death of the said (niece) and her said son leaving no other issue," over to H.—*Held*, that the issue of the niece at the time of her death, and not at the time of the death of A., took. *Kerrison* v. *Kaye*, 2 Eq., p. 455.

Distribution, Time of—Whether child born after death of testator was entitled to rank—L. died, having made a will by which he left all his property to two trustees, to hold in trust for the benefit of the infant children of two nephews.—The trustees were to use the income according to their discretion, for the support, maintenance and education of these children, until each reached the age of twenty-one years.—The words in the will are: "and on each child attaining the age of twenty-five years, to pay to such child what they consider would be his or her share in my estate, dividing the same equally between such children living, and the children of any deceased child when such payment shall be made, such payment to be *per stirpes*, and not per capita, etc."—In 1904, one of the children died without issue, and in 1906 another child was born to one of the nephews.—The oldest child has now reached the age of twenty-five years.—*Held*, that the child who had reached the age of twenty-five years was entitled to be paid her share of the corpus of the estate, which share was to be ascertained by dividing the corpus equally among the children then in *esse*, they being the only ones entitled to rank, as the class was then decided.—*Held*, that the child born after the death of the testator, but before the time for payment to the oldest child, was entitled to rank equally with the other children as the class was not determined until then.—*Held*, that the oldest child, having reached the age of twenty-five years, was entitled to be paid her share of the corpus of the estate, and took an absolute vested interest.—*Held*, that the remainder of the capital was not to be set apart now, but held in trust until another child reached the age of twenty-five years, when another division must be made.—*Held*, that the oldest child was not now entitled to any share of the accumulated income.—That can only be divided when all possible claims upon it have ceased.—It was ordered that the costs in this matter as between solicitor and client, be paid out of the corpus of the estate. *Earle, Trustee etc.* v. *Lawton et al*, No. 2, 4 Eq., p. 92.

Guardianship of person as opposed to trusteeship of funds—A testator bequeathed his estate to trustees, and directed them out of their investments of the same to set apart £1,000 "to be used by them for the purpose of educating and giving a profession to my son, providing he has not already been educated and received a profession."—He then directed the trustees to use and apply one-half of the income of the residue of the estate, as far as deemed necessary, for the maintenance and support of the said son, and that upon his arriving at the age of 25 years one-half of the estate with all accumulations thereon should be given to him absolutely.—The testator left him surviving his wife, the mother of the son mentioned in the will, and the said son an infant of about nine years of age.—On an application by the mother of the infant to be appointed guardian of his person, *held*, that the trustees were not appointed by the will guardians of the person of the infant, that the application should be granted, and that the mother as such guardian had the power, subject to the order of the Court, of selecting the school at which the infant should be educated. *In re Taylor*, 1 Eq., p. 461.

"Heirs" does not include widow—R. died in 1876 leaving a will by which he devised practically all his property to trustees upon trust for the benefit of his children and their heirs.—D. D. R., a son of the testator, died after his father, leaving him surviving a widow and five children.—*Held*, that the word "heirs" in the will should be construed in its strict legal and technical sense and was intended to mean the heirs at law and not the statutory next of kin; and that the widow of the deceased son was not entitled to any part of the testator's property, under his will. *Smith, et al, Trustees* v. *Robertson et al*, No. 2, 4 Eq., p. 252.

"Homestead farm"—After acquired property—Testator by his will devised to his daughter "the homestead farm on which I reside" and made no devise of the residue of his real estate, except a life estate therein to his wife.—After the date of the will he acquired other real estate, including land known as lot A., to which he removed from the homestead farm, and where he resided at the time of his death.—The will was confirmed by codicil executed after the testator had removed to lot A.—By

C. S. N. B., c. 77, s. 19, "every will shall be construed with reference to the real and personal estate comprised therein, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."—*Held*, that lot A. was not included in the devise to the daughter. *Ayer* v. *Estabrooks* 2 Eq., p. 392.

Infant, Power of appointment by—By will F. left his estate to a trustee with directions to invest one portion and to "pay and apply the annual income arising therefrom or from any accumulations thereof, in such manner and at such times as my wife and daughter, during their joint lives, shall by directions in writing require my trustee so to do," and in case of the death of either, the power of appointment was to go to the survivor.—The daughter was an infant (18 years of age) and her step-mother (testator's wife) was testamentary guardian. —They jointly appointed the income of this portion, as it accrued to the step-mother and the money so appointed was expended for the benefit of both equally.—On the accounting of the trustee before the judge of probate under s. 51 of the Probate Courts Act, (C. S. 1903, c. 118), the judge of probate found that the income so appointed was necessary for the maintenance of the infant in her station of life and that it had been properly expended by her guardian, but refused to confirm the payments by the trustee on the ground that the infant had an interest in the estate which was capable of being affected, diminished or disposed of to some extent by the exercise of this power and that therefore the appointments were invalid.—On appeal, *held* (1) that the payments should have been allowed irrespective of the provisions of the will as they were properly made by the trustee for the maintenance of the infant; (2) the appointments were valid as it was the testator's clear intention that the power should be exercised during infancy. *In re Estate William D. Forster*, 39, p. 526.

Innocent misconstruction—Breach by trustees—A testator, in one part of his will, gave all his real and personal estate to his wife "to be hers in such a way that she shall, during her life, have the full use, benefit and enjoyment thereof," and then over, and in a subsequent clause, after directing his executors to sell his real estate, empowered them to make investments in certain classes of securities, "so that my said wife may have the interest and income therefrom during her life."—The plaintiffs, with testator's widow, were appointed executors of the will.—The estate was comprised in part of real estate, which was sold by the executors, and the proceeds were handed by the plaintiffs to their co-executor to be held by her under the terms of the will, they honestly believing that such was their duty under the will.—On her death an investment made by her representing a part of these proceeds came to the hands of the plaintiffs; the remainder of the proceeds having been either used or lost by her.—*Held*, that the estate was devised in trust to pay the income only therefrom to the widow during her life, and that there was a breach of trust by the plaintiffs; but that they had not acted unreasonably in the view they took of the meaning of the will, and that they should be relieved from personal liability, under Act 61 Vict., c. 26. *Simpson* v. *Johnston*, 2 Eq., p. 333.

Intention, Carrying out of testator's—The codicil to A.'s will contained the following provision: "All the residue of my estate given to the city of Fredericton by the said will, I give and bequeath to T. C. A. and J. A. G. in trust for the purpose of founding an institution to be called the J. J. Fraser Fanaline Place for a home for old ladies, and for that purpose to execute a deed of settlement, containing such provisions and regulations and appointing such trustees, including themselves if they see fit, as they shall consider expedient, at which home I direct that the said S. F. B. shall have a comfortable living for her life."—The fund created by this provision is not at present sufficient for the purpose for which it was intended.—*Held*, that the general intention of the testatrix that S. F. B. should have a comfortable living at the Home for the remainder of her life should not be defeated by reason of the funds being at present inadequate for the maintenance of the Home as intended and that an allowance from the annual income of the fund would be made to S. F. B. in lieu of the support and living intended for her at the Home. *Morrison* v. *Bishop of Fredericton et al*, 4 Eq., p. 162.

Intention—Parol evidence to correct error—The following clause was contained in the will of Mrs. F.: "I release and direct my executors to cancel without collecting the money, the mortgage to me from John Doherty."—Mrs. F. held no mortgage from J. D. and she had never had any dealings with anyone of the name of J. D. but she did hold one from William Doherty.—*Held*, that parol evidence was admissible to correct such a mistake. *Id.*

Intestacy—Will made by party who was also incumbent of a corporation sole—What passes under will—The Roman Catholic Bishop of Saint John is a corporation sole.—The testator, incumbent of the bishopric, by his will made in his private name declared that "although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of Saint John, for the benefit of religion, education and charity, in trust according to the intention and purposes for which they were acquired and established, yet to meet any want or mistake, I give and devise and bequeath all my estate, real and per-

sonal, wherever situated, to the Roman Catholic Bishop of Saint John, in trust for the purposes and intentions for which they are used and established."—He then gave coupon bonds to the same devisee in trust for described charitable objects, a sum of money for masses, and a legacy of a sum of money.—The testator held in his own name certain real estate which had been conveyed to him for religious, charitable and educational purposes of the church.—He possessed in his own right real and personal estate, the income from which he had used in common with income from all sources of church revenue, for the uses of the church, including its educational and charitable needs, as well as for his private purposes.—*Held*, on appeal, affirming the judgment of Barker J. in a suit by the next of kin for a declaration that the testator had died intestate as to his real and personal estate, less the specific and pecuniary bequests.: that the testator's real and personal estate passed by the will. *Travers et al* v. *Casey et al*, 36 N. B. R., p. 229; 34 S. C. R., p. 419.

Maintenance of children—Discretion of trustees—L. died in 1899, having made a will in 1898, by which he left all his property to two trustees, to hold in trust for the benefit of the infant children of two nephews.—The trustees were to use the income according to their discretion, for the support, maintenance and education of these children, until each reached the age of twenty-one years.—*Held*, that as the testator had given the trustees full discretion, to use the income as they might see fit, for the purposes mentioned in the will, the Court would not, in the absence of fraud or wrong-doing, interfere or direct them in this respect. *Earle, Trustee etc.* v. *Lawton et al*, 4 Eq., p. 86.

Maintenance of grandchildren—Father able to support—A testator by his will gave his estate to trustees in trust to pay over the net income to the support, maintenance and education of the children of his son until the youngest should attain the age of twenty-one years.—Some of the children were of age, and the others were minors.—The father was able to support, maintain and educate the children.—*Held*, that so much of the income as would be necessary should be paid to the father while he was under an obligation to support, maintain and educate the children, and did so, until the youngest child became of age. *Schofield* v. *Vassie*, 1 Eq., p. 637.

Maintenance of infant—By will F. left his estate to a trustee with directions to invest one portion and to "pay and apply the annual income arising therefrom or from any accumulations thereof, in such manner and at such times as my wife and daughter, during their joint lives, shall by directions in writing require my trustee so to do" and in case of the death of either the power of appointment was to go to the survivor.—The daughter was an infant (18 years of age) and her step-mother (testator's wife) was testamentary guardian.—They jointly appointed the income of this portion, as it accrued, to the step-mother and the money so appointed was expended for the benefit of both equally.—On the accounting of the trustee before the judge of probate under s. 51 of the Probate Courts Act, (C. S. 1903, c. 118), the judge of probate found that the income so appointed was necessary for the maintenance of the infant in her station of life and that it had been properly expended by her guardian, but refused to confirm the payments by the trustee on the ground that the infant had an interest in the estate which was capable of being affected, diminished or disposed of to some extent by the exercise of this power and that therefore the appointments were invalid.—On appeal, *held*, (1) that the payments should have been allowed irrespective of the provisions of the will, as they were properly made by the trustee for the maintenance of the infant; (2) the appointments were valid as it was the testator's clear intention that the power should be exercised during infancy. *In re Estate William D. Forster*, 39, p. 526.

Maintenance—Trust not power—Where there is not merely a power but an absolute trust created for the maintenance and education of the children irrespective altogether of the father's ability, the father so long as he is under an obligation to furnish the maintenance and education and does furnish it has a right to have paid over to him so much of the trust fund as is necessary for the purpose. *Schofield* v. *Vassie*, 1 Eq., p. 641.

Power of appointment — Will — A testatrix, having a general power of appointment under the will of her father over real and personal estate, by her will directed that her debts and funeral expenses should be paid out of her estate.—After making certain bequests the testatrix proceeded as follows: "The real estate of which I am possessed and the personal estate to which I am entitled came to me under the will of my late father, and it is my will that after the payments above provided for that the residue of my estate, such as came to me under my said father's will, and all other I may be entitled to, both real, personal and mixed, shall be divided between my three children."—The testatrix had no estate of her own.—*Held*, that the will operated as an exercise of the power, the direction to pay the testatrix's debts out of her estate being but one circumstance to be considered in determining what her intention was. *Hutchinson* v. *Baird*, 1 Eq., p. 624.

Power of appointment by legatee—Power of trustees to sell in order to make distribution—R. died in 1876, leaving practically all his property upon trust for the benefit of his widow and children.—In

his will, in order to make an equal distribution of a large portion of his estate among his five daughters, he grouped together certain properties, in part real estate and in part personal, in five separate schedules.—The property in schedule A. was devised to the testator's daughter M. who died in 1902, leaving a will by which, in exercise of the power of appointment in her father's will, she devised one-third of her estate to her husband who survived her. —The clause in the will relating to the final distribution of the scheduled property was as follows: "And upon trust on the death of either of my said daughters to convey one-third of the said lands, tenements, hereditaments and premises apportioned to her in such schedule, to such person or persons upon the trusts and for the ends, intents and purposes or in such manner as my said daughter may by any writing under her hand, attested by two or more witnesses, or by her last will and testament direct and appoint, and as to the remaining two-thirds, to hold the same for the child or children, or such of them of my said daughter so dying, upon the trusts and in the proportion, and for the intents and purposes my said daughter may by her last will and testament direct and appoint and in default of such direction and appointment then and in such case the said two-thirds and one-third shall be held by said executors and trustees in trust for such child or children and be divided equally between them and their heirs, share and share alike, on the youngest child living attaining the age of twenty-one years and in the meantime and until such child shall attain such age, the rents, issues and profits thereof shall be applied by my said executors toward the support, maintenance and education of such child or children, and in the event of my daughter dying, leaving no issue her surviving, then and in such case I will and direct that the said two-thirds and one-third before mentioned (if no disposition of the same shall be made by my said daughter) shall be equally divided by my said executors and trustees between her sisters and brother and their respective heirs in equal proportions per *stirpes* and not per *capita*."—*Held*, that the trustees, in order to make a distribution, had power to sell and dispose of the scheduled property apportioned to the deceased daughter, such power being implied in the will in order to carry out the trusts, though no express power was given. —*Held* also, that the deceased daughter having died without issue, the unappointed two-thirds of her scheduled property should be equally divided now between the surviving daughters and the heirs of the deceased son.—The residuary clause in the will was: "The rest, residue and remainder of my said estate, both real and personal and whatsoever and wheresoever situate, I give, devise and bequeath the same to my said executors and trustees, upon the trusts and for the intents and purposes following, that is to say: Upon trust after paying my brother Duncan Robertson or his heirs, to whom I give and bequeath the same, the legacy or sum of four thousand dollars, Dominion currency, to sell and dispose of the same as and when they shall in their discretion see fit and consider to be most for the benefit and advantage of my said estate, and shall apportion the same or the proceeds of such parts or portions as shall be sold from time to time, equally to and among my said children, share and share alike, and shall hold the same for my said children and their heirs, share and share alike, subject to any advances or sums made or to be made by me, as aforesaid upon the same trusts, with regard to my said daughters as are hereinbefore declared with respect to the said estate in the said schedules mentioned."—*Held*, that the deceased daughter had a disposing power over one-third of her share of the residuary estate; and that the remaining two-thirds was divisible as was directed in regard to the scheduled property. *Smith et al, Trustees* v. *Robertson et al*, 4 Eq., p. 139.

Power of sale of real estate—Testator, owning some lands in severalty and some as tenant in common with others, devised the same to trustees and authorized them, subject to the consent of his wife, to sell the lands held in severalty and, in case of sale, directed them to invest the proceeds and hold the investments upon certain trusts. —The testator next empowered the Trustees to enter into negotiations for the purpose of making a partition of the lands held in common and provided "that such portions of said real estate now held by me as tenant in common as may be allotted and conveyed under such partition to my said trustees, shall be held by them under the same trusts as are herein mentioned concerning my estate."—A suit for partition was commenced by the testator after making his will and was pending at the time of his death.—This suit was continued by the trustees to whom were allotted in severalty certain portions of the property.—*Held*, that under all the circumstances and looking at the whole will, it was the intention of the testator that the trustees, subject to the consent of the wife, had the power to sell those portions of the lands so partitioned and allotted to them in severalty. *Gilbert* v. *Gilbert*, 42, p. 288, C. D.

Power to sell real estate—G. E. F. died in 1899, and by his will left the greater part of his property to his executors and trustees upon various trusts.—The testator's widow is still living, and the surviving executors and trustees are the plaintiffs, G. C. F. and W. T. H. F., two of the testator's children.—The will contained the following provision: "I give, devise and bequeath all my other property both real and personal whatsoever and wheresoever situate of which I may be seized or possessed or otherwise entitled, to my executors and trustees herein named upon the trusts following, etc." —The clause in the will which refered to

the Linden Hall property was: "Upon trust that my trustees will hold my residence known as Linden Hall and the grounds connected therewith (but not to include the property purchased by me and known as the Grammar School property) during the will and pleasure of my wife, and there she may live as long as she desires, free from rent, she paying one-half of the taxes, insurance, water-rates and such like, also she paying in full the running expenses in keeping up the establishment during her occupancy, it being my intention that she may live in her present home so long as she may so wish.—If, however, the above property be leased or sold during my wife's lifetime with her consent, then in such a case I desire, if leased, the rent derivable therefrom shall be used as rent for a house for her to live in and such house is to be as good as one of my present houses situate on College Road, and if after paying such rent with the money received from the rent of the said Linden Hall property, there remains a balance from time to time, this balance shall be added to the principal sum already set aside for my wife's maintenance, the income in the meantime being paid to my said wife.—Should, however, the said property be sold during my wife's lifetime, with her consent, the purchase money shall be used as follows: so much of it shall be invested as will yield enough interest to pay rent for as good a house as one of my College Road houses, and in such a house my wife may live, such interest being used to pay the rent therefor, and the balance of the said purchase money shall be divided equally among my children then living."—*Held*, that while no express power of sale was contained in the will, there was an implied power in the executors and trustees to sell the Linden Hall property to be drawn from the provisions contained in the will itself, and to enable them to carry out the trusts declared in the will; and that a conveyance executed by the surviving trustees and executors, in whom the title was vested, and the widow of the testator gave a good title to the property in question, and that it was not necessary that the beneficiaries under the will, other than the widow should join in the conveyance.—Memorials of judgment on record against some of the *cestui que trusts* are not a bar to the trustees giving a good title to the property, as they have no interest in the real estate involved, which would be liable under an execution.—Courts of first instance in deciding questions of title are bound to decide according to their own view, whether they have doubts or not, leaving it to be decided by a Court of Appeal *Fenety et al* v. *Johnston*, 4 Eq., p. 216.

Precatory trust—A testator, by his will gave and bequeathed all his property, both real and personal, to his wife for her use and benefit and then added: "I request my my wife to pay to P. R. (an adopted son)at her death, or should she sell the farm on which I now live before her death, $400.—I also give P. R. the sorrel horse now in my possession."—*Held*, that the gift to the testator's wife was subject to a precatory trust in favor of P. R. *Reneham* v. *Malone*, 1 Eq., p. 506.

Probate Court, Powers of, re construction—The testator P. by his will, bequeathed to his wife an annuity of $1,200 during her life, and to the plaintiff an annuity of $2,000 during her life, and directed his executors and trustees to set apart out of the funds of the estate, stocks or securities sufficient to pay both annuities, and that if the income therefrom should not be sufficient, a portion of the principal should be applied for the purpose, and that under no circumstances whatever should there be any default or delay in paying the annuities.—The will then contained a number of devises and specific legacies and the testator devised all the residue of both his real and personal estate after the payment of his debts, funeral and testamentary expenses, to his son, J. H. P.—He then appointed his wife, his son J. H. P. and three others to be the executors and trustees of his will.—Probate of the will was granted to all of the executors. —The trustees failed to set apart funds for the payment of the annuities.—In an administration suit brought by the plaintiff, for the purposes, *inter alia*, of construing the will, and determining whether the trustees had distributed the estate and accounted in accordance with the will, J. H. P. claimed that the trustees after paying the debts and settling of specific legacies, were unable to comply with the directions of the will as to appropriating funds for the payment of the annuities, and that he had expended the whole of the corpus of the estate in paying the annuities, and had passed his account in the Probate Court.—By the executors' accounts filed and passed in the Probate Court it appeared that the judge of the Probate Court found and decreed a balance due J. H. P. of $5,020.00.—*Held*, that the Probate Court not being a court of construction, and having no authority to determine questions relating to the meaning of a will and whether executors and trustees have discharged their duties in accordance therewith, the suit was not *res judicata* by reason of its decree. *Parks* v. *Parks et al*, Eq. Cas., p. 382.

"Proceeds" includes corpus unless clearly restricted—A bequest of annuities out of "the net income or proceeds" of property directed to be converted into money, renders the corpus subject to the payment of the annuities, if the income therefrom is insufficient to pay them, since the word "proceeds" includes corpus, unless it is clear that a more restricted meaning is intended. *Beal* v. *The Eastern Trust Co.*, 43, p. 23, C. D

"Single", Meaning of—The following provision was contained in a will: "that the sum of twenty dollars per annum be paid annually to M. F., daughter of G. F., as long

as she lives and remains single."—M. F. had been married, but before the date of the will, had been divorced *a vinculo*, which fact was well known to the testatrix.—*Held*, that M. F. was entitled to the legacy, "single" meaning "free to marry." *Morrison* v. *Bishop of Fredericton et al*, 4 Eq., p. 162.

"The Roman Catholic Bishop of Saint John." Will by—Corporation sole—The Roman Catholic Bishop of Saint John is a corporation sole.—The testator, incumbent of the bishopric, by his will made in his private name declared that "although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of Saint John, for the benefit of religion, education and charity, in trust according to the intention and purposes for which they were acquired and established, yet to meet any want or mistake, I give and devise and bequeath all my estate, real and personal wherever situated, to the Roman Catholic Bishop of Saint John, in trust for the purposes and intentions for which they are used and established."—He then gave coupon bonds to the same devisee in trust for described charitable objects, a sum of money for masses, and a legacy of a sum of money.—The testator held in his own name certain real estate which had been conveyed to him for religious, charitable and educational purposes of the church.—He possessed in his own right real and personal estate, the income from which in common with income from all sources of church revenue he had used for the uses of the church, including its educational and charitable needs, as well as for his private purposes. —*Held*, affirming the judgment of the judge in Equity in a suit by the next of kin for a declaration that the testator had died intestate as to his real and personal estate, less the specific and pecuniary bequests, that the testator's real and personal estate passed by the will. *Travers et al* v. *Casey et al*, 36 N. B. R., p. 229; 34 S. C. R., p. 419.

Trust to grandchildren subject to life interest—Testator by his will conveyed property to trustees upon trust to pay to his daughter an annuity of $1,000 during her life, and on her death to invest the securities set apart to pay said annuity and to divide such investment among his daughter's children on the youngest coming of age.—The will then provided that should the daughter be alive, on her youngest child coming of age, the daughter, if she should see fit, might have and receive from the trustees the fund set apart to yield said annuity, and the same should be absolutely assigned to her free from all control of her husband.—The youngest child came of age in the lifetime of the daughter, who died without making a request to have the fund transferred to her.—*Held*, that there was an absolute trust in favor of the children, which would not have been defeated had the request been made. *In re Fisher Trusts*, 3 Eq., p. 536.

Trustees—Relief from personal liability for loss—A testator, in one part of his will, gave all his real and personal estate to his wife, "to be hers in such a way that she shall, during her life, have the full use, benefit and enjoyment thereof," and then over and in a subsequent clause, after directing his executors to sell his real estate, empowered them to make investments in certain classes of securities, "so that my said wife may have the interest and income therefrom during her life."—The plaintiffs, with testator's widow, were appointed executors of the will.—The estate was comprised in part of real estate, which was sold by the executors, and the proceeds were handed by the plaintiffs to their co-executor to be held by her under the terms of the will, they honestly believing that such was their duty under the will.—On her death an investment made by her representing a part of these proceeds came to the hands of the plaintiffs; the remainder of the proceeds having been either used or lost by her. —*Held*, that the estate was devised in trust to pay the income only therefrom to the widow during her life, and that there was a breach of trust by the plaintiffs; but that they had not acted dishonestly or unreasonably in the view they took of the meaning of the will, and that they should be relieved from personal liability, under Act 61 Vict., c. 26. *Simpson* v. *Johnston*, 2 Eq., p. 333.

Vesting of interests of legatees predeceasing testator—G. P. by his will divided the residue of his real and personal estate into two parts, one of which he gave to the heirs of E. P., his brother, to be subdivided into nine equal shares, and directed that one share be paid to each of five persons named, one of whom was E. B.; a sixth share he gave to the three sons of E. P.'s son John, namely N., W., and J., to be divided by them, and the remaining three shares to be equally divided between the children of W. P., another deceased son of the said E. P.—The other moiety he directed to be equally divided between the children of his brother A. P.—E. B. and N. predeceased the testator without leaving issue.—*Held*, that the shares of E. B. and N. did not lapse, but vested in their next of kin. *In re the goods of Price*, Eq. Cas., p. 429.

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7. Legacies and Devises.

Election by legatee—A testator who died January 14th, 1914, by his last will dated January 17th, 1913, devised to his trustee certain lots of land situate in the cities of Saint John and Halifax in trust to pay one E. R. and H. A. R. or the survivor of them such sums out of the income as might be necessary for the support and maintenance of J. D. W., the testator's son (a person of unsound mind) and provide him with the necessaries and comforts of life so long as he shall live and upon his

death to provide a decent Christian burial, with remainder to the testator's widow absolutely, subject to a life interest in one of the lots to the said E. R.—The will also contained a clause by which the testator devised to the trustees of St. Andrew's Church, St. John, a mortgage for $30,000 which he had held on the property of the said Church but which he had assigned to his said son on March 14th 1904.—By a codicil dated September 8, 1913, the testator ratified and confirmed his said will and bequeathed to his said son absolutely the sum of $12,600 then standing on deposit in the testator's name in the Bank of Nova Scotia.—In an action for a declaration whether the trustees of St. Andrews Church take any and, if any, what interest under the will, *held* (*per* White and McKeown JJ.), affirming the judgment of Grimmer J. in the Chancery Division (McLeod C. J. dissenting), that as there was nothing in the provisions of the will or in the mode by which the testator provided for the maintenance of his son which expressly or by necessary implication showed that he intended that his son should be entitled to the benefits conferred regardless of any question of election, and as the son took a substantial, benefit under the will he was properly required to elect, and as the interest devised by the maintenance clause, while not saleable or assignable, has a definite ascertainable value and is a fund from which compensation can be made to the extent of the son's interest, the committee was properly directed to elect to take under the will, such election being in the best interest of the son and in accordance with the presumed intention of the testator.—*Held* (*per* McLeod C. J.), that the doctrine of election can only be applied where if an election is made contrary to the will the interest that would have passed to the elector can be applied towards compensating the beneficiary disappointed by the election.—That the income devised by the maintenance clause from the property vested in the trustee could not be applied towards compensating the disappointed beneficiary and the only property devised that could be so applied is the $12,600, therefore the committee should have been directed to elect against the will and to pay the $12,600 to the trustees of St. Andrews Church. *Rosborough* v. *Trustees St. Andrews Church*, 44, p. 153. Confirmed S. C. of C.

Insufficiency of specific fund to pay legacies—In cases when the fund created by the will is insufficient, then the specific legatees are entitled to rank for any unpaid balance upon the general estate. *Boyne* v. *Boyne*, 4 Eq., p. 48.

Legacies subject to abatement—Real estate not charged—Where a testator died possessed of both real and personal property and leaving a will, by which he gave several pecuniary legacies to certain relatives, to be abated proportionately in the event of his estate being insufficient to pay them and then gave "all the rest, residue and remainder of my estate" to the children of A.—*Held*, that the pecuniary legacies were not a charge upon the residuary estate in the event of the personalty not being sufficient. *In re Fairley Estate*, 1 Eq., p. 91.

Lien on real estate for maintenance of widow—Where a testator by his will gave his estate, consisting of farm and dwelling and personal property to his son, upon condition that he would maintain testator's widow and daughters, except in the event of their marrying or leaving home, and declared that they should have a home in the dwelling while unmarried, it was held that the estate was charged with their maintenance. *Cool* v. *Cool*, 3 Eq., p. 11.

Money deposited in bank in joint account—The mere fact that money has been deposited in a bank by a testator in the joint names of himself and his daughter with power to either to withdraw raises no presumption that a gift of the fund to the daughter was intended.—Testator bequeathed to his daughter any money which he might die possessed of "to hold and be enjoyed by her while she remains unmarried, and in case of her decease or marriage" then over.—*Held*, that the daughter took only a life interest. *Re Estate Paul Daly*, 37 N. B. R. p. 483; 39 S. C. R. p. 122.

Payment of special trust for maintenance at majority, even though residue still held in trust—B. G. T., the testator, died October 1st, 1895, leaving him surviving a widow and one child, a son, the present plaintiff.—The will contains the following provision: "And I hereby will and bequeath all my estate, real and personal of which I may die possessed, to my said executors and trustees for the following purposes: that they shall in the first place convert all property into cash . . and after . . shall invest the remainder in . . . and out of such investments I direct that the sum of £1,000 or the equivalent thereof be set apart and used by my said executors and trustees for the purpose of educating and giving a profession to my son G. W. T., providing he has not already been educated and received a profession."—The will also provides that the plaintiff is not to receive his share of the residue of the estate until he reaches the age of twenty-five years.—G. W. T. became of age.—*Held*, that as the plaintiff has reached the age of twenty-one years he is now entitled to have paid over to him the £1,000 fund with accumulations and interest, or to have transferred to him the securities in which this fund is invested. *Taylor* v. *McLeod et al Trustees*, 4 Eq., p. 262.

Remainder, Vesting of, by cancellation of life interest—A testator directed a sum of money to be set apart by his trustees and the income paid to A. for life, and that after

A.'s death the capital should be divided among A.'s children in certain shares.—The testator further directed that in the event of A. dying while any of his children should be under the age of twenty-five years, the income of the fund should be paid to their mother while such children respectively should be under that age "for the maintenance and education of such child or children respectively while he or she shall be under that age."—By a codicil the testator revoked the "legacy and annuity" to A.—*Held*, that the gift to the children was not revoked but accelerated and vested on the testator's death, and that the share of each child in the capital was payable on his attaining the age of twenty-five years. *Lewin* v. *Lewin*, 2 Eq., p. 477.

Uncertainty of bequest—A testator by will provided for a bequest of money to the defendants, to be paid yearly or at such times as his executor should think advisable, but omitted to fill in the amount.—In the same paragraph of the will it was then declared that "when Home Missions were considered more needy, an amount might be given to it, or to any such good and benevolent Christian objects as the executor should consider most deserving.—The will then directed the executor to sell a part of the testator's real and personal estate, "and the proceeds to be placed so as to be conveniently drawn to assist in aiding good and worthy objects."—*Held*, that the gift of an unnamed amount of money to the defendants was void, and that the gift in the rest of the will was not a gift to charitable but to benevolent uses, and failed for uncertainty. *Brewster* v. *Foreign Mission Board*, 2 Eq., p. 172.

Bequest of testator's residuary estate to trustees "to be used for benevolent purposes any way they shall see fit" is void for uncertainty and the property comprised in such bequest is the property of such person or persons as would have been entitled had the testator died intestate. *Lawrence* v. *Lawrence*, 42, p. 260, C. D.

Catherine Murdoch died October 26th, 1909, leaving a will dated November 27th, 1905.—The following legacy is found in the will: "I give and bequeath the sum of one thousand dollars to be paid by said executor to the Aged and Infirm Minister's Fund in connection with Saint Stephen's Presbyterian Church in the city of Saint John."—The defendant, The Board of Trustees of the Presbyterian Church in Canada, Eastern Section, is a corporation created for the purpose of taking in trust any property which may be conveyed or bequeathed or intended for the use of the said Church or any scheme or trust, not incorporated, in connection therewith.—The Presbyterian Church in Canada maintains a fund which is not incorporated, known as the Aged and Infirm Minister's Fund, in connection with the Presbyterian Church in Canada, and in this fund the ministers of Saint Stephen's Church are entitled to participate.—There is no separate fund in connection with Saint Stephen's Church.—*Held*, that the bequest does not fail for uncertainty, as the intention of the testator is easily ascertained; and that it should be paid to the defendant, The Board of Trustees of the Presbyterian Church in Canada, Eastern Section, for the Aged and Infirm Ministers' Fund in connection with the Presbyterian Church in Canada. *Jones Exec.* v. *Saint Stephen's Church et al*, 4 Eq., p. 316.

Quaere: Whether a bequest of this nature to a fund conducted on business principles, assessments etc., is a charitable bequest. *Id.*

Uncertainty—Evidence to establish intended beneficiary—A bequest will not fail for uncertainty, if the Court can arrive at a reasonable degree of certainty, as to the person intended to be benefitted.—Following this principle, where money was bequeathed to the "Episcopal Denomination of Queens County . . . to be used by them for Home and Foreign Missions" and it appeared that the Diocesan Synod of Fredericton managed and carried on the home and foreign missionary work of the Church of England in the Province of New Brunswick, it was held that the testator meant the Church of England, and it was ordered that the money be paid to its representative, the Diocesan Synod of Fredericton.—And likewise, where money was bequeathed to the "Methodist Denomination of Queens County . . . to be used by them for Home and Foreign Missions" and it appeared that the various Methodist Churches throughout Canada had been incorporated into one Church called the Methodist Church, which body controlled all missionary funds and made an allotment therefrom for Queens County, it was held that the testator meant the Methodist Church and it was ordered that the money be paid over to the corporate body of that name.—And likewise, where money was bequeathed to the "Deaf and Dumb Society of New Brunswick" and it appeared that there never was a Society of that name, and the only institution in New Brunswick of that nature was the New Brunswick School for the Deaf it was held that the bequest was good and it was ordered that the money to be paid to the New Brunswick School for the Deaf.—Where money was bequeathed to a religious body "to be used by them for Home and Foreign Missions in Queens County as seems best to them," and it was claimed that as there was no foreign missions in Queens County the bequest must fail, it was held that the testator meant the money to be used for home or foreign missions.—Where money was bequeathed to the Free Baptist General Conference of New Brunswick, and it appeared that after the making of the will and before the death of the testator, the Baptist Churches in the Province, forming constituent parts of the Eastern,

Southern and Western Baptist Associations respectively, and the Free Baptist General Conference of New Brunswick were incorporated by 6 Edw. VII, c. 77, under the name of "The United Baptist Churches of New Brunswick," and by section 13 of the said chapter, it was provided "Every donation, legacy or bequest of money or land, or other real or personal property, before or after the passing of this act, made to any Baptist or Free Baptist Church shall vest in such United Baptist Church, as shall include the church to which the said donation, legacy or bequest is made," it was held that the Free Baptist General Conference had not ceased to exist, and it was ordered that the money be paid to The United Baptist Churches of New Brunswick. *VanWart* v. *Diocesan Synod of Fredericton et al*, 42, p. 1, C. D.

Vagueness as to legacy and legatee—Parol instructions—Where a testator directs an executor to pay a sum previously made known to him to a person whose name had been communicated to him, this is a good bequest; and evidence may be given showing the amount of money to be paid and to whom it should be paid.—The plaintiff claimed to be entitled to a sum of money under the following paragraph in a will: "I direct my executor . . to pay a certain person whom I have make known to him, and whose name I otherwise desire to be kept strictly secret, a certain sum of money as soon after my decease as can conveniently be done, the amount of which is to be kept secret, but has been made known to him by me."—She also claimed that the defendant executor was a trustee of the money and entitled to hold the same only for the benefit of the plaintiff.—*Held*, to be a good bequest but not a trust, and that the plaintiff was entitled to show by evidence the amount of money to be paid and to whom it should be paid. *Lemon* v. *Charlton Executor etc.*, 44, p. 476, C. D.

Held also that as executor's wife was residuary legatee, there was sufficient indication of fraud to satisfy the Statute of Frauds, even treating it as a parol trust. *Id.*

11. Proof of Wills.

Onus of proof on appeal—Allegations—Where there was evidence that the contents of a will had been misrepresented to the testatrix by the solicitor who drew the same, and that the executor therein named had procured this solicitor to draw the will, and was present at the giving of instructions and took a benefit thereunder; and evidence on the other hand that the will fully expressed the wishes of the testatrix and that there had been no fraud or misrepresentation. —*Held*, on all the evidence that the decree of the judge of probate upholding the will should not be disturbed.—*Semble*, Allegations are not restricted to the grounds set forth in the *caveat*. *In re Estate of Mary B. Gilbert*, 39, p. 285.

Proof in solemn form—Costs—On proof of the will in solemn form, under C. S. 1903, c. 118, the testator's widow filed allegations alleging incapacity, and fraud and undue influence on the part of the executor and testator's sisters.—The executor gave the instructions to the solicitor for and took a remote interest under the will; one of the testator's two medical attendants pronounced him to be incapable of making a will, the other deemed him capable, and the judge of probate refused to admit the will to probate. —He also ordered that the executor should receive no costs, and should personally pay the costs of the widow, including stamps. —*Held*, reversing the judgment of the judge of probate, that the will should be admitted to probate and the ordinary order made as to costs in the Probate Court.—Costs of the appeal were allowed to the widow out of the estate, to be taxed as between party and party, and to the executor to be taxed as between solicitor and client. *In re Estate of William John Davis, Deceased*, 40, p. 23.

16. Testamentary Capacity and Undue Influence.

See *In re Estate William John Davis*, 40, p. 23, supra.

18. Widow's Election.

Bequest in lieu of dower but subject to divestment in case of remarriage—A testator by his will gave a lot of land with house thereon and personal property to his wife absolutely, to enable her to maintain a home for herself and the testator's sons until they should attain the age of 21 years.—The residue of his estate he gave to trustees in trust for his sons.—The will then provided that the devise and bequest to his wife should be in lieu of dower, and that if she married again the property devised to her should vest in the testator's trustees for the benefit of his sons.—*Held*, that the wife took an absolute interest free from any trust in favor of the sons, but subject to the gift being divested in the event of her marriage, and that such condition was not void as being repugnant to the gift. —A purchase by a husband in the name of his wife is presumed to be an advancement to the wife and creates no resulting trust in favor of the husband, and the presumption will not be rebutted by the fact of the husband devising the property by will. *Leonard* v. *Leonard*, 1 Eq., p. 576.

Life insurance and bequest—B. died in 1907, having made a will in February 1905, by which he left among other legacies

one for $1,100 to his wife, the defendant in this suit.—B. had insured his life some years previous to 1905 for $1,500, the policy being made payable to his wife.—In his will B. created a fund for the payment of the several legacies, and included as part of this fund the policy for $1,500 above mentioned.—*Held*, that this provision in the will did not operate as a reapportionment of the insurance money as regards this policy for $1,500, under the New Brunswick Life Insurance Act, (5 Edw. VII, c. 4), s. 13, passed in April, 1905, and that the proceeds of the same are payable to the defendant as sole beneficiary thereunder.—*Held, also*, that the widow was not bound to make an election, and that she was entitled to be paid the legacy for $1,100. *Boyne* v. *Boyne*, 4 Eq., p. 48.

19. Miscellaneous Cases.

Commission due trustees—Trustees under a will will be allowed five per cent. commission on income, and one per cent. commission on their investments,—No commission will be allowed on investments made by the testator. *In re Aaron Eaton's Estate*, 1 Eq., p. 527.

Election by legatee—A testator who died January 14th, 1914, by his last will dated January 17th, 1913, devised to his trustee certain lots of land situate in the cities of Saint John and Halifax in trust to pay one E. R. and H. A. R. or the survivor of them such sums out of the income as might be necessary for the support and maintenance of J. D. W., the testator's son (a person of unsound mind) and provide him with the necessaries and comforts of life so long as he shall live and upon his death to provide a decent Christian burial, with remainder to the testator's widow absolutely, subject to a life interest in one of the lots to the said E. R.—The will also contained a clause by which the testator devised to the trustees of St. Andrews Church, St. John, a mortgage for $30,000 which he had held on the property of the said Church but which he had assigned to his said son on March 14th, 1904.—By a codicil dated September 8, 1913, the testator ratified and confirmed his said will and bequeathed to his said son absolutely the sum of $12,600 then standing on deposit in the testator's name in the Bank of Nova Scotia. —In an action for a declaration whether the trustees of St. Andrews Church take any, and if any, what interest under the will, *held* (*per* White and McKeown JJ.), affirming the judgment of Grimmer J. in the Chancery Division (McLeod J. dissenting), that as there was nothing in the provisions of the will or in the mode by which the testator provided for the maintenance of his son which expressly or by necessary implication showed that he intended that his son should be entitled to the benefits conferred regardless of any question of election, and as the son took a substantial benefit under the will he was properly required to elect, and as the interest devised by the maintenance clause, while not saleable or assignable, has a definite ascertainable value and is a fund from which compensation can be made to the extent of the son's interest, the committee was properly directed to elect to take under the will, such election being in the best interest of the son, and in accordance with the presumed intention of the testator.—(Confirmed by S. C. of Canada.)—*Held* (*per* McLeod C. J.), that the doctrine of election can only be applied where if an election is made contrary to the will the interest that would have passed to the elector can be applied towards compensating the beneficiary disappointed by the election.—That the income devised by the maintenance clause from the property vested in the trustee could not be applied towards compensating the disappointed beneficiary and the only property devised that could be so applied is the $12,600, therefore the committee should have been directed to elect against the will and to pay the $12,600 to the trustees of St. Andrews Church. *Rosborough* v. *Trustees St. Andrews Church*, 44, p. 153.

Probate Courts, Powers of—Res judicata—Probate of a will devising real estate is not conclusive evidence of the validity of the will in the Courts of Equity. *Turner* v. *Turner*, 2 Eq., p. 535.

See also *Parks* v. *Parks*, Eq. Cas., p. 382, supra (Section 3).

WORDS AND PHRASES.

"Absence"—The word "absence" in section 65 of the City of Moncton Incorporation Act, (53 Vict., c. 60), does not mean absence from the place of trial but inability to attend to the business of the Court.—Here the police magistrate was in the court room during part of the trials but during the trials was obliged to attend before a commissioner appointed by the Provincial Government to inquire into his official conduct. *R.* v. *Steeves, Ex parte Cormier*, 39, p. 435.

"Attached"—Under the provisions of the Canada Shipping Act, R. S. C. 1906 c. 113, and the by-laws of the St. John Pilot Commissioners, a licensed pilot at the port of St. John may speak vessels from a gasoline launch, or from a row boat used in connection with the launch, provided that such launch and row boat are attached to a licensed pilot boat.—Such launch may be "attached" to a licensed pilot boat, although used by pilots to speak vessels, independently of the pilot boat and at a distance of several miles from it. *Spears* v. *St. John Pilot Commissioners*, 39, p. 495.

"Bread"—What is "bread" is a question of fact to be decided as other questions of

fact. *R.* v. *Kay. Ex parte LeBlanc*, 39, p. 278.

"Building"—An agreement to sell a building which covers practically all the lot on which it stands is an agreement for the sale of the land and building, and not of the building alone. *Hunter* v. *Farrell* 42, p. 323, C. D.

"Buildings and erections"—Where the city of Saint John expropriated land under lease from it, consisting mostly of mud flats, to be used for manufacturing purposes only, and the lease contained a covenant to pay at the end of the term for "the buildings and erections that shall or may then be on the demised premises" piling fastened with stringers necessary to make it available for buildings may be a subject of damages for which the city would be bound to pay on expropriation under 63 Vict., c. 59, and should not be excluded from consideration on an assessment of damages.—(*Per* Barker C. J., Hanington and Landry JJ., McLeod J. dissenting.) *Sleeth et al* v. *The City of Saint John*; *Gordon* v. *The City of Saint John*, 38, p. 542.

"By reason of the construction of the railway"—Defendants were contractors engaged in building a portion of the National Transcontinental Railway in New Brunswick. —In the course of their work a locomotive was used and sparks escaping from it set fire to the plaintiff's timber lands.—*Held*, this damage was caused by reason of the construction of a railway and s. 306 of the Railway Act providing "that all actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year" applies. *West* v. *Corbett et al*, 41, p. 420.

"Cause of action"—"Cause of action" means the whole cause of action, contract and all that causes the breach and liability. *Jack* v. *Bonnell*, 35, p. 323.

"Children"—The word "children" in the clause beginning "and if there be no widow" in s. 2 of the Intestates' Estate Act, (C. S. 1903, c. 161), includes grand-children, and a grand-daughter is entitled to the share of the personal estate which her mother would have received if living. *In re Estate David Kennedy*, 40, p. 437.

"Collusion"—"Collusion" means agreement or acting in concert. *Amherst Boot and Shoe Manufacturing Co. Ltd.* v. *Sheyn*, 2 Eq., p. 236.

"Erections" — On expropriation under 63 Vict., c. 59, of lands under a lease containing a covenant to pay at the end of the term for "any buildings or erections for manufacturing purposes" which should or might then be on the demised premises,—*Held* that damages should be assessed for the value at the time of expropriation of all piling and filling in intended for and forming a necessary part of the foundation of such buildings.—(*Per* Barker C. J., Hanington, Landry, Gregory and White JJ., McLeod J. dissenting). *Sleeth et al* v. *The City of Saint John*, 39, p. 56.

"Expiration of tenancy"—"Expiration of tenancy" means termination of the time limited by the agreement for the occupancy of the land and would not apply to a forfeiture. *Salesses* v. *Harrison*, 41, p. 103.

"Forthwith"—Publication of an election petition by posting made by the sheriff thirty-five days after receipt of the copy of the petition from the clerk of the pleas is bad under s. 6 of The New Brunswick Controverted Elections Act (C. S. 1903, c. 4) requiring the petition to be published "forthwith", the delay being due to error on the part of the sheriff. *Owens* v. *Upham*, 39, p. 344.

"Heirs"—R. died in 1876 leaving a will by which he devised practically all his property to trustees, upon trust for the benefit of his children and their heirs.—*Held*, that the word "heirs" in the will should be construed in its strict legal and technical sense, and was intended to mean the heirs at law and not the statutory next of kin; and that the widow of the deceased son was not entitled to any part of the testator's property, under his will. *Smith et al, Trustees etc. of Robertson* v. *Robertson et al*, 4 Eq., p. 252.

"In the registry office"—Posting a copy of an election petition in the vestibule of a building owned by the county, part of which is occupied as the county registry office and part as chambers of the County Court judge and part for other county purposes is not "posting in the registry office," although such vestibule is within the main walls of the building and was designated by the registrar of deeds as the place for posting notices to be posted in his offices. *Owens* v. *Upham*, 39, p. 344.

"Intoxicating liquors"—Beer manufactured from malt although not in fact intoxicating is a "malt liquor" and therefore an "intoxicating liquor" within the meaning of the Canada Temperance Act (R. S. C., 1906, c. 152) s. 2 (A). *R.* v. *Marsh, Ex parte Lindsay et al*, 39, p. 119.

"Knowingly"—A member of a board of license commissioners who, with a knowledge of all the facts, issues a license contrary to the provisions of the Liquor License Act (C. S. 1903, c. 22) is guilty under section 59 of "knowingly" issuing a license contrary to law, though there is no evidence of a corrupt motive or criminal intent. *R.* v. *Ritchie, Ex parte Blaine*, 37, p. 213.

Logs and Timber—The words "logs

and timber" as employed in sub-section 1 of section 2 of The Woodmen's Lien Act, 1894, were not intended to include deals or other manufactured lumber.—(*Per* Hanington and Landry JJ., Tuck C. J. dissenting). *Baxter* v. *Kennedy*, 35, p. 179.

"Malt liquor"—Beer manufactured from malt, although not in fact intoxicating, is a "malt liquor" and therefore an "intoxicating liquor" within the meaning of the Canada Temperance Act (R. S. C. 1903, c. 152) s. 2 (A). *R.* v. *Marsh, Ex parte Lindsay et al*, 39, p. 119.

"Most contiguous"—A policy of insurance contained a condition requiring the assured, in case of loss, to procure a certificate as to the matters contained in the statement of loss under the hands of two magistrates "most contiguous to the place of the fire."—*Held* (*per* Tuck C. J. Hanington, Barker and Gregory JJ.), that the production of the certificate of the magistrates most contiguous to the place of fire was a condition precedent to the assured's right to recover.—*Held* (*per* Landry and McLeod JJ.), that the magistrate most contiguous qualified to act is the most contiguous within the meaning of the condition, though not the nearest in point of distance to the place of the fire. *LeBlanc* v. *The Commercial Union Insurance Co.*, 35, p. 665.

"Next of kin"—That a widow is not "next of kin" of her husband (*per* Barker C.J.) *Smith et al, Trustees* v. *Robertson et al*, No. 2, 4 Eq., p. 252.

"Not less than"—An offer to sell for "not less than $10,000" is an offer to sell for that sum. *Hunter* v. *Farrell*, 42, p. 323, C. D.

"Office"—See *Carter* v. *The Standard Ltd.*, 44, p. 1; also *Nevers* v. *Lilley*, 4 Eq., p. 106.

"Otherwise"—Sub-section 4 of section 237 of the Railway Act, 1903, provides that when any cattle or other animals at large upon the highway or "otherwise" get upon the property of the company and are killed or injured by a train the owner shall be entitled to recover for the loss or injury from the company, unless it show the negligence or wilful act or omission of the owner.—*Held* that the word "otherwise" means "otherwise at large," and not otherwise at large in a place *ejusdem generis* with a highway. *Daigle* v. *Temiscouata Rwy. Co.*, 37, p. 219.

"Person"—The word "person" in the Dominion Summary Convictions Act cannot be held to include a corporation or body corporate, notwithstanding the Interpretation Act, c. 1, s. 7, sub-s. 22. *Ex parte Woodstock Electric Light Co.*, 34, p. 460.

The word "person" in C. S. 1903, c. 68, s. 13, does not include females. *In re Mabel P. French*, 37, p. 359.

"Place"—A livery stable is a place within the meaning of section 99 of the Liquor License Act (C. S. 1903, c. 22), in which proof of a sale by a person employed by the occupant may make the occupant liable to a penalty under the act, though there be no proof that the offence was committed with his authority or by his direction. *R.* v. *McQuarrie, Ex parte Rogers*, 37, p. 374.

"Plant"—The word "plant" in a mortgage of a mill, held not to include office furniture, or a horse and carriage used for occasional errand purposes in connection with the mill, or material kept on hand for repairs to machinery; but held to include scows used for lightering the output of the mill from its wharf to steamers, and in lightering coal for the use of the mill, and also to include such stores as axes, shovels and files and other articles complete in themselves, used in carrying on the mill business, but such stores only. *Eastern Trust Co.* v. *The Cushing Sulphite Fibre Co. Ltd.*, 3 Eq., p. 378.

"Proceeds"—A bequest of annuities out of "the net income or proceeds" of property directed to be converted into money, renders the corpus subject to the payment of the annuities, if the income therefrom is insufficient to pay them, since the word "proceeds" includes corpus, unless it is clear that a more restricted meaning is intended. *Beal* v. *The Eastern Trust Co.*, 43, p. 23, C. D.

"Quarrying"—Making a rock cutting in the construction of a railway road bed is not "quarrying" within the meaning of the Workmen's Compensation for Injuries Act (C. S. 1903, c. 146) even though the rock removed is used to build the road bed. *Henry* v. *Malcolm*, 39, p. 74.

"Railway"—The word "railway" includes a railway in course of construction upon which construction trains are running, though not opened for general public traffic. *Guimond* v. *Fidelity Phenix Fire Ins. Co.*, 41, p. 145.

"Residence"—See *Ex parte Miller*, 34, p. 318; *R.* v. *Assessors Fredericton*, 41, p. 564.

"Right of way clearing"—Amongst railway contractors and on railway construction work the words "right of way clearing" has acquired a special and technical meaning, and applies only to land requiring to be cleared and not to the full area of the right of way. *Laine et al* v. *Kennedy et al*, 43, p. 173.

"Sole and unconditional owner"—A mortgagor is the "sole and unconditional owner" of property within the meaning of a condition in a policy of insurance against fire stipulating that the policy shall become void if the assured is not the sole unconditional owner of the property insured. *Temple* v. *The Western Assurance Co.*, 35, p. 171.

"Stale"—See *Dunlop* v. *Dunlop*, 1 Eq., p. 72.

"Wages"—The salary for services for deputy sheriff and gaoler cannot be termed "wages" so as to entitle to exemption of twenty dollars under 45 Vict., c. 17 (Respecting Garnishee or Trustee Process), s. 33. *Ex parte Bowes*, 34, p. 76.

WORKMENS COMPENSATION ACTS.

Amount recoverable under sec. 6 (C. S. 1903, c. 146)—Under section 6 of the Act damages may be assessed to an amount equal to the estimated earnings of the workman for three years preceding the injury, although that amount should exceed $1,500. —This section fixes a limit, but not a measure of damages.—The amount, as in all other cases, must be computed. *Henry* v. *Malcolm*, 39, p. 74.

"Course of employment"—The plaintiff employed in the plumbing branch of the business carried on by the defendants' firm, being in need of oakum for work in which he was engaged for the defendants, went to defendants' shop to get the same.—The clerk in charge pointed to a shelf on which the oakum was kept.—Plaintiff taking this as a request to help himself ascended a ladder leading to the shelf on which it was stored.—He got the oakum and, when about to descend, the ladder slipped and he fell and sustained the injury complained of.—The orders in defendants' store were that no plumber was to help himself to material, but was to apply to the clerk in charge for any material that he might require in connection with his work.—Plaintiff proved that he had frequently got material for himself from the store when the clerks were busy and that he had never received from the foreman of the plumbing department, or any one else, orders to the contrary.—*Held*, in an application under the Workmen's Compensation for Injuries Act, 4 Geo. V., c. 34 (1914) as amended by 6 Geo. V., c. 36 (1916) that the accident did not arise out of, or in the course of, the plaintiff's employment and therefore he was not entitled to compensation. *McMannamin* v. *R. Chestnut & Sons Ltd.*, 44, p. 571.(Chambers)

Death of employee—Action by administrator of deceased—A plaintiff is not bound to elect at the trial whether he will proceed under the Workmen's Compensation Act or under the Act respecting Compensation to Relatives of Persons Killed by Wrongful Act, Neglect or Default, C. S. 1903, c. 79, but the action can be brought and proceeded with under both acts and the damages assessed under either act as the evidence may warrant. *Wentzell* v. *N. B. & P. E. I. Rwy. Co.*, 43, p. 475.

Loss of Fingers—Amount allowed—In an action under "The Workmen's Compensation for Injuries Act," 4 Geo. V, c. 34 (1914), the trial judge found that the plaintiff, while working at a circular saw edger in the defendant's mills, lost all the fingers of his left hand by reason of the saw not being guarded as by law required, and assessed the full compensation allowed by clause (b) of sub-s. 2 of s. 6, of the Act, for the loss of a hand.

Held, on appeal, that the fair intendment to be made in favor of the judgment is that the trial judge found that the plaintiff lost his hand and that the compensation allowed was not greater than the amount provided for by the Act, and the appeal was dismissed with costs.

Pankhurst v. *Smith*, 44, p. 279.

Practice—No motion by way of appeal or application to the equitable jurisdiction of the Court to correct an error in a matter before a judge acting within his jurisdiction under the Workmen's Compensation for Injuries Act will be entertained, except where the amount allowed the claimant is greater than is provided by the Act.—On the hearing of a petition under the Act the judge may, in the exercise of his discretion, apply any of the rules of the Supreme Court, 1909, which he may consider applicable to the circumstances of the case, and is not confined to rules *ejusdem generis* with the subjects dealt with by the rules specially referred to in the Act. *In re Merritt* v. *The Saint John Street Railway*, 42, p. 667.

Quarrying—Making a rock cutting in the construction of a railway road bed is not quarrying within the meaning of the Workmen's Compensation for Injuries Act, (C. S. 1903, c. 146) even though the rock removed is used to build the road bed. *Henry* v. *Malcolm*, 39, p. 74.

See also NEGLIGENCE.

ADDENDA.

APPEAL.

Discretion of Judge extending time to file—The discretion of a judge refusing to set aside an arrest upon a writ of capias and extending the time in which to file the affidavit to hold to bail upheld. *Gunns Limited* v. *Dugay*, 41, p. 401.

COSTS.

1. Right to Costs, etc.

Infant's Next Friend—Where an infant sued by his next friend, and judgment went against him, the next friend refusing to pay the taxed costs, a rule for attachment was granted. *McGaw, by next friend* v. *Fisk*, 39, p. 1.

2. Scale of Costs.

Joint defendants—A single bill of costs only was allowed to the defendants although they appeared by different solicitors in *Cheesman* v. *Corey et al.*, 42, p. 409.

EVIDENCE.

8. Corroborations.

Recalling witness after counsel has commenced to sum up—Where the evidence in a suit taken before a referee had been closed and counsel were engaged in summing it up before the Court, an application by the defendant to recall a witness for the purpose of giving evidence of a corroborative nature that had always been available and of such materiality that it could not have been previously overlooked, was refused. *Duncan* v. *The Bank of Nova Scotia*, Eq. Cas., p. 513.

INFANT.

Costs, liability of next friend—Where an infant sued by his next friend, and judgment went against him, the next friend refusing to pay the taxed costs, a rule for attachment was granted. *McGaw, by next friend* v. *Fisk*, 39 p. 1.

INTOXICATING LIQUORS.

1. Canadian Temperance Act.

Conviction—Variance between information and summons explained—An apparent variance between the information, summons and adjudication, satisfactorily explained, will not authorize setting aside conviction. While the information attached to the magistrate's return has a date different from the date of sale, where it is manifestly a clerical or other error, the Court wil not interfere. *R.* v. *Dibblee: Ex Parte Kavanagh*, 34, p. 1.

Search warrant—No information—An order for the destruction of liquor, without an information upon which to base a search warrant, is bad. *R.* v. *Dibblee: Ex Parte Kavanagh*, 34, p. 1.

Landlord and Tenant.

Lease, renewable, failure to renew, Position and Rights of Lessee. See *Sears* v. *Mayor etc., St. John*, Eq. Cas., p. 555.

PARTIES.

6. Miscellaneous.

Joint defendants—Costs—A single bill of costs only was allowed to the defendants although they appeared by different solicitors in *Cheesman* v. *Corey, et al.*, 42, p. 409.