THE

Canadian Annual Digest

(1897)

COMPRISING

THE CASES REPORTED IN

SUPREME COURT OF CANADA REPORTS, VOL. 27.
EXCHEQUER COURT OF CANADA REPORTS, VOL. 5, NO. 4.
ONTARIO APPEAL REPORTS, VOL. 23, NOS. 5, 6; VOL. 24, NOS. 1-4.
ONTARIO REPORTS, VOL. 28.
ONTARIO PRACTICE REPORTS, VOL. 17, NOS. 6-12.
QUEBEC QUEEN'S BENCH REPORTS, VOL. 6, NOS. 1-5.
QUEBEC SUPERIOR COURT REPORTS, VOLS. 10, 11.
NOVA SCOTIA REPORTS, VOL. 28, NOS. 3-5; VOL. 29, NOS. 1-3.
NEW BRUNSWICK REPORTS, VOL. 33, NO. 5.
NEW BRUNSWICK EQUITY REPORTS, VOL. 1, NO. 4.
MANITOBA REPORTS, VOL. 11, NOS. 5-9.
BRITISH COLUMBIA REPORTS, VOL. 5, NOS. 1-2.

A SELECTION OF CASES FROM 33 CANADA LAW JOURNAL, 17 CANADIAN LAW TIMES AND 3 LA REVUE DE JURISPRUDENCE.

AND THE CANADIAN CASES DECIDED BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DURING THE YEAR.

WITH

TABLES OF THE CASES DIGESTED AND CASES AFFIRMED, REVERSED OR SPECIALLY CONSIDERED.

BY

CHARLES H. MASTERS,
BARRISTER-AT-LAW
REPORTER OF THE SUPREME COURT OF CANADA,

AND

CHARLES MORSE, LL.B.
BARRISTER-AT-LAW.
REPORTER OF THE EXCHEQUER COURT OF CANADA.

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1898.

PREFACE.

The editors of the Canadian Annual Digest desire to record their appreciation of the generous patronage their work has met with at the hands of the profession throughout the Dominion.

In the present issue the scope of the Digest is extended by the inclusion of a selection of cases from the *Canada Law Journal*, the *Canadian Law Times* and *La Revue de Jurisprudence* which did not appear in the official reports. This has considerably increased the labour of compilation, but the editors were impelled to undertake it by the consideration that it would enhance the usefulness of their work as a whole. On the other hand, a list of the statutes cited in the cases dealt with has been omitted from this volume, the editors believing that the utility of such a feature in an annual publication is quite incommensurate with the labour and cost involved in its production.

The fact that the year 1897 was well advanced before the enterprise of publishing the Digest was settled upon, and it therefore became necessary to prepare and publish the first two volumes within a twelvemonth, accounts for the somewhat tardy appearance of the present issue. In future the editors will confine their labours to such cases as have been reported before the middle of December in each year, and they will thus be in a position to go to press at a seasonable and convenient date.

OTTAWA, 1898.

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British C
Toronto

CHIEF JUSTICES AND JUDGES

OF THE

Supreme and Exchequer Courts of Canada

AND OF THE

Superior Courts of the Several Provinces

During the Period of this Digest

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" Robert Sedgewick.
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" Désiré Girouard.

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JUDGE.

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New Brunswick District	" Ezekiel McLeod, J.
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Key to Abbreviations.

[1897] A. C.	English Appeal Cases.
B. & Ad.	Barnewall & Adolphus's Reports.
B. C.	British Columbia.
B.C.R.	British Columbia Reports.
Beav.	Beaven's Reports.
C.C.	Civil Code (Quebec).
C. C. P.	Code Civil Procedure (Quebec).
Ch. App.	Law Reports Chancery Appeals.
Ch. D.	Law Reports Chancery Division.
C.L.J.	Canada Law Journal.
C.L.T. (Occ. N.)	Canadian Law Times (Occasional Notes).
C. S. C.	Consolidated Statutes of Canada.
C. S. B. C.	Consolidated Statutes British Columbia.
Co.	Sir Edward Coke's Reports.
Col.	Column of Digest.
D.	Dominion of Canada.
E. & A.	Upper Canada Error and Appeal Reports.
E. & B.	Ellis & Blackburn's Reports.
El. & El.	Ellis & Ellis Reports.
Ex. C. R.	Exchequer Court of Canada Reports.
F. & F.	Foster and Finlason's Reports.
Gr.	Grant's Chancery Reports, Ontario.
Imp.	Imperial (Statute).
L. C. J.	Lower Canada Jurist.
L.J. (P.C.)	Law Journal, Privy Council Reports.
L. J. Q. B.	Law Journal Queen's Bench Reports.
L.R. Ch.	Law Reports, Chancery Appeals.
L.R. P. & D.	Law Reports, Probate and Divorce.
M.C.	Municipal Code, Quebec.
Man. R.	Manitoba Reports.
M. & W.	Meeson & Welsby's Reports.
N. B. R.	New Brunswick Reports.
N.B. Eq.	New Brunswick Reports.
N.S.R.	Nova Scotia Reports.
O. Ont.	Province of Ontario.
Ont. A. R.	Ontario Appeal Reports.
Ont. Ch. Ch.	Ontario Chancery Chambers Reports.
Ont. P. R.	Ontario Practice Reports.
Ont. R.	Ontario Reports.
Q.R., Q.B.	Quebec Reports, Queen's Bench.
Q.R., S.C.	Quebec Reports, Superior Court.
R.S.C.	Revised Statutes Canada.
R. S. Man.	Revised Statutes Manitoba.
R. S. N. S.	Revised Statutes Nova Scotia.
R.S.O.	Revised Statutes Ontario.
R. S. Q.	Revised Statutes Quebec.
Rev. de Jur.	Revue de Jurisprudence.
S. C. R.	Supreme Court Canada Reports.
U.C.C.P.	Upper Canada Common Pleas Reports.
U.C.L.J.	Upper Canada Law Journal.
U.C.Q.B.	Upper Canada Queen's Bench Reports.

A DIGEST

—OF—

ALL REPORTED CASES DECIDED BY THE FEDERAL AND PROVINCIAL COURTS IN THE DOMINION OF CANADA, AND BY THE PRIVY COUNCIL ON APPEAL THEREFROM, DURING THE YEAR 1897.

ABSENT OR ABSCONDING DEBTOR.

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ACCORD AND SATISFACTION.

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ACTION.

I. BAR TO ACTION.

Qui tam Action—Registration.]—In a *qui tam* action registration before the action was brought may be pleaded as a bar to the recovery of the penalty. *Chambers* v. *Connor*, 3 Rev. de Jur. 362. White, J.

II. BY AND AGAINST WHOM MAINTAINABLE.

—Partnership—Individual Debt of Partner—Payment Out of Partnership Funds—Authority—Action—Rule 317.]—The defendants were indebted to the plaintiffs' firm, consisting of two partners, and one partner was individually indebted to the defendants. This partner wrote two letters to the defendants, one over his own signature and the other over the firm name, stating that he had paid certain sums due by him to the defendants by giving the defendants credit in the books of his firm. This was done without the authority of the other partner, but the entries were actually made in the books of the firm, to which the other partner had access, though he did not in fact know of the entries until after the firm had been dissolved. Accounts were afterwards rendered to the defendants without any claim being made in respect of the sums credited. This action was brought after the dissolution, in the name of the firm, for the price of goods sold:—Held, that the defendants were not entitled to credit for the sums referred to: *Leverson* v. *Lane*, 13 C. B., N.S., at p. 285; *In re Riches*, 4 DeG. J. & S., at p. 585, and *Kendal* v. *Wood*, L. R. 6 Ex. 243, applied and followed:—Held, also, that Rule 317 authorized the bringing and sustaining of the action in the name of the partnership existing at the time the goods were furnished to the defendants. *Fisher & Co.* v. *Robert Linton & Co.*, 28 Ont. R. 322.

—Indian Lands—Control and Administration—Action for Rent.]—Where land has been granted for the use and habitation of Indians and the soil is vested in the Crown, but subject to the usufruct of the Indians:—Held, that the naked ownership in the lands is in the province within which they are situated, but the control and administration of the Indians' usufruct appertains to the Government of the Dominion, and an action to recover arrears of rent should be brought by the Attorney-General of Canada. *Mowat, Attorney-General of Canada*, v. *Casgrain, Attorney-General of Quebec*, Q.R. 6 Q. B. 12.

—Insolvent Company—Action to Annul Payment by—Liquidation—R.S.C. c. 129.]—An action to annul payment of a debt by an insolvent company within thirty days before the issue of the winding-up order should be brought in the name of the liquidator and not in that of the company. *Blandy* v. *Kent*, Q.R. 6 Q.B. 196, affirming 10 S.C. 255.

—Action against Curator—Judgment for Account—Death of Defendant—Appeal.]—C., sued by F. in his capacity of curator to a person interdicted for insanity, was condemned to render an account to F. After the judgment C. died and the person named curator in his place inscribed in review the judgment rendered against C.:—Held, that notwithstanding C. was sued as curator, the judgment was against him personally; and his heirs alone, and not the curator who had succeeded to the charge, could appeal from such judgment. *Francis* v. *Clément*, Q.R 10 S.C. 327.

—Administration of Estate in Ontario—Foreign Corporations—Art. 14 C.C.P — Art. 365 C.C.] Held, a corporation empowered under the law of Ontario to administer the estate of a person whose succession opened in that Province, may appear in a judicial proceeding in the Province of Quebec in that capacity, and continue the proceedings in the place of the deceased. *Greenshields* v. *Aitken*, Q.R. 11 S.C. 137.

—By Attorney-General in Interest of Public—Relator.] – Actions in the public interest instituted by the Attorney-General on information, may be proceeded with independently of the person named as relator.—Absence of interest in the relator is no answer to a proceeding by the Attorney-General, *Attorney-General* v. *Bergen*, 29 N.S.R. 135.

—Directors of Company—Proceedings to Remove — Right to Maintain.]—Proceedings to remove directors must be brought by the company, and an action for purpose by one shareholder does not lie; the fact that he frames his action as on behalf of himself and all shareholders of the company. other than those attacked, is immaterial *Fraser River Mining Co.* v. *Gallagher*, 5 B.C.R. 82.

III. For What Maintainable.

—Suretyship — Promissory Note—Qualified Indorsement.]—D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guidebooks, which were to be left in the hands of the firm as furthur security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment. and, A, having died, R., as surviving partner of the firm, and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action some of the books were still in the possession of R. and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm:—Held, that the action was not based upon the real contract between the parties, and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes:—Held further, per Sedgewick, J., that neither the payee of the promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself. *Robertson* v. *Davis*, 27 S.C.R. 571.

—Testamentary Executors—Failure to Account—Action for Residue of Succession—Reddition de Compte.]—On default of an account rendered by testamentary executors, the heirs have no recourse for recovery of monies professed to be the residue of the succession in their hands. It is by an action *en reddition de compte* that they should proceed, and this demand should cover the whole administration of the executors over the succession, and not be restricted to special or isolated acts. *Davidson* v. *Cream*, Q.R. 6 Q.B. 34, affirmed on appeal, 27 S.C.R. 362.

And see Parties I.

—Transfer of Revenues of Land—Administration—Landlord and Tenant—Art. 1608 C.C.]—D. having obtained a loan from L., transferred to him all the rents and revenues of certain real estate until the loan should be fully paid. L. then appointed D. his attorney for the administration of the property. D. having occupied part of the premises himself, L. instituted an action of *saisie gagerie* and in ejectment, on the ground that D. was a tenant by sufferance:—Held, that the relation of landlord and tenant did not exist between the parties, and the action of *saisie gagerie* and in ejectment was unfounded. *Létang* v. *Donohue*, Q.R. 6 Q.B. 160, affirming decision of Court of Review, which reversed Q.R. 8 S.C. 496.

—Action for Obstruction of Private Way—Form of Claim.]—See Pleading, IX.

—Principal and Agent—Gaming Transaction—Money Paid to Agent—Termination of Mandate—Recourse against Principal — Art. 1927 C.C.

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IV. Form of Action.

—Assignment of Dower—Recovery of Land.]—An action for assignment of dower, is an action for the recovery of land: *McCulloch* v. *McCulloch*, 4 C. L. T. (Occ. N.) 252 followed. *McLean* v. *McLean*, 17 Ont. P.R. 440.

—Principal and Agent—Specific Act of Agency—Action Against Agent—Accounts.]—Where one person authorizes another to do a specific act, *e.g.*, to withdraw from the Post Office Savings Bank a sum of money belonging to the principal, the latter may sue the agent for an amount alleged to have been retained by the latter, without bringing an action to account. *O'Brien* v. *Brodeur*, Q.R. 10 S.C. 155.

—Community—Action by Heirs—Account—Partition.]—Where the succession, after the death of the husband, who had been in community with his wife, remains in possession of the latter without partition, the heirs-at-law are not entitled to bring an action to account,—the proper proceeding being an action in partition, in which all interested persons would be parties. *McClanaghan* v. *Mitchell*, Q.R. 10 S.C. 203.

—**Work and Labor—Conversion of Materials into Chattel—Delivery—Action for Price.**]—Where goods are ordered from a workman who constructs them from his own materials and delivers them when completed, his action to recover the price must be for goods sold and delivered and not for work and labor. *Ferguson* v. *Reed*, 33 N.B.R. 580.

V. Hypothecary Action.

—**Promise of Sale—Possession—Art. 2058 C.C.**]—An hypothecary action can be taken against a third party (*tiers*) who is in possession, with title of proprietor; of an immovable under an agreement for sale stipulating that the title of sale of the immovable will only pass to him upon payment of the whole purchase money; but such action will not lie against one who has acquiesced in an agreement for sale but is not in possession of the immovable. *Hickson* v. *Ritchie*, Q.R. 11 S. C. 134.

VI. Jurisdiction to Entertain.

—**Patent Infringement—Actions taken in different courts—Interim injunction—Nemo bis vexari debet pro unâ et eâdem causâ.**]—Where the Judge of the Exchequer Court was asked to grant an interim injunction to restrain an infringement of a patent of invention, and it appeared that similar proceedings had been previously taken in a provincial court of concurrent jurisdiction, which had not been discontinued at the time of such application being made, this court refused the application upon the principle that a defendant ought not to be doubly vexed for one and the same cause of action. *The Auer Incandescent Light Manufacturing Company (Limited.)* v. *Dreschel*, 5 Ex. C.R. 384.

—**Action for school fees—Hypothecary Action—Forum.**]—Article 1053 of the Code of Procedure, which says that the Circuit Court has ultimate jurisdiction to the exclusion of the Superior Court in all suits for school taxes or school fees, does not apply where the action is a hypothecary one. In such case, under Articles 1142 and 1054 of the Code of Procedure, the Superior Court has jurisdiction. *School Trustees of St. Henri* v. *Salamon*, Q.R. 11 S C. 329

—**County Courts Act—Equitable Jurisdiction—Chattel Mortgage.**]—County Courts have no equitable jurisdiction other than that conferred by the County Courts' Act, C.S.B.C. 1888, c. 25, s. 44, and cannot entertain an action to set aside a chattel mortgage as being a fraudulent preference. *Parsons Produce Co.* v. *Given*, 5 B.C.R. 58.

—**Civil Action—Wrongful Arrest—Habeas Corpus—C. S. N. B., c. 41, s. 4.**]—Proceedings for the discharge of a prisoner arrested on civil process out of the Parish Civil Court of Lancaster may be taken under section 4, c. 41, C. S. N.B., and the section is not confined to criminal or quasi-criminal cases. (Per Forbes, Co. J.) *Kelly* v. *Burgess*, 33 C.L.J. 740.

VII.—Revendication.

—**Insolvency—Powers of Curator—Possession of Goods—Revendication—Authorization by Creditors—Art. 772, C.C.P.**]—See Bankruptcy and Insolvency, IV.

VIII. Right of Action.

—**Action on Disturbance—Possessory Action—"Possession annale"—Arts. 946 and 948 C.C.P.—Nature of Possession of Unenclosed Vacant Lands—Boundary marks—Delivery of possession.**]—In 1890, G. purchased a lot of land 25 feet wide, and the vendor pointed it out to him, on the ground, and showed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and unenclosed, was sold to another person who commenced laying foundations for a building, and, in doing so, encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance:—Held, that the *possession annale*, required by article 946 of the Code of Civil Procedure, was sufficiently established to entitle the plaintiff to maintain his action. *Gauthier* v. *Masson*, 27 S.C.R. 575.

—**Purchase of Goods on Credit—Statutory Inability to Buy on Credit—Acceptance of Draft in Name of Company—Implied Representation of Authority at Law—R. S. O., c. 166, s. 13.**]—The plaintiff sued the officers and directors of a co-operative association, incorporated under R.S.O., c. 166, for the price of goods sold to it on credit, which, by the statute incorporating it, the association was forbidden to buy in that way:—Held, that he could not recover, as no action could be maintained upon an implied representation or warranty of authority in law to do an act; and, moreover, the plaintiff must be taken to have known of the statutory inability. *Struthers* v. *MacKenzie*, 28 Ont. R. 381.

—**Railway Expropriation—Arbitration—Appeal from Award—Right to Subsequent Action to Annul.**]—Where an arbitration has been had to determine the value of land expropriated under the Dominion Railway Act, an appeal from the award to the Superior Court under the provisions of the Act, does not deprive the party appealing of his right to bring an action to set aside the award for irregularity. *Bennet* v. *The St. Laurent and Adirondack Railway Co.*, Q.R. 6 Q.B. 116.

—**Gaming Contract—Bet—Action against Stakeholder—Art. 1927 C.C.**]—The deposit of the amount of a bet in the hands of a stakeholder is not equivalent to a conditional payment, and, when the bet is decided in favor of one of the parties, the money does not become his property, and an action brought by him against the stakeholder, claiming the amount of the bet, will not be maintained. In the present case, the stakeholder, defendant, having brought the money into court, and the other party to

the wager having intervened and also claimed the amount of the bet, with further conclusions, in any case, for the amount of his deposit, it was ordered that the plaintiff and the intervening party should severally be paid the amount of their deposits. *Marcotte* v. *Perras*, Q.R. 6 Q.B. 400.

— **Railway — Expropriation — Right of Way — R.S.Q., Art. 5164—Indemnity—Petitory Action by Unpaid Proprietor.**]—Where a railway company has taken possession of land for its right of way, under R.S.Q., Art. 5164, and the proprietor has not been indemnified therefor, by reason of the annulling of a first award, and the failure of the company to proceed with a new arbitration, he may bring a petitory action to recover possession of his land.—Per Andrews, J.: If a railway company takes possession, *proprio motu*, without any formality, of a piece of land for its track, the owner is not bound to resort to arbitration proceedings, but may bring a possessory, or petitory action to be reinstated; but where the defendants are in lawful possession under a judge's order, and have built their railway under the protection of that order, they can only be expelled if they have been placed *en demeure* to pay the indemnity; and, in the present case, the only mode in which the plaintiff could have put the defendants *in mora* to pay, was to take up the arbitration proceedings himself, and push them to an award.—Special damage, *e.g.*, the destruction of underground drains laid by plaintiff on his farm in the neighborhood of the line of railway, if not mentioned in the declaration, cannot, though established in evidence, be taken into consideration in a judgment assessing the amount of the indemnity. *Huot* v. *Quebec, Montmorency & Charlevoix Railway Co.*, Q R. 10 S.C. 373.

—**Action for Account — Interdict — Curator ad hoc.**]—A curator ad hoc, appointed to an interdict, is not competent to bring an action for an account of administration against the heirs and legal representatives of the deceased curator. The curator appointed to succeed the deceased curator is alone competent to maintain such action. *Wilson* v. *Blanchard*, Q R. 10 S.C. 474.

—**Insolvent Estate—Action by Insolvent—Retrocession.**]—Semble, an insolvent who alleges that his estate has been retroceded to him, may sue for and obtain judgment by the prothonotary upon an account due the estate, even though he fail to prove such retrocession. (See *Lemay* v. *Martell*, Q.R. 1 Q.B. 160). If plaintiff has not in fact obtained a retrocession, defendant should seek relief from the judgment by opposition under C.C.P. Art. 483, and not by a resort to review, which latter recourse, when based upon a technicality, the Court will not encourage. *Chouinard* v. *Bernier*, Q.R. 11 S.C. 121.

—**Accident on Board Ship—Claim by Heirs of Victim—Damages—Responsibility of Owners—Common Employment—British Ship—International Law—Jurisdiction.**]—Action by the widow and children of one D., an employee of defendants, claiming $30,000 damages for his death caused by the fall of a derrick on board the steamer "Muriel," a British ship, registered in England, belonging to and being navigated by defendants, while being loaded at Port of Spain, in the Island of Trinidad. The company, defendant, was incorporated by Statute of Canada, with its head office in the city of Quebec, where the contract of hiring of D., a British subject, was originally entered into. The proof showed that the accident was the direct result of the insufficiency of the derrick and gear safely to perform the work to which they were being applied. The Superior Court dismissed the action, holding that the law of Trinidad which denies such an action, governed, because the action was in tort, and by international law such actions must be decided by the law of the country in which the tort was committed, and even if the action were deemed to be based on the contract of hiring, the case would not be governed by the law of the place where such contract was made, because it was not to be executed there, but in the West India Islands:—Held, reversing the judgment, that the ship was then a part of the territory of England, and those then and there on board of her were not subject to the laws of the Island of Trinidad in respect to their mutual rights and liabilities connected with her loading and navigation, and therefore the doctrine of "common employment" or the maxim *actio personalis moritur cum persona*, if in force on said island, could not be set up in order to defeat plaintiff's action. Even if, by reason of the assent of D. to certain changes in some of the terms of his engagement with defendants having been given by him at New York, it could be held that his contract of hiring was made in the latter city, this would be unimportant in the present case, there being no allegation or proof of any difference between the law of New York and that of this province, and such difference cannot be presumed.—The rules of international law are based on reason and justice, on a sort of moral necessity to do justice in order that justice may be done to us in return; its rules are flexible, and the circumstances of each particular case have to be carefully considered and taken into account; and under the circumstances of the present case, only the most positive, clear and undisputed rule of international law would warrant the court in applying the law of Trinidad to enable defendants to defeat the claim of deceased's widow and children, pronounced by the law of this Province to be a just one. No such rule existed, and, semble, even if the law of Quebec could not justly be applied, there was more authority for choosing the law of England than that of Trinidad.—The law to be applied to this case was that of the Province of Quebec. It could not be presumed to have been the intention of either D. or the defendants that the terms of his engagement with them or their mutual rights and liabilities connected with such engagement, or the services to be performed under them, should be interpreted or affected by any law other than that of this Province, and it would be unreasonable and unjust to apply any foreign law to the decision of this cause so as to read into the contract of hiring the doctrine of "common employment," viz., an implied consent by the party hired to take the risk of

accident caused by the acts and defaults of his fellow employees, a consent which plainly defendants never intended to exact or said D. to give.—The fall of the derrick in question having been due either to the breaking or slipping out of the bolt pin, on the sufficiency of which the safety of the hoisting apparatus depended, the defendants in either case were responsible; the apparatus was entirely theirs, and under their control; if the pin was worn out they should have renewed it; if there was a flaw in the iron they should have examined and rejected it; if it was improperly adjusted they, by their servants, were negligent, and the onus of proof was on them to show that the accident was due to something for which they could not be held responsible. No contributory negligence being proved on the part of said D., and no defence being furnished defendants by any foreign law applicable to this cause, the judgment *a quo* dismissing plaintiff's action was reversed, and $10,000 damages awarded. *Dupont* v. *Quebec S.S. Co.*, Q.R 11 S.C. 188.

—Husband and Wife—Lease Signed by Wife Common as to Property—Public Trader.]—An action cannot be maintained against a wife common as to property with her husband, on a lease signed by her, where it is not alleged that she was a public trader at the time she signed the lease, or that the lease was signed in connection with any business or trade then carried on by her, or that she was authorized by her husband to sign the same. The fact that the wife sublet to lodgers a portion of the leased premises was not an *acte de commerce*, and in doing so she must be presumed to have acted as the agent of her husband and for the benefit of the community of property existing between them. *Joseph* v. *McDonald*, Q.R. 11 S.C. 406.

— Commissioners' Court — Procedure — Divisibility of Debt Amongst Heirs.]—Proceedings before Commissioners' Courts are summary and governed by rules of equity; the incident, therefore, of two actions having been taken for the same debt, the latter containing a *désistement* of the first, and yet the judgment being rendered on the first, is not important; a consent of the parties to withdraw the second and proceed on the first, sufficing to legalize such procedure.—Each one of the heirs of the creditor of a promissory note may sue for and recover his share of it, without production of the note, and even before *partage* of the succession. *Ex parte Desharnais*, Q.R. 11 S.C. 484.

—Sale of Goods—Debtor and Creditor—Agreement.]—Per Killam, J.: There may be a right of action, and the relation of debtor and creditor may exist for the price of goods, although the property has not passed, if the parties have made an agreement to that effect: *Waterous* v. *Wilson*, 11 Man. R., at 295. C.A.Dig. (1896) col. 81, referred to. *Kirchhoffer* v. *Clement*, 11 Man. R. 460.

—Promissory Note—Indorsement—Husband and Wife—Marchande Publique—Indorsement of Wife by Husband as Agent.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, V.

—Sale of Goods—Misrepresentation—Rescission Waiver—Right of Action.

See SALE OF GOODS, VII.

—Sheriff—Building and Jury Fund—Recovery of Amounts Due.]—See SHERIFF.

IX.—VENUE.

—Telegraphic Despatch—Injury by—Action for Damages.

See PRACTICE AND PROCEDURE, XLVII.

X.—WARRANTY.

—Suretyship—Recourse of Sureties inter se—Ratable Contribution—Banking—Discharge of Co-Surety—Reserve of Recourse—Trust Funds in Possession of a Surety—Arts. 1156, 1959, C.C.]—Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him.—Where a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such recourses reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties. *Macdonald* v. *Whitfield*; *Whitfield* v. *The Merchants Bank of Canada*, 27 S.C.R. 94.

XI. MISCELLANEOUS CASES.

—"Action"—Nova Scotia County Court Act, 1889—Judicature Act.] The word "action," when it occurs in any of the provisions of the Judicature Act, must have the same meaning given to it when those provisions receive effect in the County Court, the practice and procedure being the same in the two courts. *Hill* v. *Hearn*, 29 N.S.R 25.

— Counter-claim — Action for Breach of Warranty—Jury—Queen's Bench Act (Man.), 1895, 44.]—See PLEADING, III.

—Counter-claim considered as cross-action.

See PLEADING, III.

—Workmen's Compensation Act—Notice of Action.]—See PLEADING, XI.

And see PARTIES.

" PRACTICE AND PROCEDURE, I.

ADVOCATE.

Damages—Privilege for Words spoken by an Advocate in the discharge of his professional duty.]—An advocate is not liable in damages for words spoken in the discharge of his professional duty.—It is only where the slanderous expressions are foreign to the case that an action lies. *Paille* v. *Demers*, 3 Rev. de Jur. 434. Curran, J.

And see COUNSEL.

" SOLICITOR.

AFFIDAVIT.

Chattel Mortgage—Affidavit of Bona Fides—Money Not Actually Advanced.]—See Bills of Sale and Chattel Mortgages, I.

—Capias—Arrest of Debtor—Affidavit—"Unless he be Arrested."

See Debtor and Creditor, II.

—Attachment of Goods—Insufficiency of Affidavit on which Writ Issued.

See Debtor and Creditor, VI.

And see Bills of Sale and Chattel Mortgages, I.
" Practice and Procedure, II.

AGENCY.

See Commercial Agency.
" Principal and Agent.

ALIENATION.

Restraint on—See Wills, V.

ALIMENTS.

Donation—Maintenance—Obligation to Maintain.]—*Lévesque* v. *Garon*, Q.R. 10 S.C. 514, reversed by Court of Queen's Bench on January 7th, 1897.

ALIMONY.

Costs—Disbursements—Prospective Counsel Fee—Solicitor—Rule 1144.]—Rule 1144 does not warrant the making of an order for payment by defendant to plaintiff's solicitors in an alimony action, of a sum to cover counsel fees, unless it is shown that the fees are to be paid to counsel who is not the solicitor for the plaintiff or the partner of the solicitor. *Gallagher* v. *Gallagher*, 17 Ont. P.R. 575.

AMENDMENT.

See Pleading, I.
" Practice and Procedure, III.

APPEAL.

I. Appeal Generally.

Inferences of fact—Power of Court to draw.]—Held, as to the power of the court to draw inferences of fact and to dispose of facts not covered by questions framed by the trial judge, or suggested by counsel, that R.S. (5th series) c. 104, s. 20, s.s. 8, and Order 38 R. 10, must be read together;—Held, also, that the court had such power, and that it was reasonable to use it. *Pudsey* v. *Manufacturers' Accident Insurance Company*, 29 N.S R. 124.

—Equal Division of Court—Effect of—Meaning of Word "Decision."]—Two actions were brought against defendant, in the County Court, by M. and N, for provisions supplied to an hotel kept by the defendant's son. The questions at issue in both suits being the same, an agreement was entered into by counsel for both parties, to the effect that the decision in the suit of M. v. B. should be the decision in the suit of N. v B., and that an order for judgment might be taken out by the successful party, and also that in case of appeal the decision on appeal in the case of M. v. B. should also be the decision on appeal in the case of N. v. B. Judgment was given in the County Court in the case of M. v. B. for plaintiff, and on appeal to this court the court was equally divided in opinion, the result being that an order was passed dismissing the appeal with costs, and the judgment in the County Court stood. An order for judgment having been taken out by plaintiff in the case of N. v. B., defendant appealed:—Held, per Weatherbe and Meagher, JJ., "decision" in the agreement must read as meaning "judicial determination;" that the result was a judicial determination of plaintiff's right to recover the debt sued for, inasmuch as it disposed of the appeal and left plaintiff free to enforce his judgment; that the order dismissing the appeal in the one case applied to the other, and the appeal in the second case must therefore fail:—Held, per Townshend, J., and Graham, E.J., that the court having been equally divided in opinion in the first case, there was no "decision" within the meaning of the agreement, and defendant was entitled to have his appeal heard. *Naas* v. *Backman*, 28 N.S.R. 504.

—Distinct Issues—Abandonment of One by Appellant—Effect on the Appeal.]—Held, that where there are two distinct issues in the same cause, each involving the same disputed matters, and, after judgment, the appellant elects to abandon one of the issues, retaining the other for the Court of Appeal, the appeal is not thereby destroyed altogether. *Fisher* v. *McPhee*, 28 N.S.R. 523.

—Cross Appeal—Adjournments for Benefit of—Withdrawal.]—A cross motion to an appeal applying for a new trial having been served by

respondent, and adjournments obtained by her to obtain affidavits in support of it, which were subsequently filed, the Court, on objection by defendants, refused to permit the plaintiff to withdraw such application. *Atkins* v. *Coy*, 5 B.C.R. 6.

—Superior Court—Order for Examination of Witness—Appeal pending to Supreme Court—Examination of Prisoner—Art. 240 C.C.P.

See PRACTICE AND PROCEDURE, XIV.

II. AS TO COSTS.

—Interference with Judicial Discretion.]—An adjudication as to costs should be reformed on appeal when it violates some principle or a positive rule of law. *Déchêne* v. *Dussault*, Q.R. 6 Q.B. 1.

And see COSTS, I.

III. FROM AND TO PARTICULAR COURTS.

(a) Privy Council.

—Right of Appeal—Amount in Dispute—Amount Demanded or Recovered—Art. 1178 C.C.P.]—Art. 1178 of the Code of Civil Procedure provides for an appeal to the Judicial Committee of the Privy Council in cases *inter alia* where "the amount in dispute is of the sum or value of five hundred pounds sterling": — Held, following *McFarlane* v. *Leclair* 15 Moo. P.C 181; 6 L.C.J. 170 and *Allan* v. *Pratt*, 13 App. Cas. 780; 32 L.C.J. 278 that the words "amount in dispute" in said article refer to the amount accorded by the judgment which is in appeal and not to the amount claimed by the action. *Glengoil S.S. Co.* v. *Pilkington*, Q.R. 6 Q.B. 292.

(b) Supreme Court of Canada.

—Jurisdiction—Expropriation of lands—Assessments—Local improvements—Future Rights—Title to Lands and Tenements—R.S.C. c. 135, s. 29 (b); 56 V. c. 29, s. 1 (D).]—A by-law was passed for the widening of a portion of a street up to a certain homologated line, and for the necessary expropriations therefor. Assessments for the expropriations for certain years having been made whereby proprietors of a part of the street were relieved from contributing any proportion to the cost, thereby increasing the burden of assessment on the properties actually assessed, the owners of these properties brought an action to set aside the assessments. The Court of Queen's Bench affirmed a judgment dismissing the action. On motion to quash an appeal to the Supreme Court:—Held that as the effect of the judgment sought to be appealed from would be to increase the burden of assessment not only for the expropriations then made, but also for expropriations which would have to be made in the future, the judgment was one from which an appeal would lie, the matter in controversy coming within the meaning of the words "and other matters or things where the rights in future might be bound," contained in sub-sec. (*b*) of sec. 29, Supreme and Exchequer Courts Act, as amended by 56 Vict c. 29, s. 1. *Stevenson* v. *The City of Montreal*, 27 S.C.R. 187.

—Action en Bornage—Future Rights—Title to Lands—R. S. C. c. 135, s. 29 (b)—54 & 55 V. c. 25, s. 3 (D)—56 V. c. 29, s. 1 (D)]—The parties executed a deed for the purpose of settling the boundary between contiguous lands of which they were respectively proprietors, and thereby named a provincial surveyor as their referee to run the line. The line thus run being disputed, M. brought an action to have this line declared the true boundary, and to revendicate a disputed strip of land lying upon his side of the line so run by the surveyor:—Held, that under R.S.C., c. 135, s 29 s s. (*b*). as amended by 56 V., c 29 s. 1 (D.) an appeal would lie to the Supreme Court of Canada, first, on the ground that the question involved was one relating to a title to lands, and secondly, on the ground that it involved matters or things where rights in future might be bound: *Chamberland* v. *Fortier*, 23 S.C.R. 371, referred to, and approved. *McGoey* v *Leamy*, 27 S.C.R. 193.

—From Court of Review—Appeal to Privy Council—Appealable Amount—54 & 55 V., c. 25, s. 3, s-s. 3 and 4 (D)—C.S.L.C. c. 77, s. 25—Arts. 1115, 1178 C.C.P.—R.S.Q. art. 2311.]—In appeals to the Supreme Court of Canada from the Court of Review (which by 54 & 55 V., c. 25, s. 3, s-s. 3, must be appealable to the Judicial Committee of the Privy Council), the amount by which the right of appeal is to be determined is that demanded, and not that recovered, if they are different: *Dufresne* v. *Guévremont* 26 S.C.R. 216 followed. *Citizens' Light and Power Co* v. *Parent*, 27 S.C.R. 316.

—Jurisdiction — Appealable Amount — Future rights—"Other matters and things"—R.S.C. c. 135, s. 29 (b)—59 V. c. 29 (D)].—The classes of matters which are made appealable to the Supreme Court of Canada under the provisions of section 19, subsection *b* of "The Supreme and Exchequer Courts Act," as amended by 56 Vict. c. 29, do not include future rights which are merely pecuniary in their nature and do not affect rights to or in real property, or rights analogous to interests in real property. *Rodier* v. *Lapierre*, 21 S.C.R. 69 and *O'Dell* v. *Gregory*, 24 S.C.R. 661 followed. *Raphael* v. *McLaren*, 27 S.C.R. 319.

—Jurisdiction—Title to Lands—Municipal Law—By-law—Widening Streets—Expropriation—R.S.C. c. 135, s. 29 (b)—54 & 55 V. c. 25, s. 3—56 V. c. 29, s. 1.]—In an action to quash a by-law passed for the expropriation of land the controversy relates to a title to lands, and an appeal lies to the Supreme Court of Canada, although the amount in controversy is less than $2,000. *Murray* v. *Westmount*, 27 S.C.R. 579.

(c) Ontario Court of Appeal.

—Cross-Appeal—Notice—Ont. Rule 823.]—In an action brought against three defendants for damages for pollution of a stream, judgment was given at the trial for the plaintiff against one defendant, and the action was dismissed against the other two:—Held, that upon the appeal of the first defendant to the Court of Appeal, the plaintiff, the respondent, could not maintain a cross-appeal against the other defendants by way of notice under Rule 825.

but must proceed by way of an independent appeal: *Freed* v. *Orr*, 6 Ont. A.R. 690 not followed. *Re Cavender's Trusts*, 16 Ch. D. 270 followed. *Johnston* v. *Town of Petrolia*, 17 Ont. P.R. 332.

—**Surrogate Court—Security by Cheque—Affidavit—R.S.O. c. 50, s. 33; Surrogate Rule 57.**]—The plaintiffs, desiring to appeal to the Court of Appeal from an order of the Judge of the Surrogate Court, made on the 4th October, 1895, served notice of appeal on the fifteenth day thereafter, and on the same day deposited with the Registrar of the Surrogate Court as security an unmarked cheque on a bank for $100, payable to the order of the Registrar, who simply retained it in the office and never cashed it. No other security was given, and no affidavit of the amount of the property to be affected by the order was filed:—Held, that what was done was not such a compliance with the requirements of Rule 57 of the Ontario Surrogate Rules of 1892 that the appeal was thereby lodged and brought within fifteen days, as required by section 33 of the Surrogate Courts Act, R.S.O. c. 50; and the appeal was quashed with costs. Re *Wilson, Trusts Corporation of Ontario* v. *Irvine*, 17 Ont. P.R. 407.

—**Security for costs—Appeal to Court of Appeal—Special order—Judicature Act, 1895, sec. 77.**

See COSTS, V.

(*d*) ONTARIO DIVISIONAL COURT.

—**County Court Appeal—Order setting aside—Judgment on Terms—Finality of.**]—In a County Court action the defendant made a motion to set aside a judgment by default as irregular, but the Judge held it regular, and, while he set aside the judgment, he did so upon terms of the defendant paying costs. The defendant appealed from this order upon the ground that the judgment should have been set aside unconditionally: Held, that the order was not "in its nature final," within the meaning of section 42 of the County Courts Act, R.S.O, c. 47, and the appeal did not lie. *O'Donnell* v. *Guinane*, 28 Ont. R. 389.

—**County Court—Appeal to High Court from Order for New Trial—Law Courts Act, 1895—58 Vict. c. 13, s. 44 (0).**]—Under s. 44, s.-s. 4, of the Law Courts Act of 1895, 58 Vict. (Ont.) c. 13, where a new trial has been granted in a County Court action the opposite party may appeal from the order directing the new trial to a Divisional Court of the High Court of Justice. *Cantelon* v. *Thompson*, 28 Ont.R. 396.

—"**Sum in Dispute**"—**Right of Appeal—R.S.O., c. 51, s. 148.**]—Where the subject matter of the claim in a Division Court is one cause of action exceeding $100, and the amount recovered at the trial is under that sum, an appeal lies to a Divisional Court under section 148 of the Division Courts Act, "the sum in dispute upon the appeal" being the amount claimed, and not that amount less the sum recovered at the trial. *Petrie* v. *Machan*, 28 Ont. R. 504.

(*e*) *Supreme Court of Nova Scotia.*

—**Sale of Land Under Execution—Order for—Writ of Possession.**]—After an order absolute for a writ of possession was granted by a judge of the Supreme Court, under R.S.N.S. 5th ser., c. 125, application was made to another judge of the court to quash the writ. The defect being in the order for the writ, and not in the writ itself, which was not shown to be bad on its face, the application was dismissed:—Held, that an appeal from the order refusing the application to quash must be dismissed with costs:—Held, also, that the matter having been decided adversely to the appellant, or being before the court in the other appeal, the second application should not have been made. Re *Broad Cove Coal Company*, 29 N.S.R. 1.

(*f*) *Supreme Court of New Brunswick.*

—**Appeal from Order for New Trial—Perverse Verdict.**]—In an action in the County Court to recover damages for injury to property by negligence, the trial judge, though refusing to non-suit, directed the jury that there was no evidence of negligence. The jury gave a verdict for the plaintiff, which was set aside by the judge and a new trial ordered On appeal to the Supreme Court of New Brunswick:—Held, that the verdict being perverse, the court should not search diligently for some evidence upon which the verdict could be supported. *Fournier* v. *The Canadian Pacific Railway Co.*, 33 N.B.R. 565.

(*g*) *Court of Queen's Bench, Manitoba.*

—**Appeal from—County Court—Jurisdiction—Amount in Question.**]—In deciding whether an appeal from a County Court decision under section 315 of the County Courts Act, as re-enacted by 59 Vict., c. 3. s. 2, should be taken to a single judge, or to the Full Court, it is not the amount claimed by the plaintiff which has to be looked at, but it is necessary to consider what is the amount which the party appealing seeks to relieve himself from, or to recover by the appeal. The defendant appealed to the Full Court from a verdict against him for $39.10, and relied on the fact that the plaintiff's claim was for a sum exceeding fifty dollars. Held, following *Macfarlane* v. *Leclaire*, 15 Moo. P.C. 181, and *Allan* v. *Pratt*, 13 App. Cas. 780, that the appeal should be struck out with costs. *Massey-Harris Co.* v. *McLaren*, 11 Man. R. 370.

—**Appeal from County Court—Grounds.**]—Held, that a party appealing from a County Court should be confined to the grounds stated in his præcipe to set the case down for appeal under section 319, sub-section 2 of the County Courts Act as amended by 59 Vict., c. 3, s. 2, and should not be allowed to urge any other ground without consent or leave of the Court or a Judge. *The Imperial Loan & Investment Co.* v. *Clement, Re Coulter*, 11 Man. R. 428.

—**Appeal from County Court—Motion to Strike Out.**]—When an appeal from a County Court is set down for hearing before the full Court, a motion to strike it out must be made under Rule 168 (b) of the Queen's Bench Act, 1895,

within the time there limited, and no objections to the proceedings and steps leading up to the appeal can be entertained at the hearing: Rule 168 (d). *Kirchhoffer* v. *Clement*, 11 Man. R. 460.

—Appeal from County Court — Jurisdiction — Amount in question.]—In an action in a County Court the plaintiff's claim was for $200 damages, but in the opinion of the court the evidence showed that he could not in any view of the case have recovered more than $50. He appealed to the Full Court against a verdict for defendant:—Held, that under section 315 of the County Courts Act as amended by 59 Vict., c. 3, s. 2, "the amount in question" means in such a case the amount that the plaintiff might possibly have recovered and, this not exceeding $50. that the appeal should have been made to a single Judge, and should be struck out with costs. *Aitken* v. *Doherty*, 11 Man. R. 624.

—Criminal procedure — Quashing conviction — Jurisdiction of Single Judge — Full Court — Practice — Notice of Motion.]—See CRIMINAL LAW, XII.

IV. IN PARTICULAR MATTERS.

—Appeal—Election Petition—Preliminary Objection—Delay in Filing—Objections struck out—Order in Chambers—R.S.C. c. 8, s. 50.]—The Supreme Court refused to entertain an appeal from the decision of a judge in chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections within section 50 of the Controverted Elections Act, and if it were, no judgment on the motion could put an end to the petition. *West Assiniboia Election Case*, 27 S.C.R. 215.

—Appeal—Preliminary Objections—R.S.C. c. 9, ss. 12 and 50—Order dismissing Petition—Affidavit of Petitioner.]—The appeal given to the Supreme Court of Canada by The Controverted Elections Act (R.S.C. c. 9, s. 50), from a decision on preliminary objections to an election petition can only be taken in respect to objections filed under section 12 of the Act. No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue. *Marquette Election Case*, 27 S.C.R. 219.

—Appeal—Collection and distribution—Art. 761 C.C.P.—Arts. 20 & 144 C.C.P.—Action to annul deed—Parties in interest—Incidental proceedings.]—The appeal from judgments of distribution under article 761 of the Code of Civil Procedure is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution.—The provision of article 144 of the Code of Civil Procedure that every fact of which the existence of truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench. *Guertin* v. *Gosselin*, 27 S.C.R. 514.

— Jurisdiction — Judgment—Reference to Court for Opinion—54 V., c. 5 (B.C.)—R.S.C. c. 135, ss. 24 and 28.]—The Supreme Court of Canada has no jurisdiction to entertain an appeal from the opinion of a Provincial Court upon a reference made by the Lieutenant-Governor-in-Council under a Provincial statute, authorizing him to refer to the Court for hearing and consideration any matter which he may think fit, although the statute provides that such opinion shall be deemed a judgment of the Court. *Union Colliery Company of British Columbia* v. *The Attorney-General of Brittsh Columbia*, 27 S.C.R. 637

—Jurisdiction—52 V. c. 37 s. 2 (D.)—Appointment of Presiding Officers — County Court Judges—55 V. c. 48 (Ont).—58 V. c. 47 (Ont.)—Statute, Construction of — Appeal from Assessment—Final Judgment.]—By 52 Vict. c. 37, s. 2, amending "The Supreme and Exchequer Courts Act," an appeal lies in certain cases to the Supreme Court of Canada from courts "of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority." By the Ontario Act, 55 Vict. c. 48 as amended by 58 Vict. c. 47, an appeal lies from rulings of municipal courts of revision in matters of assessment to the County Court judges of the County Court district where the property has been assessed. On an appeal from a decision of the County Court judges under the Ontario statutes:—Held, King, J., dissenting, that if the County Court judges constituted a "court of last resort" within the meaning of 52 Vict. c. 37, s. 2, the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act:—Held, per Gwynne, J., that as no binding effect is given to the decision of the County Court judges, under the Ontario Acts cited, the court appealed from was not a "court of last resort" within the meaning of 52 Vict. c. 37, s. 2:—Quære, Is the decision of the County Court judges a "final judgment" within the meaning of 52 Vict. c. 37, s. 2. *The City of Toronto* v. *The Toronto Railway Co.*, 27 S.C.R. 640.

—Interim injunction — Contempt — Practice — Ex parte motion — Parliamentary elections — Recount — Jurisdiction of High Court.]—A returning officer in a certain election of a member for the House of Commons had been served with an interim injunction order restraining him, together with others, having authority in that behalf under the Dominion Elections Act, from proceeding with a recount of the ballots cast at such election. The injunction was disobeyed and the recount proceeded with. After the expiration of the injunction, proceedings were taken against the returning offier to commit him for contempt:—Held, that an appeal would lie against the order for injunction, notwithstanding its expiration before the appeal was taken. *McLeod* v. *Noble*, 24 Ont. A.R. 459.

—**Infants—Act for Prevention of Cruelty to Children—Order of Justices—Appeal to General Sessions—Jurisdiction—56 V. c. 45 (Ont.)—58 V. c. 52. s. 2 (Ont.).**]—There is no appeal to the General Sessions from an order for the custody and care of children under section 13 and subsequent sections of 56 Vict. (Ont.) c. 45, "An Act for the Prevention of Cruelty to and Better Protection of Children," made by two justices of the peace sitting under section 2 of 58 Vict. (Ont.) c. 52, amending the former Act *In re Granger and the Children's Aid Society of Kingston*, 28 Ont.R. 555.

—**Debtor—Arrest—Discharge—County Court—Appeal.**]—Upon an appeal by the plaintiff from the order of the Judge of a County Court, in an action in that court, discharging the defendant from the custody of his bail, it was objected by the defendant that the order was not a final one, and that no appeal lay:—Held, that the Court had by Ont. Rule 1051 jurisdiction to discharge or vary the order as explained in *Elliott* v. *McCuaig*, 13 Ont. P.R. 416,—That, upon the evidence, the defendant should not have been discharged from custody: *Toothe* v. *Frederick*, 14 Ont. P.R. 287, not followed, having in effect been overruled by *Coffey* v. *Scane*, 22 Ont. A.R. 269:—Held, by the Court of Appeal that no appeal lay, with or without leave, from the order of the Divisional Court. *McVeair* v. *Ridler*, 17 Ont. P.R 353.

Security for Costs—Ont. Rule 1243—Award—Motion to Set Aside—Appeal.]—An appeal from an order dismissing a motion to set aside an award made upon a voluntary submission is not a "proceeding for the same cause," within the meaning of Rule 1243, as an action to recover moneys in respect of certain matters included in the submission, but not dealt with by the award; and, although the costs of such appeal are unpaid, security for costs of the action will not be ordered. *Caughell* v. *Brower*, 17 Ont. P.R. 438.

—**Certiorari—Order for—Appeal—Affidavits of justification—Nova Scotia Crown Rule 29—Chambers Judge—Power to adjourn Hearing—Affidavits.**]—Defendant gave notice of motion at Chambers for an order for a writ of *certiorari* to remove into the Supreme Court a conviction made against him by two Justices of the Peace The objection was taken at the hearing before the Chambers Judge, that the affidavits of justification required by Rule 29 of the Crown Rules (Nova Scotia), to be filed before giving of notice of motion for a *certiorari*, were insufficient in several particulars. The learned Judge made an order permitting further affidavits to be filed, but reserved the question as to his right to dispense with the requirements of Rule 29, to be argued before him at an adjourned hearing:—Held, that an appeal taken from this order was premature, and must be dismissed with costs:—*Semble* that the requirements of Crown Rule 29 as to the filing of affidavits of justification before notice of motion are imperative, and that where they are not complied with the Judge is bound to give effect to the objections and dismiss the application. (Per Meagher, J.) leave to file additional affidavits should not have been given, and no adjournment for that purpose ordered. (Per Macdonald, C.J.) The order of the Chambers Judge was in effect permission to file additional security under Crown Rule 36. *McIsaac* v. *McNeil*, 28 N.S.R. 424.

—**Criminal Law—Appeal—Crim. Code ss. 782, 783 (a) and 784; 58 & 59 V. c. 40 (D.).**]—The right of appeal given by section 782 of the Criminal Code, as amended by 58-59 Vict., c. 40, from convictions by two Justices of the Peace, under Criminal Code section 783 (a) and (f), is not taken away in British Columbia by section 784, s.s. 3, as amended by 58 & 59 Vict. c. 40. *The Queen* v. *Wirth*, 5 B.C.R. 114.

—**N. B. Parish Court—Trial of Civil Cause—Proof of Jurisdiction of Magistrate—When to be made.**]—Review from the Parish Court of Sussex:—On the trial of this cause in the court below, the plaintiff omitted to prove the magistrate's jurisdiction until after objection taken, whereupon the magistrate ruled that it was too late to do so after the defendant had gone into his case, and accordingly non-suited the plaintiff:—Held (per Forbes, Co J.), that, under 42 Vict. (N.B.), c. 13, the plaintiff was bound to prove the jurisdiction of the magistrate after the objection was taken. The nonsuit was set aside with costs. *Doherty* v. *Parlee*, 17 C.L.T. (Occ. N.) 127.

—**Railway Expropriation—Arbitration—Appeal from award—Subsequent action to annul.**
See ARBITRATION AND AWARD, III.

—**Probate Judge acting as Arbitrator in settling matters dehors his jurisdiction—Appeal.**
See PROBATE COURT.

V. INTERFERING WITH JUDICIAL DISCRETION.

—**Jurisdiction—Final Judgment—Discretionary Order—Default to Plead—R.S.C. c. 135, ss. 24 (a), 27—R.S.O. c. 44, s. 46—Ontario Judicature Act, Rule 796.**]—After judgment has been entered by default in an action in the High Court of Justice it is in the discretion of a master in chambers to grant or refuse an application by the defendant to have the proceedings re-opened to allow him to defend, and an appeal to the Supreme Court from the decision of the court of last resort on such an application is prohibited by section 27 of "The Supreme and Exchequer Courts Acts:"—Quære, Is the judgment on such application a "final judgment" within the meaning of section 24. (a) of the Act? *O'Donohoe* v. *Bourne*, 27 S.C.R. 654.

—**Amendment—Judge's discretion—Appeal.**]—(Per Ritchie, J.) The terms upon which the trial judge decides that he will allow an amendment, are entirely within his discretion, and no appeal lies from his decision by the party applying for the amendment, when he declines to take it upon the terms offered, unless the terms are so unreasonable as to compel the court to say that the discretion was improperly exercised. *Seary* v. *Saxton*, 28 N.S.R. 278.

—**County Court—Amendment of declaration—Refusal to amend.**]—In an action in the County Court the judge at the trial refused an amend-

ment to the declaration except on terms which the plaintiff would not accept. In a subsequent motion before him to set aside the verdict for the defendant and order a new trial this refusal was not advanced as a ground. On appeal to the full court from the refusal of a new trial:—Held, that even if the matter of the amendment had been urged on the motion the court would not interfere with the discretion of the judge in dealing with it. *Ferguson* v. *Reed*, 33 N.B.R. 580.

—**Interlocutory Order—Trial by Jury—Final Judgment—R.S.C. c. 135, s. 24—Arts. 348-350 C.C.P.**]—*Demers* v. *Bank of Montreal*, 27 S.C.R. 197.

VI. Interfering with Questions of Fact.

—**Questions of Practice—Duty of Appellate Court.**]—The Supreme Court of Canada will take into consideration questions of practice when they involve substantial rights or the decision appealed from may cause grave injustice.—Part of lands seized by the sheriff had been withdrawn before sale, but on proceedings for *folle enchére* it was ordered that the property described in the *procès verbal* of seizure should be resold, no reference being made to the part withdrawn. On appeal, the Court of Queen's Bench reversed the order on the ground that it directed a resale of property which had not been sold, and, further, because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for resale, or, prior to the proceedings, for *folle enchére*:—Held, that the Court of Queen's Bench should not have set aside the order, but should have reformed it by rectifying the error. *Lambe* v. *Armstrong*, 27 S.C.R. 309.

—**Evidence taken by Commission—Reversal on Questions of Fact.**]—Where the witnesses have not been heard in the presence of the judge but their depositions were taken before a commissioner, a court of appeal may deal with the evidence more fully than if the trial judge had heard it or there had been a finding of fact by a jury, and may reverse the finding of the trial court if such evidence warrants it. *Malzard* v. *Hart*, 27 S.C.R. 510.

—**Questions of Fact—Second Appellate Court.**]—Where a judgment upon questions of fact rendered in a court of first instance has been reversed upon a first appeal, a second court of appeal should not interfere to restore the original judgment, unless it clearly appears that the reversal was erroneous. *Demers* v. *Montreal Steam Laundry Co.*, 27 S.C.R. 537, affirming Q.R. 5 Q.B. 191.

VII. Leave to Appeal and Time to Appeal.

—**Time—Pronouncing judgment—Signing judgment—Ont. Rule 804—Extension—Grounds for.**]—Under Ont. Rule 804 the time for service of notice of appeal runs from the day on which the judgment appealed against is actually signed or entered and not from the day upon which it is pronounced.—Time for giving notice of appeal extended where the party proposing to appeal had from the first shown his intention to appeal, but had been under a misapprehension as to the practice, and no session of the court had been lost. *Johnston* v. *Town of Petrolia*, 17 Ont. P.R. 332.

—**Appeal—Leave—Winding-up Act—Successive Applications—Special Circumstances—Terms.**]—Orders having been made in the matter of the winding up of an insolvent bank for payment of certain moneys out of Court to the executors of the purchaser from the liquidator of the assets, and the moneys having been paid out to them, the Receiver-General for Canada asserted a claim to such moneys under ss. 40 and 41 of the Winding-up Act, R.S.C. c. 129, and, not having been a party to the applications for payment out made by the executors, presented a petition for payment over to him by them or repayment into Court of such moneys; or, in the alternative, for leave to appeal from such orders. This petition was dismissed, upon the ground that the petitioner was not entitled to complain, even if the moneys had been improperly paid out. Upon an application by the petitioner for leave to appeal to the Court of Appeal from the order dismissing his petition:—Held, that a Judge of the High Court had power to grant the leave sought the application not being in effect a second application for leave to appeal from the orders for payment out. Under all the circumstances of the case, leave to appeal was granted, upon security for costs being furnished, the question being a new and important one, and the amount involved considerable. *Re Central Bank of Canada*, 17 Ont. P.R. 370.

—**Order for leave to Appeal.**]—An order giving leave to appeal is an order from which an appeal does not lie:—*Re Sarnia Oil Co*, 15 Ont. P.R. 347; *ex parte Stevenson*, [1892] 1 Q.B. 394, 609; and *Kay* v. *Briggs*, 22 Q.B.D. 343, followed. *Re Central Bank of Canada*, 17 Ont. P.R. 395.

—**Appeal—Time—Extension of—Special Circumstances—Terms.**]—Where notice of appeal was given, but the appeal was not set down in due time, and a sittings of the court had been lost, the time for setting down was extended, as it appeared that there had all along been a *bona fide* intention of appealing; that security had been given for a large part of the debt and costs; and a large sum paid for a copy of the evidence. The terms of giving further security, setting down the appeal within a limited time, and paying costs in any event, were imposed. *D'Ivry* v. *World Newspaper Company of Toronto*, 17 Ont. P.R. 543.

—**Appeal from Interlocutory Judgment—Service of Petition on Adverse Party—Delay—56 V. c. 42 (P.Q.).**]—Notice of the presentation of a summary petition for leave to appeal from an interlocutory judgment must be served upon the adverse party, and the petition afterwards presented, within the thirty days allowed for making such application under 56 Vict. c. 42 (P.Q.). In this case the petition not having been so served was dismissed with costs. *Létang* v. *Burland*, Q.R. 6 Q.B. 175

—**Mining law—Practice—Appeal—Extending time for.**]—The appellant was advised by counsel up to a period considerably beyond the

time for appealing from the judgment of an inferior Court, to acquiesce in it, but he had since been advised by other counsel to appeal, and that special hardship would probably result to him if the judgment were allowed to stand:—Held, insufficient ground for extending the time for appealing. *Trask* v. *Pellent*, 5 B.C.R. 1.

—**Practice—Appeal—Time not extended as of course.**]—Where there are no special equitable circumstances calling for the intervention of the court the time for appealing from an order will not at the hearing be extended to cure an objection that the appeal is out of time—The appearance of counsel to take such an objection is not an appearance upon the appeal so as to waive the objection:—*Forster* v. *Davis*, 25 Ch. D. 16, distinguished. *Edison General Electric Co.* v. *Bank of British Columbia*, 5 B.C.R. 34.

—**County Court Appeal—Full Court—Setting Down—Time—Rules 673-678—Stat. B.C. 1893, c. 10, s. 11.**]—Notice of an appeal from a judgment of Spinks, Co. J., was served on 20th September, 1895. The appeal was never set down for argument in the Supreme Court and no further step was taken by the appellant for over a year, when respondent served on the appellant's solicitor notice of motion to dismiss the appeal. In answer to the motion the appellant produced an affidavit that the reason for not proceeding with the appeal was that he had been unable to obtain the notes taken at the trial by the learned County Court Judge:—Held, that the appellant had no excuse for not setting down the appeal within the time limited by Rule 678. Leave to extend the time for appealing refused. *Gething* v. *Atkins*, 5 B.C.R. 138.

—**N. W. Territories C.J.O. s. 504—Appeal—Extension of Time—Security for Costs—"Special Circumstances."**]—Held, (1) that as defendant's delay in applying had not prejudiced plaintiff's position, the extension of time asked for should be granted, and (2) that plaintiff's poverty and inability to pay costs constitute "special circumstances" as mentioned in s. 504 of Civil Justice Ordinance (N.W.T.), and that security for costs should be ordered: Re *Ivory*, 10 Ch. D. 372; *Farrar* v. *Lacy*, 28 Ch. D. 482; *Harlock* v. *Ashberry*, 19 Ch. D. 84, and *Donnelly* v. *Ames*, 17 Ont. P.R. 105 referred to. *Morton* v. *Bank of Montreal*, 33 C.L.J. 629; 17 C.L.T. (Occ. N.) 308.

VIII. Parties to Appeal.

Injunction—Hindrance to Defence—Intervention on Appeal.]—When an application was made for an injunction to delay the opening by the *fabrique* of a new cemetery, and the *fabrique* was prevented, by resolution adopted at two consecutive meetings of parishioners, from resisting such application and opposing an appeal taken from the judgment rejecting it, a parishioner who had acquired rights in the new cemetery was allowed to intervene before the Court of Appeal in order to maintain such judgment. *Dubé* v. *La Fabrique de l'Isle Verte*, Q.R. 6 Q.B. 424.

IX. Practice and Procedure.

—**Discontinuance—Appeal.**]—Plaintiff filed and served notice of discontinuance, January 27th, 1896. Defendants, on February 3rd, appealed from an order made on January 15th dismissing with costs a motion to set aside an order for service out of the jurisdiction:—Held, that defendants were prevented by the discontinuance from asserting their appeal at the time they did, and that the appeal must be quashed with costs. *Weatherbe* v. *Whitney*, 29 N.S.R. 97.

—**Bond—Construction—Sureties.**]—The condition of a bond given on appeal from the County Court was to effectually prosecute the appeal, and, in the event of the judgment appealed from being sustained, to pay the amount of the judgment, and such further sum as might be awarded by the Supreme Court for costs, and comply with the order of the Supreme Court on appeal:—Held, that there were only two conditions, viz., (1) to prosecute the appeal, and (2) in the event of the judgment being sustained to pay, etc., the compliance with the order of the Supreme Court on appeal being made consequent on the event of the judgment being sustained:—Held also, that if the appeal was prosecuted, and the judgment appealed from not sustained, the bond was discharged. *Smith* v. *Ashwood*, 28 N.S.R. 331.

—**Bond—Condition to "Effectually Prosecute"—County Court Judge—Order for Judgment—Amendment.**]—A bond given in the County Court to obtain a stay of proceedings, pending an appeal to the Supreme Court was conditioned to effectually prosecute the appeal, and to respond the judgment to be finally given:—Held, that the meaning of the words "effectually prosecute" was synonymous with "prosecute with effect," and that the appeal having been dismissed with costs, the condition had not been performed. *McSweeney* v. *Reeves*, 28 N.S.R. 422.

—**Canada Temperance Act—Conviction Failing to Award Costs—Validity—Appeal.**]—See Canada Temperance Act, II.

—**Notice of Trial—Irregularity—Close of Pleadings—Order Staying Proceedings—Chambers Motion—Reference to Trial Judge—Order for Judgment—Appeal.**

See Practice and Procedure, XLVI.

—**Venue—Change of—County Court Action—Ont. Rule 1260—Appeal.**

See Practice and Procedure, XLVII.

—**Venue—Order changing—Appeal—Costs.**

See Practice and Procedure, XLVII.

X. Right to take New Grounds.

—**County Court Appeal—Amendment Refused at Trial—Neglect to take Ground on Motion for New Trial.**]—On trial of an action in the County Court the plaintiff was refused an amendment to his declaration except on terms that he would not accept. He afterwards moved before the Judge in Chambers to have the verdict for defendant set aside and a new

trial ordered, but such refusal to amend was not relied on:—Held, that this ground not having been taken on the motion it was not available to plaintiff on appeal to the full Court from the order refusing a new trial. *Ferguson* v. *Reed*, 33 N.B.R. 580.

APPROPRIATION OF PAYMENTS.

Appropriation of Payments by Statute]—See MINES AND MINERALS.

ARBITRATION AND AWARD.

I. ARBITRATOR.

(*a*) *Misconduct.*

Arbitration—Improper Conduct of Arbitrators—Referring back Award.]—On an application to set aside an award made upon an arbitration to ascertain the value of certain property for the purposes of assessment, it appeared that certain of the arbitrators respectively heard evidence in the absence of each other and of the witnesses, and took into consideration the financial ability of the owners as an element in their determination:—Held, that such conduct invalidated the award, but that it should not be set aside but referred back for reconsideration under section 10 of the Arbitration Act, 1893. *Re Trythall*, 5 B.C.R. 50.

—Railway expropriation—Arbitration to determine Value of Land—Duties of Arbitrators—Effect of neglect.]—See ARBITRATION AND AWARD, III.

(*b*) *Powers.*

—Expropriation of land—Railway Co.—Fixing date for award—Death of Arbitrator pending—Right to new Appointment—Injunction—51 V., c. 29 (D.).]—See RAILWAY AND RAILWAY COMPANIES.

(*c*) *Removal of.*

—Municipal expropriation—Objection to arbitrator—Procedure—Quo warranto—Qualification—Arts. 374, 916, M.C.]—See MUNICIPAL CORPORATION.

II. AWARD.

—Submission to Arbitration—Award—Rule of Court—Judgment.]—The Exchequer Court has no jurisdiction to entertain an application to make an award under a submission to arbitration by consent in a matter *ex foro*, a judgment of the court. *The Dominion Atlantic Railway Company* v. *The Queen*, 5 Ex. C.R. 420.

—Award—Extending Time—R.S.O., c. 53, s. 43—Voluntary Submission—"Good Cause."]—The Court has jurisdiction under R.S.O., c. 53, s. 43, to enlarge the time for making an award upon voluntary submission, after the making of the award; and it is "good cause" for so enlarging that the arbitrators themselves, pursuant to their powers under the submission, did all they could to enlarge, but were unable at the time to get the original submission whereon to make the indorsement as to enlargement. *Re Clement and Dixon*, 17 Ont P.R. 455.

—Award—Order—Appeal.
See APPEAL, III (*b*).

III. SETTING ASIDE AWARD.

—Voluntary Submission—Motion to Set Aside Award—Time—52 V. (Ont.) c. 13.]—A motion to set aside the award made under a voluntary submission must be made before the expiration of the term next after publication of the award, even if three months have not expired: *In re Prittie and Toronto*, 19 Ont. A.R. 503, considered. *In re Caughell and Brower*, 24 Ont. A.R. 142.

—Railway Expropriation—Misconduct of Arbitrator—Appeal from Award—Right to subsequent Action to annul.]—In an arbitration to determine the value of land expropriated under the Dominion Railway Act all the arbitrators are bound to act faithfully and impartially, and the award may be annulled on proof that one of them acted throughout the proceedings as advocate or agent of the person appointing him, and that he neglected to attend several of the meetings of the arbitrators or to read the depositions of witnesses taken at such meetings. An appeal to the Superior Court from the award, under the provision of the Act, does not deprive the party appealing of his right to bring an action to set aside the award for irregularity. *Brunet* v. *The St. Laurent and Adirondack Railway Co.*, Q.R. 6 Q.B. 116.

—Misconduct of Arbitrators—Expropriation—Railway Co.]—An arbitrators' award on expropriation of land by a railway company may be set aside on the following grounds:—If the arbitrator for the company, after having sworn to faithfully and impartially discharge his duties, assumes the position of solicitor or agent in the company in the choice of his witnesses, and views the lands to be expropriated together with the employees of the company, in the absence and without the knowledge of the other party. If this arbitrator declares openly during the *enquête* that the offer of the company was more than sufficient. If he neglects to attend several meetings of the arbitrators and does not read the evidence. If the arbitrators neglect to read over and discuss the evidence, and refuse to hear counsel for the parties, and to deliberate before making their award. If the third arbitrator does not attend a sitting at which several witnesses were examined, and does not read the evidence taken at such sitting. If the third arbitrator before the making of the final award does not convoke the others in order to read the evidence and discuss and consider it, after a request to that effect from the arbitrator of the owner of the land to be

expropriated. If the company, after the *enquête* has closed has placed a special train at the disposal of the arbitrators, and has caused its secretary-treasurer to accompany them to visit the lands in the absence of the opposite party and without his knowledge. If the company at the time of this visit gives a dinner to the arbitrators and hires carters to travel over the road in order to establish the time required for the journey, all in the absence of the party expropriated *Brunet* v. *The St. Lawrence & Adirondack Railway Co.*, 3 Rev. de Jur. 332, Court of Q.B.

—Award—Application to set aside—Evidence—Costs.]—By their Act of incorporation it was provided that the defendant company might assume certain obligations of R. C. & Co. The company made an offer in writing in settlement of a claim of plaintiff against the firm which was outstanding at the time of the passage of the Act of incorporation:—Held, dismissing with costs an application to set aside an award against the company, that the offer unexplained might properly be regarded as operating as an admission of the existence of facts involving liability on the part of the corporation. *McRae* v. *Rhodes, Curry & Co., Limited*, 28 N.S.R. 343.

IV. Submission to Arbitration.

—Agreement respecting lands — Boundaries — Referee's decision—Bornage—Arts. 941-945 and 1341 et seq. C.C.P.]—The owners of contiguous farms executed a deed for the purpose of settling a boundary line between their lands, thereby naming a third person to ascertain and fix the true division line upon the ground and agreeing further to abide by his decision and accept the line which he might establish as correct. On the conclusion of the referee's operations one of the parties refused to accept or act upon his decision, and action was brought by the other party to have the line so established declared to be the true boundary and to revendicate the strip of land lying upon his side of it:—Held, reversing the judgment of the Court of Queen's Bench, that the agreement thus entered into was a contract binding upon the parties to be executed between them according to the terms therein expressed, and was not subject to the formalities prescribed by the Code of Civil Procedure relating to arbitrations. *McGoey* v. *Leamy*, 27 S.C.R. 545.

—Agreement for Submission—Essentials to—Arts. 1341, 1344 C.C.P.]—Arbitration, having the effect of withdrawing some matters of litigation from the cognizance of the ordinary judges, constitutes a departure from the common law and should be kept most narrowly within the limits of the rules of law upon the subject. An agreement that any disputes which may arise between the parties to a contract will be adjudicated upon by arbitrators constitutes a simple promise of a submission to arbitration and not a submission properly speaking, and such promise to be valid, as the submission itself, should designate the names and quality of the parties and the arbitrators, the matter in litigation, and the time within which the award will be rendered. An agreement for submission, deprived of these essential conditions, does not authorize the judge to stay the litigation and name the arbitrators; this agreement, assuming it to be valid, will be a mere undertaking to make the submission subject to damages for non-execution, and only gives the judge power to assess the damages but not to carry out the undertaking by naming an arbitrator in place of one who has refused to act, and so substituting his will for that of the party. *McKay* v. *Mackedie*, Q.R. 11 S.C. 513.

ARREST.

Wrongful Arrest — Habeas Corpus — Civil Action.]—See Action VI.

—On Execution — Subsequent Levy — Justices' Court—C.S.N.B. c. 60.]—See Execution, V.

—Mode of Arrest—Capias—Contrainte par corps—Judicial Abandonment—Art. 764, C.C.P.]—See Judicial Abandonment.

—Probable Cause—Good Faith.]—See Malicious Prosecution.

—Privilege of Witness—Criminal Offence.]—See Witness.

ASSESSMENT AND TAXES.

Exemptions—Real Property—Chattels—Fixtures—Gas Pipes—Highway—Title to Portion—Legislative grant of soil—11 V., c. 14 (Can.)—55 V. c. 48 (O.)—"Ontario Assessment Act, 1892."]—Gas pipes which are the property of a private corporation laid under the highways of a city are real estate within the meaning of the "Ontario Assessment Act of 1892," and liable to assessment as such, as they do not fall within the exemptions mentioned in the sixth section of that Act. The enactments effected by the first and thirteenth clauses of the company's Act of incorporation (11 Vict. c. 14), operated as a legislative grant to the company of so much of the land of the streets, squares and public places of the city as might be found necessary to be taken and held for the purposes of the company and for the convenient use of the gas works, and when the openings where pipes may be laid are made at the places designated by the city surveyor, as provided in said charter, and they are placed there, the soil they occupy is land taken and held by the company under the provisions of the said Act of incorporation. The proper method of assessment of the pipes so laid and fixed in the soil of the streets, squares and public places in a city is that it be made separately in the respective wards of the city in which they may be actually laid, as in the case of real estate. *Consumers' Gas Company of Toronto* v. *City of Toronto*, 27 S.C.R. 453.

—Drainage, Intermunicipal — Initiation and Contribution—By-law—Ontario Drainage Act of 1873—Ontario Consolidated Municipal Act, 1892.]—The provision of the Ontario Municipal Act (55 Vict., c. 42, s. 590) that if a drain constructed in one municipality is used as an outlet, or will provide an outlet, for the water of lands of another, the lands in the latter so bene-

fited may be assessed for their proportion of the cost, applies only to drains properly so called, and does not include original water-courses which have been deepened or enlarged. If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost, a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other municipality restrained from passing a contributory by-law, or taking any step towards that end, by an action brought before the passing of such contributory by-law. *Broughton* v. *Grey and Elma*, 27 S.C.R. 495.

—Charitable Institution—Bible Society—Exemption—52 V., c. 79, s. 88 (P.Q.)]—A society organized for the sale and free distribution of copies of the Holy Scriptures, without note or comment, the rules of which preclude the directors and members from receiving any profit from its operations, while not an educational institution within the meaning of section 88 of the Montreal City Charter (52 Vict., c. 79), is entitled to exemption from ordinary and annual assessments as a "charitable institution" within the meaning of said section, notwithstanding the fact that some copies of the scriptures are sold by the society at a profit. *City of Montreal* v. *Montreal Bible Society*, Q.R. 6 Q.B. 251.

—Provincial Taxation—Assessment Act, s. 3, ss. 16 (B.C.)—Income.]—The "income" made liable to taxation *eo nomine* by the Assessment Act, C.S.B.C. 1888, c. 111, s. 3, means net income. Re *Biddle Cope*, 5 B.C.R. 37.

—Assessment—Rails, Poles and Wires of Street Railway.]—Held, on appeal from Court of Revision for the city of Toronto—per McGibbon and Dartnell, Co. JJ., (McDougal, Co. J., dissenting) that the rails, poles and wires of a street railway company, operated on the trolley system and located on a public highway, are not liable to assessment. *In re Assessment of Toronto Railway Co.*, 33 C.L.J. 75.

—Water Mains and Pipes—"Land."]—Held, following *Consumers' Gas Co., of Toronto*, v. *City of Toronto*, 27 S.C.R. 453, that the water mains and pipes of the Calgary Gas and Waterworks Co., laid within the city of Calgary, are assessable as "land." *In re Calgary Gas and Waterworks Co.*, 17 C.L.T., (Occ. N.) 309.

—Appeal—Expropriation of Lands—Local Improvements—Future Rights.]

See APPEAL, III. (*b*).

—Appeal—Jurisdiction—52 V., c. 37, s. 2 (D.)—Appointment of Presiding Officers—County Court Judges—55 V., c. 48 (Ont.)—57 V. c. 51, s. 5 (Ont.)—58 V., c. 47 (Ont.)—Statute, Construction of—Appeal from Assessment—Final Judgment—"Court of Last Resort."]—SEE APPEAL, IV.

—Covenant to Pay Taxes—Mortgage.]—See MORTGAGE, IV.

—Parochial Law—Erection of Parish—Homologation of Assessment—Rejection of Opposition—Chose Jugée—Payment of Assessment—Re-payment—Interest.]—See PAROCHIAL LAW.

—Edmonton Court of Revision—Reducing Assessment—Judicial Powers—Prohibition.]—See PROHIBITION.

—City of Montreal—Improvement of Streets—Construction of Statute—57 V., c. 57 (P.Q.)]—See STATUTE, II.

ASSIGNMENTS AND PREFERENCES.

See DEBTOR AND CREDITOR.

ATTORNEY.

See SOLICITOR.

ATTORNEY-GENERAL.

Indictable offences—Proceedings—Termination—Record of acquittal.]—In the Province of Nova Scotia it is not the practice to require the record of acquittal in proceedings relating to indictable offences to be signed by the Attorney-General. *Seary* v. *Saxton*, 28 N.S.R., 278.

—Motion to add Attorney-General as Party—Civil Suit—Final Judgment.]—See PARTIES, III.

—Railway Company—Organization of—Irregularity—Intervention of Attorney-General in the public interest—Relator—Procedure.]

See RAILWAYS AND RAILWAY COMPANIES.
" RELATOR.

AUCTIONEER.

Conversion of Goods—Chattel Mortgage.]—An auctioneer who, at the instance and on the premises of the mortgagor, sells at auction in the ordinary course the goods in a chattel mortgage, valid and in full force as regards the parties to it, and delivers possession of the goods to the purchaser, is liable to the mortgagee for conversion of the goods, although the mortgage may be void as regards creditors of the mortgagor or subsequent purchasers for value: *Cochrane* v. *Rymill*, 27 W.R. 776, 40 L.T. N.S. 744, followed. *National Bank* v. *Rymill*, 44 L.T. N.S. 767, and *Barker* v. *Furlong*, (1891) 2 Ch. 172, distinguished. *Johnston* v. *Henderson*, 28 Ont. R. 25.

BAIL.

Action against Bail—Interest.]—Held (per Forbes, Co. J.), that in an action against bail, interest on the judgment against the principal in the first suit cannot be included in the judgment against the bail: *Byron* v. *Flagg*, 18 N.B.R. 396, followed. *Keith* v. *Coates*, 17 C.L.T., (Occ. N.) 33.

—**Criminal Law — Committal for Trial — Delay in Preferring Indictment—Discharge of Bail—C. S. L. C., c. 95.**]—See CRIMINAL LAW, III.

—**Estreat—Notice—English Crown Office Rules.**]—See CRIMINAL LAW, III.

BAILEE.

Pasturage—Agister—Ordinary care and prudence.]—A bailee for hire as an agister, engages by his contract to pasture cattle, to exercise ordinary care and prudence in the keeping of them. So, where a horse was drowned in a pond or quagmire existing to plaintiff's knowledge, on the pasture ground, and the sole imprudence charged against defendant was not having fenced around it—it appearing that such places were not usually fenced—he was held not liable for the loss. *McKeage* v. *Pope*, Q.R. 10 S.C. 459.

BAILIFF.

Election Petition—Preliminary Objections—Service of Petition—Bailiff's Return—Cross-examination—Production of Copy.]—A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member, is a sufficient return. It need not state by whom the copies were certified. Arts. 56 and 78 C.C.P.—Counsel for the person sued will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence. *Beauharnois Election Case*, 27 S.C.R. 232.

BANKRUPTCY AND INSOLVENCY.

I. ASSIGNEE.

(*a*) *Generally.*

Composition Arrangement—Distinction—R.S.O., c. 124, s. 13—Penalty.]—An instrument in writing whereby a debtor transfers all his assets to an assignee for the purpose of paying a fixed sum on the dollar to the creditors, and of securing to the debtor the enjoyment of the residue, is an arrangement by way of composition, and not an absolute assignment under R.S.O. c. 124, although stated in the instrument to be under that Act; and an action for penalties against the assignee for not advertising and registering such an instrument, pursuant to that Act, will not lie. *Gundry* v. *Johnston*, 28 Ont. R. 147.

—**R.S.O. c. 124, s. 7—Creditor—Action—Fraudulent sale of assets—Assignee.**]—Section 7 of the Assignments Act, R.S.O. c. 124, applies only to transactions made or entered into by the insolvent; and a creditor of the insolvent has a right of action in his own name against the assignee to set aside a sale, by the latter, of the estate as fraudulent: *Reid* v. *Sharpe*, 28 Ont. R. 156, note, followed. *Hargrave* v. *Elliot*, 28 Ont. R. 152.

(*b*) *Remuneration.*

Assignee's Commission and Expenses—Deputy Resident out of Ontario—R.S.O. c. 124, s.s. 3., s.s. 6.]—Where an assignment for the benefit of creditors is made by a resident of Ontario to an assignee residing in Ontario, but all the works in connection with the assignment is done by the assignee's partner residing out of the Province, the assignee cannot recover as against the assignor, or retain out of his estate any commission or expenses.—*Tennant* v. *MacEwan*, 24 Ont. A.R. 132.

—**Assignment for Creditors—Assignee's Remuneration—Appeal.**]—Under the Act respecting Assignment and Preferences by Insolvent Persons, 58 Vict., c. 6 (N.B.), S., a sheriff, was appointed assignee of the estate of K. and M., insolvents. At a meeting of the creditors some time after his appointment, the assignee was voted the sum of $300 as remuneration for his services, which he refused to accept, but offered to take $500. The creditors refused to give more than $300. The assignee appealed to the judge of the County Court of the city and county of St. John, making his bill out for $823.40, to be taxed by the judge:—Held (per Forbes, Co. J.), dismissing the appeal, that the sum of $300 voted by the creditors was sufficient:—Semble, that where the assignee is a professional man, the Act contemplates that he will use his own professional skill without additional expense to the estate, and in case he should require direction or advice, he should apply to the Judge in Equity or the Judge of the County Court. Ex parte *Sturdee*, in re *Kelly*, 17 C.L.T., (Occ. N.) 65; 33 C.L.J. 125.

II. ASSIGNMENT.

—**Fraudulent Conveyance—Transfer of Assets—Fictitious Joint-Stock Company — Rights of Creditors.**]—A merchant in insolvent circumstances formed a joint-stock company, he and his wife subscribing for all the stock, except a few shares, which were allotted to employees of his, these forming the five directors. They, then as directors and shareholders, appointed him manager for five years at a salary, and all his assets were assigned to the company:—Held, that the company was the mere alias and agent of the assignor, and the assignment a fraud on his creditors, and must be set aside, subject, however, to the rights of the creditors of the company: *Solomon* v. *Solomon* (1897), A.C. 22, distinguished. *Rielle* v. *Reid*, 28 Ont. R. 497.

III. CLAIMS AGAINST ESTATE.

—**Right to Prove on Insolvent Estate—Claim "not Accrued Due"—Contract.**]—Under an assignment for the benefit of creditors under

R.S.O. c. 124, a claim on a contract to pay, at a time which was subsequent to the assignment, a fixed sum for advertising space in a newspaper, whether occupied or not, may be proved as a claim "which has not accrued due," under section 20, s.-s. 4 of the Act. *Mail Printing Company* v. *Clarkson*, 28 Ont. R. 326.

IV. Curator.

—Authority of curator—Possession of goods—Revendication—Authorization by creditors—Art. 772 C.C.P.]—The curator can, without the prior authorization of the creditors, demand to be put in possession of the property not assigned by the bankrupt and taken for this purpose, an action in revendication in the interest of the body of creditors.—The authority required by Art. 772 C.C.P. applies to proceedings for recovery of debts and other actions appertaining to the debtor. *Ross* v. *Lewis*, Q.R. 11 S.C. 533.

V. Dividend.

—Payment by assignee of debtor—Payment by delivery of goods.]—Held (per McDougall, Co. J.), that the payment of a dividend by an assignee for benefit of creditors, is not such a payment as takes the case out of the operation of the Statute of Limitations.—Money received by the holder of a note from the maker within six years from the commencement of an action therefor, in payment of goods given before that period by the maker, as security for the note, is not a payment within the meaning of the statute. *Fisken* v. *Stewart*, 33 C.L.J. 41.

VI. Fraudulent Conveyance.

—Chattel Mortgage—Assignment for Creditors—Statutory Presumption of Fraudulent Intent—54 V. (Ont.) c. 20.]—Certain creditors believing their debtor to be insolvent, but not desiring by taking a chattel mortgage to bring down upon him his other creditors, procured from him an agreement in writing to give, on default of payment or on demand, a chattel mortgage to secure the debt. About four months after, pursuant to the agreement, the debtor gave a chattel mortgage, within sixty days from the date of which he made an assignment for the benefit of his creditors:—Held, that notwithstanding the agreement, the Act 54 Vict. c. 20 (Ont.), amending the Act relating to fraudulent preference by insolvent persons, applied; that the doctrine of pressure was not applicable; and that the fraudulent intent must be presumed. *Breese* v. *Knox*, 24 Ont. A.R. 203.

See also Debtor and Creditor.
" Fraudulent Conveyances.

BANKS AND BANKING.

Bank Act—53 V. c. 31, ss. 74, 75—Security—Form C—"Negotiation"—Bankruptcy and Insolvency—Assignments and Preferences.]—*Halsted* v. *Bank of Hamilton*, 24 Ont. A.R. 152 affirming 27 Ont. R. 435 and C.A. Dig. (1896) col. 39. Affirmed by Supreme Court of Canada, December 9th, 1897.

—Mistake—Over-Credit by Bank—Change of Position—Repayment—Notice.]—The plaintiffs, under telegraphic instructions from one of their branches, telephoned from the head office to one of their sub-agencies to credit the defendant with $2,000. The sub-agency, however, by some misunderstanding, credited him with $3,000, which he drew out. The $2,000 had been paid into the branch bank in the first instance by way of an advance on the shipping bills of certain cattle bought from the defendant for about $2,800, but of this the plaintiffs had no notice. The defendant, however, refused to repay the difference between the $2,000 and the price of the cattle, on the ground that in faith of the payment to him he had allowed them to be shipped abroad, which by his agreement for sale was not to be done till payment of the price in full:—Held, that the defendant was bound to repay the excess over the $2,000. *The Bank of Toronto* v. *Hamilton*, 28 Ont., R. 51.

—Negotiable Instrument—Deposit Receipt—"Not Transferable"—Assignment of Debt.]—The words "not transferable" were printed across the face of a receipt given by the bank to the assignor of the claimant for a sum of money deposited by the former with the bank at interest:—Held, that although this prevented the instrument being considered negotiable it did not prevent the depositor from assigning the claim against the bank for the money deposited:—Quære, whether it is possible for any persons so to contract as to prevent a debt arising out of their transactions from being assignable by the creditor. *In re Commercial Bank of Manitoba, Barkwell's Claim*, 11 Man. R. 494.

—Insolvent Bank—Winding-up Act—Receiver-General—Appeal—Special Circumstances—Terms.]—See Appeal, VII.

—Discount of Note—Indorsement by Married Woman—Marchande Publique—Agency of Husband—Consideration—Right of Action.]—See Bills of Exchange and Promissory Notes, V.

—Discovery—Examination of Officers of Banking Corporation—Ont. Rule 487.

See Practice and Procedure, XII.

—Agreement by Bank with Customer—Deposits—Security for Discounts—Commercial Transaction—Mode of Proof.]—See Evidence, V.

BASTARDY.

R.S. Nova Scotia, 5th ser., c. 37—Bond—Irregularity—Liability of surety.]—By section 2 of the Nova Scotia Bastardy Act (R.S.N.S., 5th ser., c. 37), the putative father of a bastard hild, when brought before a justice of the peace, is required to enter into a bond with a surety to indemnify the poor district. The form of bond to be used is given at the end of the Act, section 13 of which provides that the form following "shall be used and adhered to as nearly as may be." A bond was taken conditioned in terms more extensive than the Act prescribed:—Held, that the liability of the surety on the bond could not be extended beyond that fixed by the statute. *Overseers of Poor* v. *Chase*, 28 N.S.R. 314.

BEHRING SEA AWARD ACT, 1894.

Behring Sea Award Act, 1894—Infraction by foreigner.]—The punitive provisions of the Behring Sea Award Act, 1894, operate against a ship guilty of an infraction of the Act, whether she is "employed" at the time of such infraction by a British subject or a foreigner. *The Queen* v. *The Ship "Viva,"* 5 Ex. C.R. 360.

—Contravention—Ignorance of locality on part of master—Effect of.]—Under the Behring Sea Award Act, 1894, it is the duty of a master to be quite certain of his position before he attempts to seal. If he is found contravening the Act, it is no excuse to say that he could not ascertain his position by reason of the unfavorable condition of the weather. *The Queen* v. *The "Ainoko,"* 5 Ex. C.R. 366.

—Maritime Law—Behring Sea Award Act, 1894—Circumstances Justifying Arrest—Burden of Proof.]—A vessel had on board, within prohibited waters, certain skins with holes in them which appeared to have been made by bullets:—Held, that this was sufficient reason for the arrest of the vessel, and that the burden of showing that firearms had not been used was imposed on such vessel. *The Queen* v. *The Ship "Aurora,"* 5 Ex. C.R. 372.

—Maritime Law—Behring Sea Award Act, 1894—Infringement—Mistake by Master.]—A master takes upon himself the responsibility of his position; and if through error, want of care, or inability to ascertain his true position, he drifts within the zone, and seals there, he thereby commits a breach of the Behring Sea Act, 1894. *The Queen* v. *The Ship "Beatrice,"* 5 Ex. C.R. 378.

BENEVOLENT SOCIETY.

Rules and Regulations—Alterations in—Sick Benefit—Reduction of.]—The plaintiff became a member of an Oddfellows' Lodge by subscription under his hand that he had examined the general laws and by-laws, and was ready and willing to yield obedience thereto. At that time there was a by-law in force fixing the amount of the weekly sick benefits payable to members, and also another by-law by which the society could repeal, suspend or amend existing by-laws by a by-law passed by a two-thirds vote. Subsequently a by-law was passed reducing the amount of the sick benefit, whereupon the plaintiff availed himself of the various appeals permitted by the constitution, and on his failing thereon, brought an action seeking a declaration that the action of the lodge was contrary to natural justice and that he was entitled to payment of the amount fixed when he became a member:—Held, that this was a matter within the competence of the society, and therefore the Court could not interfere. *Baker* v. *Forest City Lodge, I.O.O.F.*, 28 Ont. R. 238.

—"Member in good standing"—Insurance.

See INSURANCE, III.

—Benevolent Society—Rule directing payment to named beneficiaries—Certificate payable to assured's executors—Rights of creditors and legatees—R.S.O. c. 172.]—See INSURANCE, III.

BIGAMY.

See CRIMINAL LAW, I.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. ACTION ON NOTE.

Heirs of Creditor—Divisibility of Action—Production of Note.]—Each one of the heirs of the creditor of a promissory note may sue for and recover his share of it, without production of the note, and even before *partage* of the succession. *Ex parte Desharnais*, Q.R. 11 S.C. 484.

II. CONSIDERATION.

—Note of debtor—Inducement to sign composition.]—A promissory note given by a debtor to his creditor to induce the latter to sign a deed of composition is null and void, as is likewise a renewal of such note. *Bury* v. *Nowell*, Q.R. 10 S.C 537.

III. DEFENCES TO ACTIONS.

—Alteration after Maturity—Discharge of Accommodation Maker—53 V. c. 33, ss. 56, 58, 63 (D.)]—A promissory note made by two persons, one signing for the accommodation of the other, was after maturity signed by a third person:—Held, on the evidence, that the third person signed as an additional maker and not as an endorser, and that there was, therefore, a material alteration of the note discharging the accommodation maker. *Carrique* v. *Beaty*, 24 Ont. A.R. 302, reversing 28 Ont. R. 175.

—Independent Contemporaneous Agreement—Parol Evidence—Admissibility.]—It is a good defence to an action by the personal representatives of the payee against the maker of a promissory note for value received, that at the time of the making of the note an oral agreement was entered into between the payee and the maker, which has been fully performed, that if the latter would pay interest on the note, and, although not liable to do so, would support for life a relative of the former, the

note should be considered paid; and evidence to the above effect was held admissible in an action on the note brought after the complete performance of the agreement by the defendant. *McQuarrie* v. *Brand*, 28 Ont. R. 69.

—Promissory Note—Collateral Security for—Further Time—Allegation in Pleading.]—Defendant pleaded as a defence to an action on certain promissory notes that a chattel mortgage had been given and accepted as collateral security for the debt represented by the notes, but it was not alleged that, in consequence of the giving of the security, further time was allowed:—Held, that the plea was not a defence to the action on the notes:—Held, also, that the defence was properly struck out, under N. S. Order 25, Rules 2 and 3, as being bad and insufficient in law. *Arthur* v. *Yeadon*, 29 N.S. R. 379.

—Equitable set-off—Counter-Claim—Trusts and Trustees.]—Action on a promissory note for $3,004.05 made by the defendant in favour of M. who indorsed it before maturity to L. and E., who in turn indorsed it to the plaintiff. Defendant paid $1,604 into Court, and as to the residue claimed pleaded that L. and E. held the note as security for $869 only, and the balance in trust for M.; that the plaintiff held the note upon the same trusts as L. and E.; that M. was indebted to the defendant in various sums, for which he claimed a set-off; that at the time of the maturity of the note M. being in insolvent circumstances and unable to pay his debts in full, and conniving with the plaintiff and L. and E. to defeat the defendant and other creditors of M., purported to execute a deed of assignment of his interest in the note in trust to pay L. and E. $200 for legal services, and also to pay the claims of several other persons named, but defendant claimed that this deed of assignment was preferential, fraudulent and void, and that it should be set aside:—Held, that the defences were bad in law; that there could be no set-off legal, statutory, or equitable as against plaintiff; and the defendants remedy, if any, was by counter-claim. *O'Brien* v. *Johnston*, 17 C.L.T. (Occ. N.) 104.

—Sale of land—Rescission—Purchase money—Deposit—Forfeiture.

See SALE OF LAND, VIII.

—Defence that Plaintiff not Legal Holder—Final Judgment—Discretion of Chambers Judge on facts before him—Payment into Court.

See PRACTICE AND PROCEDURE, XXVI.

IV. FORM.

—Promissory note—Maturity.]—A promissory note dated 7th Nov. 1895, and payable "21st November next" falls due on the 21st Nov., 1896, and not the 21st Nov., 1895. *Drapeau* v. *Pominville*, Q.R. 11 S.C. 326.

—"Bon"—Negotiability—Omission of Words "to Order"—Term of Payment—Bills of Exchange Act, s. 8, s.s. 4.]—A *bon* made payable to a party therein named is a valid promise to pay between the parties. Such a *bon* is negotiable, though the words "or order" are omitted, under section 8, s.s. 4 of The Bills of Exchange Act.—Where no term of payment is expressed a bill or *bon* is deemed to be payable on demand, under section 10 of the Act. *Désy* v. *Daly*, 3 Rev. de Jur. 492. Archibald, J.

V. PARTIES LIABLE.

—Promissory Note—Action—Suretyship—Qualified Indorsement.]—D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in possession of the firm. The notes were protested for non-payment and A., having died, R., as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action, some of the books were still in the possession of R. and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm:—Held, that the action was not based upon the real contract between the parties and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes:—Held, further, per Sedgewick, J., that neither the payee of a promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself. *Robertson* v. *Davis*, 27 S.C.R. 571.

—Assignments and preferences—Pressure—"Valuable security"—R.S.O., c. 124, s. 3, s.s. 3, s. 19, s.s. 4.]—Per Osler, J.A.—The liability of the indorser of a promissory note made by the debtor held by the creditor for part of his debt is not a "valuable security" within the meaning of sub-section 3 of section 3 of R.S.O. c. 124, and if such a note is given up by the creditor to the debtor in consideration of a transfer of goods impeached as a preference, the liability cannot be "restored" or its value "made good" to the creditor, or the indorser compelled to again indorse. Per Osler, J.A.—What is referred to in this sub-section is some property of the debtor which has been given up to him, or of which he has had the benefit; some security upon which the creditor, if still the holder of it, would be bound to place a value, under sub-section 19 of R.S.O. c. 124. *Beattie* v. *Wenger*, 24 Ont. A.R. 72.

—Division Court—Jurisdiction—Promissory Note—Interest—56 V. (Ont.), c. 15, s. 2—Abandonment of Excess—Recovery on Note—Indorsers—Sureties—Parties—Substitution of Plaintiff.]—In an action in a Division Court against the makers and indorsers of a promissory note

expressed on its face to be for $200 and interest, judgment was given for the plaintiff for $210 :—Held, that the amount was ascertained by the signatures of the defendants, and the interest accumulated on the note from the time the amount was so ascertained was not to be included in determining the question of jurisdiction, and might be recovered in addition to the claim, under 56 Vict. c. 15, s. 2 (Ont.), notwithstanding that the interest and the amount of the claim so ascertained together exceeded $200 :- Held, also, that the judge had power, under Revised Rule 7 of the Division Courts, to permit the abandonment of the excess caused by a claim for notarial fees :—Held, also, that upon payment of the amount of the note by the plaintiff to the original holder, the plaintiff being liable as indorser to such holder, the plaintiff became entitled to the note and to enforce his rights against the other parties to it; and, as it appeared that two of the defendants had indorsed the notes as sureties to the plaintiff for the makers, he was entitled to recover against them, although the note was made payable to his order : *Wilkinson* v. *Unwin*, 7 Q.B D. 636. followed :—Held, lastly, that Revised Rules 211, 216 and 224 of the Division Courts authorized the judge to substitute the name of the plaintiff for that of the original holder of the note as plaintiff in the action. *Pegg* v. *Howlett*, 28 Ont. R. 473.

—**Insolvent Estate—Valuing Securities—Accommodation Maker of Promissory Note — "Only Indirectly or Secondarily Liable."**] - A partner who has individually joined as a maker in a promissory note of his firm for their accommodation is not "indirectly or secondarily liable" for the firm to the holder within the meaning of 59 Vict., (Ont.,) c. 22, s. 1, s.s. 1, but is primarily liable, and in claiming against his insolvent estate in administration the holder need not value his security in respect to the firm's liability. *Bell* v. *The Ottawa Trust and Deposit Company*, 28 Ont. R. 519.

—**Presentment for payment—Reasonable time—Bills of Exchange Act, 1890, 53 V., c. 33.**] - By section 45 (b) of The Bills of Exchange Act, 1890, (53 Vict., c. 33) where a note is payable on demand, presentment for payment must be made within a reasonable time after its indorsement, in order to make the indorser liable :—Held, that where a demand note was made and indorsed on Aug. 25th, 1891, and only presented to the indorser and payment demanded on May 7th, 1894, the maker having been in the holder's employment nearly all the intervening time until his death before the presentment, and never having paid anything on account, the indorser was not liable. *Banque du Peuple* v. *Denicourt*, Q R. 10 S.C., 428.

—**Husband and Wife—Marchande Publique—Indorsement of Wife by Husband as her Agent—Discount—Consideration.**]—A bank discounted a note signed by one Marcotte, and indorsed by M., *marchande publique*, through her husband, who was her agent in her business. The proceeds of the discount were entered in the books of the bank, to the credit of the maker, and M. received no consideration for indorsing :—Held, that the indorsement of the note was beyond the authority of the husband, and the bank having paid the proceeds to the maker, who had no connection with the business of M., and the note having been indorsed not by the latter but by her agent, could maintain no action against M., it being proved that she received no consideration. *Banque Ville Marie* v. *Mayrand*, Q.R. 10 S C 460.

—**Promissory Note—Holder for Collection only—Compensation.**]—Compensation does not take place between a debt which is clear and liquidated and a promissory note of which the person offering it in compensation is holder for collection only. Per Taschereau, J., (dissenting) : A holder for collection only who has derived his title through a holder in due course, and who has been a party to no fraud or illegality affecting the note, has all the rights of a holder in due course as regards the maker and all parties to the note prior to such holder. *Laforest* v. *Inkeil*, Q.R. 11 S.C. 534.

VI. Presentment and Notice of Dishonour.

—**Note payable at particular place—Presentment—Duty of maker.**]—A promissory note payable at a particular place need not be presented there at maturity in order to charge the maker, although there are funds to meet it, and the Bills of Exchange Act, 1890, has made no difference in this respect. The duty of the maker of such a note is not only to have sufficient funds at the place of payment at maturity, but also to keep them there until presentment :—Semble (per Armour, C.J.), that the only effect of nonpresentation before action, when sufficient funds have been kept at the place of payment, is to disentitle the plaintiff to costs, *The Merchants Bank of Canada* v. *Henderson*. 28 Ont. R., 360.

—**Promissory note—Presentment—Statement of claim—Amendment—Affidavit—"Duly presented for payment."**

See Pleading, I.

VII. Procuration.

—**Promissory Note—Signature as Agent or Attorney—Bills of Exchange Act 53 V. c. 33, s. 26—Parol Evidence.**]—Where the maker of a promissory note adds to his signature the word "attorney" without indicating the name of any principal for whom he signs, he is not exempt from personal liability —Parol evidence cannot be given to establish an obligation different from that expressed on the face of the note. *Hamilton* v. *Jones*, Q.R. 10 S.C. 496.

VIII. Renewal.

—**Promissory Note—Verbal Agreement to Renew—Proof.**]—An alleged verbal agreement to renew a promissory note cannot be proved by parol testimony —Even admitting such evidence, the alleged promise was not proved in the present case. *Letellier* v. *Cantin*, Q.R. 11, S.C. 64.

IX. Unmatured Note.

—Attachment of Debts—Rule 497—Promissory Note not Due.]—A promissory note not yet due constitutes a debt owing and accruing, and is attachable to answer a judgment debt within the meaning of Rule 497. *Girard* v. *Cyrs*, 5 B.C.R. 45.

BILL OF LADING.

Carrier — Condition — Notice of Loss.]—The condition on the back of a railway bill of lading that "no claim for damage for loss of or detention of any goods for which the company is accountable shall be allowed unless notice in writing and the particulars of the claim for said loss, damage or detention are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the arrival of the goods, in respect of which said claim is made or delivered," is a reasonable condition, and if the terms be not complied with, the value of goods lost on the railway cannot be recovered. *Gélinas* v. *Canadian Pacific Railway Co.*, Q.R. 11 S.C. 253.

—Agreement as to trial of claims—Jurisdiction — Exterritoriality — Service of Writ — "Short delivery"—Non-delivery — Constitutional Law.]—Plaintiffs brought an action in the Supreme Court of Nova Scotia against defendants who resided in England, in Scotland, and in the Province of Quebec, on account of the non-delivery of certain goods, which were shipped in Liverpool, England, to be carried by defendants' steamer and delivered to plaintiffs at Halifax, N.S. There was a clause in the Bill of Lading, providing that "claims, if any, for loss by damage, short delivery, or any other cause shall at the option of the ship's owner be settled direct with the agents of the line in Liverpool, according to British law, with reference to which this contract is made, to the exclusion of proceedings in any other country." Plaintiffs obtained an *ex parte* order for service upon defendants out of the province. This order having been set aside with costs by order of a Judge at Chambers:—Held, reversing the decision of the Chambers Judge that as there was an uncertainty as to the sufficiency of the words of the contract to exclude the jurisdiction of the court, the proper course was to allow the service of the writ abroad, leaving the meaning of the provision to be determined later:—Held, also, that plaintiffs were entitled to their order with costs.—(Per Henry, J.), That where there are two courts of co-ordinate jurisdiction, one of which is a foreign court, and the parties contract that the foreign court shall have exclusive jurisdiction, they may be held to their agreement.—That the words of the contract as to "short delivery," etc., were sufficient to cover a claim for the non-delivery of the whole of the goods shipped.—That under the provisions of the British North America Act, s 92, s.s. 13 and 14, referring to property and civil rights and the administration of justice, including procedure in civil matters, it is within the powers of a provincial legislature to authorize service upon defendants resident abroad. *Stairs* v. *Allan*, 28 N.S.R. 410.

BILLS OF SALE AND CHATTEL MORTGAGES.

I. Affidavit of Bona Fides.

Chattel Mortgage—Affidavit of Bona Fides—Money Not Actually Advanced.]—The affidavit of *bona fides* attached to a chattel mortgage, duly executed and filed, stated that the mortgagor was justly and truly indebted to the mortgagee in the named sum. A loan was made in good faith upon the security of the chattel mortgage, but the money was not paid over for five days after the affidavit was made. In an action by the assignee for the benefit of creditors of the mortgagor under a subsequent assignment, to set aside the mortgage:—Held, that the mortgage was valid. *Martin* v. *Sampson*, 24 Ont. A.R. 1 reversing 27 Ont. R. 545.

—Bill of Sale—Affidavit—Forms of—Words "as nearly as may be"—R.S. (5th series), c. 92, ss. 1, 4, 5, and 11.]—A bill of sale was given by P. to plaintiff (1) for the purpose of securing repayment of a debt of $50 (2) for the purpose of securing plaintiff against liability as indorser on two promissory notes. The affidavit made in connection with the bill of sale was framed to cover both transactions, but was not in accordance with the requirements of the Act with respect to the debt intended to be secured, and could be made to apply to the liability as indorser, against which it was intended to protect plaintiff, only by striking out certain words, and treating them as surplusage, and by making other alterations:—Held, following *Archibald* v. *Hubley*, 18 S.C.R. 116; *Phinney* v. *Morse*, 22 S.C.R. 563; and *Reid* v. *Creighton*, 24 S.C.R. 69, that the affidavit was not "as nearly as may be" in accordance with the forms prescribed by the statute R.S. (5th series), c. 92, ss. 4, 5, and 11:—Held, also, that, under the decisions referred to, the court had no power to strike out words, or to make other alterations, with the view of making the affidavit effective as to the liability as indorser:—Held, also, that the necessity for an affidavit was not dispensed with by the fact that the instrument was not intended exclusively for the purposes mentioned in sec. 4 or sec. 5, but combined them both. Per Weatherbe, J., dissenting:—Held, that as the instrument was not one that came within sec. 4 or sec. 5 of the Act, it was not one in respect to which an affidavit or affidavits could be framed under the decisions referred to:—Held, also, that the instrument was clearly covered and protected by section 1 of the Act, and having been filed with the registrar of deeds, as required by that section, was ample to authorize judgment for plaintiff. *Lantz* v. *Morse*, 28 N.S.R. 535.

—**Consideration—Securing Mortgagee against Indorsements—53 V., c. 5, s. 6 (N.B.)—Compliance with.**]—Where a mortgage of goods is given to secure the mortgagee against the indorsement of bills and notes, the affidavit accompanying it is insufficient if it does not state the amount of the bills or notes indorsed or to be indorsed, nor the amount of liability intended to be created by the mortgage. Registry of Bills of Sale Act, 53 Vict., c. 5, sec. 6 (N.B.) *Levasseur* v. *Beaulieu*, 33 N.B.R. 569.

II. Application of Proceeds.

—**Chattel Mortgage — Partnership — Estoppel Practice—Counterclaim—Issues involving same Matters — Abandonment.**]—M. & C., while carrying on business as partners, gave a chattel mortgage to plaintiffs as security for goods supplied to them. Subsequently M. retired, leaving the assets of the firm in the hands of C., who gave a further chattel mortgage to plaintiffs, covering the goods included in the former mortgage as well as goods supplied to C. personally after M.'s retirement;—Held, that neither M. nor C. was estopped from claiming to have the proceeds of the sale of goods covered by the first mortgage applied in reduction of the partnership debt, as security for which that mortgage was given. Defendants counter-claimed, reciting the first chattel mortgage, and asking that an account might be taken of the proceeds, and of the expenses in connection with the sale, alleging that the expenses were in part unauthorized, disputing the appropriation of proceeds to C.'s account, and claiming payment of the balance of proceeds of the sale to defendants, after deducting the amount due to plaintiffs:—Held, that the circumstances detailed would have justified a suit in equity under the old practice, and therefore justified a counter-claim now, and that the counter-claim was the correct mode of asking to have the account taken. *Fisher* v. *McPhee*, 28 N.S.R. 523.

III. Change of Possession.

—**Preference—Agreement to give Chattel Mortgage—Change in Statute law—Registration of Agreement—59 V., (Ont.) c. 34.**]—An unregistered agreement by a debtor to give to his creditor upon default in payment, or upon demand, a chattel mortgage upon his "present and future goods and chattels" confers no title upon the creditor as against the debtor's assignee for the benefit of creditors, who takes possession before a chattel mortgage is given: *Kerry* v. *James*, 21 Ont. A.R. 338, considered. After judgment in the assignee's favour the Act 59 Vict., (Ont.) c. 34, was passed, and the agreement in question was registered:—Held, that this did not validate it. *Hope* v. *May*, 24 Ont. A.R. 16.

—**Auctioneer — Conversion of goods — Chattel Mortgage.**]—An auctioneer who at the instance and on the premises of the mortgagor, sells at auction in the ordinary course the goods in a chattel mortgage, valid and in full force as regards the parties to it, and delivers possession of the goods to the purchaser, is liable to the mortgagee for conversion of the goods, although the mortgage may be void as regards creditors of the mortgagor or subsequent purchasers for value: *Cochrane* v. *Rymill*, 27 W.R. 776; 40 L.T.N.S. 744, followed; *National Bank* v. *Rymill*, 44 L.T.N.S. 767, and *Barker* v. *Furlong* (1891) 2 Ch. 172, distinguished. *Johnston* v. *Henderson*, 28 Ont. R. 25.

IV. Crops.

—**Growing Crops—Transfer—Apparent Possession — Mortgagee and Execution Creditor — Absence of Fraud.**]—Plaintiff company held two mortgages of the real estate of McD., and also bills of sale covering his personal property. While these were outstanding plaintiff took from McD. a transfer of crops growing or standing upon the land covered by the mortgages, of which he remained in occupation, and entered into an agreement with McD. to cut and make the hay, and store it in barns on the premises, plaintiff paying the men employed to assist in the work. After the hay was cut and stored plaintiff took formal possession of it, the evidence of possession being clear:—*Held*, that plaintiff was entitled to the hay as against defendant, levying subsequently under execution, notwithstanding that transfer was not registered.—*Held*, also, there being a valid consideration and no fraud, that the question of apparent possession, or visible change of possession, or merely formal possession, did not arise, the Nova Scotia statute in that particular, differing substantially from the English and Ontario Acts. *Eastern Canada Savings and Loan Co.* v. *Curry*, 28 N.S.R. 323.

—**R.S.M., c. 10, s. 4—57 V., c. 1, s. 2—Growing Crops—Mortgage—Affidavit of Bona Fides—Forms—Interpretation Act, R.S.M., c. 78, s. 8, s.s. (uu) — Sheriff — Evidence — Judgment — Appeal from County Court—Q.B. Act, 1985, Rule 168, (b), (d).**]—In an action by the plaintiff claiming damages from the defendant as sheriff for the seizure of the grain grown on the lands of one Murray, under an execution in his hands, the plaintiff claimed the grain by virtue of a chattel mortgage for the purchase money of seed grain supplied to Murray in the spring of the same year. Murray, being in want at the time, applied to the plaintiff who gave him an order on a firm of grain dealers for the amount required, and took the mortgage in question, which was completed and registered before Murray actually got the grain. The dealers afterwards supplied the grain to Murray and charged the price to the plaintiff, who paid it. The affidavit of *bona fides* attached to the mortgage contained a statement that the mortgage was taken "for seed grain," but did not contain the full statement required by the statute, 57 Vict. c. 1, s. 2, "that the same is taken to secure price of seed grain." The defendant gave no evidence of the judgment against Murray, on which the execution in his hands had been issued:—Held, that the chattel mortgage had really been taken to secure the purchase price of seed grain within the meaning of the statute, and not merely as security for money advanced by the plaintiff to Murray to purchase the grain, and was, there-

fore, good and valid as against the mortgagor, and that no affidavit or registration was necessary to protect the plaintiff's rights as against the mortgagor:—Held, also, that in a case like the present where some third party brings an action against the sheriff for seizure of goods under an execution, and establishes a *prima facie* case of title as against the execution debtor, the sheriff must prove a judgment as well as an execution: *White* v. *Morris*, 11 C.B. 1015; *McLean* v. *Hannon*, 3 S.C.R. 706, and *Crowe* v. *Adams*, 21 S.C R. 342, distinguished:—Held, that notwithstanding section 8, ss. (uu) of the Interpretation Act, R.S.M., c. 78, the affidavit of the mortgagee did not sufficiently comply with the statute, and that the mortgage would, therefore, not have been sustained as against the defendant representing a creditor if he had given evidence of the judgment. Per Killam, J.:—There may be a right of action, and the relation of debtor and creditor may exist for the price of goods, although the property has not passed, if the parties have made an agreement to that effect: *Waterous* v. *Wilson*, 11 Man. R., at p. 295; C.A. Dig. (1896) col. 81, referred to. *Kirchhoffer* v *Clement*, 11 Man. R. 460.

—Mortgage of "Growing Crops" and Crops to be Grown — Equitable Security — Bills of Sale Act—R.S. Man. c. 10, ss. 3 & 4—57 Vict. (M.) c. 1. s. 2.]—Interpleader issue between plaintiffs and Massey-Harris Co. claiming under a chattel mortgage made in 1893, by which defendant agreed that all the crops of grain which the mortgagor might from time to time grow on the land until the whole principal and interest secured by the mortgage should be paid, should be included in the mortgage, and that the mortgagor would from time to time upon request execute such further mortgage or mortgages of such crops to the intent that such crops should be effectually held as a security for the payment of the debt thereby secured The plaintiffs' execution was not placed in the bailiff's hands until February, 1896, and under it the defendant's crops grown in 1896 had been seized:—Held, that while the instrument relied on could give no title at law by itself, yet a court of equity would enforce the agreement to give the further security, and, considering that done which ought to be done, would attribute the title to the mortgagee, and restrain others from interfering with the property to his injury, and that such a title can be asserted in an interpleader issue against an execution creditor, and that section 4 of the Manitoba Bills of Sale Act (R.S. Man. c. 10) had not the effect of doing away with the equitable principle referred to which existed independently of the statute:—Held, also, following *Clifford* v. *Logan*, 9 Man. R. 423, that an instrument creating only an equitable charge of this nature upon property not at the time in existence did not, before the Act 57 Vict. (Man.) c. 1, s. 2, come within the third section of the Bills of Sale Act. so as to require registration to make it operative as against an execution creditor, and the Act of 1894 repealing section 4 of the Bills of Sale Act, and substituting a new sub-section, did not affect a prior existing instrument. *Bank of British North America* v. *McIntosh*, (*Massey-Harris Co., Claimants*) 11 Man. R. 593.

V. Impeachment.

—R.S. Nova Scotia 5th ser. c. 92, s. 3—Conflict of Laws—Contract made in one Province for Purchase of Goods in Another — Assignment for Creditors.]—M. purchased from plaintiffs, in Ontario, certain machinery for his factory in Nova Scotia under agreement in writing signed in Nova Scotia, whereby M. agreed to pay for the machinery in certain instalments and that until the whole amount of the purchase money was paid the title to the machinery should not pass from plaintiffs, and that it should not be removed from the premises without plaintiff's consent, and that in case of default plaintiffs should be at liberty to enter and take possession. The machinery was shipped to M. from Ontario and the first cash payment was made as agreed, but before any of the further payments had been made M. made an assignment for the benefit of his creditors to defendant, under which the latter took possession of the machinery. Before the assignment was actually executed plaintiffs served M. with a demand of the possession of the property under the terms of the agreement, and a similar demand was made upon the defendant assignee:—Held, that the provisions of the Bills of Sale Act were not applicable, the subject matter of the contract being property in Ontario, where the contract was made, and brought into Nova Scotia subsequently.—Per Meagher, J., assuming that the agreement came within the purview of the statute, defendant had not brought himself within the class of persons against whom the statute declared such an agreement to be void. Further, that M. not being the owner of the property, but merely having possession under an agreement, which enabled him to acquire title on making payments as agreed, the machinery would not pass to defendant under an assignment which merely purported to transfer the personal property of M., and went no further. *McGregor* v. *Kerr*, 29 N.S.R. 45.

—Consideration—Securing Mortgagee against Indorsements—53 V. c. 5, s. 6 (N.B.)—Compliance with.]—By 53 Vict. c. 5, s. 6 (N B.), relating to registry of Bills of Sale, a mortgage of goods and chattels for securing the mortgagee against the indorsement of bills or notes must set forth, by recital or otherwise, the terms, nature and effect of the agreement and the amount of liability intended to be created. Held, that a mortgage not complying with this provision, or showing the amount of the bills or notes indorsed by the mortgagee, is void as against execution creditors of the mortgagor. *Levasseur* v. *Beaulieu*, 33 N.B.R. 569.

—Husband and Wife—Legacy—Advance to Husband—Bill of Sale.]—See Husband and Wife, V.

VI. Renewal.

—Chattel Mortgage—Renewal.]—Every statement made in the renewal of a chattel mortgage must show all payments made on account of the mortgage since the date of the mortgage. It is not sufficient to state only the payments in the year to which the statement refers. (Per Ketchum, Co. J.) *Kerr* v. *Roberts*, 33 C. L.J. 695; 17 C.L.T. (Occ. N.) 337.

VII. Security for Money.

—Security for Money—R.S. Man. c. 10, ss. 2 & 3.] —If the transaction between the bargainor and bargainee in a bill of sale filed in apparent compliance with the Bills of Sale Act, R.S.M. c 10, s. 2, is really a transfer to the latter by way of security only for the repayment of money, and not an absolute sale of the goods and chattels comprised therein, the bill of sale in the absence of immediate delivery, and actual and continued change of possession, will be held void under that section: *Matheson* v. *Pollock*, 3 B.C.R. 74 and *Bathgate* v. *Merchants' Bank*, 5 Man. R. 210 followed. *Boddy* v. *Ashdown*, 11 Man. R. 555.

BON.

Negotiability—Omission of words "to order"—Term of payment—Bills of Exchange Act, s. 8, s.s. 4 and s. 10.

See Bills of Exchange and Promissory Notes IV.

BOND.

Appeal Bond—Construction—Sureties.

See Appeal, IX.

—Appeal Bond—Condition to "Effectually Prosecute"—County Court Judge—Order for Judgment.]—See Appeal, IX.

BORNAGE.

Agreement Respecting Lands—Boundaries—Referee's Decision—Arbitration—Arts. 941-945 and 1341 et seq. C.C.P.]—See Arbitration and Award, IV.

—Costs of Action—Art. 504 C.C.]—See Costs, IV.

BOUNDARIES.

Division Line — Encroachment — Action for Demolition.]—See *Cusson* v. *Delorme*, Q.R. 10 S.C. 329 reversed by Court of Queen's Bench, 6 Q.B. 202, restored by Supreme Court of Canada, Dec. 9th, 1897.

—Appeal—Action en Bornage—Future Rights—Title to Lands—R.S.C. c. 135, s. 29 (b)—54 & 55 V. c. 25, s. 3—56 V. c. 29, s. 1.

—See Appeal., III (*b*).

—Boundary Marks — Possessory Action — Delivery of Possession—Vacant Lands.

See Evidence, XII.

BRIEF.

Will — Appeal — Executor's Costs — Watching Brief.]—See Will, V.

BROKER.

—Sale of Shares—Undisclosed Principal—Marginal Transfer—Principal and Agent—Indemnity.]—See Principal and Agent, V.

BUILDING SOCIETY.

Participating Borrowers—Shareholders—C. S. L.C. c. 69—42 & 43 V. c. 32 (Q.)—Liquidation—Expiration of Classes—Assessments on Loans—Notice of — Interest and Bonus—Usury Laws—C.S.C. c. 58—Art. 1785 C.C.—Administrators and Trustees—Sales to—Prête-nom—Art. 1484 C.C.]—S. applied to a building society for a loan of $3,500 which was subsequently advanced to him upon signing a deed of obligation and hypothec submitting to the conditions and rules applicable to the society's method of carrying on their loaning business and declaring that he had become a subscriber for shares in the company's stock for an amount corresponding to the amount of the loan, namely 70 shares of the nominal value of $50 each in a class to expire after 72 monthly payments, or in six years from the date of its commencement (July, 1878), this term corresponding with the term fixed for the repayment of the loan. He thereby also agreed to make monthly payments of one per cent. each upon the stock and that the loan should be repaid at the expiration of the class, when, upon the liquidation of the business of that class, members would be entitled to the allotment of their shares subscribed as paid up, partly by monthly instalments and partly by accumulated profits to be derived from whatever moneys had been paid in and invested for the benefit of that class, at which time whatever he might be so entitled to receive in shares of stock should be credited towards the reimbursement of the loan. He further obliged himself to pay, as interest and bonus, the additional sum of one per cent. upon the loan by similar monthly instalments during the time it remained unpaid. S. paid all the instalments by semi-annual payments of $420 each until 1st May, 1884, making a total of seventy monthly instalments of $70 each, leaving two more instalments of each kind still to become due before the date originally fixed for the termination of his class. The society went into liquidation under the provisions of 42 & 43 Vict., c. 32 (P.Q.) in January, 1884, prior to A.'s last payment and about six months before the date fixed for the expiration of his loan. In October, 1884, the liquidators of the society, in the exercise of the powers vested in the directors under the deed and the society's regulations, passed a resolution declaring a deficit in the business of the class to which A. belonged, and, in order to provide the necessary funds to meet the proportion of deficit attributed as his share, they thereby exacted from him a further series of twenty-eight monthly payments in addition to the seventy-two instalments contemplated at the time of the execution of the deed. Subsequently (in 1892), the plaintiff, as transferee of the society, brought action for the two original instalments remain-

ing unpaid and also for the amount of the twenty-eight additional monthly payments upon the loan and the subscription of shares:—Held, reversing the judgment of the Court of Queen's Bench, that the subscription for shares and the obligation undertaken in the deed constituted, upon the part of the borrower, merely one transaction involving a loan and an agreement to repay the amount advanced with interest and bonuses thereon amounting together to a rate equivalent to interest at twelve per centum per annum on the amount of his loan. That the contract made by the building society stipulating that they were to receive such rate of interest and bonus, equivalent to a rate of twelve per centum per annum on the amount so loaned by the society, was not a violation of any laws respecting usury in force in the Province of Quebec. That the fact of the building society going into liquidation had the effect of causing all classes of loans then current to expire at the date when the society was placed in liquidation, notwithstanding that the various terms for which such classes may have been established had not been fully completed. That under the provisions of the statute, 42 & 43 Vict. c. 32, liquidators have the same powers in regard to the determination of the affairs of expired classes, and to declare deficits therein and to call for further payments to meet the same, as the directors of the society had while it continued in operation. That the notice required by the twenty-first section of the Act, 42 & 43 Vict. c. 32, does not apply to cases where liquidators have determined a loss upon the expiration of a class and required the full amount exigible upon loans to be paid by borrowers. That, notwithstanding that the liquidation proceedings deprived the directors of the exercise of their powers as to the determination of the condition of the affairs of a class and the exaction of further payments when exigible in such cases on the expiration of a class, the resolution of the liquidators determining a deficit in the borrower's class and requiring full payment of all sums exigible under his deed of obligation, was sufficient to constitute a valid right of action against the borrower for the amount of the balance of principal money loaned, together with the interest and bonus instalments remaining due thereon according to the terms and conditions of his deed of obligation:—Held, further, affirming the decisions of both courts below, that in an action where no special demand to that effect has been made, the court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of article 1484 of the Civil Code.—*Guertin* v. *Sansterre*, 27 S.C.R. 522.

CADASTRAL PLANS.

Evidence—Admissions—Arts. 1243-1245 C.C.]—Statements entered upon cadastral plans and official books of reference made by public officials and filed in the Lands Registration Offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognizant thereof at the time the entries were made. *Durocher* v. *Durocher*, 27 S.C.R. 363.

CANADA TEMPERANCE ACT.

I. Compounding Offences.

Money Paid to Constable to Secure Release from Arrest—Recovery of.]—Plaintiff, who was arrested under a warrant, for a violation of the Canada Temperance Act, being unwilling to be conveyed from his home to the place of trial, paid the constable who arrested him $30, which was received by the constable "on and towards the fine," and paid over by him to P., one of the defendants, a justice who happened to be in M.'s office at the time. In an action against the constable and the justice who received the money, the defences relied on were (1) that the money was paid as bail to guarantee the plaintiff's appearance at the trial; (2) that it was paid to compromise and settle the offence charged, and (3) that plaintiff failed to appear. No evidence was offered to support these pleas:—Held, that the plaintiff was entitled to recover back the money so paid. *Richards* v. *Taylor*, 28 N.S.R. 311.

II. Information.

—Information—Alteration in—Re-swearing—Waiver—Conviction—Omission—Amendment.]—An information for a violation of the Canada Temperance Act, purported to be made by "J.M.B." but was signed and sworn to by "A.W.M." At the opening of the investigation the magistrate, in the presence of "A.W.M." erased the words "J.M.B," and wrote over them the words "A.W.M." Defendant's counsel raised the objection that the information having been amended should be resworn. This was not done, and the trial was proceeded with:—Held, that the information was bad, not having been resworn after the making of the alteration,—That the objection having been taken and noted, was not waived by defendants going to trial:—Held, also, that the further objection to the conviction that it contained no provision as to costs of distress and conveying defendant to jail, was proper matter for amendment. The *Queen* v. *McNutt*, 28 N.S.R. 377.

—Information not sworn to—Validity—Criminal Code.]—Neither under the provisions of the Canada Temperance Act nor the Criminal Code is it necessary that the information upon which a summons is issued, charging an offence against the second part of the first-mentioned Act, be sworn to. *The Queen* v. *Wm. McDonald*, 29 N.S.R. 35.

III. Jurisdiction.

—Summary Conviction—Stipendiary Magistrate—Territorial Jurisdiction—Warrant of Commitment—Statute Defining Municipalities—Judicial Notice—Habeas Corpus—Jurisdiction of Supreme Court of Canada—R.S.C. c. 135, s. 32.

See Habeas Corpus.

IV. SUMMONS.

—Certiorari—Service of Summons—Proof of.]—A copy of the summons was left with an adult person at the defendant's residence. There was no proof before the magistrate that this adult person was an inmate of the defendant's last or usual place of abode, or that any effort had been made to serve the defendant personally with a copy of the summons;—Held, that the service was insufficient.—The court refused to admit evidence to supplement that given before the magistrate. *In re Barron*, 33 C.L.J. 297. (Sup. Ct. P.E.I.)

V. WARRANT.

—Warrants for the Destruction of Liquors—Application to Quash.]—Where two warrants for the destruction of intoxicating liquors were in the same form as that under which the defendant justified in the case of *Sleeth* v. *Hurlburt*, 25 S.C.R. 620, and which was held good by the Supreme Court of Canada, an application to quash was dismissed with costs. *The Queen* v. *Woodlock*, 29 N.S.R. 24.

VI. WITNESS.

—Erroneous Ruling by Magistrate as to Question to Witness—Review by Court of Appeal—Costs.]—On a prosecution for a breach of the Act, the defendant was called as a witness on his own behalf, and his counsel proposed to ask him the question: "Did you ever sell liquor to C.D.?" This question was objected to and the magistrate declined to receive it:—Held, that this was at most an erroneous ruling which the Court would not review:—Held, also, that the ground that the conviction did not award costs of distress, under recent decisions, was not open to defendant. *The Queen* v. *Geo. McDonald*, 29 N.S.R. 33.

—Inducing witness to absent himself from trial—C.T.A., s. 21—Criminal Code, s. 154.]—Defendant was convicted in a summary way before two Justices of the Peace under section 21 of the Canada Temperance Act for tampering with a witness subpœnaed on the trial of a charge of violating the second part of said Act, by endeavoring to induce such witness to absent himself from the trial:—Held, affirming the conviction and dismissing the appeal with costs that the special provision contained in the section of the Act under which the conviction was made, was not repealed by the Criminal Code section 154, or by other provisions of the Code. *The Queen* v. *Gibson*, 29 N.S.R. 88.

CAPIAS.

Affidavit for—Acts of Secretion—Particulars.]—Where a writ of capias is issued on an affidavit alleging that defendant has secreted his property with intent to defraud creditors, the defendant, before filing his contestation of said writ, is entitled to particulars as to the time, place and circumstances of the act or acts of secretion referred to. *Archer* v. *Douglass*, Q.R. 10 S.C. 42.

—Amount of Debt—Transfer of Claim of Third Party.]—C., a creditor of B., for a sum less than $40, procured the transfer to himself from a third party of another claim of $44 against B., and then caused the arrest of the latter on a writ of *capias* upon declarations of departure made by B. before the second debt had been so transferred. It was proved, moreover, that such debt had been transferred to C. for collection only:—Held, that under the circumstances C. was not a creditor of B. for a sum sufficient to enable him to arrest B. on *capias*. *Cardinal* v. *Brodeur*, Q.R. 11 S.C. 29.

—Arrest of Debtor—Affidavit—"Unless he be Arrested"—Order 44 R. 1 (N.S.)]—See DEBTOR AND CREDITOR, II.

—Judicial Abandonment—Art. 764 C.C.P.]—See JUDICIAL ABANDONMENT.

—Fraudulent Deterioration of Mortgaged Land—Affidavit—Allegation as to Damages—Arts. 2054, 2055 C. C.

See PRACTICE AND PROCEDURE, II.

—Justice's Civil Court—Capias—Jurisdiction—Particulars—Indorsement Service.]—See PRACTICE AND PROCEDURE, VIII.

CARRIERS.

Express Company—Profession of Carrying—Discrimination in Customers—Charges.]—An express company is not bound to carry except according to its profession, and is entitled to discriminate as to its customers, and is not confined by any rule or regulation as to the charges it may make, providing they are reasonable.—An action by a rival company which collected together small parcels for the carriage of which is charged a rate much smaller than the defendant, an express company, did for simple parcels, packed them together in one large parcel, and sought to compel the defendant, at great loss, to carry such parcel by size and weight rate, was dismissed. *Johnson* v. *The Dominion Express Company*, 28 Ont. R. 203.

—Express Company—Risk of Loss—Negligence.]—When goods are accepted by an express company, at owner's risk the shipper takes all risks of breakage, loss or damage, except when caused by the negligence of the carrier. *Pigeon* v. *Dominion Express Co.*, Q.R. 11 S.C. 276.

—Negligence—Care of Passenger's Baggage—Condition on Ticket for Non-responsibility—R.S.C. c. 82 (2).]—See NEGLIGENCE, X.

CERTIORARI.

Illegal Evidence—Erroneous Admission—Trial Judge.]—The erroneous admission of illegal evidence by a Commissioners' Court constitutes a mere *mal jugé* insufficient to give right to *certiorari*. *Ex parte Desharnais*, Q.R. 11 S.C. 484.

—Order for —Appeal—Affidavits of Justification —Nova Scotia Crown Rule 29.

See APPEAL, IV.

— Nova Scotia Liquor License Act, 1895 — "Screens"—Regulation of Sale — Certiorari— Power to Grant where no Affidavit produced denying Violation.

See LIQUOR LICENSE.

—Certiorari—Jurisdiction of County Judges to Issue.

See PRACTICE AND PROCEDURE, IX.

—Order for—Setting Aside—Preliminary Requirements—Proof of Formal Conviction—N.S. Crown Rule 31.

See PRACTICE AND PROCEDURE, IX.

CHAMPERTY.

Will—Sheriff's deed—Proof of heirship—New trial.]—See EVIDENCE, X.

CHARITABLE INSTITUTION.

Exemption from Taxes—Bible Society—Montreal City Charter, 52 V. c. 79 s. 88 P.Q.

See ASSESSMENT AND TAXES.

CHATTEL MORTGAGES.

See BILLS OF SALE AND CHATTEL MORTGAGES.

CHOSE IN ACTION.

Parol Assignment—Validity—R.S.O. c. 122, s. 7.] *The Trusts Corporation of Ontario* v. *Rider*, 24 Ont. A R. 157, affirming 27 Ont. R. 593, and C.A. Dig. (1896) col. 55.

—Negotiable Instrument—Deposit Receipt—"Not Transferable" — Assignment of Debt.]—The words "not transferable" were printed across the face of a receipt given by the bank to the assignor of the claimant for a sum of money deposited by the former with the bank at interest:—Held, that although this prevented the instrument being considered negotiable, it did not prevent the depositor from assigning the claim against the bank for the money deposited:—Quære, whether it is possible for any persons to so contract as to prevent a debt arising out of their transactions from being assignable by the creditor, *In re Commercial Bank of Manitoba (Barkwell's Claim)*, 11 Man. R. 494.

CHOSE JUGEE.

See RES JUDICATA.

CHURCH.

Trustees — Mortgage — Covenant — Personal Liability—R.S.O. c. 237.]—The duly appointed trustees of a religious congregation to whom by that description the site for a church has been conveyed, and who by that description give to the vendor to secure part of the purchase money a mortgage with the ordinary covenant for payment, are a corporation, and are not personally liable upon the mortgage, although it is signed and sealed by them individually. *Beaty* v. *Gregory*, 24 Ont. A.R. 325, affirming 28 Ont. R. 60.

— Incumbent's Salary — Liability of Churchwardens — Voluntary Contributions.] — Where the free pew system has been adopted in an Anglican church, and the voluntary contributions of the congregation are the only means of meeting the expenses, no personal responsibility rests upon the churchwardens in respect of the incumbent's salary; the measure of their liability to him is the extent to which they receive moneys whereout to pay his salary. *Daw* v. *Ackerill*, 28 Ont. R. 452.

See also PAROCHIAL LAW.

CIRCUIT COURT.

Evocation — Incidental Demand — Art. 1058 C.C.P.]—See EVOCATION.

—Jurisdiction—Revendication of Goods—Value.

See JURISDICTION.

—Jurisdiction—Action for School Fees—Hypothecary Action.]—See JURISDICTION.

—Jurisdiction—Municipal Council—Nomination of Councillors—Contestation.

See MUNICIPAL COUNCIL.

—Jurisdiction—Erection of Church — Syndics— Corporation Irregularly Constituted—Adjudication.]—See PAROCHIAL LAW.

CIVIL SERVANT.

Extra Work—Hansard Reporter—The Civil Service Act, s. 51—Application.]—The plaintiff was chief reporter of the Debates staff of the House of Commons and, as such, was paid an annual salary out of moneys voted by Parliament. He was employed by the chairman of a Royal Commission to report the evidence, and perform other work connected with the execution of the commission, at certain rates of remuneration fixed by agreement between him and the chairman—the same to be paid out of a sum voted by Parliament to meet the expenses of the Commission:—Held, that he was entitled to recover such remuneration notwithstanding the provisions of section 51 of The Civil Service Act that "no extra salary or additional remuneration of any kind whatsoever shall be paid to any deputy head, officer, or employee in the

Civil Service of Canada, or to any other person permanently employed in the public service." *Bradley* v. *The Queen*, 5 Ex. C.R. 409, affirmed by 27 S.C.R. 657.

—Taxation of Dominion Officials — Highway Labour Act (R.S.N.S., 5th ser., c. 47)—Employee on Government Railway.]—See GOVERNMENT EMPLOYEES.

CLUB.

Committeemen—Liability.]—Where credit is given to an abstract entity such as a club, the creditor may look to those who in fact assume to act for it, and those who authorized or sanctioned that being done, at all events where he did not know of the want of authority of the agent to bind the club —The liability in such cases is not several, but joint.—*Aikins* v. *Dominion Live Stock Association of Canada*, 17 Ont. P.R. 303.

—Maintenance—Proceeds of card playing—Common gaming house—Criminal Code s. 196, 58 and 59 V., c. 40.]—See GAMING.

CODE.

See STATUTES.

COLLOCATION.

See JUDGMENT OF DISTRIBUTION.

COMMERCE, ACTE DE.

Sale—Commercial Transaction.]—The sale of a carding mill between non-commercial persons is not a commercial sale.—A carding mill attached by iron and nails to the building in which it is placed is incorporated therewith and is an immovable; he who constructs it does not perform a commercial act in purchasing from a non-commercial person the different parts of the mechanism which enter into it, and it no more becomes commercial in working it than in buying the wool which it cards to sell again. *Roy* v. *Vachon*, Q.R. 11 S.C. 116, affirmed by Court of Queen's Bench, 13 Nov., 1896.

—Carriage by Sea—Agreement for.]—An undertaking for carriage by sea is a commercial matter. *Ward* v. *McNeil*, Q.R. 11 S.C. 501.

—Act of — Commercial Contract — Letting of Immovable—Evidence of Party.

See EVIDENCE, V.

—Husband and Wife—Community—Lease Signed by Wife—Sub-letting Leased Premises—Agency.

See HUSBAND AND WIFE II.

—Bank—Agreement with Customer — Deposits —Security for Discounts—Commercial Transaction—Mode of Proof.

See EVIDENCE, V.

COMMERCIAL AGENCY.

Posting Debtors—Action for Damages—Measure of Damages.]—Where a creditor, though not a subscriber to a commercial agency, employs its services to collect his debt knowing that it resorted to posting debtors for such purposes, he is liable in damages to his debtor whose name has been posted whether the debt was really due or not: *Stein* v. *Bélanger*, Q.R. 9 S.C. 535, C. A. Dig. (1896) col. 57, followed. Where the debtor in such a case sued for $5,000, and it appeared that the debt was on a judgment obtained four years before the action; that the creditor a year before had offered to take 50 per cent., and just before action did settle for that amount, and that the debtor had frequently failed to meet his obligations to creditors, and his credit was much impaired, the court only awarded him $15 damages. *Gowen* v. *Tozer*, Q.R. 10 S.C. 1.

COMMISSIONERS' COURT.

Jurisdiction—Territory—Execution of Judgments.]—The jurisdiction of a Commissioners' Court, so far as it relates to proceedings in execution of its judgments, is not limited to the territory of the judicial district in which the court is situated, but to that alone which is assigned to it by the commission constituting the court. Commissioners' Courts are tribunals of locality and not of districts. A Commissioners' Court may take cognizance of any claim of a personal nature against any debtor residing in another locality and within a circumference not exceeding five leagues, if the debt was contracted within the locality for which the court was established: and the judgment upon such claim may be executed upon the effects of the debtor in the locality in which he resides, even though such locality may be situated within a different judicial district from that for which the Commissioners' Court is established. *Gagné* v. *Beaudoin*, 3 Rev. de Jur. 327. Pelletier J.

—Procedure—Summary Proceedings — Rules of Equity.

See PRACTICE AND PROCEDURE, XLIII.

COMMITMENT.

Form of—Jurisdiction—Judicial Notice—R.S.C. c. 135, s. 32.]—See HABEAS CORPUS.

COMMON GAMING HOUSE.

Club—Maintenance—Proceeds of Card Playing —Criminal Code s. 196—58 & 59 V. c. 40.

See GAMING.

COMMUNITY.

Revendication of Assets by Widow.]—Until the appointment of her tutor to her minor child, the widow has a right, and is the sole person

who can have a right, to possess the whole assets of the community; and further, as the proprietor of one undivided half of the community in her own right, she is entitled, as against one who is not a co-proprietor, to revendicate its assets. *Boucher* v. *Héroux*, Q R 10 S.C. 484.

—Action by Wife for Legacy—Authority of Foreign Court—Proof of Foreign Law—Right of Absent Husband.

See Husband and Wife, II.

—Husband and Wife—Lease Signed by Wife—Public Trader—Sub-letting—Acte de Commerce—Agency.]—See Husband and Wife, II.

COMPANY.

I. Actions by and Against.

Foreign Incorporated Company—Contract of Agency—Breach—Jurisdiction—Service of Writ.]—Defendants contracted with plaintiffs, as their sole agents, for the sale in Nova Scotia of goods manufactured chiefly in the Province of Ontario. The contract provided, inter alia, that defendants would sell to no other parties in Nova Scotia except through plaintiffs as their agents:—Held, that a sale by defendants to parties in Nova Scotia, through agents other than plaintiffs, was a breach within the jurisdiction of the court: Held, also, that the contract was one which, according to its terms, ought to be performed within the jurisdiction.—Held, further, that although the company defendant was formed under the English Joint Stock Companies Act, with a registered office in London, the real head office of the company being in Guelph, Ont., service of a writ issued under Order XI., Rule 1, sub-section (*e*), was properly made upon the principal officers at the latter place, and there was no reason for setting it aside. *The W. H. Johnson Co* v *The Bell Organ and Piano Co.*, 29 N S R. 84.

—Award—Application to Set Aside—Offer of Limited Company to Settle Claim arising prior to Incorporation—Presumption.

See Arbitration and Award, III.

II. Directors and Officers.

—Mining Company—Authority of Manager—Burden of Proof—Apparent Scope of Authority—Things Necessary for efficient Operation of Mine.]—The defendant Company acquired a mine from B. under an agreement, by which B. agreed to transfer the mine, and to construct certain works, including a boarding-house for the men. McC., who took a sub-contract for the erection of the boarding-house, applied to plaintiffs to supply him with material for the work, which plaintiffs refused to do without the order of McQ., the defendants' manager. McQ. gave the order asked for, and the materials were thereupon supplied, and used in the erection of the boarding-house, and for other purposes of which the defendant received the benefit:—Held, per Ritchie, J., Meagher, J., concurring, dismissing an application for a new trial, that the erection of the boarding-house appearing to be necessary for the efficient operation of the mine, and plaintiffs having no knowledge of the contract with B., the mining manager had authority to bind the company:—Per Graham, E. *J.*, Henry, J. concurring, that the burden was on plaintiffs of showing authority on the part of the manager to pledge the credit of the Company for material supplied to a third person, such power not being within the apparent scope of his authority. *Miller* v. *Cochran Hill Gold Mining Co.*, 29 N.S.R. 304.

III. Dividends.

—Joint Stock Company—Payment of Dividends or Interest—Insolvent Company—Contribution between Shareholders.]—A company constituted under the Act of Quebec relating to Joint Stock Companies can only pay benefits to the shareholders, as dividends or interest, out of its actual profits and then only when its capital is intact. The recourse that the shareholders of an insolvent company can have between themselves, can only be exercised, upon the action of the Company, after all the creditors of the company have been paid. *Angus* v. *Pope*, Q.R. 6 Q.B. 45.

IV. License.

—Foreign Corporation Doing Business in Canada—License Fee—Provincial Legislation—Constitutional Law—"Doing Business"—Agent—Liability.]—By the Nova Scotia Acts of 1883, sections 23 and 24, it was enacted that every insurance company, etc., established in the city of Halifax, or having any branch office, agent or agency therein, should be assessed in respect of the real estate and personal property owned by said company, etc., in the same way as other ratepayers, and should in addition thereto, pay an annual license fee. The license fee was made payable on the 31st May in each year, and the agent of any company, etc., not incorporated by the legislature of Nova Scotia, was made personally liable for the license fee payable by the company, etc., of which he was agent. The defendants, merchants doing business in the city of Halifax, and owning real and personal estate there, were agents of the Mississippi and Dominion Steamship Co., a body incorporated in England, but not in Nova Scotia, and having its head office and chief place of business at Liverpool, G.B. The evidence showed that the business carried on by the company in Halifax, through defendants, their agents, was of a continuous character, and the defendants advertised themselves as agents, received freight money and sold tickets,

being paid a commission therefor, and that the steamers carried freight between Liverpool and Halifax and other ports in America:—Held, that the Act imposing the license fee was *intra vires* the legislature of Nova Scotia:—Held, also, that the company did business at Halifax within the meaning of the Act, and was liable to be taxed:—Held, further, that the company not being incorporated in Nova Scotia, defendants as their agents were personally liable for payment of the license fees. *City of Halifax* v. *Jones*, 28 N.S.R. 452.

V. Powers of Company.

—**Covenant — Restraint of Trade — Company — Abandonment of Corporate Powers—Practice—Injunction Damages.**]—A mutual covenant with each other by persons engaged in the same trade throughout Canada, not to carry on a certain branch of that trade for twenty years, or for such shorter time as an incorporated company which they were then uniting to form for the purpose of carrying on that particular branch of their common trade, should continue to carry it on, is good. Acting as agent or traveller dealing in clear plate-glass in the Dominion of Canada is a breach of the covenant.—Breach of such a covenant may be restrained by injunction in an action by one or more of the other parties thereto, though no actual damage is proved to have resulted from the breach.—An agreement by a company, incorporated under the Dominion Joint Stock Companies Letters Patent Act for the purpose of manufacturing, importing, and dealing generally in mouldings, picture frames, mirrors, plate-glass, sheet-glass, etc., for the sale of its stock of plate-glass to a company to be formed with a covenant not to compete in the plate-glass business with that company for twenty years, is valid and is not an *ultra vires* abandonment of its powers.—One party to an agreement made between a number of dealers in plate-glass for the formation of a company to take over the plate-glass business of each of them, each dealer covenanting not to compete with the new company when formed, may be restrained by the other parties to it from breach of the covenant, even after the formation of the new company, the parties complaining being at the time of the action, shareholders in that company. *McCausland* v. *Hill*, 23 Ont. A.R. 738.

—**Purchase on Credit—Statutory Inability—Acceptance of Draft in Name of Company.**]—The plaintiff sued the officers and directors of a co-operative association, incorporated under R.S. O. c. 166, for the price of goods sold to it on credit, which, by the statute incorporating it, the association was forbidden to buy in that way:—Held, that he could not recover, as no action could be maintained upon an implied representation or warranty of authority in law to do an act; and, moreover, the plaintiff must be taken to have known of the statutory inability:—Held, also, that although the proceeds of a re-sale of the goods by the association were applied to relieve the defendants from a personal liability for other goods purchased by the association, they could not be said to have derived personal benefit from the plaintiff's goods, and, therefore, the latter could not recover on this ground:—Held, further, that although one of the defendants accepted, on behalf of the association, the plaintiff's drafts drawn on it for the goods, he was not liable upon an implied representation or warranty of authority in law of the association so to accept. *Struthers* v. *Mackenzie*, 28 Ont. R. 381.

VI. Stock.

—**Shares—Payment in Cash—Price of Property Sold to Company—R.S.Q. Art. 4722 (1), (5).**]—The shares of promoters of a company incorporated under the Revised Statutes of Quebec having been credited as paid in full under an arrangement by which half the amount thereof was paid in cash and half by receipts on account of the purchase price of the property acquired by the company:—Held, that under Art. 4722, par. 1 (originally enacted as s. 1 of Quebec Statute 47 Vict. c. 73, and reproducing section 25 of the English Companies Act, 1867), the shares were rightly so credited, the promoters having acted in good faith and the purchase price being fair. *Spargo's Case*, 8 Ch. App. 497, approved. *Larocque* v. *Beauchemin*, [1897] A.C. 358.

—**Shares—Issuing Shares at a Discount—Manitoba Joint Stock Companies Act, ss. 30, 33.**]—Under the Manitoba Joint Stock Companies Act, R.S.M., c. 25, ss. 30 and 33, it is competent for the directors of a company to issue shares of its stock at a discount, without the authority of a general meeting of the company, provided that the issue is *bonâ fide*, and the discount is not greater than has been fixed by a resolution passed at a previous general meeting (if any). This, however, applies only as between the company and a shareholder, and has no reference to questions arising between creditors and shareholders, or in case of a winding up. The difference between the Manitoba Act and the English Joint Stock Companies Act, under which *Daniell's Case* 22 Beav. 46, was decided, pointed out.—The defendant company had made an agreement with the Edison Electric Co. not to issue any shares at a discount:—Held, that this did not affect the validity of the issue of shares to the plaintiff at a discount, though the Edison Company might sue for damages for breach of contract. *Walsh* v. *The North-West Electric Co.*, 11 Man. R. 629.

—**Public Company — Trustees — Distribution of Share Capital among Promoters—Right of Purchaser of Shares to Question—Selling Shares at a Discount.**]—The action was brought by a public company to remove two of the trustees for refusing to obey an order of the court made in a previous action directing them to join with the other trustee in assessing, as not being *bonâ fide* fully paid up, certain founder's shares marked fully paid up, in order to raise funds for carrying on the company:—Held, that the defendant trustees should be removed and that they were estopped by the judgment in the previous action from objecting to the *status* of directors who had ordered the assessment of the stock, as that was a question which should have been raised in that action. The pro-

moters of the company agreed to allot 127,500 out of its total capital of 250,000 $10.00 shares, all marked fully paid up, to one of their number, C, in consideration of his procuring A. to advance $25,000 to the company, and of certain other services, and by the same instrument C. agreed to transfer 85,000 of such shares to A. in consideration of the $25,000:—Held, that A. was a purchaser of the 85,000 shares from C., who held them as fully paid up, and that A. could not be treated as a purchaser from the company of the shares at a discount, and could not be forced at the instance of another shareholder to contribute to its funds any part of the difference between the $25,000 which he paid for them and their face value. E. purchased at auction certain of the shares which had been placed in escrow, in the hands of trustees, by agreement between the promoters to be sold by such trustees to raise funds to carry on the company:—Held, (1) That E. had no *status* to question the distribution of the share capital among the promoters, or to subject their shares to assessment for the purposes of the company as not being *bonâ fide* fully paid up; (2) That proceedings to remove directors must be brought by the company, and that an action for that purpose by one shareholder does not lie, and the fact that E. framed his action as on behalf of himself and all shareholders of the company, other than those attacked, was immaterial. *Fraser River Mining Co.* v. *Gallagher*, 5 B.C.R. 82.

VII. Winding Up.

(*a*) *Foreign Company.*

—Security for Costs—Special Order—Ont. Judicature Act, 1895, s. 77—Foreign Domicil—Company — Property in Jurisdiction.]— Where both the appellants were domiciled out of Ontario, and one of them, an incorporated company, was in process of winding-up in the Province of Quebec under R.S.C. c. 129:—Held, having regard to sections 17, 39, and 66 of that Act, that the property of the company in Ontario was beyond the reach of the process of the Court; and the circumstances were such that a special order for security for costs of the appeal should be made under Rule 1487 (803) of the 1st January, 1896, taken from section 77 of the Judicature Act, 1895: *Grant* v. *Banque Franco-Egyptienne*, 2 C.P.D. 430, and *Whittaker* v. *Kershaw*, 44 Ch. D. 296 followed. *Boyd* v. *Dominion Cold Storage Co.*, 17 Ont. P.R. 545.

(*b*) *Liquidators.*

—Winding-up Act—Payment out of Court—Receiver-General—Compelling Repayment—Court Funds—Jurisdiction—R.S.C., c. 129, ss. 40 and 41—55 & 56 V., c. 28, s. 2 (D).]—Where the liquidators of an insolvent bank have passed their final accounts, and have paid into court the balance in their hands, and that balance is by inadvertence paid out of court to a person not entitled to it, the Receiver-General has such an interest in the fund that he may, even before three years from the time of payment into court have expired, apply to the court for an order for repayment into court of the fund. The court has also inherent jurisdiction to compel the repayment into court of money improperly obtained out of court. In re *Central Bank of Canada*, *Hogaboom's Case*, 24 Ont. A.R. 470; affirmed by the Supreme Court of Canada, 9 Dec. 1897.

—Company in Liquidation—Liquidator Intervening—Personal Order for Costs—Assets.]—After the action was at issue, an order was made by a Quebec Court directing the winding-up of the defendant company and appointing a liquidator. The plaintiff then obtained leave from that Court to proceed with this action. Afterwards the liquidator obtained an order from that Court authorizing him to intervene and defend this action in his own name as liquidator; he then applied to this Court in this action, and obtained an order that the action proceed in the name of the plaintiff against the company and the liquidator:—Held, that the liquidator having thus intervened and made himself a party to the action, and having appeared by his counsel at the trial and contested the claim of the plaintiff, the latter, having succeeded upon his claim, was entitled to a judgment for his costs both against the company and the liquidator personally. This Court had no authority to direct that the liquidator might reimburse himself out of the assets; that was a question for the Court in the Province of Quebec having control of the assets. *Boyd* v. *Dominion Cold Storage Company*, 17 Ont. P.R. 468.

—Action to Annul Payment to Company—Conflicting Interest—Parties—R.S.C. c. 129, ss. 15 and 31.]—By section 15 of The Winding-up Act (R.S.C. c. 129) after a winding-up order issues the company continues to exist until all its affairs are liquidated; and by section 31 the liquidator shall bring actions in his own name or in that of the company, according to circumstances:—Held, that an action to annul a payment made by the company within thirty days from the issuing of the order should be in the name of the liquidator, as it is brought for the benefit of the creditors, whose interests are, in the proceeding, opposed to those of the company. *Blandy* v. *Kent*, Q.R. 6 Q.B. 196, affirming 10 S.C. 255.

— Foreign Corporation — Winding-up Order — Proof—Attachment—Practice.]—On Nov. 26th, 1894, the defendants, being insolvent, a winding-up order was made by the Supreme Court of New Brunswick, under the provisions of the Winding-up Act R.S.C., c. 129. Liquidators were appointed for the carrying out of the order, and they took possession of all the estate and effects of the company. After the making of the order the business of the company ceased, and all its property, estate, effects and business, of every kind and description situate in Canada, was taken charge of and managed by the liquidators under the supervision of the Court by which the order was granted:—Held, that the making of the winding-up order was sufficiently proved by the production of an affidavit of one of the liquidators, setting forth the facts as above. The defendant company was a foreign body corporate, having offices in London, G. B., and in the provinces of Quebec and New Brunswick. After the making of the winding-

up order, as above, a quantity of laths, the property of the company, which had been shipped before the order was made, for delivery in Boston, Mass., was levied upon under writ of attachment at the instance of the plaintiff in an action for the recovery of an alleged debt:—Held, that the liquidator was entitled to take proceedings under the provisions of the Judicature Act, section 12. sub-section 5, to set aside the attachment:—Held, also, that the attachment put in force against the estate or effects of the company after the making of the winding-up order, was void, but that the plaintiff's claim was one which could be dealt with in the winding-up proceedings:—Held, further, that Order 47, Rule 1, of the Nova Scotia Judicature Act, refers only to companies carrying on a regular and continuous business, and not to companies which have only a few isolated business transactions. Per Weatherbe, J.:—That at the time of the attachment, the liquidators were *de facto* as well as legally in possession of the property. *Salter* v. *St. Lawrence Lumber Co.*, 28 N.S.R. 335.

(c) Sale of Assets.

—Sale of Good-will.]—The good-will of a trade or business is a subject of value and price and may be sold as a valuable asset by a liquidator duly appointed for the winding-up of a company. *Montreal Lithographing Co.* v. *Sabiston*, 3 Rev. de Jur. 403. de Lorimier J.

(d) Secured Creditors.

—Companies Winding-up Act, s. 62 (D)—Joint Security—Valuation of Interest—Surrender of Security.]—A mortgage had been made by the company to a trustee, for B. and certain other of its creditors jointly, as security for their claims against it. Upon a winding-up, B. when called upon to value his security under section 62 of the Winding-Up Act, swore that it was only of nominal value, and offered to assign his interest in the mortgage to the liquidator for nothing. The liquidator desired to have the whole security valued, so that he could take it over and rank all the creditors represented by it on the estate accordingly, and upon their being able to agree as to the value, Mr. Justice Drake struck such creditors off the list and relegated them to their security:—Held, that the principle of the Act is that of election and not forfeiture, and that the appellant had the right to value his own interest in the security and to maintain his claim upon the estate, except as reduced by that valuation. The right of the liquidator was limited to requiring an assignment of B's interest in the security, or permitting its retention at the value placed upon it, and the court had no right to forfeit the claim of B. upon the estate and relegate him to a security he considered valueless. *Re Thunder Hill and Bowker*, 5 B.C.R. 21.

COMPOSITION AND DISCHARGE.

See BANKRUPTCY AND INSOLVENCY.

COMPOUNDING OFFENCES.

Money paid to Constable to Secure Release from Arrest—Recovery of.

See CANADA TEMPERANCE ACT, I.

CONFLICT OF LAWS.

Contract made in one Province for Sale of Goods in Another—Nova Scotia Bills of Sales Act—Application.

See BILLS OF SALE AND CHATTEL MORTGAGES, V.

—Foreign Company—Domicile—Winding-up.

See COMPANY, VII. (*a*).

—Life Insurance Policy—Change of Beneficiary—Foreign Contract—Foreign Law.

See CONTRACT, VII (*b*).

—Will—Charitable Bequest—Foreign Lands—Validity.

See WILL, II.
And see DOMICILE.
" INTERNATIONAL LAW.

CONSEIL MUNICIPAL.

See MUNICIPAL CORPORATIONS.

CONSEILLER ELECTION DE.

See MUNICIPAL COUNCIL.

CONSTABLE.

See POLICE OFFICER.

CONSTITUTIONAL LAW.

I. DISTRIBUTION OF FEDERAL AND PROVINCIAL POWERS.

B.N.A. Act, ss. 91, 92—Legislative Powers—Administration.]—The distribution of powers contained in sections 91 and 92 of The British North America Act not only divides the legis-

lative powers between the Parliament of the Dominion and the Legislatures of the Provinces, but also defines their respective administerial powers and functions in respect to the subjects mentioned which are capable of being administered by a government. *Mowat, Attorney-General of Canada* v. *Casgrain, Attorney-General of Quebec*, Q.R. 6 Q.B. 12.

II. Executive Powers.

(*a*) *Dominion.*

—B.N.A. Act ss. 91, 92—Indian Lands—Control and Administration—Action for Rent.]—The distribution of powers provided for by sections 91 and 92 of The British North America Act not only divides the legislative powers between the Parliament of the Dominion and the Legislatures of the Provinces, but also defines their respective administerial powers and functions in respect to any of the subjects mentioned which are capable of being administered by a government. By par. 24 of section 91 the Government of the Dominion is entrusted and charged with the care of and supervision over the Indians and with the control and administration of the property appropriated to their use. Section 109 assigns all lands vested in the Crown to the government of the province in which they are situated, but does so "subject to any trusts existing in respect thereof and to any interest other than that of the Province in the same:" —Held, that where land has been granted for the use and habitation of Indians, and the soil is vested in the Crown but subject to the enjoyment or usufruct of the Indians, the naked ownership of the lands is in the province within which they are situated, but the control and administration of the Indians' usufruct appertains to the Government of the Dominion and a suit for recovery of arrears of rent should be brought by the Attorney-General of Canada. *Mowat, Attorney-General of Canada* v. *Casgrain, Attorney-General of Quebec*, Q.R. 6 Q.B. 12.

(*b*) *Provincial.*

—Appointment of Queen's Counsel.] — The Lieutenant-Governor-in-Council has the right to appoint members of the Bar of Ontario to be Her Majesty's counsel, and to give such members the right of pre-audience in the Courts of the Province. *In re Queen's Counsel*, 23 Ont. A.R., 792. Affirmed on appeal to Privy Council, 8th December, 1897. See 14 T.L.R. 106; 77 L.T. 539.

III. Legislative Powers.

(*a*) *Dominion.*

—Criminal Code ss. 275, 276—Bigamy—Canadian subject marrying abroad—Jurisdiction of Parliament.]—Sections 275 and 276 of the Criminal Code, 1892, respecting the offence of bigamy, are *intra vires* of the Parliament of Canada. Strong, C.J., contra. *The Criminal Code, 1892, Sections relating to Bigamy*, 27 S.C.R. 461.

— Dominion Government Railways — Ontario Workmen's Compensation for Injuries Act — Applicability.]—The provisions of sub-sections 2 and 3 of section 5 of the Ontario Workmen's Compensation for Injuries Act (55 Vict. c. 30), as to packing railway frogs, are not binding upon railways under the legislative control of the Dominion. *Washington* v. *Grand Trunk Railway Co. of Canada.* 24 Ont. A.R. 183. Reversed by the Supreme Court of Canada, 9th Dec., 1897.

(*b*) *Provincial.*

—Brewers' Licenses—R.S.O. c. 194, s. 51, s.s. 2—Direct Taxation—B.N.A. Act, s. 92, s.s. 2, 9—Powers of Provincial Legislature.]—The Liquor License Act (R.S.O., c. 194), s. 51, s.s. 2, which requires every brewer and distiller to obtain a license thereunder to sell wholesale within the province, is *intra vires* of the Provincial Legislature, (a) as being direct taxation within sub-section 2, section 92 of the British North America Act, 1867; *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, followed; (b) as comprised within the term "other licenses" in sub-section 9 of the same section. *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario*, [1897] A.C. 231.

—B.N.A. Act, s. 92, s.s. 13, 14—Property and Civil Rights—Procedure in Civil Matters—Powers of Provincial Legislature.]—Held, that under the provisions of the British North America Act, section 92, sub-sections 13 and 14, referring to property and civil rights, and the administration of justice, including procedure in civil matters, it is within the powers of a provincial legislature to authorize service upon defendants resident abroad. *Stairs* v. *Allan*, 28 N.S.R. 410.

—Foreign Corporation doing Business in Canada —License Fee—Provincial Legislation—Constitutional Law — "Doing Business"—Agent—Liability.]—By the Nova Scotia Acts of 1883 sub-sections 23 and 24, it was enacted that every insurance company, etc., established in the City of Halifax, or having any branch office, agent, or agency therein, should be assessed in respect of the real estate and personal property owned by said company, etc., in the same way as other ratepayers, and should in addition thereto, pay an annual license fee. The license fee was made payable on the 31st May in each year, and the agent of any company, etc., not incorporated by the Legislature of Nova Scotia, was made personally liable for the license fee payable by the company, etc., of which he was agent. The defendants, merchants doing business in the City of Halifax, and owning real and personal estate there, were agents of the Mississippi and Dominion Steamship Co., a body incorporated in England, but not in Nova Scotia, and having its head office and chief place of business at Liverpool, G.B. The evidence showed that the business carried on by the Company in Halifax, through defendants, their agents, was of a continuous character, and that defendants advertised themselves as agents, received freight money and sold tickets, being paid a commission therefor, and that the steamers carried freight between Liverpool and Halifax and other ports in America:—Held, that the Act imposing a license fee was *intra vires* the Legislature of Nova Scotia:—Held, also, that the Company did business at Halifax wtihin the meaning of the Act, and were liable to be taxed:—Held, further, that the Company not being incorporated in Nova Scotia, defendants as their agents were personally liable for payment of the license fee. *City of Halifax* v. *Jones*, 28 N.S.R. 452.

—**Dominion Lands Act, s. 129—Boundary Lines—Survey—Re-Survey—52 V., c. 27, s. 7 (D.)—Ratification by Order-in-Council—Road Allowance.**]—Under sub-section 2 of section 129 of the Dominion Lands Act, as re-enacted by 52 Vict. c. 27, s. 7, it is necessary that the Governor-in-Council should first direct the cancellation of the old survey, and the making of a new one in case of any gross irregularity or error being discovered in the survey of any township, and the proceedings were held void altogether where a new survey was made on the authority of the Minister of the Interior, without a prior order-in-council being passed, although such new survey was afterwards ratified by order-in-council:—Held, that as a number of the parcels of land affected by the new survey had ceased to be Dominion lands, the new survey was invalid, because the Act applies only to Dominion lands. The road allowance between the two parcels of land in dispute had become the property of the Province of Manitoba, by virtue of the Act 39 Vict. c. 20, s. 1, (D.) and for that reason alone it would be improper to change the boundaries by a new survey not authorized by Provincial legislation. *Pockett* v. *Poole*, 11 Man. R. 508.

—**Rev. Ordinances N.W.T., c. 36, s. 4—Master and Servant—Wages—Fine—Imprisonment—Property and Civil Rights.**]—Section 4 of the Revised Ordinances of the North-West Territories, c. 36, notwithstanding the fact that it provides for the payment of a fine, under certain circumstances, by a master or employer of labour, and, in default of such payment, imprisonment, is *intra vires* of the legislature of the Territories by virtue of its power to legislate on "property and civil rights."—Per Wetmore, J.:—There is nothing to prevent the legislature from enacting that a debtor may be arrested on mesne process, or that a judgment debtor may be arrested and imprisoned for non-payment of the amount of the judgment.—Per McGuire, J.:—The Ordinance in question does not attempt to create a court, or to appoint judicial or other officers. The legislature found judicial officers already existing and appointed under federal authority, namely, justices of the peace, and it had the right to assign duties to these officers. The section in question was therefore, *intra vires*. *In re Gower and Joyner*, 17 C.L.T., (Occ. N.) 298. (Sup. Ct. N.W.T.)

—**Criminal Law—Procedure—Provincial Criminal Law—Criminal Code—Special Case under Section 900—Right of Magistrate to State—R.S.O. c. 74.**]—See CRIMINAL LAW, XII.

—**Ontario Division Courts Act, R.S.O. c. 51, s. 240, s.s. 4 (c)—Property transfers—Fraud—Intra Vires.**]—See DEBTOR AND CREDITOR, III (*b*).

—**Worrying Sheep on Indian Reserve—R.S.O. c. 214, s. 15—R.S.C. c. 43—Scienter—Powers of Indian Council.**]—See INDIAN RESERVE.

IV. PROPRIETARY RIGHTS OF PROVINCES.

—**B. N. A. Act, ss. 109, 111, 112—Indian Reserves—Liability to pay Annuities in respect thereof.**]—By treaties in 1850 the Governor of Canada, as representing the Crown and the provincial government, obtained the cession from the Ojibeway Indians of lands occupied as Indian reserves, the beneficial interest therein passing to the provincial government, together with the liability to pay to the Indians certain perpetual annuities:—Held, that, these lands being within the limits of the Province of Ontario, created by the British North America Act, 1867, the beneficial interest therein vested under section 109 in that province.—The perpetual annuities having been capitalized on the basis of the amounts specified in the treaties, the Dominion assumed liability in respect thereof under section 111. Thereafter the amounts of these annuities were increased according to the treaties:—Held, that liability for these increased amounts was not so attached to the ceded lands and their proceeds as to form a charge thereon in the hands of the province, under section 109. They must be paid by the Dominion, with recourse to the provinces of Ontario and Quebec conjointly, under sections 111, 112, in the same manner as the original annuities. *Attorney-General for the Dominion of Canada* v. *Attorney-General for Ontario; Attorney-General for Quebec* v. *Attorney-General for Ontario*, (1897) A.C. 199, reversing in part 25 S.C.R. 434.

CONTEMPT OF COURT.

Procedure—Contrainte par corps—Signification of Rule—Notice.]

See PRACTICE AND PROCEDURE, XXXIX.

—**Execution—Sale under—Order of Sursis—Disobedience of Sheriff.**]—See SHERIFF.

—**Witness—Reference—Subpœna—Local Manager of Bank—Principal Officers Resident outside the Province—Production of Bank Books—Disclosure of Bank Accounts.**]—See WITNESS.

CONTRACT.

I. BREACH OF CONTRACT.

Lease of Machine—Warranty—Capacity.]—The appellant leased to respondents a machine which he guaranteed would "properly fiberize and screen from 8 to 10 tons of No. 3 crude

asbestos per day of 10 hours." The machine was set up in respondents' premises by men furnished by appellant:—Held, in an action of damages by respondents against appellant for breach of contract, that under the terms of the clause of warranty, even without proof that there was any defect in the construction of the machine, the respondents were entitled to recover, on evidence that the machine did not do, and was not capable of doing, the amount of work which it was guaranteed to do. *Costigan* v. *Johnson*, Q.R. 6 Q.B. 308.

—Contemporaneous Documents Relating to same Matter—Covenants in—Dependent or Independent contracts—Land Registry Act, s. 35 (B.C.).] —A lease of land for 25 years, containing a covenant by the lessee not to assign without leave, was executed contemporaneously with an agreement by the lessee to purchase from the lessor a building on the land, which agreement contained a covenant by the lessee to pay the purchase money by instalments, and to insure, and gave the lessor the right to cancel the agreement "upon breach of any of the covenants herein contained." The only reference to the agreement in the lease was contained in a proviso "the first month's rent to be paid on the execution of an agreement of even date," etc. The lessee sub-let the premises for ten years, and did not pay the instalments of purchase money under the agreement, or insure. The action was to cancel the agreement, lease and sub-lease, for such breaches. The sub-lessee set up in his defense that the lease and sub-lease were registered, and that the agreement was not, and claimed the benefit of the Land Registry Act, section 35:—Held, that a sub-lease is not a breach of a covenant in a lease not to assign. That the agreement and its covenants were independent of the lease and its covenants. *Griffiths* v. *Canonica*, 5 B.C.R. 67.

—Sale of Land—Rescission—Purchase money—Deposit—Forfeiture.]

See SALE OF LAND, VIII.
And see IV. hereunder.

II. CONSIDERATION.

—Contract de quotâ litis—Solicitor.] —A contract by which a solicitor undertakes to endeavour to obtain from the legislature the passage of an Act to annul an assessment roll which imposes a special tax upon certain persons, and by which such persons (who are to pay nothing in case of failure) agree to pay the solicitor, in case the Act passes, a percentage of the amount of the tax imposed on them, is a contract *de quotâ litis* and therefore illegal and no action can be based upon it. *Cameron* v. *Heward*, Q. R. 11 S.C. 392.

—Illegality—Pleading—Striking out.] —Summons to strike out the statement of claim as embarrassing, and not disclosing any reasonable cause of action. The statement of claim alleged that a certain chattel mortgage made by the plaintiff and another in favour of the defendants, was given for an unlawful purpose, and was contrary to public policy, and therefore absolutely void, and he claimed the chattels seized by the defendants under the mortgage:—Held, that neither of the parties to an illegal contract can invoke the aid of the Court either to enforce the execution of it or to recover damages for the breach of it, if executory, or to disturb the condition of affairs when the contract is once executed: *Ex parte* Caldecott, 4 Ch. D. 150, specially referred to:—Held, also, that it is illegal to become surety in any criminal proceeding in consideration of taking a chattel mortgage or other security, because it takes away from the law, and the authority of the law, what was intended to be given to it: *Hermann* v. *Jeichner*, 54 L.J.Q.B. 340, specially referred to. *McLaughlin* v. *Wigmore*, 17 C.L.T. (Occ. N.) 354; 33 C.L.J. 510. Rouleau, J.

III. CONSTRUCTION.

(a) *Conditions.*

—Sale—Lease of Land—Remedy for Non-performance of Conditions.] —By an *acte* called a conditional lease the plaintiff had let to the defendant the undivided half of a lot of land for which the latter was to pay, in two instalments, $275.18, and to be chargeable with half the rent and municipal taxes both due and to become due. It was agreed that if the defendant paid these sums he should be entitled to a contract of sale from the plaintiff and that the said letting should be the consideration of the price of sale; and that so long as he made the payments regularly as agreed he would occupy the land as lessee, but in case he should fail in his undertaking the lease would be void and the plaintiff released from every obligation in his favour:—Held, that this contract constituted a sale and not a lease, seeing that there was no stipulation for payment of rent and there was a fixed price of sale; the plaintiff, therefore, was not entitled to summary process against the defendant for non-performance of the stipulated conditions. *DeChantal* v. *Ranger*, Q.R. 10 S. C. 145.

—Substitution—Interpretation of Deed.] —The *appelé* in the second degree becomes absolute owner of the property from the moment he receives it, and if a curator to the substitution has been appointed previously, his functions and duties are at an end from that date.—Where, by the terms of a deed of sale, the purchase price was not to become due until the opening of the substitution, and it was also stated in the deed that the substitution was to extend to four degrees, the proper interpretation of the contract, where it appears that the term was stipulated in the interest of the creditor (the substitution), is that the price is due when the property is received by the second *appelé*, that being the date when by law the substitution became open. *Langelier* v. *Perron*, Q.R. 10 S.C. 333.

—Suspensive Condition—Sale à remér.—Third Parties—Immobilization by Destination.] —The defendant, B., was owner of a mill which he sold with right of redemption (*reméré*) Sept. 14th, 1891, to one Desmarais. On Sept. 28th, 1891, B. ordered from the plaintiff an engine and boiler to be built, and they were delivered to him and placed in the mill at the beginning of November. Time was given for payment

and it was agreed that B. should give notes, indorsed by his brother for the price. The contract contained this clause: "It is distinctly understood and agreed that the property in the goods so to be furnished by you (Leonard) to me (Boisvert) is not to pass to me until you are fully paid the price for same and that the notes so to be given are to be held by you as collateral security in respect of such purchase money. If default be made in the payment of said notes, or if the said goods are attempted to be disposed of by me, or are seized in execution in respect of any debt due by me, then you are at liberty to take possession of the goods, and resell the same by public auction or private sale, crediting me with the proceeds only, less all expenses." B., notwithstanding the sale *à remére*, remained in possession of the mill, as well as of the engine and boiler, until June, 1893, when he left the country. Desmarais then took possession and sold the whole to one Mme. Hamel, who resold it to the defendant P., from whom the plaintiff caused to be seized by *saisie-revendication* the engine and boiler on Nov. 26th, 1894:—Held, that the contract in question was not a sale with a suspensive condition as to the transfer of property, but a sale pure and simple, which had transferred to B. the property in the engine and boiler; that the stipulation that the plaintiff should have a right to take back the things sold in case of non-payment had, at most, only the effect of giving him a personal right against B. to take them back with legal proceedings, but did not subordinate the transfer of the right of property to the payment of the whole price of sale.—In placing the engine and boiler in the mill B. had made them immovable by destination and they passed to the defendant P. by the sale of the mill.—B. had a sufficient interest in the mill, in spite of the sale *à remèié* which he had made, to immobilize by destination the engine and boiler, and though his interest was gone he would still be deemed to have placed them in the mill on account of the owner and the immobilization, therefore, would be valid. *Leonard* v. *Boisvert and others*, Q.R. 10 S.C. 343.

—Sale of Goods—Resumption by Seller for Default in Payment—Instalments—Right to Retain Amounts Paid—Illegal Seizure.]

See SALE OF GOODS. I

—Contract — Sale of Lobsters for Delivery in Europe—Warranty, etc.—Acceptance of Goods after Examination Before Defects have Developed — Waiver of Warranty—Damages — Questions for Jury.]

See SALE OF GOODS, IX.

(b) Implying Terms.

—Notary—Tariff Fees—Usage.] — Where there is a usage among notaries public of a locality to charge for their services less than the tariff would authorize, such usage constitutes an agreement between the notaries and their clients, binding upon the former, and prevents a notary enforcing payment of full fees. *Hebert* v. *Matte*, Q.R. 10 S.C. 4.

—Boarding-house Keeper—Board and Lodging—Compensation.]—S. lived with a relative, wife of the plaintiff, promising to constitute said relative her heir, but failed to do so. There was no definite agreement as to payment for board and lodging:—Held, that plaintiff was entitled to reasonable compensation for board and attendance. *Cleary* v. *Burke*, Q.R. 10 S.C. 150.

—Contract of Hiring of Services—Interpretation of Contracts—Termination thereof.]—The words "your salary has been fixed at $1,800 per annum, and will take effect from 1st May, prox.," do not constitute a hiring for one year, unless the nature of the work to be performed requires such an interpretation. A person cannot claim both salary and extra pay for special work done during the time he was not occupied on the contracted works. *McGreevy* v. *Quebec Harbour Commissioners*, Q.R. 11 S.C. 455.

—Commercial Contract — Sale — Unreasonable delay in Delivery.]—In all contracts of a commercial nature, in which the time of performance is fixed, the debtor is put in default by the mere lapse of such time, and when no time is expressly fixed in the contract, the law implies that the time should be a reasonable one. So, where a contract for the purchase of a carload of flour was made by telegraph between Stanfold and Quebec, on the 27th May, and the flour was not put on board the cars for conveyance to defendant until the 27th June, and only actually tendered for delivery at Stanfold on the 20th July (the sole reason or excuse offered by plaintiff for such delay being that it took seven days to communicate by mail between Quebec and Glenboro, Manitoba, wherefrom said flour was shipped):—Held, that, in the absence of a fair explanation, such delay could not be adjudged reasonable, nor the defendant condemned in damages for refusal to accept the flour. And defendant could so refuse without having previously put plaintiff *in morâ* to deliver. *Mahaffy* v. *Baril*, Q.R. 11 S.C. 475.

—Parol Evidence—Consideration.]—The defendant having given a written order to the plaintiffs for a binder, it was delivered to him, but he afterwards returned it claiming that he was not satisfied with it. At the trial the evidence showed that either at the time of the negotiations or after the order had been signed, a verbal agreement had been made between the defendant and the plaintiff's agent to the effect that if the binder did not work to the defendant's satisfaction he might return it:—Held, following *Mason* v. *Scott*, 22 Gr. 592, that if the condition sought to be proved was agreed to at the time of the signing of the order, parol evidence of it could not be received, as it would be a variation and contradictory to the written contract; and, if subsequent to the signing of the order, no consideration for the plaintiff entering into it had been proved; and that the plaintiff's verdict should be upheld: *Lindley* v. *Lacey*, 17 C. B.N.S. 578; *Morgan* v. *Griffith*, L.R. 6 Ex. 70; *Erskine* v. *Adeane*, 8 Ch. App. 756, distinguished, on the ground that in each of these cases the verbal agreement sought to be proved was collateral and on a subject distinct from that to which the written contract related. *Saults* v. *Eaket*, 11 Man. R. 597.

IV. COVENANTS.

—Restraint of Trade—Company—Abandonment of Corporate Powers—Covenant between intending Shareholders—Right of Shareholders to enforce after Incorporation—Practice—Injunction—Damages.]—A mutual covenant with each other by persons engaged in the same trade throughout Canada, not to carry on a certain branch of that trade for twenty years, or for such shorter time as an incorporated company which they were then uniting to form for the purpose of carrying on that particular branch of their common trade, should continue to carry it on, is good.—Acting as agent or traveller for a firm dealing in clear plate glass in the Dominion of Canada is a breach of the covenant.—Breach of such a covenant may be restrained by injunction in an action by one or more of the other parties thereto though no actual damage is proved to have resulted from the breach.—An agreement by a company, incorporated under the Dominion Joint Stock Companies Letters Patent Act for the purpose of manufacturing, importing and dealing generally in mouldings, picture frames, mirrors, plate glass, sheet glass, etc., etc., for the sale of its stock of plate glass to a company to be formed with a covenant not to compete in the plate glass business with that company for twenty years, is valid, and is not an *ultra vires* abandonment of its powers.—One party to an agreement made between a number of dealers in plate glass for the formation of a company to take over the plate glass business of each of them, each dealer covenanting not to compete with the new company when formed, may be restrained by the other parties to it from breach of the covenant, even after the formation of the new company, the parties complaining being at the time of the action shareholders in that company. *McCausland* v. *Hill*, 23 Gnt. A.R. 738.

And see COVENANT.

V. ENFORCEMENT.

—Private and Personal Rights—Mode of enforcing—Mandamus.]—See MANDAMUS.

VI. FORMATION.

—Agreement in Writing—Municipal Corporation—Waterworks—Extension of Works—Repairs—By-law—Resolution—Injunction—Highways and Streets—R.S.Q. Art. 4485—Art. 1033a C.C.P.]—By a resolution of the Council of the Town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and to lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the river Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system of waterworks and had it in operation within the time prescribed, but the system proving inefficient a company was formed in 1895 under the provisions of R.S.Q., art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir, and to make new excavations in the streets for these purposes without receiving any further authority from the council:—Held, that these were not merely necessary repairs but new works, actually part of the system required to be completed during the year 1892 and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town:—Held further, that the resolution and the application upon which it was founded constituted a "contract in writing" and a "written agreement" within the meaning of Article 1033*a* of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works. *La Ville de Chicoutimi* v. *Légaré* 27 S.C.R. 329, reversing Q.R. 5 Q.B. 542.

—Agreement Respecting Lands—Boundaries—Referee's Decision—Bornage—Arbitration—Arts. 941-945 and 1341 et seq. C.C.P.]—The owners of contiguous farms executed a deed for the purpose of settling a boundary line between their lands, thereby naming a third person to ascertain and fix the true division line upon the ground and agreeing further to abide by his decision and accept the line which he might establish as correct. On the conclusion of the referee's operation one of the parties refused to accept or act upon his decision, and action was brought by the other party to have the line so established declared to be the true boundary, and to revendicate the strip of land lying upon his side of it:—Held, reversing the judgment of the Court of Queen's Bench, that the agreement thus entered into was a contract binding upon the parties to be executed between them according to the terms therein expressed and was not subject to the formalities prescribed by the Code of Civil Procedure relating to arbitrations. *McGoey* v. *Leamy*, 27 S.C.R. 545.

—Contract of Sale—Negotiations—Correspondence.]—In negotiations for the sale of goods carried on by correspondence the contract is only entered into and formed when the letter containing the acceptance has reached the party who made the offer and has become known to him; until that moment he can withdraw his offer. *Underwood* v. *Maguire*, Q.R. 6 Q.B. 237.

—Gifts by Marriage Contract—Consorts—Future Property.]—A gift of future property between future consorts by marriage contract constitutes a means of conferring benefits *inter vivos* to one another, and consequently is illegal and void. *Ferland* v. *Savard*, Q.R. 11 S.C. 404.

—Evidence—Exchange of Properties—Commencement of Proof in Writing.]—A contract for the exchange of immovable properties, where the amount exceeds $50, must be proved by a writing, or there must be a commencement of proof in writing, supplemented by verbal evidence.—A memorandum made by a notary of *pourparlers* between the parties, for the purpose of drawing a deed if the parties came to an agreement later on, and which, moreover, the notary admits to be incomplete, will not serve as a commencement of a proof in writing. *Levallée* v. *Leroux*, Q.R. 11 S.C. 496.

—**Municipal Corporation—Contract—Seal—C.S. B.C. (1888) c. 88, ss. 71, 83—Municipal Act, 1892, ss. 21, 82—Ratification.**]—Section 82 of the Municipal Act, 1892, providing that "each Municipal Corporation shall have a corporate seal, and the Council shall enter into all contracts under the same seal, which shall be affixed to all contracts by virtue of an order of the Council;" is imperative, and applies to all contracts of the Corporation.—The contract was in fact wholly executed, and the work completed and accepted by the Corporation, and part payment therefor made, and the clerk of the Corporation had acknowledged an order by the contractor in favour of the plaintiffs:—Held, not to operate to cure the objection that the contract was not under seal. *United Trust Co.* v. *Chilliwack*, 5 B.C. R. 128.

—**Commercial Contract—Letting of Real Estate—Action for Rent—Evidence of Party.**]

See EVIDENCE, V.

—**Municipal Corporation—Contracts of—Seal—Municipal Act, 1892, s. 82 (B.C.)**]

See MUNICIPAL CORPORATION, II.

—**Contract for Construction of Sewer—Extras—Power of City Engineer—Liability.**]

See MUNICIPAL CORPORATIONS, II.

—**Municipal Corporations—Contract—By-law—Resolution.**]

See MUNICIPAL CORPORATIONS, I (*d*).

VII. PERFORMANCE.

(*a*) *Excuse for Non-performanee.*

—**Sale of Real Estate—Putting in Default.**—Where the owner of real estate offered to sell the same, for a price named, to the plaintiff or to any one whom he might designate, and in the event of the plaintiff effecting a sale he was to receive a commission of $500—the offer to hold good until a day fixed—the plaintiff was not entitled to claim the commission unless the vendor was put *en demeure* before the day fixed, to complete his part of the obligation, by the tender of a deed with the purchase price; or unless there is proof that the plaintiff, before the expiry of the term, had obtained a purchaser able and willing to fulfil his obligation, and that the inexecution of the sale was due to the unwillingness or inability of the vendor to complete it. *Deschamps* v. *Goold*, Q.R. 6 Q.B. 367.

—**Sale of Land—Covenant—Specific Performance—Description—Dower.**]

See SALE OF LAND, III.

Contract for Towage — Non-Execution — Vis major—Burden of Proof.]—See SHIPPING IV.

(*b*) *Place for Performance.*

—**Life Insurance—Beneficiary—Vested Interest—Foreign Contract.**]—By a contract between the insured and her husband, in consideration of his agreeing not to apportion amongst his children any part of the moneys to arise from an insurance policy upon his life, of which she was the named beneficiary, she agreed that a policy to be issued upon her life should be made payable to him as beneficiary. This agreement was carried out, and the husband for five years paid the premiums upon his wife's policy:—Held, that a vested interest in the policy passed to him, and the beneficiary could not be changed without his consent, even where the policy had lapsed and a new policy been issued in lieu of it, by agreement between the insurers and insured:—Held, also, that although the application for insurance was made and the policy delivered in Ontario, the insured and the insurers having agreed that the place of contract should be in New York, and that the contract should be construed according to the law of that State, if the change in the beneficiary was validly made according to the law of that State, the husband was not entitled to the insurance moneys, notwithstanding that the insurers had not intervened and were raising no question as to whether the law of Ontario or that of New York should govern; but, applying the law of New York, that the change was not validly made. *Bunnell* v. *Shiling*, 28 Ont. R 336.

—**Division Court—Breach of Contract—Place of—Cause of Action—Mandamus.**]—Plaintiff gave an order in Ontario for goods, to the traveller of the defendants, wholesale merchants in Montreal: "Ship *via* G. T. R.", at a certain named date. The goods were not so shipped and a correspondence ensued, ending in the defendants refusing to supply the goods:—Held, that the breach was the non-shipment *via* Grand Trunk Railway at Montreal, and not the subsequent refusal by correspondence, and as the whole cause of action did not arise where the order was given, a mandamus to a Division Court Judge to try the action was refused. *Re Diamond* v. *Waldron*. 28 Ont. R. 478.

—**Foreign Incorporated Company—Contract of Agency—Breach—Jurisdiction—Service of Writ.**]—Defendants, a foreign corporation, contracted with plaintiffs that the latter should become their sole agents in Nova Scotia for the sale of goods manufactured chiefly in Ontario. The contract contained a provision that defendants would sell to no other parties in Nova Scotia except through plaintiffs as their agents:—Held, that the contract was one which, according to its terms, ought to be performed in Nova Scotia, and that a sale by defendants to parties in Nova Scotia through agents other than plaintiffs was a breach within the jurisdiction of the court:—Held, further, that although the defendant company was formed under the English Joint Stock Companies Act, with a registered office in London, the real head office being in Guelph, Ontario, service of a writ issued under Ord. XI., Rule I., clause (*e*), was properly made upon the principal officers at the latter place, and there was no reason for setting it aside. *The W. H. Johnson Co. (Limited)* v. *The Bell Organ and Piano Co. (Limited)*. 29 N.S.R. 84.

—**Contract Made in One Province for Sale of Goods in Another—Nova Scotia Bills of Sale Act—Application.**]

See BILLS OF SALE AND CHATTEL MORTGAGES, V.

(c) *Who may Enforce.*

—Contract—Street Railway—Enforcement of—Municipal Corporations—Running Cars—Specific Performance—Mandamus—Action—Injunction—Declaration of Right.]—The plaintiffs wished to force the defendants to keep their cars running over the whole of their line of railway, during the whole of each year, in accordance with the terms of the agreement between them set out in the schedule to 56 Vict. (Ont.) c. 91 :—Held, that the agreement was one of which the Court would not decree specific performance, because such a decree would necessarily direct and enforce the working of the defendants' railway under the agreement in question, in all its minutiæ for all time to come: *Bickford* v. *Town of Chatham*, 16 S.C.R. 235, followed, *Fortescue* v. *Lostwithiel and Fowey R.W. Co.*, (1894) 3 Ch 621, not followed. (2) Nor would it be expedient to grant a judgment of mandamus for the performance of a long series of continual acts involving personal service and extending over an indefinite period. (3) The prerogative writ of mandamus is not obtainable by action, but only by motion. *Smith* v. *Chorley District Council*, (1897) 1 Q.B. 532, followed. (4) To grant an injunction restraining the defendants from ceasing to operate the part of their line in question would be to grant a judgment for specific performance in an indirect form: *Davis* v. *Foreman*, (1894) 3 Ch. 654, followed. (5) Nor was there any object in making a declaration of right under s. 52, s.s. 5, of the Judicature Act, 1895, where the terms of the contract were plain and were confirmed by statute, and the only difficulty was that of enforcing them. *City of Kingston* v. *Kingston, Portsmouth and Cataraqui Electric Railway Company*, 28 Ont. R. 399.

VIII. Rescission.

—Obligation—Error—Proof.]—One who alleges error in order to free himself from an obligation, or to be re-imbursed, must prove three things: (1) That the debt which he has paid, or undertaken to pay, does not exist; (2) That there was no real consideration for paying, or contracting the obligation to pay, and (3) That the obligation to pay, and the execution of this obligation, were the result of the error alleged. *Leclerc* v. *Leclerc*, Q.R. 6 Q.B. 325.

IX. Termination.

—School Law—Engagement of Teachers—Termination of Engagement—Two Months' Notice—Collective Resolution—R.S.Q. Arts 2028, 2029.]

See Schools.

X. Validity.

—Railway Company—Liability for Accident—Contract between Two Companies—Stipulation for Immunity—Negligence—Onus Probandi—Arts. 1028, 1029, 1676 C.C.—51 & 52 V. c. 29, s. 246 (D).]—See Railways and Railway Companies, V.

See also Bills of Lading.
" Bills of Sale and Chattel Mortgages.
" Insurance.
" Mortgage.
" Sale of Goods.
" Sale of Land.

CONTRAINTE PAR CORPS.

Judicial Abandonment—Art. 764 C.C.P.]

See Judicial Abandonment.

—Procedure—Formalities—Waiver—Delays—Folle-enchère.]

See Practice and Procedure, XV.

CONTRAT DE MARRIAGE.

Separate Property of Future Wife—Donation à Cause de Mort—Saisie Conservatoire—Art. 823 C.C.]—See Donation.

CONTROVERTED ELECTIONS ACT.

See Parliamentary Elections.

CONVEYANCING.

Mortgage—Leasehold Premises—Terms of Mortgage—Assignment or Sub-Lease.]

See Mortgage, VIII.

CORONER.

—Depositions at Inquest—Formalities—Admissibility as Evidence at subsequent Trial.]—Unless the depositions at a coroner's inquest are taken with the formalities prescribed for the taking of depositions at a preliminary inquiry they cannot be used at the subsequent trial of an indictment. *The Queen* v. *Ciarlo*, Q.R. 6 Q.B. 142.

COSTS.

I. Appeal as to Costs.

Discretion—Judicial Officer—Appeal—Interference—Rule 1170 (a).]—The Court will not interfere with the discretion exercised as to

costs, unless the judge whose order is appealed from has proceeded upon some erroneous principle of law or upon some misapprehension of the facts of the case: *Young* v. *Thomas*, [1892] 2 Ch. 134 followed.—It is not intended by Rule 1170 (*a*) that the discretion of the appellate tribunal should be substituted for that of the judicial officer whose decision is appealed from. *Campbell* v. *Wheler*, 17 Ont. P.R. 289.

—Married Woman — Judgment Against — Costs Payable out of Separate Property—Costs Payable to Married Woman—Appeal — Set-off.]—Judgment for debt and costs having been recovered by the plaintiffs against the defendant, a married woman, to be levied out of her separate estate, there was an appeal by the plaintiffs with regard to the form of the judgment, which was dismissed with costs. An application to vary the order made upon the appeal by directing that the costs thereof should be set off *pro tanto* against the amount of the judgment was refused; but the Court intimated that the taxing officer, upon taxing the costs of the appeal, would have power under Rule 1164 to set them off *pro tanto* against the costs awarded by the judgment to be levied out of the defendant's separate property: *Pelton* v. *Harrison* (No 2), (1892) 1 Q.B. 118, followed. *Hammond* v. *Keachie*, 17 Ont. P.R. 565.

—Discretion of Judge — Interference with on Appeal—Art. 478 C.C.P.]—An adjudication as to costs should be reformed on appeal if it violates some principle or a positive rule of law. By the terms of Art. 478 C.C.P. the judgment which dismisses an action should grant the costs to the defendant, and the tribunal can order otherwise only for special reasons. When a defendant sued on a promissory note, pleading that it was null by virtue of Art. 425 R.S.Q. (dépenses d'election) and for this reason the action was dismissed, the tribunal was not justified in finding in this defence a special cause for refusing to grant costs against the plaintiff. *Déchêne* v. *Dussault*, Q.R. 6 Q B. 1.

—Interference with Discretion of Court Appealed from—General Rule.]—As a general rule a judgment will not be reviewed on a question of costs where a sound discretion has apparently been used. But in a case where a mandamus was granted without costs, and the Court of Review held that nothing justified the judge granting it in refusing the costs, his judgment was varied accordingly. *Lacerte* v. *Pepin*, Q.R. 10 S.C. 542.

—Canada Temperance Act—Conviction Failing to Award Costs.]—Upon a motion to quash a conviction for a violation of the Canada Temperance Act;—Held, that the ground that the conviction did not award costs of the distress, under recent decisions, was not open to defendant. *The Queen* v. *Geo. McDonald*, 29 N.S.R. 33.

II. Distraction.

—Attorney and Client—Execution for Costs.]—Distraction of costs granted to an attorney is equivalent to a signified assignment, and the attorney is entitled to the costs as against the party condemned to pay them. The distraction transfers directly to the attorney the benefit of the condemnation, and this benefit is deemed never to have vested in the client personally, the distraction conferring upon the attorney a right of debt in his own person and not in that of his client.—Execution for costs *distraits* to his attorney can only be taken by the client when he has paid them, or when the writ mentions the distraction and indicates the attorney who has obtained it.—The client and the person condemned to pay the costs which have been distracted are debtors of the same debt; the client has an interest in discharging it, and if he does he is subrogated, solely by the effect of the law (Art. 1156, par. 3, C.C.), to the rights of his attorney, and can have execution for his costs in his own name, and that without signification to or previous demand on the debtor, the same not being required in the case of legal subrogation. *Macnider* v. *Myrand*, Q.R. 11 S.C. 232.

—Solicitor and Client—Distraction—Legal Subrogation—Execution for Costs.]—The distraction of costs granted to a solicitor *ad litem* is to protect him against any arrangement that might be made by the parties to his prejudice; it confers upon the solicitor a personal claim against the party condemned to pay the costs, and the client of the solicitor, who remains responsible for this debt, is only an indirect creditor of the party so condemned.—The writ of execution, or of *saisie-arrêt* after judgment, which is only a mode of execution, issued to recover the costs *distraits* to such solicitor, should be issued in the latter's name, though it may also issue in the name of the client if it appears on the writ that he has paid these costs to his solicitor. The client who, under these circumstances, pays to his solicitor the costs for which he is equally liable discharges a debt of which he is debtor; he is subrogated *de plein droit*, and by the effect of the law solely, to the rights of his solicitor *distrayant*, and in such case the client may have execution for these costs against the party condemned, on mentioning the fact of payment in the writ, without prior signification or summons to the debtor so condemned, as such signification is not necessary in a case of legal subrogation. *Scheffer* v. *Demers*, 3 Rev. de Jur. 371. de Lorimier, J.

III. Giving and Withholding.

(*a*) *Conduct of Parties.*

—Mandamus—Right to Writ raised by Defence.]—On an application for a mandamus to compel justices of the peace to render judgment on an information in which evidence had been taken, the defendant raised the question of plaintiff's right to the writ and so prevented him obtaining judgment on his application without proof:—Held, that the defendants should pay the costs incurred through their fault, notwithstanding their declaration that they would submit themselves to the court. *Lacerte* v. *Pepin*, Q.R. 10 S.C. 542.

—Appeal Case not Printed in Accordance with Rules—Costs.]—Where the case on appeal is not printed in accordance with the rules, no costs should be allowed therefor. *Johnson* v. *Buchanan*, 29 N.S.R. 27.

(b) *New Grounds.*

—Costs in Review—Ground not taken at First Instance.]—A defendant having failed to maintain an exception to the form, was foreclosed from his defence on the merits in the Superior Court, but the Court of Review allowed him to produce it on a ground not taken in the court of first instance, but refused him his costs in the Court of Review. *Champagne* v. *Bachand*, Q R. 10 S.C. 299.

(c) *Payment into Court.*

—Payment into Court—Leading Issue—Costs to Successful Party — Apportionment.]—Where a defendant pays money into court, either in the alternative or as a sole defence to an action, and the plaintiff replies that the sum so paid in is not sufficient; if the case goes to trial and the sum paid in is found to be sufficient to satisfy the plaintiff's claim, the defendant has succeeded upon an issue going to the root of the action and is entitled to have judgment entered in his favour, and to recover the general costs of the action as well as the costs of other issues, if any, on which he has succeeded. The plaintiff is also entitled to the costs of any issues on which he has succeeded. *Hart* v. *Davies*, 28 N.S.R. 303.

(d) *Unnecessary Proceedings.*

—Bornage—Costs of Action—Art. 504 C.C.]—A proprietor of land can only compel the owner of the adjoining property to submit to a *bornage* when the latter has refused to do so. When the parties have always agreed to a *bornage*, and the action *en bornage* is only rendered necessary by the unfounded refusal of the plaintiff to accept the line proposed by the defendant, which is recognized as being the true line of division between the properties of the parties, the plaintiff should be condemned to pay the costs of the action, of the placing of the boundaries, of the *procès-verbal*, and of the *bornage* remaining common. By "the costs of litigation in case of a contestation," article 504 of the Civil Code covers not only the cost of contesting the right to a *bornage*, but every contestation between the parties respecting the place where the boundaries should be established. *Dauphin* v. *Beaugrand*, Q.R. 10 S.C 338.

—Default Judgment—Setting Aside—Opposing Motion—Costs.]—Defendant paid to plaintiff the amount of a claim after it had been placed in the hands of a solicitor for collection. Plaintiff omitted to notify the solicitor of the fact of payment, and a writ was issued and served, and judgment entered for default of appearance. Defendant moved to set the judgment aside, and, the application having been resisted: —Held, that the motion having been unnecessarily opposed, defendant was entitled to have the judgment set aside with costs. Per Meagher, J., that it was in the judge's discretion whether he gave or withheld costs. *Imperial Oil Co.* v. *Deming*, 29 N.S.R. 98.

IV. In Particular Matters, or to and against Particular Persons.

—Chambers Motion—Copies of Depositions.]—In taxing the costs of a motion in Chambers, no allowance can be made for copies of depositions taken for use upon the motion. *Rennie* v. *Block*, 17 Ont. P.R. 317.

—Will—Appeal—Executor's Costs out of Estate—Watching Brief.]—The costs of opposing an unsuccessful appeal to the Court of Appeal from a judgment establishing a will and codicil, were ordered to be paid to the respondents, who were the executors, and certain legatees, out of the estate, in the event of their not being able to make them out of the appellant, the costs of the executors to be only as on a watching brief. *Re Cassie, Toronto General Trusts Co.* v. *Allen*, 17 Ont. P.R. 402.

—Infants—Next Friend—Costs out of Estate or Share.]—The plaintiffs, infants suing by a next friend, claimed against their father and the executors of a will a forfeiture by their father of his share of the testator's estate, and that they had become entitled to it. The action was occasioned by acts which, if they occurred, were done by the legatee after the testator's death. The action was successful in the High Court, but was dismissed on appeal to the Court of Appeal:—Held, that the costs should not be made payable out of the testator's estate, nor out of the share of the infants' father, but should be paid by the next friend, without prejudice to his claim for indemnity out of the shares of the infants whenever they should come into possession.—In general a next friend is in the same position as any other litigant, and receives or pays costs personally as between himself and the defendants. *Smith* v. *Mason*, 17 Ont. P.R. 444.

—Company in Liquidation—Liquidator Intervening—Personal Order for Costs.]—After the action was at issue, an order was made by a Quebec Court directing the winding-up of the defendant company and appointing a liquidator. The plaintiff then obtained leave from that Court to proceed with this action. Afterwards the liquidator obtained an order from that Court authorizing him to intervene and defend this action in his own name as liquidator; he then applied to this Court in this action, and obtained an order that the action proceed in the name of the plaintiff against the company and the liquidator:—Held, that the liquidator having thus intervened and made himself a party to the action, and having appeared by his counsel at the trial and contested the claim of the plaintiff, the latter, having succeeded upon his claim, was entitled to a judgment for his costs both against the company and the liquidator personally. *Boyd* v. *Dominion Cold Storage Company*, 17 Ont. P.R. 468.

—Alimony—Disbursements — Prospective Counsel Fee—Solicitor—Rule 1144.]—Rule 1144 does not warrant the making of an order for payment by defendant to plaintiff's solicitors in an alimony action, of a sum to cover counsel fees, unless it is shown that the fees are to be

paid to counsel who is not the solicitor for the plaintiff or the partner of the solicitor. *Gallagher* v. *Gallagher*, 17 Ont. P.R. 575.

—**Libel—Apology—Satisfaction—Trial of Question of Costs—Application at Chambers.**]—After action for libel brought, the defendants published a retraction and apology, which was accepted as satisfactory by the plaintiff. The defendants declined to pay the plaintiff's costs up to that time, and the plaintiff proceeded to trial:—Held, that either party could, after the publication of the apology and its acceptance by the plaintiff, have moved in Chambers to have the question of costs disposed of; but, neither party having moved, that the plaintiff should have such costs only as he would have been entitled to had he so moved, and that the defendants should have no costs: *Knickerbocker* v. *Ratz*, 16 Ont. P.R. 191, followed. *Eastwood* v. *Henderson*, 17 Ont. P.R. 578.

—**Commissioner of Dominion Police—Acting on behalf of the Queen in Criminal Proceedings—Personal Liability for Costs—Taxation in Criminal Matters.**]—The person filling the office of Commissioner of the Dominion Police has, as such, no legal capacity to represent and act on behalf of Her Majesty the Queen, and in laying an information in which he designated himself as such Commissioner of the Dominion Police, he acted as a private individual and not as the legal representative of the Crown, although he declared that he was acting as such Commissioner on behalf of Her Majesty the Queen. The accused having been discharged and the Commissioner, Mr. Sherwood, having bound himself by recognizance to prefer and prosecute an indictment on the charge contained in his information, and the Grand Jury having thrown out the bill of indictment, Mr. Sherwood was held under Art. 595 of the Criminal Code, to be personally liable for the costs incurred by the accused on the preliminary inquiry and before the Court of Queen's Bench.—The costs allowed were not the fees and disbursements paid by the accused St. Louis to his counsel, such payment being a matter between client and counsel, but such costs as were held by analogy with the costs allowed in civil suits to be costs recoverable from a losing party. Such costs should be taxed according to a tariff made for criminal proceedings, and in the absence of such tariff they had to be taxed in the discretion of the Judge, by implication, according to the spirit of the provisions contained in Art. 835 of the Criminal Code. *The Queen* v. *St. Louis*, Q.R. 6 Q.B. 389.

—**Nova Scotia Probate Act—Disallowance of Solicitor's Costs not Covered by the Tariff.**]—A solicitor, who was executor of an estate, had performed certain professional services for the testator and sought to recover them in the Probate Court under the designation of "retainers" The Judge of Probate declined to allow them as not coming within the items allowable by the tariff in the Probate Act. Held, that the items were properly disallowed. *Re Estate Edwin Kyerson*, 29 N.S.R. 81.

—**Practice—Second Commission to Same Place—Costs.**]—A second commission to New York was granted to defendant to examine a witness, he having already obtained a commission to the same place, but he was ordered to pay the costs of executing it in any event of the action. *Gill* v. *Ellis*, 5 B.C.R. 137.

—**Motion for Further Particulars—Costs of.**]
See PLEADING, V.

V. SECURITY FOR COSTS

—**Public Officer—59 V. (Ont.), c. 18, s. 7—Pleading—Affidavits.**]—Where a person who holds a public office is made defendant in an action, the pleadings must be looked at to determine whether he is sued in his capacity of a public officer, and so entitled to security for costs under s. 7 of the Ontario Law Courts Act, 1896; and if the pleadings are of such a character that the case cannot go on them to the jury against the defendant as a public officer, he cannot claim the protection of the statute, even when he shows by affidavits that his sole connection with the matters alleged against him was in his public capacity. *Parkes* v. *Baker*, 17 Ont. P.R 345.

—**Præcipe Order—Motion to Set Aside—Ont. Rule 1251.**]—A plaintiff may move to set aside a præcipe order requiring him to give security for costs, notwithstanding the stay of proceedings imposed thereby, without giving security for costs; and, where his writ of summons is specially indorsed, he is not compelled to follow the procedure indicated in Rule 1251, which is inapplicable unless he is moving for summary judgment under Rule 739: *Thibaudeau* v. *Herbert*, 16 Ont. P. R. 420, distinguished. *Walters* v. *Duggan*, 17 Ont. P.R. 359.

—**Libel—Newspaper—R.S.O. c. 57, s. 9—Criminal Charge—Pleading—Innuendo.**]—Where a statement of claim in an action for libel contained in a public newspaper is not so defective as to be demurrable, and the words are alleged by the plaintiff to have been used in a sense which involves the making by the person using them of a criminal charge against the plaintiff, and may have that meaning, the case is brought within the exception contained in clause (*a*) of section 9 (1) of the Act respecting Actions of Libel and Slander, R.S.O. c. 57, and the defendant is not entitled to security for costs; that clause is applicable to cases where an innuendo is necessary to give the words complained of a defamatory sense; and upon an application for security there cannot be a trial of the action on the merits in order to determine whether the words used involve a criminal charge. *Smyth* v. *Stephenson*, 17 Ont. P.R. 374.

NOTE.—See reference to unreported case of *Drumm* v. *O'Beirne*, decided by Meredith, C.J., 22nd February, 1897, at p. 376 of 17 Ont. P.R.

—**Plaintiff out of Jurisdiction—Property within.**]—Where the plaintiff lived out of the jurisdiction, but had real property in the jurisdiction, encumbered, but of the value of $510 over and above all encumbrances and all debts that it was shown or suggested that he owed, a præcipe order for security for costs was set aside. *Belair* v. *Buchanan*, 17 Ont. P.R. 413, affirmed, 17 Ont. P.R. 476.

—**Ont. Rule 1243 — "Proceeding for the Same Cause" — Award — Order — Appeal — Action.**]— The word "proceeding" in Rule 1243 means a proceeding in Court. An appeal from an order dismissing a motion to set aside an award made upon a voluntary submission is not a "proceeding for the same cause," within the meaning of Ont. Rule 1243, as an action to recover moneys in respect of certain matters included in the submission, but not dealt with by the award; and, although the costs of such appeal are unpaid, security for costs of the action will not be ordered. *Caughell* v. *Brower*, 17 Ont. P.R. 438.

—**Appeal to Court of Appeal—Special Order—Ont. Judicature Act, 1895, s. 77.**]—Where there was no reason to suppose that the defendants were not intending to prosecute their appeal to the Court of Appeal in good faith, where they were conforming to an injunction obtained by the plaintiffs at an early stage, and where their ability to answer for costs had not been put to the test of an execution, and the proof of their alleged inability to pay the plaintiffs' costs, in case the appeal should prove unsuccessful, rested in great measure upon statements founded upon information and belief, a special order for security for costs under s. 77 of the Judicature Act, 1895, was refused. *Welsbach Incandescent Gaslight Company* v. *Stannard*, 17 Ont. P.R. 486.

—**Solicitor—Action brought without Authority—Applicants out of the Jurisdiction.**]—When plaintiffs in an action repudiate the authority of the solicitor to take the proceedings, and move to set them aside, they cannot be compelled by the solicitor to give security for costs on the ground that they reside out of the jurisdiction: *Re Percy and Kelly Nickel Co.*, 2 Ch. D. 531, followed.—Where a charge of improper conduct is made against a solicitor, who is an officer of the Court, by a person out of the jurisdiction, the Court ought not to order security for costs, and thus prevent such a charge being investigated. *Sample* v. *McLaughlin*, 17 Ont. P.R. 490.

—**Prior Action—Costs unpaid—New Plaintiff—Notice—Nominal and Insolvent Plaintiff.**]—Security for costs may be ordered where the costs of a former action for the same cause are unpaid, even although the actions are not between precisely the same parties, if the plaintiffs are suing substantially by virtue of the same alleged title: *McCabe* v. *Bank of Ireland*, 14 App. Cas. 413, followed. And where the title to property, the subject of the present and a former action of ejectment, was shifted into the hands of the present plaintiff to evade, if possible, the effect of an order requiring the plaintiff in the former action to give security for costs—the former action having been dismissed for default of such security—and it appeared that the present plaintiff knew the history of the prior litigation, an order for security for costs was affirmed. The order was also maintainable upon the ground that the plaintiff was a person of no substance, and the action brought mainly, if not entirely, for the benefit of some unknown and unnamed person, not a party to the record. *May* v. *Werden*, *May* v. *Bedingfield*, 17 Ont. P.R. 530.

—**Court of Appeal—Special Order—Judicature Act, 1895, s. 77—Foreign Domicil—Company—Winding-up—Property in Jurisdiction.**]—Where both the appellants were domiciled out of Ontario, and one of them, an incorporated company, was in process of winding up in the Province of Quebec under R.S.C. c. 129:—Held, having regard to sections 17, 39 and 66 of that Act, that the property of the company in Ontario was beyond the reach of the process of the Court; and the circumstances were such that a special order for security for costs of the appeal should be made under Rule 1487 (803) of the 1st of January, 1896, taken from section 77 of the Judicature Act, 1895: *Grant* v. *Banque Franco-Egyptienne*, 2 C.P.D. 430, and *Whittaker* v. *Kershaw*, 44 Ch. D. 296, followed. *Boyd* v. *Dominion Cold Storage Company*, 17 Ont. P.R. 545.

—**Slander—52 V. (Ont.) c. 14, s. 1, s.s. 3—Meaning of Words Spoken—Good Defence.**]—In an action for slander brought by a married woman the words alleged to have been spoken were, "You are a blackguard; you are a bad woman"; and the innuendo was that the plaintiff was a common prostitute and a woman of evil character. Upon an application by the defendant under 52 Vict., c. 14, s. 1, sub-sec. 3 (Ont.), for security for costs, the defendant admitted having called the plaintiff "a bad, quarrelsome woman," but said he did not recollect using, and believe he had not used, the word "blackguard," and he denied that he used the words with the meaning attributed to them by the plaintiff:—Held, Meredith, J., dissenting, that the defendant had not shown a good defence to the action on the merits, and his application was properly refused. Per Boyd, C., and Ferguson, J., that the expressions used might be employed in circumstances and surroundings such that bystanders might think them a statement of want of chastity. Per Meredith, J., that as it was shown by the pleadings and the affidavit of the defendant that there was a real and substantial question for the jury to pass upon, and upon which the action might fail, the defendant had shown a good defence upon the merits. *Paladino* v. *Gustin*, 17 Ont. P.R. 553.

—**Executors—Custody of Papers—Security for Costs.**]—Where it is established, on the petition of one of the executors to an estate, that the documents and papers connected with the estate are not kept by the co-executor in a safe place, the court will order that they be deposited in a place sufficiently secure, subject to the joint control of the executors of the estate.—Security for costs is not exigible on a summary petition of the above nature, which is merely an incident of an inventory, the question of custody of papers having been reserved at the time the inventory was made. *Papineau* v. *Papineau*, Q.R. 10 S.C. 205.

—**Opposition—Security for Costs—Art. 29 C.C.P.**]—The plaintiff contesting an opposition, who has left the province of Quebec *pendente lite*, cannot be called upon to furnish security for costs. The opposant occupies the position of *actor* and "institutes a proceeding" within the meaning of Art. 29 C.C.P., and it is he who may be compelled to give security. *O'Flaherty* v. *McLaughlin*, Q.R. 10 S.C. 450.

—Real Estate — Security for Costs—Evidence —Affidavit—Queen's Bench Act, 1895, Rule 500.] —The plaintiff, who lived out of the jurisdiction, moved to set aside a praecipe order for security for costs on the ground that he owned real estate of sufficient value within the jurisdiction to secure costs. The affidavit in support of the motion alleged that half a section of land in the province was vested in him, and that, according to the best of his knowledge, information and belief, it was worth $3,000, and that it was unincumbered as he was informed and verily believed:—Held, that such affidavit did not comply with Rule 500 of the Queen's Bench Act, 1895, as it did not give the plaintiff's grounds of belief, and that there was no sufficient evidence to support the plaintiff's application. *Dobson* v. *Leask*, 11 Man. R. 620.

VI. Solicitor and Client.

—Discretion of Local Officer—Increased Counsel Fees.]—Solicitor and client taxations are distinct from party and party taxations, both as to scope of the inquiry and as to the powers of the officer to whom the reference is made, in regard to the allowance of items. In solicitor and client taxations there is no power of intervention on the part of the taxing officer at Toronto in order to obtain an increase in amount under such items in the Tariff as 104, 145, 150, 153; but the officer charged with the reference has power to exercise the discretion recognized by the Tariff in increasing the amount chargeable for certain services ordinarily exercisable by the officer at Toronto in party and party taxations. *Re Macaulay, a Solicitor*, 17 Ont. P.R. 461

—Duty of Solicitor—Effect of Neglect on Costs—Lien on Client's Papers.]—The solicitor in charge of a suit is bound by his mandate to make signification of the writ and take all necessary proceedings to obtain judgment. If he sends the writ of summons to his client to make signification he does it at his peril, and if, because of the client's illness or for any other cause, the writ is not served in proper time, the solicitor cannot make his client responsible for his costs of the writ.—Solicitors cannot retain, as security for payment of their costs in causes they have instituted, the writings and muniments of title confided to them by their clients to establish their rights. *Letartre* v. *Langlais*, 3 Rev. de Jur. 398. Gagne, J.

—Costs as between—Statute of Limitations, R. S.N.S. 5th ser., c. 112—Date of Settlement of Action.] — Plaintiff was retained, September 26th, 1886, to act as solicitor in an action brought against defendants. Defendants, subsequently, without consulting plaintiff, entered into an arrangement whereby the action was abandoned, each party paying his own costs. Plaintiff having sued to recover his costs as between solicitor and client:—Held, that the Statute of Limitations, R.S., 5th series, c. 112, as against plaintiff, commenced to run from the date of the settlement, and not from the date of the retainer. *Gourley* v. *McAloney*, 29 N.S.R. 319.

—Allowance for Support — Fees of Solicitor— Attachment—Saisie-arrêt—Proceedings in Forma Pauperis—Gratuitous Services.]

See Saisie-arrêt.

VII. Taxation and Recovery of Costs.

(a) *Appeal from Taxation.*

—Apportionment—Common Defence by Several Defendants.]—An action by a judgment creditor against three defendants, one of whom was the judgment creditor, to set aside a conveyance as fraudulent, was dismissed with costs, but with the direction that the costs of the judgment debtor should be set off against the judgment recovered by the plaintiff. There was a common defence by one solicitor for all three defendants, and no separate proceedings for the benefit of particular defendants:—Held, upon appeal from taxation, that a set-off of one-third of the whole costs taxed to the defendants should be allowed: *Re Colquhoun*, 5 DeG. M. & G. 35, and *Clark* v. *Virgo* 17 Ont. P.R. 260 followed. *Zavitz* v. *Dodge*, 17 Ont. P.R. 295.

—Costs thrown away Owing to Absence of Trial Judge — Counsel Fees — Quantum — Review.]—The costs to which a party is entitled on a party and party taxation are such costs as have been incurred by the act of the opposite party, and costs of the day of a trial thrown away by reason of the absence of a trial judge, were disallowed upon review, overruling the taxing officer. The *quantum* of counsel fees reviewed and reduced. *Hamilton Mfg. Co.* v. *Victoria Lumber Co.*, 5 B.C.R. 53.

— Sheriff's Poundage — Judicature Ordinance, N.W.T.]—This was an appeal by the defendants from a taxation by the Clerk of the Court of the sheriffs' costs under a writ of execution to levy against defendants' goods $4,000, the amount of plaintiffs' judgment. The sheriff seized a locomotive engine, when proceedings were stayed, pending an appeal to the Court in Banc to set aside the judgment by an order which directed the defendants to pay the sheriff's costs. The only item complained of was one of $85, poundage allowed by the clerk on taxation on a value of six thousand dollars on the locomotive. The application was under sections 356 and 358 of the Judicature Ordinance. It was contended on behalf of the sheriff that the defendants having proceeded by way of taxation, could not now apply to a judge to have the costs reduced, and that such reduction could not be made by way of appeal from taxation:—Held, that the defendants had not by submitting to taxation, waived their right to apply for a reduction, and that a reduction could be made on this application; that under the provisions of sections 356 and 358 an application can be made to a judge without any taxation, or after taxation by way of appeal therefrom:—Held, that there being no English rule similar to section 356, the English practice allowing poundage only on amounts realized does not apply:—Held, further, that the sheriff should not be allowed full poundage, but only a reasonable amount according to circumstances.—Order made

reducing the amount to be allowed to $40: *Wadsworth* v. *Bell*, 8 Ont. P.R. 478, approved. *Patton* v. *Alberta Railway and Coal Co.*, 33 C.L.J. 130; 17 C.L.J., (Occ. N.) 41.

(b) Apportionment.

—Items Common to Defence and Counter-claim.] —A claim and counter-claim are to be treated as separate actions, and the costs are to be taxed in accordance with that principle; but items common to both defence and counter-claim should not be taxed, either in whole or in part, to a defendant who has succeeded upon his counter-claim, but should be wholly disallowed him: *In re Brown, Ward* v. *Morse*, 23 Ch. D. 377, followed; *Griffiths* v. *Patterson*, 22 L.R. Ir. 656, not followed; *Summerfeldt* v. *Johnston*, 17 Ont. P. R. 6, distinguished. *Haggert* v. *Town of Brampton*, 17 Ont. P.R. 477.

(c) Criminal Proceedings.

—Commissioner of Dominion Police—Capacity to Represent the Crown—Personal Liability for costs—Taxation—Tariff.]—See COSTS, IV.

(d) Disallowances.

—Service of Summons—Court of Revision—Prohibition.]—In this case there was an application by summons in Chambers, for a writ of prohibition, the summons was directed to "H. C. W., Mayor of the town of E., and M. M., W. S. E., J. K., C. S, T. B. and G. S., councillors of the said town of E., for the year 1896." Each one of the members of the Court of Revision was personally served with the summons, and also with the writ of prohibition. On the taxation of the applicants' costs, the taxing master held that service on the Mayor as being the presiding officer of the Court, or upon the clerk of the municipality, as being the clerk of the Court, was sufficient and disallowed all services but one of the summons and one of the writ of prohibition. On appeal to a Judge in Chambers (Scott, J.):—Held, that the taxing-master was right: *Reg.* v. *Mayor of Liverpool*, 18 Q.B.D. 510, referred to. In *re Hickson and Wilson*, 17 C.L.T. (Occ. N.) 363.

—Counsel Fee Advising on Evidence—Brief at Trial — Discontinuance — Notice of Trial Not Given—Practice.]—On a taxation in a matter wherein the plaintiffs, with the present defendant's consent, procured an order to discontinue as against him, "on payment of his costs forthwith after taxation," all items respecting brief, counsel fee advising on evidence, and counsel fee with brief at trial, were disallowed by the taxing officer on the ground that the notice of trial provided for in the order above recited had not been given. On appeal to Rouleau, J. in Chambers:—Held, that the practice in the Territories with regard to setting a cause down for trial differs from the practice in England. The order setting down takes the place of the English notice of trial and order entering. No importance is to be attached to the fact that in the order setting down provision is frequently made for notice of trial before hearing. This notice is a mere matter of courtesy, and the order is not impaired if no clause with regard to it be inserted. The date of the opening of the Court is fixed, and litigants must be ready for trial on that day. The items claimed should therefore be taxed, except the fee with brief at trial. *Mongenais* v. *Henderson*, 17 C.L.T. (Occ. N.) 429.

(e) In Particular Matters, or to and against Particular Persons.

—Assignment to Creditors—Fees on Creditors' Claims.]—In a case of assignment for benefit of creditors, the prothonotary of the Superior Court has a right to charge a fee of four dollars for each creditor's claim produced before him. In *re Blouin*, Q.R. 10 S.C. 143.

—Opposition afin de Distraire—Tariff of Superior Court—Art. 70.]—When the contestation of an *opposition afin de distraire*, without bringing in question the right of property of the opposant, bears only upon the question whether or not the goods seized, and of which the opposant demands the distraction, are subject to the privilege of the *locateur* (plaintiff in the action), the latter can only tax his costs according to the value of the things claimed by the opposant and according to the class of his action, Art. 70 of the tariff relating to advocates of the Superior Court not applying to a case of the kind. *Labrecque* v. *Talioretti*, Q.R. 10 S.C. 190.

— Interlocutory Judgment — Costs of Copy of Judgment—Bill of Costs.]—The party who, by an interlocutory judgment has obtained an adjudication for costs in his favour has a right to include in his bill the cost of a copy of the judgment and the fee for the preparation of the bill. *Paquette* v. *Rhéaume*, 3 Rev. de Jur. 311. de Lorimier, J.

—Practice—Appeal—Costs.]—Although there is no allowance in terms in the tariff for the costs of making briefs on appeal, they may be allowed under the heading of "copies of pleadings, briefs and other documents, where no other provision is made, and though there is no allowance for fees paid to the official stenographer, his transcript may be taxed as a copy. *Edison General Electric Co.* v. *Bank of British Columbia*, 5 B.C.R. 34.

(f) Scale.

— Costs—Scale of — Jurisdiction of Taxing Officer—Rule 1174.]—Where there has been a trial of an action, and the plaintiff has thereat been awarded costs, Ont. Rule 1174 gives no jurisdiction to the taxing officer to deal with the scale of costs: *Brown* v. *Hose*, 14 Ont. P.R. 3, distinguished. *Andrews* v. *City of London*, 12 Ont. P.R. 44, applied and followed. *Dale* v. *Weston Lodge I.O.O.F.*, 17 Ont. P.R. 513.

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Compilation — Proprietor — Infringement.]—*Frowde* v. *Parrish*, 23 Ont. A.R. 728 affirming 27 Ont. R. 526 and C.A. Dig. (1896) col. 87.

CORPORATIONS.

See COMPANY.
" MUNICIPAL CORPORATIONS.
" STOCK EXCHANGE.

COUNSEL.

Costs—Counsel Fee where Counsel other than Solicitor for Successful Party—Alimony.

See COSTS, IV.

—Counsel Fees—Increase.]—See COSTS, VI.

—Counsel Fees—Review.]—See COSTS, VII.

—Inflammatory Address—New Trial.]

See PRACTICE AND PROCEDURE, XXVIII.
And see QUEEN'S COUNSEL.
" SOLICITOR.

COUNTERCLAIM.

Action for Breach of Warranty—Counter-Claim—Jury—Queen's Bench Act (Man.) 1895, s. 49.]—A counterclaim is not an action within the meaning of The Queen's Bench Act (Man.) 1895, not being a civil proceeding commenced by statement of claim, and a defendant is not entitled to have his counterclaim tried by jury by virtue of section 49, sub-section 1, although such counterclaim is for damages for breach of warranty; nor does this constitute any special ground for an order under sub-section 3 for trial by jury: *Case* v. *Laird*, 8 Man. R. 461; *Woollacott* v. *Winnipeg Electric Street Railway Co.*, 10 Man. R. 482 followed. *Bergman* v. *Smith*, 11 Man. R. 364.

And see PLEADING, III.

COUNTY COURTS.

Landlord and Tenant—Overholding—R.S.O. c. 144—Notice—Jurisdiction of Judge.]—The questions whether a three months' notice to determine a tenancy required by a lease should be lunar or calendar months, and whether a notice given by the lessor after conveyance of the reversion is sufficient, should not, when there is any doubt in the matter, be decided by a County Court Judge on an application under the Ontario Overholding Tenants Act, and amendments. *Re Magann and Bonner*, 28 Ont. R. 37.

—Jurisdiction—Legacy under $200 Charged on Land—59 V. (Ont.), c. 19, s. 3, s.s. 13.]—A County Court has jurisdiction under sub-section 13 of section 3 of 59 Vict. (Ont.), c. 19, in an action brought by the legatee against the devisee of land, to recover a legacy of $5 charged on the land, as involving equitable relief in respect of a a matter under $200.—The subject-matter involved in such an action is the amount of the legacy and not the value of the land. *Rustin* v. *Bradley*, 28 Ont. R. 119.

—Appeal to High Court from Order for New Trial—Law Courts Act, 1895—58 V. (Ont.), c. 13, s. 44.]—Under section 44, sub-section 4, of the Law Courts Act of 1895, 58 Vict. (Ont.), c. 13, where a new trial has been granted in a County Court action the opposite party may appeal from the order directing the new trial to a Divisional Court of the High Court of Justice. *Cantelon* v. *Thompson*, 28 Ont. R. 396.

—Order for Judgment—Right of Judge of County Court to amend same.]—Held, that the Judge of the County Court had a right to amend his order for judgment by adding any words which had been omitted by error and accidental slip. *McSweeney* v. *Reeves*, 28 N.S.R. 422.

—Appeal—Equal Division of Court—Effect of—Meaning of Word "Decision."]—Two actions were brought against defendant, in the county court, by M. and N., for provisions supplied to an hotel kept by defendant's son. The questions at issue in both suits being the same, an agreement was entered into by counsel for both parties, to the effect that the decision in the suit of M. v. B. should be the decision in the suit of N. v. B., and that an order for judgment might be taken out by the successful party, and also that in case of appeal the decision on appeal in the case of M. v. B. should also be the decision on appeal in the case of N. v. B. Judgment was given in the county court in the case of M. v. B. for plaintiff, and on appeal to this court the court was equally divided in opinion, the result being that an order was passed dismissing the appeal with costs, and the judgment in the county court stood. An order for judgment having been taken out by plaintiff in the case of N. v. B., defendant appealed:—Held, per Weatherbe and Meagher, JJ., that "decision" in the agreement must be read as meaning "judicial determination;" that the result was a judicial determination of plaintiff's right to recover the debt sued for, inasmuch as it disposed of the appeal and left plaintiff free to enforce his judgment; that the order dismissing the appeal in the one case applied to the other, and the appeal in the second case must therefore fail:—Held, per Townshend, J., and Graham, E.J., that the court having been equally divided in opinion in the first case, there was no "decision" within the meaning of the agreement, and defendant was entitled to have his appeal heard. *Naas* v. *Backman*, 28 N.S.R. 504.

—Certiorari—Jurisdiction of County Court Judges to issue—Prohibition—Nova Scotia County Court Consolidation Act—Acts of 1889, c. 9—Amending Act—Acts of 1895, c. 28, s. 64.]—A writ of certiorari was issued out of the County Court for District No. 5 (Nova Scotia), of which the County of Cumberland forms a part, for the return into the County Court of the original writ of summons, entry of judgment and other proceedings in a cause tried before a justice of the peace for the county, the amount involved being below the jurisdiction of the County Court:—Held, allowing a writ of prohibition, that the Judges of the County Court have no general jurisdiction to bring up causes by certiorari, either under the County Court Consolidation Act, 1889, c. 9, or under the amending

Act, Acts of 1895, c. 28, s. 64:—Held, also, that such jurisdiction must be conferred by express words, and was not to be inferred from expressions indicating an opinion on the part of the Legislature, when the amending Act was passed, that such jurisdiction already existed. *Ross* v. *Blake*, 28 N.S.R. 543.

—Writ—Several causes—Excess of Jurisdiction—Attachment upon real estate—Amendment—Nova Scotia County Courts Consolidation Act of 1889, c. 9, s. 34.]—A writ of summons issued in the County Court contained four distinct causes of action, each within the jurisdiction of the court, but aggregating in the whole $630.76:—Held, that under s. 34 of c. 9 of the County Court Consolidation Act of 1889, the action was within the jurisdiction of the County Court.—On an application to set aside the plaintiff's writ and attachment, and all proceedings thereunder, on the ground that the amount sued for and indorsed on the writ was beyond the jurisdiction of the court, plaintiff abandoned his claim upon all the causes of action sued for except one, thus reducing his claim to the sum of $371.71, and applied for an amendment of his claim accordingly:—Held, that, after the amendment, it was no ground for setting aside the attachment, that the attachment, which had been levied upon real estate, remained for a much larger sum than plaintiff could possibly recover.—(Per Graham, E.J.) That the application to set aside the writ of attachment should not be granted upon a ground that was not available to defendant when the application was made:—Held, also, that if the amendment made irregular proceedings that were regular before, the court should restore them to their original condition, or by further amendment make them consistent throughout.—(Per Meagher, J.) That a substantive motion to amend was not necessary, the judge having power, with the plaintiff's consent, to amend the attachment, and to direct it to stand for the amount to which plaintiff's cause of action was by the amendment reduced:—Held, also, assuming that the action as it stood could not be maintained in the County Court for want of jurisdiction, the causes of action were severable at the plaintiff's election:—Held, further, that the moment the amendment was made, the attachment was only available to secure the reduced amount. *Harris* v. *Morse*, 29 N.S.R. 105.

—County Courts Act—Equitable Jurisdiction—Chattel Mortgage.]—County Courts have no equitable jurisdiction other than that conferred by the County Courts Act C.S.B.C. 1888, c. 25, s. 44, and cannot entertain an action to set aside a chattel mortgage as being a fraudulent preference. *Parsons Produce Co.* v. *Given*, 5 B.C.R. 58.

—Jurisdiction—Secondary Evidence—Bail—Interest.]—Held (per Forbes, Co. J.), that 58 Vict. (N.B.), c. 21, gives any Judge of any County Court in the Province jurisdiction to hear a matter in review from any parish or county in the Province. *Keith* v. *Coates*, 17 C.L.T. (Occ. N.) 33.

—Appeal from County Court—Manitoba Queen's Bench—Full Court—Jurisdiction—Amount in Controversy.]—See APPEAL, III. (*g*)

—Appeal, Grounds of.]—See APPEAL, V.

—Criminal Assault—Criminal Code, ss. 596, 601, 910—Bail—Jurisdiction of County Court—Police Officer de facto—Protection.]

See CRIMINAL LAW, XI.

—Parliamentary Election—Recount by County Court Judge—Injunction—Jurisdiction of High Court Judge.]—See INJUNCTION.

—Ontario Overholding Tenants' Act—Jurisdiction of County Court Judge.]

See LANDLORD AND TENANT, IX.

—Action in—Venue—Change of—Ont. Rule 1260—Second Application—Appeal—Ont. Law Courts Act, 1895, s. 9 (2).]

See PRACTICE AND PROCEDURE, XLVII.

—County Court—Man. Queen's Bench Act, 1895—Rules 804, 806—Sale of Land under Judgment.]

See PRACTICE AND PROCEDURE, XXVI.

COURTS OF JUSTICE.

Equipment of Courts of Justice—Offices—"Furniture"—Stationery—Liability—Authority—County Council—R.S.O. c. 184, ss. 466, 470.]

See MUNCIPAL CORPORATIONS, VI.

See also APPEAL.

" CIRCUIT COURTS.

" COUNTY COURTS.

" SUPERIOR COURT.

COVENANT.

Husband and Wife—Separate Property—Covenant—Mortgage—Estoppel.]—A married woman may show in answer to an action against her upon a covenant in a mortgage made by her husband and herself containing no recital of her ownership, given to secure part of the purchase money of land purchased by the husband, but conveyed to her, that the conveyance was taken merely as trustee for her husband, and not for her benefit; and this although the mortgagee or those claiming under him had no knowledge of her position. *Gordon* v. *Warren*, 24 Ont. A.R. 44.

Indemnity—Release—Sale of Land.]—A covenant by a purchaser with his vendor that he will pay the mortgage moneys and interest secured by a mortgage upon the land purchased, and will indemnify and save harmless the vendor from all loss, costs, charges and damages sustained by him by reason of any default, is a covenant of indemnity merely; and if before default the purchaser obtains a release from the only person who could in any way damnify the vendor, he has satisfied his liability. *Smith* v. *Pears*, 24 Ont. A.R. 82.

—Breach of Covenant not to Assign Lease—Evidence—Varying Report.]—Upon breach of a covenant in a lease not to assign without leave,

the lessors are entitled to recover as damages such sum of money as will put them in the same position as if the covenant had not been broken and they had retained the liability of the defendant instead of an inferior liability, but in estimating the value of the defendant's liability allowance must be made for the vicissitudes of business and the uncertainty of life and health. Upon appeal from a referee's report the damages were reduced from $3,897.62 to $500. *Williams* v. *Earle*, L.R. 3 Q.B. 739, followed. *Munro* v. *Waller*, 28 Ont. R. 574.

—Restraint of Trade—Company.

See CONTRACT, IV.

—Equity of Redemption—Purchaser—Indemnity—Covenant—Assignment.]

See MORTGAGE, XIII.

—Specific Performance of Covenant for Sale of Land.]—See SALE OF LAND, III.

See also CONTRACT.

CRIMINAL LAW.

I. ADULTERATION OF FOOD

—52 V. c. 43 (D.)—Cheese Factories—Supply of Inferior Milk—Intent.]—Held (per Elliot, Co. J.), that under 52 Vict. (D.) c. 43, the physical condition of the milk supplied is the test, irrespective of the intent. *The Queen* v. *McIntosh*, 33 C.L.J. 246.

II. ARREST.

—Witness—Privilege from arrest.]—The privilege from arrest of a witness residing in one district, and cited to appear before a court sitting in another, will not protect him against arrest for a criminal offence committed during the time he was absent from his residence for the purpose of giving evidence. *Ex parte Ewan*, Q.R. 6 Q.B. 465.

III. BAIL.

—Committal for trial—Delay in Preferring Indictment—Discharge of Bail.]—C. was committed for trial for publishing a defamatory libel and two terms were allowed to pass without a bill of indictment being laid before the grand jury. By C.S.L.C. c. 95, when a person has been committed for felony, and having prayed to be brought to trial is not indicted during the term of the Court following the committal, he is entitled to be discharged on bail and to be discharged if not indicted and tried at the second term after committal:—Held, that as the Criminal Code has abolished the distinction between felonies and misdemeanors the above Act applies to all indictable offences and C. was entitled to be released from custody on bail as he would formerly have been to be released from imprisonment, notwithstanding the offence with which he was charged would formerly have been a misdemeanor. *The Queen* v. *Cameron*, Q.R. 6 Q.B. 158.

—Bail—Estreat—Notice—Crown Rules.]—By the recognizance the cognizors acknowledged that they severally owed Her Majesty $500 to be made and levied, etc., unless one M. who had been charged before a justice of the peace with theft, should personally appear "at the next sitttng of a court of competent jurisdiction, at the City of Calgary, in and for the Northern Alberta Judicial District, and there surrender himself into custody and plead to such charge":—Held, that no notice of intention to estreat or to produce M. was necessary, and, even if necessary, the giving of such notice would be but a ministerial act, and merely for the convenience of the parties. *Reg.* v. *Schram*, 2 U.C. Q.B. 91, and *Re Talbot's Bail*, 23 Ont. R. 65, followed:—Held, also, that the Crown Office Rules adopted in England in 1886 had no application, nor had Rule 124 of such Rules, or anything like it, previously been in force in England. *R.* v *Clark*, 5 B. & Ald. 728, referred to:—Held, further, that the "next sitting" was the next regular sitting of the Supreme Court which had, under section 53 of the N.W. Territories Act, been previously fixed by the Lieutenant-Governor and announced to the public. *In re McArthur's Bail*, 17 C.L.T., (Occ. N.) 301; and sub nom. *The Queen* v. *McArthur*, 33 C.L.J. 630 (Sup. Ct., N.W.T.)

And see BAIL.

IV. BIGAMY.

—Constitutional law—Criminal Code ss. 275, 276, Canadian Subjects Marrying Abroad—Jurisdiction of Parliament.]—Sections 275 and 276 of the Criminal Code, 1892, respecting the offence of bigamy, are *intra vires* of the Parliament of Canada. Strong, C.J., contra. *Criminal Code, 1892, Sections relating to Bigamy*, 27 S.C.R. 461.

V. EVIDENCE.

(*a*) *Admissibility.*

—Non-support of Wife—Criminal Code, 1892, s. 210, s.s. 2—Lawful Excuse—Agreement.]—Upon an indictment of a prisoner under section 210, sub-section 2, of the Criminal

Code, 1892, for omitting without lawful excuse to provide necessaries for his wife, evidence is admissible on behalf of the prisoner of an agreement between him and the person who became his wife, at the time of the marriage, that they were to live at their respective homes, and be supported as before the marriage until the prisoner obtained a situation where he could earn sufficient for their maintenance. *The Queen* v. *Robinson*, 28 Ont. R. 407.

—Perjury—False Evidence—Admissions of Prisoner—Admissibility—Criminal Code, ss. 611, 723.]—Prisoner was charged on two counts, the first being that he had committed perjury on the inquest before R., a coroner, concerning the death of one T., by swearing that all night previous to the death of T., he was awake attending to certain business and did not sleep at all:—Held, having regard to ss. 611 and 723 of the Criminal Code, that the circumstance that the evidence was given before a coroner and jury instead of before a coroner alone, as charged, did not vitiate the count, and therefore the inquisition was properly received in evidence, and the first count properly submitted to the jury.—The prisoner, in giving evidence before a justice of the peace subsequently to the inquest, swore that his statement before the coroner was a lie. It was objected that admissions made by him on the hearing before the justice were inadmissible as evidence against him, under section 5 of the Canada Evidence Act:—Held, that the witness need not object to answer in order to avail himself of the protection of this enactment, and therefore the evidence of the prisoner's admission in his testimony before the justice ought to have been struck out or withdrawn from the consideration of the jury. *The Queen* v. *Thompson*, 17 C.L.T. (Occ. N.) 295.

(b) As to Specific Offences.

—Criminal Law—Murder—Evidence of Cause of Death—Insufficient Post Mortem Examination.]—On a trial for murder, by committing an abortion on a girl, it appeared in evidence that a *post mortem* examination of the girl had been made by medical men, which was, however, confined to the pelvic organs and was, upon the medical evidence, inconclusive as to the cause of death, but there was other evidence pointing to the inference that death was caused by the operation. Davie, C.J., left the case to the jury, but reserved a case for the Court of Criminal Appeal as to whether there was in point of law evidence to go to the jury upon which they might find that the death of the girl resulted from the criminal acts of the accused. The jury found a verdict of guilty:—Held, that there is no rule that the cause of death must be proved by *post mortem* examination, and that there was evidence to go to the jury of the cause of death notwithstanding the absence of a complete *post mortem* examination. *The Queen* v. *Garrow*, 5 B.C.R. 61.

(c) Former Depositions.

—Trial of Indictment—Deposition at Coroner's Inquest or Preliminary Inquiry—Admissibility as Evidence.]—A deposition taken at a coroner's inquest cannot be read at the trial of an indictment unless in taking it the formalities prescribed for the taking of depositions at a preliminary inquiry before a Justice of the Peace have been observed. *The Queen* v. *Ciarlo*, Q.R. 6 Q.B. 142.

And where evidence at the preliminary inquiry was given in French but taken down in English by a translator, and not read over to, and signed by the witness, it was not allowed to be read at the trial to establish a contradiction between it and the evidence of the witness at the trial; but counsel for the defence was permitted to cross-examine the witness as to any material statement made by him at the preliminary inquiry with a view to examine witnesses to show such contradiction. *The Queen* v. *Ciarlo*, Q.R. 6 Q.B. 144.

—Canada Evidence Act, 1893, s. 5—Deposition—Admissibility—Identity.]—At the trial of the prisoner an official stenographer from the Province of Quebec verified the deposition of D., taken in a civil action, before the Superior Court at Montreal, and stated that the prisoner resembled the person whose deposition he had taken in Montreal, but as this took place over six months previously he could not sufficiently remember his face to swear positively that the prisoner was really the same man, but stated, however, that to the best of his knowledge he was the same man, and that he had no doubt he was the same man:—Held, following *Reg.* v. *Coote*, L.R. 4 P.C. 599, and *Reg.* v. *Connolly*, 25 Ont. R. 151, that the deposition in question was admissible in evidence and could not be excluded under section 5 of the Canada Evidence Act, 1893. That there was sufficient evidence of the identity of the prisoner with the person whose deposition was put in to warrant the judge in submitting the deposition to the jury, the question of identity being one entirely for them. *The Queen* v. *Douglas*, 11 Man. R. 401.

(d) Parliamentary Election.

—Evidence—Ballot—Compelling Witness to Disclose for Whom he Voted—Dominion Elections Act, s. 71.]—See PARLIAMENTARY ELECTIONS.

VI. EXTRADITION.

—Ashburton Treaty—Evidence—Habeas Corpus—Convicted Prisoner.]—Held, that under the Ashburton treaty between Great Britain and the United States of America of 1842, and the convention of 1890, to obtain the extradition of a fugitive charged with the commission of an extradition crime, the same evidence must be given as would justify his committal for trial if the crime had been committed in Canada, and to obtain the extradition of a fugitive who has been convicted of an extradition crime, a duly authenticated copy of the record must be produced, and proof of the fugitive's identity must be made.—On an application for the extradition of a fugitive, evidence to show that the offence charged is a political one, or that it is not an extradition crime, should be allowed; and if proof be made to that effect the prisoner must be discharged.—On a writ of habeas corpus, the

judge must see, in the first place, whether the offence charged is or is not of a political character, or whether it is or is not an extradition crime, and then whether the proceedings are regular, and justify the prisoner's committal for surrender.—In the case of a fugitive who has been convicted, the judge does not examine the evidence given at his trial, and must not revise the verdict of the jury; his duty is to see if the offence is an extradition crime, if the conviction, after a regular trial, has been duly proved, and if the prisoner has been identified. *In re Levi*, Q.R. 6 Q.B. 151.

—Larceny—Extradition—False Pretences—"Extraditable Offence."]—The accused was charged in the State of Minnesota with having committed grand larceny in the second degree, in that he obtained cattle from one H. by means of a cheque issued on a bank in which the accused had neither an account nor credit, the cheque being accepted by H. on the representation that there were funds to meet it. On obtaining the cattle the accused disposed of them and fled to the Northwest Territories of Canada with the proceeds. He was arrested on a warrant issued in the Territories charging him with having obtained goods under false pretences. An objection was taken to the regularity of the proceedings on the ground that grand larceny was no offence in Canada, and therefore did not come within the term "extraditable offence." Further it was objected that article I. of the Imperial Order of 1890 did not cover obtaining goods by false pretences:—Held, that though the offences were known in the State of Minnesota and in Canada by different names, nevertheless the same facts constituted, and the same evidence would prove the crime in each country, and the name was immaterial:—Held, also, that as provided by section 2 of the Extradition Act, sub-sec. *b*, obtaining property under false pretences being described in Schedule I. of said Act, and further being described in section 3 of article I. of the Imperial Order-in-Council of 1890, the same constituted an extraditable offence, and the accused was committed. *In re F. H. Martin*, 33 C.L.J. 253; 17 C.L.T. (Occ. N.) 131. (Supreme Court of N.W.T.)

NOTE.—The fugitive was not surrendered and conveyed out of Canada within two months after his committal for surrender, and application was made to the committing justice on behalf of the prisoner under section 19 of the Extradition Act, for an order discharging him out of custody. No cause being shown by the Attorney-General for Canada, upon whom notice of the application had been served, the order was granted. See 33 C.L.J. 448.

VII. FORGERY OF TRADE-MARKS.

—Criminal Code s. 448—Extent of Resemblance.]—Where a person is accused of placing on his goods an imitation of a duly registered trade-mark he may be convicted under section 448 of the Criminal Code if the resemblance between his goods and those of the proprietor of the trade-mark is such as to deceive an incautious or unwary purchaser; it need not be such as to deceive persons who might see the two marks placed side by side or who might examine them critically. *The Queen* v. *Authier*, Q.R. 6 Q.B. 146.

VIII. LIBEL.

—Criminal Law—Libel—Plea of Justification—Defective Plea.]—A plea of justification to an indictment for defamatory libel must allege that the defamatory matter published is true and that it was for the public benefit that the alleged libel was published, and must then set forth concisely the particular facts by reason of which its publication was for the public good, but it must not contain the evidence by which it is proposed to prove such facts, nor any statements purely of comment or argument:—A plea of justification which embodies a number of letters which it is proposed to use as evidence, and contains paragraphs of which the matter consists merely of comments and arguments, is irregular and illegal, and the illegal averments should be struck out, or the plea itself should be rejected from the record, and the defendant allowed to plead anew. *The Queen* v. *Grenier*, Q.R. 6 Q.B. 31.

IX. LOTTERY.

—Gaming—Lottery—Art Association—Pictures—Part Value in Money—Criminal Code, s. 205.]
See GAMING.

X. MANSLAUGHTER.

—Manslaughter—Pagan Indian—Evil Spirit—Delusion.]—A Pagan Indian who, believing in an evil spirit in human shape called a Wendigo, shot and killed another Indian under the impression that he was the Wendigo, was held properly convicted of manslaughter. *The Queen* v. *Machekequonâbe*, 28 Ont. R. 309.

XI. PEACE OFFICER.

—Criminal Code—ss. 596-601—County Court—Jurisdiction—Assault—Bail—Police Officer de facto—Protection.]—Defendants were brought before a justice of the peace charged with an assault upon a peace officer in the discharge of his duty. There was a preliminary enquiry, after which defendants were admitted to bail under Crim. Code, s. 601, on giving a bond conditioned for their appearance at the time and place of trial, but, subsequently, on application of one of the sureties an order was made by a County Court Judge, under Crim. Code, s. 910, under which defendants were committed to jail, and they were subsequently tried and convicted:—Held, that the defendants not having been committed for trial under Crim. Code, s. 596, the Judge of the County Court had no jurisdiction to try them and the conviction must be set aside. (Per Meagher and Ritchie, JJ.) That a constable *de facto*, while acting in the discharge of his duty is entitled to the same measure of protection as if his title to the office he professes to fill were undisputed:—Semble, that defendants could be indicted and tried in the Supreme Court. *The Queen* v. *James Gibson*, 29 N.S.R. 4.

XII. Practice and Procedure.

—Provincial Criminal Law—Criminal Code—Special case—S. 900—Right of Magistrate to State—R.S.O. c. 74.]—A magistrate has no power to state a case under section 900 of the Criminal Code, for an alleged offence against an Ontario statute, not involving the constitutionality of the statute, the procedure by way of appeal to the sessions provided for by Ontario legislation applying in such a case. *The Queen ex rel. Brown* v. *The Robert Simpson Company*, 28 Ont. R. 231.

—Election to be tried by Jury—Re-election—Mandamus to Sheriff to bring Prisoner before County Judge—Criminal Code—55 & 56 V. c. 29, ss. 766, 767.]—Where a prisoner is brought before a County Judge under section 766 of the Criminal Code, and elects to be tried by a jury, and is thereupon remanded under section 767 to await such trial, although his election is made under a mistake, or qualified by using the words "at present," there is no duty upon the sheriff to notify the judge a second time under section 766, or to bring the prisoner again before him to enable the prisoner to re-elect to be tried by the Judge. *The Queen* v. *Ballard*, 28 Ont. R. 489.

—Commitment for Trial—Dies non Juridicus—Subsequent Trial—Validity—Court of Record——Habeas Corpus—Writ of Error.]—The prisoner was on a statutory holiday committed for trial by a magistrate upon a charge of attempting to steal from the person, and on being brought before the County Court Judge, in compliance with section 766 of the Criminal Code, 1892, consented to be tried by the Judge without a jury, and, being so tried, was convicted and sentenced to a term of imprisonment:—Held, upon the return to a writ of *habeas corpus*, that the fact that the prisoner was committed for trial and confined in gaol on a warrant that was a nullity, could not affect the validity of the trial before the Judge under the Speedy Trials Act. Upon appeal, the Court of Appeal held that the County Court Judges' Criminal Court being a Court of Record, its proceedings were not reviewable upon *habeas corpus*, but only upon writ of error. *The Queen* v. *Murray*, 28 Ont. R. 549.

—Trial of Indictment—Order for Mixed Jury—Abandonment of—Discretion of Judge.] -On the trial of an indictment in the Province of Quebec the prisoner is entitled to a mixed jury as a matter of right; but having obtained an order for a mixed jury he cannot, as of right, abandon it and claim a trial by the ordinary jury, though the judge, in his discretion, may revoke the order. *The Queen* v. *Sheehan*, Q.R. 6 Q.B. 139.

—Criminal Libel—Witnesses—Subpœna—Application for, at Cost of Crown—R.S.Q. Art. 2614.]—A motion or summary request for the gratuitous issue of subpœnas for witnesses on behalf of the accused on a criminal trial should state two facts only, namely, that the witnesses named are necessary for the defence, and that the accused is poor and needy. In a prosecution for libel where the accused has pleaded justification, the reception and granting of a motion which shows the facts which each witness should prove to establish that the publication of the libel was in the public interest, would be to prejudge the question of the admissibility of such proof. Such a motion, therefore, cannot be entertained. Under Art. 2614 of the Revised Statutes of Quebec the accused can only obtain the issue of subpœnas at the expense of the Crown in a case which was a felony before the Criminal Code, and as a libel was, before the Code, only a misdemeanor, the Court in this case was not authorized to order the gratuitous issue of the subpœnas asked for by the accused. *The Queen* v. *Grenier*, Q.R. 6 Q.B. 322.

—Commissioner of Dominion Police—Capacity to Act on Behalf of Her Majesty the Queen in Criminal Proceedings before the Courts.]—The person filling the office of Commissioner of the Dominion Police has, as such, no legal capacity to represent and act on behalf of Her Majesty the Queen, and in laying an information in which he designated himself as such Commissioner of the Dominion Police he acted as a private individual and not as the legal representative of the Crown, although he declared that he was acting as such Commissioner on behalf of Her Majesty the Queen. *The Queen* v. *St. Louis*, Q.R. 6 Q.B. 389.

And see Costs, IV.

—Summary Convictions—Depositions—Certiorari—Arts. 856, 857 and 590 et seq. Criminal Code.]—Where the hearing of a complaint, under the provisions respecting summary convictions, has been duly adjourned by the justice or justices of the peace, the hearing may take place at the time fixed, notwithstanding the absence of the defendant. Under articles 856 and 590 et seq. of the Criminal Code of Canada, the depositions of the witnesses, both for the complainant and the accused, on the hearing before the justices, must be taken in writing. The remedy by *certiorari* exists where the petitioner has not appealed, and the taking of a writ of *certiorari* is a waiver on his part of the right of appeal:—*Semble*, if the writ of *certiorari* issues before the right to appeal has lapsed, the other party may ask that the *certiorari* be suspended until the delay for appealing has expired. *Denault* v. *Robida*, Q.R. 10 S.C. 199.

—Criminal Code, ss. 762-781—Several Charges—Consecutive Trials—Withholding Judgment—Evidence—Intent.]—Defendant was brought before the Judge of the County Court for the County of Halifax, under the Act relating to speedy trials (Code, ss. 762-781), for trial, charged with four distinct and separate offences. On the conclusion of the first trial defendant's solicitor asked for a verdict, but the learned Judge, not being prepared to determine the case, proceeded with the trial of the other charges, and, when all had been heard, rendered verdicts of guilty in all four cases. On a Crown case reserved:—Held, that the Judge had no power to so withhold his verdicts; that, having done so, the prisoner was wrongly convicted in all four cases, and that the verdicts must be set aside and new trials ordered:—Held, also, that on the trial of a prisoner charged with a criminal act, evidence of the commission by

him of other acts of a like character is receivable to show intent. *The Queen* v. *McBerny*, 29 N.S.R. 327.

—Crown Case Reserved—Criminal Prosecutions—Attorney-General—Queen's Counsel—Authority to Conduct—Grand Jury—"True Bill"—Criminal Code, ss. 641, 645, 760—Nova Scotia Acts of 1887.]—By R.S.C. c. 174, s. 175 (Crim. Code, s. 645) it is enacted that the name of every witness examined or intended to be examined, shall be indorsed on the Bill of Indictment, and the foreman, etc., of the Grand Jury shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment:—Held, that the provisions in the section cited are of a directory character, and that failure to affix the initials, etc., as directed, will not constitute sufficient ground for quashing an indictment.—The Nova Scotia Acts of 1887, c. 66, s. 2, impose upon the Attorney-General the duty of appointing some Queen's Counsel, or other competent barrister of the Court, to attend the criminal business of each sittings of the Supreme Court in each county of the province; such authority to be conveyed by written instructions under the hand of the Attorney-General, the presentment of which, to the presiding judge, in the absence of the Attorney-General is made sufficient authority for any barrister to take charge, on behalf of the Crown, of criminal business, and conduct the trial of criminals at any sittings or term:—Held, that these words were sufficient to cover the specific act of preferring an indictment, but:—Held, construing the words of the Code, section 641, sub-sec. 2, "may prefer a bill of indictment for any offence, before the Grand jury, or any court specified in such consent:"—that the Attorney-General must direct the preferring of the bill, in the particular case, and that it will not do to direct the counsel to prepare bills in all cases which may arise:—Held, also, that the conviction of the defendant T, under an indictment so preferred, was bad.—The Criminal Code, section 760, provides that in the Province of Nova Scotia a calendar of criminal cases shall be sent by the clerk of the Crown to the grand jury, in each term, together with the depositions taken in each case, etc., and the indictments shall not be made out, except in Halifax, until the grand jury so directs. In this case the indictment was indorsed, on the back thereof, with the name of the cause, and the name of the foreman of the grand jury, and, over the name of the foreman the words, "indictment for an assault on a peace officer, and for resisting and preventing apprehension and detainer." The words "a true bill" did not appear:—Held, that under the provisions of the Code, section 760, the signature of the foreman of the grand jury, on the back of the indictment, could only signify a true bill; and that in view of the provisions of the section, the reason for the English practice did not apply and the words "a true bill" were not necessary. *The Queen* v. *Townsend and Whiting*, 28 N.S.R. 468.

—Sunday—Judicial Proceedings—Habeas Corpus—Evidence.]—Judicial proceedings should not be conducted on Sunday, and where the prisoner was committed for trial at a preliminary investigation before a magistrate on a Sunday:—Held, that he was entitled to his discharge, following *Mackalley's* case, 9 Co. 66, and *Waite* v. *Hundred of Stoke*, Cro. Jac. 496. Held, also, following *Eggington's* case, 2 E. & B. 717, and *Re Bailey*, 3 E. & B. 607, that the affidavit of the prisoner was receivable in evidence to show that the investigation and commitment had taken place on a Sunday. *The Queen* v. *Cavelier*, 11 Man. R. 333.

—Quashing Conviction—Jurisdiction of Single Judge—Full Court—Notice of Motion.]—An application to quash a conviction under section 337 of the Criminal Code must be made to the Full Court and not to a single judge. The provincial legislature having no authority to make laws respecting criminal procedure, the practice introduced by the Queen's Bench Act, 1895, Rule 162, cannot apply to proceedings under the Criminal Code. *Re Boucher*, 4 Ont. A.R. 191, and *Reg.* v. *McAuley*, 14 Ont. R. 643, followed. Held, also, that such an application must be made by summons or rule *nisi* and not by notice of motion, and that in the rule for the *certiorari* the grounds for moving must be specified. *The Queen* v. *Beale*, 11 Man. R. p. 448.

—Criminal Law—Appeal—Criminal Code, ss. 782, 783 (a) and 784—58 & 59 V. (D.), c. 40.]—The right of appeal given by section 782 of the Criminal Code, as amended by 58 & 59 Vict. (D.) c. 40, from a conviction by two Justices of the Peace under the Criminal Code, s. 783 (a) and (f), is not taken away in British Columbia by section 784, sub-section 3, as amended by 58 & 59 Vict. (D.) c. 40. *The Queen* v. *Wirth*, 5 B.C.R. 114.

—Murder—Confession—Indian Agent—Inducement—Burden of Proof.]—An Indian Agent is, quoad the Indians on his reserve, a person in authority; he is appointed by the Governor-General to carry out the Indian Act, and the Orders-in-Council made under it, and is *ex officio* a justice of the peace. A confession made to such an officer under the inducement of a promise or under a threat or menace, is not admissible in a criminal proceeding. The inducement may be of a very slight character. The burden of proving that the admission was not made under an inducement or threat is on the Crown: *Reg.* v. *Fennell*, 7 Q.B.D. 147, and *Reg.* v. *Thompson* (1893) 2 Q.B. 12 followed. *The Queen* v. *Pah-Cah-Pah-Ne-Cappi*, 17 C.L.T. (Occ. N.) 306.

—Conviction—Justice of Peace—Adjournment to consider Judgment—Jurisdiction—Certiorari.]

See JUSTICE OF THE PEACE.

XIII. VAGRANCY.

—Prostitution—Criminal Code, s. 207 (l).]—A woman who is kept by a married man, and who surrenders herself to sexual intercourse with him alone, does not come within the purview of section 207 (l) of the Criminal Code which declares any one to be a vagrant who, having no peaceable profession or calling to maintain herself by, for the most part supports herself by the avails of prostitution. *The Queen* v. *Rehe*, Q.R. 6 Q.B. 274.

CROPS.

Fire Insurance—Threshing Crops by Steam—Change Material to the Risk.]—A provision in a policy of fire insurance, permitting the insured to use "for the purpose of threshing the crops on the premises, a steam thresher with an efficient spark arrester" does not by inference prohibit the use of a steam engine in connection with a machine for crushing grain. The use of a steam engine on one occasion in connection with the machine for crushing grain is not a change material to the risk within the meaning of the statutory condition. That condition refers to some structural alteration in the premises or habitual or permanent alteration in the nature of the work or business carried on. *Johnston* v. *Dominion Grange Mutual Fire Insurance Company*, 23 Ont. A.R. 729.

—Growing Crops—Transfer—Registration of—Possession.]—See BILLS OF SALE AND CHATTEL MORTGAGES, IV.

CROWN.

Negligence—Niagara Falls Park Commissioners—Status—50 Vict., c. 13, ss. 3, 4, 10—Fences—Highways.]—There is no liability on the part of the commissioners for the park to the public using the highways in the Queen Victoria Niagara Falls Park by reason of the absence or insufficiency of a fence, railing or barrier on the edge of the cliff, there being no statutory obligation in that behalf imposed on them: *Gibson* v. *Mayor of Preston*, L.R. 5 Q.B. 218; *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400; *Cowley* v. *Newmarket Local Board* (1892), A.C. 345; *Municipality of Pictou* v. *Geldert* (1893) A.C. 524; *Municipal Council of Sydney* v. *Bourke* (1895) A.C. 433, followed. Nor are the commissioners liable for an accident happening under the above circumstances to a person while resorting to the park, who, paying nothing for the privilege, is in the position of a bare licensee, to whom no duty would be owing, unless the accident occurred by reason of some unusual danger known to the commissioners, and unknown to the person injured: *Southcote* v. *Stanley*, 1 H. & N 247; *Ivay* v. *Hedges*, 9 Q.B.D. 80; *Schmidt* v. *Town of Berlin*, 26 Ont. R. 54; and *Moore* v. *City of Toronto*, ib. 59 (n), followed.—The commissioners, under the provisions of the statutes in that behalf, under any circumstances, act in the discharge of their various duties as "an emanation from the Crown," or as agent of the Crown, which is not liable for the acts of the subordinate servants of the commissioners. *Mersey Docks Co.* v. *Gibbs*, L.R. 1 H.L. 93; *The Queen* v. *Williams*, 9 App. Cas. 418; and *Gilbert* v. *Corporation of Trinity House*, 17 Q.B.D. 795, distinguished.—The enactment in Ontario of legislation establishing the liability of the Crown for wrongs committed by its servants, suggested. *Graham* v. *Commissioners for Queen Victoria Niagara Falls Park*, 28 Ont. R. 1.

—Administration—Will—Probate—R.S.O. c. 59.]—Where a person possessed of real and personal estate dies leaving no known relatives within the Province, the Attorney-General on behalf of Her Majesty may maintain an action to set aside letters probate of that person's will, executed without mental capacity, and in that action may obtain an order for possession of the real estate; but a grant of administration should be obtained by a separate proceeding. Such an action under the statute R.S.O. c. 59 is not for the purpose of escheating but to protect the property for the benefit of those who may be entitled. *The Queen* v. *Bonnar*, 24 Ont. A.R. 220.

—Third Party Procedure—Jurisdiction—Costs.]
See PARTIES, III.
And see CONSTITUTIONAL LAW.
" PUBLIC WORK.

CROWN LANDS.

Saisie en Revendication of logs—Damages by obstruction of Lumbering Operations—Joint Possession of Crown Lands by Holder of Timber License and Settler—Conflicting Rights of Licensee and Locatee.]—The holder of a timber license renewed from the 30th of April for one year has the right of possession of any lot included in his license, with the right to cut timber on any portion of said lot until the 1st of May of the following year. If a settler takes up one of the lots during that year, he accepts it *subject* to the rights of the timber licensee, but has a right of joint possession from and after the date of his location ticket, with the right to begin clearing thereon, provided he does so in good faith. The ownership of wood cut by the settler *in the bonâ fide process of clearing*, does not vest in the licensee, but in the locatee, who would have the right to sell and dispose of such of it as he did not require for buildings and fences, inasmuch as it is not "cut by others" "in trespass" but by "an authorized person." This right of clearing does not necessarily interfere with the licensee's right to cut timber anywhere on the lot, so long as the latter does not "interrupt" the settler's clearing operations. The right of the licensee to cut could not be prevented by the locatee simply marking out, by blazing trees, a certain area which he *intended* to clear. —Whether either of the parties has failed to respect the rights of the other, and has wrongfully caused damages thereby, is a question of evidence to be established by the particular circumstances disclosed in each case. *Price* v. *Leblanc*, Q.R. 11 S.C. 30.

CROWN OFFICE RULES.

English Crown Office Rules—Bail—Estreat.]
See CRIMINAL LAW, III.

CURATOR.

To Interdict—Action against—Judgment for Account—Personal Condemnation—Death of Curator—Appeal.]—See ACTION, II.

—Right of Action—Interdict—Curator ad hoc.]—A curator ad hoc, appointed to an interdict, cannot maintain an action for an account of administration by the deceased curator, the person appointed to succeed the latter as curator being alone competent to institute such action. *Wilson* v. *Blanchard*, Q.R. 10 S.C. 474.

CUSTOMS DRAWBACK.

See REVENUE.

CUSTOMS DUTIES.

See REVENUE.

DAIRY INSPECTION.

See CRIMINAL LAW, I.

DAMAGES.

Equitable Relief—Ontario Judicature Act, s. 52, s.s. 3.]—Under a covenant contained in a lease granting a right of way over certain lands to a railway company for the purpose of a switch to a gravel pit, the lessees on default in removing the tracks and ties from the land within fifteen days from the termination of the lease, were to forfeit and pay to the lessor $5 a day as liquidated damages and not as a penalty for each day after the said time that the lands and premises should remain in any way obstructed:—Held, that such damages were liquidated:—Held, however, that under the circumstances set out in the judgment this was a proper case in which to grant relief under section 52 of sub-sec. 3 of the Ontario Judicature Act, 1895, by awarding actual damages estimated on a liberal scale. *Townsend* v. *Toronto, Hamilton and Buffalo Railway Company*, 28 Ont. 195.

— Covenant against Incumbrances — Sale of Land—Breach—Measure of Damages.]— Where the vendee of lands who had himself, after purchasing, mortgaged the property, brought action for breach of covenant against incumbrancers, and the mortgage, constituting the breach, covered other lands as well as his, and was for an amount much greater than the present value of the land, and it was impossible to apportion it:—Held, that the measure of damages was the whole amount due on the mortgage, which should be paid into court, to insure its reaching its proper destination. *McGillivray* v. *The Mimico Real Estate Security Company*, 28 Ont R. 265.

— Commercial Agency — Posting Debtors.]—In an action by a debtor against his creditor for $5,000 damages because of the debtor's name having been placarded by a commercial agency it appeared that the debt was on a judgment obtained four years before the action was brought; that a year before action the creditor offered to accept 50 per cent. of the debt, and finally settled it on payment of that portion; and that the debtor had frequently failed to meet his obligations to creditors, and his credit was much impaired; the Court awarded him only $15 damages. *Gowen* v. *Tozer*, Q.R. 10 S.C. 1.

—Railway Collision—Claim by Mother of Victim—Measure of Damages—Prospective pecuniary Loss—Art. 1056, C.C.]—The claim for damages for the death of a person resulting from a quasi-offence forms no part of his succession, the surviving consort, ascendants and descendants being alone entitled to claim under the provisions of art. 1056 C.C.—The plaintiff's son having lost his life in a railway collision, she brought an action of damages against the company, and being entitled in the terms of that article, to "all damages occasioned by such death," and having had a reasonable expectation of receiving for the rest of her life a comfortable home with her said son, the damage she suffered by his death must be held to be the equivalent of that maintenance; and, estimating such maintenance at $100 per annum as a fair and moderate value, a sum sufficient to buy an annuity of that amount, (in this case $752), was the amount of pecuniary damage recoverable.—The fact that plaintiff had other surviving children (against whom, in any case, the proof showed her recourse to be doubtful and precarious), could not affect the amount which she had a right to recover from defendants, the legal recourse of a mother against her children for maintenance being *solidaire* for the whole against each. *Bernard* v. *The Grand Trunk Railway Co.*, Q.R. 11 S.C. 9

—Nominal Damages—New Trial.]—The court will not grant a new trial to enable a plaintiff to recover nominal damages only. *Haines* v. *Dunlap*, 33 N.B.R. 556.

—Behring Sea Award Act, 1894 (57 & 58 Vict. Imp.) — Wrongful Seizure — Damages — Measure of.]—The measure of damages recoverable for a wrongful seizure under colour of an infringement of the Behring Sea Award Act, 1894 (Imp.), is the whole injury caused by such seizure. *The Beatrice*, 5 B.C.R. 110.

—Measure of — Breach of Covenant — Lease — Evidence—Varying Report.]—See COVENANT.

—Measure—Sale of Machine—Latent Defect—Property in Goods.]—See SALE OF GOODS, IX.

—Street Railway—Interference with Telephone System—Use of Streets.]

See STREET RAILWAY.

DATION EN PAIEMENT.

Sale—Donation in Form of—Gifts in Contemplation of Death—Mortal illness of Donor—Presumption of Nullity—Validating circumstances—Arts. 762, 989 C.C.]—During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale for a price therein stated, but in reality the transaction was in-

tended as a settlement of arrears of salary due by B. to the grantee and the consideration acknowledged by the deed was never paid:—Held, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of Article 762 of the Civil Code, as the circumstances tended to show that the transaction was actually for good consideration (*dation en paiement*), and consequently legal and valid. *Valade* v. *Lalonde*, 27 S.C.R. 551.

DEBTOR AND CREDITOR.

I. Accord and Satisfaction.

Accord and Satisfaction—Solicitor—Right to proceed for Costs after settlement by Parties.]—Defendant after service of a writ claiming $152.16 settled with plaintiff personally by payment of $60, taking a receipt in full. Plaintiff's solicitor, being unaware of the settlement, signed judgment for the full amount and costs. Upon motion by the defendant to set aside the judgment as a breach of the settlement:—Held, that as there was no release under seal of the balance of the debt, or consideration for the agreement to accept a part in full discharge, the plaintiff was entitled to maintain the judgment. The plaintiff consenting to accept the amount of the settlement:—Held, that the plaintiff's solicitor had a right to maintain the judgment as to his costs, and *nem. con.* the judgment was allowed to stand for the amount of the settlement and costs. *Soder* v. *Yorke*, 5 B.C.R. 133.

II. Arrest of Debtor.

—Judgment Debtor—Commitment—Fraudulent Transfer of Property—R.S.O. c. 51, s. 240, s.s. 4 (c).]—A conveyance of real estate is a "gift, delivery, or transfer of any property," within the meaning of section 240, sub-sec. 4 (c), of the Division Courts Act, R.S.O. c. 51. Under the sub-section an express wrongful intent need not be shown; it is sufficient to show that the natural consequence of what was done was to defraud creditors. The sub-section is *intra vires* of the Ontario Legislature.—A Judge in a Division Court who has made an order for the commitment of a judgment debtor has power to vacate it upon a subsequent application.—An order for the commitment of a judgment debtor who had conveyed real estate to his wife, made upon the evidence afforded by his examination, was vacated upon evidence afterwards produced that she had a claim against him for moneys advanced which she urged in good faith and in respect of which she pressed him for payment or security. (Robb, Co. J.) *Kitchen* v. *Saville*, 17 C.L.T. (Occ. N.) 88.

—Arrest—Ca. sa.—Discharge.]—Where a debtor is in custody under a writ of *ca. sa.*, the court cannot make an order for his discharge except under the Indigent Debtors' Act. *Gossling* v. *McBride*, 17 Ont. P.R. 585.

—Capias—Affidavit—"Unless he be Arrested"—Order 44 R. 1, (Nova Scotia.]—Order 44 Rule 1 authorizes a Judge of the Supreme Court of Nova Scotia to make an order directing the arrest and imprisonment of the defendant in any action in which the defendant is liable to arrest, where the plaintiff by affidavit of himself or some other person proves to the satisfaction of such judge, etc., (1) that the defendant is about to leave the province, unless he be arrested, and (2ndly), his belief that the debt will be lost, unless the defendant be forthwith arrested:—Held, that an affidavit which omitted the words "unless he be arrested" in connection with the allegation that the defendant was about to leave the province, was insufficient:—Held (per Henry and Townshend, JJ.), that Order 44, Rule 1 is distinguishable from the English Rule, where the words used are "unless he be forthwith apprehended," and that, therefore, the affidavit would have been no better with the words omitted than without them, but:—*Quære*, whether as a matter of practice the necessity for an immediate arrest should not be shown otherwise than by the words "and I believe the said debt will be lost unless the said defendant be forthwith arrested." *Spain* v. *Manning*, 28 N.S.R. 437.

—N.B. Debtor's Act—59 V., c. 28, s. 53—Attachment—Contempt.]—The defendant was examined under the Act 59 Vict., c. 28, s. 53, and ordered to pay the amount of a judgment debt by instalments payable at the plaintiff's office. Having made default an order was taken out against him for contempt:—Held (per Forbes, Co. J.), that the application should be dismissed as the defendant was not in contempt until the order to pay in instalments was made a rule of court and served upon him, and that a demand for the payment of the instalment was also necessary. *Jones* v. *Monroe*, 33 C.L.J. 578.

—Debtor—Arrest—Discharge—County Court—Appeal.]—See Appeal, IV.

III. Assignment.

(*a*) *For Benefit of Creditors.*

—Assignment for the Benefit of Creditors—Preferred Creditors—Moneys Paid under Voidable Assignment—Liability of Assignee—Statute of Elizabeth—Hindering and Delaying Creditors.]—In an action to have a deed of assignment for

the benefit of creditors set aside by creditors of the assignor on the ground that it is void under the statute 13 Elizabeth, neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor or persons claiming under him can be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them: *Cox* v. *Worrall*, (26 N.S. R. 366) questioned. *Taylor* v. *Cummings*, 27 S.C.R. 589.

—Assignee's Commission and Expenses—Deputy Resident out of Ontario—R.S.O. c. 124, s. 3, s.s. 6.] —Where an assignment for the benefit of creditors is made by a resident of Ontario to an assignee residing in Ontario, but all the work in connection with the assignment is done by the assignee's partner residing out of the province, the assignee cannot recover as against the assignor or retain out of his estate any commission or expenses. *Tennant* v. *MacEwan*, 24 Ont. A.R. 132.

—Assets—Payments by Debtor Direct to Creditors—Assignee's Liability—Equitable Execution—Receiver.]—After an assignment for the benefit of creditors, the debtor made certain payments directly to the creditors:—Held, that such sums were not recoverable from the assignee (*a*) because they had not passed through his hands; (*b*) because they had gone into the hands of *bonâ fide* takers for value without notice, and (*c*) because the property out of which the proceeds were realized had also presumably gone into the hands of *bonâ fide* purchasers for value without notice:—Held, also, that the assignee was not personally liable on account of having parted with property in his hands (*a*) because he was not a trustee for creditors who repudiated the deed and could not be made to account as such; and (*b*) because plaintiffs were only creditors when the assignment was made, and could have nothing more than judgment and execution against the debtor's property wherever it could be found:—Held, further, that all conveyances interposed by the debtor between execution and the property were void under the statute (13 Eliz. c. 5), but that if the property was beyond the reach of an ordinary execution, the Court could afford relief in the form of an equitable execution if it had the necessary materials before it, but only to obtain property or proceeds which could be followed. Where there are materials, and there is nothing available for legal execution, there may be in the one action a prayer to set aside the deed, and a prayer for the appointment of a receiver. The statement of claim in such a case must allege that the transactions between each creditor and the debtor were contrary to the statute.—Where a suit is brought on behalf of all the creditors, the proceeds recovered should be distributed *pro ratâ* except that those who had acquired liens must be satisfied to the extent of the liens. *Taylor* v. *McKinnon*, 29 N.S.R. 162.

—Assignment for Benefit of Creditors—Preferences—Distribution of Assets—Assignee's Discretion—Arbitration Clause.]—A deed of assignment for the benefit of creditors from L.E.H. and E.F.H. to the plaintiff, was made in trust, after paying expenses and three creditors, to whom first preferences were given, to pay certain persons named, being creditors of the assignors, all sums that should thereafter become due to them in consequence of the retirement or payment by them of any bills of exchange or promissory notes upon which the said parties, at the date of the assignment, were directly or contingently liable with the assignors as drawers, makers, acceptors or indorsers; to divide and distribute the residue among the remaining creditors of the assignors who should have executed the assignment "at such time or times as the assignee should find convenient," and to pay the surplus to the remaining creditors of the assignors who should not have executed the deed. The deed also contained a clause under which all disputes and matters of difference existing between the executing creditors and the assignee, were required to be submitted to arbitration:—Held, that the provisions of the deed were not of an unreasonable character. *Hart* v. *Maguire*, 29 N.S.R. 181.

—Creditors' Trust Deeds Act, 1890—Execution—Exemption—Selection of—Statute Regarding Procedure—Retroactivity.]—A deed of assignment of the estate and effects of insolvents for the benefit of their creditors, executed on the 29th March, 1896, pursuant to the Creditors' Trust Deeds Act, 1890, excepted "such personal property as may be selected by the said debtors under the Homestead Act and Homestead Amendment Act, 1890":—Held, that the onus was on the claimant (debtor) to show that the claim was not within the exception to the right of exemption provided by section 10 of the Homestead Act, 1890, as amended by the Act of 1893, section 2, in regard to goods seized in "satisfaction of a debt contracted for or in respect of such identical goods," and in the absence of evidence upon the point the claim was disallowed:—Semble, the Homestead Act Amendment Act, 1890, c. 23, s. 2, directing the method of selecting the goods proposed to be exempted is retroactive in its effect, as regulating procedure, and applied to the claim under the deed in question, though passed after the date of the deed, and that the claim was also invalid for want of compliance with that statute. *In re Sharp*, 5 B.C.R. 117.

— Composition Arrangement — Distinction — R.S.O. c. 124, s. 13—Penalty.]

See BANKRUPTCY AND INSOLVENCY, I. (*a*)

—Real Property Limitation Act, R.S.M. c. 89, s. 24—Payment on Account of Judgment—Leave to issue Execution—Assignment in Trust.]

See LIMITATION OF ACTIONS, III.

—Agreement to give Chattel Mortgage—Bills of Sale and Chattel Mortgages—Change in Statute Law—Registration of Agreement—59 V. (Ont.) c. 34.]—An unregistered agreement by a debtor to give to his creditor upon default in payment, or upon demand, a chattel mortgage upon his "present and future goods and chattels" confers no title upon the creditor as against the debtor's assignee for the benefit of creditors, who takes possession before a chattel mortgage is given: *Kerry* v. *James*, 21 Ont. A.R. 338, con-

sidered.—After judgment in the assignee's favor the Act 59 Vict. c. 34 (O.) was passed, and the agreement in question was registered:—Held, that this did not validate it. *Hope* v. *May*, 24 Ont. A.R. 16.

(*b*) *Preferences.*

—Pressure — Valuable Security—R.S.O. c. 124, s. 3, ss. 3—S. 19, ss. 4—Practice—Parties.]—The doctrine of pressure may still be invoked in order to uphold a transaction impeached as a preference, when it is not attacked within sixty days, or when an assignment for the benefit of creditors is not made within that time. Per Osler, J.A.:—The liability of the endorser of a promissory note made by the debtor held by the creditor for part of his debt is not a "valuable security" within the meaning of sub-sec. 3 of section 3 of R.S.O. c. 124, and if such a note is given up by the creditor to the debtor in consideration of a transfer of goods impeached as a preference the liability cannot be "restored" or its value "made good" to the creditor, or the indorser compelled to again indorse. Per Osler, J.A.:—What is referred to in this sub-section is some property of the debtor which has been given up to him or of which he has had the benefit; some security upon which the creditor, if still the holder of it, would be bound to place a value under sub-sec. 19 of R.S.O. c. 124. Per Osler, J.A.:—The debtor is not a proper party to an action by his assignee against the creditor to set aside a preferential transfer. *Beattie* v. *Wenger*, 24 Ont. A.R. 72.

—Transfer of Unearned Profits.]—An assignment by way of security of the profit expected to be made out of a contract to do work does not come within the Act respecting Assignments and Preferences, and cannot be set aside under that Act. *Blakely* v. *Gould*, 24 Ont., A.R. 153. Affirmed by 27 S.C.R. 682.

—Fraudulent Conveyance—Voluntary Conveyance—Grantor's Intention to Embark in Business.]—A voluntary conveyance of part of his estate by a retired and successful hotelkeeper to his wife, made at a time when he was in insolvent circumstances, but was, after some months of idleness, about to take up the hotelkeeping business again, was upheld as against subsequent creditors, the grantor's subsequent insolvency being caused by loss of fire. *Fleming* v. *Edwards*, 23 Ont. A.R. 718.

—Fraudulent Preference—Previous Agreement—Threatened Action for Tort.]—One of the defendants, when threatened with an action on behalf of the plaintiff to recover damages for slander, conveyed his farm to his co-defendant, his son, the alleged consideration being the son's agreement, entered into several years before, to maintain the grantor and his wife for life. The plaintiff brought the threatened action, and obtained judgment for damages and costs, and then attacked the deed, and in that action it was proved that such an agreement had in good faith been made:—Held, that the previous agreement, although not proved with sufficient clearness to have enabled either party to it to enforce specific performance, was an answer to the charge of fraud. *Montgomery* v. *Corbit*, 24 Ont. A.R. 311.

—Garnishee—Husband and Wife—Assignment of Debt.]—This was an interpleader issue in which the plaintiff claimed that certain moneys paid into Court by a garnishee under an order procured by the defendant, a judgment creditor of the plaintiff's husband had been assigned by her husband to her before the garnishee order. Defendant contended that the assignment was a fraudulent preference, and that the husband could not in law assign the debt to his wife; and at the trial before the County Court Judge, a verdict was entered for defendant on the latter ground:—Held, that the verdict could not be sustained upon that ground, but that there should be a new trial to enable the County Court Judge to decide whether there had been a fraudulent preference.—All the judges agreed that the circumstances showed that the debtor was insolvent, and was aware of his insolvency, and that the effect of the assignment was to give the plaintiff a preference over his other creditors, but they were unable to decide whether there was sufficient pressure upon the debtor to save the assignment under *Molson's Bank* v. *Holter*, 18 S.C.R. 88 and *Stephens* v. *McArthur*, 19 S.C.R. 446; as the only evidence on this point was that of the debtor, who said that he had made the assignment at the request of the plaintiff's solicitor.—The question to be determined in such case is whether the debtor was actuated solely by a desire to prefer in making the assignment, or whether the request to do so was the moving cause: *Van Casteel* v. *Booker*, 2 Ex. 691 followed.—(Per Bain, J.):—The evidence showed that there was no real pressure actuating the mind of the debtor, and that he had made the assignment solely with the intent to prefer, and the original verdict for the defendant should stand. *Colquhoun* v. *Seagram*, 11 Man. R. 339.

—"Creditor"—Fraudulent Conveyance—Action for Tort.]—*Gurofski* v. *Harris*, 23 Ont. A.R. 717; affirming 27 Ont. R. 201, C. A. Dig. (1896) cols. 145, 340.

—Assignment for Creditors—Assignee's Remuneration—Appeal.]—See BANKRUPTCY AND INSOLVENCY, I. (*b*).

—Chattel Mortgage Given within Sixty Days Pursuant to Agreement Given Prior to Sixty Days from Assignment—Statutory Presumption of Fraudulent Intent—(54 V. (Ont.) c. 20.]—See BANKRUPTCY AND INSOLVENCY, VI.

—Negotiable Instrument—Deposit Receipt—"Not Transferable"—Chose in Action—Assignment of Debt.]—See CHOSE IN ACTION.

—Action to Compel Conveyance of Lands—Fraud on Creditors.]—See FRAUDULENT CONVEYANCES.

IV. ASSIGNMENT OF DEBTS.

—Sale of Debts—Arts. 1488, 1571, 2127, C.C.—Transfer—Signification—Fraud.]—A. G. sold a lot of land to R., the price to the extent of $350, being made payable to one S. G. Notwithstanding this indication of payment, the vendor transferred to a Mrs. St. Pierre by notarial deed, $250 of the price due by R., and

this transfer was assented to by S. G. some months afterwards by *sous seing privé*, whereby he ceded the said $250 to A. G. The notarial transfer was signified upon the debtor but not the *sous seing privé*. Subsequently, S. G. made over to plaintiffs any balance there might be due him under the original deed of sale, which transfer was accepted by the debtor, and afterwards the latter sold the property itself to the present defendants, who paid off Mrs. St. Pierre's claim, she granting *main levée* of the hypothec:—Held, maintaining the plaintiff's action *en déclaration d'hypothèque* that the transfer to Mrs. St. Pierre of the debt in question, of which transfer the debtor had to be served with a copy, was complex; it was composed quite as much of the cession by S. G. to A. G., as of the transfer of the latter to Mrs. St. Pierre, and in the absence of signification of the former deed (*sous seing privé*) she was not vested with the ownership of the debt as against third parties. The circumstances and proof in the present case showed that all the parties acted with their eyes open, and each risked his money on the opinion that his position was the better one in law. *Côté* v. *Paradis*, Q.R. 11 S.C. 2.

—Transfer of Claim — Promesse de Garantir, Fournir et Faire Valoir—Warranty—Insolvency of Debtor.]—A warranty, "promesse de garantir, fournir et faire valoir," in a transfer of a claim which is due and exigible, does not necessarily imply a warranty of anything more than the solvency of the debtor at the time of the transfer; and so, where the transferee, at the date of the transfer, was aware that the payment had already been demanded by the transferor, who had refused to grant any extension, and the transferee nevertheless allowed more than a year to elapse without taking any steps to obtain payment, it was held that he could not recover from the transferor under the warranty without proving the insolvency of the debtor at the time of the transfer. *Cardinal* v. *Boileau*, Q.R. 11 S.C. 431.

V. Attachment of Debt.

—Attachment of Debt—Rule 497 — Promissory Note not Matured.]—A promissory note not yet due constitutes a debt owing and accruing, and is attachable to answer a judgment debt within the meaning of Rule 497. *Girard* v. *Cyrs*, 5 B.C.R. 45.

—Debt dependent on unperformed Condition—Priority between prior Assignment without Notice and Attaching Order.]—A sum of money payable under a building contract as soon as the building should be finished is not attachable before the performance of the condition, as not being a debt. The fact that the creditor has assigned the debt to a third person, though there be no notice of the assignment to the debtor, is a good answer to an attaching order, as the attaching creditor can only take that which the debtor can lawfully part with, having regard to the rights of others. *Gray* v. *Hoffar*, 5 B.C.R. 56.

VI. Attachment for Debt.

— Absent or Absconding Debtor — Attaching Creditor—Expenses of Sale Delayed at Instance of Creditor — Sheriff's Right to Recover.]—Where the sale of property seized by the sheriff under a writ of attachment is delayed at the instance of the attaching creditor, the fact of such a request being made, either expressly or impliedly, when the creditor knows that the sheriff is in possession of the property, and has reason to know that the latter is incurring expenses in connection with the care and possession of the property seized, is sufficient to make him liable to the sheriff for any reasonable expenses properly incurred in that behalf. *McDonald* v. *Curry*, 28 N.S.R. 305.

—Absent or Absconding Debtor—Attachment—Justification by Sheriff of taking under the writ—Acceptance of property in discharge of Debt—Possession—Proof of Ownership.]—Property in the possession of plaintiffs was taken under an attachment issued against J. as an absent or absconding debtor. The evidence showed that plaintiffs bought and paid for the property, and that it was in their possession at the time of the attachment:—Held, that the onus was upon the defendant (sheriff) to justify the taking under the writ:—Held, also, following *Mills* v. *McLean*, 1 R. & C. 379 that the affidavit on which the attachment issued was insufficient because it failed to prove any debt from J. to the attaching creditor:—Held, also, that as the goods were purchased on two occasions, and the amount did not on either occasion exceed $40, the defence of the statute of frauds was not applicable.—With respect to the sale of a horse to one of the plaintiffs the evidence showed an agreement that a debt due from the execution debtor to plaintiff should be extinguished, and that plaintiff should receive the horse in satisfaction of the debt:—Held, that this was a good sale within the *dicta* of the judges in *Walker* v. *Nussey*, 16 M. & W. 302:—Held, also, that the property having been taken out of the plaintiff's possession, and defendant having failed to prove his justification under the attachment, objections taken under the statute of frauds and the statute 13 Elizabeth would not avail defendant, as the plaintiffs' possession was of itself sufficient to enable them to sustain the actions, and they were not required to prove the real ownership of the property. *Johnson* v. *Buchanan*, 29 N.S.R. 27.

— Foreign Corporation — Winding-up Order — Proof of — Proceedings by Liquidator to set aside Attachment.]—See Company, VII. (*b*).

VII. Demand of Payment.

— Demeure — Contract in Writing—Promise to pay Creditor's solicitor—Art. 1067 C.C.]—Article 1067 of the Civil Code, which requires putting in default (*mise en demeure*) to be in writing when the contract itself is in writing, does not apply to a simple demand of payment of a debt which resolves itself into a question of fact, capable of being proved by testimony. When the debtor puts himself in default by promising to pay his debt to the attorney of

the creditor, in which promise he admits the special authority of the attorney and his power to receive payment in the name of the creditor, and has made payments to the attorney on account, it is not necessary to renew a demand of payment from him which has been already made by the interposition of the creditor's attorney, and to which he has agreed to submit. *Bagg* v. *Baxter*, Q.R. 11 S.C. 71.

VIII. Discharge of Debtor.

—Promissory Note—Consideration—Inducement to Sign Composition.]—A promissory note given by a debtor to his creditor to induce the latter to sign a deed of composition is null and void, as is likewise a renewal of such note. *Bury* v. *Nowell*, Q.R. 10 S.C. 537.

—Promissory Note—Holder for Collection only—Compensation.]—Compensation does not take place between a debt which is clear and liquidated, and a promissory note of which the person offering it in compensation is holder for collection only. Per Taschereau, J. (dissenting): A holder for collection only, who has derived his title through a holder in due course, and who has been a party to no fraud or illegality affecting the note, has all the rights of a holder in due course as regards the maker and all parties to the note prior to such holder. *Laforest* v. *Inkeil*, Q.R. 11 S.C. 534.

—Partnership—Payment of Debt to one Partner—Acceptance of Goods for Cash.]

See Partnership III.

IX. Examination of Judgment Debtor.

—Examination—Right to issue Appointment for.]—A judgment creditor is *primâ facie* entitled to issue an appointment for the examination of his judgment debtor; and upon a motion to commit the latter for refusal to be sworn, it is for him to show affirmatively that the issue of the appointment was an abuse of the process of the Court. *Grant* v. *Cook*, 17 Ont. P.R. 362.

—Ont. Rule 928—Examination—"Transfer."]—A judgment debtor had made a transfer of his property, after the debt sued for was incurred, to a mortgagee of the land of his wife, which had the effect of giving a benefit to the wife by reducing the encumbrance:—Held, that the judgment creditor was entitled to an order under Ont. Rule 928 for the examination of the wife as a person to whom the debtor had made a "transfer" of his property; but *quære* as to the scope of the examination. *Croft* v. *Croft*, 17 Ont. P.R. 452.

—Examination—Order for—Judgment for Costs—Interpleader Proceedings—Motion to Commit—Ont. Rules 926, 932, 1360—Concealment of Property.]—An order under Ont. Rule 932 for the examination of a judgment debtor for costs in interpleader proceedings having been made upon hearing all parties, an objection that the rule is not applicable to such proceedings cannot be raised on a subsequent application to commit.—The judgment debtor, upon hearing that judgment had gone, or was about to go against her, turned all the property she had into money and sent it to a friend in a foreign country where it remained, and upon her examination she refused or professed to be unable to give any information as to where it was. After she had ample opportunity to become aware of her position, but had done nothing towards satisfying the plaintiff's claim, an order was made for her committal to gaol for three months and for payment by her of the costs of the motion. *McKinnon* v. *Crowe*, 17 Ont. P.R. 291.

—Judgment for Costs Only—Examination of Judgment Debtor—Execution Act, C.S.B.C. 1888, c. 42—Order ex parte.]—Section 11 of the Execution Act, C.S.B.C. (1888), c. 42, providing for the examination of a judgment debtor "as to the means or property he had when the debt or liability was incurred," refers to the debt or liability to recover which the action was brought, and does not apply to a judgment for costs only.—When an order is made after service of a summons upon which the opposite party does not attend it will be treated as an *ex parte* order, and may be re-heard in Chambers and rescinded. *Griffiths* v. *Canonica*, B.C.R. 48.

—59 V. c. 28, (N.B.)—Effect of former Examination under N.B. Con. Stat. c. 38—Retroaction.]—Summons taken out by a judgment creditor under 59 Vict., c. 28, with a view to having the defendant, a judgment debtor, committed to jail for a year, on the grounds that the defendant had since the judgment had the means of paying the debt, but had refused to do so. A preliminary objection was taken, supported by affidavit, that on a similar summons taken out under Con. Stat. of N.B., c. 38, in that some time previously a new agreement had been made, founded on a consideration that the defendant would pay and the plaintiff would accept payment of the debt by instalments:—Held (per Forbes, Co. J.) that by making a new agreement, with consideration therefor, the plaintiff had waived his right under the statute, and was therefore precluded from proceeding further on present summons:—Held, also, that the proceeding should have been pressed, if pressed at all, under the Act under which the first summons had been taken out. *Bailey* v. *Ross*, 33 C.L.J. 47.

—59 V. (N.B.) c. 28 s. 36—Actions Ex Contractu and Ex delicto.]—Held (per Forbes, Co. J.), (1) that 59 Vict. (N.B.) c. 28, s. 36 applies to judgments in actions both *ex contractu* and *ex delicto*; and (2) that the principal in *Beste* v. *Berastain*, 20 N.B.R. 106, does not extend to an examination of a judgment debtor under the above enactment. *Belyea* v. *McGinnis*, 17 C.L.T. (Occ. N.) 32.

X. Judgment Creditor.

—Action to declare foreign Defendant's Trustees—Writ—Service out of Jurisdiction.]

See Practice and Procedure, L.

XI. Novation.

—Payment of Debt by Third Party—Assignment not Signified to Debtor—Arts. 1141, 1174, 1572 C.C.]—Payment to a creditor by a third party only effects the discharge of the debtor when it is made for that purpose and not with the object of changing the creditor; therefore, a debtor cannot oppose to an action by his creditor a payment received by the latter from a third party to whom the debt had been transferred by an assignment not signified to the debtor, such assignment not effecting a novation. *Gravel* v. *Charbonneau*, Q.R. 11 S.C. 408.

XII. Prejudice to Creditor.

— Consent Judgment with intent to Delay Creditors — Consolidated Statutes, c. 51, s. 1.]—Under section 1 of c. 51 of the Consolidated Statutes of British Columbia a consent judgment obtained by the respondent bank against the insolvent respondent tramway company, with intent to defeat or delay the creditors of the latter, was held to be null and void against them. So long as the intent is proved, it is immaterial whether or not consent was given under pressure. *Edison General Electric Company* v. *Westminster and Vancouver Tramway Company* [1897], A.C. 193

XIII. Recovery of Debt.

—Change of Domicile—Effects not Seizable—Rights of Creditor.]—The creditor of a debtor who has left his domicile and taken with him a considerable portion of his household effects is not bound to search in order to discover what they are which have been carried away nor what those are which he desires to retain.—Effects exempted from seizure are declared so to be for the public good, but it is the debtor who wishes to claim the benefit of the exemption to signify his intention and to oppose the sale of his effects so exempt. *Boucher* v. *Véronneau dit Denis*, 3 Rev. de Jur. 467. Court of Review.

—Commercial Agency—Posting Debtors—Damages.]—See Commercial Agency.

XIV. Set Off.

—Joint Debtors—Claim of One Debtor.]—When one of a number of debtors, bound jointly but not *solidairement*, has himself a claim against the joint creditor, the amounts so due cannot be set off or compensated so as to liberate all concerned. *Clerk* v. *Wadleigh*, Q.R. 10 S.C. 456.

And see Bankruptcy and Insolvency.
" Capias.
" Execution.
" Fraudulent Conveyance.
" Receiver.
" Set-off.

DEED.

—Construction of—Title to Lands—Ambiguous Description — Evidence to Vary or Explain —Possession—Conduct of Parties—Presumptions from Occupation of Premises—Arts. 1019, 1238, 1242, 1473, 1599 C.C.—47 V. c. 87, s. 3 (D.); 48 & 49 V. c. 58, s. 3 (D.)—45 V. c. 20 (Q.)]—By a deed made in August, 1882, the appellant ceded to the Government of Quebec, who subsequently conveyed to the respondent, an immovable described as part of Lot No. 1937, in St. Peter's Ward in the City of Quebec, situated between the streets St. Paul, St. Roch, Henderson and the River St. Charles, with the wharves and buildings thereon erected. Of the lands of which the respondents entered into possession by virtue of said deeds they remained in possession for twelve years without objection to the boundaries. They then brought an action to have it declared that, by the proper construction of the deeds, an additional strip of land and certain wharves were included and intended to be transferred. They contended that the description in the deed was ambiguous, and that Henderson street as a boundary should be construed as meaning Henderson street extended, and they sought to establish their case by the production of certain correspondence which had taken place between the parties prior to the execution of the deed of August, 1882:—Held, that the words "Henderson street" as used in the deed must be construed in their plain natural sense as meaning the street of that name actually existing on the ground; that the correspondence was not shown to contain all the negotiations or any finally concluded agreement, and could not be used to contradict or modify the deed which should be read as containing the matured conclusions at which the parties had finally arrived; that the deed should be interpreted in the light of the conduct of the parties in taking and remaining so long in possession without objection, which raised against them a strong presumption, not only not rebutted but strengthened by the facts in evidence; and that any doubt or ambiguity in the deed, in the absence of evidence to explain it, should be interpreted against the vendees, and in favour of the vendors. *The City of Quebec* v. *The North Shore Railway Company*, 27 S.C.R. 102.

— Nullification — Allegations — Admission.]—A deed was entered into by the parties to a suit in order to effect a compromise of family disputes and prevent litigation but failed to attain its end, and was annulled and set aside by order of the court as being in contravention of article 311 of the Civil Code of Lower Canada.—Held, that upon the nullification of the deed no allegation contained in it could subsist even as an admission. *Durocher* v. *Durocher*, 27 S.C.R. 363, affirming Q.R. 5 Q.B. 458.

—Unilateral—Execution before Notary—Acceptance—Power of Executing Notary to accept for Creditor—Obligation.]—Where an obligation without hypothec is executed before notary, the deed being unilateral, and of a kind not

requiring acceptance by the creditor, the fact that the executing notary accepted so far as he could for the creditor, who was not present, does not affect the validity of the obligation.—In any case the institution of an action by the creditor would constitute an acceptance.—But, *semble*, if a hypothec had been concerned, the presence of the notary as a contracting party might cause the deed to lose its authentic form (R.S.Q. Art. 3640). *St. Germain* v. *Birtz dit Desmarteau*, Q.R. 10 S.C. 185.

—Recital — Heirship — Evidence for Jury.]—A recital in a deed conveying land that one of the parties is heir of a former owner is not of itself evidence of his heirship to submit to the jury on trial of an action affecting the title. *Hovey* v. *Long*, 33 N.B.R. 462.

—Of Infant—Repudiation—Silence.]—The deed of an infant is voidable only and if he wishes to avoid it after attaining his majority he must expressly repudiate it within a reasonable time, otherwise his silence will amount to an affirmance. *McDonald* v. *The Restigouche Salmon Club*, 33 N.B.R. 472.

—Title of Lands—Seignorial Tenure—Deed of Concession — Construction — Words of Limitation — Covenant by Grantee—Charges Running with the Title — Servitude — Condition, si voluero—Prescriptive Title—Edits and Ordonnances (L.C.) — Municipal Regulations — 23 V. c. 85 (Can.).]—See SERVITUDE.

— Building Society—Assessments on Loans — Administrations and Trustees—Sales to—Nullity —Art. 1484 C.C.]—See BUILDING SOCIETY.

—Sale—Donation in Form of—Gifts in Contemplation of Death—Mortal Illness of Donor — Presumption of Nullity — Validating Circumstances—Consideration—Dation en paiement—Arts. 762, 989 C.C.]—See DATION EN PAIEMENT.

—Substitution—Terms of Deed—Interpretation —Payment of Purchase Money.]

See SUBSTITUTION.

DELAYS.

See PRACTICE AND PROCEDURE, XI.

DEVOLUTION OF ESTATES ACT. (ONT.)

Children of Deceased Brother and Sister—R.S.O. c. 108, s. 6.]—Under section 6 of the Devolution of Estates Act, R.S.O. c. 108, where brothers or sisters are entitled to share on an intestacy, the children of a deceased brother or sister of the intestates are entitled to share *per stirpes*: *Re Colquhoun*, 26 Ont. R. 104, overruled. *Walker* v. *Allen*, 24 Ont. A.R. 336.

DISTRIBUTION.

See JUDGMENT OF DISTRIBUTION.

DITCHES AND WATERCOURSES.

Ontario Ditches and Watercourses Act—Municipal Corporations — Damages—R.S.O. c. 220.]

See MUNICIPAL CORPORATIONS, III.

—Engineer's Action—Time — Estoppel—R.S.O. c. 220.]—See MUNICIPAL CORPORATIONS, III.

DIVISION COURTS.

Interest—Splitting Demand — Prohibition.]—Where the plaintiff sued in a Division Court for $100 interest upon moneys deposited with the defendants, and it appeared that she had treated the deposit receipt in her hands as one upon which the whole sum was past due and collectible:—Held that the action came within s. 77 of the Division Courts Act, R.S.O. c. 51, whereby the splitting of causes of action is forbidden; and prohibition was granted: *In re Clark* v. *Barber*, 26 Ont. R. 47, followed, but commented on as irreconcilable with such cases as *Dickenson* v. *Harrison*, 4 Price 282, approved in *Attwood* v. *Taylor*, 1 M. & G. 307. *Re McDonald* v *Dowdall*, 28 Ont. R. 212.

—Prohibition—Transfer—Division Courts Act—Action against Bailiff for wrongful Seizure—Joinder of Execution Creditor—R.S.O. c. 51, ss. 81, 87, 89, 290.]—Action brought against a Division Court Bailiff in an adjoining county, pursuant to R.S.O. c. 51, s. 89, for wrongful seizure of a mare of the plaintiff's, the party however, on whose execution the seizure was made, being joined as a co-defendant. Neither of the defendants resided in the Division where action was brought:—Held, per Ferguson, J., on motion for prohibition, that the Court had no jurisdiction to entertain the action, notwithstanding R.S.O. c. 51, s. 81, although if the bailiff had been sued alone, the proceedings would have been regular:—Held, on appeal, that whether sustainable against both the defendants in the Division where brought or not, the action could have been so brought in the county where the cause of action arose, and therefore a motion to transfer should have been made before moving to prohibit. *In re Hill* v. *Hicks and Thompson*, 28 Ont. R. 390.

—Prohibition—Procedure — Jurisdiction — Issue of Blank Summons—R.S.O. c. 51, s. 44.]—The issue by the clerk of a Division Court of a summons with a blank for the name of a party, which is afterwards filled up by the bailiff pursuant to the clerk's instructions, though contrary to the provisions of section 44 of the Division Courts Act, R.S.O. c. 51, does not affect the jurisdiction of the Division Court, nor afford ground for prohibition, but is a matter of practice or procedure to be dealt with by the Judge in the Division Court. *Re Gerow* v. *Hogle*, 28 Ont. R. 405.

— Jurisdiction—Promissory Note—Interest—56 V. c. 15, s. 2 (Ont.),—Abandonment of Excess—Recovery on Note—Indorsers—Sureties—Parties—Substitution of Plaintiff.] In an action in a Division Court against the makers and indorsers of a promissory note expressed on its face to be for $200 and interest, judgment was given for the plaintiff for $210:—Held, that the amount was ascertained by the signatures of the defendants, and the interest accumulated upon the note from the time the amount was so ascertained was not to be included in determining the question of jurisdiction, and might be recovered in addition to the claim under 56 Vict, c. 15, s 2 (Ont.), notwithstanding that the interest and the amount of the claim so ascertained together exceeded $200:—Held, also, that the judge had power, under Revised Rule 7 of the Division Courts, to permit the abandonment of the excess caused by a claim for notarial fees:—Held, also, that upon payment of the amount of the note by the plaintiff to the original holder, the plaintiff being liable as indorser to such holder, the plaintiff became entitled to the note and to enforce his rights against the other parties to it; and, as it appeared that two of the defendants had indorsed the notes as sureties to the plaintiff for the makers, he was entitled to recover against them, although the note was made payable to his order: *Wilkinson* v. *Unwin*, 7 Q.B.D. 636, followed:—Held, lastly, that Revised Rules 211, 216 and 224 of the Division Courts authorized the judge to substitute the name of the plaintiff for that of the original holder of the note as plaintiff in the action. *Pegg* v. *Howlett*, 28 Ont. R. 473.

—Breach of Contract—Place of—Cause of Action—Mandamus.]—Plaintiff gave an order in Ontario for goods to the traveller of the defendants, wholesale merchants in Montreal, "Ship *via* G.T.R." at a certain named date. The goods were not so shipped, and a correspondence ensued, ending in the defendants refusing to supply the goods:—Held, that the breach was the non-shipment *via* Grand Trunk Railway at Montreal, and not the subsequent refusal by correspondence, and as the whole cause of action did not arise where the order was given, a mandamus to a Division Court Judge to try the action was refused. *Re Diamond* v. *Waldron*, 28 Ont. R. 478.

—Prohibition—Court nearest Defendant's Residence—Jurisdiction.]—An action was brought in a Division Court against a firm consisting of two partners, which had been dissolved before action, one of the partners being resident out of Ontario and the other where the cause of action arose, being in a county other than that comprising the Division in which the action was brought, although such Division was nearest to where the firm had carried on business and the applicant resided. The Judge having overruled an objection to his jurisdiction and tried the case and pronounced judgment on the merits, prohibition was, under the circumstances refused. *Semble*.—The Judge at the trial might have made an order permitting the plaintiff to proceed. *Re Sinclair* v. *Bell*, 28 Ont. R. 483.

—Division Court—"Sum in Dispute"—Right of Appeal — R.S.O. c. 51, s. 148.]—Where the subject matter of the claim in a Division Court is one cause of action exceeding $100 and the amount recovered at the trial is under that sum, an appeal lies to a Divisional Court under section 148 of the Division Courts Act, "the sum in dispute upon the appeal" being the amount claimed, and not that amount less the sum recovered at the trial. *Petrie* v. *Machan*, 28 Ont. R. 504.

—Judgment Debtor — Commitment — Jurisdiction.]—A Judge of a Division Court who has made an order for the commitment of a judgment debtor has power to vacate it, upon a subsequent application. An order for the commitment of a judgment debtor who had conveyed real estate to his wife, made upon the evidence afforded by his examination, was vacated upon evidence afterwards produced that she had a claim against him for moneys advanced which she urged in good faith and in respect of which she pressed him for payment or security. (Robb, Co. J.) *Kitchen* v. *Saville*, 17 C.L.T. (Occ. N.) 88.

DIVISIONAL COURT.

See APPEAL, III. (*d*).

DOG.

Vicious Dog—Injury by—Person entering Building without Permission—Liability of Owner.]

See NEGLIGENCE, IX.

DOMICILE.

Will—Charitable Bequest—Validity of—Lands in Ontario—Foreign Lands—Debts and Testamentary Expenses—Liability for.]—A testator, domiciled in a foreign country, died in 1891, possessed of certain lands and personal estate in that country, and also of lands in Ontario. His personal estate was insufficient to pay his debts. By his will, after specific bequests and devises, he gave the residue of his estate, real, personal and mixed, wherever situated, to his trustees, to promote, aid and protect citizens of the United States of African descent in the enjoyment of their civil rights, or, in case of such trust becoming inoperative, to his heirs at law:—Held, that the devise of lands, as far as Ontario was concerned, was void and inoperative. *Lewis* v. *Doerle*, 28 Ont. R. 412.

—Husband and Wife — Marriage contracted in Quebec and Property acquired in New Hampshire—Change of Domicile—Intention.]—The fact of lengthened residence in the United States of natives of Quebec (who married and lived here for many years after marriage) is not of itself sufficient to establish a change of domicile so as to give to the wife the right of owning property acquired after marriage, as her separate property.—To constitute a change

of domicile it must be *animo et facto*, and when, as in the present case, there was no evidence of intention to reside permanently in the United States, but on the contrary they have returned, and since their return the wife has judicially declared they were always, since marriage, *communs en biens*, not only the presumption of law, but also the presumption arising from the circumstances is against the intention to abandon the domicile of origin. *McNamara* v. *Constantineau* 3 Rev. de Jur. 482. White, J.

—Legacy—Advance to Husband—Bill of Sale.] —The execution debtor and the claimant were married in 1873 in England, where they had their domicile. The debtor was a non-commissioned officer in the army. In 1883 he went with his regiment, accompanied by his wife, to Bermuda, and in 1886 to Halifax, where he and his wife remained until 1888. In 1888 he retired with a pension and went to the North-West Territories with his wife and family to reside there. In April, 1886, the wife's father died in England and left her £400, which was brought to her at Halifax in March, 1888. Between April, 1888, and November 1895, she advanced to her husband of that money $1,500, for which she got from him the bill of sale under which she claimed:—Held, (per Rouleau, J. in Chambers), that the £400 vested in the claimant as her separate property in 1886, and, being such in England, where her domicile then was, notwithstanding her temporary residence abroad, it continued to be such in the North-West Territories; and the money paid thereout to her husband was a valid consideration for the bill of sale: *Conger* v. *Kennedy*, 26 S.C.R. 397, referred to. *Lougheed* v. *Murray*, 17 C.L.T. (Occ. N.) 105.

—Action against Husband and Wife—Service of Writ.] —See PRACTICE AND PROCEDURE, L.

—Election—Venue—Promissory Note—Place of Payment—Art. 85 C.C.]

See PRACTICE AND PROCEDURE, XLVII.

DOMINION LANDS.

Boundary Lines — Survey — Re-survey — Dominion Lands Act, s. 129—52 V., c. 27, s. 7 (D.) —Ratification by Order-in-Council—Road Allowance.]—See CONSTITUTIONAL LAW, III (*b*).

DONATION.

Marriage Contract—Gift to Future Husband—Donation a Cause de Mort—Sale of Movables by Donor—Saisie Conservatoire—Art. 823 C.C.]—By contract of marriage between B. and D. providing for separation as to property it was declared that the property of D. consisted of certain movables and agricultural effects enumerated in the *acte* and in a lot of land, and it also provides as follows:—"In consideration of the present marriage the future wife wishes and intends to leave to the future husband, at her death, the enjoyment during his life of the land (described in the *acte*) to possess it as *bon père de famille*, as well as of the movables and agricultural effects more particularly designated and described in a list marked B. (this list is annexed to the *acte*, the goods enumerated being there designated in specie as: 1,000 bundles of hay, 38 measures (*minots*) of grain, a large cart, etc.,) also possessing them as *bon père de famille* in order that he may render an account of them to the heirs of the future wife" D. (the donor) had announced a sale by auction of these movables and agricultural effects and B. (donee) caused them to be seized by way of *saisie conservatoire* in order to prevent the sale:—Held that the donation was a *donation pour cause de mort* and of the future property, and that the donor could not dispossess herself at once of the movables mentioned in order to vest them in the donee, but that she retained her present effects in her possession as her property, and could dispose of them *par acte onéreux* the right of the donee, until the death of the donor, being only in expectancy, which could only be realized after her death and upon the property of her succession if he survived her; that, therefore, the donee could not, because a sale was announced by the donee, cause the movables to be seized.—The *donation à cause de mort* can be applied to some particular and definite property to take effect in the succession of the donor as well as to an *aliquot part* of the succession. *Boissy* v. *Daignault*, Q.R. 10 S.C. 33 reversing 8 S.C. 409.

— Maintenance — Obligation to Maintain.] — *Lévesque* v. *Garon*, Q.R. 10 S.C. 514, reversed by Court of Queen's Bench on Jan. 7th, 1897.

—Sale—Donation in Form of—Gifts in Contemplation of Death—Mortal Illness of Donor—Presumption of Nullity—Validating Circumstances —Dation en Paiement—Arts. 762, 989 C.C.]

See DATION EN PAIEMENT.

—Donation by Marriage Contract—Seizin—Rights of Third Parties—Art. 823 C.C.]

See HUSBAND AND WIFE, I.

—Donation Mutuelle—Insurance Policy—Fraud.]

See HUSBAND AND WIFE, I.

—Future Succession—Guarantee—Art. 658 C.C.]

See SUCCESSION FUTURE.

DOWER.

Action for Assignment of Dower—Recovery of Land.]—See ACTION, IV.

—Covenant—Action for Specific Performance—Dower—Conveyance of.]

See SALE OF LAND, III.

—Administration cum test. annexo—Composition—Dower—R.S.O. c. 110, s. 31.]

See EXECUTORS AND ADMINISTRATORS, VI.

DRAINAGE.

See MUNICIPAL CORPORATIONS, IV.

DRAW-BACK.

See REVENUE.

DYING WITHOUT ISSUE.

Statute, Construction of—Estates tail, Acts Abolishing—R.S.N.S. (1 ser.) c. 112; (2 ser.) c. 112; (3 ser.) c. 111—23 V. c. 2 (N.S.)—Will—Construction of—Executory Devise Over—"Dying Without Issue"—"Lawful Heirs" "Heirs of the Body"—Estate in Remainder Expectant—Statutory title—R.S.N.S. (2 ser., c. 114, ss. 23 and 24—Title by Will—Conveyance by Tenant in Tail.]—See WILL, II.

—Will—Construction of—Words of Futurity—Life Estate—Joint Lives—Times for Ascertainment of Class—Survivor Dying without Issue—"Lawful heirs".]—See WILL, II.

EASEMENT.

Necessary Way—Implied Grant—User—Obstruction of Way—Interruption of Prescription—Acquiescence—Limitation of Action—R.S.N.S. (3 ser.) c. 112; (4 ser.) c. 100—2 & 3 Wm. IV. (Imp.) c. 71, s. 2 and 4.]—K. owned lands in the county of Lunenburg, N.S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood-lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There was not any formed road across the lands, but merely a track upon the snow during the winter months, and the way was not used at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed, and caused a cessation of the actual enjoyment of the way during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff. The statute (R.S.N.S. 5 ser. c. 112) provides a limitation of twenty years for the acquisition of easements, and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof, and of the person making the same:—Held, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute:—Held, also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would without special grant pass by implication, upon the severance of the tenements. *Knock* v. *Knock*, 27 S.C.R. 664, reversing 29 N.S.R. 267.

—Action for Obstruction of Private Way—Form of Claim.]—See PLEADING, IX.

—Surface Water—Easement—Lands of Different Levels.]—See WATERS AND WATERCOURSES.

EDUCATIONAL INSTITUTION.

Exemption from Taxes—Bible Society—Montreal City Charter, 52 V. c. 79, s. 88 (P.Q.)]

See ASSESSMENT AND TAXES.

EJECTMENT.

Title not derived from Crown—Possession.]—Held, following *Cunard* v. *Irving* (James [N.S.R.] 36), that where a party claiming land in ejectment does not derive his title from the Crown he is bound to start from some one in possession of the land, possession being in such case, *primâ facie* evidence of title. *McLeod* v. *Delaney*, 29 N.S.R. 133.

—Ouster—Defence not Raised—Necessity to Prove.]—In an action for ejectment the plaintiff is not obliged to prove ouster where the defendant does not raise it by his statement of defence but insists on his absolute title to the land. *McDonald* v. *The Restigouche Salmon Club*, 33 N.B.R. 472.

—Landlord and Tenant—Creation of Tenancy—Transfer of Revenues—Art. 1608 C.C.]

See LANDLORD AND TENANT, III.

ELECTION.

Of Domicile—Venue—Promissory Note—Place of Payment—Art. 85 C.C.]

See PRACTICE AND PROCEDURE, XLVII.

ELECTION LAWS.

See PARLIAMENTARY ELECTIONS.

EQUITABLE EXECUTION.

See RECEIVER.

EQUITABLE RELIEF.

Damages—Liquidated damages or Penalty—Ontario Judicature Act, s. 52, s.s. 3.]

See DAMAGES.

EQUITY OF REDEMPTION.

See MORTGAGE, V. and XIII.

ESTOPPEL.

Leasehold—Charge.]—Where the assignee of a term, subject to a mortgage, becomes the owner of the fee by purchase, the reversion in the lands is bound in his hands for the payment of such mortgage, without repayment to him of the purchase money; and where he has obtained the conveyance of the reversion upon the representation that he is the assignee of the term, he is estopped from saying that he acquired it otherwise than as the conveyance to him shows. *Building and Loan Association* v. *McKenzie*, 28 Ont. R. 316. Affirmed by 24 Ont. A.R. 599. Appeal to Supreme Court of Canada now standing for judgment.

—Public Company — Trustees — Removal of — Former Action — Estoppel.]—The action was brought by a public company to remove two of the trustees for refusing to obey an order of the Court made in a previous action directing them to join with the other trustees in assessing, as not being *bonâ fide* fully paid up, certain founder's shares marked fully paid up, in order to raise funds for carrying on the company:—Held, (1) That the defendant trustees should be removed. (2) That they were estopped by the judgment in the previous action from objecting to the *status* of directors who had ordered the assessment of the stock, as that was a question which should have been raised in that action. *Fraser River Mining Co.* v. *Gallagher*, 5 B.C.R. 82.

—Evidence—Judicial Admissions—Nullified Instruments—Cadastre—Plans and Official Books of Reference — Compromise — "Transaction"—Arts. 311 and 1243-1245 C.C.—Arts. 221-225 C.C.P.]

See EVIDENCE, II.

— Administrator cum Testamento Annexo — Agreement to Treat Two Estates as One in Probate Court—Commissions—Estoppel.]

See EXECUTORS AND ADMINISTRATORS, VIII.

—Husband and Wife—Separate Property—Covenant—Mortgage—Estoppel.]

See HUSBAND AND WIFE, V.

—Judgment — Acceptance of Promissory Note in Discharge of—Revivor—Evidence—Satisfaction Piece—Mistake—Estoppel.]

See JUDGMENT, III.

—Chattel Mortgage—Application of Proceeds—Partnership—Estoppel.]—See PARTNERSHIP, I.

— Statement of Defence — General Denial — Amendment—Striking Out—Joinder—Estoppel.]

See PLEADING, IX.

ESTREAT.

Bail—Estreat—Notice—English Crown Rule.]

See CRIMINAL LAW, III.

EVIDENCE.

I. ADMISSIBILITY.

Negligence — Bodily Injuries — Exhibition to Jury—Surgical Testimony.]—The plaintiff in an action for bodily injuries may exhibit them to the jury for the purpose of having the nature and extent of the damage explained by a medical witness. Review of American authorities on this subject.—The exhibiton of injuries which have happened to another person, for the purpose of contradicting evidence given on behalf of the plaintiff in such an action, is not permissible unless competent evidence is forthcoming to explain their nature; but even with such evidence, *quære*. *Sornberger* v. *Canadian Pacific Railway Co.*, 24 Ont. A.R. 263.

—Life Insurance for Benefit of Child — Oral declarations of Insured.]—In the course of proceedings for the administration of an intestate's estate, the amount of a life policy taken out by deceased under the Act to secure to wives and children the benefit of life insurance, in favour of his daughter absolutely, and which had been paid to her guardian, was set up as satisfaction of a claim made on behalf of the daughter and of the personal representative of her mother against the estate, and certain oral declarations of the deceased made before effecting the insurance were proved to show such to have been his intention:—Held, that if the evidence was admissible at all, which was doubtful, there should at least be something in writing evidencing the obligation to accept the amount in satisfaction of the claim as formal as the Act requires in the case of changes in the description of, or apportionment among, the beneficiaries. In *re Mills, Newcombe* v. *Mills*, 28 Ont. R. 563.

—Criminal Trial — Depositions at Coroner's Inquest—Admissibility.]—The depositions taken at a coroner's inquest cannot be read on the trial of an indictment unless the formalities prescribed for the taking of depositions at a preliminary inquiry before a Justice of the Peace have been observed. *The Queen* v. *Ciarlo*, Q.R. 6 Q B. 142.

And where the evidence at the preliminary inquiry was given in French, but taken down in English by a translator, and not read over to, and signed by the witness, it was not allowed to be read at the trial to establish a

contradiction between it and the witness' evidence at the trial, but cross-examination of the witness was permitted as to any material statement made by him at the preliminary inquiry to enable the defence to examine witnesses to show such contradiction. *The Queen* v. *Ciarlo*, Q.R. 6 Q.B. 144.

—**Promissory Note — Obligation Under.**]—In an action on a promissory note parol evidence cannot be given to establish an obligation different from that expressed on its face. *Hamilton* v. *Jones*, Q.R. 10 S.C. 496.

—**Party Testifying on His Own Behalf—Action on Debt anterior to Statute—54 V. c. 45 (P.Q.)**]—A party cannot give evidence on his own behalf when the debt claimed is anterior to the statute (54 Vict. c. 45) permitting this mode of proof. *Campbell* v. *Baxter*, Q R. 10 S.C. 191.

—**Promissory Note—Verbal Agreement to Renew —Proof.**]—Evidence will not be received, in an action on a promissory note, of an alleged verbal agreement to renew. *Letellier* v. *Cantin*, Q.R. 11 S.C. 64.

—**Commissioners' Court—Oral Evidence.**]—Oral testimony is admissible in all cases before Commissioners' Courts, even such as would be illegal before other Courts. The erroneous admission of illegal evidence by a Commissioners' Court constitutes a mere *mal jugé* insufficient to give right to *certiorari*. *Ex parte Desharnais*, Q.R. 11 S.C. 484.

—**Witness—Stenographer's Notes—Addition to.**]—A witness cannot out of court, and of the presence of the parties, add anything to his deposition when it has been closed and signed by the stenographer. *Ward* v. *McNeil*, Q.R. 11 S.C. 501.

—**Contract—Condition—Parol Evidence—Consideration.**]—See CONTRACT, III (b).

—**Criminal Code, ss. 762-781—Several Charges—Consecutive Trials — Evidence — Intent—Judgment withheld until Conclusion of last Case—Evidence of Acts of like Character receivable to show Intent.**]—See CRIMINAL LAW, XII.

—**Murder—Confession—Indian Agent — Inducement—Burden of Proof.**]

See CRIMINAL LAW, XII.

—**Canada Evidence Act, 1893, s. 5—Deposition —Admissibility of in Criminal Prosecution.**]

See CRIMINAL LAW, V (*c*).

II. ADMISSIONS.

— **Evidence — Judicial Admissions — Nullified Instruments—Cadastre—Plans and Official Books of Reference — Compromise — "Transaction"— Estoppel— Arts. 311 and 1243-1245 C. C. — Art. 221-225 C. C. P.**]—A will, in favour of the husband of the testatrix, was set aside in an action by the heir-at law and declared by the judgment to be *un acte faux* and therefore to be null and of no effect. In a subsequent petitory action between the same parties :—Held, that the judgment declaring the will *faux* was not evidence of admission of the title of the heir-at-law, by reason of anything the devisee had done in respect of the will, first, because the will having been annulled was for all purposes unavailable, and, secondly, because the declaration of *faux*, contained in the judgment, did not show any such admission.—The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under C.C.P. Art. 225, cannot be invoked as a judicial admission, in a subsequent action of a different nature between the same parties.—Statements entered upon cadastral plans and official books of reference made by public officials and filed in the lands registration offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognizant thereof, at the time the entries were made.—Where a deed entered into by the parties to a suit in order to effect a compromise of family disputes and prevent litigation failed to attain its end, and was annulled and set aside by order of the court as being in contravention of article 311 of the Civil Code of Lower Canada, no allegation contained in it could subsist even as an admission *Durocher* v. *Durocher*, 27 S.C.R. 363, affirming Q.R. 5 Q B. 458; C.A. Dig. (1896) col. 132.

III. APPELLATE COURT.

— **Appeal — Evidence by Commission — Reversal on Questions of Fact.**]—Where the witnesses have not been heard in the presence of the judge but their depositions were taken before a commissioner, a Court of Appeal may deal with the evidence more fully than if the trial judge had heard it or there had been a finding of fact by a jury, and may reverse the finding of the trial court if such evidence warrants it. *Malzard* v. *Hart*, 27 S.C.R. 510, reversing 29 N.S R. 430.

IV. COMMENCEMENT OF PROOF IN WRITING.

—**Exchange of Properties—Memo. of Notary.**]—A contract for the exchange of immovable properties, where the amount exceeds $50, must be proved by a writing, or there must be a commencement of proof in writing, supplemented by verbal evidence. A memorandum made by a notary of *pourparlers* between the parties, for the purpose of drawing a deed if the parties came to an agreement later on, and which, moreover, the notary admits to be incomplete, will not serve as a commencement of proof in writing. *Lavallée* v. *Leroux*, Q.R. 11 S.C. 496.

V. COMMERCIAL MATTER.

—**Witness—Lease—Art. 1232 C.C.**]—The lease of real estate, though made to a merchant and for the purpose of carrying on business, is not a commercial contract, therefore one of the parties, in an action relating to the lease, cannot be heard as a witness in his own favour. *Corbeil* v. *Marleau*, Q R. 10 S.C. 6.

VI. Foreign Commission.

—Practice—Second Commission to same Place—Costs.]—A second commission to New York was granted to defendant to examine a witness, he having already obtained a commission to the same place, but he was ordered to pay the costs of executing it in any event of the action. *Gill* v. *Ellis*, 5 B.C.R 137.

—Practice — Evidence — Commission—Right of Non-resident Defendant—Affidavit.]—A defendant resident outside the jurisdiction has a *primâ facie* right to a commission to take his own evidence for use at the trial. An affidavit that such defendant was resident in Australia and manager of a woolen factory, held sufficient to support an order for a commission to examine him though it did not state that he could not personally attend at the trial. The fact that he could not do so without great inconvenience was a reasonable inference from the facts deposed to. *Cranstoun* v. *Bird*, 5 B.C.R. 140.

—Proof of—Art. 1220 C.C.]—A judgment rendered by a foreign tribunal, duly certified and authenticated according to the terms of art. 1220 C.C., *primâ facie* proves itself and the facts mentioned in it, and also the law which is applied as being the law of the country where it is rendered. *Bauron* v. *Davies*, 3 Rev. de Jur. 360, Court of Q.B. reversing Q.R. 11 S.C. 124.

VII. Mode of Proof.

—Bank—Agreement with Customer—Deposits—Security for Discounts — Commercial Transaction.]—See Evidence, V.

VIII. Necessary Proof.

—Relief from Obligation—Error—Proof.]—One who alleges error in order to free himself from an obligation, or to be re-imbursed, must prove three things: (1) That the debt which he has paid, or undertaken to pay, does not exist; (2) That there was no real consideration for paying or contracting the obligation to pay; and (3) that the obligation to pay, and the execution of this obligation were the result of the error alleged. *Leclerc* v. *Leclerc*, Q.R. 6 Q.B. 325.

—Bill of Lading—Stipulation — British Law.]—Where the bill of lading stipulates that "this contract shall be governed by British law, with regard to which this contract is made," the party desiring to avail himself of such law is bound to state in his pleadings what it means and to prove it by expert testimony, otherwise the Court will assume that there is no difference between our law and the foreign law. And *quære* whether "British law" means the law of England. The parties cannot, by a consent that "British law" be proved by reference to the statutes and jurisprudence in the same way as if it were established by evidence in the case, cast upon the Court the duty of finding out what the law is from such books. It is a fact that ought to be proved. *Rendell* v. *Black Diamond Steamship Co.*, Q.R. 10 S.C. 257, affirming 8 S.C. 442.

IX. Presumptions and Onus of Proof.

—Libel — Privileged Communication— Onus of Proof.]—In an action of libel for an attack upon plaintiff's character contained in a communication by defendant to the Government, if the occasion be held privileged, the onus of proving plaintiff's character and conduct, and defendant's knowledge thereof and his grounds and motives for making the imputation, is upon plaintiff, and he must show actual malice in defendant in order to secure a condemnation. *Robitaille* v. *Portevus*, Q.R. 11 S.C. 181.

—Inland Revenue—Seizure of Tobacco—Revenue Stamps—Onus.]—On the hearing of an information for being in possession of tobacco not stamped according to law, the burden of proof as to its being stamped is upon the defendant. *Simpson* v. *Raymond*, 3 Rev. de Jur. 511. Curran, J.

—Award—Application to set Aside — Offer of Limited Company to settle Claim—Presumption.]

See Arbitration and Award, III.

—Mining Company — Authority of Manager to Bind Company—Burden of Proof.]

See Mines and Minerals.

—Railway Company—Accident to Employee—Contract for Immunity—Negligence—Onus Probandi—Art. 1676 C.C.; 51 & 52 V. c. 29, s. 246 (D.).]

See Railways and Railway Companies, V.

—Contract for Towage—Non-execution—Responsibility for—Vis Major.]

See Shipping VI.

—Solicitor—Liability for Loss of Note Received for Collection—Damages — Burden of Proof—Conflicting Evidence.]—See Solicitor.

—Will—Abatement of Legacies on Deficiency of Assets—Intention—Burden of Proof.]

See Will, II.

X. Privileged Communications.

—Discovery—Inspection of Documents — Privilege—Letters between Principal and Agent.]—In an action for redemption of shares in a public company deposited by plaintiff as collateral security for an over-draft, or in the alternative for damages for their improper sale by the bank, the defendants, in answer to an order for discovery, made an affidavit of documents disclosing possession of a number of letters relating to the matters in question which had passed between the manager of the bank at Victoria and the manager of the bank at Vancouver, which they objected to produce as being privileged:—Held, following *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644, that the letters were not privileged and must be produced. *Van Volkenburg* v. *Bank of British North America*, 5 B.C.R. 4.

XI. Secondary Evidence.

—**Contents of Document.**]—Held (per Forbes, Co. J..) that before secondary evidence can be given of the contents of a paper, it must first be shown that every reasonable effort has been made to obtain it, or that it is absolutely lost. *Keith* v. *Coates*, 17 C.L.T. (Occ. N.) 33.

XII. Sufficiency.

Will—Undue Influence.]—In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator, it is not sufficient to show that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shown that they are inconsistent with a contrary hypothesis. *Adams* v. *McBeath*. 27 S.C.R. 13, affirming 3 B.C.R. 513; C.A. Dig. (1896) col. 366.

—**Landlord and Tenant—Loss by Fire—Cause of Fire—Negligence — Civil Responsibility—Legal Presumption — Rebuttal of— Onus of Proof—Hazardous Occupation — Arts. 1053, 1064, 1071, 1626, 1627, 1629, C.C.**.]—To rebut the presumption created by Article 1629 of the Civil Code of Lower Canada it is not necessary for the lessee to prove the exact or probable origin of the fire or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (*un bon père de famille*), and that the fire occurred without any fault that could be attributed to him or to any person for whose acts he should be held responsible. *Murphy* v. *Labbé*, 27 S.C.R. 126, affirming Q.R. 5, Q.B. 88; C.A. Dig. (1896). col. 180.

—**Negligence—Defective Machinery — Evidence for Jury.**]—T. was employed as a weaver in a cotton mill, and was injured while assisting a less experienced hand, by the shuttle flying out of the loom at which the latter worked, and striking her on the head. The mill contained some 400 looms, and for every forty-six there was a man, called the "loom fixer," whose duty it was to keep them in proper repair. The evidence showed that the accident was caused by a bolt breaking by the shuttle coming in contact with it, and as this bolt served as a guard to the shuttle, the latter could not remain in the loom. The jury found that the breaking of the bolt caused the accident, and that the "loom fixer" was guilty of negligence in not having examined it within a reasonable time before it broke. T. obtained a verdict, which was affirmed by the Court of Appeal:—Held, that the "loom fixer" had not performed his duty properly; that the evidence as to negligence could not have been withdrawn from the jury and that as there was evidence to justify the finding, their verdict should stand. Per Gwynne, J., that the finding of the jury that the negligence consisted in the omission to examine the bolt was not satisfactory, as there was nothing to show that such examination could have prevented the accident, and there should be a new trial. *The Canadian Coloured Cotton Mills Co.* v. *Talbot*, 27 S.C.R. 198.

—**Will—Sheriff's Deed—Evidence—Proof of Heirship—Rejection of Evidence—New Trial—Champerty—Maintenance.**]—A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator and through conveyances from them to persons abroad. The courts below held that the will was valid:—Held, affirming such decision, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father and it was not established, and the court would not presume, that his father died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transaction by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust, and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed, and the appeal should be dismissed. *May* v. *Logie*, 27 S.C.R. 443, affirming 23 Ont. A.R. 785; C.A. Dig. (1896) col. 360

—**Action on Disturbance—Possessory Action—"Possession Annale"—Arts. 946 and 948 C.C.P.—Nature of Possession of Unenclosed vacant Lands—Boundary Marks—Delivery of Possession.**]—In 1890, G. purchased a lot of land 25 feet wide and the vendor pointed it out to him on the ground, and showed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895, the adjoining lot, which was also vacant and unenclosed, was sold to another person who commenced laying foundations for a building, and, in doing so, encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance. Held, that the *possession annale* required by article 946 of the Code of Civil Procedure, was sufficiently established to entitle the plaintiff to maintain his action. *Gauthier* v. *Masson*, 27 S.C.R. 575.

—**Extradition—Ashburton Treaty—Habeas Corpus—Convicted Prisoner.**—Under the Ashburton treaty between Great Britain and the United States of America of 1842, and the convention of 1890, to obtain the extradition of a fugitive charged with the commission of an extradition crime, the same evidence must be given as would justify his committal for trial if the crime had been committed in Canada, and to obtain the extradition of a fugitive who has been convicted of an extradition crime, a duly authenticated copy of the record must be produced and proof of the fugitive's identity must be made.—On an application for the extradition of a fugitive, evidence to show that the offence charged is a political one, or that it is not an extradition crime, should be allowed; and if proof be made to that effect the prisoner

must be discharged.—On a writ of habeas corpus, the judge must see, in the first place, whether the offence charged is or is not of a political character, or whether it is or is not an extradition crime, and then whether the proceedings are regular and justify the prisoner's committal for surrender.—In the case of a fugitive who has been convicted, the judge does not examine the evidence given at his trial and must not revise the verdict of the jury; his duty is to see if the offence is an extradition crime, if the conviction, after a regular trial, has been duly proved, and if the prisoner has been identified *In re Levi*, Q.R. 6 Q.B. 151; 3 Rev. de Jur. 493.

—Witness—Discredit.]—The court will not base a judgment upon the uncorroborated evidence of a single witness where the credibility of such evidence is drawn into grave doubt. *Chevalier* v. *Wilson*, Q.R. 10 S.C. 59.

—Commencement de preuve par Ecrit—Contradictory proof.]—A writing relied upon as a commencement of proof should state precisely the fact which it attempts to establish; it will not suffice if it states merely an unknown fact from which, by inference, the person offering it may claim to draw the truth of the matter in question. Thus, a discharge *sous seing privé* by a third party to the defendant, which makes no allusion to the grantor of the plaintiff, cannot be invoked as a commencement of proof in writing of a loan by the grantor to the defendant. In this case it was held that, even assuming that the writing in question could avail as a commencement of proof of the loan alleged by the plaintiff, the proof made was too contradictory to justify a judgment against the defendant. *Laliberté* v. *Roy*. Q.R. 11 S.C. 18.

—Péremption d'Instance—Agreement between Solicitors—Proof.]—Proof of an agreement between the solicitors of the parties to a suit, sufficient to prevent the *péremption d'instance*, can only be made by writing. *Daoust* v. *Daoust*, Q.R. 11 S.C. 438.

—Evidence—Answers of Defendant—Divisibility of—Art. 231, C.C.P.]—The plaintiff alleged an agreement by defendant to pay him, the plaintiff, one and a half per cent. commission if he obtained a loan for defendant; he further alleged that he had obtained the money, but that the loan had not been carried out through the act of defendant. The latter by his plea denied that there had been an agreement in the form alleged. When examined as a witness, defendant admitted that there had been an agreement, but added that by the agreement it was stipulated that he was not to be bound to pay a commission if for any reason the loan was not carried out:—Held, that under the circumstances, as the answers of defendant contained facts foreign to the issue as joined, they might be divided. The alleged rate of commission, however, not being proved, the plaintiff was only entitled to the ordinary rate of compensation. *Lewis* v. *Lamontagne*, Q.R. 11 S.C. 441.

—Recital in Deed—Heirship—Evidence for Jury—Sheriff's Inquisition—Depositions on—Use at Subsequent Trial.]—A recital in a deed conveying land, that one of the parties is an heir of a former owner, is not in itself evidence of his heirship, on trial of an action affecting the title to such land, to submit to the jury.—The hearing before the sheriff on a writ *de proprietate probanda* under C.S.N.B. c. 37, s. 203, is a trial between the parties to the replevin suit, and on the trial of the suit itself the deposition of a witness on such hearing, who has died in the interval, may be given in evidence from the sheriff's notes as provided by C.S.N.B. c. 46, s. 29. *Hovey* v. *Long*, 33 N.B.R. 462.

—Railway Co.—Action for Negligence—Evidence for Jury.]—In an action to recover from a railway company damages for injury to property by fire caused by sparks from an engine, the plaintiff relied on the fact that there was a heavy up-grade on the track very near the property destroyed and claimed that a properly constructed engine would not have thrown sparks to the distance of such property from the track. It was shown that the engine was in good condition and that the usual precautions had been taken to prevent injury from sparks:—Held, that there was no evidence of negligence to be submitted to the jury. *Fournier* v. *The Canadian Pacific Railway Co.*, 33 N.B.R. 565.

—Criminal Law—Murder—Evidence of Cause of Death—Post Mortem Examination.]—On the trial of the accused for murder, by committing an abortion on a girl, it appeared in evidence that a *post mortem* examination of the girl had been made by a medical man, which was however confined to the pelvic organs and was, upon the medical evidence, inconclusive as to the cause of death, but there was other evidence pointing to the inference that death was caused by the operation. Davie, C.J., left the case to the jury, but reserved a case for the Court of Criminal Appeal as to whether there was in point of law evidence to go to the jury, upon which they might find that the death of the girl resulted from the criminal acts of the accused. The jury found a verdict of guilty:—Held, that there is no rule that the cause of death must be proved by *post mortem* examination, and that there was evidence to go to the jury of the cause of death notwithstanding the absence of a complete *post mortem* examination. *The Queen* v. *Garrow*, 5 B.C.R. 61.

XIII. Varying and Explaining Written Documents.

—To Vary or Explain Deed—Construction of Deed—Title to Lands—Ambiguous Description—Possession—Conduct of Parties—Presumptions from Occupation of Premises—Arts. 1019, 1238, 1242, 1473, 1599 C. C.—47 V. c. 87, s. 3 (D.)—48 & 49 V. c. 58, s. 3 (D.)—45 V. c. 20 (Q.).]—By a deed made in August, 1882, the appellant ceded to the Government of Quebec, who subsequently conveyed to the respondent, an immovable described as part of lot No. 1937, in St. Peters Ward in the city of Quebec, situated between the streets St. Paul, St. Roch, Henderson and the river St. Charles, with the wharves and buildings thereon erected. Of the lands of which the respondents entered into possession

by virtue of said deeds they remained in possession for twelve years without objection to the boundaries. They then brought an action to have it declared that, by the proper construction of the deeds, an additional strip of land and certain wharves were included and intended to be transferred. They contended that the description in the deed was ambiguous, and that Henderson street as a boundary should be construed as meaning Henderson street extended, and they sought to establish their case by the production of certain correspondence which had taken place between the parties prior to the execution of the deed of August, 1882.—Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, that the words "Henderson Street" as used in the deed must be construed in their plain natural sense as meaning the street of that name actually existing on the ground; that the correspondence was not shown to contain all the negotiations or any finally concluded agreement, and could not be used to contradict or modify the deed which should be read as containing the matured conclusion at which the parties had finally arrived; that the deed should be interpreted in the light of the conduct of the parties in taking and remaining so long in possession without objection, which raised against them a strong presumption, not only not rebutted but strengthened by the facts in evidence; and that any doubt or ambiguity in the deed, in the absence of evidence to explain it, should be interpreted against the vendees, and in favor of the vendors. *The City of Quebec* v. *The North Shore Railway Company*, 27 S.C.R, 102.

—Contract—Sale by Sample—Objections to Invoice—Reasonable Time—Acquiescence—Presumptions.]—See SALE OF GOODS, VI.

And see CRIMINAL LAW, V.
" PRACTICE AND PROCEDURE.
" WITNESS.

EVOCATION.

Circuit Court—Incidental Demand—Art. 1058' C.C.P.]—A defendant in the Circuit Court who produces an incidental demand for an amount in excess of the jurisdiction of that tribunal, is not entitled to an evocation to the Superior Court. *Beauchène* v. *Thibault*, Q.R. 10 S.C. 423.

EXECUTIONS.

I. CHARGE ON LANDS.

N.W. Territories Real Property Act—Executions—"Instrument."]—The provision in the N. W. Territories Real Property Act, section 94, to the effect that certain executions shall not bind lands until certified copies of the executions accompanied by a memorandum of the lands sought to be charged were delivered by the sheriff to the registrar, must be construed to mean that for the purposes of the Act alone the lands should not be bound until such delivery. The Act does not contemplate that the procedure under executions should be interfered with to any greater extent than was necessary for the purposes of the Act, and for these purposes it was not necessary to provide that priority should be given to executions in the order in which copies are delivered to the registrar.—A copy of an execution with the accompanying memorandum is not an "instrument" within the meaning of section 41 of the Act, nor is it covered by the definition of that term given in section 3 (l). *Limoges* v. *Campbell*, 17 C.L.T. (Occ. N.) 296.

—Sale of Land under Execution—Order for Writ of Possession—R.S.N.S. 5th ser. c. 125 s. 23.]

See PRACTICE AND PROCEDURE, XXXIII

II. EXEMPTIONS.

—Tools of Trade—Liberal Professions—Medical Instruments—Art. 556 C.C.P.]—The exemption from seizure enacted by art. 556 of the Code of Civil Procedure of "tools and implements or other chattels ordinarily used by the debtor in his trade" does not include the professional instruments of a physician and surgeon, or other members of a liberal profession, the word "trade" *(métier)* not being applicable to a liberal profession. *Demers* v. *O'Connor*, Q.R. 10 S.C. 371, 7 S.C. 216.

—Labourer's Wages—Seizure—Wages Not Due—Arts. 558, 628, C.C.P.]—The fourth part of the wages of a workman *(operarius)* is seizable even for wages not yet due; and that notwithstanding the provisions of act 558, par. 5 C.C.P. the seizure being governed by act 628, par. 5 C.C.P. *Chabot* v. *Oneson*, Q.R. 11 S.C. 223.

—Exemption from Seizure—Claim of Exemption.]—Effects exempt from seizure are declared so for the public good, but it is for the debtor who wishes to claim the benefit of the exemption to signify his intention and oppose the sale of the goods so exempt. *Boucher* v. *Véronneau*, 3 Rev. de Jur. 467, Court of Review.

III. ISSUING EXECUTION.

—Issue within Twenty Years—43 V. c. 8, ss. 8, 10—Application.]—Section 10 of 43 Vict., c. 8, providing that causes in which pleas have been delivered shall be carried on to completion as if the Act had not been passed, does not apply to the issue of execution within twenty years from the signing of judgment as provided in section 8 but only to matters of pleading. *Gleeson* v. *Domville*, 33 N.B.R. 548.

—Execution for Costs—Distraction—Attorney and Client.]—See COSTS, II.

—Real Property Limitation Act, R. S. Man. c. 89 s. 24—Payment on Account of Judgment—Leave to Issue Executions—Assignment in Trust.]

See LIMITATION OF ACTIONS, III.

IV. PRIORITY OVER OTHER CREDITORS.

—Priority—Sheriff—Executions Act, R.S.M., c. 53, s. 20.]—Interpleader issue to try the question of priority between two writs of execution issued by the plaintiff and defendant against the goods of one Pope. The plaintiff's execution was received by the sheriff in 1894 without any special instructions; none had afterwards been sent to the sheriff in any way and the writ had been renewed according to the practice. The evidence showed that there was an agreement or understanding between the plaintiff and Pope, who was a country merchant, that the execution was not to be proceeded with until other creditors pressed, and Pope continued to carry on the business, bought other goods from the three firms for whom the plaintiff's judgment had been obtained and made payments on account, the plaintiff and the creditors well knowing the debtor's circumstances. Neither the plaintiff nor his attorney had made any inquiry as to what the sheriff was doing, or required him in any way to proceed;—Held, following *Pringle* v. *Isaac*, 11 Price, 445, and *Kempland* v. *MacAuley*, 1 Peake, 95, that the plaintiff's writ of execution was not in the sheriff's hands to be executed when seizure was made in 1896 under defendant's execution, and that the latter had priority as it was issued before the plaintiff gave special instructions for the sheriff to proceed. The absence of the words "to be executed" from section 20 of the Executions Act makes no difference in its construction. *Hazley* v. *McArthur*, 11 Man. R. 602.

V. PROCEEDINGS UNDER.

—Saisie-gagerie—Saisie-exécution—Expiration of Writ—Alias.]—A *saisie-gagerie* declared good and valid is converted, by the issue of a writ of execution, into *saisie-exécution*, and therefore this seizure is, as every *saisie-exécution*, subject to lapse, by the default of the person seizing to proceed to a sale of the effects seized within the prescribed delay.—When a writ of execution has lapsed it is a new and not an *alias* writ which should issue. *Montreal Board of Trade* v. *United Counties Railway Co.*, Q.R. 11 S.C. 516.

—Execution issued by Justice of the Peace—Power to Extend—Arrest—Subsequent Levy.]—Where an execution is issued by a justice under C.S.N.B., c. 60, section 38, he has power to extend the return before it has run out: *Marks* v. *Newcomb*, 22 N.B.R. 419, followed—An execution directed the constable to levy on the goods and chattels of the debtor and in default of goods to take the body. The debtor was arrested and discharged on disclosure; afterwards goods were seized and sold:—Held, that the levy on the goods was valid. Section 4 of the Bills of Sale Act, 56 Vict. c. 5 (N.B.) provides that mortgages not filed as required by the Act shall be void as against execution creditors of the mortgagor:—Held, that this referred to all executions, not those issued out of the Supreme and County Courts only. *Levasseur* v. *Beaulieu*, 33 N.B.R. 569.

VI. SALE UNDER.

—Opposition—Order of Sursis Disregarded by Sheriff—Contempt.]—The sheriff is bound to obey an order of *sursis* granted by a judge in one district to suspend a sale in another, even though irregularly granted; he is not competent to judge of the validity of such order, nor of the opposition, nor of the sufficiency of the notices; and if, in defiance of the order, he goes on with the sale, he may be proceeded against as for a contempt. In the present case, the sheriff so acting was declared in contempt, but merely condemned to pay costs of motion. *Roy* v. *Noel*, Q.R. 10 S.C. 528.

—Notice of Sale—Omission in Date—Frivolous Opposition.]—See SALE OF LAND, X.

VII. STAYING PROCEEDINGS.

—Landlord and Tenant—Sheriff Seizing Under Execution—Rent—Bona fide Claim.]

See LANDLORD AND TENANT, XI.

And see BILLS OF SALE AND CHATTEL MORTGAGES, III and IV.

EXECUTORS AND ADMINISTRATORS.

I. ACCOUNT.

Testamentary Executors—Default to Account—Action for Residue—Reddition de Compte—Parties—Action for Possession.]—On default of an account rendered by testamentary executors the heirs have no recourse against them for recovery of sums professed to be the residue of the succession in their hands. They are bound to proceed by action *en reddition de compte*, and this demand should cover the whole administration of the executors with the succession and not restricted to special or isolated acts. In a demand to be put in possession of a testamentary succession, against an executor who has had its administration, all the heirs must be plaintiffs; the default of any of them to be joined is fatal and the defendant is not obliged to bring them into the cause.—This demand in a case where there are two executors, cannot properly be made against one of them even with the consent out of court (*extra-judiciaire*) of the other; the action must

be brought against the two executors jointly. *Davidson* v. *Cream*, Q.R. 6 Q.B. 34, affirmed by Supreme Court of Canada, 27 S.C.R. 362.

—Practice—Suit by Administratrix—Non-joinder of Husband—Amendment—The Married Women's Property Act, 1895 (58 V. c. 24), s. 18—Suits Commenced before Act in Force—Will—Suit for Recovery of Legacy—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, a married women, 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 plaintiff did not make her husband a party to the suit. 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 bill should be amended by making plaintiff's husband a co-plaintiff. 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. Section 18 of the Act 58 Vict. c. 24, does not apply to suits commenced before the Act came into force. *Walsh* v. *Nugent*, 1 N.B. Eq. 335.

II. Administration.

—Partnership — Surviving Partner— Joint and Separate Creditors—Administration.]

See Partnership, IV.

III. Advice.

—Bequest to Charities—Next of Kin—Advertisement for — Payment into Court—Petition for Advice.]—A testator by his will directed that his executor should distribute his residuary estate amongst churches and charities, or otherwise as he might think fit. The executor advertised for heirs and next of kin of the testator without result, and then paid into Court the money representing the residue. Upon a petition under R.S.O. c. 110, s. 37, for the advice of the Court as to the construction of the will and as to further advertising for next of kin, the Court refused to make any order in the absence of any of the heirs or next of kin. *Re Harley's Estate*, 17 Ont. P.R. 483.

IV. Custody of Documents.

—Executors—Custody of Papers—Security for Costs.]—Where it is established on the petition of one of the executors to an estate, that the documents and papers connected with the estate are not kept by the co-executor in a safe place, the court will order that they be deposited in a place sufficiently secure, subject to the joint control of the executors of the estate.—Security for costs is not exigible on a summary petition of the above nature, which is merely an incident of an inventory, the question of custody of papers having been reserved at the time the inventory was made. *Papineau* v. *Papineau*, Q.R. 10 S.C. 205.

V. Judicial Proceedings.

—Administration of Estate in Ontario—Foreign Corporations.]—A corporation empowered under the law of Ontario to administer the estate of a person whose succession opened in that Province, may appear in a judicial proceeding in the Province of Quebec in that capacity, and continue the proceedings in the place of the deceased. *Greenshields* v. *Aitken*, Q.R. 11 S. C. 137.

—Action by Executor—Proof of Quality—Art. 144 C.C.P.]—See Pleading, XI.

VI. Powers and Liabilities.

—Administrator ad Litem—Tax Sale—Action to Set Aside—Locus Standi of Plaintiff—Rule 311.]—The plaintiff was appointed under Rule 311 administrator *ad litem* of a deceased person's estate in a summary administration matter more than twelve months after the death:—Held, that he had no *locus standi* to maintain an action to set aside a tax sale of land belonging at the time of death to the estate of the deceased. *Rodger* v. *Moran*, 28 Ont. R. 275.

—Administrator cum test. annexo—Composition Dower—R.S.O. c. 110, s. 31.]—An administrator *cum testamento annexo* has no authority as such to compromise dower or other claims by assigning to the claimant a portion of the real estate of the deceased. *Irwin* v. *Toronto General Trusts Co.*, 24 Ont. A.R. 484.

—Payment of Legacy where Assets insufficient to pay Creditors—Executor's Liability—Costs.]—Held, that where the assets of the estate were insufficient to pay the creditors, the executor was not relieved from liability in paying a legacy under the will by the fact that the widow of the deceased, who was the principal creditor and was aware of such payment, made no objection to it, it appearing that she was not aware of the insufficiency of the assets.—Costs of contestation of executor's account ordered to be paid out of estate. *Re Estate Edwin Ryerson*, 29 N.S.R. 81.

—Administratrix—Action by Next of Kin—Discovery — Photographs — Privilege—Ont. Rule 507.]—See Practice and Procedure, XII.

VII. PROBATE.

—Crown—Administration—Will—Probate—R.S. O. c. 59.]—Where a person possessed of real and personal estate dies leaving no known relatives within the Province, the Attorney-General on behalf of Her Majesty may maintain an action to set aside letters probate of that person's will, executed without mental capacity, and in that action may obtain an order for possession of the real estate; but a grant of administration should be obtained by a separate proceeding.—Such an action under the statute R.S.O. c. 59 is not for the purpose of escheating but to protect the property for the benefit of those who may be entitled. *The Queen* v. *Bonnar*, 24 Ont. A.R. 220.

VIII. REMUNERATION OF.

—Accounts—Commission.]—An executor who discharges his duty honestly, but owing to want of business training keeps his accounts loosely and inaccurately, is entitled to compensation for his care, pains and trouble, but the amount of compensation should not, in such a case, be relatively large. Compensation when allowed should be credited to the executor at the end of each year. *Hoover* v. *Wilson*, 24 Ont. A. R. 424.

—Administrator Cum Testamento Annexo—Agreement to treat two Estates as one in Probate Court—Commissions—Estoppel.]—W. B. H. died in October, 1892, leaving a will under which his wife, H. B H., was made residuary legatee. H. B. H. died in December, 1892, leaving a will under which her estate was devised to A. B. H. The respondent, P., was appointed administrator with the will annexed, in both estates. The funds were blended and the two estates treated as one, and an understanding was arrived at by which P., in addition to certain charges for personal expenditures, was allowed a commission of 5 per cent. on the estate of W. B. H., which was to be in full for his services in both estates. Subsequently, in the interests of the sureties, it was suggested that there should be a formal accounting in the estate of H. B. H., and it was agreed that P. should take charge of the settlement, the expenses being paid by the solicitor of A. B.:—Held, that P., having had the advantage of the agreement as to commissions, must be held to its observance, that he was not entitled to charge an additional commission in consequence of the formal accounting in the estate of H. B. H., and that so much of the decree of the Judge of Probate as allowed such commission must be set aside with costs. In *re Estate of Hamilton*, 29 N.S.R. 249.

EXEMPTION.

Real Property—Chattels—Fixtures—Gas Pipes—Highway—Legislative Grant of Soil—11 V. c. 14 (Can.)—55 V. c. 48 (O.)—"Ontario Assessment Act, 1892."]

See ASSESSMENT AND TAXES.

—From Seizure—Tools of Trade—Medical Instruments—Art 556, C.C.P.]

See EXECUTION, II.
" also LANDLORD AND TENANT, IV.

EXTRADITION.

See CRIMINAL LAW, VI.

FALSE IMPRISONMENT.

Solicitor—Expulsion from Court—False Imprisonment—Action against Police Officers—Directions to Jury—Damages.]—See SOLICITOR.

FEES.

Notary Public—Tariff—Implied Contract—Usage.]—See NOTARY PUBLIC.
And see COSTS.

FIRE.

Negligence—Clearing Land.]

See NEGLIGENCE, IV.

FIRE LIMITS.

Erection of Buildings Within—By-Law Therefor—Validity—Ont. Consolidated Municipal Act, 1892, s. 496, s.s. 10.]

See MUNICIPAL CORPORATIONS, I. (*f*).

FISHERIES.

Constitutional Law—Convention of 1818—Treaty, Construction of—Statute, Construction of—Three-mile Limit—Foreign Fishing Vessels—"Fishing"—59 Geo. III., c. 38, (Imp.)—R.S.C. cc. 94 & 95.]—Where fish had been enclosed in a seine more than three marine miles from the coast of Nova Scotia, and the seine pursed up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew being then engaged in the act of bailing the fish out of the seine:—Held, that the vessel when so seized was "fishing" in violation of the convention of 1818 between Great Britain and the United States of America and of the Imperial Act 59 Geo. III. c. 38, and the revised Statutes of Canada, c. 94, and consequently liable with the cargo, tackle, rigging, apparel, furniture and stores, to be condemned and forfeited. *The Ship "Frederick Gerring, Jr."* v. *The Queen*, 27 S.C.R. 271, affirming 5 Ex. C.R. 164 and C. A. Dig. (1896) col. 143.

And see BEHRING SEA AWARD ACT.

FOLLE ENCHERE.

Procedure—Description of Immovable.]—In an application for *folle enchère* it is not necessary to describe the immovable of which the sale *à la folle enchère* is demanded. *Robinson* v. *Séguin*, Q.R. 11 S.C. 409.

—Sheriff's Sale—False Bidding—Resale—Registration of Sheriff's Deed—Nullity—Rectification.]

See APPEAL, VI.

—Contrainte par corps—Amount payable by Bidders—Procedure.]

See PRACTICE AND PROCEDURE, XV.

FOREIGN LAW.

Life Insurance—Beneficiary—Foreign Contract.]—See CONTRACT, VII (*b*).

And see CONFLICT OF LAWS.
" DOMICIL.
" INTERNATIONAL LAW.

FORFEITURE.

Mines and Minerals—Lease of Mining Areas—Rental Agreement—Payment of Rent—R.S.N.S. 5 ser. c. 7—52 Vict. c. 23 (N.S.)—Interpretation of.]—See MINES AND MINERALS.

FORUM.

See JURISDICTION.

FRAUDULENT CONVEYANCES.

Chattel Mortgage—Pressure—Fraudulent Intent.]—Certain creditors believing their debtor to be insolvent, but not desiring by taking a chattel mortgage to bring down upon him his other creditors, procured from him an agreement in writing to give, on default of payment or on demand, a chattel mortgage to secure the debt. About four months after, pursuant to the agreement, the debtor gave a chattel mortgage, within sixty days from the date of which he made an assignment for the benefit of his creditors. Held, that, notwithstanding the agreement, the Act 54 Vict. (Ont.) c. 20, amending the Act relating to fraudulent preference by insolvent persons, applied, that the doctrine of pressure was not applicable, and that the fraudulent intent must be presumed. *Breese* v. *Knox*, 24 Ont. A.R. 203.

—Voluntary Conveyance—Grantor's Intention to Embark in Business.]—A voluntary conveyance of part of his estate by a retired and successful hotel-keeper to his wife, made at a time when he was in solvent circumstances, but was, after some months of idleness, about to take up the hotel-business again, was upheld as against subsequent creditors, the grantor's subsequent insolvency being caused by loss from fire. *Fleming* v. *Edwards*, 23 Ont. A.R. 718.

—Action to compel Conveyance of lands—Fraud on Creditors.]—Under an agreement to purchase from M., plaintiff went into possession of certain lands and proceeded to build a house thereon. Some time after, as M. was pressing for his money, plaintiff applied to a loan society for a loan on mortgage, which was refused because plaintiff had admitted that there were several judgments recorded against him. It was then arranged between M. and plaintiff that M. should convey the land to defendant, a nephew of plaintiff who was in plaintiff's employ and was treated as a member of his family, and that defendant should execute the mortgage and obtain the loan. The business of obtaining the loan, and of applying the proceeds, was performed by plaintiff, and without any attempt at concealment, and his interest in the property was shown to have been known to some, at least, of his creditors:—Held, that plaintiff was entitled to a decree with costs for the conveyance of the land from defendant, who, while admitting plaintiff's ownership, sought to retain the property on the ground that the conveyance to him was fraudulent. *McKenzie* v. *McKenzie*, 29 N.S.R. 231, affirmed by Supreme Court of Canada, February 20th, 1897.

—Manitoba Queen's Bench Act, 1895—Rules 803 to 807—Bona fide Purchaser—Husband and Wife—Garnishment—Interest in Land—Vendor's Lien.]—Plaintiffs moved under Rules 803 to 807 of the Queen's Bench Act, 1895, for an order for the sale of a parcel of land alleged to have been purchased by defendant in his wife's name for the purpose of delaying, hindering, or defrauding the plaintiffs as judgment creditors of defendant, but it was shown in return of the motion that the wife had entered into an agreement for the sale of the land to a *bonâ fide* purchaser who had paid a part of his purchase money and had entered with possession. The plaintiffs then served a notice of motion on the purchaser, calling on him to appear and state the nature of his claim, and either maintain or relinquish the same:—Held, that both motions must be dismissed as the purchaser could not be called upon to defend himself in such a proceeding, and neither the husband nor the wife after the sale had any interest in the land within the meaning of the Rules, which could be ascertained and sold thereunder, and the plaintiff's only remedy under the circumstances would be under the garnishing provisions of the Queen's Bench Act.—A vendor's lien is not an interest in land; it is only a remedy for a debt, and is neither a right of property, an estate in lands, nor a charge on the land. *Bank of Montreal* v. *Condon*, 11 Man. R. 366.

—Assignments and Preferences—"Creditor"—Fraudulent Conveyance—Action for Tort.]—*Gurofski* v. *Harris*, 23 Ont. A.R. p. 717, affirming 27 Ont. R. 201; C.A.Dig. (1896) cols. 145, 340.

—Transfer of Assets—Fictitious Joint Stock Company—Rights of Creditors.]

See BANKRUPTCY AND INSOLVENCY, II.

—Assignments and Preferences—Fraudulent Perference — Previous Agreement — Threatened Action for Tort.]

See DEBTOR AND CREDITOR, III (*b*).

—Husband and Wife—Proprietary Interest—Letting Lodgings—Fraudulent Conveyance—Attack under Claim of Third Person acquired by person himself Estopped.]

See HUSBAND AND WIFE, V.

—Husband and Wife—Bill of Sale—Fraud—Ante-nuptial Settlement.]

See HUSBAND AND WIFE, I.

FRAUDULENT PREFERENCES.

Insolvency — Pressure — Assignment of expected Profits—Statute of Elizabeth—Assets Exigible in Execution.] — *Blakeley* v. *Gould* 27 S.C.R. 682, affirming 24 Ont. A.R. 153.

—Assignment for the Benefit of Creditors—Preferred Creditors—Money paid under Voidable Assignment—Liability of Assignee—Statute of Elizabeth—Hindering and Delaying Creditors.]

See DEBTOR AND CREDITOR, III (*a*).

FUTURE RIGHTS.

See APPEAL, III (*b*).

GAMING.

Lottery — Art Association — Pictures — Part Value in Money—Criminal Code, s. 205, s. s. (b), s.s. 6 (c).]—The defendant, an agent of an incorporated art society, was convicted by a police magistrate for that he did "unlawfully sell and barter a certain card and ticket for advancing, selling, and otherwise disposing of certain property: to wit, pictures or one-half the stated value of each picture in money by lots, tickets, and modes of chance:"— Held, that "property" in s.s. (b) of s. 205 of the Code is not necessarily to be read "specific property," the essence of the enactment being in the disposal of any property by any mode of chance Held, also, there being evidence of an option reserved to the society to give money instead of pictures to the winning tickets, this destroyed the privilege in favour of works of art under s.s. 6 (c) of the code. Conviction affirmed. *The Queen* v. *Lorrain*, 28 Ont. R. 123.

—Gaming Contract—Bet—Action against Stakeholder—Art. 1927 C.C.] — The deposit of the amount of a bet in the hands of a stakeholder is not equivalent to a conditional payment, and, when the bet is decided in favour of one of the parties, the money does not become his property, and an action brought by him against the stakeholder, claiming the amount of the bet, will not be maintained. In the present case, the stakeholder, defendant, having brought the money into court, and the other party to the wager having intervened and also claimed the amount of the bet, with further conclusions, in any case, for the amount of his deposit, it was ordered that the plaintiff and the intervening party should severally be paid the amount of their deposits. *Marcotte* v. *Perras*, Q.R. 6 Q.B. 400.

—Common Gaming-house—Club—Criminal Code, s. 196.] — An institution known as "The Commercial Club" was maintained by the proceeds of *cagnotte* or "rake-off" in card playing:—Held, that the *cagnotte* or "rake-off" used for the benefit of the establishment, constituted the club a common gaming-house and its officers were liable to prosecution under section 196 (a) of the Criminal Code and the Act amending it, 58 & 59 Vict. c. 40. *The Queen* v. *Brady*, Q.R. 10 S.C. 539.

—Gaming Contract—Art. 1927 C.C—Money Paid by Agent—Recourse of Agent against Principal.] —An agent has no action against his principal, to be reimbursed money advanced and paid by him (the agent) in behalf of his principal, in settlement of a gaming transaction in stocks, the agent being fully aware, at the time he made the advance, of the fictitious nature of the transaction, and that his principal had repudiated any liability in respect thereof. *Brand* v. *Metropolitan Stock Exchange*, Q.R. 11 S.C. 303, affirming 10 S.C. 523.

GARNISHEE.

Procedure—Seizure by Garnishment—Art. 558 C.C.P.]—Inasmuch as under art. 558 of the Code of Procedure, only the wages which are due to a clerk at the date of the service of the attachment are affected thereby, the defendant is entitled to claim from the garnishee the amount which became due subsequent to the service of the attachment, and especially where the garnishee's declaration was not contested before the seizure became exhausted. *Earby* v. *Canadian Pacific Railway Co.*, Q.R. 10 S.C. 187.

And see DEBTOR AND CREDITOR, III & V.

GOODWILL.

Injunction—Sale of Goodwill—Use of the Name of the Liquidated Concern.]—Goodwill means every positive advantage that has been acquired by the old concern in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the *name* of the late concern, or with any other matter carrying with it the benefit of business. The goodwill of a trade or business is a subject of value and price and may be sold as a valuable asset by a liquidator duly appointed to the winding up of a concern.—Courts of justice will interfere and grant injunction for the purpose of protecting the owner of a business from the unjust or fraudulent invasion of that business by others. *Montreal Lithographing Co.* v. *Sabiston*, 3 Rev. de Jur. 403., de Lorimier, J.

GOVERNMENT EMPLOYEES.

Taxation of Dominion Officials — Highway Labour Act (R.S.N.S. 5th ser. c. 47)—Employee on Government Railway.]—A penalty for the non-performance of labour in clearing a highway after a snow-storm, as provided for by the Highway Labour Act (R.S.N.S. 5th ser. c. 47), may be recovered against a person employed as a servant of the Crown upon the Intercolonial Railway: *Leprohon* v. *City of Ottawa*, 2 Ont. A.R. 522, referred to. (Per Meagher, J.): —*Semble, aliter*, if it were the case of an assessment levied directly under a provincial act upon the salary payable to the defendant by the Dominion Government. *Fillmore* v. *Colburn*, 28 N.S.R. 292.

—Civil Service Act.]—See CIVIL SERVANT.

GUARANTEE.

Guarantee—Special Indorsement—Consideration—Dismissal of Action—Amendment.]
See PLEADING, IX.

—Donation—Future Succession—Art. 658 C.C.]—See SUCCESSION.

—Lease of Machine—Guarantee of Capacity—Breach—Proof of Defect.]—See WARRANTY.

GUARDIAN AND WARD.

Public Schools — Guardian — "Boarding-out Agreement"—54 V. (Ont.) c. 55, s. 40, s.s. 5.]
See SCHOOLS.

HABEAS CORPUS.

Jurisdiction — Form of Commitment — Territorial Division—Judicial Notice—R. S. C. c. 135, s. 32.]—A warrant of commitment was made by the stipendiary magistrate, for the police division of the municipality of the county of Pictou, in Nova Scotia, upon a conviction for an offence stated therein to have been committed "at Hopewell, in the county of Pictou." The county of Pictou appeared to be of a greater extent than the municipality of the county of Pictou,—there being also four incorporated towns within the county limits—and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the municipality of the county of Pictou. The Nova Scotia statute of 1895 respecting county corporations (58 Vict. c. 3, s. 8) contains a schedule which mentions Hopewell as a polling district in Pictou county entitled to return two councillors to the county council:—Held, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place so mentioned in the warrant was within the territorial limits of the police division:—Held, also, that the jurisdiction of a judge of the Supreme Court of Canada in matters of *habeas corpus* in criminal cases is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of commitment. *Ex parte Macdonald*, 27 S.C.R. 683.

—Motion for—Magistrate's Conviction—Burden of Proof—Judicial Notice.]
See MUNICIPAL CORPORATIONS, XVI.

HANSARD REPORTER.

Status of Hansard Reporter under Civil Service Act.]—See CIVIL SERVANT.

HOMESTEADS.

Repeal of N.W.T. Homestead Exemption Act.]
See STATUTES, III.

HUSBAND AND WIFE.

I. ANTE-NUPTIAL CONTRACT.

Mutual Donations—Insurance Policy—Fraud.]—An insurance upon the life of one of the *conjoints* is a "*bien-meuble*" which is included in a mutual donation stipulated for by their marriage contract. The husband who, by contract of marriage, makes donation to his wife of "all the property, movable and immovable, which he shall leave at his death," cannot afterwards dispossess himself of such property, either by sale or donation, with the object of depriving his wife of the same. In this case the transfers by the husband to his wife were null, being of the nature of donations *causâ mortis*. The wife, if she had really purchased the insurance policy, could not oblige the company to reimburse her for the price paid as she had not demanded it, for this amount she remained a creditor of her husband's succession and could exercise her right of recourse against whomsoever it concerned. *Dufresne* v. *Fiset*, Q.R. 11 S.C. 167.

—Gifts by Marriage Contract—Consorts—Future Property.]—A gift of future property between future consorts by marriage contract constitutes a means of conferring benefits *inter vivos* to one another, and consequently is illegal and void. *Ferland* v. *Savard*. Q.R. 11 S. C. 404.

—Donation—Seizure—Rights of Third Party—Art. 823 C.C.]—A donation by a husband to his wife, by contract of marriage, of all the movables and household effects appertaining to the husband, is valid as against third parties only

so far as there has been an actual seizure, that is, that the movables and effects are in existence when the donation is made. *Prince* v. *Barrington*, 3 Rev. de Jur. 481. Casault, C. J.

—Fraudulent Conveyance—Bill of Sale—Ante-nuptial Settlement.]—Appeal from a County Court in an interpleader issue. The plaintiff having recovered a judgment against the husband of defendant in the issue for the price of certain furniture sold to him, issued an execution under which the furniture was seized. The defendant claimed the goods as her property under a bill of sale made by her husband to her in pursuance of an ante-nuptial settlement. This settlement was executed just prior to the marriage of the parties in 1893, and provided that the husband would forthwith after the celebration of the marriage grant and convey to his wife all the personal and real property and life insurance which he owned, and that he would further transfer to her within one year other furniture to be selected by her to the value of $1,500 in all, and would within five years convey to her further real estate to the value of $5,000, and increase his life insurance in her favour to make a total of $10,000, and would keep and maintain the same, and would pay all taxes, and keep the real and personal property insured and bear and sustain all expenses of the common domicile. The husband was indebted at the time for the furniture in question, and also to other creditors, and the evidence in this and other respects showed, in the opinion of the Court, that the settlement was entirely voluntary and without consideration, and was not stipulated for by the claimant as a condition of the marriage, but was made with the intention of putting all his property then owned and practically all his after-acquired property beyond the reach of his creditors. It appeared, also, that nothing had been done to carry out the covenants in the marriage settlement for nearly two years until the execution of the bill of sale which the husband gave to his wife two days after the service of the writ in the action against him. It was admitted that he was then insolvent and that he gave the bill of sale in order to protect her as a creditor, and without any solicitation or pressure from her:—Held, following *Ex parte Kilner*, 13 Ch. D. 248, and *Ex parte Bolland*, L.R. 17 Eq. 115, that the onus of proof was upon the claimant, and that both the bill of sale and the ante-nuptial settlement were void as against the plaintiff: *Mercer* v. *Peterson*, L.R. 2 Ex. 209, distinguished:—*Quære* whether, if the settlement could be considered as valid and binding, the bill of sale could be supported as against an execution creditor:—Held, also, that as the furniture in question had been, since the marriage, in the house occupied by the defendant and her husband, the possession must be presumed to have been his and not hers, and that there was no change of possession at the marriage: *Ramsay* v. *Margrett* (1894), 2 Q.B. 18, distinguished. *Brown* v. *Peace*, 11 Man. R., 409.

II. Authority of Wife to Bind Husband.

—Revocation of Authority—Statute of Limitations—Payment on Account.]—Defendant purchased a sewing machine from plaintiff, in August, 1887, and paid $14 on account some time during the year. The action was brought October 24th, 1895. The Statute of Limitations was pleaded:—Held, that a payment of $5 made by defendant's wife in February, 1893, was not sufficient to take the case out of the statute, the evidence showing that defendant had forbidden his wife to make further payments until the machine was put in order, and that this was never done:—Held, also, that any implied authority which the wife had previously was terminated by this prohibition. *Robertson McKeigan*, 29 N.S.R. 315.

III. Dealings Between Husband and Wife.

—Conveyance by Wife—Non-joinder of Husband—59 Vict. c. 41, (Ont.)—Limitation of Actions—Enclosed Lands—Timber—Trespass—Possession—Building Operations—Farm Work—Entry by one Tenant in Common—Residence out of Ontario—Improvements under mistake of Title.]—(1) The plaintiff claimed an undivided interest in the farm of his uncle, who died intestate and without issue in 1854, seized in fee simple and in possession. One of the links in the chain of title of the uncle was a conveyance made in 1846 by a married woman, whose husband did not join in the conveyance:—Held, that the conveyance was wholly inoperative, and was not validated by 59 V. c. 41 (Ont.), as the action was begun before the passing of the Act, and section 2 excepts pending litigation; and this objection was fatal to the plaintiff's claim, for although the uncle's possession was evidence of his seizin, the plaintiff's case disclosed his title and showed that the true title was in the married woman.—Shortly after the uncle's death his widow returned to the farm which she found in possession of a man put in by a person to whom her husband had contracted to sell, and she thereupon forcibly took possession, and continued to reside upon the farm till her death in 1877, with the exception of a short interval in 1874. During this whole period she tilled such part of the farm as was enclosed and under cultivation, and put such part as was unenclosed and not under cultivation to the ordinary farm uses. In 1873 she made a conveyance of the whole farm to a neighbouring farmer, who worked it until 1879, and then rented it until 1881, after which he put his son, one of the defendants, into possession, and the latter then continued to work it up to the time this action was brought in 1895, though until 1889 he did not live in the house erected upon it. In 1885 the widow's grantee purchased the rights of the heirs-at-law of the person to whom the plaintiff's uncle had contracted to sell:—Held, that the widow entered as a trespasser, and so, in order to extinguish the right and title of the heirs, her twenty years' possession must have been actual, visible, and continuous, and the Statute of Limitations operated only as to the enclosed part, notwithstanding sales by her of timber from the unenclosed part, which must be treated as mere acts of trespass: *Harris* v. *Mudie*, 7 Ont. A.R. 414, followed.—In April, 1874, the dwelling-house on the farm was destroyed by fire, and during a short period until it was rebuilt the widow did not actually live upon the farm, but

stayed in the neighborhood, and the work of the farm went on as usual:—Held, that during this interval her possession was a visible one, by reason of the building operations and the farm work: *Agency Company* v. *Short*, 13 App. Cas. 793, and *Coffin* v. *North American Land Company*, 21 Ont. R. 80, distinguished.—Another nephew of the deceased resided with the widow upon the land for about two years after her return to it, but at that time had no interest in it, his father being then alive, and he made occasional visits to it in subsequent years, and paid the taxes on it for 1872, and during all this time he made no claim to any interest in the land:—Held, upon the evidence, that he did not go upon the land in the assertion of a right, as owner of an interest, to live upon it, but merely as the guest of his aunt, and in paying the taxes he did so on her behalf, and not as having or claiming an interest for himself or any one else, and therefore it could not be said that the possession was not hers, or that it was a possession by his license.—Even if what happened amounted to an entry it did not operate in favour of the plaintiff's co-tenants, for an entry by one tenant in common is not an entry by his co-tenant.—The fact that the heirs were resident out of Ontario entitled them to no longer time to bring their action than if they had been residents: 25 Vict. c. 20.—Therefore, in 1874, the right and title of the heirs-at-law as to the enclosed part of the farm were extinguished.—The widow's grantee entered not as a mere trespasser, but, after the conveyance to him or at all events, after the expiration of twenty years from her entry, was in under colour of right, and his right was not confined to the portion of the land of which he was in pedal possession, but he and those claiming under him were in the actual and visible possession of the whole of the land included in his conveyance; and the right and title of the plaintiff were therefore extinguished; notwithstanding an entry made in 1878 by the plaintiff, who had not then any interest in the land or any authority from those interested in it; but if not, the defendants were at least entitled to be paid for their lasting improvements since the purchase in 1885, with a set-off of the mesne profits since that date. *Hartley* v. *Maycock*, 28 Ont. R. 508.

IV. Proceedings By and Against Married Women.

—Parties—Misjoinder of Defendants—Distinct Causes of Action.]—The plaintiff's claim as against her husband, one of the defendants, was for specific performance of an ante-nuptial contract to transfer to her certain property of various kinds, and as against the several other defendants, to whom the husband had made transfers of such property, or in whose hands it was, for relief by way of declaration, cancellation, and order for payment:—Held, that, although the plaintiff's right to each cause of action was historically connected with each of the others, that connection related only to her rights; the rights of each set of the defendants were as distinct as they were before the events which conferred upon the plaintiff the rights which she asserted; and such causes of action could not properly be joined in one action: *Smurthwaite* v. *Hannay* (1894), A.C. 494, and *Sadler* v. *Great Western Railway Co.* (1896), A.C. 450, followed. *Faulds* v. *Faulds*, 17 Ont. P.R. 480.

—Action by Wife for Legacy—Authority to Sue—Foreign Tribunal.]—A married woman domiciled in France, in community as to property, and authorized by the tribunal of her domicile to collect a personal legacy and take legal proceedings for the purpose, may, without other authorization, sue in the Courts of Quebec to recover a sum of money forming part of this legacy and of which the debtor is domiciled in the Province of Quebec. *Bauron* v. *Davies*, 3 Rev. de Jur. 360, Court of Q.B. reversing Q.R. 11 S.C. 123.

—Husband and Wife—Lease signed by Wife common as to Property—Public Trader—Acte de Commerce.]—An action cannot be maintained against a wife common as to property with her husband, on a lease signed by her, where it is not alleged that she was a public trader at the time she signed the lease, or that the lease was signed in connection with any business or trade then carried on by her, or that she was authorized by her husband to sign the same. The fact that the wife sub-let to lodgers a portion of the leased premises was not an *acte de commerce*, and in doing so she must be presumed to have acted as the agent of her husband and for the benefit of the community of property existing between them. *Joseph* v. *McDonald*, Q.R. 11 S.C. 406.

—Marchande Publique—Agency of Husband—Indorsement of Note—Discount—Consideration—Right of Action.]

See Bills of Exchange and Promissory Notes, V.

—Action by Wife for separation as to Property—Notice—Error in name of Husband—Judgment Nullity.]—See Judgment, VIII.

—Action against Husband and Wife—Marchande Publique—Service of Writ—Domicile.]

See Practice and Procedure, L.

V. Separate Estate and Business.

—Covenant—Mortgage—Estoppel.]—Personal estate settled upon a married woman for her separate use for life without power of anticipation, and after her death to such uses as she might by deed or will appoint, and in default of appointment then over, no income therefrom having accrued due at the time of contracting, is not separate property in reference to which the married woman can be presumed to have contracted.—A married woman may show in answer to an action against her upon a covenant in a mortgage made by her husband and herself containing no recital of her ownership, given to secure part of the purchase money of land purchased by the husband, but conveyed to her, that the conveyance was taken merely as trustee for her husband, and not for her benefit; and this although the mortgagee or those claiming under him had no knowledge of her position. *Gordon* v. *Warren*, 24 Ont. A.R. 44.

—**Proprietary Interest—Letting Lodgings—R.S.O. c. 132, s. 5—Fraudulent Conveyance—Attack under claim of Third Person—Estoppel.**]—Where a married woman living in a house furnished by her husband and supporting herself during his temporary absence in search of employment, lets lodgings and supplies necessaries to the lodger, she cannot recover from the lodger the money due as earned by her in an employment or occupation in which the husband has no proprietary interest.—Where a creditor takes the benefit of a conveyance alleged to be fraudulent, and on that ground fails in his action attacking it, the acquiring by him of a small claim and the bringing of another action upon it is an abuse of the process of the Court. *Young* v. *Ward*, 24 Ont. A.R. 147, reversing 27 Ont. R. 423; C.A.Dig. (1896) col. 153.

—**Sale of Wife's Property—Retention of proceeds by Husband—Trustee—Lapse of Time—Parties—Separate Estate.**]—Where a house and land, the separate property of a married woman, were sold, and the proceeds taken and retained by her husband, who had never accounted for them:—Held, in an action on a promissory note of the wife, twenty-six years after, that the husband remained a trustee for his wife of the proceeds, and the wife's claim constituted separate estate:—*Semble*, per Meredith, C.J., that where in such an action, the plaintiff claims that the married woman is entitled to separate estate, under a certain will, the court will determine the point without requiring the other beneficiaries under the will to be added as parties. *Briggs* v. *Willson*, 24 Ont. A.R. 521.

—**Separate Estate—Property received from Husband during Coverture—R.S.O. c. 132, s. 4, ss. 4.**]—Where the only property possessed by a married woman, without a settlement, consisted of an interest in personal property given by her husband to her during coverture:—Held, that this was separate estate liable for her debts. *The Trusts Corporation of Ontario* v. *Clue*, 28 Ont. R. 116.

—**Settlement—Conveyance by Husband for use of Wife and Children—Rights of Children.**]—A husband conveyed lands to trustees to receive the rents, and after payment of a mortgage, to pay the balance into the hands of his wife during her life, for her use and that of her children, to be at her separate disposal:—Held, that the plaintiff the sole surviving child, was entitled to half the yearly income. *Turner* v. *Drew*, 28 Ont. R. 448.

—**Contract of Wife—Separate Estate—Action after Husband's Death—Liability—R.S.O. c. 132, s. 3, ss. 2, 3, 4—Form of Judgment.**]—In 1894, a married woman possessed of separate estate, entered into a covenant for payment of money. In an action against her upon the covenant, after the death of her husband, but before the passing of 60 Vict. (Ont.) c. 22:—Held, that under section 3, sub-secs. 2, 3 and 4, of the Married Women's Property Act, R.S.O., c. 132, the liability which she undertook by her contract with the plaintiffs was expressly limited by the extent of her separate property then existing, and thereafter required during coverture: and that the judgment against her should be in the usual form, to be levied out of such property, so far as the same might not have been disposed of by her. *Hammond* v. *Keachie*, 28 Ont. R. 455.

—**Revendication by Husband—Property Sold by Wife Séparée de biens, without his Consent.**]—Where the wife, separated as to property, has sold part of her movable property without the consent of her husband, the latter cannot have recourse to a *saisie-revendication*. *Paquet* v. *Lejeune*, Q.R. 11 S.C. 402.

—**Domicile—Marriage Contracted in Quebec and Property acquired in New Hampshire—Sale of Real Estate to Husband—Separation of Property—Sale to Wife after Separation—Art. 6 C.C.**]—The fact of lengthened residence in the United States of natives of Quebec (who married and lived there for many years after marriage) is not of itself sufficient to establish a change of domicile so as to give to the wife the right of owning property acquired after marriage, as her separate property.—To constitute a change of domicile it must be *animo et facto*, and when, as in the present case, there was no evidence of intention to reside permanently in the United States, but on the contrary they have returned, and since their return the wife has judicially declared they were always, since marriage, *communs en biens*, not only the presumption of law, but also the presumption arising from the circumstances is against the intention to abandon the domicile of origin.—In the present case, the pretended right of the wife, to the ownership of $3,000, involves a question of her status and capacity to contract, and is therefore governed by Art. 6 C.C.—Real estate paid for with the moneys of the community and conveyed to the husband, by a secret deed, not registered, but executed before the institution of an action by the wife *en séparation de biens*, will, after the judgment granting her separation, be held to be his property, when during her action she had renounced the community.—A transaction, entered into after the judgment *en séparation*, by which an insolvent husband, with intent to defraud his creditors, pretends to resiliate the deed to him and procures from his vendor a conveyance to the wife (*séparée de biens* under the judgment), will be set aside as fraudulent, and the second deed with its registration will be held to operate and avail a conveyance to the husband. *McNamara* v. *Constantineau*, 3 Rev. de Jur. 482. White J.

—**Nova Scotia Married Women's Property Act—"Earnings" Construction.**]—Plaintiff, who was carrying on the business of lumbering, farming, and general trading on her separate account, with her husband's consent, registered under the provisions of the Nova Scotia Married Women's Property Act, 1884, purchased from W. certain wood-working machinery, in payment for which she gave her promissory note. The machinery having been levied upon and sold by the sheriff under an execution against the husband:—Held, that the word "earnings" as used in s. 52 was broad enough to cover the property in question, and, this being so, plaintiff could sue in her own name without joining the husband. *Slaughenwhite* v. *Archibald*, 28 N.S.R. 359.

—Judgment against Married Woman — Irregularity—Separate Estate—Proprietary or Personal Judgment—N.W.T Act, R.S.C. c. 50, s. 40.]—Judgments were entered against a married woman for default of appearance. There was nothing on the face of the proceedings to show that defendant was sued as a married woman or that she was possessed of separate estate. Upon motion to set the judgments aside upon the grounds. (1) that defendant was a married woman at the time they were entered, and, being personal, not proprietary judgments, they were irregular and void; and (2) that the executions issued thereon, not being limited to her separate estate, were irregular:—Held (per Scott, J., in Chambers), that the judgments and executions were not irregular or void, under section 40 of the North-West Territories Act, R.S.C. c 50, upon either of the grounds stated. *Lougheed* v. *Murray*, 17 C.L.T. (Occ. N.) 105.

—Married Woman — Judgment Against— Costs Payable out of Separate Property—Costs Payable to Married Woman—Set-off.]—See COSTS, I.

VI. SEPARATION DE CORPS.

—Adultery—Forfeiture of Matrimonial Rights—Rights of Community.]—The *séparation de corps* pronounced against the wife on account of adultery carries with it the loss of all the matrimonial rights of the wife, including the forfeiture of her rights of community in the property composing it. *Dubuc* v. *Audette*, 3 Rev. de Jur. 464. Tellier, J.

VII. SUPPORT OF WIFE.

—Criminal Law—Evidence—Non-Support of Wife—Criminal Code, 1892, s. 210, s.s. 2—Lawful excuse—Agreement.]—See CRIMINAL LAW, V.

IMMOVABLE PROPERTY.

Vendor and Purchaser—Unpaid Vendor—Conditional Sale—Suspensive Condition—Movables Incorporated with Freehold — Immovables by Destination — Hypothecary Charges — Arts. 375 et seq. C.C.]—A suspensive condition in an agreement for the sale of movables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor, is a valid condition.—In order to give movable property the character of immovables by destination, it is necessary that the person incorporating the movables with the immovable, should be, at the time, owner both of the movables and of the real property with which they are so incorporated; *Lainé* v. *Béland*, 26 S.C.R. 419, and *Filiatrault* v. *Goldie*, Q.R. 2 Q.B. 368, distinguished. *La Banque d'Hochelaga* v. *The Waterous Engine Works Company*, 27 S.C.R. 406, affirming Q.R. 5 Q.B. 125.

IMPOUNDING ANIMALS.

Delivery to Owner—Damages—Art. 440 M.C.]—A person who has sent to his own pound an animal found on his land must deliver it to the owner on payment of the fees allowed by Art. 440 of the Municipal Code, and for the damage the animal caused to him the day it was seized; he has not the right to refuse delivery until recompensed for damages suffered anterior to that day. *Meunier dit Lagacé* v. *Cardinal*, Q.R. 10 S.C. 250.

INDIAN.

Manslaughter—Pagan Indian—Evil Spirit—Delusion.]—A Pagan Indian who, believing in an evil spirit in human shape called a Wendigo, shot and killed another Indian under the impression that he was the Wendigo, was held properly convicted of manslaughter. *The Queen* v. *Machekequonabe*, 28 Ont. R. 309.

—Murder—Confession—Indian Agent—Inducement—Burden of Proof.]

See CRIMINAL LAW, XII.

INDIAN RESERVE.

Worrying Sheep on Indian Reserve—R.S.O. c. 124, s. 15—R.S.C. c. 43—Scienter—Powers of Indian Council.]—A sheep was worried on an Indian Reserve by a dog owned by a resident thereof, who was sought to be made chargeable for the injury by the owner:—Held, that R.S.O. c. 214, s. 15 is not applicable, and a scienter must still be proved against such a resident.—Without express power given by the Dominion Indian Act (R.S.C. c. 43), the Indian Council cannot alter the common law rule in this respect. *The Queen* v. *Johnson*, 33 C.L.J. 204.

INDIAN TREATIES.

B.N.A. Act, s.s. 109, 111, 112—Indian Reserves—Increased Annuities—Liability for—Charge on Lands.]—See CONSTITUTIONAL LAW, II (a).

INDICTABLE OFFENCES.

Proceedings in Relation to — Termination — Record of Acquittal—Signature of Attorney-General.]—See ATTORNEY-GENERAL.

And see CRIMINAL LAW.

INFANT.

I. Capacity.

Minor—Transaction of Business—Formation of Company — Emancipation — Art. 323 C.C.]—A minor may engage in business, and even form a commercial company for the purposes of such business, without having been emancipated. *Normandin* v *Daignault*, Q.R. 11 S.C. 322.

II. Contracts.

—Deed Executed during Minority—Ratification —Silence.]—A deed executed by an infant is voidable only and if, within a reasonable time after attaining his majority he does not expressly repudiate it, his failure to do so will amount to an affirmance: *Doe d. Foster* v. *Lee*, 2 Han. (N.B.) 486 and *Doe d. Seely* v. *Charlton*, 21 N.B.R. 119, overruled. *McDonald* v. *The Restigouche Salmon Club*, 33 N.B.R. 472.

III. Custody.

—Act for Prevention of Cruelty to Children—Order of Justices—Appeal to General Sessions—Jurisdiction—56 V. (Ont.) c. 45—58 V. (Ont.) c. 52, s. 2.]—There is no appeal to the General Sessions from an order for the custody and care of children under section 13 and subsequent sections of 56 Vict. (Ont.) c. 45, "An Act for the Prevention of Cruelty to and better Protection of Children," made by two justices of the peace sitting under section 2 of 58 Vict. (Ont.) c. 52, amending the former Act. *In re Granger and the Children's Aid Society of Kingston*, 28 Ont. R. 555.

IV. Estate.

— Infant — Insurance Moneys — Payment into Court — Foreign Tutrix—Payment out—Trustee —60 V. (Ont.) c. 36, ss. 155, 157.]— Sections 155 and 157 of the Ontario Insurance Act, 60 Vict. c. 36, provide a special mode for dealing with the shares of infants in insurance moneys, and exclude the application of the ordinary rules of law so far as inconsistent therewith. And therefore a tutrix of infants duly appointed in the Province of Quebec is not entitled, *qua tutrix*, to moneys of the infants paid into Court under section 157 of the Act; but she may under section 155, s.s. 2, be appointed a trustee of the fund and receive it, upon giving proper security. *Re Berryman*, 17 Ont. P.R. 573.

— Minor — Representation of Minor Resident Abroad—Sale of Bank Stock belonging to Minor —Nullities—Liability of Bank—Tutor ad hoc.]—By his last will D. bequeathed to his mother the usufruct of his estate (which comprised among its assets forty shares in the capital stock of the bank defendant), and the ownership to his nephew, then a minor domiciled in the United States. A tutor *ad hoc aux biens* was appointed in the district of Montreal, and subsequently, during the lifetime of the usufructuary, on the petition of the tutor *ad hoc aux biens*, the usufructuary legatee and the executors, the forty shares were sold for the purpose, as alleged, of making repairs to the immovable property of the estate, and the transfer was made in the books of the bank, the tutor *ad hoc aux biens*, however, not appearing as a party to the transfer. The minor, after becoming of age, and after the death of the usufructuary, brought the present action against the bank, claiming to be reinstated in the possession of the forty shares, the sale and the transfer of which he alleged to be null and void.—Held, that a tutor *ad hoc* can be appointed to a minor only in the special cases provided by law, and the appointment in the present case was null and void, the proper course being the appointment of a tutor and subrogate-tutor. (Arts. 267, 269 C.C.) The sale of the shares was therefore void, not being made in conformity to law. The authorization to sell the shares was also null, as it did not appear that the necessity for such sale had been established before the family council. (Art. 298 C.C.). Further, the transfer of the shares was null and void, being made without the participation of any one legally entitled to represent the minor. Art. 299 C.C. — Where a transfer of bank shares belonging to a minor is declared null and void, and it is not established that he derived any advantage from the sale, he is entitled to be reinstated in the possession of the shares, or to recover the value thereof from the bank. *Donohue* v. *La Banque Jacques Cartier*, Q.R. 10 S.C. 110.

—Infant — Sale of Land — R.S.O. c. 137, s. 3— Dispensing with Examination.]

See Sale of Land, IV.

V. Next Friend.

—Suit by—Costs.]—See Costs, IV.

INFORMATION.

Alteration in—Re-Swearing—Waiver.]

See Canada Temperance Act, II.

—Validity when not Sworn to.]

See Canada Temperance Act, II.

—Quo Warranto and Informations in Chancery.]

See Practice and Procedure, XVIII.

INJUNCTION.

Municipal Corporation—Waterworks—Extension of Works—Repairs—By-law—Resolution—Agreement in Writing—Highways and Streets—R.S.Q. Art. 4485—Art. 1033a C.C.P.]—By a resolution of the council of the town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained per-

mission to construct waterworks in the town and to lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the River Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system of waterworks and had it in operation within the time prescribed, but the system proving insufficient, a company was formed in 1895 under the provisions of R.S.Q. Art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir and to make new excavations in the streets for these purposes without receiving any further authority from the council:—Held, reversing the judgment appealed from, that these were not merely necessary repairs, but new works, actually part of the system required to be completed during the year 1892, and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town:—Held, further, that the resolution and the application upon which it was founded constituted a "contract in writing" and a "written agreement" within the meaning of article 1033*a* of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works. *La Ville de Chicoutimi* v. *Legaré*, 27 S.C.R. 329, reversing Q.R. 5 Q.B. 542.

—**Company Law—Restraint of Trade—Injunction.**]—One party to an agreement made between a number of dealers in plate glass for the formation of a company to take over the plate glass business of each of them, each dealer covenanting not to compete with the new company when formed, may be restrained by the other parties to it from breach of the covenant, even after the formation of the new company, the parties complaining being at the time of the action shareholders in that company, *McCausland* v. *Hill*, 23 Ont. A.R. 738.

—**Parliamentary Election—Restraining Judge of County Court and Returning Officer from Holding Recount—Jurisdiction of High Court.**]—A Judge of the High Court has no jurisdiction to restrain by injunction a County Court Judge and the Returning officer from holding a recount of the ballots cast at an election for the House of Commons: In re *Centre Wellington*, 44 U.C. Q.B. 132; re *North Perth*, *Hessin* v. *Lloyd*, 21 Ont. R. 538 considered.—Where an injunction is being applied for *ex parte*, counsel who desire to appear in opposition to the application should be heard. *McLeod* v. *Noble*, 24 Ont. A.R. 459.

—**Practice—Injunction—Undertaking as to Damages—Dismissal of Bill.**]—Where plaintiff on giving the usual undertaking as to damages obtained an *ex parte* injunction, which was subsequently dissolved, he was allowed to have his bill dismissed without payment of damages recoverable under the undertaking. *Morehouse* v. *Bailey*, 1 N.B. Eq. 393.

—**Interim Injunction—Appeal—Contempt—Practice.**]—See APPEAL, IV.

—**Parliamentary Elections—Recount by County Judge—Injunction—Jurisdiction—Disobedience of Injunction—Motion to Commit—Contempt.**]

See PARLIAMENTARY ELECTIONS.

—**Parochial Law—Opening of New Cemetery—Orders of Competent Authority—Injunction—Proceedings on Application—Intervention on Appeal.**]—See PRACTICE AND PROCEDURE, XIX.

INJURIOUS AFFECTION.

Damage to Property arising from Public Work.]—See PUBLIC WORK.

INLAND REVENUE.

Seizure of Tobacco—Revenue Stamp—Onus probandi.]—On the hearing of an information for being in possession of tobacco not stamped according to law, the burden of proof as to its being stamped is upon the defendant. *Simpson* v. *Raymond*, 3 Rev. de Jur. 511. Curran, J.

And see REVENUE

INNKEEPER.

Café—Obligations of keeper of—Necessary Deposit—Art. 1814 C.C.]—The obligations of the keeper of a café or restaurant, as regards the effects of guests, are similar to those of an innkeeper. *Dunn* v. *Beau*, Q.R. 11 S.C. 538.

INSCRIPTION.

Procedure—Review—Deposit—Arts. 497 & 498, C.C.P.]—A document which reads "the plaintiff gives notice to defendant that he has this day duly made the deposit required by law, and that he has inscribed the case in Review, etc.," when in fact the deposit was not made nor the original filed until three days later, is not an inscription but a mere notice, and such notice being given before the deposit was made, the inscription was set aside as irregular and null. *Banks* v. *Burroughs*, Q.R. 11 S.C. 440.

—**For Hearing—Resolution of City Council—Application to Annul—Delay—Charter of Montreal—Arts. 235, 1004 C.C.P.—52 V. c. 79 s. 144 (P.Q.).**]—See PRACTICE AND PROCEDURE, XI.

INSURANCE.

I. Accident Insurance.

Renewal of Policy—Payment of Premium—Promissory Note—Instructions to Agent—Agent's Authority—Finding of Jury.]—A policy issued by the Manufacturers' Accident Insurance Co. in favour of P. contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the policy was that it was not to take effect unless the premium was paid prior to any accident on account of which a claim should be made, and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director and countersigned by the agent. P. having been killed in a railway accident, payment on the policy was refused on the ground that it had expired and not been renewed. In an action by the widow for the insurance it was shown that the local agent of the company had requested P. to renew and had received from him a promissory note for $15 (the premium being $16), which the father of the assured swore the agent agreed to take for the balance of the premium after being paid the remainder in cash. He also swore that the agent gave P. a paper purporting to be a receipt and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium it was agreed between him and P. that there was to be no insurance until it was paid, and that he gave no renewal receipt and was paid no cash. Some four years before this the said agent and all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore. The note was never paid but remained in possession of the agent, the company knowing nothing of it. The jury gave no general verdict, but found in answer to questions that a sum was paid in cash and the note given and accepted as payment of the balance of the premium, and that the paper given to P. by the agent as sworn to by P.'s father, was the ordinary renewal receipt of the company. Upon these findings judgment was entered against the company:—Held, that the fair conclusion from the evidence was, that as the agent had been employed to complete the contract and had been entrusted with the renewal receipt, P. might fairly expect that he was authorized to take a premium note, having no knowledge of any limitation of his authority and the policy not forbidding it; and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the court according to the practice in Nova Scotia:—Held, further, that there was evidence upon which reasonable men might find as the jury did; that an inference might fairly be drawn from the facts that the transaction amounted to payment of the premium and it was to be assumed that the act was within the scope of the agent's employment; the fact that the agent was disobeying instructions did not prevent the inference though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial, as the company might have supposed that the plaintiff would seek to show that such receipt had been obtained and were not taken by surprise. *The Manufacturers' Accident Insurance Company* v. *Pudsey*, 27 S.C.R. 374, affirming 29 N.S.R. 124.

II. Fire Insurance.

—Threshing Crops by Steam—Change material to the Risk.]—A provision in a policy of fire insurance permitting the insured to use "for the purpose of threshing the crops on the premises a steam thresher with an efficient spark arrester" does not by inference prohibit the use of a steam engine in connection with a machine for crushing grain. The use of a steam engine on one occasion in connection with the machine for crushing grain is not a change material to the risk within the meaning of the statutory condition; that condition refers to some structural alteration in the premises or habitual or permanent alteration in the nature of the work or business carried on. *Johnston* v. *Dominion Grange Mutual Fire Insurance Co.*, 23 Ont. A.R. 729.

—Mercantile Stock — Value — "Goods Sold but not Delivered."]— (Per Morgan, Co. J.) The owner of a stock of goods destroyed by fire is entitled to receive from the insurers only the actual cash value of the goods, which value is represented by a sum equivalent to the cost of replacement. The liability of the insurers is not increased by reason of the fact that the assured had before the fire contracted to sell the goods destroyed, and that he could not replace them in time to carry out his contract. *Darling* v. *Insurance Companies*, 33 C.L.J. 439.

—Landlord and Tenant—Loss by Fire—Cause of Fire — Negligence — Civil Responsibility—Legal Presumption — Rebuttal — Onus of Proof — Hazardous Occupation—Extra Premiums—Arts. 1053, 1064, 1071, 1626, 1627, 1629 C.C.]

See Landlord and Tenant, VI.

—Proofs of Loss—False and Fraudulent Statements—Particulars.]

See Practice and Procedure, XXXIV.

III. Life Insurance.

—Policies of Life Assurance—Proviso for Cash payment of Premium—Onus Probandi—Duties of Insurers' Agent—Payment of Premium by Notes Discounted and then Dishonoured.] — Where a life policy contains provisions to the effect that it shall not be in force till the first premium is paid, and that if a note be taken for the first or renewal premium and not paid the policy is void at and from default, the onus is

on the policy-holder to prove cash payment of the premium. — Where the insurers' agent accepts in payment of a premium a note which is not paid when due, there is no presumption that he was to raise money thereon as an agent for the insured and pay the premium out of the proceeds.—And where the insurers accept their agent's note in discharge of an account current between them in which the agent was debited with the amount of the premium, that affords no presumption of an intention to treat their agent as agent for the insured, or the insurance as subsisting contrary to the terms of their contract with the policy-holder: *Acey* v. *Fernie*, 7 M. & W. 151, approved. *London and Lancashire Life Assurance Co.* v. *Fleming* [1897], A.C. 499, reversing 23 Ont. A.R. 666; C.A. Dig. (1896) col. 162.

—**Benevolent Society—Named Beneficiaries—Certificate payable to Assured's Executors—Creditors and Legatees—R.S.O. c. 172.**]—A certificate issued by a benevolent society incorporated under R.S.O. c. 172 in favour of an unmarried man declared the sum therein mentioned to be payable to his executors. The rules of the society required the beneficiary to be named in the certificate, and in default provided for payment to certain named relations of the member, or his next of kin, or to the beneficiary fund of the society:—Held, that this was not a legal appointment or declaration of the fund under the statute and rules of the society; that the fund did not pass to the members' executors under his will; and that neither creditors nor legatees could claim it, but that the case must be looked upon as one of default of appointment, and the money applied as directed by the rules *Johnston* v. *Catholic Mutual Benevolent Association*, 24 Ont. A.R. 88.

—**Life Insurance—Benevolent Society—"Member in Good Standing"—Domestic Forum.**]—Where the rules of a benevolent society give to a member, dissatisfied with a decision as to sick benefits, a right of appeal to a domestic forum, the widow of a member whose application for sick benefits has in his lifetime been refused, and who has acquiesced in that decision and has not appealed, cannot recover sick benefits. Where, however, the widow of "a member in good standing" is entitled to certain pecuniary benefits and the status of the member has not been passed upon by the society in his lifetime, an action by the widow will lie, and the status of the deceased member at the time of his death is a question of law to be determined in the usual way. In the present case the fact that the deceased member was at the time of his death in arrear for dues was held, having regard to the constitution and rules of the society, not to deprive him of his status, and the widow was held entitled to recover. *Dale* v. *Weston Lodge*, 24 Ont. A.R. 351.

—**Benefit Society—Misrepresentation as to Age—Good Faith—52 V. (Ont.) c. 32, s. 6.**]—The Ontario Insurance Amendment Act, [1889] 52 Vict. c. 32, applies to benefit societies; and where a person was admitted to the defendants' order on the strength of a representation as to age, which was false, but made in good faith and without any intention to deceive:—Held, that by virtue of section 6 of the above Act, the contract was not avoided thereby. If the true age of the deceased had been stated, he could not have been admitted to the order, nor could he have effected any insurance:—Held, nevertheless, he being a member in good standing at the time of his death, and his membership not having been attacked in his lifetime, his certificate of insurance was not avoided by this fact. *Cerri* v. *The Ancient Order of Foresters*, 28 Ont. R. 111.

—**Policy—Change of Beneficiary—Vested Interest—Foreign Contract—Foreign Law.**]—By a contract between the insured and her husband, in consideration of his agreeing not to apportion amongst his children any part of the moneys to arise from an insurance policy upon his life, of which she was the named beneficiary, she agreed that a policy to be issued upon her life should be made payable to him as beneficiary. This agreement was carried out, and the husband for five years paid the premiums upon his wife's policy:—Held, that a vested interest in the policy passed to him, and the beneficiary could not be changed without his consent, even where the policy had lapsed and a new policy been issued in lieu of it, by agreement between the insurers and insured:—Held, also, that although the application for insurance was made and the policy delivered in Ontario, the insured and the insurers having agreed that the place of contract should be in New York, and that the contract should be construed according to the law of that State, if the change in the beneficiary was validly made according to the law of that State, the husband was not entitled to the insurance moneys, notwithstanding that the insurers had not intervened and were raising no question as to whether the law of Ontario or that of New York should govern; but, applying the law of New York, that the change was not validly made. *Bunnell* v. *Shilling*, 28 Ont. R. 336.

—**Construction of Policy—Beneficiary—Designation—Assignment of Policy—Security for Advances—Trust—Evidence.**]—By a policy of life insurance the insurers promised to pay the amount insured, upon the death of the insured person, to his wife, the plaintiff, or such other beneficiary or beneficiaries as he might in his life-time have designated in writing indorsed on the policy, and in default of any such designation to his legal personal representatives. The application stated that the money was to be paid to his wife. The only indorsement upon the policy was an absolute assignment of it by the insured to the defendant, and notice of the assignment was given by him to the insurers, and all premiums were afterwards paid by him. The assignment was, however, shown to have been made only as security for advances:—Held, that in the absence of an indorsement designating a beneficiary, the insurance moneys belonged to the legal personal representatives of the insured. If, however, there was a trust of the policy in the plaintiff's favour, a right to revoke it was still reserved to the deceased, and no absolute and irrevocable trust such as is contemplated by the statute was ever created:—Held, also, upon the correspondence, that the defendant, believing he was entitled to a charge for all his advances, under conversa-

tions had with the insured so stated the fact to the plaintiff, and she, desiring to pay her husband's debts and funeral expenses, ratified the action of the defendant in paying out certain sums on her husband's account, and assented to his retaining his own claim, so far as the money would go. *Fisher* v. *Fisher*, 28 Ont. R. 459.

—**Benefit of Child—Satisfaction—Evidence—Oral declaration of Insured.**]—In the course of proceedings for the administration of an intestate's estate, the amount of a life policy taken out by deceased under the Act to secure to wives and children the benefit of life insurance, in favour of his daughter absolutely, and which had been paid to her guardian, was set up as satisfaction of a claim made on behalf of the daughter and of the personal representative of her mother against the estate, and certain oral declarations of the deceased made before effecting the insurance were proved to show such to have been his intention:—Held, that if the evidence was admissible at all, which was doubtful, there should at least be something in writing evidencing the obligation to accept the amount in satisfaction of the claim as formal as the Act requires in the case of changes in the description of, or apportionment among, the beneficiaries. *In re Mills, Newcombe* v. *Mills*, 28 Ont. R. 563.

—**Infant — Insurance Moneys — Payment into Court—Foreign Tutrix—Payment Out—Trustee —60 V. c.36, ss. 155, 157 (Ont.)**]—Sections 155 and 157 of the Ontario Insurance Act, 60 Vict. c. 36, provide a special mode for dealing with the shares of infants in insurance moneys, and exclude the application of the ordinary rules of law so far as inconsistent therewith. And therefore a tutrix of infants duly appointed in the Province of Quebec is not entitled *qua tutrix* to moneys of the infants paid into Court under section 157 of the Act; but she may, under section 155, sub-section 2, be appointed a trustee of the fund and receive it, upon giving proper security. *Re Berryman*, 17 Ont. P.R. 573.

—**Benevolent Society—Rules and Regulations—Alterations in—Amount of Sick Benefit—Reduction of.**]—See BENEVOLENT SOCIETY.

IV. MARINE INSURANCE.

—**Constructive Total Loss—Average—Abandonment—Notice.**]—Where a lot of sewing machines, laden on board of a vessel bound on a trading voyage, are insured under one policy, but each machine is separately valued, the assured may abandon to the underwriters such out of the number as may be declared by a survey to be a total loss.—And a condition in the policy "free of particular average" cannot be held to operate so as to exclude a claim on the insurers for those lost. The meaning of the words "different things or classes of things" as used in Art. 2540 C.C., considered.—In the present case the abandonment was clearly proved (Art. 2474 C.C.), and the same was made within a reasonable delay after assured had received notice of loss (Art. 2541 C.C.). Under the circumstances disclosed, the master of the vessel in causing her to be towed back to port, used all necessary care and diligence in the interest of all concerned (Art. 2427 C.C.), and the cost of such towage was a general average expenditure.—Per Casault, C.J., the return to the assured at the port of departure before abandonment, of goods insured free of particular average, and valued separately, restricts his recourse to a claim for such of said goods as have suffered damage equal to constructive total loss on condition of his making abandonment of the same within a reasonable delay after said return. *Singer Manufacturing Co.* v. *Western Assurance Co.*, Q.R. 10 S.C. 379.

—**Loss of Ship by Sinking—Unexplained Cause —Repairs—Seaworthiness—Perils of the Sea—Jury—Jurisdiction — New Trial.**]—A vessel insured by the defendant company sank at sea, shortly after leaving port. No evidence was given to explain the cause of sinking, but there was evidence that in the spring of the year she was caulked, painted and cleaned, and also in the month prior to that in which she was lost, she was put on the slip, and the caulking examined and made tight and other repairs made, and that at this time there was no indication of planks starting or anything of that kind:—Held, that the fact that no explanation could be given to account for the sinking of the vessel was not enough to establish an inference of unseaworthiness, there being evidence from which it could be reasonably inferred that the vessel was seaworthy at the beginning of the voyage; that in dealing with the cause of the loss, it was for the jury to say whether the loss was occasioned by perils of the sea, notwithstanding the lack of evidence as to the exact cause of the sinking; that the trial judge having instructed the jury as a matter of law that the vessel was lost by perils of the sea, that this was misdirection, and that the case must go back for a new trial. *Morrison* v. *Nova Scotia Marine Ins. Co.*, 28 N.S.R. 346.

INTEREST.

Unfounded Contestation—Loss of Interest—Liability to Recoup—Art. 1053 C.C.]—M. was an hypothecary creditor of one Ferland, who had assigned all his property for the benefit of his creditors, and the proceeds were about to be distributed when G. and others, chirographic creditors of Ferland, contested by *action paulienne* the hypothec of M., claiming that it had been given in fraud of the creditors of Ferland when the latter was notoriously insolvent. Their action was maintained by the Superior Court, but rejected by the Court of Appeal, fraud not having been proved, but on the contrary the evidence showing that M. had believed that Ferland was solvent since he had made advances to him at the time the hypothec was given. M., who had lost the interest on his debt during these proceedings, took action against G. *et al* to recover from them the amount of such interest by way of damages:—Held, that G. and others having, by their unfounded contestation, deprived M. of the interest on his debt, were responsible for the loss which had thus been occasioned. *Malo* v. *Gravel*, Q.R. 11 S.C. 336.

The following case was similar in character to the above, but decided differently by the same court. The defendants had instituted an *action paulienne* demanding the revocation of the sale of an immovable made by one P.M. to his son E M. The latter, while the action was pending, had placed upon the immovable sold a hypothec in favour of the plaintiff, and eventually the action was maintained and the sale annulled. The defendants then sold the immovable and the plaintiff was collocated upon the proceeds of the sale for the amount of his hypothecary debt. This collocation was opposed by the defendants upon the advice of their solicitors on the ground that the annulling of the title of E.M. had involved the nullity of the hypothec, but their contestation was rejected by the Superior Court, whose judgment was confirmed by the Court of Appeal. In an action by the plaintiff claiming from the defendants, by way of damages, the interest lost by reason of the collocation being contested:—Held, that the defendants having, in good faith and upon the advice of their solicitors, contested the collocation of the plaintiff, they were not responsible for the loss of interest suffered by the latter. *Royal Institution for the Advancement of Learning* v. *Barsalou*, Q.R. 11 S.C. 345.

—Usury Laws—C.S.C. c. 58—Art. 1785 C.C.]

See BUILDING SOCIETY.

—Mortgage—Agreement for Compound Interest—Charge on Lands.]—See MORTGAGE, VI.

—Improvements under Mistake of Title—Mortgage—Enforcement against True Owner—Interest—Rents and Profits.]

See TITLE TO LAND.

INTERLOCUTORY PROCEEDINGS.

Appeal—Interlocutory Order—Trial by Jury—Final Judgment—R.S.C. c. 135, s. 24—Arts. 348-350 C.C.P.]—*Demers* v. *Bank of Montreal*, 27 S.C.R. 197.

INTERNATIONAL LAW.

Convention of 1818—Treaty, Construction of—Statute, Construction of—Fisheries—Three Mile Limit—Foreign Fishing Vessels—"Fishing"—59 Geo. III., c. 38, (Imp.)—R.S.C. cc. 49 and 95.]—Where fish have been enclosed in a seine more than three marine miles from the coast of Nova Scotia, and the seine pursed up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew being then engaged in the act of bailing the fish out of the seine:—Held, that the vessel when so seized was "fishing" in violation of the convention of 1818 between Great Britain and the United States of America and of the Imperial Act 59 Geo. III., c. 38, and the Revised Statutes of Canada, c. 94, and consequently liable with the cargo, tackle, rigging, apparel, furniture and stores, to be condemned and forfeited. *The Ship "Frederick Gerring Jr."* v. *The Queen*, 27 S.C.R. 271, affirming 5 Ex. C.R. 164.

—Accident on board Ship—Claim by Heirs of Victim—Damages—Responsibility of Owners—Common Employment—British Ship—International Law—Jurisdiction.]—Action by the widow and children of one D., an employee of defendants, claiming $30,000 damages for his death, caused by the fall of a derrick on board the steamer "Muriel," a British ship, registered in England, belonging to and being navigated by defendants, while being loaded at Port of Spain, in the Island of Trinidad. The company defendant was incorporated by statute of Canada, with its head office in the City of Quebec, where the contract of hiring of D, a British subject, was originally entered into. The proof showed that the accident was the direct result of the insufficiency of the derrick and gear safely to perform the work to which they were being applied. The Superior Court dismissed the action, holding that the law of Trinidad, which denies such an action, governed, because the action was in tort, and by international law such action must be decided by the law of the country in which the tort was committed, and even if the action were deemed to be based on the contract of hiring, the case would not be governed by the law of the place where such contract was made, because it was not to be executed there, but in the West India Islands:—Held, reversing the judgment, that the ship was then a part of the territory of England, and those then and there on board of her were not subject to the laws of the Island of Trinidad in respect to their mutual rights and liabilities connected with her loading and navigation, and therefore the doctrine of "common employment," or the maxim *actio personalis moritur cum personâ*, if in force on said island, could not be set up in order to defeat plaintiff's action. Even if, by reason of the assent of D. to certain changes in some of the terms of his engagement with defendants having been given by him at New York, it could be held that his contract of hiring was made in the latter city, this would be unimportant in the present case, there being no allegation or proof of any difference between the law of New York and that of this Province, and such difference cannot be presumed. The rules of international law are based on reason and justice, on a sort of moral necessity to do justice in order that justice may be done to us in return; its rules are flexible, and the circumstances of each particular case have to be carefully considered and taken into account; and under the cicumstances of the present case, only the most positive, clear and undisputed rule of international law would warrant the Court in applying the law of Trinidad to enable defendants to defeat the claim of deceased's widow and children, pronounced by the law of this Province to be a just one. No such rule existed, and *semble*, even if the law of Quebec could not justly be applied, there was more authority for choosing the law of England than that of Trinidad. The law to be applied to this case was that of the Province of Quebec. It could not be presumed to have been the intention

of either D. or the defendants that the terms of his engagement with them or their mutual rights and liabilities connected with such engagement, or the services to be performed under them, should be interpreted or affected by any law other than that of this Province, and it would be unreasonable and unjust to apply any foreign law to the decision of this case so as to read into the contract of hiring the doctrine of "common employment," viz., an implied consent by the party hired to take the risk of accident caused by the acts and defaults of his fellow employees, a consent which plainly defendants never intended to exact or said D. to give. No contributory negligence being proved on the part of the said D., and no defence being furnished defendants by any foreign law applicable to this case, the judgment *a quo* dismissing plaintiff's action was reversed and $10,000 damages awarded. *Dupont* v. *Quebec SS. Co.*, Q.R 11 S C. 188.

INTERROGATORIES.

Evidence — Faits et Articles — Judicial Admissions — Arts. 221-225 C. C. P.] — The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under art. 225 C. C P., cannot be invoked as a judicial admission in a subsequent action of a different nature between the same parties. *Durocher* v. *Durocher*, 27 S.C.R. 363.

INTERVENTION.

Procedure—Right of Party already in cause to Intervene.]—

See PRACTICE AND PROCEDURE, XXIII.

INTESTACY.

Ontario Devolution of Estates Act—Children of Deceased Brother and Sister—R.S.O. c. 108, s. 6.]—See DEVOLUTION OF ESTATES ACT (ONT.).

INTOXICATING LIQUORS.

See CANADA TEMPERANCE ACT.
" LIQUOR LICENSE.

JOINT STOCK COMPANY.

See COMPANY.

JUDGE.

Surrogate Courts—Vacant Senior Jndgeship—Junior Judge — Jurisdiction — Subsequent Appointment of Senior Judge.]—A junior County Judge who has heard the evidence and trial in an issue in a Surrogate Court while the office of senior County Judge is vacant has the right to deliver judgment in such case after a new senior Judge has been appointed. *Speers* v. *Speers*, 28 Ont. R. 188.

— Duty of — Mandamus — Art. 1022 C.C.P.] — A judge has no right to depart from the obligation he is under to try a cause presented to him within the limits of his jurisdiction, and of which he has taken cognizance, on the ground that the law which is invoked is unjust and adjudication upon it may result in serious inconvenience and lead to disastrous consequences; if the judge belongs to an inferior tribunal he may be compelled by mandamus to exercise his jurisdiction. *Fournier* v. *De Montigny*, Q.R. 10 S.C. 292.

—Judge in Chambers—Powers of—Contestation of Accounts—Extension of Time—Art. 774 C.C.P.] —A Judge in Chambers has no power to extend the time for proving allegations in the contestation of the accounts of an insolvent. *Rose* v. *Desmarteau*, Q.R. 11 S.C. 22, reversing 8 S.C. 315.

—Criminal Trial—Mixed Jury—Revocation of Order for—Discretion of Judge.]

See CRIMINAL LAW, XII.

—Judge of Probate acting as Arbitrator in Settling Matters dehors His Jurisdiction — Appeal.]—See PROBATE COURT.

JUDGMENT.

I. APPEAL FROM.

—Appeal—Interlocutory Order—Final Judgment —Arts. 348-350 C.C.P.—Trial by Jury.]—*Demers* v. *Bank of Montreal*, 27 S.C.R. 197.

II. AMENDMENT.

— Rectification of Slight Errors in — Duty of Appellate Court.]—See APPEAL, VI.

III. DISCHARGE OF JUDGMENT.

—Acceptance of Promissory Note in Discharge of—Revivor of—Evidence—Satisfaction Piece—Mistake—Estoppel.]—J.W.H., as agent of plaintiff, delivered to defendant a satisfaction piece of a judgment held by plaintiff against defend-

ant, on receiving from defendant a promissory note for $110.00 The note so taken was subsequently returned to defendant, and three other notes taken in lieu thereof. The latter notes were finally returned to defendant without anything having been paid on account of them:—Held, that the judgment having been satisfied by the acceptance of the notes, and delivery of the satisfaction piece, could not be revived unless by express agreement:—Held, also, that the delivery back of the notes was not sufficient evidence to establish such an agreement.—Defendant, on receiving the satisfaction piece, instead of taking it to the Clerk of the Court and obtaining his certificate, took it to the Registrar of Deeds, who registered it, and made an entry that the judgment was discharged:—Held (per Townshend J.), that it was not competent for J.W.H., to whom the judgment was subsequently assigned, after he became aware of the mistake, to take advantage of such mistake, and obtain execution on the judgment. *Maguire* v. *Carr*, 28 N.S.R. 431.

IV. Evidence of.

— Evidence — Admissions — Nullified Instruments.]—A will, in favour of the husband of the testatrix, was set aside in an action by the heir-at-law and declared by the judgment to be *un acte faux*, and therefore to be null and of no effect. In a subsequent petitory action between the same parties:—Held, that the judgment declaring the will *faux* was not evidence of admission of the title of the heir-at-law by reason of anything the devisee had done in respect of the will, first, because the will having been annulled was for all purposes unavailable, and, secondly, because the declaration of *faux*, contained in the judgment, did not show any such admission. *Durocher* v. *Durocher*, 27 S.C.R. 363, affirming, Q.R. 5 Q.B. 458; C.A. Dig. (1896) col. 132.

V. In Special Proceedings.

—Appeal—Jurisdiction—Reference to Court for Opinion—54 V. c. 5 (B.C.)—R.S.C. c. 135, ss. 24 and 28.]—The Supreme Court of Canada has no jurisdiction to entertain an appeal from the opinion of a provincial court upon a reference made by the Lieutenant-Governor-in-Council under a provincial statute, authorizing him to refer to the court for hearing and consideration any matter which he may think fit, although the statute provides that such opinion shall be deemed a judgment of the court. *Union Colliery Company of British Columbia* v. *The Attorney-General of British Columbia and others*, 27 S.C.R. 637.

VI. Judgment by Consent.

—British Columbia — Consent Judgment with Intent to Delay Creditors—Consolidated Statutes, c. 51, s. 1.]—Under s. 1 of c. 51 of the Consolidated Statutes of British Columbia a consent judgment obtained by the respondent bank against the insolvent respondent tramway company, with intent to defeat or delay the creditors of the latter, was held to be null and void against them. So long as the intent is proved, it is immaterial whether consent was given under pressure. *Edison General Electric Company* v. *Westminster and Vancouver Tramway Company* [1897], A.C. 193.

VII. Judgment by Default.

—Appeal—Jurisdiction— Discretionary Order—Default to Plead—R.S.C. c. 135, ss. 24a. and 27—R.S.O. c. 44, s. 65—Ontario Judicature Act, Rule 796.]—See Appeal, V.

—Action—Service of—Opposition to Judgment — Reasons of — "Rescissoire" joined with "Rescindant"—Arts. 16, 89 et seq., 483, 489, C.C.P.—False Return of Service.]—No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff. The provisions of articles 483 and following of the Code of Civil Procedure of Lower Canada (respecting opposition to judgment) relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered, for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment by opposition, and have it set aside notwithstanding that more than a year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits.—An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescissoire* had thus been improperly joined with the *rescindant*. *Turcotte* v. *Dansereau*, 27 S.C.R. 583.

—Judgment by Prothonotary—Interest—Art. 91 C.C.P.]—A claim for interest may be included in the judgment rendered by the prothonotary under Art. 91 C.C.P., as being an accessory of the principal demand; a promise to pay a certain rate of interest may also be fairly deemed an "agreement to pay a specific sum of money" within the meaning of that article. *Chouinard* v. *Bernier*, Q.R. 11 S.C. 121.

VIII. Nullity.

—Action by Wife—Separation as to Property—Notice—Error in Name of Party.]—C. took proceedings against her husband for separation as to property (*séparation de biens*) and obtained judgment against him in conformity with her demand. The notices were given by advertisements in the newspapers, but, by mistake, in one of them, the Christian name of the husband was given as "Pierre" instead of "Philéas." No deceit or fraud was proved:—Held, that this error in printing the name of the husband did not make the judgment for separation as to property a nullity. *Charest* v. *Dufresne*, Q.R. 11 S.C. 148.

IX. Practice and Procedure.

—County Court—Order Setting Aside Judgment on Terms—Finality of.]—See Appeal, III (d).

—Examination of Judgment Debtor.]

See Debtor and Creditor, IX.

—Accident on Highway—Non-feasance or Misfeasance—Fact Necessary to Judgment—New Trial.]—See Municipal Corporations, VII.

—Amendment after Final Judgment—Adding Parties.]—See Parties, III.

—Mortgage—Action of Covenant—Motion for Summary Judgment.]—See Mortgage, XI.

—Summary Judgment—Ont. Rule 744—Application of—Special Ground for Relief—Fraudulent Preference.]

See Practice and Procedure, XXVI.

—Service of Papers—Posting up Copies—Ont. Rule 1830—Judgment—Irregularities.]

See Practice and Procedure, XXVI.

—Default—Setting Aside—Discretion—Terms—Defence—Merits—Rule 796.]

See Practice and Procedure, XXVI.

—County Court—Man. Queen's Bench Act, 1895, Rules 804-6—Sale of Land under Judgment.]

See Practice and Procedure, XXVI.

—Bill of Exchange—Defence that Plaintiff not Legal Holder—Order for Judgment—Discretion of Chambers Judge.]

See Practice and Procedure, XXVI.

X. Requête Civile.

—Procedure—Action in Warranty—Requête Civile.]—The defendant, after staying the suit by dilatory exception to call in a warrantor, neglected during two months to plead or have his warrantor take up the *instance*. The plaintiff then inscribed *ex parte*, and obtained judgment:—Held, that the circumstances under which the judgment was rendered disclosed no grounds justifying recourse by *requête civile*. *Cuddington* v. *Tougas*, Q.R. 11 S.C. 177.

—Petition in Revocation of—Requête Civile—Concealment of Evidence—Jurisdiction—C.P.Q. Art. 1177—R.S.C. c. 135, s. 67.]—Where judgment on a case in appeal has been rendered by the Supreme Court of Canada and certified to the proper officer of the court of original jurisdiction, the Supreme Court has no jurisdiction to entertain a petition (*requête civile*) for revocation of its judgment on the ground that the opposite party succeeded by the fraudulent concealment of evidence. *Durocher* v. *Durocher*, 27 S.C.R. 634.

XI. Setting Aside.

—Procedure—Summary Matters—Inscription—Notice—Point de Nullité sans grief—Art. 897a C.C.P.]—Notwithstanding Art. 897a C. C. P., which requires five days' notice of inscription for proof and final hearing in contested summary matters, the Court will not disturb a judgment rendered in a summary action on a protested acceptance, where only one day's notice has been given, but it appears by affidavit that there was a consent to have the case *en délibéré* before the vacation, and where the defendant has suffered no real wrong or damage, applying the well settled rule "*point de nullité sans grief*." *Canada Paper Co.* v. *Forgues*, Q.R. 11 S.C. 178.

— Irregularity — Appeal to Supreme Court.]—After judgment had been entered in a contested cause, and an appeal taken to the Supreme Court of Canada, the Court refused to set aside such judgment and subsequent proceedings on the ground that the cause was not entered and the writ and other pleadings filed in the office of the Clerk of the Pleas, as required by law and the rule of Court Hilary Term, 1837. *Gleeson* v. *Domville*, 33 N.B.R. 548.

JUDGMENT OF DISTRIBUTION.

Appeal—Collocation and Distribution—Art. 761 C.C.P. — Hypothecary Claims — Assignment—Notice—Registration—Prête-nom—Arts. 20 and 144 C.C.P.—Action to Annul Deed—Parties in Interest—Incidental Proceedings.]—The appeal from judgments of distribution under article 761 of the Code of Civil Procedure is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution.—The provisions of article 144 of the Code of Civil Procedure that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench.—The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties. *Guertin* v. *Gosselin*, 27 S.C.R. 514.

—Collocation—Opposition to—Want of Interest—Chirographic Creditor.] — A simple chirographic creditor who is not a party to the cause, and has no interest in the proceeds of sale of an immovable because of hypothecs which burden it, cannot be allowed on account of this want of interest, to contest a collocation taken on the judgment of distribution. *Société Permanente de Construction d'Iberville* v. *Thibodeau*, Q.R. 10 S.C. 252.

JUDICIAL ABANDONMENT.

Procedure—Art. 764 C.C.P.—Capias—Contrainte par Corps.]—Art. 764 of the Code of Procedure is not to be interpreted as limiting the cases in which a judicial abandonment may be made in the district where the debtor is imprisoned, to cases where such imprisonment is under *capias*, but must be extended to cases where imprisonment is upon *contrainte par corps*. *Davidson* v. *Bouchard*, Q.R. 10 S.C. 148.

—Lessor and Lessee—Judicial Abandonment by Lessee—Rights of Curator—Lessor's Privilege—Saisie-gagerie.]

See Landlord and Tenant, X.

JURISDICTION.

Dominion Railway—Section capable of Sale—Jurisdiction of Provincial Court—Part of Section outside Jurisdiction.]—In a suit by the appellants, being mortgagees of a division of 180 miles of the respondents' railway and of its revenues subject to working expenses, for a sale of the division and for a receiver and other relief:—Held, that this division of 180 miles is by the law of Canada applicable to the railway, a section capable of sale in its entirety, but that the provincial court had no power to order a sale, part of the section being within and part without its jurisdiction. *Grey* v. *Manitoba and North-Western Railway Company of Canada* (1897), A.C. 254, affirming 11 Man. R. 42; C.A. Dig. (1896) col. 298

—Municipal Election—Quo Warranto—Art. 346, M.C.]—The Superior Court has no jurisdiction to try a petition to annul an election to a municipal office on any of the grounds mentioned in article 346 of The Municipal Code. *Lajeunesse* v. *Nadeau*, Q.R. 10 S.C. 61.

—Saisie Revendication—Value of Goods Revendicated.]—W. revendicated in the Superior Court, under a contract giving him the right to do so, certain movables sold to V for the sum of $118, on which a balance of $79 was due, and he demanded by his conclusions a return of the movables unless the balance was paid. The value of the movables was not stated in the declaration:—Held, that W having offered to leave V. in possession of the movables on payment of $79, had fixed that sum as the value of the goods revendicated, and his claim, therefore, was within the exclusive jurisdiction of the Circuit Court. *Wilder* v. *Valliére*, Q.R. 10 S.C. 140.

—Prothonotary—Judgment by Default—Special Action.]—The prothonotary has no jurisdiction to render judgment by default or *ex parte* in an action upon a promissory note prescribed on its face with an allegation of interruption of prescription, which allegation gives to the action a particular character calling for documentary proof or proof by witnesses which can only be given before a regular tribunal and in the prescribed form; such a judgment is, therefore, radically null and the defendant may invoke the nullity by opposition to the judgment. *Campbell* v. *Baxter*, Q.R. 10 S.C. 191.

—Jurisdiction—Action for School Fees—Hypothecary Action—Forum.]—Art. 1053 of the Code of Procedure, which says that the Circuit Court has ultimate jurisdiction to the exclusion of the Superior Court in all suits for school taxes or school fees, does not apply where the action is an hypothecary one. In such case, under Arts. 1142 and 1054 of the Code of Procedure, the Superior Court has jurisdiction. *School Trustees of St. Henri* v. *Salomon* Q.R. 11 S.C. 329.

—Commissioners' Court—Territory—Execution of Judgments.]—See COMMISSIONERS' COURT.

—Security for Costs—Plaintiff Without the Jurisdiction—Property Within.]—See COSTS, V.

—County Court—Equitable Jurisdiction—County Courts Act (B.C.)—Chattel Mortgage.]
See COUNTY COURTS.

—Municipal Council—Nomination of Councillors—Contestations—Jurisdiction of Circuit Court and Magistrates.]—See MUNICIPAL COUNCIL.

—Circuit Court—Erection of Church—Syndics—Corporation irregularly Constituted—Adjudication.]—See PAROCHIAL LAW.

—Moneys in Court Improperly Paid Out—Jurisdiction of Court to Order Repayment.]
See PAYMENT INTO COURT.

—Superior Court—Order for Examination of Witness—Appeal Pending to Supreme Court—Examination of Prisoner—Art. 240 C.C.P.]
See PRACTICE AND PROCEDURE, XIV.

—Interpleader—Foreign Claimants—Fund Payable in Foreign Country.]
See PRACTICE AND PROCEDURE, XXI.

—By-law—Ousting Jurisdiction of Courts.]
See STOCK EXCHANGE.

JURISPRUDENCE.

Trade-marks—Derivation of Law Respecting—Controlling Authority.] — The Canadian law respecting trade-marks being derived from English legislation reference for its interpretation should be had to English decisions, and a court in Quebec should not follow French authorities which differ from the English decisions on the same matter, more especially as the law extends throughout the Dominion, and it is desirable that the jurisprudence should be uniform. *The Queen* v. *Authier*, Q.R. 6 Q.B. 146.

JURY.

Perverse Verdict—Order for New Trial—Appeal from.]—On appeal from an order of a county Court Judge setting aside the verdict for the plaintiff and granting a new trial, the Court will not search diligently for evidence to support the verdict when the jury were directed that there was no evidence to support the claim and their verdict was, therefore, perverse. *Fournier* v. *The Canadian Pacific Railway Co.*, 33 N.B.R. 565.

—Criminal Trial—Order for Mixed Jury—Abandonment of—Discretion of Judge.]
See CRIMINAL LAW, XII.

—Accident Insurance—Renewal of Policy—Payment of Premium—Promissory Note—Agent's Authority—Finding of Jury.]
See INSURANCE, I.
" also PRACTICE AND PROCEDURE, XXVIII.

JUSTICE OF THE PEACE.

I. Action Against.

—Malicious Prosecution — Arrest — Trespass — Damages.]—A complainant who in good faith lays an information for an offence unknown to the law before a magistrate, who thereupon without jurisdiction convicts and commits the accused to gaol, is not liable to an action for malicious prosecution, the essential ground for such an action being the carrying on maliciously and without probable cause of a legal prosecution: *Smith* v. *Evans*, 13 U.C.C.P. 60; *Stephens* v. *Stephens*, 24 U.C.C.P. 424, referred to; *Anderson* v. *Wilson*, 25 Ont. R. 91, considered. His liability in an action of trespass for such imprisonment would depend upon whether he had directly interfered in and caused the arrest, or whether the conviction and imprisonment were the acts of the magistrate alone. There was evidence upon which the jury might have reasonably found that the complainant, before laying the information, assisted in arresting the plaintiff. The case was left to the jury, by the trial judge, as one of trespass as regarded that arrest, and of malicious prosecution as to the subsequent proceedings, and they found a general verdict in the plaintiff's favour for $200 damages:—Held, that there must be a new trial. *Grimes* v. *Miller*, 23 Ont. A.R. 764.

II. Conviction.

—Habeas Corpus — Magistrate's Conviction—Burden of Proof—Judicial Notice.]

See Municipal Corporations, XVI.

III. Execution.

—Execution Issued by—Power to Extend Return.]—A justice who has issued an execution under C.S.N.B. c. 60, s. 38, has power, before it expires, to extend its return: *Marks* v. *Newcomb*, 22 N.B.R. 419, followed. *Levasseur* v. *Beaulieu*, 33 N.B.R. 569.

IV. Jurisdiction.

—Jurisdiction—Associate Justices — Request.]—Where a party charged comes or is brought before a magistrate in obedience to a summons or warrant, no other magistrate can interfere in the investigation of or adjudication upon the charge, except at his request. *The Queen* v. *McRae*, 28 Ont. R. 569.

—Adjournment to Consider Judgment—Conviction — Jurisdiction — Certiorari — Quashing — Conviction.]—On an application for a certiorari and to quash a summary conviction, one of the grounds was that the convicting justice, having reserved judgment at the conclusion of the hearing, without adjourning to any stated time, subsequently gave judgment without any notice to the defendant, though later in the day he wrote to the defendant's advocates stating that he had found the defendant guilty, etc.:—Held, an excess of jurisdiction.—It may be necessary for the proper protection of his interests that the defendant should be present or represented by counsel when judgment is given, *e.g.*, in order that he may know within what time he ought to give notice of appeal. In the present case notice was given on the same day, but the validity of the conviction cannot be dependent on a subsequent act. The justice having returned the record, an order was made quashing the conviction, certiorari being unnecessary: *Reg.* v. *Hall*, 12 Ont. P.R. 142, and *Reg.* v. *Morse*, 11 C.L.T. (Occ.N.) 342, referred to. *The Queen* v. *Mitchell*, 17 C.L.T. (Occ. N.) 352.

—Justices' Civil Court—Capias—Jurisdiction.]

See Practice and Procedure, VIII.

V. Mandamus.

—Proceedings Before—Refusal to Proceed—Mandamus.]—Justices of the Peace cannot, having taken evidence in proceedings before them and reserved their decision, declare that they have no jurisdiction and refuse to pronounce the decision on the ground that the defendant had appeared and pleaded before another justice who had since died, and had no right to appear anew before them. If they refuse to give judgment upon the information they may be compelled to do so by way of mandamus. *Lacerte* v. *Pepin*, Q.R. 10 S.C. 542.

VI. Special Case.

—Provincial Criminal Law—Special Case—Criminal Code, s. 900—Right of Magistrate to State —R.S.O. c. 74.]—See Criminal Law, XII.

VII. Summary Proceedings.

—Adjudication—Adjournment Sine Die—Conviction.]—A justice of the peace in summary proceedings before him cannot adjourn *sine die* for the purpose of considering his judgment. *The Queen* v. *Quinn*, 28 Ont. R. 224.

LANDLORD AND TENANT.

I. Assignment.

— Assignment with Leave — Reassignment — "Any Person" — R.S.O. c. 106.]—The words "any person or persons" in the long form of the covenant not to assign or sublet without leave

in the Act respecting Short Forms of Leases, R.S.O. c. 106, include the original lessee, and where an assignment by him has been made with consent a reassignment to him without a fresh consent is a breach of the covenant: *Varley* v. *Coppard*, L.R. 7 C.P. 505, and *Corporation of Bristol* v. *Westcott*, 12 Ch. D. 461, referred to. *Munro* v. *Waller*, 28 Ont. R. 29.

—**Lease—Pleading—New Case made at the Trial—Statute of Frauds.**]—See PLEADING, I.

II. COVENANTS IN LEASE.

—**Covenant not to Assign—Sub-lease—Breach.**]—A sub-lease is not a breach of a covenant in a lease not to assign. *Griffiths* v. *Canonica*, 5 B.C.R. 67.

III. CREATION OF TENANCY.

—**Transfer of Revenues—Attorney to Administer—Art. 1608 C.C.**]—D. having obtained a loan from L., transferred to him all the rents and revenues of certain real estate until the loan should be fully paid. L. then appointed D. his attorney for the administration of the property. D. having occupied part of the premises himself, L. instituted an action of *saisie-gagerie* and in ejectment, on the ground that D. was a tenant by sufferance:—Held, that the relation of landlord and tenant did not exist between the parties and the action of *saisie-gagerie* and in ejectment was unfounded. *Létang* v. *Donohue*, Q.R. 6 Q.B. 160, affirming decision of Court of Review which reversed Q.R. 8 S.C. 496.

IV. DISTRESS.

—**Set-off — Notice — Illegal Distress—"Double Value"—R.S.O. c. 143, s. 29—2 W. and M., Sess. 1. c. 5, s. 5.**]—The service by the tenant, after distress but before sale, of a notice of set-off, pursuant to R.S.O. c. 143, s. 29, of an amount in excess of the rent, to which the tenant is entitled, does not make the distress illegal, and the landlord is not liable for "double value" for selling, under 2 W. and M., sess. 1, c. 5, which requires both seizure and sale to be unlawful. *Brillinger* v. *Ambler*, 28 Ont. R. 368.

—**Monthly Tenancy—Exemptions—R.S.O. c. 143, s. 27—55 V. (Ont.) c. 31—Interpretation.**]—The tenancy was a monthly one. There was some eighteen months' rent in arrear at the date of the seizure. Section 27 of R.S.O. c. 143, as amended by 55 Vict. c. 31, provides, *inter alia*, that "in the case of a monthly tenancy such exemption shall only apply to two months' arrears of rent:" Held, (per McDougall, Co.J.) that it was impossible to say from the language used in this proviso what limitations the Legislature intended to put on a monthly tenant's right to exemption for certain of his goods when sought to be taken by a distress for rent. Injunction granted restraining the distress. *Harris* v. *Canada Permanent Loan and Savings Company*, 17 C.L.T. (Occ. N.) 424.

V. FIXTURES.

—"**Buildings and Erections**"—**Payment for—Fixtures and Machinery.**]—A covenant in a lease to pay for "buildings and erections" on the demised premises, covers and includes fixtures and machinery which would have been fixtures but for 58 Vict. Ont. c. 26, section 2, sub sec. (c.). *Re Brantford Electric and Power Company and Draper*, 28 Ont. R. 40, affirmed by 24 Ont. A.R. 301.

VI. LIABILITY OF LESSEE.

—**Loss by Fire—Cause of Fire—Negligence—Civil Responsibility—Legal Presumption—Rebuttal of—Onus of Proof—Hazardous Occupation—Arts. 1053, 1064, 1071, 1626, 1627, 1629 C.C.**]—To rebut the presumption created by Art. 1629 of the Civil Code of Lower Canada it is not necessary for the lessee to prove the exact or probable origin of the fire or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (*en bon père de famille*) and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible. *Murphy* v. *Labbé*, 27 S.C.R. 126, affirming Q.R. 5 Q.B. 88; C.A. Dig. (1896) col. 180.

—**Covenant to Repair—Permissive Waste.**]—In the absence in a lease of an express covenant to repair by the lessee he is not liable for permissive waste, and an accidental fire, by which the leased premises are burnt, is permissive, not voluntary waste. *Wolfe* v. *McGuire*, 28 Ont. R. 45.

VII. LIABILITY OF LESSOR.

—**Lessor and Lessee—Obligations of Lessor—Premises infested by Bugs.**]—A lessor, who has been duly put *en demeure* to remedy the evil, is responsible for damages suffered by the lessee in consequence of the premises leased being infested with bed bugs to such an extent as to cause grave inconvenience and to render it impossible for the lessee to carry on therein her business as a boarding-house keeper. *Snodgrass* v. *Newman*, Q.R. 10 S.C. 433.

VIII. MORTAGE OF LEASE.

—**Mortgage—Leasehold Premises—Terms of Mortgage—Assignment of Sub-lease.**]—A lease of real estate for twenty one years with a covenant for a like term or terms was mortgaged by the lessee. The mortgage after reciting the terms of the lease proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and form part of the term hereby granted and mortgaged;" the *habendum*

of the mortgage was, "To have and to hold unto the said mortgagees their successors and assigns, for the residue yet to come and unexpired of the term of years created by the said lease less one day thereof and all renewals, etc.:"—Held, reversing the judgment of the court of appeal, that the premises of the said mortgage above referred to contained an express assignment of the whole term and the *habendum*, if intended to reserve a portion to the mortgagor, was repugant to the said premises and therefore void; that the words "leasehold premises" were quite sufficient to carry the whole term, the word "premises" not meaning lands or property but referring to the recital which described the lease as one for a term of twenty-one years:—Held, further, that the *habendum* did not reserve a reversion to the mortgagor; that the reversion of a day generally without stating it to be the last day of the term is insufficient to give the instrument the character of a sub-lease. *Jameson* v. *The London and Canadian Loan and Agency Company*, 27 S.C.R. 435, reversing 24 Ont. A.R. 602.

IX. Overholding Tenant.

—R.S.O. c. 144—Notice—Jurisdiction of County Court Judge.]—The questions whether a three months' notice to determine a tenancy required by a lease should be lunar or calendar months, and whether a notice given by the lessor after conveyance of the reversion is sufficient, should not, when there is any doubt in the matter, be decided by a county court judge on an application under the Overholding Tenants' Act and amendments. *Re Magann and Bonnar*, 28 Ont. R. 37.

—Colour of Right—Jurisdiction—R.S.O. c. 144—58 V. (Ont.) c. 13, s. 23.]—Since the amendment of the Overholding Tenants' Act (R.S.O. chapter 144), by 58 Vict. chapter 13, section 23, striking out of the Act the words "without colour or right," the Judge of the County Court tries the right and finds whether the tenant wrongfully holds. And where the dispute was in reference to the tenancy, the landlord claiming it to be a monthly holding, and the tenant a yearly tenancy:—Held, that the County Court Judge had jurisdiction. *Moore* v. *Gillies*, 28 Ont, R. 358.

—Nova Scotia County Court Consolidation Act of 1889, ss. 62 and 64—Action—Practice.]—A proceeding to obtain a warrant against a tenant for over-holding rented premises, under s. 62 of the County Court Consolidation Act of 1889, is not an "action" within the meaning of section 64 of said Act, but is merely a summary proceeding to obtain possession of the premises. *Hill* v *Hearn*, 29 N.S.R. 25.

—Terms of Tenancy — Notice — Termination — Overholding.]—The following letter was written on the 16th July, 1894, by the defendant to the plaintiff's agent, and accepted by him:—"We are prepared to rent that store . . . and will give you $400 a year for the whole of the ground floor, as well as the cellar. We will rent for eleven months from the 1st August, next, at the rate of $400 per year":—Held, that if the defendants had surrendered the store at the end of the eleven months, the plaintiff would not have been entitled to any notice, but they continued in occupation as overholding tenants. When a tenant is allowed to hold after the expiration of the tenancy, the terms on which he continues to occupy are matters of evidence rather than of law. If there is nothing to show a different understanding, he will be considered to hold on the former terms. There being nothing to show that the defendants were holding on different terms, and the original tenancy not being a yearly tenancy, the defendants must be regarded as monthly tenants, and a month's notice was sufficient to put an end to the tenancy: *Mayor of Thetford* v. *Tyler*, 8 Q.B. 95; *Doe d. King* v. *Grafton*, 21 L.J. (Q.B.) 276, and *Atherstone* v. *Bostock*, 2 Man. & G. 518 specially referred to. *Eastman* v. *Richard*, 17 C.L.T. (Occ. N.) 315.

X. Privilege of Lessor.

—Lessor and Lessee—Judicial Abandonment by Lessee—Rights of Curator as regards Effects subject to Lessor's Privilege—Saisie-gagerie.]—Where the lessee has made a judicial abandonment of his effects, and the same are in the possession of a curator, who, in his capacity as such curator, is charged to realize them for the benefit of the creditors generally, the lessor has no right to cause the same to be seized by a writ of *saisie-gagerie*. His recourse, if prejudiced by the delay of the curator to bring the effects to sale, is by petition to the court or judge for the immediate sale of the effects subject to his privilege as lessor.—The defendant, as well as the curator, has sufficient interest to contest a *saisie-gagerie* issued under the circumstances above stated. *Forsyth* v. *Beaupré*, Q.R. 10 S.C. 311.

—Removal of Goods of Tenant by Third Party—Saisie-gagerie — Hindering Seizure—Landlord's Remedy—Saisie-arrêt.]—When a third party has carried away some of the movables which furnished a rented house, and refuses to point them out to a bailiff who has the execution of a writ of *saisie-gagerie* by right of mortgage, and thus renders a seizure impossible, the landlord can, by means of a writ of *saisie-arrêt* against the third party, exercise his privilege upon these movables and have them placed in legal custody to be sold according to law. *Macdonald* v. *Meloche*, Q.R. 11 S.C. 318.

XI. Rent.

—Receipt for Rent—Lease or Agreement—Implied Covenant—Fire.]—An informal document which acknowledges the receipt of rent of premises for a future definite term, and under which possession is taken by the person paying the rent, is a contract of letting and hiring and not merely an agreement for a lease. *Wolfe* v. *McGuire*, 28 Ont. R. 45.

—Rent payable in Advance—Covenant not to assign without leave—Breach—Damages.]—Where a few days prior to the accruing due of a quarter's rent payable in advance, the lessee assigned without the lessor's leave, in breach of a covenant contained in the lease, the lessor was held entitled to recover, as damages for such

breach, the rent so payable in advance without any deduction for rents realized during the said quarter under a new lease created by the lessor, who, finding the property vacant, had taken possession. *Patching* v. *Smith*, 28 Ont. R. 201.

— **Mortgage — Lease by Mortgagee to Mortgagor—Excessive Rent.**]—In an action for damages brought by the plaintiffs against a sheriff for seizure and sale of the goods of one Coulter made under an execution in his hands, and refusing to acknowledge the plaintiff's claim for rent due under a lease by Coulter from them to an amount exceeding the value of the goods, it appeared that Coulter was in arrears under two mortgages to the plaintiffs, and in May, 1895, signed a lease of the mortgaged premises, agreeing to pay a rental of $700 for a term ending on the first of November of the same year. The rent was made payable in advance, on the first day of January, 1895, and was shown to be about three times the rental value of the property for a year. Besides this, other circumstances were proved, tending to show that the lease had been procured by the manager of the plaintiffs with a view of preventing the execution creditors of Coulter getting anything out of his crops for that year, and that it was not the intention of the parties to create a real tenancy between them:—Held, following *Hobbs* v. *Ontario Loan & Debenture Co.*, 18 S.C.R. 483, that the lease relied upon by the plaintiffs could not be deemed to have been intended as a *bonâ fide* one, and that the relation to landlord and tenant was not validly created thereby so as to affect third parties. *The Imperial Loan & Investment Co.* v. *Clement*, *re Coulter*, 11 Man. R. 428.

—**Mortgage—Lease from Mortgagee to Mortgagor—Excessive Rent.**]—The facts in this case were similar to those in the preceding case except that the lease relied on bore date 21st December, 1894, and purported to let the land until 1st November, 1895, at a rental of $705, payable 1st January, 1895, and that evidence was given that the plaintiffs had insisted on the lease being signed on pain of eviction and sale of the property, and there was no evidence that plaintiffs had notice of Murray's financial difficulties:—Held, that the lease was void against execution creditors on account of the excessive amount fixed for the rent: *Hobbs* v. *Ontario Loan & Debenture Co.*, 18 S.C.R. 483, followed. *Imperial Loan & Investment Co.* v. *Clement*, *Re Murray*. 11 Man. R. 445.

—**Sheriff Seizing under Execution—Rent—Bonâ fide Claim.**]—Where the landlord, under 8 Anne c. 14, s. 1, makes a claim for rent as against goods seized by the sheriff under an execution and the sheriff sells the goods for a sum not exceeding the landlord's claim, and the execution creditor claims the money in an action against the sheriff, it is a sufficient answer to the plaintiff's action to show that the landlord has a good claim to the money, although it has not been paid over to him. *Lambert* v. *Clement*, 11 Man. R. 519.

XII. Resiliation of Lease.

—**Lessor and Lessee — Resiliation of Lease—Claim of Rent—Option.**]—The plaintiff leased premises to the defendants for a term of six years, but the latter made default to pay the rent. During the first year, the plaintiff brought an action to resiliate the lease, on the ground of non-payment of rent, and prayed judgment for the rent and taxes due, and for a further sum of $1,350, representing the rent and taxes for the second year, as damages for resiliation. The defendants confessed judgment for the rent due and to become due up to the end of the first year:—Held, that the confession of judgment was sufficient, it being proved that the premises were garnished sufficiently to secure the rent for the second year, and that the lessor who makes option to resiliate is not entitled to regain possession of the premises and at the same time claim the rent for the unexpired term by way of damages. *Joseph* v. *Penfold*, Q.R. 10 S.C. 152.

—**Lessor and Lessee—Cancellation of Lease—Repairs—Putting in Default.**]—Where the lessor of immovable property institutes an action for rent due and for the resiliation of the lease, and the lessee does not plead, the latter is not entitled to consider that this constitutes a cancellation of the lease by mutual consent, and the lessor may desist before judgment from the demand for resiliation.—Where a lease which stipulated that the lessee should make all necessary repairs, and that the lessor should be obliged to make no repairs whatever, is continued from year to year by tacit renewal, the lessee has no right to demand the resiliation of the lease on the ground of the premises being uninhabitable, without first putting the lessor *en demeure* to make repairs, more especially where it appears that on the occasion of the last tacit renewal the premises were in the same condition as they were at the date of the institution of the action. *Leduc* v. *Finnie*, Q.R. 11 S.C. 490.

XIII. Rights of Lessee.

—**Unregistered Lease—Sale of Leased Property—Opposition afin de Conserver.**]—A lessee who has not registered his lease cannot, for the remainder of his term, protect himself by *opposition afin de conserver* upon the moneys produced by the sale under judicial decree of the immovable leased, the sale having the effect of putting an end to the lease and the purchaser having a right to demand possession of the immovable. *Phaneuf* v. *Smith*, Q.R. 11 S.C. 400.

XIV. Rights of Lessor.

—**Saisie-gagerie—Sale of Effects by Gardien—Deposit of Proceeds in Court.**]—A landlord can, even in the Court of Review, on proving that the movables which he has caused to be seized by means of *saisie-gagerie* in the proceeding—which seizure had been pronounced valid by the Superior Court—had been sold by the *gardien à cette saisie*, oblige the said *gardien*, without prejudice to any other recourse he might have against him, to deposit in court (*au greffe*) the moneys proceeding from the said sale. *Leduc* v. *Finnie*, Q.R. 11 S.C. 401.

LAND TITLES ACTS.

See TITLE TO LAND.

LEGACY.

See WILL, II.

LEGAL AND EQUITABLE ISSUES.

Jury Notice—Striking Out—Legal and Equitable Issues.]—See PRACTICE AND PROCEDURE, XXVIII.

LEGAL MAXIMS.

Actio Personalis Moritur cum Persona.]—See *Dupont* v. *Quebec S.S. Co.*, Q.R., 11 S.C. 188.

—Equity looks upon that as done, which ought to be done.] — See *Bank of British North America* v. *McIntosh*, 11 Man. R. 503.

—Nemo bis vexari debet pro unâ et eâdem causâ.—See *Auer Incandescent Light Manufacturing Coy. (Limited)* v. *Dreschel*, 5 Ex. C.R. 384.

—Omnia Præsumuntur contra Spoliatorem.]—See *McGoey* v. *Leamy*, 27 S.C.R. 546.

— Respondeat Superior.] — See *McDonald* v. *Dickenson*, 24 Ont. A.R. 31.

—Usurpateur n'acquiert que pied à pied.]—See *McGoey* v. *Leamy*, 27 S.C.R. 546.

—Volenti non fit injuria.]—See *Murphy* v. *Labbé*, 27 S.C.R. 126.

—Volenti non fit injuria.]—See *Tobin* v. *New Glasgow Iron, &c., company*, 29 N.S.R. 70.

LIBEL AND SLANDER.

I. APOLOGY.

Apology—Satisfaction — Trial of Question of Costs—Application at Chambers.]—After action for libel brought, the defendants published a retraction and apology, which was accepted as satisfactory by the plaintiff. The defendants declined to pay the plaintiff's costs up to that time, and the plaintiff proceeded to trial:—Held, that either party could, after the publication of the apology and its acceptance by the plaintiff, have moved in Chambers to have the question of costs disposed of; but, neither party having moved, that the plaintiff should have such costs only as he would have been entitled to had he so moved, and that the defendants should have no costs: *Knickerbocker* v. *Ratz*, 16 Ont. P.R. 191, followed. *Eastwood v. Henderson*, 17 Ont. P.R. 578.

II. CRIMINAL LIBEL.

—Criminal Law—Libel—Plea of Justification—Allegations in.]—A plea of justification to an indictment for defamatory libel must allege that the defamatory matter published is true and that it was for the public benefit that the alleged libel was published, and must then set forth concisely the particular facts by reason of which its publication was for the public good, but it must not contain the evidence by which it is proposed to prove such facts, nor any statements purely of comment or argument. —A plea of justification which embodies a number of letters which it is proposed to use as evidence, and contains paragraphs of which the matter consists merely of comments and arguments, is irregular and illegal, and the illegal averments should be struck, or the plea itself should be rejected, from the record, and the defendant allowed to plead anew. *The Queen* v. *Grenier*, Q.R. 6 Q.B. 31.

—Procedure—Witnesses—Subpœnas at expense of Crown—Art. 2614 R.S.Q.]—By Art. 2614 of the Revised Statutes of Quebec the accused in a criminal prosecution can only obtain the issue of subpœnas at the expense of the Crown in the case of a crime which was a felony before the Criminal Code, and is not entitled to it in a case of criminal libel which was formerly a misdemeanour. A motion or summary request for the issue of such subpœnas should state two facts only, that the witnesses named are necessary for the defence, and that the accused is poor and needy.—In a prosecution for libel, where the accused has pleaded justification, a motion indicating the facts which each witness should prove in order to establish that the publication of the libel was in the public interest cannot be entertained, as the reception and granting of such a motion would be to prejudge the question of the admissibility of such proof. *The Queen* v. *Grenier*, Q.R. 6 Q.B. 322.

III. DEFENCE.

— Slander — 52 V. c. 14, s. 1, s.s. 3 (Ont.)—Meaning of Words used — Good Defence.] — In an action for slander brought by a married woman the words alleged to have been spoken were, "You are a blackguard; you are a bad woman"; and the innuendo was that the plaintiff was a common prostitute and a woman of evil character. Upon an application by the defendant, under 52 Vict. (Ont.), c. 14. s. 1, s.s. 3, for security for costs, the defendant admitted having called the plaintiff "a bad, quarrelsome woman," but said he did not recollect using, and believed he had not used, the word "blackguard," and he denied that he used the words with the meaning attributed to

them by the plaintiff: Held, that the defendant had not shown a good defence to the action on the merits, and his application was properly refused. Per Boyd, C., and Ferguson, J., that the expressions used might be employed in circumstances and surroundings such that bystanders might think them a statement of want of chastity. Per Meredith, J., that as it was shown by the pleadings and the affidavit of the defendant that there was a real and substantial question for the jury to pass upon, and upon which the action might fail, the defendant had shewn a good defence upon the merits. *Paladino* v. *Gustin*, 17 Ont. P.R. 553.

IV. Newspaper Libel.

—Newspaper—Criminal Charge—R.S.O. c. 57 s. 9—Security for Costs—Innuendo.]

See Costs, V.

V. Privilege.

— Defamation—Libel—Mercantile Agency—Privilege.]—A mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained by the agency from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness: *Cossette* v. *Dun*, 18 S.C.R. 222, considered. *Robinson* v. *Dun*, 24 Ont. A.R. 287, reversing 28 Ont. R. 21.

— Defamation — Slander — Privilege.] — The defendant while aiding, at his request, the owner of stolen material in his search for it, said, when what was supposed to be part of it was found in the possession of a workman employed by the defendant, that the plaintiff had stolen it:—Held, that both on the ground that the defendant had an interest in the search, and on the ground that it was his duty to tell his workman that the material did not belong to the person from whom he had received it, the statement was *primâ facie* privileged. *Bourgard* v. *Barthelmes*, 24 Ont. A.R. 431.

—Public Officer—Protection against Criticism.]—The public acts of a public officer may be critized and censured, even severely, and he is only entitled to the protection of the courts when the censure exceeds the limits of justice and a proper sense of duty. *Curless* v. *Graham*, Q.R. 10 S.C. 175.

— Libel — Privileged Communication — Onus of Proof—Publication—Damages.] — In an action of libel for an attack upon plaintiff's character contained in a communication by defendant to the Government, if the occasion be held privileged, the onus of proving plaintiff's character and conduct, and defendant's knowledge thereof and his grounds and motives for making the imputation, is upon plaintiff, and he must show actual malice in defendant in order to secure a condemnation.—Where there is no publication of the libel, except by plaintiff himself, his action must fail, particularly if he has suffered no real damage, and defendant's conduct is not shown to be such as should subject him to vindictive damages. *Robitaille* v. *Porteous*, Q.R. 11 S.C. 181.

—Damages—Privilege for Words spoken by an Advocate in the Discharge of his Professional Duty.]—An advocate is not liable in damages for words spoken in the discharge of his professional duty. It is only where the slanderous expressions are foreign to the case that an action lies. *Paille* v. *Demers*, 3 Rev. de Jur. 434. Curran, J.

—Pleading — Defamation — Defences — Fair Comment—Privilege—Mitigation of Damages—Confusion—Embarrassment.]—See Pleading, X.

—Defamation—Production of Documents—Incorporated Company—Indictment,]

See Practice and Procedure, XII.

VI. Procedure

—Libel — Pleading — Practice — Discovery — Particulars.]—In an action of libel a defendant who has pleaded a general justification must furnish the plaintiff with the particulars of the facts relied on as a justification before he can obtain discovery from the plaintiff. *Bullen* v. *Templeman*, 5 B.C.R. 43.

VII. Trade-Libel.

—Pleading — Defamation — Action on the Case — Particulars—Slander—Examination of Party.]

See Practice and Procedure, XXXIV.

— Defamation — Action on the Case — Trial by Jury — Ont. Judicature Act, [1895,] s. 109.]

See Practice and Procedure, XXVIII.

LICENSE.

Foreign Corporation doing Business in Canada —License Fee—Provincial Legislation—Constitutional Law — "Doing Business"—Agent — Liability.]—See Constitutional Law, III (*b*).

—Crown Lands—Timber License—Obstructing Operations — Joint Possession of Licensee and Settler — Conflicting Rights of Licensee and Locatee.]—See Crown Lands.

See Crown Lands.
" Liquor License.
" Municipal Corporations, IX.

LIEN.

I. Mechanics' Lien.

—Materials—Drawback—59 V. (Ont.) c. 35 s. 10.]—Under section 10 of the Mechanics and Wage-Earners' Lien Act, 59 Vict. (Ont.) c. 35, it is the duty of the owner to retain out of the payments to be made to the contractor, as the work pro-

gresses, twenty per cent. of the va ue of the work done and material provided, to form a fund for the payment of the lien-holders, not subject to be affected by the failure of the contractor to perform his contract: *Goddard* v. *Coulson*, 10 Ont. A.R.I.; *Re Cornish* 6 Ont. R. 259; and *Re Sear and Woods*, 23 Ont. R. 474, are not now applicable. *Russell* v. *French*, 28 Ont. R. 215.

—Mechanics' Lien Act, 1891—Lien for Materials —Affidavit for Lien—Particulars of Work done —Insufficient Statement.]—In an affidavit for a mechanic's lien the particulars of the work done were stated as follows: "Brick and stone work and setting tiles in the house situate upon the land hereinafter described, for which I claim the balance of $123:"—Held, insufficient, and plaintiff non-suited. *Knott* v. *Cline*, 5 B.C.R. 120.

II. Solicitor's Lien.

—Costs—Damages—Set-off—Ont. Rule 1205.]—There can be no set-off of damages or costs between the same parties in different actions, to the prejudice of the solicitor's lien; that is the effect of Ont. Rule 1205. The lien is simply a right to the equitable interference of the court not to leave the solicitor unpaid for his services, and it exists if it is made to appear that the solicitor has not been paid his costs. *Turner* v. *Drew*, 17 Ont. P.R. 475.

III. Trustees' Lien.

—Trustee—Compensation—Lien—Municipal Debentures—R.S.O. c. 110, s. 38.]—A person to whom municipal debentures in aid of a railway company are delivered in trust to be handed over to the company upon the completion of the railway, is a trustee within section 38 of R.S.O. chapter 110, and entitled to compensation, and is also entitled to a lien on the debentures until that compensation is paid. *In re Tilsonburg, Lake Erie and Pacific Railway Company*, 24 Ont. A R. 378, affirming 28 Ont. R. 106 sub. nom. *In re Ermatinger*, but reducing the compensation.

IV. Vendor's Lien.

—Position and Character in Real Property Law.]—A vendor's lien is not an interest in land: *Parke* v. *Rielly* 3 E. & A. 215. It is a remedy for a debt; and is neither a right of property, an estate in lands, nor a charge on the land. *Bank of Montreal* v. *Condon*, 11 Man. R. 366.

LIMITATION OF ACTIONS.

I. Adverse Possession.

—Sale of Land—Purchaser in Possession—Implied Trust—Tenant-at-Will—R.S.O. c. 111, s. 5 s.s. 7 and 8.]—Sub-section 8 of section 5 of R.S.O., c. 111, applies to the case of an implied trust, and a purchaser in possession with the assent of his vendor, and not in default, is, therefore, not to be deemed a tenant-at-will to his vendor within the meaning of sub-section 7 of that section: *Warren* v. *Murray* (1894), 2 Q.B. 648, applied. *Irvine* v. *Macaulay*, 24 Ont. A.R. 446, affirming 28 Ont. R. 92.

—Statute of Limitations — Mortgage — Possession.]—The Real Property Limitation Act, R.S.M. c. 89, does not begin to run against a mortgagee of land in a state of nature until actual possession is taken by some person not claiming under him: *Smith* v. *Lloyd*, 9 Ex. 562; *Agency Company* v. *Short*, 13 App.Cas. 793, and *Delaney* v. *Canadian Pacific Railway Co.*, 21 Ont. R. 11, followed. *Doe d. McLean* v. *Fish*, 5 U.C.Q.B. 295, dissented from. *Bucknam* v. *Stewart*, 11 Man. R. 625.

—Easement—Obstruction of Way—User.]

See Easement.

—Husband and Wife—Conveyance by Wife—Non-joinder of Husband—59 V. c. 41 (Ont.)—Enclosed Lands—Sale of Timber—Trespass—Interval in Possession—Building Operations—Farm Work — Entry by one Tenant in Common — Residence out of Ontario—Conveyance—Entry—Improvements under Mistake of Title.]

See Husband and Wife, III.

—Seignorial Tenure—Charges Running with the Title—Servitude—Edits et Ordonnances (L.C.).]

See Servitude.

II. Interruption of Prescription.

—Easement — Necessary way — Implied grant—User—Obstruction of Way—Interruption of Prescription—Acquiescence—R.S.N.S. (5 ser.) c. 112, (4 ser.) c. 100 — 2 & 3 Wm. IV. (Imp.) c. 71, ss. 2 & 4.]— K. owned lands in the county of Lunenburg, N.S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood-lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There was not any formed road across the lands, but merely a track upon the snow during the winter months, and the way was not used at any other season of the year. This user was enjoyed, for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed and caused a cessation of the actual enjoyment of the way, during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff. The statute (R.S.N.S. 5 ser. c.

112) provides a limitation of twenty years for the acquisition of easements and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same:—Held, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute:—Held also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would, without special grant, pass by implication upon the severance of the tenements. *Knock* v. *Knock*, 27 S.C.R. 664, reversing 29 N.S.R. 267.

— Husband and Wife — Implied Authority of Wife to Bind Husband—Revocation of—Statute of Limitations — Payment on account.]—Defendant purchased a sewing machine from plaintiff, in August, 1887, and paid $14 on account sometime during the year. The action was brought October 24th, 1895 The Statute of Limitations was pleaded:—Held, that a payment of $5 made by defendant's wife in February, 1893, was not sufficient to take the case out of the statute, the evidence showing that defendant had forbidden his wife to make further payments until the machine was put in order, and that this was never done:—Held, also, that any implied authority which the wife had previously, was terminated by this prohibition. *Robertson* v. *McKeigan*, 29 N.S.R. 315.

—Real Property Limitation Act, R.S. Man. c. 89' s. 24—Payment on Account of Judgment—Leave to issue Execution—Assignment in Trust.]—On the application of a judgment creditor for leave to issue execution upon a judgment recovered more than ten years before:—Held, following *Harlock* v. *Ashberry*, 19 Ch. D. 539, that a payment to the plaintiff by an assignee in trust for creditors of the judgment debtor under a deed containing the usual provisions made before the date of the judgment was not sufficient to take the case out of the statute, section 24 of the Real Property Limitation Act, R.S. Man. c. 89, although such payment was made within ten years before the application, and that leave to issue execution upon such judgment should be refused. *McKenzie* v. *Fletcher*, 11 Man. R. 540.

—Payment by Assignee of Debtor—Payment by Delivery of Goods.]—The payment of a dividend by an assignee for the benefit of creditors, is not such a payment as takes the case out of the operation of the Statute of Limitations. Held (per McDougall, Co. J.), that money received by the holder of a note from the maker within six years from the commencement of an action therefor, in payment for goods given before that period by the maker, as security for the note, is not a payment within the meaning of the statute. *Fisken* v. *Stewart*, 33 C.L.J. 41.

III. Period of Limitation.

—Amendment—Pleading—New Defence—Statute of Limitations.]—The defendants obtained leave to amend their statement of defence by setting up the Statute of Limitations as an additional defence in an action for waste brought by the plaintiffs as owners of the remainder in fee in certain lands of which the defendants were tenants for the lives of others:—Held, following *Williams* v. *Leonard*, 16 Ont. P.R. 544; 17 Ont. P.R. 73, that the Statute of Limitations being a defence permitted by law, and the real question between the parties being as to the right of the plaintiffs to recover by action the damages claimed by them, "the very right and justice of the case" demanded that the plaintiffs should not recover in this action if the statute afforded a bar to their right to do so: *Brigham* v. *Smith*, 3 Ont. Ch. Ch. R. 313, referred to, however, as laying down a more reasonable and just practice, *Patterson* v. *Central Canada Savings and Loan Co.* 17 Ont. P.R. 470.

—Prescription — Art. 2262 C.C. — Board and Lodging.]—The prescription of one year under Art. 2262 C.C. does not apply to a claim of a person who is not engaged in the business of keeping a boarding house, but has incidentally furnished board and lodging to another. *Cleary* v. *Burke*, Q.R. 10 S.C. 150.

—Prescription — Boarding-house Keeper — Art. 2262 C.C.]—The prescription of one year applicable to hotel and boarding-house charges under Art. 2262 C.C., does not apply to the claim of a person who keeps a lodger as a mere temporary incident, and who is not engaged in the business of keeping a hotel or boarding-house. *McGoun* v. *Cuthbert*, Q.R. 10 S.C. 158.

—Husband, liability of for Wife's Board and Lodging—Sick Attendance—Prescription — Art. 2262 C.C.]—Action for one year's board, and five years' nursing of defendant's sick wife, who had been removed to her parents (plaintiffs) for care and attendance. Plea, that it was never contemplated that any charge should be made, that defendant was always ready and willing to receive his wife, and she remained away from him by preference of herself and parents, and prescription as to four of the five years' sick attendance. The Court below awarded $111:—Held, modifying the judgment below, that under the circumstances the plaintiff was entitled to $51, for one year's board and nursing—costs in review against plaintiff: and as to the sick attendance it was an incident of the board and subject to the same prescription. *Gosselin* v. *Aubé*, Q.R. 10 S.C. 447.

—Action for Personal Injuries—Art. 2262. par. 2 C.C.]—The action for recovery of damages for personal injuries is prescribed by one year. *Thibault* v. *Vanier*, Q.R. 11 S.C. 495.

—Solicitor and Client—Costs as between—Statute of Limitations, R.S., N.S. 5th ser. c. 112—Runs from Date of Settlement of Action.]—Plaintiff was retained, September 26th, 1886, to act as solicitor in an action brought against defendants. Defendants, subsequently, without consulting plaintiff, entered into an arrangement whereby

the action was abandoned, each party paying his own costs. Plaintiff having sued to recover his costs as between solicitor and client:—Held, that the Statute of Limitations, R.S., N.S. 5th ser. c. 112, as against plaintiff, commenced to run from the date of settlement, and not from the date of the retainer. *Gourley* v. *McAloney*, 29 N.S.R. 319.

—R.S. Man., c. 89, s. 4—Mortgage—Foreclosure—Tax Sale—Assessment Act (Man.) s. 194—55 V. c. 26, s. 8.]—The surplus proceeds of land sold for municipal taxes in 1888, paid to the Treasurer in November, 1890, were claimed in April, 1896, by the holder of a mortgage on the land, and also by the assignee of the equity of redemption. Judgment against the mortgagor had been obtained upon the covenant contained in the mortgage, and execution placed in the sheriff's hands. The holder of the mortgage had, in 1887, obtained a final order of foreclosure and had afterwards renewed the execution issued in the suit upon the covenant. It was contended by the assignee of the equity of redemption that all rights under the mortgage were barred by the Real Property Limitation Act, R.S. Man., c. 89, section 4, as more than ten years had elapsed from the time when the principal money secured by the mortgage fell due, also that the renewal of the execution opened up the foreclosure, and that the foreclosure action did not interfere with the running of the statute in his favour:—Held, that at the time of the application to the District Registrar the holder of the mortgage had not lost his right to recover the land as against the holder of the equity of redemption, or to continue successfully the suit for such recovery, which was pending when the money in question was paid to the Municipal Treasurer, and that consequently he was still entitled to such money, being the proceeds of the land in question:—*Quære*, whether section 194 of the Assessment Act, as amended by 55 Vict. c. 26, s. 8, giving the right to apply for the money to the person who, at the expiration of the time for redemption from the tax sale, held an encumbrance on the land, does not furnish a new point of departure and operate to bring to an end the running of the period fixed by the Statute of Limitations. *In re Bain and Chambers*, II. Man. R. 550.

—Workman's Compensation for Injuries Act—Retrospective Legislation—Limitation of Actions—Notice—Negligence.]

See MASTER AND SERVANT, V (*b*).

IV. PLEA IN BAR.

—Leave to bring new Action—Term preventing—Plea of Statute of Limitations.]

See PARTIES, III.

LIQUIDATOR.

See COMPANY.

LIQUOR LICENSE.

Brewers' Licenses—R.S.O. c. 194, s. 51, s.s. 2—Direct Taxation—B.N.A. Act, s. 92, s.s. 2, 9—Powers of Provincial Legislature.]—The Liquor License Act (Revised Statutes of Ontario, c. 194), s. 51, s.s. 2, which requires every brewer and distiller to obtain a license thereunder to sell wholesale within the province, is *intra vires* of the Provincial Legislature (a) as being direct taxation within subsec. 2, section 92 of the British North America Act, 1867: *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, followed; (b) as comprised within the term "other licenses" in sub-sec. 9 of the same section. *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* [1897], A.C. 231.

—Action for Price of Goods Sold—Illegal Object of Sale—Sale of Liquor to Unlicensed Dealer—Pleading—Illegality.]—In an action to recover the price of ale sold to the defendant by the plaintiffs, duly licensed brewers, it appeared that immediately after the order was booked, the plaintiffs were informed by her purchasing agent that the defendant had no license to sell, and it was then arranged that she should have the benefit of the plaintiffs' wholesale license and sell as their agent. The defendant pleaded that the ale was supplied to her for the purpose of its being sold by her in contravention of the Ontario Liquor License Act:—Held, that the delivery of the ale having taken place with the knowledge of the purpose of the defendant, which was illegal, and having been made for the purpose of enabling her to carry that out, the plaintiffs could not recover. *Bowie* v. *Gilmour*, 24 Ont. A.R. 254.

—R.S.O. c. 194, s. 20—By-law—"Year."]—The words "in any year" in section 20 of the Liquor License Act mean "calendar year," and not "license year," and a by-law under that section limiting the number of licenses for the ensuing or any future year must be passed in the months of January or February in any year. *Re Goulden and the Corporation of the City of Ottawa*, 28 Ont. R. 387.

— Nova Scotia Liquor License Act, 1895 — "Screens" — Regulation of Sale — Certiorari — Power to Grant—Affidavit denying Violation.]—The Nova Scotia Liquor License Act of 1895, c. 2 s. 39, provided in effect that in shops in respect of which licenses were granted for the sale of intoxicating liquor, no blind, screen, counter, box, or other obstruction of any kind should be permitted in the shop, or in connection with the window, so as to conceal any part of the interior of the shop from the view of persons on the street without:—Held, that this was a mere regulation of the conditions under which the licensee was permitted to carry on his business, and was in no sense an increase of the burden of the law, as it stood before, to such an extent as to make it prohibitory:—Held, also, affirming *The Queen* v. *McDonald*, 26 N.S.R. 402, that the court is absolutely precluded from granting a writ of certiorari in the absence of the affidavit required to be made by defendant, that he has not violated the Act. *The Queen* v. *Power*, 28 N.S.R. 373.

—N.S. Liquor License Act, 1886—Affinity existing between Magistrate and Prosecutor—Setting aside Conviction—Objection as to Absence of Affidavit — Return of Certiorari — Form of Conviction — Quashing.]—Motion to quash a conviction made by the Stipendiary Magistrate of the City of Halifax against defendant for a violation of the N.S. Liquor License Act of 1886. The main ground upon which the conviction was attacked was relationship existing between the magistrate making the conviction and the chief inspector of licenses who was the informant and prosecutor in the proceedings in which the conviction was made, they having married sisters:—Held, that the affinity existing between the magistrate and the inspector, under the circumstances disclosed by the affidavits, did not disqualify the magistrate from hearing the case or render the conviction void. "In no case instituted for breach of the Liquor License Act of 1896 * * shall a writ of certiorari issue unless the party applying therefore shall make affidavit that he did not * * sell the liquor contrary to law as charged in the information, etc.," Acts of 1889, c. 17, section 7:—Held, that an objection on the part of the prosecution to the absence of the affidavit was not available after the certiorari had been issued and returned:—Held, also, that objection to the form of the conviction was not sufficient ground for quashing it. *The Queen* v. *Major*, 29 N.S.R. 373.

—Manitoba Liquor License Act, R.S.Man., c. 90, s. 35—Cancellation of License—"Year"—Prohibition—Implied Authority.]—Plaintiff claimed an injunction to restrain the defendants, License Commissioners, from acting on a petition, under the proviso in section 35 of the Liquor License Act, R.S. Man., c. 90, to cancel his license. This proviso reads as follows:—"Provided, however, that once in every year after the first year of license a petition by eight out of the twenty nearest householders against any license can be presented, and will have the effect of cancelling such license":—Held, that the word "year" in the Act means the license year, ending on the 31st of May, and not the calendar year; also, that by necessary implication, the License Commissioners are the persons to whom such a petition should be presented, and would have the right, on receipt of same, to hold a meeting, after notice to the licensee, for the purpose of considering whether the document presented was really a petition of eight out of the twenty nearest householders, and on being satisfied of this to declare that the license should be cancelled. *Crothers* v. *Monteith*, 11 Man. R. 373.

—Prohibition—Certiorari—Procedendo — Second Summons after Conviction quashed — Return of Information to Justices.] — The conviction of defendant by a justice of the peace under section 174 of the Liquor License Act of Manitoba, having, together with the information on which it was based, been removed into this court by *certiorari*, was quashed on the ground that the original summons had not been personally served on the defendant, and that she had not authorized any person to appear for her on its return. At the same time the judge who quashed the conviction, relying on section 895 of the Criminal Code, 1892, ordered that the information should be returned to the justice, who issued a second summons upon it, it being too late for the prosecutor to lay a second information in respect of the offence charged:—Held, on motion for prohibition, that there was no authority for the return of the information to the convicting justice after the quashing of the conviction, as the section of the Criminal Code referred to only applied in cases where before that section a *procedendo* would have been issued to send back a record; that the information was, therefore, not properly before the justice when he issued the second summons thereon, and that he had no jurisdiction to proceed upon it. Review of cases in which a record filed in a superior court upon a *certiorari* may be sent back to the inferior court by a *procedendo*. *The Queen* v. *Zickrick*, 11 Man. R. 452.

—Liquor License Act, R.S. Man. c. 90, s. 35—Cancellation of License—Appeal from Commissioners—Criminal Procedure — Quashing Conviction—Jurisdiction of a single Judge—Full Court.]—Held, following *The Queen* v. *Beale*, 11 Man. R. 448, that an application to quash a conviction, even under a Provincial statute, must be made to the Full Court and not to a single Judge, as such an application is criminal procedure, and the Provincial Legislature has no jurisdiction to make laws altering the practice therein. After the decision of the Full Court in *Crothers* v. *Monteith*, 11 Man. R. 373, Crothers, contending that the commissioners had cancelled his license improperly, under section 35 of the Liquor License Act, R.S. Man. c. 90, sold intoxicating liquor, was convicted and fined, and then applied to have the conviction quashed, claiming that the action of the commissioners could be reviewed on the application and that they had acted on insufficient evidence:—Held, that the action of the License Commissioners in cancelling a license under that section cannot be reviewed by this Court, as no appeal is provided for against any decision of theirs. *The Queen* v. *Crothers*, 11 Man. R. 567.

LORD'S DAY ACT.

See SUNDAY.

MAGISTRATE.

See JUSTICE OF THE PEACE.

MAINTENANCE.

Maintenance of Children—Father in Receipt of unseizable Income—Prospective Rights of Child.]—The obligation of the parent to maintain his daughter does not cease with her marriage and removal from the paternal domicile, if she be in actual need and her husband be unable to provide for her wants. This obligation is not affected by the circumstance that the father's income is *insaisissable* by the terms of the will

under which he receives it, nor does the fact that the daughter may inherit money at some future time from her grandfather's succession deprive her of her right to maintenance in the meantime. *Pratt* v. *Pratt*, Q.R. 10 S.C. 134.

—Obligation to Maintain — Donation.]

See ALIMENTS.

—Will—Sheriff's Deed—Proof of Heirship—Rejection of Evidence—New Trial.]

See EVIDENCE, XII.

MALICIOUS PROSECUTION.

Probable Cause.]—S., being a holder of a promissory note indorsed to him by the payees, sued to recover the amount, but his action was dismissed upon evidence that it had never been signed by the person whose name appeared as maker, nor with his knowledge or consent, but had been signed by his son without his authority. The son's evidence on the trial of the suit was to the effect that he never intended to sign the note, and if he had actually signed it with his father's name, it was because he believed that it was merely a receipt for goods delivered by express. Immediately after the dismissal of the suit, S. wrote to the payees asking them if they would give him any information which would help him in laying a criminal charge in order to force payment of the note and costs. He also applied to the express company's agent, by whom the goods were delivered and the note procured, and was informed that there was a receipt for the goods in the delivery book, but that the signature was denied and could not be proved. However, without further inquiry, and notwithstanding the warning of a mutual friend against taking criminal proceeding, S. laid information against the son for forgery. The police magistrate at Montreal, upon the investigation of the charge, declared it to be unfounded and discharged the prisoner:—Held, reversing the judgments of both courts below, that, under the circumstances, the prosecution was without reasonable or probable cause, and the plaintiff was entitled to substantial damages. *Charlebois* v. *Surveyer*, 27 S.C.R. 556.

—Arrest — Trespass — Justice of the Peace — Damages.]—A complainant, who in good faith lays an information for an offence unknown to the law before a magistrate, who thereupon, without jurisdiction, convicts and commits the accused to gaol, is not liable to an action for malicious prosecution, the essential ground for such an action being the carrying on maliciously and without probable cause of a legal prosecution: *Smith* v. *Evans*, 13 U.C.C.P. 60; *Stephens* v. *Stephens*, 24 U.C.C.P. 424, referred to. *Anderson* v. *Wilson*, 25 Ont. R. 91, considered. His liability in an action of trespass for such imprisonment would depend upon whether he had directly interfered in and caused the arrest, or whether the conviction and imprisonment were the acts of the magistrate alone. There was evidence upon which the jury might have reasonably found that the complainant, before laying the information, assisted in arresting the plaintiff. The case was left to the jury by the trial judge as one of trespass as regarded that arrest, and of malicious prosecution as to the subsequent proceedings, and they found a general verdict in the plaintiff's favour for $200 damages.—Held, that there must be a new trial. *Grimes* v. *Miller*, 23 Ont. A.R. 764.

—Arrest—Grounds for—Good Faith.]—In order that there may be probable cause for an arrest it is necessary that the fact invoked by the accuser be such, as if true, would justify a criminal prosecution. If this element is wanting good faith or absence of malice is no excuse. *Gowan* v. *Holland*, Q.R. 11 S.C. 75.

—Omission of Judge to Instruct Jury—Material Point—Setting aside Verdict.]—In an action for malicious prosecution the trial judge, not having been requested so to do, omitted to instruct the jury that even although the defendant believed in the charge he was making he might still be held to be acting maliciously:—Held, that the judge was not excused from directing the jury on a material point by the absence of a request, and that his failure to do so was a valid reason for setting the verdict aside. *Hawkins* v. *Snow*, 28 N.S.R. 259.

—Reasonable and Probable Cause—Legal Advice — Malice — Service of Process by Constable — Trespass — Indictable Offence — Solicitor.] — Plaintiff entered defendant's house, in the capacity of a constable, for the purpose of arresting defendant's servant under a writ of capias which had been delivered to him to be executed. Not finding his man he left the house, but it appearing that the former had escaped through a window of the house, the plaintiff re-entered the house for the purpose of examining the marks on the window and of making a second search. Plaintiff was subsequently arrested at the instance of defendant and put upon his trial, charged with breaking and entering defendant's house, and also with wilfully misconducting himself in the execution of legal process. Defendant had consulted a solicitor before taking this step, and did so upon his advice. The first charge was abandoned at the trial, and plaintiff was acquitted on the second. Plaintiff then brought an action against defendant for falsely, maliciously, and without probable cause preferring and prosecuting the charge against him. The solicitor was also joined as a defendant. The trial judge dismissed the charge against the solicitor, and told the jury that in his opinion as to the other defendant, plaintiff had not established the absence of reasonable and probable cause. He left it to the jury to say whether malice or indirect motive was brought home to defendant:—Held, that while the question of reasonable and probable cause is for the judge in cases where there is no conflict of testimony, he must submit to the jury facts tending to show a want of such cause, and ask them to infer from these facts whether or not there was malice; that the solicitor having had the same knowledge of the facts as the other defendant, his case should have been put to the jury; that in Nova Scotia the taking of legal advice before laying a charge, while it is not the same as taking counsel's opinion in England, is matter for the jury, and with some limitations tends to repel the idea of malice;

that the abandonment of one charge and uncontradicted evidence of an acquittal on the other, was sufficient evidence of the termination of the proceedings to enable an action to be brought. In the province of Nova Scotia it is not the practice to require the record of acquittal to be signed by the Attorney General; that the constable having lawfully effected his entrance in the first instance, was justified in re-entering, provided he did so in a reasonable manner, nor would an unreasonable exercise of the right of re-entry constitute "wilful misconduct in the execution of the process;" that the question whether a person who enters a house for the purpose of executing a warrant, exceeds his privilege of remaining longer than is reasonable is one for the jury. *Seary* v. *Saxton*, 28 N.S.R. 278.

MANDAMUS.

How Obtainable.]—The prerogative writ of mandamus is not obtainable by action, but only by motion; *Smith* v. *Chorley District Council*, (1897) 1 Q.B. 532, followed. *City of Kingston* v. *Kingston, Portsmouth and Cataraqui Electric Railway Co.*, 28 Ont. R. 399.

—Justices of the Peace—Refusal to Proceed—Costs.]—If Justices of the Peace, after hearing evidence on an information before them, and reserving their decision, refuse to render judgment on the ground that they had no jurisdiction because the defendants had appeared and pleaded before another justice, since deceased, and had no right to appear anew before them, a mandamus will be granted to compel them to do so. If the defence to the mandamus raise the question of the right to the writ, thus preventing the applicant from obtaining judgment without proof, the defendants should pay the costs incurred through their fault, notwithstanding their declaration that they would submit themselves to justice. *Lacerte* v. *Pepin*, Q.R. 10 S.C. 542.

—Remedy by—Enforcement of Contract Rights—Exercise of Discretion.]—Mandamus is not an appropriate remedy for the enforcement of contract rights of a purely private or personal nature, of obligations which rest wholly upon contract, and which involve no questions of trust or official duty. Mandamus will not lie as to all acts or duties necessarily calling for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is registered. *Pagé* v. *Longueuil*, 3 Rev. de Jur, 366. Curran, J.

— Nova Scotia Municipal Act — Election of—Councillor — Two Candidates returned by two Returning Officers in one District—Mandamus to compel swearing in of one—Procedure—Crown Rule 55.]—Two candidates, R. and C., in a municipal election for a single councillor, in a certain district, were returned by two returning officers, both returning officers assuming themselves to have been regularly appointed. When the Municipal Council met on January 14th, 1896, both R. and C. applied to be sworn in, and, no action having been taken, on the following day R. served the warden and clerk of the municipality with notice of motion for a mandamus to compel them to swear him in. On the 18th January C. was sworn in as councillor for the district in question, and continued to act as such. No notice of motion was served upon him until two months after he was sworn in:—Held, that the principle that mandamus will not lie where the office sought is full, was not affected by the fact that notice of the application was given prior to the date at which C. was sworn in, the return of the writ having reference to the state of affairs as it existed when the writ was served:—Held, also, that if the warden and clerk had power before the service upon them, to effectively swear in C., that power could not be affected by a mere notice of motion, and that, therefore, when C. was sworn in, he would become a councillor *de facto*:—Held, further, that under Crown Rule 55 it was necessary to serve C. as the person principally, if not wholly, interested in opposing the motion, and that the fact that he was not served until two months after the time at which he was sworn in, and commenced to act, was a complete answer to the motion, which, therefore, must be refused, even if the warden and clerk had failed to show any reason why mandamus should not be allowed. *The Queen* v. *Burke*, 29 N.S.R. 227.

—Judge Refusing to exercise Jurisdiction—Art. 1022 C.C.P.]—See JUDGE.

—Municipal Council—Vacant Seat—Reinstatement of Councillor.]—See MUNICIPAL COUNCIL.

See also MUNICIPAL CORPORATIONS, XI.

MANDAT.

Termination by Death of Mandant—Partnership.]—The mandate, even for remuneration, is at an end at the death of the *mandant* except one which is only the accessory of a synallagmatic contract, or where the *mandataire* is only *procurator in rem suam*.—An agreement by which the owner of an article charges another with the sale of it, with a stipulation that the latter shall have, for his remuneration, the surplus of the price of sale over a fixed sum, constitutes a mandate for reward and not a partnership. *Stafford* v *Smith*, Q.R. 10 S.C. 470 affirming 8 S.C. 371.

MANDATARY.

Payment of Debt—Deposit with Third Party—Right to Retain for Fees.—Special Mandate.]—G., threatened with an action by his brother and by D. on account of the same debt, borrowed the sum necessary to pay it, but to avoid the risk of having to pay twice he demanded, and it was, moreover, understood between the two brothers, that the money should be deposited in the hands of a third party until the decision of the action and should then be paid over, either to G.'s brother or to G. himself, to pay it to D., according to the judgment rendered:—Held, that the sum thus entrusted to the third

party was in the character of a deposit and he could not, therefore, retain it for what was due to him from G. for costs and fees as solicitor in the cause.—Even if he could be deemed a mandatary and not a depository he could not claim this compensation as he was acting under a special mandate of a sum entrusted for a particular purpose.—The compensation could not exist where the evident intention of the parties was to the contrary.—The right to claim restitution of the deposit is not confined to him who made it but vests also in the owner of what was deposited who exercises all the rights of the depositor. *Duggan* v. *Gauthier*, Q.R. 11 S. C. 410.

MARCHANDE PUBLIQUE.

Agency of Husband—Indorsement of Note by Agent — Discount — Consideration — Liability of Indorser.]

See BILLS OF EXCHANGE AND PROMISSORY NOTES, V.

MARI ET FEMME.

See HUSBAND AND WIFE.

MARRIAGE CONTRACT.

Donation—Separate Property of Future Wife —Gift to Husband—Donation a Cause de Mort—Saisie Conservatoire—Art. 823 C.C.]

See DONATION.

" also HUSBAND AND WIFE, I.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

I. ACTION FOR WAGES.

—Rev. Ordinances N.W.T. c. 36, s. 4—Master and Servant — Wages — Fine — Imprisonment—Property and Civil Rights—Ultra Vires.]

See CONSTITUTIONAL LAW, II (*b*).

II. CONTRACT OF SERVICE.

—Contract of Hiring of Services—Interpretation of Contract—Termination thereof.]—The words "Your salary has been fixed at $1,800 per annum, and will take effect from 1st May prox.," do not constitute a hiring for one year, unless the nature of the work to be performed requires such an interpretation. A person cannot claim both salary and extra pay for special work done during the time he was not occupied on the contracted works. *McGreevy* v. *Quebec Harbour Commissioners*, Q.R. 11 S.C. 455.

III. DISMISSAL OF SERVANT.

—Hiring of Personal Services—Municipal Corporation — Appointment of Officers — Summary Dismissal—Libellous Resolution—Statute, interpretation of—Difference in Text of English and French Versions—52 V. c. 79, s. 79 (Q.)—"A Discrétion"—"At Pleasure."]—The Charter of the City of Montreal, 1889, (52 Vict. c. 79), section 79, gives power to the City Council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised "*à sa discrétion*," while the English version has the words "*at its pleasure*":—Held, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment, and the City Council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal. *Davis* v. *City of Montreal*, 27 S.C.R. 539, affirming Q.R. 6 Q.B. 177.

—Contract for Defined Term—Continuance of Employment — Right to Dismiss.]—Where a book-keeper is engaged for the term of one year, and his employment is continued after the expiration of that time there is no presumption that it is to continue for another year absolutely. The employer may dismiss him at any time upon reasonable notice, and where there is no evidence of usage to the contrary, three months' notice is reasonable. *Harnwell* v. *Parry Sound Lumber Co.*, 24 Ont. A.R. 110.

—Railway—Employee Drinking on Duty—Summary Dismissal—Railway Act 51 V. c. 29 (D.).]—It is good cause for the summary dismissal by a railway company of one of its employees that he was proved while on duty to have drunk intoxicating liquor; such conduct constitutes a participation in a criminal offence under section 293 of the Railway Act 51 Vict. c. 29 (D.), which prohibits any one selling, giving or bartering spirits or intoxicating liquor while on duty. *Marshall* v. *The Central Ontario Railway Co.*, 28 Ont. R. 241.

IV. DISOBEDIENCE TO ORDERS.

—Master of Ship—Violation of Instructions—Resulting Damage.]—See SHIPPING, II.

V. Injury to Servant.

(a) Liability of Master under Civil Code.

—Negligence—Injuries sustained by Servant—Responsibility—Contributory Negligence—Protection of Machinery.]—Where an employee sustains injuries in a factory through coming in contact with machinery, the employer, although he may be in default, cannot be held responsible in damages, unless it is shown that the accident by which the injuries were caused was directly due to his neglect. *Tooke* v. *Bergeron*, 27 S C. R. 567, reversing the judgment in Review and Q.R. 9 S.C. 506.

(b) Workmen's Compensation Acts.

— Government Railways — Ontario Workmen's Compensation for Injuries Act—Applicability.]—The provisions of sub-section 2 and 3 of section 5 of the Workmen's Compensation for Injuries Act, 55 Vict. (Ont.) c. 30 as to packing railway frogs, are not binding upon railways under the legislative control of the Dominion. *Washington* v. *Grand Trunk Railway Co. of Canada*, 24 Ont. A R. 183, reversed by the Supreme Court of Canada 9 Dec., 1897.

—Cause of Accident—Evidence.]—In an action for negligence, causing the death of an employee, the evidence showed that in the defendants' factory two large wheels, 45 feet apart, had been placed partly in a trench in the floor of the basement for the purpose of driving a wide belt with great rapidity. The deceased was employed to oil the bearings and to see that they did not heat. His dead body was found, much injured, close to one of the wheels, but there was no evidence as to how he had met with his death. The wheels were not guarded by fencing, but there was evidence that deceased had on previous occasions crossed the trench on two planks placed over it between the upper and lower moving belt, and there was evidence that he had been cautioned against doing so, and that the planks, although removed by the superintendent, were there at the time of the accident:—Held, that there was evidence proper to be submitted to the jury that the accident was caused by the negligence of the defendants. *Kervin* v. *The Canadian Coloured Cotton Mills Company*, 28 Ont. R. 73.

—Manitoba Workmen's Compensation for Injuries Act — Retroactive Effect — Limitation — Notice — Negligence.]—The plaintiff sued for an injury sustained by the negligence of a fellow workman. The accident causing the injury occurred in May, 1894; no notice of the injury had been given within twelve weeks, and the action was not commenced until 1st October, 1895; so that at the time of passing c. 48 of the Statutes of 1895 the plaintiff's right of action for the injury under the Workmen's Compensation for Injuries Act, 56 Vict. c. 39 had ceased to exist by virtue of section 7. By the amendment of 1895, however, this section was repealed and the following substituted therefor:—"No action for the recovery of compensation under this Act shall be maintainable unless commenced within two years from the occurrence of the accident causing an injury or death":—Held, that this legislation was not retrospective and had not the effect of restoring a right of action which was gone before it had passed. The plaintiff also claimed that defendants were liable at common law under the principles applied in *Smith* v. *Baker* [1891], A.C. 325, and *Webster* v. *Foley*, 21 S.C.R. 580, but the answers of the jury showed no defect in the works or machinery or system of using the same, and the plaintiff was non-suited. *Dixon* v. *Winnipeg Electric Street Ry. Co.*, 11 Man. 528

—Negligence — Defective Machinery — Evidence for Jury.]—See Evidence, XII.

VI. Liability of Master for Acts of Servant.

—Workmen's Compensation for Injuries Act—Notice of Action—Notice of Objection thereto—Pleading—55 V. (Ont.) c. 30, s. 14.]—The provisions of section 14 of the Workmen's Compensation for Injuries Act, 55 Vict. c. 30 (Ont.), are not complied with merely by pleading that the notice of action relied on by the plaintiff is defective, or that notice of action has not been given. The defendant must give formal notice of his objection not less than seven days before the hearing of the action if he intends to rely upon it. *Cavanagh* v. *Park*, 23 Ont. A.R. 715.

— Negligence — Nuisance — Highway — Drain Tiles—Contractor—Respondeat Superior.]

See Municipal Corporations, VII.
" Nuisance.

VII. Loss of Service.

—Seduction — Right of Action — Service — Pregnancy.]—In an action for seduction, it appeared that the connection took place while the plaintiff's daughter resided at service with the defendant. There was no evidence of any possible loss of service by the father, and, although a slight illness occurred subsequent to the connection, there was neither birth of a child nor pregnancy:—Held, that the father had no right of action, either at common law or under the Act respecting seduction, R.S.O. c. 58: *Kimball* v. *Smith*, 5 U.C.Q.B. 32, and *L'Esperance* v. *Duchene*, 7 U.C.Q.B. 146, followed. *Harrison* v. *Prentice*, 28 Ont. R. 140.

VIII. Slander of Servant.

—Defamation—Slander—Privilege.]

See Libel and Slander, V.
And see Negligence, VI.

MEDICAL PRACTITIONER.

Malpractice—Damages—Exposure of Body to Jury—New Trial.]

See Practice and Procedure, XXVIII.

MEPRIS de COUR.

See Contempt of Court.

MERCANTILE AGENCY.

Defamation — Libel — Mercantile Agency — Privilege.]—A mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained by the agency from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness: *Cossette* v. *Dun*, 18 S.C.R. 222, considered. *Robinson* v. *Dun*, 24 Ont. A.R. 287, reversing 28 Ont. R. 21.

MILK INSPECTION.

52 V. (D.) c. 43—Supply of Inferior Milk—Intent.]—See CRIMINAL LAW, I.

—Municipal Law—By-Law — Inspection of Milk —Ultra vires.]

See MUNICIPAL CORPORATIONS, I (*b*.)

MINES AND MINERALS.

Lease of Mining Areas—Rental Agreement—Payment of Rent—Forfeiture—R.S.N.S. 5 Ser. c. —52 V. c. 23 (N.S.).]—By R.S.N.S. 5 ser. c. 7, the lessee of mining areas in Nova Scotia was obliged to perform a certain amount of work thereon each year on pain of forfeiture of his lease which, however, could only be effected through certain formalities. By an amendment in 1889 (52 Vict. c. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by sub-section (*c*) the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions of such annual payment and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By section 7 all leases are to contain the provisions of the Act respecting payment of rental and its refund in certain cases, and by section 8 said section 7 was to come into force in two months after the passing of the Act. Before the Act of 1889 was passed a lease was issued to E., dated June 10th, 1889, for twenty-one years from May 21st, 1889. On June 1st, 1891, a rental agreement under the amending Act was executed under which E. paid the rent for his mining area for three years, the last payment being in May, 1893. On May 22nd, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year and issued a prospecting license to T. for the same areas. E. tendered the year's rent on June 9th, 1894, and an action was afterwards taken by the Attorney-General, on relation of E., to set aside said license as having been illegally and improvidently granted:—Held, that the phrase "nearest recurring anniversary of the date of the lease" in sub-sec. (*c*) of section 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on June 10th, no rent for 1894 was due on May 22nd of that year, at which date the lease was declared forfeited, and E.'s tender on June 9th was in time: *Attorney-General* v. *Sheraton*, 28 N.S. R. 492 approved and followed:—Held, further, that though the amending Act provided for forfeiture without prior formalities of a lease in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of formalities prescribed by the original Act. *Temple* v. *The Attorney-General of Nova Scotia*, 27 S.C.R. 355, affirming 29 N.S.R. 279.

—Gold Mining Lease — Forfeiture — Rental in Advance—"Next Recurring Anniversary"—Date of Lease—Powers of Commissioner—Receipt—Words of controlled by Statute—Acceptance of Second Lease—Mines Act, R.S. N.S., 5th ser. c. 7—Amending Act, Acts of 1889, c. 23.]—On the 27th November, 1886, the Crown granted to W. and others a lease of certain gold mining areas, to commence on the 25th of the same month, which lease was, by various assignments, transferred to the relators. The lease was issued under the provisions of the Mines Act, R.S., 5th series, c. 7, by which the lessee was required to perform a certain number of days work in each year for each area contained in the lease, on failure to do which the lease was subject to forfeiture. By the Acts of 1889, c. 23, the provisions of R.S. N.S., c. 7, as to the work required to be done, were amended, and the lessee was enabled to enter into an agreement in writing with the Commissioner of Mines substituting for the work previously required to be done a payment in advance of a rental of fifty cents per area, which payments in advance were to be construed to commence from the "nearest recurring anniversary of the date of the lease." The relators availed themselves of the provisions of this latter Act, and entered into an agreement in writing with the Commissioner of Mines on the 17th December, 1889, and made their first annual payment in advance on the 31st December of that year, the receipt for which was given by a clerk in the office as being "for amount of fee accompanying application for rental lease No. 354, at Malega Barrens, one year from the 15th November, 1889." In December, 1890, the relators attended at the Mines Office for the purpose of making their next payment, but learned that the lease had been forfeited on the previous 25th November, for non-payment of rental in advance:—Held, that the lease commenced on the 27th November, when the grant was made, and not on the 25th, the prior date at which it was described as commencing:—Held, also, setting aside the forfeiture, that the rental was not in arrears, the words "nearest recurring anniversary" having reference to the anniversary next ensuing after the date of the lease:—Held, further as to the form of receipt given, that the words of the statute must govern, the powers of the Commissioner being merely statutory, and that officer having no power to make a different contract from that contemplated by the statute.—At the time the relators attended to make their second payment, and learned that their lease had been declared forfeited, as an act of prudence, they took out a license to search over the same areas covered by the lease and, on the expiry of the

license to search, they applied for and obtained a lease of the area upon which their plant was situated:—Held, that as the Commissioner, in seeking to forfeit the lease, was acting under colour of office, the action of the relators in protecting themselves in the way stated was not of a voluntary character, and was not to be construed as a voluntary acceptance of a second lease by which the prior lease would be surrendered. *Attorney-General* v. *Sheraton*, 28 N.S.R. 492.

—Authority of Manager to bind Company—Burden of Proof—Apparent scope of Authority—Things necessary for efficient Operation of Mine.]—The defendant company acquired a mine from B., under an agreement, by which B. agreed to transfer the mine, and to construct certain work, including a boarding-house for the men. McC., who took a sub-contract for the erection of the boarding house, applied to plaintiffs to supply him with material for the work, which plaintiffs refused to do without the order of McQ., the defendant's manager. McQ. gave the order asked for, and the materials were thereupon supplied, and used in the erection of the boarding-house, and for other purposes of which the defendant received the benefit:—Held, per Ritchie, J., Meagher, J., concurring, dismissing an application for a new trial, that the erection of the boarding-house appearing to be necessary for the efficient operation of the mine, and plaintiffs having no knowledge of the contract with B., the mining manager had authority to bind the company. Per Graham, E.J., Henry J., concurring, that the burden was on plaintiffs of showing authority on the part of the manager to pledge the credit of the company for material supplied to a third person, such power not being within the apparent scope of his authority. *Miller* v. *Cochran Hill Gold Mining Co.*, 29 N.S.R. 304.

—Mining Law—Mineral Acts, 1888, ss. 37 and 50; 1891, s.s. 10 and 18; 1892, s. 9 (B.C.)—Location—Record—Priorities—Notice to subsequent Purchasers.]—Two miners having located the same ground on different days and respectively recorded their locations within the fifteen days thereafter required by section 19 of the Mineral Act, 1891, the record of the subsequent locator being made on a day prior to the record of the first locator. In a dispute between their respective successors in title as to priority:—Held, that a valid location is a pre-requisite to a valid record of a mineral claim; that section 9 of the Mineral Act (1891) Amendment Act, 1892, must be read in the light of section 10 of Mineral Act, 1891; that the subsequent location was void as made upon ground already occupied and not upon waste lands of the Crown, and did not acquire any validity by being recorded, and the priority of its record was, therefore immaterial as against the claim of the prior locator who had perfected his title by recording within the statutory time.—Sections 50 and 51 of the Mineral Act, 1891, introduce the policy of the Land Registry laws and a prior unregistered must be postponed to a subsequent but registered conveyance:—*Quaere* (per McCreight, J.): Whether the record of a document of title under sections 50 and 51 constitutes notice of it to subsequent purchasers.—The "Cariboo" and "Rambler" mineral claims in part covered the same ground:—*Quaere*, whether the owner of the "Rambler" was affected with notice of a bill of sale affecting the title of the common ground registered only upon the "Cariboo" record of title. *Atkins* v. *Coy*, 5 B.C.R. 6.

MINOR.

See INFANT.
" TUTOR.

MISTAKE.

Account Judicially Ordered—Error in Calculation—Rectification.]—A material error, or error in calculation, in an account, even judicially ordered, is always subject to rectification by the same tribunal when such rectification will not have the effect of changing the decision arrived at or of attacking the authority of a *chose jugée*. *Bury* v. *Murphy*, Q.R. 11 S.C. 507.

—Possession of Land by—Purchase of Land—Identity of Lot — Revendication—Reimbursement.]—See TITLE TO LAND.

MORTGAGE.

I. ACCOUNT.

Mortgage—Power of Sale—Negligence—Sale of Two Lots in one Parcel.]—A mortgagee who, under a power of sale, without previous inquiry of any kind, put up for sale by auction, and sold in one parcel, a farm and two shops in a village nearly three-quarters of a mile away, not in any way used together, was held liable for the difference between the amount realized and the amount which would have been realized had the farm and shops been sold separately. *Aldrich* v. *Canada Permanent Loan and Savings Co.*, 24 Ont. A.R. 193, affirming 27 Ont. R. 548; C.A. Dig. (1896), col. 206.

—**Accounts — Speculative Securities — Bonuses and Commissions.**]—Where money is lent on securities of a speculative or unsatisfactory nature, bonuses or commissions deducted by the lender at the time of the advance, together with bonuses or commissions charged and agreed to for an extension of time, and which form part of the consideration of the mortgage security, are properly chargeable in an accounting between borrower and lender, provided they were made part of the contract. *Gardiner* v. *Munro*, 28 Ont. R. 375.

II. Assignment.

—**Indemnity—Mortgage—Purchase subject to Mortgage—Assignment of right to Payment.**]—The equitable obligation of a purchaser of land subject to a mortgage may be assigned by the vendor to the mortgagee, who may maintain an action thereon against the purchaser for recovery of the mortgage moneys. *Campbell* v. *Morrison*, 24 Ont. A.R. 224.

III. Charge on Lands.

—**Improvements under Mistake of Title—Mortgage by Person making them—Enforcement against True Owner—Interest—Rents and Profits—"Assigns"—R.S.O. c. 100, s. 30.**]—A purchaser of land made lasting improvements thereon under the belief that he had acquired the fee and then made a mortgage in favour of a person who took in good faith under the same mistake as to title. Subsequently it was decided that the purchaser had acquired only the title of a life tenant. The mortgagee was never in possession:—Held, that the mortgagee was an "assign" of the person making the improvements within the meaning of section 30 of R.S.O. c. 100, and had a lien to the extent of his mortgage which he was entitled to actively enforce:—Held, also, that the value of the improvements should be ascertained as at the date of the death of the tenant for life, and that there should be as against the mortgagee a set-off of rents and profits or a charge of occupation rent only from that date till the date of the mortgage:—Held, also, that interest should be allowed, on the enhanced value from the date of the death of the tenant for life. *McKibbon* v. *Williams*, 24 Ont. A.R. 122.

—**Mortgage—Leasehold—Reversion—Charge—Estoppel.**]—Where the assignee of a term, subject to a mortgage, becomes the owner of the fee by purchase, the reversion in the lands is bound in his hands for the payment of such mortgage, without repayment to him of the purchase money; and where he has obtained the conveyance of the reversion upon the representation that he is the assignee of the term, he is estopped from saying that he acquired it otherwise than as the conveyance to him shows. *Building and Loan Association* v. *McKenzie*, 28 Ont. R. 316, affirmed by 24 Ont. A.R. 599. Appeal to Supreme Court of Canada standing for judgment.

—**N.W.T. Land Titles Act, 1894 — N.W.T. Real Property Act—Mortgage by Strangers to Title—Registration.**]—See Title to Land.

IV. Covenants and Obligations.

—**Taxes—Ontario Short Forms Act.**]—Held, (per Morson Co. J.) that the covenant by the mortgagor to pay taxes applies only until default be made in payment of principal or interest. As there is an express contract by the mortgagor to pay taxes until such default, the right, if any, which the mortgagees had to recover the money so paid as being money due by the mortgagor which they had been compelled to pay to protect their security, is, therefore, excluded. *Lee* v. *Green*, 33 C.L.J. 622.

V. Foreclosure.

—**Default of Payment of Interest—Foreclosure through no proviso that principal should become due on default.**]—Upon default in payment by mortgagor of any instalment of interest the mortgagee has a right, independently of any express proviso in the mortgage to that effect, to call in the whole principal and interest and foreclose. *Canada Settlers' Loan Company* v. *Nicholles*, 5 B.C.R. 41.

—**Suit for Foreclosure—Summons—Affidavit of Service—53 V. c. 4, s. 185 (N.B.).**]

See Practice and Procedure, II.

VI. Interest.

—**Agreement to pay Compound Interest—Charge upon Land—Intention.**]—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 to 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. *Jackson* v. *Richardson*, 1 N.B.Eq. 325.

VII Landlord and Tenant.

—Lease from Mortgagee to Mortgagor—Landlord and Tenant—Excessive Rent.]

See Landlord and Tenant, XI.

VIII. Mortgage of Lease.

— Leasehold Premises — Terms of Mortgage — Assignment or Sub-Lease.]—A lease of real estate for twenty-one years with a covenant for a like term or terms was mortgaged by the lessee. The mortgage after reciting the terms of the lease proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and form part of the term hereby granted and mortgaged;" the *habendum* of the mortgage was: "To have and to hold unto the said mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the said lease less one day thereof and all renewals, etc.:"—Held, reversing the judgment of the court of appeal, that the premises of the said mortgage above referred to contained an express assignment of the whole term, and the *habendum*, if intended to reserve a portion to the mortgagor, was repugnant to the said premises and therefore void; that the words "leasehold premises" was quite sufficient to carry the whole term, the word "premises" not meaning lands or property but referring to the recital which described the lease as one for a term of twenty-one years:—Held, further, that the *habendum* did not reserve a reversion to the mortgagor; that the reversion of a day generally without stating it to be the last day of the term is insufficient to give the instrument the character of a sub-lease. *Jameson* v. *The London and Canadian Loan and Agency Company*, 27 S.C.R. 435, reversing 23 Ont. A.R. 602.

IX. Mortgage on Railway.

—Dominion Railway—Section capable of Sale—Jurisdiction of Provincial Court—Part of section outside of Province.]

See Railways and Railway Companies, VI.

X. Payment.

—Settlement—Mortgage—Exoneration—Will—Construction—Direction to Sell—Legacy—Discretion as to Time of Payment.]—Certain land, subject with other lands to an overdue mortgage made by the settlor, was conveyed by him to trustees for his daughter by way of settlement to take effect on his death or her marriage. The conveyance to the trustees contained no covenants by the settlor and no reference to the mortgage, which remained unpaid at the time of the settlor's death—*Held*, that the mortgage should be paid out of the settlor's general estate. *Lewis* v. *Moore*, 24 Ont. A.R. 393.

XI. Power of Sale

—Notice of Sale—Abandonment—Costs—Action on Covenant—Motion for Summary Judgment.]—After the issue of the writ of summons and service of a notice of motion for summary judgment in an action upon the covenant for payment contained in a mortgage deed, the plaintiff, without the leave required by R.S.O. c. 102, section 30, served notice of exercising the power of sale contained in such deed. Before the hearing of the motion, the plaintiff gave notice of abandonment of his notice of sale and of all costs in respect thereof:—Held, that the effect of the notice of sale was to give the defendant time within which to pay off what was claimed, and, unless the defendant was willing to release the plaintiff, he was bound by the notice; and the motion for judgment could not be entertained; but the object of R.S.O. c. 102, section 30, will be fully attained by directing that the motion should stand over until after the expiration of the thirty days mentioned in the notice. *Lyon* v. *Ryerson*, 17 Ont. P.R. 516.

XII. Practice in Mortgage Actions.

—Manitoba Real Property Act—Practice—Plaintiff in Issue.]—A mortgagee of land having applied to bring it under The Real Property Act, a caveat was filed, and the caveator proceeded by petition for the purpose of establishing his claim, alleging that he had acquired a title from the mortgagor subsequent to the caveatee's mortgage, that the mortgagee's claim was barred by the Real Property Limitation Act, and that he himself was in possession of the property, which he verified by affidavit:—Held, that in the issue ordered to determine the question whether the mortgagee's rights had been barred under the statute, the onus of showing this was upon the petitioner and that he should be the plaintiff. *Bucknam* v. *Stewart*, 11 Man. R. 491.

XIII. Redemption.

—Equity of Redemption—Purchaser—Indemnity—Covenant—Assignment—Release of Mortgagor—Damages.]—A mortgagor of land sold the equity and took from the purchaser a covenant to pay off the mortgage, which he assigned to the mortgagee, who afterwards, without his knowledge, took by assignment from the purchaser the benefit of similar covenants from sub-purchasers, agreeing to exhaust her remedies against the latter before suing the purchaser.—Held, that the mortgagee had not thereby lost her right of action in the mortgagor's covenant in the mortgage, and if the latter's rights against the purchaser of the equity from him had been impaired by the plaintiff's conduct, that would be matter for damages after inquiry. *Barber* v. *McCuaig*, 24 Ont. A.R. 492. Appeal to Supreme Court of Canada stands for judgment.

XIV. Statute of Limitations

—Mortgage—Possession.]—The Real Property Limitation Act, R.S. Man., c. 89, does not begin to run against a mortgagee of land in a state of nature until actual possession is taken by some person not claiming under him: *Smith* v.

Lloyd, 9 Ex. 562; *Agency Company* v. *Short*, 13 App. Cas. 793, and *Delaney* v. *C. P. R.*, 21 Ont. R. 11, followed. *Doe d McLean* v. *Fish*, 5 U.C. Q.B. 295, dissented from. *Bucknam* v. *Stewart*, 11 Man. R. 625.

—Limitations—R.S. Man. c. 89 s. 4—Mortgage—Foreclosure—Tax Sale—55 V. (Man.) c. 26 s. 8.]

See LIMITATION OF ACTIONS, III.

And see BILLS OF SALE and CHATTEL MORTGAGES.

MOVABLES.

Vendor and Purchaser—Unpaid Vendor—Conditional Sale—Suspensive Condition — Movables incorporated with Freehold — Immovables by Destination — Hypothecary Charges — Art. 375 et seq. C.C.] — A suspensive condition in an agreement for the sale of movables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor is a valid condition. In order to give movable property the character of immovables by destination, it is necessary that the person incorporating the movables with the immovable should be, at the time, owner both of the movables and of the real property with which they are so incorporated: *Lainé* v. *Béland*, 26 S.C.R. 419, and *Filiatrault* v. *Goldie* Q.R 2 Q.B. 368, distinguished. *La Banque d'Hochelaga* v. *The Waterous Engine Works Co.*, 27 S.C.R. 406, affirming Q.R. 5 Q.B. 25.

MUNICIPAL CORPORATIONS.

I. By-Law.

(a) *Passage of By-Law.*

—Special Meeting—Acquiescence—Signature of Mayor—Division of Municipality—Arts. 16, 127, 457, M.C.]—A municipal by-law may be passed after discussion at a special meeting of the council where all the members are present, if no one objects to proceeding on that day. The penalty of nullity provided for by art. 127 M.C. only applies to the case where there are absentees to whom notice of the meeting has not been given.—A by-law signed by the mayor outside a council meeting will be deemed valid if it is shown that no alteration has been made in it during the interval; the prescriptions of art. 457 M.C. are not on pain of nullity and art. 16 M.C. may be applied in such case.—The council has power, *proprio motu*, to divide the municipality into districts with a view to the public interests, and to pass a by-law for the purpose. —In this case no reason of general interest existed for dividing the municipality of the village of Rigaud into districts; the by-law had been passed to favour the majority of the council to the prejudice of the minority whose authority (*mandat*) would only terminate after the elections of the month of January then next, and to control, by means of this division, the general election which would thus become necessary.—The by-law in question was passed without necessity and was unjust, partial and oppressive, in that the division of the municipality by it had the effect of destroying the equality of the electors assuring the control of the affairs of the council to the representatives of one district to the prejudice of the others; it was, therefore, illegal, *ultra vires* and void. *Mongenais* v. *The Corporation of Rigaud*, Q.R. 11 S.C. 348.

(b) *Proceedings to Quash.*

— Quashing By-law — Dairy Inspection — Ultra Vires.]—The city of Winnipeg relying on sections 593 and 607 of the Municipal Act and section 17 of 57 Vict. c. 20, passed a by-law for inspecting and licensing vendors of milk:—Held, that a provision requiring the owners of all dairies whose milk was sold in the city to submit to an inspection and to take out a license whether their dairies were in the city or not, was *ultra vires* and illegal so far as it applied to the owners of dairies who did not sell their milk in the city but disposed of it to other persons, who might or might not sell it there: —Held, also, that section 3 of the by-law which required applicants for licenses to satisfy the health officer of the city before their licenses could issue, and left it in his power to decide who should have a license and who should not, was also *ultra vires* as an illegal delegation of authority which the council itself should exercise. *Re Elliott*, 11 Man. R. 358.

—Dairy Inspection — Quashing By-Law — Ultra vires.]—The City of Winnipeg having in assumed exercise of the powers conferred by the Municipal Act, s. 599, as amended by 57 Vict. c. 20, s. 17, 58 & 59 Vict. c. 32, s. 16 and 59 Vict. c. 15, s. 16, passed a by-law providing for the licensing, inspecting and regulating of dairies and vendors of milk and for preventing the sale or use of milk or other food products until compliance with regulations, an application was made to quash it under section 385 of the Municipal Act:—Held, following *Merritt* v. *Toronto*, 22 Ont. A.R. 205, that all such by-laws should be construed strictly, and that any ambiguity or doubt as to the extent of the powers conferred

on municipalities to make by-laws is to be determined in favour of the general public as against the grantee of the power, especially where such by-laws affect the rights of liberty or property of a citizen, and that the by-law in question should be quashed because some of its provisions were unreasonable, and others exceeded the powers conferred by the Act. The following are the provisions declared to be objectionable by the judgment:—(1) The by-law is so worded that some carriers of milk from points outside the city, as railway companies, might be required to procure licenses as vendors of milk, or otherwise they would be subject to penalties imposed. It provides that in case any animal is found to be affected with tubercular disease, it is to be separated from all others, and kept apart until it is proved by inspection that the animal has recovered, and in the meantime the owner is prevented from selling the milk from the other cows in the dairy until a further inspection shows that they have not contracted the disease. This further inspection is to be made not less than two weeks, nor more than eight weeks after the first, which puts it in the power of the inspector arbitrarily to keep the dairy closed for eight weeks. The by-law further provides for an inspection of dairies and a report as to whether the regulations have been complied with or not, but a license is to be issued only if the Market, License and Health Committee gives no contrary order to the health officer which puts it in the power of that Committee to deny a license even when there is a favorable report. The by-law further provides that in no case where the regulations have not been complied with, shall the health officer issue a license, but contains a provision that the Council may override all that and direct a license to issue, which opens a wide door to favouritism, and makes the by-law unequal in its provisions. The by-law imposes a special tax, charging so much for licenses and a further fee of fifty cents for every cow contrary to the provisions of sections 333 and 334 of the Municipal Act. It is provided that if a licensee adds any cow to his stable he must bring it to the inspector's stable to be inspected, and pay a fee of fifty cents, whether he intends to sell her milk or not. The by-law further provides that the inspector may inspect any cows or cattle in the city, whether the owner is or is not selling milk or any other food products of these cows or cattle, and may collect from the owner a fee of fifty cents per head for such inspection, which is *ultra vires* of the Act. *Re Taylor and the City of Winnipeg*, 11 Man. R. 420.

—**By-law—Widening Streets—Expropriation.**]

See APPEAL, III. (*b*).

(*c*) *Promulgation.*

—**Irregular Promulgation—Effect of—Art. 454 M.C.**]—Although an enunciation in a municipal by-law that it shall come into force the day of its promulgation may be illegal and null by the terms of Art. 454 M.C., which declares that municipal by-laws shall come into operation and have the force of law fifteen days after promulgation, yet this irregularity does not involve the nullity of the by-law itself nor prevent it from being capable of enforcement fifteen days after it is promulgated. *Brosseau* v. *The Corporation of St. Lambert*, Q.R. 11 S.C. 425.

(*d*) *Resolutions of Council.*

—**Municipal Corporations—Police Magistrate—Salary—Reduction of—R.S.O. c. 72, ss. 5, 28.**]—In 1892 the plaintiff was appointed by the provincial government of its own motion police magistrate, without salary, under R.S.O. c. 72, sec. 5, of a town whose population exceeded 5,000. The plaintiff then demanded a salary of $800 as his right under section 2 (b), which was for a time conceded, but, in 1894, reduced to $400, and by resolution in 1896, withdrawn altogether by the council:—Held, that the council had a right so to do and R.S.O. c. 72, sec. 28, did not apply. *Ellis* v. *The Town of Toronto Junction*, 28 Ont. R. 55, affirmed 24 Ont. A.R. 192.

—**Contract—By-Law—Resolution—Ont. Consolidated Municipal Act, 1892, ss. 282, 288.**]—A by-law of a village corporation authorized the raising by way of a loan of a certain sum for the purpose of mining and supplying the village with natural gas, and the issue of debentures therefor:—Held, having regard to section 282 of the Ontario Consolidated Municipal Act, 1892, that a by-law was necessary to authorize the making of a contract for the mining work to be done, and that this by-law did not authorize it:—Held, also, that a resolution of the council, though entered in the minute book and containing the contract at full length, and having the seal of the corporation attached to it, could not be considered a by-law because it was not signed as required by section 288. *Wigle* v. *Village of Kingsville*, 28 Ont. R. 378

(*e*) *Submission to Ratepayers.*

—**Omission to post By-law and Notice—55 V. (Ont.) c. 42. s. 293—Irregularities—Result of Voting—Saving Clause s. 175.**]—Upon a motion to quash a municipal by-law which required the assent of the electors and was voted upon by them and carried by a majority of 16 in a total vote of 550 out of an electorate of 941:—Held, that the unexplained omission of the council to put up a copy of the by-law with a notice stating, *inter alia*, the hour, day, and places for taking votes in four or more of the most public places in the municipality, as required by section 293 of the Municipal Act, 55 Vict. c. 42 (Ont.), or at any place therein, was fatal to the by-law; the evidence disclosing many other irregularities; and the onus which was upon the council to show, under section 175, that the proceedings were conducted in accordance with the principles laid down in the Act, and that the result was not affected by the mistakes and irregularities, not being satisfied. *Re Pickett and Township of Wainfleet*, 28 Ont. R. 464.

(*f*) *Validity.*

—**Early Closing By-Law—Excepted Times—Uncertainty.**]—A by-law providing for the closing of shops for the sale of watches and jewellery at

a certain time every day, "excepting . . . the days during which the Central Canada Exhibition Association is being held, ..." such days being fixed by by-law of the association pursuant to statute, is not invalid for uncertainty. *The Queen* v. *McMillan*, 28 Ont. R. 172.

— Debentures — Limitation to Twenty Years — Consolidated Municipal Act, 1892, s. 340.]—A by-law passed by the municipality of a town for the construction of water-works and gas or electric light works made the debentures to be issued thereunder payable in thirty years from the date on which the by-law took effect:—Held, that the by-law was invalid, for under section 340 of the Consolidated Municipal Act, 1892, 55 Vict. c. 42 (Ont.), the time for the payment of debentures for electric light works is limited to twenty years. *Re Hay and the Corporation of the Town of Listowel*, 28 Ont. R. 332.

—Fire Limits—Erection of Buildings within—By-law therefor—Validity— Consolidated Municipal Act, 1892, s. 496, s.s. 10.]—Sub-section 10 of section 496, Consolidated Municipal Act, 1892, which empowers the corporation of a city, town or village to pass by-laws "for regulating the repair or alteration of roofs or external walls of existing buildings" within the fire limits, "so that the said buildings may be more nearly fire proof," does not empower the council to pass a by-law requiring "all buildings damaged by fire, if rebuilt or partially rebuilt," to be made fire-proof, at the peril of such building being removed at the expense of the owner. *Quinn* v. *The Corporation of the Town of Orillia*, 28 Ont. R. 435.

—Control of Bridge—By-law assuming Control—Destruction of Bridge—Right to rescind By-law—Arts. 525, 526, 527, 539, 794, 795, M.C.]—A corporation which is charged by a by-law with the control and maintenance of a bridge constructed by private persons, and has at the same time assumed the obligation of opening and maintaining the two ends of a road leading to it, can subsequently, after all the prescribed formalities have been complied with, abrogate the by-law and abolish such bridge which, in the meantime, had been destroyed after the by-law was passed. *Daigneau* v. *The Corporation of East Farnham*, Q.R. 6 Q.B. 258.

—Statutory Requirements—Penalty for Violation—Fine and Imprisonment—Discharge—Charter of Montreal—59 V. c. 49 (P.Q.).]—By sec. 141 of the charter of Montreal (59 Vict. c. 49) the city council is empowered to impose, for every infraction of a by-law, a fine not exceeding $40 with or without costs, or imprisonment for two months or under, and when a fine is imposed, with or without costs, to order imprisonment for two months or less in default of payment, such imprisonment to cease before the expiration of the term imposed on payment of the fine. A by-law imposing a tax on public laundries in Montreal, contained a clause, under the power conferred by said sec. 141, imposing a fine for neglect to pay such tax and imprisonment in default of payment, with the condition that the imprisonment should cease upon payment of the fine and costs:—Held, that as the by-law exceeded the authority given by the charter in requiring payment of costs in addition to the fine as a condition of release from imprisonment, a warrant of commitment in the terms of said by-law was bad, not only as to the imposition of such costs, but in the whole, and should be quashed. *Ex parte Lon Kai Long*, Q.R. 6 Q.B. 301.

—Early Closing—Penalties—Powers of Council—52 V. c. 79 (P.Q.)—57 V. c. 50 (P.Q.).]—By 57 Vict. c. 50, the Legislature of Quebec empowers the Council of any city or town to pass by-laws ordering certain places of business to be closed within certain hours, but not providing a penalty for infraction of such by-laws. The City of Montreal passed a by-law ordering certain stores to be closed during certain hours at night, excepting from its operation among others, stores where fruit, confectionery, tobacco and liquor by retail, were sold. The by-law imposed a penalty for its infraction of a sum not exceeding $40, or, in default of payment, imprisonment for not more than two months. R., who kept a grocery store, and sold therein fruit, tobacco and liquors by retail, under a Government license, applied to have the by-law annulled:—Held, that as the statute 57 Vict. c. 50, did not authorize the Councils to impose a penalty, with imprisonment in default of payment, for violation of by-laws ordering stores to be closed, the provisions of the by-law in question, imposing this penalty and imprisonment, were *ultra vires* of the Corporation, and that articles 140 and 141 of the Charter of the City (52 Vict. c. 79), under which the Corporation claimed this power, did not apply to the case dealt with by the by-law. In the absence of an express statutory provision to the contrary, municipal corporations can only impose by their by-laws pecuniary penalties and not imprisonment in default of payment. The by-law in question was arbitrary and oppressive, in so far as it made an unjust discrimination between different classes of merchants selling the same articles, and ordered without lawful cause the closing of stores at hours when trade could be carried on without violating the police regulations concerning order, health, morality and the public good; it restrained the freedom of trade and should therefore be deemed null and void. *Rasconi* v. *The City of Montreal*, Q.R. 10 S.C. 278.

II. Contracts.

—Waterworks—Extension of Works—Repairs—By-law—Resolution—Agreement in Writing—Injunction—Highways and Streets—R.S.Q. Art. 4485—Art. 1033a C.C.P.] — By a resolution of the Council of the Town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the River Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system of waterworks and had it in operation within the time prescribed, but the system proving insufficient a company was formed in 1895 under the provisions of R.S.Q.,

Art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon, L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir and to make new excavations in the streets for these purposes without receiving any further authority from the council:—Held, reversing the judgment appealed from, that these were not merely necessary repairs but new works, actually part of the system required to be completed during the year 1892 and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town:—Held, further, that the resolution and the application upon which it was founded constituted a "contract in writing" and a "written agreement" within the meaning of Art. 1033a of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works. *La Ville de Chicoutimi* v. *Légaré*, 27 S.C.R. 329, reversing Q.R. 5 Q.B. 542.

—**Contract for Construction of Sewer—Extras—Power of City Engineer — Liability.**]—Under a contract entered into by the plaintiff with the City of Halifax for the construction of a sewer—the city engineer while empowered to do certain things in relation to the work contracted for had no power to change or vary the terms of the contract or specification. The plaintiff, with the approval of the engineer, performed certain work beyond that which plan and specification called for:—Held, that as the engineer had no authority to depart from the terms of the contract, the city was not liable for the extra work so performed. *Ellis* v. *City of Halifax*, 29 N.S.R. 90.

—**Seal—C.S.B.C. 1888 c. 88, ss. 71, 83—Municipal Act, 1892, ss. 21, 82—Estoppel—Ratification.**]—Section 82 of the Municipal Act, 1892, providing that "each Municipal Corporation shall have a corporate seal, and the council shall enter into all contracts under the same seal, which shall be affixed to all contracts by virtue of an order of the council"; is imperative, and applies to all contracts of the corporation. The contract was in fact wholly executed, and the work completed and accepted by the corporation, and part payment therefor made, and the clerk of the corporation had acknowledged an order by the contractor in favour of the plaintiff's:—Held, not to operate to cure the objection that the contract was not under seal. *United Trust* v. *Chilliwack*, 5 B C.R. 128.

—**Municipal Act, 1892, s. 82 (B.C.)—Contract—Seal.**]—The Municipal Act of British Columbia, 1892, s. 82, providing that "each Municipal Corporation shall have a corporate seal, and the Council shall enter into contracts under the same seal, which shall be affixed to all contracts by virtue of an order of the Council," is imperative and applies to all contracts by Municipal Corporations subject to the Act. *Paisley* v. *Chilliwack*, 5 B C.R. 132.

III. Ditches and Watercourses.

— **Ditches and Watercourses Act — Municipal Corporations — Damages — R.S.O. c. 220.**] — A township municipality, within the limits of which a ditch is constructed under the provisions of the Ditches and Watercourses Act, in accordance with the award of the township engineer, made in assumed compliance with the requisition of the ratepayers interested, is not liable for damages caused to a resident of the township by the construction of the ditch, even though the requisition be in fact defective. *Seymour* v. *The Township of Maidstone*, 24 Ont. A.R. 370.

—**Engineer taking Action— Time — Estoppel—Collector's Roll—Reeve—Corporate Act— R.S.O. c. 220, ss. 15, 18—57 V. (Ont.) c. 55, ss. 28, 30.**]—By section 28 of 57 Vict. c. 55 (R.S.O. c. 220, s. 15), the Ditches and Watercourses Act, it is provided that "the engineer, at the expiration of the time limited by the award for the completion of the ditch, shall inspect the same, if required in writing so to do by any of the owners interested, . . and may let the work . . to the lowest bidder," etc.:—Held, that even the lapse of two years did not debar the engineer from acting under the above section, where it was plainly made to appear that the drain was not made, within the time or after the time, of the proper dimensions, by the person who had the first option to do the work:—Held: also, that the amount the several owners are liable for may be placed upon the collector's roll under 57 Vict. c. 55, s. 30 (R.S.O. c. 220, s. 18), on the authorization of the reeve of the municipality. *Rose* v. *The Corporation of the Village of Morrisburg*, 28 Ont. R. 245.

IV. Drainage.

—**Municipal Law—Drainage — Assessment—Intermunicipal Obligations as to Initiation and Contributions—By-law—Ontario Drainage Act of 1873—36 V. c. 38 (Ont.)—36 V. c. 39 (Ont.)—R.S.O. [1887] c. 184—Ontario Consolidated Municipal Act of 1892—55 V. c. 42 (Ont.).**]—The provisions of the Ontario Municipal Act (55 Vict. c. 42 s. 590), that if a drain constructed in one municipality is used as an outlet, or will provide an outlet for the water of lands of another, the lands in the latter so benefited may be assessed for their proportion of the cost, applies only to drains properly so called, and does not include original watercourses which have been deepened or enlarged.—If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost, a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other municipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law. *Broughton* v. *Grey and Elma*, 27 S.C.R. 495, reversing 23 Ont. A.R. 601.

—**Drainage—Improvement of Old Drain—Drain Extending into Adjoining Municipality—57 V. c. 56 s. 75 (Ont.).**]—Under section 75 of 57 Vict. c. 56 (Ont.), a township municipality which has constructed a drain within its own boundaries, connecting however with a drain constructed as

an independent work by an adjoining municipality, has power, without the petition of the ratepayers, to provide for the necessary repairs to both drains, and to assess the adjoining municipality with its proportion of the cost. *In re Stonehouse and Plymton*, 24 Ont. A.R. 416.

— **Jurisdiction — Public and Private Drains — Servitude—Art. 882 M.C.**]—Municipal corporations have jurisdiction only over streams of water serving to drain several lots of land, that is to say, over those which have a character of general utility and have not originated in a private interest; they have no authority in respect of trenches which only drain the two lots between which they are situate and which, having the character of private utility only are subject to the exclusive jurisdiction of the rural inspectors (*inspecteurs agraires*).—The servitude created by Art. 882 of the Municipal Code cannot be invoked in aid of private utility.—The proprietor of lower lands is not bound to receive the waters from the higher lands when they do not flow down by virtue of the natural grade, but are collected and turned upon the lower lands by means of artificial works which change the natural character of the place. *Lapointe* v. *The County of Berthier*, Q.R. 10 S.C. 24.

— **Servitude — Aggravation — Interference with Surface Waters—Damages.**]—A municipal corporation had constructed, opposite buildings owned by R., a drain, which raised at that place the level of the street and prevented the surface waters coming from higher ground behind said buildings, and the surface water of the street, from draining the lower ground on the opposite side of the road. In making the drain the corporation had destroyed a wooden drain constructed by R., starting from his cellar, crossing the street, and carrying the drainage of the opposite side upon lower ground. The corporation had refused to place a catch basin at the corner of the street to conduct the surface waters into the drain, and in consequence the cellars of R. were flooded. Held, that the corporation had aggravated the servitude imposed upon R.'s land in respect to the higher ground, and was responsible for the damages established by R. to have resulted from the defective drainage of the surface waters of the street. *Roy* v. *The Corporation of St. Louis du Mile End*, Q.R. 10 S.C. 503.

—**Insufficient Drain — Damage by—Liability of Corporation.**]—A municipal corporation is responsible for damage caused to ratepayers from the flooding of their cellars and subsoil caused by the drains of the corporation not being adequate, especially when, as in this case, these drains had been constructed in a manner contrary to that provided in the article of the code, in causing to deflect the drains on several streets, notably one of fifteen inches in diameter, into an *égout conducteur* of only twelve inches and manifestly insufficient, in heavy rains, to receive the waters from these drains. *Papineau* v. *The Town of Longueuil*, Q.R. 11 S.C. 98.

V. Expropriation of Lands.

— **Jurisdiction of Commissioners — Damages previously awarded.**]—The commissioners on expropriation of lands by a municipal corporation, while recognizing the right of the owner to compensation and fixing the amount, may, without exceeding their powers, refuse to award such compensation on proof that it was paid to the owner on a prior expropriation. *City of Montreal* v. *Catelli*, Q.R. 10 S.C. 464.

— **Objection to Arbitrator — Procedure — Quo Warranto—Qualification—Arts. 374, 916 M.C.**]—A person appointed by a Superior Court Judge as third arbitrator in a case of expropriation by a municipality cannot be removed from the position by writ of *quo warranto*, but the party who claims that he has not the qualifications required by law should present his objection and then apply by petition to a Judge of the Superior Court to have such objection maintained. The arbitrators appointed under article 916 of the Municipal Code must have the qualifications prescribed by Article 374, that is to say, each arbitrator should possess, in his own name, or in that of his wife, real estate (*biens fonds*) of the value of $400 according to the assessment roll in force. *Préfontaine* v. *Ducharme*, Q.R. 10 S.C. 478.

VI. Furnishing Courts of Justice.

— **Equipment of Courts of Justice — Offices "Furniture"—Stationery—Liability—Authority—County Council—R.S.O. c. 184, s. 466, 470.**]—By section 466 of the Municipal Act, R.S.O. c. 184, it was enacted that the county council shall "provide proper offices, together with fuel, light, and furniture, for all officers connected with the courts of justice," etc.:—Held, that "furniture" must include everything necessary for the furnishing of the offices referred to in the enactment for the purpose of transacting such business as might properly be done in such offices; and the word therefore included stationery and printed forms in use in the courts. *Ex parte Turquand*, 14 Q.B.D. 643, followed:—Held, also, upon the facts of this case, that a local officer of the courts, who had ordered supplies of stationery and forms from the plaintiffs for his office, was duly authorized by the defendants' council to do so, pursuant to the provisions of section 470 of R.S.O. c. 184. *Newsome* v. *County of Oxford*, 28 Ont. R. 442.

VII. Highways.

— **Underground Wires — Power to lay Wires underground for purpose of supplying Electricity and Gas—Right to excavate Streets—Quebec Act (55 & 56 V. c 77), s. 5—Construction.**]—Section 5 of the respondent company's incorporating Act (55 & 56 Vict. c. 77) empowers it on certain conditions (which have been complied with) to lay its wires underground as the same may be necessary, and in so many streets, squares, highways, lanes, and public places as may be deemed necessary for the purpose of supplying electricity and gas:—Held, that the power to open streets, that is, to break up their surface and excavate them, is plainly involved in this provision, and that an injunction obtained by the respondents to restrain the municipality from interfering therewith was properly granted

City of Montreal v. *Standard Light and Power Company*, [1897] A.C. 527 affirming Q.R. 5 Q.B. 558.

—Negligence—Snow and Ice on Sidewalks—By-law—Construction of Statute—55 V. c. 42. s. 531—57 V. c. 50, s. 13—Finding of Jury—Gross negligence.]—A by-law of the City of Kingston requires frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings, which therefore became higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being severely injured brought an action of damages against the city and obtained a verdict. The Municipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks; notice of action in such case must be given, but may be dispensed with on the trial if the court is of opinion that there was reasonable excuse for the want of it, and that the corporation has not been prejudiced in its defence: Held, that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair; (*Cornwall* v. *Derochie*, 24 S.C.R. 301, followed); that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the Act; that "gross negligence" in the Act means very great negligence, of which the jury found the corporation guilty; and that an appellate court would not interfere with the discretion of the trial judge in dispensing with notice of action. *The City of Kingston* v. *Drennan*, 27 S.C.R. 46, affirming 23 Ont. A.R. 406; C.A. Dig. (1896) col 228.

—Defect in Sidewalk beyond Line of Highway.]—A city corporation is liable for injuries happening to a person while walking and resulting from the defective condition of a part of a sidewalk constructed by them, extending beyond the true line of the street over adjacent private property so as ostensibly to form a portion of the highway, such defect being caused through the owner of the property having placed on such part of the sidewalk a grating covering an area, and having allowed it, to the knowledge of the municipality, to fall into disrepair so close to the highway as to render travel unsafe. *Badams* v. *City of Toronto*, 24 Ont. A.R. 8.

—Negligence—Nuisance—Highway—Drain Tiles—Contractor—Respondeat Superior.]—A township council appointed by resolution two of the defendants, who were members of the council, a committee to rebuild a culvert under a highway within the municipality. These two defendants employed another defendant as overseer of the work and two other defendants to draw drain tiles, which were required for the work, to the place in question. The work was done by the day and while it was being done the tiles in question, which were of a large size and of a light gray colour, were piled on the highway near the culvert. The plaintiffs' horse shied when passing the tiles and upset the vehicle, and the plaintiffs were injured:—Held, that the act in which the defendants were engaged being in itself lawful they could be regarded only as servants of the council, and that the maxim *respondeat superior* applied:—Held, per Maclennan, J.A., that leaving the tiles at the side of the roadway was not negligence and did not constitute a nuisance, and that no action lay. *McDonald* v. *Dickenson*, 24 Ont. A.R. 31.

— Railway — Overhead Bridge — Approaches thereto—Unlawful incline—Accident—Liability to Repair—Railway Act of 1888—51 V. c. 29, s. 186 (D.)—55 V. c. 42, s. 531 (Ont.).]—A railway company, with the sanction of a township municipality, erected an overhead bridge across a highway, and afterwards, without the consent of the municipality, raised the same so as to cause the approaches thereto to be at a greater incline than prescribed by the Railway Act, 1888, 51 Vict. c. 29 (D.). An accumulation of snow resulted from this, against which the plaintiff's cutter was upset, and she sustained injuries for which she brought this action:—Held, that the accumulation of snow amounted to a want of repair under section 531 of the Municipal Act, 55 Vict. c. 42 (O.), for which the municipality was liable:—Held, also, that the railway company was also liable for a misfeasance in raising the bridge and approaches so as to be at a greater incline than prescribed by section 186 of the Railway Act, 1888, thus causing the obstruction by means of which the accident happened. *Fairbanks* v. *The Township of Yarmouth*, 24 Ont. A.R. 273.

—Negligence—Nuisance.]—A municipal corporation is not responsible for damages resulting from a horse taking fright at railway ties piled, without the authority of the corporation, on the untravelled portion of a highway, but the person piling the ties on the highway is responsible: *Maxwell* v. *Clarke*, 4 Ont. A.R. 460, followed. *Castor* v. *Uxbridge*, 39 U.C.Q.B. 125, considered. *O'Neil* v. *Windham*, 24 Ont. A.R. 341.

—Railways—Municipal Corporations—Highway—Damages.]—The plaintiff fell while attempting to cross a railway track which was lawfully, and without negligence or undue delay, being built across a street in a city:—Held, that neither the railway company nor the city was responsible in damages: *Keachie* v. *Toronto*, 22 Ont. A.R. 351, followed. *Atkin* v. *City of Hamilton*, 24 Ont. A.R. 389, reversing 28 Ont. R. 229.

—Power to Lease Road to Private Person.]—Prior to the 13th May, 1851, the London and Port Stanley road belonged to the Government of Canada, as one of the public roads of that Province. On that day the Government, by an order-in-council or proclamation, issued under the authority of 12 Vict. c. 5 and 13 & 14 Vict. c. 14, granted the road, for valuable consideration, to the county of Middlesex. The part of the road lying within the limits of the County of Elgin afterwards fell into the hands of the corporation of that municipality, who, on the 16th February, 1857, leased it to the defendant's predecessor or assignor for the term of 199 years:—Held, that the county corporation had the power to sell or lease the road to any

grantee or lessee, being a local authority or company, mentioned in the above statutes and the further power to let to farm the tolls on the road, but had not the power to lease or sell the road, or any part of it, to a private person; and therefore the defendants had no title to the road, and were not justified in obstructing it by bars and exacting tolls upon it. *Payne* v. *Caughell*, 28 Ont. R. 157.

—**Highway — Negligence—Accident — Notice of —55 V. Ont. c. 42, s. 531 (1)—57 V. Ont. c. 50, s. 13—59 V. Ont. c. 51, s. 20.**]—The latter part of the clause added to section 531 (1) of the Consolidated Municipal Act, 1892, by 57 Vict. c. 50, s. 13, as amended by 59 Vict. c 51, s. 20, whereby it is provided that "no action shall be brought to enforce a claim for damages under this sub-section unless notice in writing of the accident and the cause thereof has been served," applies to all cases of non-repair of highways, etc., and is not confined to cases where the non-repair is by reason of the corporation not removing snow or ice from the sidewalks: *Drennan* v. *City of Kingston*, 23 A.R. 406 discussed. *Aldis* v. *City of Chatham*, 28 Ont. R. 525.

—**Electric Street Railway — Interference with operation of Telephone System—Use of Streets—34 V. c. 45 (P.Q.) — Interpretation of.**] — The company respondent was authorized by statute (34 Vict. c. 45), to run its street cars with "motive power produced by steam, caloric, compressed air, or by any other means or machinery whatever:" Held, that even if it were true that electricity was not at that time known or used as a motive power for street railways, the words of the statute were broad enough to include undiscovered as well as the modes of operation then known, and therefore covered the use of electric power by respondent. —The city council has power, by resolution, to authorize the construction, in the streets of the city, of a temporary electric railway intended to accommodate visitors to an exhibition, saving the recourse of persons who may be damaged by such construction; and moreover, where a by-law was legally passed by the council subsequently authorizing the construction of such electric railway, such enactment is a sufficient ratification of the construction.—The dominant purpose of a street being for public passage, any appropriation of it by legislative authority to other objects will be deemed to be in subordination to this use, unless a contrary intent be clearly expressed. So, where the operation of a telephone service worked by the earth circuit system, was interfered with by a street railway company's adoption of electricity as its motive power, it was held that the telephone company having no vested interest in or exclusive right to the use of the ground circuit or earth system as against a street railway company incorporated by statute, the telephone company could not recover by way of damages from the street railway company the cost of converting its earth circuit system—a change which was rendered necessary by the street railway company's adoption of electricity as its motive power. *Bell Telephone Co.* v. *Montreal Street Railway Co.*, Q.R. 6 Q.B, 223, affirming 10 S.C. 162.

—**Turnpike Road—Widening Streets—Powers of Corporation—By-law.**]—On a demand for the annulment of the by-law for the widening of Greene avenue—a main thoroughfare in the Town of Westmount—it was held that the arrangement between the municipality and the turnpike road trustees, by which the latter handed over to the municipality the care of turnpike roads within its limits in consideration of the municipality assuming certain obligations, was duly authorized by 42 & 43 V. c. 43 (P.Q.). The corporation of the municipality, in passing the by-law complained of, for the widening of a municipal thoroughfare, was acting within the limits of the authority conferred by its Act of incorporation and other statutes regulating the rights and duties appertaining to it as a municipal corporation The right of turnpike road trustees over a municipal street is limited to the road-bed, and so long as their power of repairing the road-bed and collecting tolls is not interfered with they have no right to oppose measures of public interest adopted by the municipal authorities, such as the widening of streets, laying of sewers, etc. Moreover, in the present case, the road-bed had been transferred by the turnpike trustees to the municipality from 1st Nov., 1890, so that when the by-law was passed the municipality had the actual control of the road. *Murray* v. *The Town of Westmount*, Q.R 6 Q.B. 345, affirming 9 S.C. 366. Affirmed by 27 S.C.R. 579.

—**Non-repair of Road — Inspector of Roads—Recovery of Penalty by—Art. 793 M.C.**]—The inspector of roads for the district in which a road is situate may recover from the municipal corporation having control of it the penalty imposed by Article 793 of the Municipal Code for neglect to maintain the roads of the municipality, especially where it is shown that the bad state of such road was not caused by the fault or negligence of the inspector.—The corporation cannot escape the penalty by showing that the road was repaired with all diligence and that its bad condition was due to causes for which they could not be blamed. *Leroux* v. *The Corporation of St Marc de Cournoyer*, Q.R. 10 S.C. 297.

—**Municipal Road—Property in Site of—Art. 740 M.C.—Indication of Road on Private Plan—Dedication —Verbalization without Expropriation or Indemnity—Art. 407 C.C.—Sheriff's Sale—Effect of.**]—In 1870 Lagueux conceded to Roberge a lot of land described as bounded on one side by St. Pierre Street indicated on the plan, a street opened by grantor for the use of his grantees, Roberge agreeing to maintain his share of such street and obey such municipal by-laws as might be enacted in regard to it. In 1882 Roberge sold the lot to Dionne, its front boundary being given as said St. Pierre Street. In 1889 the lot was sold upon Dionne by the sheriff and bought in by Roberge, (the deed describing it as situate on St. Pierre Street), and the latter sold it to plaintiff's wife's mother, who, in 1890, donated it to her daughter. About ten years after the first concession, Lagueux granted to Atkinson a right of way over the street, with permission to repair and pave it as he might think fit, and the latter in doing so, lowered the

level opposite the lot in question, then owned by Dionne, who built a wharf or retaining wall to protect his lot; the excavated roadway did not include the whole width of what had originally been the street, so the wharf covered that portion of it not lowered. In 1895, the corporation defendant, by *procés-verbal*, erected the road into a municipal street, making no provision, however, in the nature of expropriation or indemnity, and in 1896 the council by resolution authorized the road inspector to remove all obstructions existing on said street, notably opposite plaintiff's property, and that officer demolished the wharf. Plaintiff then brought the present action, possessory and in damages:—Held, that although the original grantor had indicated, in his concession deeds and plan, the ground in dispute as subject to a right of way in favour of grantees of lots fronting on the street he so opened, and it had been so used by them and by the public for a number of years, there had been no actual dedication of such ground as a public road, and the corporation defendant could not therefore verbalize it as a street and take possession, without due process of expropriation and the payment of an indemnity.—Even had the defendants acquired the road by dedication, their right to that portion of it covered by the wharf was extinguished by the sheriff's sale upon Dionne, they having filed no opposition: *Laclerc* v. *Phillips*, Q.R. 4 Q.B. 288 followed. *Lavertu* v. *Corporation of St Romuald*, Q.R. 11 S.C. 254.

—Accident Caused by Defective Grating in Sidewalk — Non-feasance and Misfeasance — Fact necessary to a Judgment—New Trial Ordered to Determine.]—Plaintiff while walking along one of the sidewalks of the Town of A., stepped upon a grating which had been placed over a catch-box or basin. The grating tilted under plaintiff's weight, causing his foot and leg to go into the hole, and inflicting a severe sprain. Plaintiff brought an action against the town for the injury sustained, and was awarded $300 damages, but the finding of the trial judge left it in doubt as to whether the accident was to be attributed to the original defective construction of the grating, or to negligence in maintenance and supervision:—Held, per Graham, E. J., and Meagher, J., Henry, J., concurring, that there must be a new trial, a material fact necessary to a judgment having been left undetermined. Per Townsend, J., Weatherbe, J., concurring:—Held, that plaintiff was entitled to retain his verdict, it appearing that it was the intention of the trial judge to hold that the accident was due to original defective construction. *Thomas* v. *Town of Annapolis*, 28 N.S.R. 551.

—Non-feasance Liability.]—Action for injuries sustained by plaintiff on account of obstruction in front of a house on Dorchester street in Charlottetown, P.E.I. The sidewalk at this place was properly constructed by the city in the usual way, and when complete it left an intervening space between the sidewalk and the lowest step of the stairs leading to the street door of the house in question. In order to cover this intervening space of the stairs and the sidewalk, the owner of the house placed a plank over it, without the knowledge of the city authorities. The plank projected out about four inches on the sidewalk (which was narrow) and was certainly an obstruction on the sidewalk. Plaintiff while passing along the street struck her foot against the projecting plank and sustained certain injuries:—Held, that the corporation was not liable for non-feasance. *McInnis* v. *City of Charlottetown*, 33 C.L.J. 297.

—Negligence—Way—Invitation—Land adjoining Highway.]—*Noverre* v. *City of Toronto*, 24 Ont. A.R. 109, affirming 27 Ont. R. 651 and C.A. Dig (1896), col. 352.

—New Sidewalk—Liability of Property-owner to Contribute towards Costs—Double Taxation.]—*The City of Halifax* v. *Lithgow*, 28 N.S.R 268. Reversed on appeal. See 26 S.C.R. 336 and C.A. Dig. (1896), col. 217.

—Accident — Snow on Highway — Non-repair — Jury Notice—Motion to Strike Out—Ont. Law Courts Act, 1896, s. 5.]

See PRACTICE AND PROCEDURE, XXVIII.

— Railway — Highway Crossing — Accident — Damages.]

See RAILWAYS AND RAILWAY COMPANIES, V.

VIII. LIABILITY TO OFFICIALS.

—Master and Servant—Hiring of Personal Services—Appointment of Officers—Summary Dismissal—Libellous Resolution—Statute, interpretation of—Difference in text of English and French versions—52 V. c. 79, s. 79 (Q.)—"A Discretion" — "At Pleasure."]—The charter of the City of Montreal, 1889 (52 Vict. c. 79), section 79, gives power to the City Council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised "*à sa discrétion*," while the English version has the words "*at its pleasure:*"—Held, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment, and the City Council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officers up to the date of such dismissal. *Davis* v. *City of Montreal*, 27 S.C.R. 539.

—Special Superintendent—Liability for Fees—Administrative or Judicial Functions—Art. 807 M.C.]—A municipal corporation which has appointed a special superintendent is bound to pay his disbursements and fees, and Art. 807 of the Municipal Code does not enable the corporation to discharge itself from the obligation it has assumed by virtue of its contract with the superintendent by deciding who are the interested parties who should pay these fees. If the corporation neglects or refuses to pay, the superintendent may demand payment with a conclusion that in case of default the corporation may be condemned itself to make payment. A corporation in appointing a special superintendent exercises administrative functions which cannot be retroactively turned in-

to judicial functions if the Council should afterwards adjudicate upon the merits of a question submitted to it. *Rielle* v. *The Corporation of Lachine*, Q.R. 6 Q.B. 467.

IX. License.

— Trade Licenses — Business Tax — Municipal Code.]—Trade licenses imposed by municipal councils must be proportioned to the extent of the business of each person bound to take a license.—Municipal councils cannot arbitrarily fix the extent of such business, but must have legal sources of information therefor – *Semble*: The valuation roll should contain information on the extent of the trade carried on by each merchant. *Corporation of Lauzon* v. *Boutin*, Q.R. 11 S.C. 403.

X. Local Improvements.

—Improvements—Increase of Cost.]—The extension of a street was petitioned for as a local improvement by the requisite number of owners, and the petition was acceded to by the council and a by-law passed for the purpose, the cost being estimated at $14,500, an assessment for that sum being adopted by the Court of Revision after notice to the persons interested. After some delay the council purchased the land required at a price much greater than the estimate and passed a by-law levying over $36,000 for the work. No work was done on the ground and no notice of the second assessment was given :—Held, that an opportunity of contesting the second assessment should have been given, and that the by-law was invalid. *Petman* v. *City of Toronto*, 24 Ont. A.R. 53.

—Statute, interpretation of—57 V. (P.Q.), c. 57—Retroactivity — Widening Streets.]—The word "widening" in a statute cannot be read to mean "opening" or "extension," in relation to street improvements; and even if the word "widening" was used by the legislature by inadvertence, instead of "opening," the court cannot correct such error. The Act, 57 Vict. (Que.) c. 57, s. 1, enacts that "notwithstanding any law to the contrary, the cost of widening (certain streets mentioned) shall be paid as follows, etc." And section 3 enacts that "the commissioners named for each of the said expropriations are hereby empowered to act in order to give effect to the present law." The preamble to the Act refers to a petition presented in 1892, asking for the establishment of a uniform rule :—Held, that the statute was retroactive as regards the apportionment of the cost of the improvement, for the streets named in the Act, even where an assessment roll had been completed under the law previously in force. *Joseph* v. *The City of Montreal*, Q.R. 10 S.C. 531.

—Repair of Road—Reconstruction — By-law — Liability of Frontagers for Cost.]—A portion, sixty feet wide, of a road in front separating the property of P. from a river, was broken up by the action of the waters, and the municipal corporation having restored it to its original condition by means of a wall of stones taken from the bottom of the river and dried, with a filling (*remplissage*) in stone, wood and earth, took action against P. to recover from him the cost of the work No by-law or *procès-verbal* had been passed in the matter :—Held, that the works in question were works of reconstruction and not of repair, and that P., especially in the absence of a by-law or *procès-verbal*, was not obliged to defray the cost. *The Corporation Belœil* v. *Prefontaine*, Q.R. 11 S.C. 81.

XI. Municipal Elections.

—Deputy Returning Officer—Irregularity—Consolidated Municipal Act, 1892, s. 175.]—At an election of county councillors one of the deputy returning officers for a town in a county was absent from his booth on three separate occasions during polling-day. The first and second absences were on account of illness; on the third occasion he went out to dinner and voted in another place The first absence was for about ten minutes, during which the booth was locked up, with the poll-clerk and constable inside, in charge. The deputy swore that no voter came in till he returned. In his second and third absences the town clerk took his place. During the second no votes were cast, but during the third there were several. The town clerk placed the deputy's initials on the back of the ballots given to such voters, and the consequence was that these ballots were upon a judicial investigation identified and separated, and it appeared that during the third absence nine votes were cast for the relator and nine for the respondent. Upon the whole the respondent had two more votes than the relator, and by section 13 of the County Councils Act (1896), there being two county councillors to be elected, a voter could give both his votes to one candidate. There was no suggestion of bad faith :—Held, that the absences and what was done during the absences did not affect the result of the election, and, applying the saving provisions of section 175 of the Consolidated Municipal Act (1892), that it should not be declared invalid. *The Queen ex rel. Watterworth* v. *Buchannan and Cuthbert*, 28 Ont. R. 352.

—Returning Officer—Duties—Refusal to deliver Ballot Paper to Voter—Wilful Act—Absence of Malice or Negligence—Liability—Consolidated Municipal Act, 1892, secs. 80, 168.]—The plaintiff's name was properly entered on the last revised assessment roll of a municipality as a tenant of real property of the value entitling him to vote at a municipal election under Consolidated Municipal Act, 1892, sec. 80, and was entered on the voters' list, but after the final revision thereof, he ceased to be the tenant and to occupy the property, although he continued to reside in the municipality and was the owner of real property as a freeholder of the value entitling him to vote and was such freeholder at the time of an election. At such election, he demanded a ballot paper and was willing to take the oath for freeholders, but the defendant, the returning officer, refused to furnish him with a ballot or to permit him to vote unless he took the oath required for tenants :—Held, that the defendant's duties were merely ministerial, and that an action for a breach thereof was maintainable without any proof of malice or negli-

gence; that the plaintiff was entitled to vote at such election, and that the defendant's refusal to allow him to vote constituted a breach of his duty, and rendered him liable to the penalty given by section 168, and also to damages at common law. *Wilson* v. *Manes*, 28 Ont. R. 419.

—**Incorporated Village—Leasehold qualification for Councillor — Consolidated Municipal Act, 1892, sec. 73.**]—The respondent was rated as lessee of land assessed for $800, which, with other land, worth at least $1,000, was mortgaged by the landlord for $800 in priority to the lease:—Held, that the respondent was duly qualified as a candidate for the office of councillor of an incorporated village, as, under 55 Vict. (Ont.) c. 42, s. 73, the mortgage was not to be taken into account in diminution of the value, not being on his leasehold interest:—Semble, also, that, in qualifying, the respondent would be entitled to have the mortgage marshalled so that recourse should be first had to the other lands included in it, and that it should be apportioned according to the respective values of the different properties, and so the qualification was sufficient. *The Queen ex rel. Ferris* v. *Speck*, 28 Ont. R. 486.

—**County Councillor—Property qualification—"Actual Occupation"—Partnership—Ont. Consolidated Municipal Act, 1892—55 V. c. 42, s. 73.**]—Held, that "actual occupation" in section 73 of the Consolidated Municipal Act, 1892, 55 Vict. c. 42 (O.), which provides, with regard to the property qualification of candidates, that where there is actual occupation of a freehold rated at not less than $2,000, the value for the purpose of the statute is not to be affected by incumbrances, does not necessarily mean exclusive occupation; and that when two partners were in occupation of partnership property, each should be deemed in actual occupation of his interest in the property within the meaning of the above enactment: *Regina ex rel. Harding* v. *Bennett*, 27 O.R. 314, followed as to the latter point. *The Queen ex rel. Joanisse* v. *Mason*, 28 Ont. R. 495.

—**Voters' Lists — Finality of—Qualification of Voter—Municipal Election.**]—Voters' lists are final as to the qualification to vote at a municipal election in the Province of Ontario. *The Queen ex rel. McKenzie* v. *Martin*, 28 Ont. R. 523.

—**Quo Warranto—Relator—Withdrawal—Intervention—Substitution.**]—Where the relator in a proceeding in the nature of a *quo warranto* under the Ontario Consolidated Municipal Act, 1892, desires to withdraw, the court has no power, under the statute or otherwise, to compel him to go on against his will, or to substitute a new relator. The power given by section 196 is to substitute a new defendant, not a relator. *The Queen ex rel. Masson* v. *Butler*, 17 Ont. P.R. 382.

—**Election of Municipal Officer—Proceedings to Annul — Jurisdiction of Superior Court—Arts. 346, 348, M.C.**]—The Superior Court has no jurisdiction to hear and determine a contestation of an election to a municipal office on the ground of violence and "non-observance of the necessary formalities" which, by Arts. 346 and 347 of the Municipal Code, are grounds of contestation. By Art. 348 the examination and decision of such contestations are vested exclusively in the Circuit Court or Magistrate's Court of the county. The want of a quorum of duly qualified councillors to vote at an election is "non-observance of a necessary formality" and the forcible expulsion of three qualified councillors and the secretary-treasurer is "violence" within the meaning of Art. 346. *Lajeunesse* v. *Nadeau*, Q.R. 10 S.C. 61.

—**Nova Scotia Municipal Act—Presiding Officer — Two Candidates returned — Swearing in — Mandamus:—Councillor de facto — Crown Procedure Rule 55 (N.S.).**—H., having been appointed to act as returning officer at the election of a municipal councillor, formally resigned the office, whereupon the deputy warden and three councillors, under the authority of the Municipal Act, appointed M. to act in his stead. H. then delivered to M. the papers in his possession as presiding officer, including the nomination papers of both candidates, and a protest signed by one of the candidates, C., against the nomination of the other candidate, R., on the ground of disqualification. Subsequently H., treating his resignation as ineffective, obtained his resignation paper from the municipal clerk, took it away, and proceeded to hold a poll. A number of votes having been polled for R. and none for C., H. declared R. elected. M., acting under his appointment by the deputy warden and councillors, held no poll, on the ground that R. was disqualified, and returned C. as duly elected. At a meeting of council, on January 14th, 1896, both R. and C. applied to be sworn in, and, no action having been taken, on the following day R. served the warden and clerk of the municipality with a notice of motion for a mandamus to compel them to swear him in. On the 18th of January C. was sworn in as councillor for the district in question, and continued to act as such. No notice of motion was served upon him until two months after he was sworn in:—Held, that the principle that mandamus will not lie, where the office sought is full, was not affected by the fact that notice of the application was given prior to the date at which C. was sworn in, the return of the writ having reference to the state of affairs as it existed when the writ was served:—Held, also, that if the warden and clerk had power before the service upon them, to effectively swear in C., that power could not be affected by a mere notice of motion, and that therefore when C. was sworn in, he would become a councillor *de facto*:—Held, further, that under Crown Rule 55 it was necessary to serve C. as the person principally, if not wholly, interested in opposing the motion, and that the fact that he was not served until two months after the time at which he was sworn in, and commenced to act, was a complete answer to the motion, which therefore, must be refused, even if the warden and clerk had failed to show any reason why mandamus should not be allowed. *The Queen* v. *Burke*, 29 N.S.R. 227.

—**Disclaimer—Manitoba Municipal Act, ss. 215, 247, 252.**]—Held, notwithstanding section 215 of the Municipal Act, that an election petition

should not be filed complaining of the return of a candidate for a municipal office after he has handed in a disclaimer under section 249, unless the seat is claimed for the petitioner or some other candidate: *Regina* v. *Murney*, 5 U.C.L.J.O.S. 87, and *Regina* v. *Blizard*, L.R. 2 Q.B. 55, distinguished.—The words "complained of" in section 249 are equivalent to "petitioned against." *Paterson* v. *Brown*, 11 Man. R. 612.

—Personation—Penalty—Mode of Enforcing.]—(Per McDougall, Co.J.) the penalty imposed under the Ontario Municipal Act of 1892, section 210, is recoverable by civil action only, and not by proceedings on summary conviction. *The Queen* v. *Strong*, 33 C.L.J. 203.

—Ontario Municipal Act, 1892, s. 188—Election—Jurisdiction of County Court.]—County Courts have no jurisdiction to try election cases under the Ontario Municipal Act, 1892, section 188, and proceedings must be instituted in the High Court. (Per Merrill, Co.J.) *The Queen ex rel. Hudgin* v. *Rose*, 33 C.L.J., 398.

—Quo Warranto—Qualification of Councillor—Assessment Roll—Finality.]—The rating in the last revised assessment roll is final and conclusive as to the property qualification of a candidate. (Merrill, Co.J.) *The Queen ex rel. Hudgin* v. *Rose*, 33 C.L.J. 692.

XII. Municipal Taxes.

—Appeal—Jurisdiction—Expropriation of Lands—Assessments—Local Improvements—Future Rights—Title to Lands and Tenements—R.S.C. c. 135, s. 29 (b); 56 Vict. c. 29 s. 1 (D.).]—A by-law was passed for the widening of a portion of a street up to a certain homologated line, and for the necessary expropriations therefor. Assessments for the expropriations for certain years having been made whereby proprietors of a part of the street were relieved from contributing any proportion to the cost, thereby increasing the burden of assessment on the properties actually assessed, the owners of these properties brought an action to set aside the assessments. The Court of Queen's Bench affirmed a judgment dismissing the action. On an application for leave to appeal:—Held, that as the effect of the judgment sought to be appealed from would be to increase the burden of assessment not only for the expropriations then made, but also for expropriations which would have to be made in the future, the judgment was one from which an appeal would lie, the matter in controversy coming within the meaning of the words "and other matters or things where the rights in future might be bound," contained in sub-section (*b*) of section 29 of the Supreme and Exchequer Courts Acts, as amended by 56 Vict. c 29, s. 1. *Stevenson* v. *The City of Montreal*, 27 S.C.R. 187.

—Assessment and Taxation—Exemptions—Real Property—Chattels—Fixtures—Gas Pipes—Highway—Title to Portion—Legislative Grant of Soil—11 V. c. 14 (Can.)—55 V. c. 48 (Ont.)—"Ontario Assessment Act, 1892."]—Gas pipes which are the property of a private corporation laid under the highways of a city are real estate within the meaning of the "Ontario Assessment Act of 1892," and liable to assessment as such, as they do not fall within the exemptions mentioned in the sixth section of that Act. The enactment effected by the first and thirteenth clauses of the company's Act of incorporation (11 Vict. c. 14), operated as a legislative grant to the company of so much of the land of the streets, squares and public places of the city as might be found necessary to be taken and held for the purposes of the company and for the convenient use of the gas works, and when the openings where pipes may be laid are made at the place designated by the city surveyor, as provided in said charter, and they are placed there, the soil they occupy is land taken and held by the company under the provisions of the said Act of incorporation. The proper method of assessment of the pipes so laid and fixed in the soil of the streets, squares and public places in a city is that it be made separately in the respective wards of the city in which they may be actually laid, as in the case of real estate. *The Consumers Gas Co.* v. *City of Toronto*, 27 S.C.R. 453.

—Limitation of Annual Rate—"School Rate"—Debentures for School House—Consolidated Municipal Act, 1892, 55 V. c. 42 (O.).]—The annual amount required to pay for debentures issued under a by-law passed for the purchase of a school site and the erection of a school house thereon, comes within the term "school rates" and is excluded from the two cents, to which by section 357 of the Consolidated Municipal Act, 1892, 55 Vict. c. 42 (O.), the annual rate permitted to be levied by municipalities, is limited. *Foster* v. *The Village of Hintonburg*, 28 Ont. R. 221.

—Sale for Taxes—Mode of Preventing Sale—Prohibition—Railway—Seizure of Part.]—As a sale for municipal taxes, which is made by a simple notice given to the sheriff by the secretary-treasurer of the municipality, can only be stopped by means of an order of the Superior Court, recourse may be had, in the absence of a special procedure being prescribed by the Code of Civil Procedure, to a writ of prohibition which is only, in fact, an order given by the Superior Court to suspend the proceedings. A wharf made part of a railway, but from which the rails and sleepers have for several years been taken up, cannot, especially when the railway has been directed upon another road and the remains of the old road sold, be regarded as an integral part of the railway. In the present case such a wharf was properly seized for municipal taxes. *Montreal, Portland and Boston Railway Co.* v. *The Town of Longueuil*, Q.R. 10 S.C. 182, affirming on the first point and reversing on the second, 9 S.C. 3. And C.A. Dig., (1896) col. 298.

—Highway—Private Way—Widening Streets—Special Assessments—Res judicata.]—*Stevenson* v. *City of Montreal*, 27 S.C.R. 593.

See also Assessment and Taxes.

XIII. Notice of Action.

—Notice—General Issue—Breach of Contract in not Supplying Pure Water—Inapplicability of Statutory Defences—35 V. (Ont.) c. 79, ss. 28, 35—41 V. c. 41, ss. 1, 3—R.S.O. c. 73, ss. 1, 13, 14, 15.]—Action against a municipal corporation for not providing a proper supply of pure water for the plaintiff's elevator, according to agreement, and for negligently and knowingly allowing the water supplied to them to become impregnated with sand, which greatly damaged the elevator:—Held, that the action was one for breach of contract, and therefore the statutory defences and the defence of want of notice of action, etc., under statutes giving the same protection as that given to justices of the peace in the execution of their duties, were inapplicable. *The Scottish, Ontario, and Manitoba Land Company* v. *The Corporation of the City of Toronto*, 24 Ont. A.R. 208.

XIV. Public Works.

—Cours d'eau — County Works.]—Works done upon a watercourse traversing two parishes of the same county are county works. They should be done in conformity with the provisions of the *procès verbal;* if not no action will lie against the county council to recover the cost. *Gravel* v. *The County of Laval*, 3 Rev. de Jur. 479, Loranger, J.

—Diversion of corporate funds to Unlawful Purpose—Injunction—Parties to Action.]—The Municipal Corporation of the City of Victoria, having by special resolution appropriated $5,200 to defray the cost of constructing a bridge over navigable water, part of a public harbour within the city limits, did not obtain the sanction of the Dominion Government to the work, and proceeded to execute it in such a way as to interfere with navigation. Upon information by the Attorney-General of Canada, an injunction was granted restraining the continuation of the work. This action was then brought by the plaintiff individually as a ratepayer to restrain the corporation from expending any part of the $5,200 in payment for the work:—Held, that an injunction should be granted restraining the application of the money to any further construction of the bridge, but refused as to payment for work *bonâ fide* done upon that part of it already completed:—Held, as to the form of the action: That the Provincial Attorney-General was not a necessary party; that plaintiff should sue on behalf of himself and all other ratepayers, except the aldermen; that both the corporation, and the members thereof responsible for the illegal action, should be parties defendants. *Elworthy* v. *City of Victoria*, 5 B.C.R. 123.

XV. Retired Officials.

—Pension to Retired Official—Payment of Debts—Receiver—Equitable Execution R.S. N.S. (5th series) c. 104—Acts 1889, c. 9, ss. 26, 29.]—Defendant under the provisions of the N.S. Acts of 1895 c. 43, was entitled to a pension of $1,000 per annum, during his life, to be assessed annually, upon the rate payers of the City of Halifax, and to be paid out of the city revenue. The pension was given in consideration of services which had been rendered defendant as Stipendiary Magistrate of the city, on his retirement from that office, when his official connection with the city ceased. Defendant was not liable to be called upon to perform any further duty for the city, either official or personal. There was nothing in the Act, under which provision for payment of the pension was made, prescribing the time and mode of payment to defendant, nor was there anything to prevent him from assigning it:—Held, that defendant's pension could be made available for the payment of his debt:—Held, also, that as defendant was residing out of the jurisdiction of the court, and had no property within the jurisdiction, and the ordinary modes of execution were not available, plaintiffs were entitled to the appointment of a receiver:—Held, also, that since the passage of the Judicature Act (R S., 5th series, c. 104), the court has power to grant equitable execution by the appointment of a receiver, at the instance of a judgment creditor, against debts and sums of money payable to the judgment debtor, in cases where the garnishee process is not applicable:—Held, also, that this was clearly a case for the exercise of such power, defendant being resident out of the jurisdiction, and having no property within the jurisdiction out of which payment of the amount of the judgment could be enforced:—Semble, that the County Court had power to grant such equitable relief under the Acts of 1889, c. 9, ss. 26, 29. *The Imperial Bank of Canada* v. *Motton*, 29 N.S.R. 368.

XVI. Territorial Limits.

—City separated from County—Maintenance of Court House and Gaol—Care and maintenance of Prisoners—55 V. c. 42, secs. 469, 473, (Ont.)]—No compensation can be awarded by arbitrators to a county municipality in respect of the use by a city separated from that county of the court house and gaol unless the question is specifically referred to them by a by-law of each municipality—A claim for compensation for the care and maintenance of prisoners stands, as far as the meaning to be given to the word "city" is concerned, upon the same basis as a claim for compensation for the use of the court house and gaol. The right to, and mode of arriving at the amount of, compensation for the use of the court house and gaol considered: *York* v. *Toronto*, 21 U.C. C.P. 95, considered. *In re County of Carleton and City of Ottawa*, 24 Ont. A.R. 409.

—Magistrate's Conviction—Jurisdiction—Habeas Corpus—Burden of Proof—Judicial Notice.]—By the Acts of 1895 (Nova Scotia) c. 89, s. 1, the municipality of the county of Pictou was created a police division. By the Acts of 1895, c. 3, s. 1, the municipality of the county of Pictou was defined to be what at that time was known as the County of Pictou. By section 2 all cities or incorporated towns were cut out of this area, and the term "county" was defined as that part of the county or district within the

territorial jurisdiction of the county council. In the schedule to the Act "Hopewell" was described as polling section No. 17, and entitled to return two municipal councillors to the municipal council of the municipality of Pictou. Defendant was committed to the Pictou county jail on a warrant signed by the stipendiary magistrate for the municipality, the offence for which he was convicted being stated as having been committed at Hopewell in the county of Pictou:—Held, refusing an application for a writ of *habeas corpus*, that chapter 3 of the Acts of 1895 read as a whole, sufficiently showed jurisdiction in the convicting magistrate:—Held, also, that there being jurisdiction *primâ facie*, it was incumbent upon the applicant to show that there was some other part of the county called "Hopewell" which was not within the polling district:—Held, further, that the matter was a public one affecting the government of the county, of which the Court would take judicial notice. *The Queen* v. *McDonald*, 29 N.S.R. 160.

MUNICIPAL COUNCIL.

Vacant Seat — Reinstatement — Mandamus — De facto Officer.]—A councillor whose seat has been illegally declared vacant may proceed by *mandamus* to have himself reinstated, but he may also attack the resolution by an ordinary action and demand and obtain its nullity. Before taking such action it is not necessary to inscribe *en faux* against the resolution; the *faux* may be set up by a principal demand as well as by an incidental proceeding. The quality of an official *de facto* cannot be attributed to a councillor whose nomination was illegal and null and a fraud known to the public to which he was a party. *Rouleau* v. *The Corporation of St. Lambert*, Q.R. 10 S.C. 85, affirming 10 S.C. 69.

—Municipal Councillor—Quo Warranto—De facto Officer—Art. 120 M.C., meaning of.]—To constitute a *de facto* officer, the person holding the office must have the reputation of being the officer he assumes to be, though not a good officer in point of law. The true meaning of Art. 120 of the municipal code, which enacts that "no vote given by a person filling illegally the office of member of the council, and no act in which he participates in such quality, can be set aside solely by reason of the illegal exercise of such office" is that, if the corporate body or the individual corporators,—the mandators of the municipal council,—allow a man to act as councillor who is not legally such, it is only right that they should be bound by his acts in so far as such acts affect persons who have in good faith thought him to be the rightful holder of the office But the article cannot be construed to validate, for all purposes and as respects everyone, the official acts of a councillor whose nomination was publicly known to be illegal. *Lacasse* v. *Labonté*, Q.R. 10 S.C. 104, affirming 10 S.C. 97.

—Resignation of Councillor—Appointment by Lieutenant-Governor.]—By Art. 337, par. 6 of the Municipal Code, the resignation of a councillor, to be valid, must be accepted by the council. However, if four councillors resign at the same time, so that there is no longer a quorum in the council, Art. 338 M. C. will apply, and the Lieutenant-Governor may replace them without their resignations being accepted by the council and without waiting over the delay of two months mentioned in Art. 118 M.C. One of the four councillors cannot withdraw his resignation after the Lieutenant-Governor, even without waiting for the two months, has appointed some person in his place. *Thivierge* v. *Fortier*, Q.R. 11 S.C. 373.

—Election of Councillors—Eligibility—Payment of Taxes—Jurisdiction—Arts. 208, 283, 348, M.C.]—When a councillor gives in his resignation at a council meeting, the council may immediately name his successor at this same meeting, if all the other councillors are present, without infringing the provisions of Art. 208 M.C.—Under Art. 283 M.C. to be eligible as municipal councillor it is necessary to be an elector, and to be an elector it is necessary amongst other things, to have paid all the municipal taxes and school taxes due at the time.—The exclusive jurisdiction conferred upon the Circuit Court, and upon a Justice of the Peace, by Art. 348 M.C., only extends to contestations respecting the nominations of councillors made by the electors (Art. 346 M.C.) and not to those made by the Council. *Boissounault* v. *Couture*, Q.R. 11 S.C. 523.

—Resolution—Application to Annul—Charter of Montreal—Notice of Inscription—Delay—Arts. 235, 1004 C.C.P.—52 V. c. 79 s. 144 (P.Q.).]

See PRACTICE AND PROCEDURE, XI.

NAVIGATION.

Trespass—Interference with submarine cable—Notice—Damages.]—By the regulation passed by the Quebec Harbour Commissioners in 1895 and subsequently approved by the Governor-in-Council and duly published the Commissioners prohibited vessels from casting anchor within a certain defined space of the waters of the harbour. Some time after this regulation had been made and published, the Commissioners entered into a contract with the plaintiffs whereby the latter were empowered to lay their telephone cable along the bed of that part of the harbour where vessels had been prohibited from casting anchor. No marks or signs had been placed in the harbour to indicate where the cable was laid. The defendant vessel, in ignorance of the fact that the cable was there, entered upon the prohibited space, and cast anchor. Her anchor caught in the cable and in the effort to disengage it the cable was broken:—Held, that she was liable in damages therefor. *The Bell Telephone Company* v. *The Brigt. "Rapid,"* 5 Ex. C.R. 413.

NEGLIGENCE.

I. Bailee for Hire.

— Pasturage — Agister — Ordinary care and prudence.]—A bailee for hire as an agister, engages, by his contract to pasture cattle, to exercise *ordinary* care and prudence in the keeping of them. So, where a horse was drowned in a pond or quagmire existing, to plaintiff's knowledge, on the pasture ground, and the sole imprudence charged against the defendant was not having fenced around it—it appearing that such places were not usually fenced—he was held not liable for the loss. *McKeage* v. *Pope*, Q.R. 10 S.C. 459.

II. Carriage of Goods.

—Carriage of Goods—Merchant vessel—Care of passengers' luggage—Responsibility—Condition on ticket.]—W. took passage by the S.S. Amarynthia for Glasgow, and embarked with her baggage at the port of Montreal to await the sailing of the ship in the evening. She charged the captain to place in safety a valise containing jewellery and articles for the toilet, but he replied that it was in safety in the saloon where some of the boat hands had carried it. During the night the boat was filled with people in charge of some animals on board and W.'s valise was taken from where it had been put, carried to another part of the boat and broken open and its contents stolen :—Held, that the captain became civilly responsible to W. by neglecting to put the valise in a place of safety, especially at a time when a great number of persons were moving about in the ship and there was reason to fear the presence of thieves. A clause providing for non-responsibility for the care of baggage of passengers, indorsed on the ticket for the trip, did not suffice to free the captain from the responsibility he had thus incurred by his negligence, and the provisions of R S.C. c. 82 (2) could not, in such case, cover the responsibility resulting from this negligence. W. had a lien on the ship for the amount of the damages sustained and could seize it before judgment by *saisie conservatoire*. *Ward* v. *McNeil*, Q.R. 11 S.C. 501.

III. Contributory Negligence.

—Vicious Dog—Personal Injuries by—Liability of Owners—Entering building without permission.]—P., a carter, having delivered some parcels to V went into the latter's stable to satisfy a necessity of nature and was bitten by a vicious dog which V. had confined there. V. had not fastened the door of the stable but had posted up a notice warning persons of the danger of entering on account of the dog. P. could not read and entered the stable without permission :—Held, that V. was not, under the circumstances, responsible in damages for the injury inflicted by the dog upon P. *Prud'homme* v. *Vincent*, Q.R. 11 S.C. 27.

—Accident—Proximate Cause—Effect of contributory negligence—Damages—Railway Co.]—A party who establishes his right to damages resulting from an accident, does not lose his recourse against the author because he may himself have been imprudent, but it is then necessary to ascertain the immediate cause of the accident so as to reduce the amount of the damages by taking into account the negligence or imprudence of the victim and making him responsible for his share of them. This is especially the case when the accident happens upon the line of a railway which traverses the streets of a town, and it is evident that a child, an old man, a drunken man, or, in fact, anyone who is looking in the wrong direction and does not seem to hear the warning, persists in walking on the track. It is then the duty of the driver of the car to stop it in order to prevent an accident, and he will incur responsibility, both on his own part and on behalf of his employers, notwithstanding the imprudence of the victim and without a reduction of the consequent indemnity, if, being able to stop the car he fails to do so, especially if his car is proceeding at a greater rate of speed than is permitted by the by-laws of the town. *Jacquemin* v. *The Montreal Street Railway Co.*, Q.R. 11 S.C. 419.

IV. Injury to Adjoining Proprietor.

—Fire — Negligence — Clearing Land.]—In the month of August, defendant set out fire on his own land for the purpose of clearing it. The fire continued to burn till October, when, in consequence of a very high wind, sparks were carried to the plaintiff's land and set fire to some ties and posts stored thereon :—Held, that the question of the defendant's liability for negligence should be determined having regard to the circumstances existing in October, and not to those existing in August. *Beaton* v. *Springer*, 24 Ont. A.R 297.

V. Lessee of Premises.

—Landlord and Tenant—Loss by Fire—Cause of Fire—Civil Responsibility—Legal Presumption—Rebuttal of—Onus of Proof—Hazardous Occupation—Arts. 1053, 1064, 1071, 1626, 1627, 1629 C.C.]—To rebut the presumption created by Article 1629 of the Civil Code of Lower Canada it is not necessary for the lessee to prove the exact or probable origin of the fire or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (*en bon père de famille*), and that

the fire occurred without any fault that could be attributed to him or to persons for whose acts he could be held responsible. *Murphy* v. *Labbé*, 27 S.C.R. 126, affirming Q.R. 5 Q.B. 88.

VI. Master and Servant.

— Defective Machinery — Evidence for Jury.] — T. was employed as a weaver in a cotton mill and was injured while assisting a less experienced hand, by the shuttle flying out of the loom at which the latter worked, and striking her on the head. The mill contained some 400 looms, and for every forty-six there was a man, called the "loom fixer," whose duty it was to keep them in proper repair. The evidence showed that the accident was caused by a bolt breaking through the shuttle coming in contact with it, and as this bolt served as a guard to the shuttle the latter could not remain in the loom. The jury found that the breaking of the bolt caused the accident, and that the "loom fixer" was guilty of negligence in not having examined it within a reasonable time before it broke. T. obtained a verdict, which was affirmed by the Court of Appeal:—Held, that the "loom fixer" had not performed his duty properly; that the evidence as to negligence could not have been withdrawn from the jury; and that, as there was evidence to justify their finding, the verdict should stand. Per Gwynne, J., that the finding of the jury that the negligence consisted in the omission to examine the bolt was not satisfactory, as there was nothing to show that such examination could have prevented the accident, and there should be a new trial. *The Canadian Coloured Cotton Mills Co.* v. *Talbot*, 27 S.C.R. 198.

— Master and Servant — Injuries sustained by Servant — Responsibility — Contributory Negligence — Protection of Machinery.] — Where an employee sustains injuries in a factory through coming in contract with machinery, the employer, although he may be in default, cannot be held responsible in damages, unless it is shown that the accident by which the injuries were caused was directly due to his neglect. *Tooke* v. *Bergeron*, 27 S.C.R. 567, reversing judgment of Court of Review and Q.R. 9 S.C. 506.

—Use of dangerous Machinery— Improper instructions—Responsibility.]—Y., a boy sixteen years old, was employed in a factory belonging to A. A belt connecting a transmitting shaft *(arbre de transmission)* with a centrifugal fan in said factory having been broken, one of the employees proceeded to lace it (*au laçage*) and in doing so threw the strap from the pulley on to the shaft. The employee was aided in this operation by Y., whom he caused to hold the strap to prevent it coming in contact with the shaft. Suddenly Y. was lifted up and rolled by the strap around the shaft. His arm was broken and he suffered other injuries. In an action by Y.'s father against A. it did not appear how the accident happened, but no negligence on the part of Y. was established, he having been engaged in performing the duty to which he had been assigned:—Held, that the accident was attributable to the fact that the revolving shaft was in motion, and although the operation of the lacing (*laçage*) of a strap in like circumstances might generally be performed without accident yet it was dangerous, and the fact that it was allowed to be done by a young man devoid of experience, and to whom his superior had given wrong directions, above all without stopping the shaft, constituted a fault for which the proprietor of the factory was responsible. *Archbald* v. *Yelle*, Q.R. 6 Q.B. 334.

—Incapacity—Contractor—Liability to employee —Ignorance of rules of Art.—Art. 1053 C.C.]—As every person is responsible for damages caused by his incapacity, a contractor who has undertaken the construction of a sewer in land composed of *déchets* and who, from ignorance of how to expel it by ventilation of the trenches or by other means which knowledge of the rule his art should suggest to him, has neglected the carbonized gas which necessarily accumulates at the bottom of these trenches, is civilly responsible for the death of one of his workmen by asphyxiation.—The fact that the said workman and his companions had undertaken to deepen the trenches within a certain time, and for a fixed sum per day, does not affect the responsibility of the contractor who has employed them. *Dagenais* v. *Houle*, Q.R. 11 S.C. 225.

—Lord Campbell's Act—Volenti non fit injuria— New Trial.]—In an action brought by the father of an employee of the defendants who was killed in an accident alleged to have occurred through the negligence of the defendants, the trial judge instructed the jury that "when a workman knows that the employment is a dangerous or risky one, he has nothing to complain of, and even admitting, as plaintiff contends, that the work T was engaged to do was dangerous, and that the danger was known to the defendants, it was likewise known to T (the deceased), and in that case, the plaintiff would be disentitled to recover. In short, as a matter of law, knowledge of the danger of his employment on the part of the deceased, in itself, would operate as a bar to the plaintiff's claim:"—Held, that the verdict for defendant must be set aside for misdirection, and a new trial ordered. Per Meagher and Townshend, JJ., that the case should have been put to the jury to ascertain whether or not the deceased freely and voluntarily, and with full knowledge and comprehension of the nature and extent of the risk he ran, impliedly agreed to incur it. *Tobin* v. *New Glasgow Iron, etc. Company*, 29 N.S.R. 70 affirmed by Supreme Court of Canada, Nov. 7th, 1894.

— Master and Servant — Cause of Accident — Evidence.]—See Master and Servant, V (b).

VII. Medical Practitioner.

—Malpractice—Damages—Exposure of body to Jury—New Trial—Misconduct of Juror.]

See Practice and Procedure, XXVIII.

VIII. Municipal Corporations.

—Municipal Corporation—Snow and Ice on Sidewalks—By-law—Construction of Statute—55 V. c. 42, s. 531 (Ont.)—57 V. c. 50, s. 13—Finding of Jury —Gross Negligence.]—A by-law of the City of Kingston requires frontagers to remove snow

from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings, which therefore became higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being severely injured brought an action of damages against the city and obtained a verdict. The Municipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks; notice of action in such case must be given, but may be dispensed with on the trial if the court is of opinion that there was reasonable excuse for the want of it and that the corporation has not been prejudiced in its defence: — Held, that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair; *Cornwall* v. *Derochie* (24 S.C.R. 301) followed; that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the Act; that "gross negligence" in the Act means very great negligence, of which the jury found the corporation guilty; and that an appellate court would not interfere with the discretion of the trial judge in dispensing with the notice of action. *The City of Kingston* v. *Drennan*, 27 S.C.R. 46, affirming 23 Ont. A.R. 406; C.A. Dig. (1896) col. 228.

IX Proximate Cause.

—Personal Injuries—Runaway Horse—Accident—Damages—Art. 1055 C.C.]—The wife of B. was knocked down and badly hurt by the horse of H. which was running away, having been frightened. B. brought an action for $2,500 damages.—Held that the accident to B.'s wife happened by chance (*par cas fortuit*), and the different circumstances which led to it could neither have been foreseen nor prevented by H., who was nowise in fault. The rule in Art. 1055 C.C. is founded upon a presumption of fault, negligence or imprudence; whence it follows that if the owner of the animal can destroy this presumption he ceases to be responsible. Even if there was some fault on the part of his servant, H. should not be condemned to vindictive damages, and the sum ($400) offered in this case, and received by B., was a sufficient compensation for the real damages which he had suffered. *Bedard* v. *Hunt*, Q.R. 10 S.C. 490, affirming 9 S.C. 6 at p. 13.

— Responsibility — Damage caused by Wire charged with Electric current—Fault—Proximate cause.]—The plaintiff's horse was killed by stepping on a wire heavily charged with electricity. This wire was owned by the defendant company, but it had become heavily charged with electricity in consequence of its being broken and having fallen upon a trolley wire of the street railway company which had erected its trolley system after the erection of the telephone system. The Court found, on the evidence, that the breaking of the wire and its fall across the trolley wire of the street railway company were due solely to the fault and negligence of the employees of the street railway company:—Held, that the immediate or proximate cause of the accident, that is to say, the breaking of the wire and the charging of it with electricity, not being due to the fault of the defendant, but to the fault of the street railway company the plaintiff had no recourse against the defendant. *Morgan* v. *The Bell Telephone Co.*, Q.R. 11 S.C. 103.

—Park Commissioners—Non-Feasance—Liability of Crown.]—See Crown.

X. Railway Company.

—Sparks from Engine—Evidence for Jury.]—In an action against a railway company for damages for injury to property set on fire by sparks from an engine, the plaintiff relied on the fact that there was a heavy up-grade on the track in close proximity to the property destroyed, and that a properly constructed engine would not throw sparks to the distance between the track and such property. It was shown that the engine was in good condition and all the usual precautions had been taken to avoid injury from sparks:—Held, that there was no evidence of negligence to be submitted to the jury. *Fournier* v. *The Canadian Pacific Railway Co.*, 33 N.B.R. 565.

—Contract between two Companies—Stipulation for Immunity—Liability for Accident—Fault or Negligence — Onus probandi — Arts. 1028, 1029, 1676 C.C.—51 & 52 V. c. 29, s. 246 (D.)]

See Railways and Railway Companies, V.

XI. Ship-Owner.

—Carrier—Bill of Lading—Defective Stowage of Cargo — Stipulation excluding Liability for Negligence—Art. 1676 C.C.— R.S.C. c. 82.]—The ship-owner is responsible for the destruction of cargo during a storm, when such destruction results from improper stowage. Under the terms of Art 1676 C.C. the ship-owner cannot validly contract himself out of responsibility for his negligence. The delivery of a bill of lading by the shipping company with special conditions limiting its liability, was equivalent to a notice to plaintiff that it intended to limit its liability accordingly And nothing in the Dominion Statute 37 V. c. 25 re-enacted in R.S.C. c. 82, conflicts with Art 1676 of the Civil Code. *Rendell* v. *Black Diamond Steamship Co.*, Q.R. 10 S.C. 257, affirming 8 S.C. 442.

XII. Voluntary Risk.

—Negligence— Unsafe Premises — Risk voluntarily incurred.]—An employee of a company which had contracted to deliver coal at a school building went voluntarily to inspect the place where the coal was to be put on the evening preceding the day upon which arrangements had been made for the delivery, and was accidentally injured by falling into a furnace pit in the basement on his way to the coal-bins. He did not apply to the School Board or the caretaker in charge of the premises before making

his visit:—Held, that in thus voluntarily visiting the premises for his own purposes and without notice to the occupants, he assumed all risks of danger from the condition of the premises and could not recover damages. *Rogers* v. *The Toronto Public School Board*, 27 S.C.R. 448, affirming 23 Ont. A.R. 597; C.A. Dig. (1896) col. 232.

See also MUNICIPAL CORPORATIONS.
" PUBLIC WORK.
" RAILWAYS AND RAILWAY COMPANIES.
" SHIPPING.

NEW TRIAL.

Nominal Damages.] — The Court will not grant a new trial to enable the plaintiff to obtain nominal damages only. *Haines* v. *Dunlop*, 33 N.B R. 556.

NEXT FRIEND.

Infant suing by next Friend—Costs.] See COSTS, IV.

NIAGARA FALLS PARK.

Niagara Falls Park Commissioners—Status—50 V. c. 13, ss. 3, 4, 10—Fences—Highways Liability of Crown.]—See CROWN.

NON-SUIT.

Writ of Summons—Clerical Error—Non-suit—Costs.]—See PRACTICE AND PROCEDURE, L.

NOTARY PUBLIC.

Affidavit—Notary—Seal.]—An affidavit for use in the court, sworn before a notary public in Ontario, should be authenticated by his official seal. *Boyd* v. *Spriggins*, 17 Ont. P.R. 331.

—Fees—Tariff—Implied Contract.]—A notary public cannot enforce payment of full tariff fees for his services when the customary and well-known prices charged by notaries in his locality are under the tariff. The usage constitutes an agreement between notaries and their clients by which the former are bound. *Hebert* v. *Matte*, Q.R. 10 S.C. 4.

— Notary — R.S.Q. Art. 3640 — Art. 1221 C.C. — Execution of Deed—Personal interest.]—Where a notary is the person really interested in the contract, though his name does not appear, he cannot validly act in his professional capacity as notary to execute the deed in relation thereto. A deed of transfer so executed by him, nominally to his brother but in reality to himself, cannot be invoked by him.—Art. 1221 of the Civil Code which says that "a writing which is not authentic by reason of any defect of form, or of the incompetency of the officer, avails as a private writing, if it have been signed by all the parties," is intended for the protection of the parties where the notary is incompetent and cannot be invoked by a notary who has been guilty of a violation of R.S.Q. 3640. *Cardinal* v. *Boileau*, Q.R. 11 S.C. 431.

—Powers — Obligation — Unilateral Deed — Acceptance for Creditor.]—See OBLIGATION.

NOTICE OF TRIAL.

See PRACTICE AND PROCEDURE, XLVI.

NOVATION.

See DEBTOR AND CREDITOR, XI.

NUISANCE.

Negligence—Nuisance—Highway—Drain Tiles—Contractor—Respondeat Superior.]—A township council appointed by resolution two of the defendants, who were members of the council, a committee to rebuild a culvert under a highway within the municipality. These two defendants employed another defendant as overseer of the work and two other defendants to draw drain tiles, which were required for the work, to the place in question. The work was done by the day and while it was being done the tiles in question, which were of a large size and of a light gray colour, were piled on the highway near the culvert. The plaintiffs' horse shied when passing the tiles and upset the vehicle, and the plaintiffs were injured:—Held, per Burton, J.A., that the act in which the defendants were engaged being in itself lawful they could be regarded only as servants of the council, and that the maxim *respondeat superior* applied:—Held, per Maclennan, J.A., that leaving the tiles at the side of the highway was not negligence and did not constitute a nuisance, and that no action lay. *McDonald* v. *Dickenson*, 24 Ont. A.R. 31.

— Property — Injury Caused by Neighbour — Rights of Owner.]—The owner of real property is obliged to suffer the reasonable inconveniences which result from neighbourhood, and these inconveniences vary in kind and in extent according to the circumstances of place and quality of the population. But inconveniences of neighbourhood must be reduced by the care and prudence of neighbours to the lowest possible limit. So, in a case of alleged encroachment by a manufacturing concern upon the rights of a property owner in the neighbourhood, by the emission of thick smoke and vapour, the question to be considered is whether the inconvenience proved to be more than the proprietor ought reasonably, as a neighbour, to be obliged to endure, and this question will be

decided in the affirmative where it appears that the inconvenience was susceptible of great reduction, if not entire removal. *Carpentier* v. *La Ville de Maisonneuve*, Q.R. 11 S.C. 242.

— Livery Stable — Offensive Odours — Future Damages.]—*Drysdale* v. *Dugas*, Q.R. 6 Q.B. 278, affirming 5 S.C. 418. Affirmed on appeal 26 S.C.R. 20; C.A. Dig. (1896) col. 235.

— Municipal Corporations— Highways— Negligence—Nuisance.]

See MUNICIPAL CORPORATIONS, VII.

NULLITY.

Assignment — Prête-nom — Notice — Registration—Action to annul—Parties in Interest.]—The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties. *Guertin* v. *Gosselin*, 27 S.C.R. 514.

—Sale—Donation in form of—Gifts in contemplation of Death—Mortal Illness of Donor—Presumption of Nullity—Validating Circumstances —Dation en paiement—Arts. 762, 989 C.C.]—During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee and the consideration acknowledged by the deed was never paid:—Held, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of Article 762 of the Civil Code, as the circumstances tended to show that the transaction was actually for good consideration (*dation en paiement*,) and consequently legal and valid. *Valade* v. *Lalonde*, 27 S.C.R. 551.

—Evidence—Estoppel—Arts. 311 and 1243 C.C.]

See EVIDENCE, II.

OBLIGATION.

Execution Before Notary—Unilateral Deed—Acceptance — Power of executing Notary to accept for Creditor.] — Where an obligation without hypothec is executed before a notary, the deed being unilateral, and of a kind not requiring acceptance by the creditor, the fact that the executing notary accepted so far as he could for the creditor, who was not present, does not affect the validity of the obligation. In any case the institution of an action by the creditor would constitute an acceptance. But, semble, if a hypothec had been concerned, the presence of the notary as a contracting party might cause the deed to lose its authenic form (R.S.Q. Art. 3640). *St. Germain* v. *Birtz dit Desmarteau*, Q.R. 10 S.C. 185.

OPPOSITION.

Appeal — Collocation and Distribution — Hypothecs—Arts. 20, 144 and 761 C.C.P.—Assignment — Notice — Registration — Prête-nom — Action to annul Deed — Parties in Interest—Incidental Proceedings.]

See JUDGMENT OF DISTRIBUTION.

ORDER-IN-COUNCIL.

Boundary Lines — Survey — Re-survey — Dominion Lands Act, s. 129—52 V. (D.) c. 27, s. 7—Ratification by Order-In-Council—Road Allowance.]—See CONSTITUTIONAL LAW, III (b).

— Customs Drawback — Materials for Ships — Order-in-Council—Refusal of Minister to grant Drawback—Remedy.] —See REVENUE.

PARENT AND CHILD.

Maintenance of Children—Father in Receipt of unseizable Income — Prospective Rights of Child.]—The obligation of the parent to maintain his daughter does not cease with her marriage and removal from the paternal domicile, if she be in actual need and her husband be unable to provide for her wants. This obligation is not affected by the circumstance that the father's income is *insaisissable* by the terms of the will under which he receives it, nor does the fact that the daughter may inherit money at some future time from her grand-father's succession deprive her of her right to maintenance in the meantime. *Pratt* v. *Pratt*, Q.R. 10 S.C. 134.

—Boarding-house Keeper—Claim for Board and Lodging—Maintenance.]—Where a person continues to lodge and board a child with the knowledge and consent of its father, and the latter, on being applied to for a settlement of the account, requests a postponement on the ground that he is not then in a position to attend to the matter, a legal obligation to pay for the maintenance of the child exists. *McGoun* v. *Cuthbert*, Q.R. 10 S.C. 158.

PARISH COURT.

New Brunswick Parish Courts—Judgments—Review.]—See APPEAL, IV.

PARLIAMENTARY ELECTIONS.

Election Petition — Service—Copy— Status of Petitioner — Preliminary Objection.]—On the hearing of preliminary objections to an election petition to prove the status of the petitioner, a list of voters was offered with a certificate of the Clerk of the Crown in Chancery, which,

after stating that said list was a true copy of that finally revised for the district, proceeded as follows: "And is also a true copy of a list of voters which was used at said polling division at and in relation to an election of a member of the House of Commons of Canada for the said electoral district * * which original list of voters was returned to me by the returning officer for said electoral district in the same plight and condition as it now appears, and said original list of voters is now on record in my office:"—Held, that this was, in effect, a certificate that the list offered in evidence was a true copy of a paper returned to the clerk of the Crown by the returning officer as the very list used by the deputy returning officer at the polling district in question, and that such list remained of record in possession of said clerk. It was then a sufficient certificate of the paper offered being a true copy of the list actually used at the election. *Richelieu Election Case* (21 S.C.R. 168) followed. *Winnipeg Election Case. Macdonald Election Case*, 27 S.C.R. 201.

—Appeal — Election Petition — Preliminary Objection—Delay in Filing— Objections struck out —Order-in-Chambers—R.S.C. c. 8, s. 50.]—The Supreme Court refused to entertain an appeal from the decision of a judge in chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections within s. 50 of the Controverted Election Act, and if it were no judgment on the motion could put an end to the petition. *West Assiniboia Election Case*, 27 S.C.R. 215.

—Appeal—Preliminary Objections—R.S.C. c. 9, ss. 12 and 50—Order dismissing Petition—Affidavit of Petitioner.] — The appeal given to the Supreme Court of Canada by the Controverted Elections Act (R.S.C. c. 9, s. 50), from a decision on preliminary objections to an election petition, can only be taken in respect to objections filed under section 12 of the Act. No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue. *Marquette Election Case*, 27 S.C.R. 219.

—Election Petition — Preliminary Objections— Affidavits of Petitioner — Bonâ-fides — Examination of Deponent—Form of Petition—R.S.C. c. 9— 54 & 55 V. c. 20, s. 3 (D).]—By 54 & 55 Vict. c. 20, s. 3, amending The Controverted Elections Act (R.S.C. c. 9), an election petition must be accompanied by an affidavit of the petitioner "that he has good reason to believe and verily does believe that the several allegations contained in the said petition are true." The petitioner in this case used the exact words of the Act in his affidavit. Held, that the respondent to the petition was not entitled on the hearing on preliminary objections to examine him as to the grounds of his belief. Held, further, that it was not necessary that the petition should be annexed to or otherwise identified by the affidavit, as in case of an exhibit, the references in the affidavit being sufficient to show what petition was referred to.—It is no objection to an election petition that it is too general (as by the Act it may be in any prescribed form) if it follows the form that has always been in use in the province. Moreover, any inconvenience from generality may be obviated by particulars. *Lunenburg Election Case*, 27 S.C.R. 226.

— Election Petition — Preliminary Objections — Service of Petition — Bailiff's Return — Cross-examination — Production of Copy.]—A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member, is a sufficient return. It need not state by whom the copies were certified. Arts. 56 and 78 C.C.P.—Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence. *Beauharnois Election Case*, 27 S.C.R. 232.

—Controverted Election—Corrupt Treating— Agent of Candidate—Limited Agency—Trivial or Unimportant Corrupt Act—54 & 55 V. c. 20, s. 19 (D.)—Benefit of.]—During an election liquor was given to an elector who at the same time was asked to vote for a particular candidate:—Held, that this was corrupt treating under section 86 of the Dominion Election Act, R.S.C. c. 8.—If a political association is formed for a place within the electoral district, and it is not shown that there was any restriction on the members to work for their candidate within the limits of that place only, they are his agents throughout the whole district.—Though the only corrupt act proved against a sitting member was of a trivial and unimportant character, and he had at public meetings warned his supporters against the commission of illegal acts, yet as such act was committed by an agent whom he had taken with him to canvas a certain locality and there were circumstances which should have aroused his suspicion, he should have given a like warning to this agent, and not having done so he was not entitled to the benefit of the amendment to the Controverted Election Act in 54 & 55 V. c. 20, s. 19. *West Prince Election Case*, 27 S.C.R. 241.

—House of Commons—Recount by County Judge — Injunction — Jurisdiction — Disobedience — Motion to Commit—Contempt.]—The House of Commons of Canada alone has the right to determine all matters not relegated to the courts concerning the election of its own members, and their right to sit and vote in Parliament.—The preliminary recount provided for by R.S.C. c. 8, section 64, is a delegation *pro tanto* of Parliamentary jurisdiction and the County Judge, as the presiding officer, is one designated by Parliament, and is responsible to the House for the right performance of his duties.—On an application to commit for contempt of court a barrister, who had in argument, as agent of a candidate, urged a County Court Judge to disregard an injunction staying proceedings granted by the High Court of Justice for Ontario and to proceed with the recount, and a returning officer who had, under the direction of the County Judge, produced the ballots for the purpose of the recount, notwithstanding that the injunction prohibited him from so doing:—Held, that the plaintiff, the defeated candidate, had no particular

specified legal right as applicant for a recount which entitled him to claim a specified legal remedy in the courts; that the High Court had no jurisdiction to enjoin the prosecution of proceedings connected with controverted elections of the Dominion, such as a recount under section 64, R.S.C. c. 8; that a County Judge having jurisdiction, and having issued his appointment for a recount, the procuring of an injunction from the High Court was an unwarrantable attempt to interfere with the due course of the election; and that the injunction, being one the court had no jurisdiction to grant, was extra judicial and void, and might properly be disobeyed. *McLeod* v. *Noble*, 28 Ont. R. 528.

—Election Law—Assessment Roll—R.S.Q. Art. 173 —52 V. c. 4 (P.Q.)—53 V. c. 7 (P.Q.).]—In order that the name of an owner, occupant or tenant may be placed upon the list of electors, it is necessary for it to have been upon the assessment roll from which the electoral list is made. *Saucier* v. *The Corporation of St Moise*, Q.R. 11 S.C. 300.

—Election Petition — Notice — Preliminary objections.]—Failure by the petitioner to serve upon the defendant a notice of the presentation of an election petition is fatal and the petition in such case should be dismissed with costs.—There is no signification if the original of the notice is not on the record and the bailiff declares that he exhibited to the defendant the copy which is found on the record. —A motion made on the day of pronouncing judgment upon preliminary objections, without notice to the opposite party, asking that the case be continued in order to amend the return of the bailiff by stating that notice of presentation of the petition was served upon the defendant who received the original, a certified copy of which was annexed to the petition on which was indorsed the return of the bailiff who exhibited said copy to the defendant at the time of the service, was rejected as the petitioner could not, at such stage of the proceedings, re-open his *enquête* and prove that service had been regularly made. *Bernatchez* v. *Lillois*, Q.R. 11 S.C. 360.

—Quebec Election Act of 1895—List of Electors—Owners, Occupants and Tenants — Valuation Roll.] — Under the "Quebec Election Act, 1895," and its amendments, the names of all owners, occupants and tenants of real property, must appear as such on the valuation roll before they can be placed on the list of electors. *Burnett* v. *East Farnham*, 3 Rev. de Jur. 382. Lynch J.

— Petition — Dominion Controverted Elections Act—Affidavit of Petitioner—54 & 55 V. (D.) c. 20, s. 3 — Examination of Petitioner — Abuse of Process.]—The affidavit required by 54 & 55 Vict. (D.) c. 20, s. 3, to be made by the petitioner, and presented with his petition that he has good reason to believe, and verily does believe that the several allegations contained in the said petition are true, must be a true affidavit, and if it be shown that the petitioner has no good reason for such belief all proceedings on the petition will be stayed for want of jurisdiction in the court: - Held, also, that the respondent might take the objection within a reasonable time after he discovered it, notwithstanding the time had passed for filing preliminary objections under section 12 of the Dominion Controverted Elections Act. That under section 2, sub-section (J.) the Court has the same power at any time to correct an abuse of its process, or to punish a fraud attempted to be practised upon it, as it would have in an ordinary case within its jurisdiction.—The petitioner was examined under section 14 of the Act upon his affidavit, and practically admitted the falsity of his statement therein. but *quære*, whether the examination on the affidavit was not *ultra vires*. (Per Taylor, C.J.) even if the examination on the affidavit was unauthorized by the statute, no objection was taken to it at the time, and besides the Court can of its own motion at any time direct an inquiry as to any fraud practised upon it, or any improper use of its process: *Dungey* v. *Angove*, 2 Ves. 304 referred to *Re Marquette Election: King* v. *Roche*, 11 Man. R. 381.

—Dominion Controverted Elections Act — Preliminary Objections — Affidavit of Petitioner—54 & 55 V. (D.) c. 20, s. 3—Examination of Petitioner —Abuse of Process.]—This was a motion to stay the proceedings on an election petition on the same grounds as those relied on in re *Marquette Election*, 11 Man. R. 381. The petitioner, on his examination on his affidavit presented with the petition, stated that before making the affidavit there were read to him statements made by a number of persons as to transactions connected with the election and he gave several instances of corrupt practices which had been related to him by certain persons whose names he gave, and he said he believed these statements were correct:—Held, that it could not be said that his affidavit was untrue, although his evidence was far from satisfactory, and a judge might feel he could not have made the affidavit on the same information that the petitioner had. *Re MacDonald Election*: *Snyder* v. *Boyd*, 11 Man. R. 398.

—Evidence—Ballot—Compelling witness to disclose for whom he voted—Dominion Elections Act, s. 71.]—In a prosecution of a deputy returning officer under the Dominion Elections Act for fraudulently putting into the ballot box divers papers purporting to be ballot papers, but to his knowledge not being ballot papers, and being other than the ballot papers which he was authorized by law to put in the ballot box:—Held, notwithstanding section 71 of the Act, that voters may be required at the trial to state for whom they have marked their ballots: *The Queen* v. *Beardsall*, 1 Q.B.D. 452, followed. Such evidence cannot be ruled out as secondary evidence of the contents of written documents, because under the Act there is no way of identifying the particular ballot marked by any witness. *The Queen* v. *Saunders*, 11 Man. R. 559.

—Appeal — Election Petition — Preliminary Objection—Delay in Filing—Objections struck out —Order in Chambers—R.S.C. c. 8, s. 50.]

See APPEAL, IV.

—Appeal—Preliminary Objections—R.S.C. c. 9, ss. 12 and 50—Order Dismissing Petition—Affidavit of Petitioner.]—See APPEAL, IV.

—Recount by County Court Judge—Injunction—Jurisdiction of High Court Judge.]

See INJUNCTION.

—Withdrawal of Petitioner—Petition for Leave to Intervene—Grounds.]—

See PRACTICE AND PROCEDURE, XXIII.

PAROCHIAL LAW.

Assessment — Homologation — Opposition — Chose Jugée — Repayment to Parishioner — Interest.]—When the commissioners for the erection of civil parishes have homologated *un acte de repartition* and rejected an opposition of a parishioner to said *acte*, their judgment has not the authority of *chose jugée* between the *synaics* and such parishioner. The parishioner who has paid the assessment under an *acte* thus homologated in spite of his opposition may, several years after, claim repayment from the *syndics* on proof that he was improperly assessed. In this case the parishioner was not allowed interest on the amount he had paid. *Syndics de St. David de L'Auberivière* v. *Lemieux*, Q.R. 6 Q.B. 378, affirming, except as to interest, the judgment of the Court of Review 30th Nov., 1885, which reversed 10 Q.L.R. 325.

—Parish—Freeholder — Resident — Right to be Present at Parochial Meeting—Wrongful Expulsion—Arts. 3408, 3427, R.S.Q.]—A person whose name appears on the assessment roll as representing an immovable property in a parish, and whose assessment thereon, for the construction of the church, has been paid, has an apparent right to be present at a meeting of the freeholders of the parish, called for the purpose of discussing, among other things matters connected with the building of the church and the acts of the trustees, although at the date of meeting the immovable represented by him had been sold at sheriff's sale.—A resident of the parish, who is of the Roman Catholic religion, and of the age required by law, is entitled to attend a meeting convened for such purpose, as well as a freeholder, but the former has no right to vote.—Police constables in the employ of the city, who are present for the purpose of preserving order at a meeting of parishioners, are not justified, at the mere request of the chairman, in expelling a person present at such meeting, who is conducting himself peaceably, and who claims that he is lawfully entitled to be present, and has an apparent right; and for such illegal expulsion the city as well as the chairman who gave the order therefor, is responsible in damages. *Walsh* v. *The City of Montreal*, Q.R. 10 S.C. 49, affirming 8 S.C. 123.

—Erection of Church—Resignation of Syndics—Restoration—Confirmation by Civil Commissioners—Jurisdiction of Circuit Court—R.S.Q. Arts. 3403, 3404.]—When all the trustees (*syndics*) appointed to execute an ecclesiastical order for the building of a church have resigned, and their resignations have been accepted by the bishop, the corporation constituted by these trustees ceases to exist, and can only be re-established by the observance of all the formalities prescribed for its formation, and especially by obtaining, from the commissioners for the erection of civil parishes, the confirmation of the election of the new trustees. However, the fact that the trustees chosen to replace those resigned, and who have publicly exercised the duties devolving upon them since their appointment, have not had their election confirmed by the commissioners, does not involve the nullity of their acts of administration, but exposes them to dismissal by the commissioners upon petition presented under R.S.Q. arts. 3403 and 3404, and assuming the corporation of trustees to be irregularly constituted, the Circuit Court has no authority to adjudicate upon such illegality, which is a matter within the exclusive jurisdiction of the Superior Court. *Syndics of the Parish of St. Gabriel* v. *McShane*, Q.R. 11 S.C. 309.

—New Cemetery—Opening—Orders of Competent Authority—Injunction—Proceedings on Application—Intervention on Appeal.]

See PRACTICE AND PROCEDURE, XIX.

PARTICULARS.

See PRACTICE AND PROCEDURE, XXXIV.

PARTIES.

I. GENERALLY.

Testamentary Succession—Action for Possession.]—In a demand to be put in possession of a testamentary succession, against an executor who has had its administration, all the heirs must be made plaintiffs; failure of any of them to be joined is fatal and the defendant is not obliged to bring them into the cause.—If there are two executors this demand cannot properly be made against one even with the consent out of court (*extra-judiciaire*) of the other; the action should be brought against the two executors jointly. *Davidson* v. *Cream*, Q.R. 6 Q.B. 34, affirmed on appeal 27 S.C.R. 362

—Insolvent Company — Winding-up Order — Action to Annul Payment of Debt by—R.S.C. c. 129.]—Where an insolvent company has paid a debt within thirty days before the issue of a winding-up order an action to annul the payment should be in the name of the liquidator, not in that of the company. *Blandy* v. *Kent*, Q.R. 6 Q.B. 196, affirming 10 S.C. 255.

II. Intervention.

—**Procedure—Right of Party already in Case to Intervene.**]

See Practice and Procedure, XXIII.

III. Joinder.

— **Insolvency — Action by Assignee — Setting Aside Preference.**]—Per Osler, J. A.—The debtor is not a proper party to an action by his assignee against the creditor to set aside a preferential transfer. *Beattie* v. *Wenger*, 24 Ont. A.R. 72.

— **Will — Beneficiaries — Separate Estate.**] — Semble, per Meredith, C. J., that where, in an action against a married woman on a promissory note the plaintiff claims that she is entitled to separate estate under a certain will, the court will determine the point without requiring the other beneficiaries under the will to be added as parties. *Briggs* v. *Willson*, 24 Ont. A.R. 521.

— **Separate Causes of Action — Joinder.**]— The statement of claim alleged that two of the defendants, by fraudulent representations, induced the plaintiffs to enter into an agreement for the purchase of a horse; that one of these defendants, in the name of his partner, a third defendant, having agreed to become a co-partner with the plaintiffs in the purchase, made a fraudulent profit by way of commission out of the transaction; that these three defendants transferred promissory notes, made by the plaintiffs with the intention of carrying out the transaction to the fourth and fifth defendants, who had notice of the fraud, and claimed to have the agreement declared fraudulent and void and ordered to be cancelled; to have the notes declared void and ordered to be cancelled; or to have the first three defendants ordered to indemnify the plaintiffs against the notes; damages for the false representations; or that the defendants alleged to have received a commission should be ordered to account to the plaintiffs therefor. After the parties had been for more than six months at issue, the defendants applied to strike out the statement of claim as embarrassing:—Held, that the transaction was one that should be investigated in all its parts on the one record, and that no peculiar difficulty would arise in dealing with it as a whole, and then following such details as might be pertinent. *Crerar* v. *Holbert*, 17 Ont. P.R. 283.

— **Amendment — Adding Plaintiff — Attorney-General—Final Judgment.**]—A motion made by the plaintiffs after the judgment of this Court (23 Ont. A R. 566) for leave to amend by adding the Attorney-General as a party plaintiff in order to meet the difficulty raised by the judgment that the plaintiffs had no *locus standi*, was refused, upon the ground that such an amendment could not be made after final judgment. *Johnston* v. *Consumers' Gas Company of Toronto*, 17 Ont. P.R. 297.

—**Club — Unincorporated Company— Liability— Application to add — Affidavit — Costs.**]—By analogy to the old practice where a plea in abatement for non-joinder of co-contractors was pleaded, a defendant when moving to stay proceedings until the co-contractors are added as parties, should show by affidavit the names and residences of the persons alleged to be joint contractors whom he seeks to have added, and the same liability as to costs, in case persons are added who turn out not to be liable, should be entailed upon him.—In an action begun against an incorporated company, as a partnership, to recover a sum for costs paid by the plaintiffs, an order in Chambers allowing the plaintiffs to amend by adding as defendants certain members of the executive committee of the company, and to charge them in the alternative as personally liable by reason of their having sanctioned the arrangement between the plaintiffs and the association, was affirmed without prejudice to the defendants applying to add parties. *Aikins* v. *Dominion Live Stock Association of Canada*, 17 Ont. P.R. 303.

—**Misjoinder of Plaintiffs—Ont. Rule 324—Striking out—Leave to bring new Action—Ante-dating Writs—Terms—Statute of Limitations.**] —Upon the defendants' application, in a case of misjoinder of plaintiffs, under Rule 324, the usual order is that all proceedings be stayed till election is made as to the plaintiff who shall proceed, and that the names of the others be struck out. But there is no power to direct that the rejected plaintiffs shall be allowed to issue writs of summons for their respective causes of action against the defendants *nunc pro tunc* of the date when the writ in the original action was issued, there being no power to alter the date of the process: *Clarke* v. *Smith*, 2 H. & N. 753, *Nazer* v. *Wade*, 1 B. & S. 728, and *Doyle* v. *Kaufman*, 3 Q.B.D. 7, 340, followed. Nor can a term be imposed that in the new actions the defendants be restrained from setting up the Statute of Limitations: *Smurthwaite* v. *Hannay*, [1894] A.C. 494, 506, specially referred to. *Huthnance* v. *Township of Raleigh*, 17 Ont. P.R. 458.

—**Misjoinder of Defendants — Distinct causes of Action.**]—The plaintiff's claim as against her husband, one of the defendants, was for specific performance of an ante-nuptial contract to transfer to her certain property of various kinds, and as against the several other defendants, to whom the husband had made transfers of such property, or in whose hands it was, for relief by way of declaration, cancellation, and order for payment:—Held, that, although the plaintiff's right to each cause of action was historically connected with each of the others, that connection related only to her rights; the rights of each set of the defendants were as distinct as they were before the events which conferred upon the plaintiff the rights which she asserted; and such causes of action could not properly be joined in one action: *Smurthwaite* v. *Hannay*, [1894] A.C. 494, and *Sadler* v. *Great Western Railway Co.*, [1896] A.C. 450, followed. *Faulds* v. *Faulds*, 17 Ont. P.R. 480.

—**Common right of Action.**—Two or more persons complaining of the same cause of damage and invoking a right of action proceeding from the same act of the defendant (e.g. the illegal exposure to public view of a photograph of plaintiffs), and the principal prayer of whose

conclusions is common to all, may join in the same action. *Boyd* v. *Dagenais*, Q.R. 11 S.C. 66.

IV. Misjoinder and Nonjoinder.

—Misjoinder—Form of Objection—Exception to Form—Defence en droit.]—Misjoinder should be pleaded by an exception to the form (*exception à la forme*) and not by *defense en droit*. *Lévesque* v. *Garon*, Q.R. 10 S.C. 514

V. Necessary Parties.

—Municipal Corporation—Diversion of Corporate Funds to Unlawful Purpose—Injunction—Parties to Action.]—The municipal corporation of the city of Victoria having by special resolution appropriated $5,200 to defray the cost of constructing a bridge over navigable water, part of a public harbour within the city limits, did not obtain the sanction of the Dominion Government to the work, and proceeded to execute it in such a way as to interfere with navigation. Upon information by the Attorney-General of Canada, an injunction was granted restraining the continuation of the work. This action was then brought by the plaintiff individually as a ratepayer to restrain the Corporation from expending any part of the $5,200 in payment for the work:—Held, that the Provincial Attorney-General was not a necessary party; that the plaintiff should sue on behalf of himself and all other ratepayers, except the aldermen; that both the Corporation and the members thereof responsible for the illegal action, should be parties defendants. *Elworthy* v. *City of Victoria*, 5 B.C.R. 123.

VI. Third Party Procedure.

—Third Party Procedure—Jurisdiction—Costs.]—In an action by the Crown upon two Customs export bonds, defendants applied for an order to bring in a third party, and it appeared that such bonds were given by the defendants personally, and did not indicate that the person against whom the third party order was sought was in any way liable to the Crown in respect of said bonds. The defendants, however, claimed that in giving the bonds they were only acting as agents for such person, and that he had agreed to indemnify them against the payment thereof:—Held, that the court had no jurisdiction to try the issue of indemnity between the defendants and such proposed third party, and that the application should be dismissed with costs to the Crown in any event. *The Queen* v. *Finlayson*, 5 Ex. C.R. 387.

— Accident — Action for Damages — Defence — Recourse in Warranty.]—Where in an action to recover the value of a horse alleged to have been killed through the negligence of the defendant, the latter pleads that the accident was not due to any fault of his, and so has a direct means of resisting the action, he has no right to call in, *en garantie*, a third party who, he claims, was the person really responsible for the loss incurred by the plaintiff. *Morgan* v. *The Bell Telephone Co.*, Q.R. 11 S.C. 127.

PARTITION.

Will—Construction of—Donation—Substitution—Partition, per stirpes or per capita—Usufruct—Alimentary Allowance—Accretion between Legatees.]—See Substitution.

—Tenants in Common—Partition—Protection of Grantee of one Tenant—Laches.]

See Tenants in Common.

PARTNERSHIP.

I. Actions By and Against.

Individual Debt—Payment out of Partnership Funds—Authority—Action—Ont. Rule 317.]—The defendants were indebted to the plaintiffs' firm, consisting of two partners, and one partner was individually indebted to the defendants. This partner wrote two letters to the defendants, one over his own signature and the other over the firm name, stating that he had paid certain sums due by him to the defendants by giving the defendants credit in the books of his firm. This was done without the authority of the other partner, but the entries were actually made in the books of the firm, to which the other partner had access, though he did not in fact know of the entries until after the firm had been dissolved. Accounts were afterwards rendered to the defendants without any claim being made in respect of the sums credited. This action was brought after the dissolution, in the name of the firm, for the price of goods sold:—Held, that the defendants were not entitled to credit for the sums referred to: *Leverson* v. *Lane*, 13 C.B. N.S. at p. 285, *In re Riches*, 4 DeG. J. & S. at p. 585, and *Kendal* v. *Wood*, L.R. 6 Ex. 243, applied and followed:—Held, also, that Rule 317 authorized the bringing and sustaining of the action in the name of the partnership existing at the time the goods were furnished to the defendants. *Fisher & Co.* v. *Robert Linton & Co.*, 28 Ont. R. 322.

—Action Against Firm—Place of Service—Art. 60 C.C.P.]—Every partnership is presumed to have a place of business where service of the writ and declaration in an action against it must be made. If it has none the bailiff's return of the service must state the fact, otherwise service upon one of the partners, under Art. 60 C.C.P., is not a valid service upon the partnership. *Underwood* v. *Malone*, Q.R. 10 S.C. 435.

—Chattel Mortgage—Application of Proceeds—Partnership—Estoppel—Practice—Counterclaim—Issues involving same Matters—Abandonment—Appeal—Referee.]—M. & C., while carrying on business as partners, gave a chattel mortgage

to plaintiffs as security for goods supplied to them. Subsequently M. retired, leaving the assets of the firm in the hands of C., who gave a further chattel mortgage to plaintiffs, covering the goods included in the former mortgage as well as goods supplied to C. personally after M.'s retirement:—Held, that neither M. nor C. was estopped from claiming to have the proceeds of the sale of goods covered by the first mortgage applied in reduction of the partnership debt, as security for which that mortgage was given. Defendants counterclaimed, reciting the first chattel mortgage, and asking that an account might be taken of the proceeds, and of the expenses in connection with the sale, alleging that the expenses were, in part, unauthorized, disputing the appropriation of proceeds to C.'s account, and claiming payment of the balance of proceeds of the sale to defendants, after deducting the amount due to plaintiffs:—Held, that the circumstances detailed would have justified a suit in equity under the old practice, and therefore justified a counterclaim now, and that the counterclaim was the correct mode of asking to have the account taken:—Held, also, that where several items of expenses connected with the sale were not proved or were not justified by the evidence, particularly the solicitor's bill for costs and disbursements, the items were a proper subject for consideration by a referee. *Fisher* v. *McPhee*, 28 N S.R. 523.

II. Formation.

— Mandat — Remuneration — Share in Profit — Société.]—See Mandat.

III. Liability of Partners to Third Persons.

—Insolvent Estate—Valuing Securities—Promissory Note — "Only Indirectly or Secondarily Liable."]—A partner who has individually joined as a maker in a promissory note of his firm for their accommodation is not "indirectly or secondarily liable" for the firm to the holder within the meaning of 59 Vict. (Ont.) c. 22, s. 1, s.s. 1, but is primarily liable, and in claiming against his insolvent estate in administration, the holder need not value his security in respect to the firm's liability. *Bell* v. *The Ottawa Trust and Deposit Company*, 28 Ont. R. 519.

—Payment of Debt to one Partner—Acceptance of Goods for Money.]—If a debt is owing to a firm, payment by the debtor to any one partner extinguishes the claim of all, each partner being ostensibly the agent of all the rest to get in the firm debts. It follows that, a partner can effectually release and give a valid receipt for such debt, unless it be shown that he acted in fraud of his partners, and in collusion with the debtor.—A debtor can pay a partnership debt to one of the partners by an equivalent for cash, unless it can be shown that the debtor is in collusion with the partner: *Niemann* v. *Niemann*, 43 Ch. D., 205 discussed. *Van Wart* v. *Chritchley*, 17 C.L.T. (Occ. N.) 316.

IV. Rights and Liabilities of Partners between Themselves.

— Joint and Separate Creditors — Administration.]—In the administration by the Court of the insolvent estate of a deceased partner, the surviving partner is entitled to rank for a balance due to him in respect of partnership transactions and partnership debts paid by him, when, apart from his claim, there would be no surplus available for partnership creditors. *In re Ruby, Trusts Corporation of Ontario* v. *Ruby*, 24 Ont. A.R. 509.

—Action for Account—Recovery for Work and Labour where original Action fails—Pleading.]—Plaintiff sued for wages and for an accounting, under an alleged partnership. The trial judge found that the partnership had been terminated, and that there was no agreement to pay wages in addition to profits. Plaintiff appealed. It appeared on the argument that, after the termination of the partnership, plaintiff did certain work in superintending operations for defendants:—Held, that plaintiff would be entitled to recover for this work, but, as the statement of claim was not framed to meet that view, and there was no evidence of the amount or value of the work upon which judgment could be entered if an amendment were allowed, the appeal must be dismissed with costs. *McDonald* v. *McKeen*, 28 N.S.R. 329.

—Mercantile Partnership—Dissolution by Death—Right of Surviving Partner to Remuneration for Winding up Business.]—Upon the dissolution of an ordinary mercantile partnership by death, the surviving partner is not entitled, as a matter of law, in the absence of special agreement, to be paid for his personal services in winding up the business and disposing of the assets. *Butler* v. *Butler*, 29 N.S.R. 145.

—Partnership Action—Particulars—Application for—Close of Pleadings—Discretion.]

See Practice and Procedure, XXXIV.

PATENTS OF INVENTION.

I. Infringement.

—Actions taken in different Courts—Interim Injunction—Nemo bis vexari debet pro uná et eádem causâ.]—Where the judge of the Exchequer Court was asked to grant an interim injunction to restrain an infringement of a patent of invention, and it appeared that similar proceedings had been previously taken in a provincial court of concurrent jurisdiction which had not been discontinued at the time of such application being made, this court refused the application upon the principle that a defendant ought not to be doubly vexed for

one and the same cause of action. *The Auer Incandescent Light Manufacturing Company* v. *Dreschel*, 5 Ex.C.R. 384.

—**Discovery—Action to restrain Infringement—Denial of Right — Details of Business Transactions.**]—In an action to restrain the defendants from selling a certain drug in violation of the rights of the plaintiffs under a patent, and of the terms upon which the drug was sold to the defendants, and for damages for selling in violation of such rights and terms, and for damages for a trade libel, the defendants admitted that they bought the drug but not from the plaintiffs, and were selling it by their agents, and upon their examination for discovery stated fully their mode of procedure in buying and selling, but in their pleading they denied the plaintiffs' patent right:—Held, that there being a *bonâ fide* contest as to that right, the defendants should not, before the trial, be compelled to afford discovery of the details and particulars of such buying and selling, so as to disclose their and their customers' private business transactions. Such discovery should be deferred until after the plaintiffs should have established their right, even if a subsequent separate trial of the question of infringement should be necessary. *Dickerson* v. *Radcliffe*, 17 Ont. P.R. 586.

II. Novelty.

—**New application of old Mechanical Device.**]—The application to a new purpose of an old mechanical device is patentable when the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study. The application to an oil pump of the principle of "rolling contact" was held patentable. *Bicknell* v. *Peterson*, 24 Ont. A.R. 427.

III. Proceedings to Annul.

—**Default of Pleading—Judgment—Registrar's Certificate—Practice.**]—Upon a motion for judgment for default of pleading in an action to avoid certain patents of invention, the court granted the motion, but directed that a copy of the judgment should be served upon the defendants, and that the registrar should not issue a certificate of the judgment for the purpose of entering the purport thereof on the margins of the enrolment of the several patents in the Patent Office until the expiry of thirty days after such service. *Peterson* v. *The Crown Cork and Seal Company*, 5 Ex. C.R. 400.

—**Proceedings to set aside—Proper Remedy—Scire facias—R.S.C. c. 61 s. 34.**]—A patent of invention cannot be annulled, at the suit of a party interested, in an ordinary action. The only remedy is by writ of *scire facias* at the suit of the Crown as provided by R.S.C. c. 61, s. 34. *Patent Elbow Co.* v. *Cunin*, Q.R. 10 S.C. 56.

PAYMENT.

Appropriation of Payments by Statute.]
See Mines and Minerals.

—**Legal Tender — Equivalent — Bank Bills or Cheques.**]
See Tender.
See also Debtor and Creditor.

PAYMENT INTO COURT.

Moneys in Court improperly paid out—Jurisdiction of Court to order Repayment.]—The Court has inherent jurisdiction to compel the repayment into Court of money improperly obtained out of Court. *In re Central Bank of Canada, Hogaboom's case*, 24 Ont. A.R. 470.

— **Insurance Moneys — Payment into Court—Foreign Tutrix.**]—See Insurance III.

—**Payment into Court—Defence—Payment out.**]
See Pleading, X.

PELAGIC SEALING.

See Behring Sea Award Act.

PENSION.

Pension to Retired Municipal Officer—Availability for payment of Officer's Debts.]
See Municipal Corporations, XV.

PERPETUITY.

Will—Rule against Perpetuity — Thellusson Act—52 V. c. 10, s. 2 (Ont.).]—See Will, V.

PERSONATION.

Municipal Elections—Penalty—Mode of Enforcing.]—See Municipal Corporations, XI.

PLEADING.

I. Amendment.

New Case made at Trial—Statute of Frauds.]—In an action by a lessor against an assignee of the lease, brought after the expiry of

the lease, to recover possession of the demised premises, and for cancellation of the lease, and for relief from any claim of the defendant for renewal under a covenant in that behalf, the defendant set up in his defence the covenant to renew, and alleged that he had always been ready and willing to have it fixed by arbitration, as required by the lease, and had, since action, notified the plaintiff of the appointment of an arbitrator. In reply the plaintiff alleged that the defendant had made a written offer to renew at a named rental; that the plaintiff had accepted the offer; but that the defendant had not carried out the arrangement so made. There was no further pleading. At the trial the evidence showed a written offer made by the defendant, but only a conditional acceptance by the plaintiff, who, however, gave uncontradicted evidence of a subsequent verbal renewal by the defendant and acceptance by the plaintiff of the terms of the former written offer:—Held, that by the conditional acceptance of the written offer, it was in effect refused, and had ceased to exist when the subsequent verbal agreement was made; it was not necessary for the defendant to plead the Statute of Frauds in rejoinder to the reply, as he was able to show that his offer had been refused: and when the plaintiff was allowed at the trial to give evidence of a subsequent renewal by parol of the terms of the lapsed written offer, the defendant should have been allowed to set up the Statute of Frauds; upon which he was entitled to succeed. *Elmsley* v. *Harrison*, 17 Ont. P.R. 425, affirmed by Court of Appeal, 17 Ont. P.R. 525.

—**New Defence—Statute of Limitations.**]—The defendants obtained leave to amend their statement of defence by setting up the Statute of Limitations as an additional defence in an action for waste brought by the plaintiffs as owners of the remainder in fee in certain lands of which the defendants were tenants for the lives of others:—Held, following *Williams* v. *Leonard*, 16 P.R. 544, 17 P.R. 73, that the Statute of Limitations being a defence permitted by law, and the real question between the parties being as to the right of the plaintiffs to recover by action the damages claimed by them, "the very right and justice of the case" demanded that the plaintiffs should not recover in this action if the statute afforded a bar to their right to do so: *Brigham* v. *Smith*, 3 Ont. Ch. Ch. R. 313, referred to, however, as laying down a more reasonable and just practice. *Patterson* v. *Central Canada Savings and Loan Company*. 17 Ont. P.R. 470.

—**Promissory Note—Presentment—Statement of Claim—Amendment—Default Judgment—Affidavit—"Duly Presented for Payment."**]—In an action upon two promissory notes payable at a bank, the statement of claim alleged that the notes were "duly presented for payment and were dishonoured," but did not aver presentment at the bank. Appearance was entered, but no grounds of defence were delivered. On application by Chamber summons, under Ord. 14, Rule 1, for leave to enter judgment, the judge received an affidavit showing, as a matter of fact, that the presentment was properly made. Defendant, in opposing the application, relied on the defect in the statement, and produced no affidavit of merits:—Held, that the Chambers Judge, by receiving the affidavit as to presentment, treated the matter as if an amendment had been made, and the objections removed, and that, therefore, the objection should not be given effect to an appeal:—*Quære*, whether the form of statement was not good? *Crowell* v. *Longard*, 28 N.S.R. 257.

—**Action for Account—Recovery for Work and Labour where original Action fails—Pleading—Amendment.**]—Plaintiff sued for wages and for an accounting under an alleged partnership. The trial judge found that the partnership had been terminated and that there was no agreement to pay wages in addition to profits. Plaintiff appealed. It appeared on the argument that, after the termination of the partnership, plaintiff did certain work in superintending operations for defendants:—Held, that plaintiff would be entitled to recover for this work, but as the statement of claim was not framed to meet that view, and there was no evidence of the amount or value of the work upon which judgment could be entered if an amendment were allowed, the appeal must be dismissed with costs. *McDonald* v. *McKeen*, 28 N.S.R. 329.

—**Partnership Accounts—Statement of Defence—Amendment—Production of Documents.**]—At the trial defendant's counsel asked leave to amend the statement of defence, by alleging that the plaintiff and defendants had been in partnership in a skating rink business, and that at the dissolution of the partnership an account was taken by which it was shown that the plaintiff was indebted to the defendants. The accounts of the partnership business had been kept in a set of books to which the defendants had access, although they were no longer in their possession or control, and in obedience to an order for production the defendant, Mann, had made an affidavit in which he stated that he had no documents relating to the matters in dispute in his possession or power; and although the plaintiff wanted to see and inspect the books he was refused access to them:—Held, that the defendants should not now be allowed the amendment asked for, and that the partnership accounts should not be gone into in this action, more especially as it was open to the defendants by an independent action to have the partnership accounts taken, and thereby to recover any amount that might be due to them. *Douglas* v. *Mann*, 11 Man. R. 546.

— **Misrepresentation — Rescission — Waiver — Failure of Consideration—Amendment—Parties—Right of Action.**]—See SALE OF GOODS, VII.

And see PRACTICE AND PROCEDURE, III.

II. COMPENSATION.

— **Unliquidated Damages — Set-off — Judgment Debt.**]—A debt which is clear and liquidated and established by a judgment, may be pleaded in compensation to a demand for unliquidated damages. *Banks* v. *Burroughs*, Q.R. 11 S.C. 439.

III. Counterclaim.

—Cross-action — Dismissal.]—A counterclaim may be considered as a cross-action, and if so there is no authority for summarily dismissing it. *Whitford* v. *Zinc*, 28 N.S.R. 531.

—Jury — Counterclaim — Action for Breach of Warranty — Queen's Bench Act [1895], s. 49.]—A counterclaim is not an action within the meaning of the Queen's Bench Act, 1895, not being a civil proceeding commenced by statement of claim, and a defendant is not entitled to have his counterclaim tried by a jury, by virtue of section 49, sub-section 1, although such counterclaim is for damages for breach of warranty; nor does this constitute any special ground for an order under sub-section 3 for trial by jury: *Case* v. *Laird*, 8 Man. R. 461; *Woollacott* v. *Winnipeg Electric St. Ry. Co*, 10 Man. R. 482, followed. *Bergman* v. *Smith*, 11 Man. R. 364.

—Promissory Note—Equitable Set Off—Counterclaim.]

See Bills of Exchange and Promissory Notes, III.

—Partnership—Counterclaim—Issues Involving Same Matters.]—See Partnership, I.

IV. Criminal Libel.

—Criminal Law—Libel—Plea of Justification—Matters of Evidence.]—A plea of justification to an indictment for defamatory libel must allege that the defamatory matter published is true and that it was for the public benefit that the alleged libel was published, and must then set forth concisely the particular facts by reason of which its publication was for the public good, but it must not contain the evidence by which it is proposed to prove such facts, nor any statements purely of comment or argument. A plea of justification which embodies a number of letters which it is proposed to use as evidence, and contains paragraphs of which the matter consists merely of comments and arguments, is irregular and illegal, and the illegal averments should be struck, or the plea itself should be rejected, from the record, and the defendant allowed to plead anew. *The Queen* v. *Grenier*, Q.R. 6 Q.B. 31.

V. Declaration.

—Striking out — Particulars.]—Application to strike out common counts from plaintiff's writ and declaration, on the ground that there were no particulars:—Held, (per Forbes, Co. J.) that particulars must be given within three days or the counts will be struck out. Order striking out made with costs. *Mollison* v. *Hoffman*, 17 C.L.J. (Occ. N.) 180; 33 C.L.J. 334. Reversed on appeal to S.C.N.B. 33 C.L.J. 445.

VI. Form of Plea.

—Misjoinder—Exception to the Form—Defense en droit.]—Misjoinder should be pleaded by an exception to the form (*exception à la forme*) and not by *defense en droit*. *Lévesque* v. *Garon*, Q.R. 10 S.C. 514.

VII. Necessary Averment.

—Bill of Lading — Stipulation — Contract governed by British law.]—Where a bill of lading stipulates that "this contract shall be governed by British law with regard to which this contract is made," the party desiring to avail himself of such law is bound to state in his pleadings what it means and to prove it by expert testimony, otherwise the Court will assume that there is no difference between our law and the foreign law. *Rendell* v. *Black Diamond Steamship Co.*, Q.R. 10 S.C. 257.

VIII. Separate Defence.

—Joint Appearance—Severance in Pleading.]—Defendants who appear jointly by the same attorney are not precluded from pleading separately. *Volensky* v. *Sassenwein*, Q.R. 10 S.C. 162.

IX. Statement of Claim.

—Amendment—Writ of Summons—Service out of Jurisdiction—Adding New Claim—Limitation—Terms.]—Where a writ of summons in an action for a specified cause has been issued and served upon defendant out of the jurisdiction, with a statement of claim, pursuant to an order under Rule 271 (1309), and the defendants have appeared, an order may properly be made allowing the plaintiffs to amend the statement of claim by adding a new claim for an entirely different cause of action, provided that it is a claim in respect of which leave to serve process out of the jurisdiction might have been obtained: *Holland* v. *Leslie*, [1894] 2 Q.B. 346, 450, followed:—Held, also, that the plaintiffs should, in respect of the Statute of Limitations running against their added claim, be placed in the same position as if their action for the added claim had been brought at the date of the amendment. *Hogaboom* v. *McCulloch*, 17 Ont. P.R. 377.

—Matters arising pending action—Joinder of causes of action—Land—Dower—Leave—Rule 341.]—A plaintiff cannot set up in his statement of claim matters arising pending the action.—An action for assignment of dower is an action for the recovery of land: *McCulloch* v. *McCulloch*, 4 C.L.T. (Occ. N.) 252, followed.—Where leave is necessary under Ont. Rule 341 to join other causes of action with an action for the recovery of land, it must be obtained before the writ of summons is issued, unless under very exceptional circumstances. *McLean* v. *McLean*, 17 Ont. P.R. 440.

—Action of Revendication — Plaintiff's Title — Omission to set forth—Exception to Form.]—In an action of revendication the title by virtue of which the plaintiff claims the things seized must be set forth in his declaration, and the omission to do so is good ground for an exception to the form.—The plaintiff in such case will be allowed to amend by furnishing particulars of his title. *Taylor* v. *The International Produce and Manufacturing Exchange Co.*, Q.R. 10 S.C. 129.

—**Joint Demands—Art. 15 C.C.P.**]—To a demand for cancellation (*radiation*) of a contractor's privilege may be joined a claim for damages. *Macaulay* v. *Bayard*, Q.R. 11 S.C. 278.

—**Guarantee — Special Indorsement—Consideration — Dismissal of Action — Amendment.**]—Plaintiff's writ was specially indorsed as follows: "Plaintiff's claim is against the defendant upon a guarantee in writing, on the 6th day of November, 1895, by which defendant agreed to see that plaintiff was paid ten dollars per month on the following note: 'Ten months after date I promise to pay to the order of Walter Johnson, one hundred dollars, payable ten dollars per month, without interest, at Caledonia Corner, for value received.'" Particulars:

To instalments due to July 6th, 1896	$80
By instalments paid to April 6th, 1896	50
Amount due	$30

"No instalments have been paid since April 6th, 1896, and defendant refuses to perform his guarantee. The plaintiff claims $30." The statement of claim was struck out by the Judge of the County Court, and plaintiff's action dismissed, on the ground that the action was based upon the guarantee, but no consideration was stated, and it did not appear whether the guarantee was under seal or not:—Held, affirming the judgment of the County Court Judge, that a special indorsement, equally with every other statement of claim, must show a cause of action and that, in order to constitute a good special indorsement, in an action upon a guarantee, it was necessary to show the consideration upon which it was alleged to have been made:—Held, also, that there was nothing stated from which consideration might or must be inferred:—Held, also, that the word "guarantee" did not of itself import consideration.—Held, also, that the plaintiff not having asked for leave to amend below, must be deemed to have taken his chances upon the case he made, and that such leave should not be granted now:—Held, also, that the judge below adopted the correct course, upon the conclusion he reached in dismissing the action.—Per Weatherbe, J., dissenting:—Held, that the indorsement was sufficient, but if not, the defect was a mere slip, as to which the County Court Judge should have suggested an amendment, and that he erred in dismissing the action. *Johnson* v. *Fitzgerald*, 29 N.S.R. 339.

—**Action for obstruction of Private Way—Prescription—Form of Claim.**]—In an action for the obstruction of a right of way acquired by prescription, the periods of user of successive owners may be united so as to justify the claim of plaintiffs to the way by virtue of the Statute of Limitations:—Held, also, that plaintiff's statement of their title to the way claimed, viz, "under c. 112 R.S. of Nova Scotia, 5 ser. Of the Limitation of Actions," substantially fulfilled the spirit of the Judicature Act, because it indicated to the defendant that he would have to meet the fact of title by possession:—Semble, that the proper form of statement of title by plaintiffs in such a case would be to the effect that the occupiers of the lands possessed by plaintiffs had for twenty years before the suit enjoyed the way as of right and without interruption. *Corkum* v. *Feener*, 29 N.S.R. 115.

—**Contract—Illegality—Striking out.**]—Summons to strike out the statement of claim as embarrassing and not disclosing any reasonable cause of action. The statement of claim alleged that a certain chattel mortgage made by the plaintiff, and another in favour of the defendants, was given for an unlawful purpose, and was contrary to public policy and therefore absolutely void, and he claimed the chattels seized by the defendants under the mortgage.—Held, that neither of the parties to an illegal contract can invoke the aid of the Court either to enforce the execution of it or to recover damages for the breach of it, if executory, or to disturb the condition of affairs when the contract is once executed: *Ex parte* Butt, 4 Ch. D. 150, specially referred to:—Held, also, that it is illegal to become surety in any criminal proceeding in consideration of taking a chattel mortgage or other security, because it takes away from the law and the authority of the law what was intended to be given to it: *Hermann* v. *Jenchner*, 54 L.J.Q.B. 340, specially referred to *McLaughlin* v. *Wigmore*, 17 C.L.T. (Occ. N.) 354; 33 C.L.J. 510. Rouleau, J., N.W.T.

—**Joint tort-feasors—Sufficiency of Allegations.**]—The plaintiffs, insurers of plate glass windows, sued the defendants for damages for negligence whereby they broke a window insured by the plaintiffs, who had paid the loss, and claimed to be subrogated to the rights of the insured. There were two defendants, H. and the A.T.Co.—The statement of claim alleged (1) that the defendants carried on a cartage business, and (2) that on a certain day they had negligently and improperly left their horses and waggons on a highway without having the horses properly tied, and without anyone in charge of them, owing to which negligence the horses ran and frightened another horse, making it run also, whereby the window was broken. The plaintiffs claimed $107 and costs. Upon motion by one of the defendants, under section 39 of the Judicature Ordinance, to strike out the statement of claim as embarrassing or to compel the plaintiff to select to sue one or other defendant, or to amend so as to show that the defendants were sued as joint tort-feasors:—Held, (per Rouleau, J. in Chambers) that both defendants were complained of as tort-feasors, because the combined action of both was alleged to have broken the pane of glass. The tort occasioned was one and the same act, and, therefore, the defendants must necessarily be sued jointly. There was no necessity to add to the statement of claim the word "jointly." It was sufficient to allege the defendants' liability, and ask judgment against them. *Mongenais* v. *Henderson*, 17 C.L.T. (Occ.N.) 132.

X. Statement of Defence.

— **Defamation — Defences—Fair comment — Privilege—Mitigation of damages—Confusion—Embarrassment.**]—The plaintiff should not be driven to spell out the defence set up in an

action. He is entitled to have them set forth in such manner as will enable him, upon reading them, to form a fairly correct judgment as to their scope and meaning, and as to what is intended to be relied upon under them. And while the defendant in an action of defamation ought not to be shut out from setting up any matter which he may properly plead, either in bar or by way of mitigation of damages, he should so arrange the paragraphs of his statement of defence as to group the separate defences of privileges and fair comment and the matters alleged in mitigation under their appropriate heads. *Dryden* v. *Smith* (2nd case), 17 Ont. P.R. 505.

—Payment into Court—Payment out—Election—Time—Ont. Con. Rules, 632 et seq.—Appeal—Removal of stay of proceedings.]—In an action to recover money for services rendered, the defendant pleaded that $325 was more than an ample and sufficient payment: that he had before action paid the plaintiff $25, and had always been ready and willing, and was now ready and willing to pay him $300 more, that before action he had tendered $300 in payment of the services rendered, but the plaintiff refused to accept it; and the defendant brought $300 into court in satisfaction of all claims and demands of the plaintiff in this action:—Held, that the defence was so framed that if the plaintiff had desired to take the money out of court he must have elected to do so before replying, or before the expiration of the time for replying, as provided by Cons. Rule 636, and must have taken it in satisfaction of all his claims in the action, and have filed and served a memorandum in accordance with Rule 635. But, as he, instead of taking this course, proceeded with the action (in which he recovered more than $300), the defendant was absolved from his offer, and the money remained in court subject to further order; the defendant was entitled, in the absence of special circumstances, to have it remain to be dealt with when the case should be finally disposed of; and it was open to the defendant to contend upon appeal that the amount recovered should be reduced below $300, notwithstanding the payment into court, by the plaintiff's election not to take the money out at the appropriate time. *Denison* v. *Woods*, 17 Ont. P.R. 549.

—Defence—Motion to set aside—Affidavit in Reply—Cross-Examination on—Notice—Failure of Defendant to Appear—N.S. Order 36 R. 28—Counterclaim—Cross Action—Dismissing Summarily.]—Plaintiff moved to set aside as false, frivolous and vexatious, and pleaded merely for delay, the defence to an action on two promissory notes, and also the counterclaim pleaded to the action. On the hearing of the motion an affidavit of defendant was produced in reply to the affidavits read on behalf of plaintiff, in which defendant swore, among other things, that there was no consideration for the notes, that his signatures were obtained by fraud and misrepresentation, and that at the time the notes were made he was ill and had been, as he believed, of unsound mind. Plaintiff's counsel thereupon applied for leave to cross-examine defendant on his affidavit, which was granted, and a time was fixed for defendant's appearance before the Court for examination, but no order was taken out or notice in writing served. Defendant, having failed to appear, his affidavit was rejected, and all the paragraphs of his defence and the counterclaim were ordered to be struck out:—Held, that Order 36, Rule 28, applied, and that, as the notice in writing required by the rule was not given, the affidavit was improperly rejected:—Held, also, that the allegations in the affidavit were sufficient to prevent the setting aside of the defence, and that the cause should have been allowed to go to trial:—Held, also, that the counterclaim must be considered as if it were a cross-action, and that there was no authority for summarily dismissing it. *Whitford* v. *Zinc*, 28 N.S.R. 531.

—General Denial—Amendment—Striking out Defence—Joinder—Estoppel.]—In an action against the sureties of a sheriff for his negligence and failure to discharge his duties, whereby certain goods seized by him under the plaintiff's writ were stolen, etc., the statement of defence was as follows:—"The defendants deny each and every allegation contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the plaintiff's statement of claim."—Upon an application by the plaintiff to strike out the statement of defence as embarrassing, it was objected that the plaintiff, having joined issue, was estopped from making the application:—Held, that this objection was not well taken, section 120 of the N.W.T. Judicature Ordinance providing that the judge may, at any stage of the action, order a statement or proceeding to be struck out or amended:—Held, also that the pleading in question was not strictly in accordance with the form required by section 111 of the Judicature Ordinance, and should be amended so as to specify every material allegation which the defendants intended to deny: *Adkins* v. *North Metropolitan Tramways Co.*, 63 L.J.Q.B. 361 referred to, *Pollinger* v. *London Accident Co.*, 17 C.L.T., (Occ. N.) 134.

—Defence—Payment into Court—Leading Issue—Costs to successful party—Appointment.]—

See Costs, III (c).

—Motion for better particulars of Defence—Affidavit—Costs.]

See Practice and Procedure, II.

XI. Sufficiency of Pleading.

—Master and Servant—Workmen's Compensation for Injuries Act—Notice of Action—Notice of objection thereto—Pleading—55 V. (Ont.) c. 30, s. 14.]—The provisions of section 14 of the Workmen's Compensation for Injuries Act, 55 Vict. c. 30 (Ont.) are not complied with merely by pleading that the notice of action relied on by the plaintiff is defective, or that notice of action has not been given. The defendant must give formal notice of his objection not less than seven days before the hearing of the action if he intends to rely upon it. *Cavanagh* v. *Park*, 23 Ont. A.R. 715.

—Action by Executor—Proof of Quality—Art. 144 C.C.P.]—A testamentary executor who sues *ès qualité* is not obliged to prove his quality

when it has not been expressly denied by the pleadings. *Taschereau* v. *Mathieu*, Q.R. 10 S.C. 418.

—**Objection to Quality of Plaintiff—Mode of Stating Objection—Exception to Form.**]—An objection to a capacity in which a plaintiff proceeds should be pleaded by exception to the form. *Thibaudeau és-qual.* v. *The City of St. Henry*, Q.R. 11 S.C. 532.

— **Promissory Note — Collateral Security for — Further Time — Allegation in Pleading.**]—Defendant pleaded as a defence to an action on certain promissory notes that a chattel mortgage had been given and accepted as collateral security for the debt represented by the notes, but it was not alleged that, in consequence of the giving of the security, further time was allowed:—Held, that the plea was not a defence to the action on the notes:—Held, also, that the defence was properly struck out, under N.S. Order 25, Rules 2 and 3, as being bad and insufficient in law. *Arthur* v. *Yeadon*, 29 N.S.R. 379.

XII. Time to Plead.

—**Premature Judgment—Summary Action—Non-Judicial Days—Arts. 3, 24, 81, 131, 892 C.C.P.**]—Where, in a summary action, a preliminary plea is dismissed and the two days following the dismissal are non-juridical days, the defendant is entitled to plead on the third day, and a judgment signed thereon *ex parte* is premature. Arts. 3, 24, 81, 131, 892 C.C.P. *Vien* v. *The Holmes Electric Protection Co.*, Q.R. 10 S.C. 128.

POLICE MAGISTRATE.

Municipal Corporations—Police Magistrate—Salary—Reduction of—R.S.O. c. 72, ss. 5, 28.]

See Municipal Corporations, I (*d*).

—**Pension of—Liability for Debts.**]

See Municipal Corporations, XV.

POLICE OFFICER.

Constable de facto—Protection.]—Held, (per Meagher and Ritchie, JJ.) that a constable *de facto* while acting in the discharge of his duty, is entitled to the same measure of protection as if his title to the office he professes to fill were undisputed. *The Queen* v. *James Gibson*, 29 N.S.R. 4.

POSSESSION.

Testamentary Succession — Balance due by Tutor—Executors—Account, Action for—Action for Provisional Possession—Parties to Action.]—*Cream and Another* v. *Davidson*, 27 S.C.R. 362, affirming Q.R. 6 Q.B. 34.

— **Deed — Construction of — Ambiguous Description—Title to Lands—Conduct of Parties—Presumptions in favour of Occupant.**]

See Evidence, XIII.

POSSESSION ANNALE.

Action on Disturbance—Possessory Action—"Possession Annale"—Arts. 946 and 948 C.C.P.—Nature of Possession of unenclosed Vacant Lands—Boundary Marks — Delivery of Possession.]—In 1890, G. purchased a lot of land 25 feet wide, and the vendor pointed it out to him, on the ground, and showed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and unenclosed, was sold to another person who commenced laying foundations for a building, and, in doing so, encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance:—Held, that the *possession annale*, required by article 946 of the Code of Civil Procedure, was sufficiently established to entitle the plaintiff to maintain his action. *Gauthier* v. *Masson*, 27 S.C.R. 575.

POUNDAGE.

See Sheriff.

PRACTICE AND PROCEDURE.

I. ACTIONS.

(a) *Generally.*

Matters Arising Pending Action — Joinder — Land—Dower—Leave—Ont. R. 341.]—A plaintiff cannot set up in his statement of claim matters arising pending the action.—An action for assignment of dower is an action for the recovery of land: *McCulloch* v. *McCulloch*, 4 C.L.T. (Occ. N.) 252 followed.—Where leave is necessary under Ont. Rule 341 to join other causes of action with an action for the recovery of land, it must be obtained before the writ of summons is issued, unless under very exceptional circumstances. *McLean* v. *McLean*, 17 Ont. P.R. 440.

—Account—Master's Office — Verification — Affidavit—Vouchers—Cross-examination — Notice—Re-opening Account.]—The person bringing into the Master's office an account verified by affidavit is obliged to vouch the payment of the amounts included in it, and is liable to cross examination upon his affidavit, notice being first given him of the items upon which it is proposed that he shall be cross-examined. When no such notice was given, and the executor was not cross-examined, although ample opportunity was offered for the purpose, and the accounts were in no way objected to until the reference had been closed so far as the evidence was concerned, the master properly considered that the affidavit verifying the accounts under Rule 63, and the vouchers, had sufficiently proved the accounts: *Wormsley* v. *Sturt*, 22 Beav. 398; *Re Lord*, L.R. 2 Eq. 605; *McArthur* v. *Dudgeon*, L.R. 15 Eq. 102; *Meacham* v. *Cooper*, L.R. 16 Eq. 102; *Bates* v. *Eley*, 1 Ch. D. 473, followed.—Upon an application to re-open an account of $55,129.54, comprised in upwards of 16,000 items of disbursements, one or two items were pointed out as being *primâ facie* of such a character as might have been objected to:—Held, not to justify opening up the whole account, especially in view of other facts appearing. *Re Curry, Curry* v. *Curry*, 17 Ont. P.R. 379.

—Form of Action—Work and Labor—Goods sold and delivered—Conversion of materials into Goods.]—If goods are ordered from a workman who constructs them from his own materials and delivers them when completed, his action to recover the price must be for goods sold and delivered and not for work and labor. *Ferguson* v. *Reed*, 33 N.B.R. 580.

—Leave to bring new Actions—Term preventing plea of Limitations.]—See PARTIES, III.

—Workmen's Compensation for Injuries Act (Ont.)—Notice of Action—Notice of Objection—Pleading.]—See PLEADING, XI.

And see ACTION.

(b) *Dismissal.*

—Action—Dismissal—Default—Ont. R. 434, 542.]—Rule 434 provides that "in actions in the County of York, to be tried without a jury, if the plaintiff does not set down the action for trial within six weeks after the pleadings are closed and proceed to trial as provided in Ont. Rule 542, the action may be dismissed for want of prosecution":—Held, that unless there is default in setting down and in proceeding to trial, an action cannot be dismissed. *Toronto Type Foundry Co.* v. *Tuckett*, 17 Ont. P.R. 538.

— Practice — Injunction — Undertaking as to Damages—Dismissal of Bill.]—Where plaintiff on giving the usual undertaking to damages obtained an *ex parte* injunction, which was subsequently dissolved, he was allowed to have his bill dismissed without payment of damages recoverable under the undertaking. *Morehouse* v. *Bailey*, 1 N.B. Eq. 393.

— N.W.T. Civil Justice Ordinance, s. 153 — Cause of Action—Abuse of Process — Jurisdiction.]—On the 12th January, 1897, plaintiff issued a writ against the widow and four children of R., deceased, alleging by his statement of claim that R. died at Glasgow, on the 8th January, 1897, intestate; that defendants were the widow and next of kin of deceased; that they resided within the jurisdiction of the Court; that R. was indebted to the plaintiff in the sum of $495; that deceased left personal property within the jurisdiction of the Court, sufficient to satisfy plaintiff's claim; that defendants were the persons entitled thereto; that no administrator had been appointed, and asking for judgment against defendants for the amount of the plaintiff's claim. On a summons by defendants, after appearance, order made declaring that no cause of action was disclosed by the pleadings, that the action was vexatious and an abuse of the process of the Court, and under above section of the Ordinance and under the inherent jurisdiction of the Court, action dismissed with costs. *Becker* v. *Rutherford*, 33 C.L.J. 214; 17 C.L.T. (Occ. N.) 106.

And see ACTION.

II. Affidavit.

—**Sworn Before Notary—Seal.**]—An affidavit for use in the Court sworn before a notary public in Ontario should be authenticated by his official seal. *Boyd* v. *Spriggins*, 17 Ont. P.R. 331.

— **Commissaire — Procureur ad litem — Public Officer—Competency—Opposition.**] — The *commissaire* of the Superior Court, who acts as attorney of one of the parties to a cause, cannot receive the affidavit of his client in support of his proceeding. An *opposition afin de distraire*, drawn up and signed by an attorney *ad litem* who afterwards, in his capacity of *commissaire* of the Superior Court, receives the affidavit of the *opposant* required by Art. 583 C.C.P., will be rejected from the record as not being accompanied by the affidavit required by law. *Gosselin* v. *Bergevin*, Q.R. 11 S.C. 288.

—**Capias—Deterioration of mortgaged land—Allegation as to Damages—Arts. 2054, 2055 C.C.**]—In a capias for fraudulent deterioration of a mortgaged immovable the affidavit should allege that the deterioration has caused the plaintiff damages to an amount exceeding $40. It is not sufficient to allege that the defendant, with the intent to defraud the plaintiff, has caused deterioration of the immovable in a manner to prevent the plaintiff recovering his debt, and that the plaintiff has a hypothec upon the immovable for more than $40. *Bédoiseau* v. *Rattelade*, Q.R. 11 S.C. 428.

—**"Qui tam Action"—Penalty under Art. 981 C.C.P. — Affidavit.**]— The insufficiency of the affidavit may be urged on the merits.—The affidavit must state the cause of action. A mere reference in it to the article under which the penalty is imposed is not sufficient.—An affidavit declaring it is made in an existing cause will not support an action which is not issued until the day following.—An affidavit in which the defendant does not depose to the facts alleged in it, but in which he deposes that he has alleged those facts in his declaration, is not sufficient. *Chambers* v. *Connor*, 3 Rev. de Jur. 362. White, J.

—**Motion for better particulars of Defence—Affidavit—Costs.**]—Plaintiffs applied to a Judge at Chambers for an order for particulars of the defence. In answer an affidavit of defendants' counsel was read showing that defendants were not at the time in a position to give the information sought with any more detail than was given in an affidavit of the president of the defendant company, used in opposing a motion previously made on behalf of plaintiffs to set aside the defence, to which affidavit reference was made:—Held, that this was a sufficient answer to the application; but that the Chambers Judge erred in dismissing the application with costs, plaintiff being unaware of defendant's inability to give more information until the affidavit was read. *Ouchterloney* v. *Palgrave Gold Mining Co.*, 29 N.S.R. 59.

—**Practice—Foreclosure suit—Affidavit of service of summons—Supreme Court in Equity Act, 1890 (53 V. c. 4), s. 185.**]—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 N.B. Eq. 341.

—**Mechanic's Lien Act, 1891—Lien for Materials—Affidavit for Lien—Particulars of work done—Insufficient Statement.**]—In an affidavit for a mechanic's lien the particulars of the work done were stated as follows: "Brick and stone work and setting tiles in the house situate upon the land hereinafter described, for which I claim the balance of $123":—Held, insufficient, and plaintiff non-suited. *Knott* v. *Cline*, 5 B.C.R. 120.

—**Practice — Evidence — Commission—Right of non-resident defendant—Affidavit.**]—A defendant resident outside the jurisdiction has a *primâ facie* right to a commission to take his own evidence for use at the trial. An affidavit that such defendant was resident in Australia and manager of a woollen factory, held sufficient to support an order for a commission to examine him, though it did not state that he could not personally attend at the trial. The fact that he could not do so without great inconvenience was a reasonable inference from the facts deposed to. *Cranstoun* v. *Bird*, 5 B.C.R. 140.

—**Certiorari—Order for—Appeal—Affidavits of Justification—Nova Scotia Crown Rule 29.**]
See Appeal IV.

—**Production of Documents—Affidavit—Privilege—Better Affidavit.**]—See Hereunder, XII.

—**Account—Master's Office — Verification — Affidavit—Vouchers—Cross-examination — Notice—Re-opening Account.**]
See Hereunder, I. (*a*).

—**Dominion Controverted Election Act—Affidavit of Petitioner—Right to cross-examine on.**]
See Parliamentary Elections.

III. Amendment.

—**Action of Revendication — Title to Things Seized — Omission to set forth — Exception to form.**]— In an action of revendication the omission to set forth in the declaration the title under which plaintiff claims the things seized is good ground for an exception to the form, but the plaintiff will be allowed to amend by furnishing particulars of his title. *Taylor* v. *The International Produce and Manufacturing Exchange Co.*, Q.R. 10 S.C. 129.

—**Discretion of Trial Judge to amend—Appeal.**]—(Per Ritchie, J.) The terms upon which the trial judge decides that he will allow an amendment, are entirely within his discretion, and no appeal lies from his decision by the party appealing for the amendment, when he declines to take it upon the terms offered, unless the terms are so unreasonable as to compel the Court to say that the discretion was improperly exercised. *Seary* v. *Saxton*, 28 N.S.R. 278.

—Writ issued in County Court—Several Cases—Excess of Jurisdiction — Attachment of Real Estate—Amendment—Nova Scotia County Courts Consolidation Act of 1889, c. 9, s. 34.]—On an application to set aside plaintiffs' writ and attachment, and all proceedings thereunder, on the ground that the amount sued for and indorsed on the writ, was beyond the jurisdiction of the Court, plaintiffs abandoned their claim upon all the causes of action sued for except one, thus reducing their claim to the sum of $393.71, and applied for an amendment of their claim accordingly:—Held, that it was no ground for setting aside the attachment, after the amendment, that the attachment, which had been levied upon real estate, remained for a much larger sum than plaintiffs could possibly recover. (Per Graham, E.J.) that if the amendment made irregular proceedings that were regular before, the Court should restore them to their original conditions, or, by further amendment make them consistent throughout. (Per Meagher J.) that a substantive motion to amend was not necessary, the judge having power, with the plaintiff's consent, to amend the attachment, and to direct it to stand for the amount to which plaintiffs' cause of action was, by the amendment, reduced:—Held, also, that the moment the amendment was made, the attachment was only available to secure the reduced amount. *Harris* v *Morse*, 29 N.S.R. 105.

—Title of Court—The New Brunswick County Courts Act, 60 V. c. 28.]—Held, that under the above statute the court must be described as "The Saint John County Court," and that a writ of capias describing the court by the former title "The County Court of the City and County of Saint John," was irregular, but might be amended. (Forbes, Co. J.) *Myers* v. *Norton*, 33 C.L.J. 700, and sub. nom. *Myers* v. *Northrup*, 17 C.L.T. (Occ. N.) 362.

—Inherent power of Court to amend its Record.]
See *Cousins* v. *Cronk*, 17 Ont. P.R. 348.

—Information — Alteration in — Re-swearing—Waiver—Conviction—Omission—Amendment.]
See CANADA TEMPERANCE ACT, II.

—Suit by Administratrix—Non-Joinder of Husband.]
See EXECUTORS AND ADMINISTRATORS, I.
And see PLEADING, I.

IV. APPEARANCE.

—Application by Administratrix for time to Plead — Appearance.]— Where an action was brought against an administratrix on a debt by the intestate:—Held, that she could apply for time to plead without having appeared to the action. *Williams* v. *Washington*, 33 C.L.J. 368.

V. APPELLATE COURT.

—Appeal—Collocation and Distribution — Art. 761 C.C.P.—Hypothecary claims—Assignment—Notice—Registration—Prête-nom—Arts. 20 and 144 C.C.P.—Action to annul Deed—Parties in Interest—Incidental proceedings.]—The appeal from judgments of distribution under Article 761 of the Code of Civil Procedure is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution.—The provision of Article 144 of the Code of Civil Procedure that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench. *Guertin* v. *Gosselin*, 27 S.C.R. 514.

—Questions of Practice—Appeal — Duty of Appellate Court.]—See APPEAL, VI.

—Appeal—Jurisdiction—Discretionary Order — Default in Pleading—R.S.C. c. 135, ss. 24 (a) and 27—R.S.O. c. 44, s. 65 — Ontario Judicature Act, rule 796.]—See APPEAL, V.

VI. APPLICATIONS.

— Folle-enchère — Description of Immovable.]—In an application for *folle enchère* it is not necessary to describe the immovable of which the sale *à la folle enchère* is demanded. *Robinson* v. *Séguin*, Q.R. 11 S.C. 409.

VII. BAIL.

—Criminal Law—Committal for Trial—Delay in preferring Indictment — Discharge of Bail — C.S.L.C. c. 95.]—See CRIMINAL LAW, III.

VIII. CAPIAS.

—Justice's Civil Court—Capias—Jurisdiction—Particulars—Indorsement—Service.]—Held (Per Forbes, Co. J.), that in an action in a Justice's civil court, a copy of the plaintiff's particulars of demand must be attached to the copy of the capias and served on the defendant; and (2ndly) the amount of the debt and costs must be indorsed on the copy of the capias served on the defendant:—Semble, that a Justice's civil court of the Parish of Simonds, in the City and County of St. John, has jurisdiction to issue a capias, and have it served on a defendant within the City of St. John *Daley* v. *Howisenski*, 17 C.L.T. (Occ. N.) 179.
See also CAPIAS.

IX. CERTIORARI.

—Notice of Demand — Signification—Condemnation for costs—Relief from — Opposition—Art. 486 C.C.P.]—A person taking proceedings before an inferior court is not entitled to notice of a demand for *certiorari* nor to a signification of the writ (Q.R. 7 S.C. 236, reversed); and he cannot, for want of such notice and signification, demand that the writ and judgment upon it be annulled; but if he has been condemned to pay the costs of the writ, without having had an opportunity to oppose the application for it, he can, by means of an opposition, have annulled the portion of the judgment so condemning him and the execution issued for such costs. In such a case the

opposant is not bound to deposit the costs in court, such deposit only being required in case of an opposition upon condemnation by default of the party who has been summoned. Art. 486 C.C P.—The nature of the writ of certiorari, which is an order to the inferior jurisdiction to transmit the proceedings to the higher tribunal, sufficiently indicates that the writ, the original of which should be left with the judge of the inferior tribunal, should not be signified to the plaintiff, although he may be allowed a copy which, if he does not appear, prevents the necessity of subsequent signification to him of the inscription. But in order that he may be condemned to payment of costs it is necessary that he should have an opportunity to be heard; when he has not appeared before not after the report of the writ the defendant should, if he wishes to obtain the costs, give him notice of the inscription. *Marcotte* v. *Cour des Commissaries*, Q.R. 11 S.C. 282.

—Nova Scotia Liquor License Act, 1895—Violation—Certiorari—Power to Grant—Affidavit of Defendant denying violation.]—Held, affirming *The Queen* v. *McDonald*, 26 N.S R. 402, that the court is absolutely precluded from granting a writ of certiorari in the absence of the affidavit required to be made by defendant, that he has not violated the Act. *The Queen* v. *Power*, 28 N.S.R. 373.

—Order for Certiorari set aside—Non-Compliance with preliminary requirements—Proof of formal Conviction—Crown Rule 31.]—An order was made at Chambers for the removal into this Court of a record of conviction made by W., a stipendiary magistrate, etc. The affidavit on which the motion for the order was made contained a paragraph in which it was alleged that defendant was "served with the paper writing or minute of conviction herewith produced and marked 'A,' being the minute or memorandum of the conviction or judgment made by the said stipendiary magistrate, etc." There being no proof, apart from this, that a formal conviction was ever made out:—Held, that Crown Rule 31, which requires the production of a copy of the conviction, verified by affidavit, at the time the motion is made, as the condition of granting an order for the issuing of a writ of *certiorari*, had not been sufficiently complied with, and that the order must be set aside with costs. *The Queen* v. *Wells*, 28 N.S.R. 547.

—Certiorari — Jurisdiction of County Court Judges to Issue — Prohibition — County Court Consolidation Act—Acts of 1889, c. 9—Amending Act, Acts of 1895, c. 28, s. 64.]

See County Courts.

—Prohibition—Manitoba Liquor License Act—Certiorari—Procedendo.]

See Liquor License.

—Service of Summons under Canada Temperance Act—Proof of—Certiorari.]

See hereunder, XL.

X. Criminal Law.

— Summary Convictions — Depositions — Certiorari—Arts. 856, 857 and 590 et seq. Criminal Code.]—Where the hearing of a complaint, under the provisions respecting summary convictions, has been duly adjourned by the justice or justices of the peace, the hearing may take place at the time fixed, notwithstanding the absence of the defendant.—Under Arts. 856 and 590 et seq. of the Criminal Code of Canada, the depositions of the witnesses, both for the complainant and the accused, on the hearing before the justices, must be taken in writing. The remedy by certiorari exists where the petitioner has not appealed, and the taking of a writ of certiorari is a waiver on his part of the right of appeal.—Semble, if the writ of certiorari issues before the right to appeal has lapsed, the other party may ask that the certiorari be suspended until the delay for appealing has expired. *Denault* v. *Robida*, Q.R. 10 S.C. 199.

— Criminal Libel — Witnesses — Application for Subpœnas at expense of Crown—Art. 2614 R.S.Q.]

See Libel and Slander, II.

XI. Delays.

—Exercise of Right—Time prescribed—Service—Appeal from interlocutory Judgment—56 V. c. 42 (P.Q.).]—Where a term is fixed within which a right has to be exercised the proceeding necessary for the exercise of such right must be served upon the adverse party, and afterwards presented before the expiration of such term. Therefore, notice of the presentation of a summary petition for leave to appeal from an interlocutory judgment must be served upon the adverse party, and the petition afterwards presented, within the thirty days allowed for making such application under 56 Vict. c. 42 (P.Q.). *Létang* v. *Burland*, Q.R. 6 Q.B. 175.

—Contestation of Account—Expiration of delay —Arts. 527, 529, 530 C.C.P.]—The court may, even after the expiration of the delay for contesting an account and filing the contestation, permit the party accounted to to contest the account, the delay fixed by Art. 527 C.C.P. not being a bar after it has expired. *Pearson* v. *James*, Q.R. 10 S.C. 248.

—Resiliation of Lease—Demand of Rent and Saisie-Gagerie—Signification of Declaration—Preliminary Exception—Foreclosing Defence—Costs.]—When a lessor takes proceedings for resiliation of the lease, and at the same time makes a demand for rent with *saisie-gagerie*, he may signify his declaration by depositing a copy with the prothonotary within three days from the signification of the writ. The plaintiff cannot, when an exception to the form, which the defendant has opposed to his demand, has been rejected, foreclose the defendant the same day that the exception was returned; the defendant should have the ordinary delay computed from this judgment, for producing his defence, and plaintiff cannot take advantage of a demand of plea signified to the defendant after argument, but before

judgment, on the exception to the form; to be effective the demand of plea must be made before contestation of the preliminary exception. However, in this case, the defendant not having brought this defect in procedure to the notice of the court of first instance, although signified personally to his attorney for inscription on the merits, and not having succeeded in review upon the exception to the form, was refused his costs in the Court of Review. *Champagne* v. *Bachand*, Q.R. 10 S.C. 299.

—**Municipal Council — Resolution — Application to annul—Notice of Inscription—Arts. 235, 1004 C.C.P.—52 V. c. 79, s. 144 (P.Q.)**]—Upon an application under section 144 of the charter of Montreal (52 Vict. c. 79) to have a resolution of the City Council annulled, the delay for giving notice of inscription for the hearing is governed by Art. 235 of the Code of Civil Procedure and not by Art. 1004. The delay is, therefore, eight days. *Trempe* v. *City of Montreal*, Q.R. 10 S.C. 508.

—**Contestation of Account—Extension of Time—Judge in Chambers—Art. 774 C.C.P.**]—A judge in chambers has no power to extend the time for proving allegations in a contestation of the accounts of an insolvent. *Rose* v. *Desmarteau*, Q.R. 11 S.C. 22, reversing 8 S.C. 315.

— **Waiver of Objection.**]

See hereunder, XLVIII.

XII. Discovery.

—**Production of Documents—Penalty—Double Tolls—R.S.O. c. 160, s. 42.**]—The double tolls by section 42 of the Timber Slide Companies Act, R.S.O. c. 160, for false statements, are imposed by way of punishment, and not as compensation; and therefore an action to recover such double tolls is an action for a penalty, in which discovery of documents will not be enforced. *Pickerel River Improvement Co.* v. *Moore*, 17 Ont. P.R. 287.

—**Examination of Officer of Railway Company—Flagman.**]—A flagman in the employment of a railway company, whose duty it is to give notice of danger to persons intending to cross a line of railway at a particular place, he being under the superintendence of the yard foreman, is not an officer of the company examinable for discovery at the instance of the plaintiff in an action against the company to recover damages for injuries sustained through the alleged neglect of the flagman to give notice of danger. *Henderson* v. *Canada Atlantic Railway Co.*, 17 Ont. P.R. 337.

—**Discovery—Defamation—Production of Documents—Privilege—R.S.O. c. 61, s. 5—Incorporated Company—Indictment.**]—A person is protected against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards doing so; the person however, or, in the case of a corporation, an officer, must pledge his oath to his belief that such would or might be the effect of his answer, and it must appear that such belief is likely to be well founded. R.S.O. c. 61, s. 5, has merely embodied the existing law as to the protection of a witness against answering questions tending to criminate, though including the case of a party examined as a witness or for the purpose of discovery. In regard to affidavits of documents the same privilege exists as in regard to questions put to a witness or party. The proposition that a corporation is not liable to an indictment for libel is at least so doubtful that it would not be proper to compel a newspaper publishing corporation to make production of documents on oath which might tend to subject them to a criminal persecution: *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 App. Cas. 857, specially referred to. *D'Ivry* v. *World Newspaper Company of Toronto*, 17 Ont. P. R. 387.

—**Production of Documents—Affidavit—Privilege—Confidential Communications—Solicitor and Client—Better Affidavit.**]—In an affidavit of a party on a production of documents, a certain letter was described by its date, and as being from a firm of solicitors to the deponent, who said that he objected to produce it, that it was a communication between solicitor and client, and was privileged:—Held, doubting, but following *Hamelyn* v. *Whyte*, 6 Ont. P.R. 143, that the statement was sufficient to protect the document from production.—In the same affidavit two other letters were described by their dates, and as being from a solicitor to a firm of solicitors, and a copy of a letter written in answer to one of them was similarly described. These documents, the affidavit stated, were in the possession of the solicitors for the deponent and others in another action, and he objected to produce them and claimed privilege for them "on the ground that they are communications between solicitor and client, and between my solicitors and others in the course of their conducting my business":—Held, that these letters not being written to or by the deponent, there was no reasonable intendment that the deponent was the "client" referred to, nor that they were necessarily confidential because they were written by the deponent's solicitors to other persons in the course of their conducting his business; and the opposite party was entitled to a better affidavit on production, in which the deponent might set up other grounds of protection. It is irregular to go into the merits upon an application for a better affidavit: *Morris* v. *Edwards*, 23 Q.B.D 287 followed. *Hoffman* v. *Crerar*, 17 Ont. P.R. 404.

—**Examination of Officers of Corporation—Ont. Rule 487.**]—In an action to recover moneys alleged to have been deposited with the defendants, a banking corporation, at a branch, the plaintiff examined for discovery, as officers, the persons who were respectively manager and ledger-keeper at the branch at the time the alledged deposits were made. He then sought to examine the general manager:—Held, that the plaintiff had the right under Rule 487 to examine the general manager as an officer of the corporation, and the regular means of procuring his attendance having been taken, there was no excuse for his non-attendance. *Dill* v. *Dominion Bank*, 17 Ont. P.R. 488.

— Documents—Photographs—Privilege—Ont. R. 507.]—In an action by certain persons, claiming to be the next of kin of a testator (the beneficiary under the will having predeceased him) against the administratrix with the will annexed, for administration of the estate, the defendant denied that the plaintiffs were the next of kin of the testator, and alleged that he had no relatives. By her affidavit of documents she stated that she had in her possession, in her personal capacity but not as administratrix, certain photographs of the testator, which she objected to produce. The plaintiffs sought production with a view of establishing the identity of a relative of theirs with the testator:—Held, that the photographs in question were "documents" within the meaning of Rule 507, and were not privileged nor protected, and therefore must be produced. *Fox* v. *Sleeman*, 17 Ont. P.R. 492.

— Affidavit — Cross-examination — Examination on pending Motion — Appointment — Residence of Party.]—Where a plaintiff is so situated that he may for some purposes be deemed to have more than one residence within the jurisdiction, and in the writ of summons he designates one of these places as the place where he resides, that place is to be considered his place of residence for the purposes of the action, and an appointment for his examination in another county is irregular.—Ont. Rule 512, providing that the deponent in every affidavit on production shall be subject to cross-examination, having been rescinded by Rule 1337, it is not competent for a party to obtain, in effect, a cross-examination of such a deponent upon his affidavit by the indirect means of examining him under Rule 578, for the purpose of using his evidence upon a motion for a better affidavit. *Dryden* v. *Smith*, 17 Ont. P.R. 500.

— Production of Documents—Affidavit— Objection to Produce — Specification of Document.]—Where, in an affidavit of documents made in compliance with the usual order for production, only one document is mentioned, and the possession or control of other documents is negatived, the statement "I object to produce the said document" complies with Ont. Rule 513 and sufficiently specifies the document mentioned in the affidavit which the defendant objects to produce, although no information is given as to its date, nature or contents. *Vansickle* v. *Axon*, 17 Ont. P.R. 535.

—Production of Documents—Deed relating to Plaintiff's Title.]—To deny the execution of a deed sought to be protected, or to set up that it is forged, or to plead *non est factum*, does not give to the defendant a right to have it produced on an affidavit of documents, where the deed is a part of the title to be proved at the hearing by the plaintiff; for the onus of proving it lies upon him, and if he fails he can go no further: *Frankenstein* v. *Gavin's Cycle Co.*, [1897] 2 Q.B 62, followed. *Griffin* v. *Fawkes*, 17 Ont. P.R. 540.

— Patent of Invention — Action to restrain Infringement — Denial of Right — Details of business transactions.]— In an action to restrain the defendants from selling a certain drug in violation of the rights of the plaintiffs under a patent, and of the terms upon which the drug was sold to the defendants, and for damages for selling in violation of such rights and terms, and for damages for a trade-libel, the defendants admitted that they bought the drug, but not from the plaintiffs, and were selling it by their agents, and upon their examination for discovery stated fully their mode of procedure in buying and selling, but in their pleading they denied the plaintiffs' patent right:—Held, that, there being a *bonâ fide* contest as to that right, the defendants should not, before the trial, be compelled to afford discovery of the details and particulars of such buying and selling, so as to disclose their and their customers' private business transactions Such discovery should be deferred until after the plaintiffs should have established their right, even if a subsequent separate trial of the question of infringement should be necessary. *Dickerson* v. *Radcliffe*, 17 Ont. P.R. 586.

—Practice—Discovery—Inspection of Documents — Privilege — Letters between Principal and Agent.]—In an action for redemption of shares in a public company, deposited by plaintiff as collateral security to an overdraft, or in the alternative for damages for their improper sale by the bank, the defendants, in answer to an order for discovery, made an affidavit of documents disclosing possession of a number of letters relating to the matters in question which had passed between the manager of the Bank at Victoria and the manager of the Bank at Vancouver, which they objected to produce as being privileged:—Held, following *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644, that the letters were not privileged and must be produced. *Van Volkenburg* v. *Bank of British North America*, 5 B.C.R. 4.

—Libel — Pleading—General justification—Particulars.]—In an action of libel a defendant who has pleaded a general justification must furnish the plaintiff with the particulars of the facts relied on as a justification before he can obtain discovery from the plaintiff. *Bullen* v. *Templeman*, 5 B.C.R. 43.

XIII Evocation.

—Circuit Court—Incidental Demand—Art. 1058 C.C.P.]—A defendant in the Circuit Court, who produces an incidental demand for an amount in excess of the jurisdiction of that tribunal, is not entitled to an evocation to the Superior Court. *Beauchêne* v. *Thibault*, Q R. 10 S.C. 423.

XIV. Examination of Witnesses.

—Witness about to leave Province—Order for Examination—Appeal pending—Absence of Record—Examination of Prisoner—Arts. 240 C.C.P.]—When the Supreme Court is seized of a cause on appeal from an interlocutory judgment, and the record is therefore not in the Superior Court, a judge of the latter Court has, nevertheless, jurisdiction to order the immediate examination of a witness who is about to leave the Province and of whose evidence the parties

will be deprived if obliged to wait for the judgment of the Supreme Court. Such order may be made where the witness is in prison but his term of imprisonment has expired, if it is shown by affidavit that he will depart from the Province on leaving the prison. *Bank of Montreal*, v. *Demers*, Q.R. 10 S.C. 521.

XV. Formalities.

— Contrainte par Corps — Mode of Procedure — Waiver — Folle-Enchère.]—The demand for condemnation to payment of a sum of money *par corps* should not be confounded with putting into execution the writ for arrest (*contrainte*); the proceedings required in the latter are of strict right and all the formalities should be observed rigourously and on pain of nullity. It is not so with the former proceeding, which does not differ from ordinary demands except in the manner of presenting it, that is, by petition or motion instead of by writ of summons, when it is done by a party already in the cause. If a party called upon to answer a demand for condemnation to payment of money, even *par corps*, appear without raising any questions of form such as the insufficiency of the delay between the notice and presentation of the petition, he will be deemed to have waived it, which he can do as it is for his benefit the delays are prescribed. In case of *folle-enchére* the court must, upon request, fix the amount to be paid by the bidders and condemn them *par corps* in respect to it; it is for the court to determine the amount of the condemnation and to reduce it if what is indicated is not proved to be correct. A prior taxation of the costs is not necessary. *Dupuis* v. *Béland*, Q.R. 11 S.C. 185.

XVI. Garnishee.

— Procedure — Seizure by Garnishment — Art. 558 C.C.P.]—Inasmuch as under art. 558 of the Code of Procedure, only the wages which are due to a clerk at the date of the service of the attachment are affected thereby, the defendant is entitled to claim from the garnishee the amount which became due subsequent to the service of the attachment, and especially where the garnishee's declaration was not contested before the seizure became exhausted. *Earby* v. *Canadian Pacific Railway Co.*, Q.R. 10 S.C. 187.

— Labourer's Wages — Seizure — Wages not Earned — Arts. 558, 628 C.C.P.]—The fourth part of the wages of a workman (*operarius*) is seizable, even for wages not due, and that notwithstanding the provisions of art. 558, par. 5 of the Code of Civil Procedure, this seizure being governed by art. 628 par. 5 C.C.P. *Chabot* v. *Oneson*, Q.R. 11 S.C. 223.

XVII. Incidental Demand.

—Dismissal—Peremption d' Instance—Libel.]—An incidental demand will not be received if it emanates from the same source as the principal demand, and if both have been instituted at the same time and depend upon the same proof. In this case the libel alleged in the incidental demand was contained also in the special reply of the plaintiff to the defendant's pleas, and therefore the two *instances* could not be separated. *Landry* v *Pucaud*, Q.R. 11 S.C. 368.

XVIII. Information.

—Alteration in—Re-swearing.]—Where an information under the Canada Temperance Act purported to be made by "J.M.B," but was signed and sworn to by "A.W.M." and the magistrate at the hearing erased the words "J.M.B.", and wrote over them the words "A.W.M." without requiring the information to be resworn by the deponent, the information was held to be invalid. *The Queen* v. *McNutt*, 28 N.S.R. 377.

—Proceedings by Information—Attorney-General—Relator.]—Actions in the public interest, instituted by the Attorney-General on information may be proceeded with independently of the person named as relator.—Absence of interest in the relator is no answer to a proceeding by the Attorney-General.—Ord. 11, rule 1 (Nova Scotia Practice) provides that "all actions and suits which previously to the first day of October, 1884, were commenced by suit, bill or information in the Supreme Court, shall be instituted in the said court by a proceeding to be called "an action":—Held, that the word "information," as used in the rule, must be read in the same sense as the corresponding word in the English Rule (Ord. 1, r. 1) as referring exclusively to informations in Chancery, and that it would not cover an information in the nature of a *quo warranto*. *Attorney-General* v. *Bergen*, 29 N.S.R. 135.

XIX. Injunction.

—Parochial Law—New Cemetery — Orders of competent Authority—Application for Injunction — Intervention on Appeal.]—Where it appears that a *fabrique* lawfully represented has only executed the orders of the competent religious authority, confirmed by the civil authority, for the opening of a new cemetery and closing up of the old, the issue of a writ of injunction to refrain from fresh interments for the present will be refused until it is shown that the said ecclesiastical authority has withdrawn its orders, or that the *fabrique* has acted in opposition to them. The application for a writ of injunction for this purpose will be too late if the act has been accomplished already, that is, if the new interments have already taken place in the new cemetery. A motion to reject an appearance produced in the name of the *fabrique*, upon resolution of the former and present church wardens (*marguilliers*) authorizing a counsel (*procureur*) to appear to inform the judge—when a majority of the freeholders have, by resolution adopted in a meeting of parishioners, consented to the issue of the writ of injunction—will be rejected without costs, where the counsel of the *fabrique* produced with his appearance documents relative to the cause and proper for the information of the judge to enable him to grant or refuse the application, which documents would have to be produced

by the applicants themselves if the appearance of counsel for the *fabrique* was rejected. The *fabrique* having been prevented, by resolutions adopted in two consecutive meetings of parishioners, from opposing the application for a writ of injunction and the appeal taken from the judgment rejecting such application, a parishioner who had acquired rights in the new cemetery was allowed to intervene before the Court of Appeal in order to maintain said judgment. *Dubé* v. *La Fabrique de l'Isle Verte*, Q.R. 6 Q.B. 424.

XX. Inscription.

—Review — Inscription — Deposit — Arts. 497 & 498 C.C.P.]—A document which reads "the plaintiff gives notice to defendant that he has this day duly made the deposit required by law, and that he has inscribed the case in review, etc.," when in fact the deposit was not made nor the original filed until three days later, is not an inscription but a mere notice, and such notice being given before the deposit was made, the inscription was set aside as irregular and null. *Banks* v. *Burroughs*, Q.R. 11 S.C. 440.

XXI. Interpleader.

—Jurisdction — Foreign Claimants — Fund payable in Foreign Country.]—Under an agreement with respect to a mining property in the Province of Ontario, a certain royalty was payable in a foreign country to foreigners residing therein, by a person also residing therein, but was claimed by another person in the jurisdiction:—Held, upon an application for an interpleader order, that the court had no power to direct foreigners to come within its jurisdiction to defend their rights to the fund. *Re Benfield and Stevens*, 17 Ont. P.R. 300, affirmed by 17 Ont. P.R. 330.

XXII. Interrogatories.

—Interrogatories sur faits et Articles—Illegal Answers—Art. 228 C.C.P.]—Answers to interrogatories on articulated facts which contravene the terms of Article 228 of the Code of Civil Procedure may be rejected on motion, and the interrogatories taken *pro confessis*. *Hislop* v. *McConomy*, Q.R. 11 S.C. 1.

— Practice — Interrogatories — Insufficiency of Answer.]—It is not sufficient for the plaintiff, in answer to an interrogatory, to deny having any knowledge, without stating his information and belief. *Hannaghan* v. *Hannaghan*, 1 N.B. Eq. 395. *Laughlan* v. *Prescott*, 1 N.B. Eq. 342.

XXIII. Intervention.

—Saisie-Arret after Judgment—Intervention—Party already in Cause—Beneficiary Heir—Personal Condemnation.]—A judgment was obtained against a defendant in her quality of beneficiary heir of her father, and the plaintiff proceeded by *saisie-arrêt* against money in defendant's hands personally, to compel her to declare what she owed to the succession of her father. The defendant declared that she owed nothing personally, but added that as heir, she owed $1,002.96; that she could not pay this sum without an order of the court, owing to the succession being insolvent, but that she was prepared to deposit it in court for distribution among the creditors. Subsequently, the defendant filed an intervention, alleging that she, personally, was a creditor of the succession of her father for $4,000, and asking for an order directing her, as *tiers-saisi*, to deposit the moneys of the succession in court for distribution ratably among creditors including herself:—Held, that that part of the declaration of the defendant, as *tiers saisi*, which related to the monies she had in her hands as beneficiary heir, was not established, the *saisie-arrêt* being addressed to her personally, and she could not be compelled to pay personally what she owed as heir; and, moreover, that she could not intervene to obtain the distribution of these moneys, the more so as she was already a party in the cause. *Audette* v. *Valiquette*, Q.R. 6 Q.B. 58, modifying 10 S.C. 8.

—Controverted Election—Petition for leave to Intervene—Grounds.]—A petition in intervention by an elector will be dismissed *sur défense en droit* unless it is alleged that the petitioner is dead, or that he has given notice of his intention not merely to abandon the proceedings but also to withdraw or abandon his petition, or that a special request has been presented by him for permission to withdraw his petition. *Desparois* v. *Bergeron*, 3 Rev. de Jur. 480. Bélanger J.

XXIV. Irregularities.

—Articulation of Facts — Failure to Answer — Subsequent Enquête.]—Failure to answer the articulation of facts is cured by the parties proceeding to enquête upon those facts and submitting the case without taking advantage of the irregularity. *Boucher* v. *Véronneau*, 3 Rev. de Jur. 467. Court of Review.

XXV. Joinder.

— Joinder of Plaintiffs — Common Right of Action.]—Two or more persons complaining of the same cause of damage and invoking a right of action proceeding from the same act of the defendant (*e. g.* the illegal exposure to public view of a photograph of plaintiffs), and the principal prayer of whose conclusions is common to all, may join in the same action. *Boyd* v. *Dagenais*, Q.R. 11 S.C. 66.

And see Action.
" " Parties.
" " Pleading.

XXVI. Judgments Generally.

—Judgment by Default—Reference to Registrar.]—Upon a motion for judgment in default of pleading to an information by the Crown it appeared that the information while showing that the Crown was entitled to judgment, did not show clearly the amount for which judg-

ment should be entered, and a reference was made to the Registrar to ascertain the amount. *The Queen* v. *Connolly*, 5 Ex. C.R. 397.

—Patent of Invention — Action to Avoid—Default of Pleading—Judgment—Registrar's Certificate.]—Upon a motion for judgment in default of pleading in an action to avoid certain patents of invention, the court granted the motion, but directed that a copy of the judgment should be served upon the defendants, and that the registrar should not issue a certificate of the judgment for the purpose of entering the purport thereof on the margins of the enrolment of the several patents in the Patent Office until the expiry of thirty days after such service. *Peterson* v. *The Crown Cork and Seal Company*, 5 Ex. C.R. 400.

—Submission to Arbitration—Award—Rule of Court—Judgment.]—The Exchequer Court has no jurisdiction to entertain an application to make an award under a submission to arbitration by consent in a matter *ex foro*, a judgment of the court. *The Dominion Atlantic Railway Company* v. *The Queen*, 5 Ex. C.R. 420.

—Amendment—Order of Court—Accidental Slip or Omission—Ont. Rule 536, 780—Carelessness—Delay—Terms.]—One of several defendants in ejectment by a mortgagee disclaimed title and denied possession, and the plaintiff's action was dismissed at the trial. A Divisional Court reversed the decision at the trial, and ordered judgment to be entered for the plaintiff with all costs, the disclaiming defendants not appearing on the argument, although duly notified and served with the minutes of the order, upon which judgment was entered and execution issued:—Held, upon a motion to amend or vary the order as to costs, made after some months' delay, that the court being satisfied that his defence was made out at the trial, in the exercise of its inherent powers over its records or the powers conferred by Rule 780, could now correct an error arising from an accidental slip or omission in its order, and make the order as to the applicant's costs which would have been made originally:—Held, also, that he was entitled to relief under Rule 536 as amended by Rule 1454 as a party who, through mistake, had not been represented upon the argument of the appeal:—Held, further, that the carelessness and delay of the applicant did not disentitle him to relief, though they afforded ground for imposing upon him the terms set out in the judgment. *Cousins* v *Cronk*, 17 Ont. P.R. 348.

—Summary Judgment—Ont. Rule 744—Relief—Fraudulent Preference.]—An unopposed application for summary judgment under Rule 744, made the day after service of the writ of summons, in an action against a trader upon a bill of exchange, was refused. It was sworn, among other things, that the defendant had fraudulently transferred his business and property to certain persons; but the court considered that the plaintiffs would not be prejudiced by the action being allowed to proceed in the ordinary way: *Leslie* v. *Poulton*, 15 Ont. P.R. 332, and *Molsons Bank* v. *Cooper*, 16 Ont. P R. 195, applied and followed. *Lake of the Woods Milling Co* v. *Apps.*, 17 Ont. P.R. 496.

—Service of Papers—Posting up Copies—Ont. Rule 1330—Judgment—Irregularities.]—Where a service of a statement of claim and notice of motion for judgment was effected under Ont. Rule 1330, by posting up a copy of each in the office in which the proceedings were conducted:—Held, that the posting up of one copy only for two defendants was not to be deemed service on either, and a judgment founded thereon was set aside as irregular. *Haacke* v. *Ward*, 17 Ont. P.R. 520.

—Default—Setting Aside—Discretion—Terms—Defence—Merits—Ont. Rule 796.]—Under Ont. Rule 796 the court has a discretion to set aside any judgment by default upon proper terms. Where such judgment is a final one, the court is not in a position to exercise a discretion, unless the defendant shows at least some such plausible defence as he would have to show on resisting a motion for judgment under Rule 739. The court will not try the defence so asserted, but affidavits may be received, or the defendant may be cross-examined upon his own, for the purpose of enabling the court to determine how far there is *bona fide* defence of the nature of that set up; and *à fortiori*, his application may be met by documents under his own hand, not explained or answered, showing that such defence is non-existent. *Bourne* v. *O'Donohoe*, 17 Ont. P.R. 522.

—Jury Trial—Motion for Judgment on Verdict—Jurisdiction of original Court—Art. 28 C.C.P. as amended by R.S.Q. 5858 — Appreciation of Evidence by Court of Appeal.]—Where jurisdiction is expressly conferred by statute it can only be taken away by express legislation, and not by mere implication. And the Superior Court in first instance being originally vested with jurisdiction to pronounce judgment on the verdict in a jury case, and there being no legislation expressly taking away such jurisdiction as to a motion for judgment on the verdict in a case arising in any district other than Quebec and Montreal the original court still has jurisdiction to give judgment on the verdict in a case in a rural district, where the Court of Review has dismissed adverse motions for judgment *non obstante veredicto* and for a new trial, and the record has then been remitted to the court below. But the Court of Review has nevertheless the right to adjudicate upon a motion for judgment on the verdict if such motion be made while the court is still seized of the record:—*Ottawa & Gatineau Valley Railway Co.* v. *Rice*, Q.R. 4 Q.B. 545, explained. (The procedure in jury trials is amended by Arts. 491 *et seq.* of the new text).—Where an action of damages is brought by a parent for the death of his son, and the defendants not only fail to specially deny the relationship, but virtually accept its correctness by referring to the deceased as the plaintiff's son, both in their plea and in their suggestions of facts to be submitted to the jury, they cannot subsequently urge the omission of a specific finding on this point as ground for a new trial.—In adjudicating upon a motion for a new trial in a jury case the

Court of Appeal will not substitute its appreciation of the evidence nor its estimate of the amount of damage suffered for that of the jury whose special function it is to weigh and appreciate the evidence. *Canadian Pacific Railway Co* v. *Ball*, Q.R. 6 Q.B. 445.

—Judgment of Foreclosure—Non-Juridical Days—Arts. 3, 24, 81, 131, 892 C.C.P.]—In a summary case, where an exception to the form was dismissed on May 21st, and the 23rd and 24th were non-juridical days, a foreclosure and judgment *ex parte* on the 25th were premature, the defendant being entitled to plead on that day. Arts. 3, 24, 81, 131, 892 C.C.P. *Vien* v. *The Holmes Electric Protection Co.*, Q.R. 10 S.C. 128.

—Prothonotary — Special Action—Judgment by Default — Nullity — Opposition to Judgment—Proof—Arts. 89 et seq. 483a, 484 et seq. C.C.P.—54 V. c. 45 (P. Q.).]—The prothonotary has no jurisdiction to render judgment by default or *ex parte* in an action upon a promissory note prescribed on its face, with an allegation of interruption of prescription, which allegation gives to the action a particular character calling for documentary proof or proof by witnesses which can only be given before a regular tribunal and in the prescribed form, such a judgment is, therefore, radically null and the defendant may invoke the nullity by opposition to the judgment. The fact that the opposition to a judgment, rendered by the prothonotary under articles 89 *et seq.* of the Code of Civil Procedure, and the affidavit which accompanies it, do not state that the *opposant* has been prevented from producing his defence by surprise, by fraud, or for other good and sufficient reasons, is not a cause of nullity in the opposition which should be governed in such case by Arts. 484 *et seq.* of the Code of Procedure and not by Art. 483a. *Campbell* v. *Baxter*, Q.R. 10 S.C. 191.

—Bill of Exchange—Defence that Plaintiff not Legal Holder—Final Judgment—Discretion of Chambers Judge on facts before him—Further Affidavits read on Argument — Defendant allowed opportunity, on new facts shown to substantiate Defence — Payment into Court Required.]—Under Order 14, R. 1, where the defendant appears to a writ of summons, specially indorsed under Order 3, R. 5, and the plaintiff on affidavit verifying the cause of action, and stating that in his belief there is no defence to the action, applies for liberty to enter final judgment for the amount indorsed, with interest, if any, etc., the judge may, unless the defendant, by affidavit or otherwise, satisfies him that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly. In this case the affidavit read on behalf of the defendant, before the Chambers' Judge, stated: "I have been informed by the agent of the Havana Cigar Co., by whom the bill of exchange sued on herein was drawn, and from such information I verily believe that the plaintiff herein is not, and was not, at the time this action was brought, the holder of said bill of exchange." Other than this, no facts of any kind were stated, and there was nothing to satisfy the judge that the defendant should be entitled to defend. The Judge at Chambers having granted plaintiff the order applied for:—Held, that under these circumstances the question was entirely within the discretion of the judge, and there was no reason for holding that such had been wrongfully exercised. On the argument further affidavits were read on behalf of defendant under Order 57, R. 5, to which plaintiff replied:—Held, that, under the facts disclosed in the latter affidavits, defendant should have an opportunity of substantiating the defence that plaintiff was not the legal holder of the bill, on paying into court the amount of plaintiff's claim. Plaintiff to have costs of the motion below. Costs of the appeal to be costs in the cause. *Banque de Hochelaga* v. *Maritime Railway News Co.*, 29 N.S.R. 358.

—Setting Aside Judgment—Irregularity—Contested Case—Appeal to Supreme Court—43 V. c. 8.s. 10 (N.B.)—Application.]—After a judgment in a contested case had been taken on appeal to the Supreme Court of Canada, the court refused to set aside such judgment and subsequent proceedings on the ground that the cause had not been entered, and the writ and other pleadings filed in the office of the clerk of the pleas, as required by statute and Rule of Court Hilary Term, 1837. By section 8 of 43 Vict. c. 8 (Proceedings and Practice in the Supreme Court). "During the lives of the parties to a judgment . . . an execution may be issued within the period of twenty years from the signing of such judgment without a revival of the judgment." Section 10 enacts that "The provisions of this Act shall apply to all suits now pending in which a plea or pleas have not been delivered, but shall not apply to any suit now pending in which a plea or pleas have been delivered, which last mentioned suit or suits shall be carried on to completion as if this Act had not been passed." Held, that this last section applies only to the matter of pleadings and not to the issuing of an execution within the period of twenty years, as provided in section 8. *Gleeson* v. *Domville*, 33 N.B.R. 548.

—Action against Sheriff—Evidence—Judgment Proof of.]—Held, that in a case where some third party brings an action against the sheriff for seizure of goods under an execution and establishes a *primâ facie* case of title as against the execution debtor, the sheriff must prove a judgment as well as an execution; *White* v. *Morris*, 11 C.B. 1015 followed; *McLean* v. *Hannon*, 3 S.C.R. 706, and *Crowe* v. *Adams*, 21 S.C.R. 342 distinguished. *Kirchhoffer* v. *Clement*, 11 Man. R. 460.

—Judgment—County Court—Man. Queen's Bench Act, 1895, Rules 804-6—Sale of Land under Judgment.]—The provisions of Rules 804-6 of the Man. Queen's Bench Act, 1895, do not authorize proceedings to be taken in a summary way under them for the purpose of realizing a registered judgment of a County Court by sale of land, such rules being applicable only to judgments in the Queen's Bench. *Proctor* v. *Parker*, 11 Man. R. 485.

—Practice—Judgment for Costs Only—Examination of Judgment Debtor—Execution Act, C.S.B.C. 1888, c. 42—Order ex parte.]—Section 11 of the Execution Act, C.S.B.C. 1888, c. 42, providing for the examination of a judgment debtor "as to the means or property he had when the debt or liability was incurred," refers to the debt or liability to recover which the action was brought, and does not apply to a judgment for costs only.—When an order is made after service of a summons upon which the opposite party does not attend it will be treated as an *ex parte* order, and may be re-heard in chambers and rescinded. *Griffiths* v. *Canonica*, 5 B.C.R. 48.

—Entry of in New Brunswick Parish Court—C.S.N.B. c. 60 s. 25.]—The action was tried before a parish court commissioner with a jury, and verdict rendered for the defendant on the 20th October, but judgment was not entered up, and no adjournment was made. On the 11th December following the commissioner entered judgment. By s. 25 of c. 60 Cons. Stat. N.B. it is provided that an adjournment shall not extend beyond one month. Held, that the judgment should be set aside, as it could not be entered except on a day to which the court adjourned. *Brayley* v *Morrison*, 33 C.L.J. 507; 17 C.L.T. (Occ. N.) 127.

—Judgment Debtor—Examination—Order for judgment for costs—Interpleader proceedings—Motion to commit—Ont. Rules 926, 932, 1360—Concealment of property.]

See DEBTOR AND CREDITOR, IX.

—Judgment Debtor—Ont. Rule 928—Examination under—"Transfer" by Judgment Debtor.]

See DEBTOR AND CREDITOR, IX.

—Judgments against Married Woman—Irregularity—Separate estate—Proprietary or personal judgment—N.W.T. Act, R.S.C. c. 50 s. 40.]

See HUSBAND AND WIFE, V.

—Action by Wife for separation as to property—Judgment in—Nullity—Notice—Error in Husband's name.]—See JUDGMENT, VIII.

—Revivor—Acceptance of Promissory Note in discharge of judgment—Satisfaction piece.]

See JUDGMENT, III.

—Mortgage—Notice of Sale—Abandonment—Costs—Action on Covenant—Motion for Summary Judgment.]—See MORTGAGE, XI.

—Municipal Corporation—Accident caused by defective grating in sidewalk—Non-feasance or mis-feasance—Fact necessary to a judgment—New trial ordered to determine.]

See MUNICIPAL CORPORATIONS, VII.

XVII. JUDGMENT BY DEFAULT.

—Action—Service of—Judgment by default—Opposition to judgment—Reasons of—"Rescissoire" joined with "Rescindant"—Arts. 16, 89 et seq., 483 489, C.C.P.—False return of service.]—No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff. The provisions of articles 483 and following of the Code of Civil Procedure of Lower Canada relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered, for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment and have it set aside, notwithstanding that more than a year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits.—An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescissoire* has thus been improperly joined with the *rescindant*. *Turcotte* v. *Dansereau*, 27 S.C.R., 583.

—Default judgment—Setting aside—Opposing motion—Costs.]—See COSTS, III. (*d*.)

—Promissory Note—Presentment—Statement of Claim—Amendment—Default judgment—Affidavit—"Duly presented for payment."]

See PLEADING, I.

XXVIII. JURY AND JURY NOTICE.

—Inflammatory address—No objection at trial—Excessive damages.]—Where complaint is made that counsel at the trial has improperly inflamed the minds of the jurors by remarks addressed to them, objection must be lodged at the time the remarks are made, and the intervention of the trial Judge claimed; and where this has not been done, the Court will not interfere upon appeal. The injuries having been severe and caused much suffering, a verdict of $6,500 was not one that should be disturbed as excessive. *Sornberger* v. *Canadian Pacific Railway Co.*, 24 Ont. A.R. 263.

—Negligence—Damages—Exposure of body to Jury—New trial—Misconduct of Juror.]—In an action to recover damages for alleged malpractice, the plaintiff is not entitled to show to the jury the part of the body in question for the purpose of enabling them to judge as to its condition: *Sornberger* v. *Canadian Pacific Railway Co.*, 24 Ont. A.R. 263, approved and distinguished.—Attempting to dissuade a witness from giving evidence, is such misconduct on the part of a juror as would justify the granting of a new trial. *Laughlin* v. *Harvey*, 24 Ont. A.R. 438.

—Jury Notice—Motion to strike out—Non-repair of Highway—Ont. Law Courts Act, [1896], s. 5.]—In an action against a railway company and a city corporation to recover damages for injuries sustained by the plaintiffs by being upset upon a street in the city owing to the heaping up of snow upon the side of the roadway, the plaintiffs

in their statement of claims alleged that the corporation had permitted this to be done, and had thereby allowed the street to be out of repair and dangerous for travel:—Held, that the action must be treated as one for non-repair of a street within the meaning of section 5 of the Law Courts Act, 1896; and a jury notice was, therefore, irregular and should be struck out.—It made no difference that the motion to strike out the jury notice was made by the railway company and not by the city corporation, as the latter appeared and supported the notice. *Barber* v. *Toronto Railway Co.*, 17 Ont. P.R. 293.

—**Jury—Failure to answer Questions—Effect of—Judgment—New Trial.**]—At the trial of an action for negligence causing the death of a servant of the defendants, the jury, in answer to questions, found that the defendants were guilty of negligence which caused the accident, and assessed the plaintiff's damages, but disagreed as to, and did not answer a question put to them as to, whether the deceased, with knowledge of the danger, voluntarily incurred the risks of the employment:—Held, that judgment could not under these circumstances, be entered either for the plaintiffs or the defendants:—Held, also, that as soon as such a decision was given, to which both parties yielded, that no judgment could be given for either of them on the findings, there was an end of the trial, and either party was at liberty to give a new notice of trial, and again to enter the action for trial as upon a disagreement of the jury, without moving to set aside the findings and for a new trial: *McDermott* v. *Grout*, 16 Ont. P.R. 215, approved; *Stevens* v. *Grout*, 16 Ont. P.R. 210, overruled. *Faulknor* v. *Clifford*, 17 Ont. P.R. 363.

—**Non-jury sittings—Notice of trial—Default—Ontario Judicature Act, [1895], s. 88, R. 647.**]—Where an action is to be tried without a jury, and two Spring or Autumn Sittings have been appointed at the place of trial, one for the trial of actions with, and the other without a jury, the plaintiff, although by section 88 of the Judicature Act, 1895, he can have his action tried before at the jury sittings, is not in default under Rule 647 by reason of his not giving notice of trial therefor, where the non-jury sittings, for which he intends to give notice of trial, is to be held at a later date. *Leyburn* v. *Knoke, Leyburn* v. *Herbort*, 17 Ont. P.R. 410.

—**Defamation—Trade-Libel—Action on the Case—Trial by Jury—Ont. Judicature Act, [1895], sec. 109.**]—An action for words written and published relating to articles of the plaintiffs' manufacture, and the rights of the plaintiffs under certain letters patent by virtue of which they claimed a monopoly of the manufacture and sale of the articles, is not an action of defamation properly so called, but an action in the case for maliciously acting in such a way as to inflict loss upon the plaintiffs, and does not come within section 109 of the Judicature Act of 1895, so as to be triable only by a jury, unless by consent. *Dickerson* v. *Radcliffe*, 17 Ont. P. R., 418.

—**Jury Notice—Striking out—Legal and Equitable Issues—Irregularity—Discretion.**]—Where both legal and equitable issues are raised by the pleadings, a jury notice cannot be regarded as irregular: *Baldwin* v. *McGuire*, 15 Ont. P.R. 305, distinguished.—Where it is apparent that an action should be tried without a jury, a Judge in Chambers will strike out the jury notice as a matter of discretion. *Toogood* v. *Hindmarsh*, 17 Ont. P.R. 446.

—**Omission of Judge to instruct Jury—Absence of request—Setting aside verdict.**]—In an action for malicious prosecution the trial Judge, not having been requested to do so, omitted to instruct the jury that even although the defendant believed in the charge he was making he might still be held to be acting maliciously. Held, that the Judge was not excused from directing the jury on a material point by the absence of a request, and that his failure to do so was a valid reason for setting aside the verdict. *Hawkins* v. *Snow*, 28 N.R S. 259.

—**Marine Insurance—Loss of ship—"Perils of the Sea"—Misdirection—New Trial.**]—In an action to recover the amount of a policy of insurance on a ship that had sunk at sea, the trial judge instructed the jury, as a matter of law, that the ship had been lost by "perils of the sea," there being no explanation offered as to the cause of the sinking, but there being evidence from which it could be reasonably inferred that the vessel was sea-worthy at the commencement of the voyage:—Held, that this was misdirection, and that there must be a new trial. *Morrison* v. *Nova Scotia Marine Ins. Co.*, 28 N.S.R. 346.

—**Action for Breach of Warranty—Counterclaim—Jury—Queen's Bench Act (Man.), 1895, s. 49.**]—A counterclaim is not an action within the meaning of the Queen's Bench Act (Man.), 1895, not being a civil proceeding commenced by statement of claim, and a defendant is not entitled to have his counterclaim tried by jury by virtue of section 49, sub-section 1, although such counterclaim is for damages for breach of warranty; nor does this constitute any special ground for an order under sub-section 3 for trial by jury: *Case* v. *Laird*, 8 Man. R. 461; *Woollacott* v. *Winnipeg Electric Street Railway Co.*, 10 Man. R. 482 followed. *Bergman* v. *Smith*, 11 Man. R. 364.

—**Solicitor—Expulsion from Court—False imprisonment—Action against Police Officers—Directions to Jury—Damages.**]—See SOLICITOR.

XXIX. LACHES.

—**Procedure—Action in Warranty—Requête Civile.**]—The defendant, after staying the suit by dilatory exception to call in a warrantor, neglected during two months to plead or have his warrantor take up the *instance*. The plaintiff then inscribed *ex parte*, and obtained judgment:—Held, that the circumstances under which the judgment was rendered disclosed no grounds justifying recourse by *requête civile*. *Cuddington* v. *Tougas*, Q.R. 11 S.C. 177.

—**Practice—Writ of summons—Laches.**]—A delay of four months, unaccounted for, from the date of the expiry of a writ, is fatal to a motion to renew the writ. *Loring* v. *Sonneman*, 5 B.C.R. 135.

XXX.—Mortgage Action.

—Manitoba Real Property Act—Practice—Plaintiff in issue.]—See Mortgage XII.

XXXI. New Trial.

—Issues tried by Jury—Improper admission and rejection of evidence—Misdirection—Voluntary Gift inter vivos—Undue influence—Burthen of Proof.]—The granting of a new trial by the Court of Equity of issues tried before a jury is largely in the discretion of the Court, and where evidence has been improperly admitted or rejected, if the findings are satisfactory to the Court, and are the same that ought to have been made had there been no improper admission or rejection of evidence, and the Court is satisfied that justice has been done, a new trial will not be granted.—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. 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 N.B. Eq. 346.

And see hereunder, XLVI.

XXXII.—Notice.

—Election petition—Failure to serve notice—Application to re-open Enquête.]

See Parliamentary Elections.

XXXIII.—Orders.

—Sale of land under Execution—Order for writ of Possession—R.S.N.S., 5th ser. c. 125, s. 23.]—In order to put a purchaser of land sold under execution into possession, section 23 of R.S. N.S. 5th ser. c. 125, provides that a Judge of the Supreme Court may make an order absolute "directing a writ of possession to issue out of said court after a certain number of days to be named in said order:"—Held, that where an order, purporting to be granted under the above section, omitted to specify the number of days after which the suit should issue, it must be set aside as being made without jurisdiction.—After the order absolute for the writ was granted, application was made to another judge to quash the writ. The defect being in the order for the writ and not in the writ itself, which was not shown to be bad on its face, the application was dismissed:—Held, that an appeal from the order refusing the application to quash must be dismissed with costs:—Held, also, that the matter having been decided adversely to the appellant, or being before the court in the other appeal, the second application should not have been made. *Re Broad Cove Coal Co.*, 29 N.S.R., 1.

—Practice—Order in Chambers—Delay in issuing—Abandonment.]—An application to settle the minutes of an order was made fifteen days after it was pronounced in Chambers:—Held, that the delay was not sufficient to constitute an abandonment of the order. *Baker* v. "*The Province*," 5 B.C.R. 45.

—Officer—Registrar—Whether Deputy competent to take examination appointed to be held before the Registrar.]—An order directed the examination of a witness *de bene esse* before "the Registrar of this Court." The Registrar not being able to take the examination the witness was examined before the Deputy Registrar of the Court. By the Supreme Court Act, C.S.B.C., 1888, c. 31, section 2, "The District Registrar shall include any deputy of such Registrar:"—Held, that the nomination of the Registrar by the order to take the examination was not as "*persona designata*," but as Registrar, and that the deputy Registrar was competent to act for him thereon. *Richards* v. *Ancient Order of Foresters*, 5 B.C.R. 59.

—Præcipe Order—Motion to set aside—Security for Costs.]—See Costs, V.

And see hereunder XXVI.

XXXIV. Particulars.

—Fire Insurance—Proofs of Loss—False and Fraudulent Statements.]—The defence to an action to recover the loss alleged to have been sustained by the plaintiffs by the destruction by fire of property insured by the defendants was that the plaintiff's claim was vitiated by the 15th statutory condition to which the defendants' policies were subject, because of the following false and fraudulent statements in a statutory declaration forming part of the proof of loss: (1) that the fire originated at a specified time from the embers of a previous fire upon the same premises; (2) that the fires were not caused by the wilful act or neglect, procurement, means, or contrivance of the manager or any officer of the plaintiffs; that the schedules attached to the declaration contained as particular an account of the loss as the nature of the case permitted, and that such account was just and true. Upon an application for particulars:—Held, that the plaintiffs were entitled to know what acts of omission or commission the defendants intended to charge the plaintiffs' manager with as constituting the negligence imputed to him, and in what way it was charged that the fires were caused by his procurement, means or contrivance; that as to the origin of the fire, the statement that it did not occur at the time and in the way stated, and that the untrue statement was made with intent to defraud the defendants, was sufficient information to give the plaintiffs, and the defendants could not be required to give further particulars without disclosing their evidence merely, nor should further particulars be required as to how the declaration that the fire was not caused by the wilful act of the manager was false and fraudulent; the statement that the fire was caused by his wilful act was sufficient; that as to the alleged falsity and fraud of the declaration with respect to the extent of the loss, it was sufficient for the de-

fendants to say that the plaintiffs had overstated by a specified sum the loss on the whole of the articles insured, without saying by how much the plaintiffs had overstated the loss on each of the classes of articles. *Katrine Lumber Co.* v. *Liverpool and London and Globe Ins. Co.*, 17 Ont. P.R. 318.

—Defamation —Trade libel — Action on the Case — Particulars — Slander — Examination of Party.]—The plaintiff, a tradesman, claimed damages for injury to his credit and business by reason of the defendant having sent certain hand bills issued by the plaintiff, advertising his business, to various wholesale creditors of the plaintiff, and having written and published letters to such creditors falsely and maliciously charging that the plaintiff was advertising his business and unduly forcing sales with the view of selling and disposing of his goods to defeat and defraud his creditors:—Held, that the action was for libel and not in case for disturbing the plaintiff in his calling, and the defendant was entitled to have the words of the alleged libel set out in the pleading: *Flood* v. *Jackson* [1895], 2 Q.B. 21, and *Riding* v. *Smith*, 1 Ex. D. 91, specially referred to. The plaintiff also alleged that at a certain city, in a certain month and year, the defendant falsely and maliciously spoke and published of the plaintiff certain specified words:—Held, that the defendant was entitled to some particulars as to the times when, and the places where, the defamatory words were used, and as to some of the persons in whose hearing they were alleged to have been spoken: *Winnett* v. *Appelbe*, 16 Ont. P.R. 57 distinguished:—Held, also, that the plaintiff should have leave to examine defendant before delivering particulars in order to enable him to furnish them. *Robinson* v. *Sugarman*, 17 Ont. P.R. 419.

—Partnership action—Application for particulars—Close of Pleadings—Discretion.]—It is only in exceptional cases that particulars are ordered after the close of the pleadings. And where, in an action by the plaintiff against his former partner and another, for conspiracy to ruin the business of his firm, the defendant partner set up the defence that the business was ruined by the wrongful withdrawals and overdrafts of the plaintiff and by his mismanagement, negligence, fraud and embezzlement, and certain particulars were given thereunder, as to which the defendants swore that they were given with as much detail as he could demand, showing how the business had been conducted and the shortage which had arisen, for which he alleged the plaintiff was responsible as the acting partner:—Held, that the discretion exercised in Chambers in refusing to order further particulars, after issue joined and notice of trial given by the plaintiff, should not be interefered with. *Smith* v. *Boyd*, 17 Ont. P.R. 463.

—Writ of Capias—Affidavit—Allegation of secretion of Goods.]—Where a writ of capias is issued upon an affidavit alleging that defendant has secreted his property with intent to defraud creditors, the defendant, before filing his contestation of said writ, is entitled to particulars as to the time, place and circumstances of the act or acts of secretion referred to. *Archer* v. *Douglass*, Q.R., 10 S.C. 42.

—Action of revendication—Title to things seized—Omission to set forth—Exception to form—Amendment.]—See PLEADING, IX.

XXXV. PROCEDURE IN PARTICULAR MATTERS.

—Patent of invention—Proceedings to annul—Form of—R.S.C. c. 61 s. 34.]—The only proceeding by which a patent of invention can be annulled is a writ of *scire facias* issued at the instance of the Crown under R.S.C. c 64, s. 31. *Patent Elbow Co.* v. *Cunin*, Q.R. 10 S.C 56.

—Opposition—Security for costs—Art. 29 C.C.P.]—The plaintiff contesting an opposition, who has left the province of Quebec *pendente lite*, cannot be called upon to furnish security for costs. The *opposant* occupies the position of *actor* and "institutes a proceeding" within the meaning of Art. 29, C.C.P., and it is he who may be compelled to give security. *O'Flaherty* v. *McLaughlin*, Q.R. 10 S.C. 450.

—Municipal expropriation—Objection to arbitrator—Qualification—Quo warranto—Recusation—Arts. 374, 916 M.C.]—A person appointed by a Superior Court Judge as a third arbitrator in a case of municipal expropriation cannot be removed from the position by writ of *quo warranto;* but the party who claims that he has not the qualifications required by law should present his objection and then apply to a judge of the Superior Court to have such objection (*recusation*) maintained. *Préfontaine* v. *Ducharme*, Q.R. 10 S.C. 478.

—Judicial Abandonment—Mode of Arrest—Capias—Contrainte par corps—Art. 764 C.C.P.]—See JUDICIAL ABANDONMENT.

XXXVI. PRODUCTION OF DOCUMENTS.

—Affidavit on Production—Controverting—Second Affidavit.]—An affidavit of a party on production of documents cannot be controverted.—The Court is not restricted to requiring from a party one affidavit only; but where the affidavit filed is positive and conclusive that all the documents relevant or relating to the action are set out in the schedules to the affidavit, the Court will not order a second one to be filed: *Compagnie Financière* v. *Peruvian Guano Co.*, 11 Q.B.D. 63, distinguished. *Hull* v. *Brener*, 17 C.L.T. (Occ.N.) 132.

—Partnership accounts—Statement of defence—Amendment—Production of documents.]
See PLEADING, I.

XXXVII. REFERENCE.

—Suit by Administratrix—Recovery of legacy—Admission of assets—Payment of legacies—Personal liability.]
See EXECUTORS AND ADMINISTRATORS, I.

XXXVIII. REMEDIES.

—Municipal Council—Vacant seat—Reinstatement of Councillor—Mandamus—Action—Faux.]
See MUNICIPAL COUNCIL.

XXXIX. Rules.

—Rules for Contempt—Contrainte par Corps—Signification—Notice.]—The proceedings on a rule for contempt of court for not conforming to a writ of prohibition are subject to the provisions respecting *contrainte par corps*.—Such a rule should be signified personally to the party against whom it is directed unless he conceals himself to avoid it, and a judge's order permitting signification at his domicile is illegal.—The party defendant under the rule is entitled to notice of one clear day before its presentation. *Beaupré* v. *Desnoyers*, Q.R. 11 S.C. 541.

XL.—Service of Process.

Service of summons under Canada Temperance Act—Proof of—Certiorari.]—A copy of the summons was left with an adult person at the defendant's residence. There was no proof before the magistrate that this adult person was an inmate of the defendant's last or usual place of abode, or that any effort had been made to serve the defendant personally with a copy of the summons:—Held, that the service of the summons was insufficient. The court refused to admit evidence to supplement that given before the magistrate. *In re Barron*, 33 C.L.J. 297.

And see hereunder, XLIV. and L.

XLI. Stay of Proceedings.

—Jurisdiction—Application of stranger—Ont. Judicature Act, [1895], s. 52 (9).]—The jurisdiction to stay proceedings given by section 52 (9) of the Judicature Act, 1895, at the instance of any person, whether a party to the action or not, is only to be exercised where the action is an improper one, or where, under the former practice, the Court of Chancery might have enjoined its prosecution, and only where the stranger is one who seeks to intervene and can properly be added as a party. *Fawkes* v. *Griffin*, 17 Ont. P.R. 473.

XLII. Subpœna.

—Copy of Subpœna—Certified by Solicitor—Law Stamp.]—A copy of a subpœna certified by the solicitor of the party who issues it does not require a law stamp (*timbre*) which is only necessary upon official copies, that is, those which emanate from the prothonotary of the court. *Mesnard* v. *Laberge*, Q.R. 11 S.C. 321.

XLIII. Summary Proceedings.

—Justice of the Peace—Adjudication—Adjournment sine die—Conviction.]—A justice of the peace in summary proceedings before him cannot adjourn *sine die* for the purpose of considering his judgment. *The Queen* v. *Quinn*, 28 Ont. R. 224.

—Articulations de faits—Art. 892, C.C.P.]—In a summary proceeding articulations of facts should not be produced. *Hudon* v. *Raymond*, Q.R. 11 S.C. 16.

—Commissioners' Court—Procedure—Two actions for same Debt—Consent.]—Proceedings before Commissioners' Courts are summary and governed by rules of equity; the incident, therefore, of two actions having been taken for the same debt, the latter containing a *désistement* of the first, and yet the judgment being rendered on the first, is not important; a consent of the parties to withdraw the second and proceed on the first, sufficing to legalize such procedure. *Ex parte Desharnois*, Q.R. 11 S.C. 484.

—Procedure—Summary matters—Inscription—Notice—Pointe de nullité sans grief—Art. 897a, C.C.P.]—Notwithstanding Art. 897a, C.C.P., which requires five days' notice of inscription for proof and final hearing in contested summary matters, the court will not disturb a judgment rendered in a summary action on a protested acceptance, where only one day's notice has been given, but where it appears by affidavit that there was a consent to have the case *en délibéré* before the vacation, and where the defendant has suffered no real wrong or damage, applying the well settled rule "*point de nullité sans grief*." — *Canada Paper Co.* v. *Forgues*, Q.R. 11 S.C. 178.

—Nova Scotia County Court Consolidation Act of 1889 ss. 62 and 64—Overholding tenant—"Action"—Practice.]—A proceeding to obtain a warrant against a tenant for overholding rented premises, under section 62 of the County Court Consolidation Act of 1889, is not an "action" within the meaning of section 64 of said Act, but is merely a summary proceeding to obtain possession of the premises.—The word "Action," when it occurs in any of the Nova Scotia Judicature Acts, must have the same meaning given to it when these provisions receive effect in the County Court, the practice and procedure being the same in the two Courts. *Hill* v. *Hearn*, 29 N.S.R. 25.

—Contract—Sale or Lease—Non-performance of Conditions—Remedy.]—See Contract, III (*a*).

XLIV. Summons.

—Practice—Foreclosure Suit—Affidavit of Service of Summons—Supreme Court in Equity Act, 1890 (53 V. c. 4), s. 185.]—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 N.B. Eq. 341.

—Examination of debtor under 59 V., c. 28 (N.B.)—Former Examination under C.S.N.B., c. 38—59 V., c. 28—Retroaction.]—Summons taken out by a judgment creditor under 59 Vict. c. 28, with a view to having the defendant, a judgment debtor, committed to jail for a year, on the grounds that the defendant had since the judgment had the means of paying the debt, but had refused to do so. A preliminary objection was taken, supported by affidavit, that on a similar summons taken out under Con. Stat. of N.B., c. 38, in that some time previously a new agreement had been made,

founded on a consideration that the defendant would pay and the plaintiff would accept payment of the debt by instalments:—Held, per Forbes, Co. J., that by making a new agreement, with consideration therefor, the plaintiff had waived his right under the statute, and was therefore precluded from proceeding further on present summons:—Held, also, that the proceeding should have been pressed if pressed at all, under the act under which the first summons had been taken out. *Bailey* v. *Ross*, 33 C.L.J. 47.

—**Irregular proceeding.**]—Where a summons has been discharged because the proper procedure is by notice of motion, the grounds taken are open upon notice of motion subsequently given. *Conrad* v. *Alberta Mining Co.*, 17 C.L.T. 133.

XLV.—Tender.

Offres réelles—Conditional tender.]—An offer of payment by the defendant to an action, subject to the condition that the plaintiff should withdraw his proceedings and pay the costs occasioned by the action, is not sufficient, the defendant having no right to impose such conditions: *Malenfant* v. *Barrette*, Q.R. 5 Q.B. 529; C.A. Dig., (1896), col. 272, followed. *Ferguson* v. *McLachlan*, Q.R. 11 S.C. 305.

—**Attorney ad litem—Tender to, in settlement of Suit.**]—Where the defendant, after service upon him of the writ and declaration, went to the agent and administrator of plaintiff for the purpose of settling the claim, and the agent requested him "to go and settle with the plaintiff's lawyers," a notarial tender to the attorneys *ad litem* of the amount due, with costs before return, was a valid tender under the circumstances. *Mitcheson* v. *Bell*, Q.R. 11 S.C. 461.

XLVI. Trial.

—**Notice of trial—Irregularity—Order staying proceedings—Appeal.**]—On 21st March, 1896, the defendant appeared, delivered a defence, and served an order for security of costs, which imposed a stay of proceedings. On the 2nd October, 1896, the plaintiff complied with the order by filing a bond, and on the 3rd October gave notice of trial:—Held, that the notice of trial was irregular, the pleadings not being closed when it was given.—A motion made in Chambers by the defendant to set aside the notice of trial was referred to the Judge at the trial, who dismissed it. The defendant thereupon withdrew, and the action was tried in his absence and judgment given for the plaintiff:—Held, that the judge when disposing of the motion was sitting and acting as a Judge of the Assize, and that this and the trial of the cause might properly be deemed one proceeding; and one appeal, comprehending all, was sufficient. *Campau* v. *Randall*, 17 Ont. P.R. 325.

—**Trial by Jury—Assignment of facts—Acceptance—New Trial.**]—Where the parties in a jury case, proceed with the trial before the jury without objecting to the assignment of facts, or appealing against the judgment by which they are assigned, they cannot afterwards obtain a new trial on the ground that the assignment was insufficient: *Laflamme* v. *The Mail Printing Co.*, M.L.R. 2 S.C. 146, and *Brossard* v. *The Canada Life Assur. Co.*, M.L.R. 3 S.C. 388, followed. *Curless* v. *Graham*, Q.R. 10 S.C. 175.

—**Bank—Agreement with Customer—Deposits—Security for paper—Commercial transaction—Mode of Proof.**]—An agreement between a merchant and a bank that the deposits made by the merchant shall be held to secure payment of his paper discounted by the bank is a commercial transaction which may be proved by witnesses. *Insky* v. *The Hochelaga Bank*, Q.R. 10 S.C. 142. Affirmed by Court of Review, 10 S.C. 510.

—**Ejectment — Ouster — Defence not raised — Necessity to prove.**]—In an action of ejectment the plaintiff is not obliged to prove ouster when the defendant does not raise it by his statement of defence; but insists on his absolute title to the land.—*McDonald* v. *The Restigouche Salmon Club*, 33 N.B.R. 472.

—**New trial—Nominal damages.**]—The Court will not grant a new trial to enable a plaintiff to recover nominal damages only. *Haines* v. *Dunlap*, 33 N.B.R. 556.

—**Notice of Trial not given—Discontinuance—Counsel Fees—English practice.**

See Costs, VII. (*d*).

—**Criminal law — Depositions at Preliminary Inquiry—Admissibility at Trial—Formalities.**]

See Criminal Law, V. (*a*).

—**Criminal Trial—Order for Mixed Jury—Abandonment—Discretion of Judge.**]

See Criminal Law, XII.

—**Replevin—Sheriff's Inquisition—Hearing on—Evidence—Use at Trial of Suit.**]

See Evidence, XII.

—**Lord Campbell's Act—Volenti non fit injuria—New trial**—See Negligence, VI.

—**Non-jury Sittings—Notice of Trial—Default—Ontario Judicature Act, 1895, s. 88, Rule 647.**]

See hereunder, XXVIII.

—**Jury—Misdirection—New Trial.**]

See hereunder, XXVIII.

— **Preliminary objections — Service of Election Petition—Bailiff's return — Cross-examination.**

See Parliamentary Elections.

XLVII. Venue.

—**Change of Venue—County Court action—Ont. Rule 1260—Second application — Appeal — Law Courts Act (Ont.) 1895, s. 9 (2).**]—Where in a County Court action an application has been made to the Master in Chambers under Rule 1260, to change the place of trial, no appeal lies from his order; and a second application for the same purpose, not based upon any new

state of facts arising since the first application was made will not be entertained by a Judge in Chambers: *McAllister* v *Cole*, 16 Ont. P.R. 105, followed; *Milligan* v. *Sills*, 13 Ont. P.R. 350, not followed, with the concurrence of the judges who decided it, pursuant to s. 9 (2) of the Ontario Law Courts Act, 1895. *Cameron* v *Elliott*, 17 Ont. P.R. 415.

—**Promissory Note—Place of Payment—Election of Domicile—Art. 85, C.C.**]—A promissory note dated at Montreal had, in fact, been made and was payable at Huntington, in the district of Beauharnois. An action on said note was instituted in the district of Montreal:—Held, that the action should have been brought in the district of Beauharnois, the indication of the place of payment constituting an election of domicile which, it must be presumed, was made in the interest of the maker of the note. —*Cameron* v. *Wilson*, Q.R. 6 Q.B. 289, reversing 11 S.C. 171, and restoring 9 S.C. 487: C.A. Dig. (1896), 281.

—**Action on Promissory Note—Election of Domicile—Art. 85 C.C.**]—*Wilson* v. *Cameron*, Q.R. 11 S.C. 171 reversed by Court of Queen's Bench, 24th Feb., 1897, and Judgment of Superior Court, Q.R. 9 S.C. 487; C.A. Dig. (1896), col. 281 restored.

—**Telegraphic Message—Injury by—Action for Damages.**]—An action claiming damages on account of an injurious telegraphic despatch transmitted from one judicial district to another, may be brought in the district in which the despatch was received by its destination. *Leduc* v. *Theoret*, Q.R. 11 S.C. 395.

—**Change of—Preponderance of convenience.**]—On an application for change of venue the affidavits for and against the motion showed that the balance of convenience preponderated in favour of the change, and the application was allowed by a Judge in Chambers. On appeal: Held, that the order allowing the change should not be interfered with, and the appeal should be dismissed with costs. *Munro* v. *McNeil*, 29 N.S.R. 79.

XLVIII. Waiver.

— **Sale of goods — Action — Non-production of Exhibits—Action by Insolvent for Debt due estate.**]—Held in an action for goods sold, a motion by defendant that he be not held to plead until plaintiff produce particulars of his account, amounts to a waiver of an objection based upon the non-production by plaintiff of certain written exhibits. *Chouinard* v. *Bernier*, Q.R. 11 S.C. 121.

—**Delays.**]—A party called upon to answer a demand for condemnation to the payment of money *par corps* may waive an objection to the insufficiency of the delay between the notice and the presentation of the petition since it is for his benefit the delays are prescribed.—*Dupuis* v. *Béland*, Q.R. 11 S.C. 185.

—**Practice—Objection to Jurisdiction—Appearance under Protest.**]—An appearance does not waive a right to object to the jurisdiction if notice of the objection be given to the plaintiff. —A notice appended to an appearance, that it is filed under protest, is a sufficient notice for that purpose: *Fletcher* v. *McGillivray*, 3 B.C.R. 50 questioned. *Loring* v. *Sonneman*, 5 B.C.R. 135.

XLIX. Warranty.

—**Accident—Liability for—Negligence—Recourse in Warranty.**]—M., whose horse had been killed by coming in contact with a live electric wire of The Bell Telephone Co., took action against the latter to recover its value. The Telephone Co. called in, *en garantie*, the Street Railway Co. alleging that, by the fault of the latter, the wire had been broken and left in contact with the wires of the Street Railway Co. which carried a heavy charge of electricity, and therefore that the accident was due, not to the fault of the Telephone Co. but to that of the Street Railway Co. The latter met the action in warranty by *une defense en droit*:—Held, that the plaintiff in warranty (Telephone Co.), alleging that the accident had happened without fault on its part, had a direct means of resisting the principal action and, therefore, had no right to call in, *en garantie*, the Street Railway Co. *Morgan* v. *The Bell Telephone Co.*, Q.R. 11 S.C. 127.

L. Writs.

— **Alteration — Return day — Nullity.**]—The change of the return day of a writ before it is signified is not a cause of nullity. *Mignier* v. *Laurin*, Q.R. 10 S.C. 254.

—**Action against Firm—Place of Service—Art. 60 C.C.P.**]—Service of a writ of summons and declaration on a general partnership must be made at its place of business if it has one.—Every partnership is presumed to have a place of business, and if it has none, the bailiff's return must state the fact, otherwise a service made upon one of the partners, under Art. 60 C.C.P., is not a valid service upon the partnership. *Underwood* v. *Malone*, Q.R. 10 S.C. 435.

—**Service of Writ—Action against Married Woman—Domicile.**]—In an action against a husband and wife for the price of goods sold to the latter a *marchande publique*, service of the writ at the domicile of the wife is insufficient as regards the husband, where it appears that he has been non-resident in the province for a number of years; the proper mode of serving him in such case is by advertisement in the newspapers. This defect, however, should not entail the dismissal of the action, and a judgment of the Superior Court dismissing it was reversed on review. *Martineau* v. *Michaud*, Q.R. 10 S.C. 486.

—**Execution — Lapse of Writ—Alias.**]—When a writ of execution has lapsed it is another writ, and not an *alias*, that should issue. *Montreal Board of Trade* v. *United Counties Railway Co.*, Q.R. 11 S.C. 516.

—**Foreign incorporated company—Contract of Agency—Breach—Jurisdiction—Service of Writ.**]—Defendants, a foreign corporation, contracted with plaintiffs that the latter should become their sole agents in Nova Scotia for the sale of

goods manufactured chiefly in Ontario. The contract contained a provision that defendants would sell to no other parties in Nova Scotia except through plaintiffs as their agents:—Held, that the contract was one which according to its terms ought to be performed in Nova Scotia, and that a sale by defendants to parties in Nova Scotia through agents other than plaintiffs was a breach within the jurisdiction of the Courts:—Held, further, that although the defendant company was formed under the English Joint Stock Companies' Act, with a registered office in London, the real head office being in Guelph, Ontario, service of a writ issued under Ord. XI., R. 1, sub-section (*e*) was properly made upon the principal officers at the latter place. *The W. H. Johnson Co.* v. *The Bell Organ & Piano Co.* 29 N.S.R. 84.

—**Practice—Form of Application to set aside Writ for Irregularity—Summons or Motion—Plaintiff's Address in Writ—Rule 70 (B.C.).**]—An application to set aside a writ of summons for irregularity need not be by motion to the Court, but may be by summons in chambers, and objection that the defendant had no *status* to take out such summons without entering a conditional or other appearance, overruled.—The writ was in Form 2 of Appendix A. of the Rules, and gave the plaintiff's address as "Victoria, B.C.:"—Held, sufficient. *Carse* v. *Tallyard*, 5 B.C.R. 142.

—**Writ of Summons—Address of Parties—Omission—Setting aside Writ—Notice of Motion—Irregularity—Amendment—Costs—Service out of Jurisdiction.**]—An application to set aside a writ of summons on the ground that there is no statement therein of the places of residence, and addresses of the various parties must be made upon notice of motion, and not by way of summons. A writ of summons in such a case will not be set aside unless the omission was deliberate and intentional. The omission makes the writ irregular; but it will be amended on payment of costs.—An action by judgment creditors to declare defendants resident in a foreign country trustees for the judgment debtor of lands situated within the jurisdiction of the court, and for sale of the lands to satisfy the judgment, is an action in which the whole subject-matter is land situate within the judicial district, within the meaning of the N.W.T. Judicature Ordinance, s. 32, s.s. 1, and service out of the jurisdiction of the writ will be allowed. *Conrad* v. *Alberta Mining Co.*, 17 C.L.T. (Occ. N.) 133. Rouleau, J.

—**Writ of Summons—Clerical Error—Non-suit—Costs.**]—In the County Court of St. John (Forbes, Co. J.), on review from the City Court of St. John. In this cause the Clerk of the Court made a mistake and issued the writ of summons in the name of *Miller* instead of *Milton*. The defendant did not appear, and the magistrate gave judgment against him by default. No amendment of the process was made on the trial. A non-suit was ordered with costs of the application. *Miller* v. *Flewelling*, 17 C.L.T. (Occ.N.) 265.

—**Writ of Capias—Necessary Amount—Transfer of Debt of third party.**]—See CAPIAS.

—**Writ issued in County Court—Several Causes—Excess of Jurisdiction—Attachment upon Real Estate—Amendment—Nova Scotia County Courts Consolidation Act of 1889, c. 9, s. 34.**]

See COUNTY COURT.

—**Power of Court to order Anti-dating of Writ.**]

See PARTIES, III.

—**Sale of land under execution—Order for Writ of possession—R.S.N.S. 5th ser. c. 125 s. 3.**

See hereunder, XXXIII.

See also ACTION.
" APPEAL.
" CRIMINAL LAW.
" INJUNCTION.
" PAYMENT INTO COURT.
" PLEADING.

PREMIUM NOTE.

Accident Insurance—Renewal of Policy—Payment of Premium—Promissory Note—Instructions to Agent—Agent's Authority—Finding of Jury.]—See INSURANCE, I.

PRESCRIPTION.

See LIMITATION OF ACTIONS.

PRESUMPTIONS.

Sale—Donation in form of—Gifts in contemplation of Death—Mortal illness of Donor—Presumption of Nullity—Validating Circumstances—Dation en paiement—Arts. 762, 989 C.C.]

See NULLITY.

See also EVIDENCE.

PRETE-NOM.

Assignment—Action to annul—Parties in Interest.]—See NULLITY.

—**Building societies—Participating borrowers—Shareholders—C.S.L.C., c. 68—42 & 43 V. (Q.) c. 32—Liquidation—Expiration of classes—Assessments on loans—Notice of—Interest and bonus—Usury laws—C.S.C. c. 58—Art. 1785 C.C.—Administrators and trustees—Sales to—Art. 1484 C.C.**]—See BUILDING SOCIETY.

PRINCIPAL AND AGENT.

I.—Agent's Recourse Against Principal.

—Gaming Contract—Art. 1927 C.C.—Money paid by Agent—Recourse of Agent against Principal.] —An agent has no action against his principal, to be reimbursed money advanced and paid by him (the agent) in behalf of his principal, in settlement of a gaming transaction in stocks, the agent being fully aware, at the time he made the advance, of the fictitious nature of the transaction, and that his principal had repudiated any liability in respect thereof. *Brand* v. *Metropolitan Stock Exchange*, Q.R. 11 S.C. 303. Affirming 10 S.C. 523.

II. Liability of Principal to Third Persons.

—Attorney for sale of Land—Advance—Charge—Attorney purchasing—Liability for charge—Equitable assignment—Acknowledgment—Registry Act—Notice.]—An attorney under an irrevocable power from the owner for the sale or other disposition of certain lands, and entitled in the event of sale to a share of the proceeds after payment of charges, agreed to pay out of the owner's share of the proceeds, when received, the amount of a further charge made by the owner, and subsequently purchased the lands himself:—Held, that he was not personally liable to pay the amount of the charge; reversing 27 Ont. R. 511, and C. A. Dig. (1896), col. 123. Execution of the document creating the further charge was proved by affidavit and attached to it, but without any proof of execution, where the agreement by the attorney to pay the charge and a transfer by the chargee to the plaintiff of the charge, and all the documents were accepted by the registrar and registered:—Held, affirming 27 Ont. R. 511, and C.A. Dig. (1896), col. 123, that the defect in registration was cured by section 80 of the Registry Act, R.S.O. c. 114, and that the attorney, who subsequently became the purchaser of the lands in question, was affected with notice of the plaintiff's rights. *Armstrong* v. *Lye*, 24 Ont. A.R. 543.

III. Power and Authority of Agent.

—Accident Insurance—Renewal of Policy—Payment of Premium—Promissory Note—Instructions to Agent—Agent's Authority—Finding of Jury.]—A policy issued by the Manufacturers' Accident Insurance Co. in favour of P. contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the policy was that it was not to take effect unless the premium was paid prior to any accident on account of which a claim should be made and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director and countersigned by the agent. P. having been killed in a railway accident, payment on the policy was refused on the ground that it had expired and had not been renewed. In an action by the widow for the insurance it was shown that the local agent of the company had requested P. to renew and had received from him a promissory note for $15 (the premium being $16) which the father of the assured swore the agent agreed to take for the balance of the premium after being paid the remainder in cash. He also swore the agent gave P. a paper purporting to be a receipt and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium it was agreed between him and P. that there was to be no insurance until it was paid, and that he gave no renewal receipt and was paid no cash. Some four years before this the said agent and all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore. The note was never paid but remained in possession of the agent, the company knowing nothing of it. The jury gave no general verdict but found in answer to questions that a sum was paid in cash and the note given and accepted as payment of the balance of the premium, and that the paper given to P. by the agent, as sworn to by P.'s father, was the ordinary renewal receipt of the company. Upon these findings judgment was entered against the company.—Held, affirming the judgment of the Supreme Court of Nova Scotia, Gwynne J. dissenting, that the fair conclusion from the evidence was, that as the agent was employed to complete the contract and had been entrusted with the renewal receipt P. might fairly expect that he was authorized to take a premium note having no knowledge of any limitation of his authority, and the policy not forbidding it; and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the court according to the practice in Nova Scotia:—Held, further, that there was evidence upon which reasonable men might find as the jury did; that an inference might fairly be drawn from the facts that the transaction amounted to payment of the premium and it was to be assumed that the act was within the scope of the agent's employment; the fact that the agent was disobeying instructions did not prevent the inference though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial, as the company might have supposed that the plaintiff would seek to show that such receipt had been obtained and were not taken by surprise. *The Manufacturers' Accident Insurance Co.* v. *Pudsey*, 27 S.C.R. 374. Affirming 29 N.S.R. 124.

—Agency—Sale of real estate—Proof of agency.] —The owner of real estate is not liable for a commission to a real estate agent of whose intervention he is not aware, the ground of the claim being simply that the real estate agent,

without any authorization from the owner, either express or tacit, called the attention of the purchaser to the property in question, and the sale resulted. *Plummer* v. *Gillespie*, Q.R. 10 S.C. 243.

IV. Recourse of Principal against Agent.

—Specific act of Agency—Action against agent —Account.] — Where one person authorizes another to do a specific act, *e.g.*, to withdraw from the Post Office Savings Bank a sum of money belonging to the principal, the latter may sue the agent for an amount alleged to have been retained by him, without bringing an action to account. *O'Brien* v. *Brodeur*, Q.R. 10 S.C. 155.

V. Undisclosed Principal.

—Broker — Sale of Shares—Marginal transfer —Indemnity.]—A broker who buys bank shares for an undisclosed principal and does not accept the shares himself but, pursuant to a general power to transfer given by the vendor, transfers them to his principal is not liable to indemnify the vendor against the statutory "double liability" which the principal fails to pay: In *re Central Bank of Canada —Bain's Case*, 16 Ont. A.R. 237, referred to. *Boultbee* v. *Growski*, 24 Ont. A.R. 502, reversing 28 Ont. R. 285.

—Promissory Note — Signature as Agent or Attorney—Bills of Exchange Act 53 V. c. 33 s. 26 —Parol evidence.]

See Bills of Exchange and Promissory Notes, VII.

PRINCIPAL AND SURETY.

I.—Contribution.

—Contribution between Co-sureties—Refusal to enforce Security—Depreciation.]—A surety who holds collateral security from the debtor on behalf of himself and co-surety, and who has paid more than his share of the principal debt, is not obliged before enforcing contribution to take proceedings on the collateral security at the request of the co-surety, and the latter is not discharged from liability by reason of depreciation of the security occurring subsequently to a refusal to take such proceedings, and not arising from any act of the surety. *Moorhouse* v. *Kidd*, 28 Ont. R., 35.

II. Proceedings against Surety.

—Action—Suretyship—Promissory note—Qualified indorsement.]—D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not be required while the books remained in the possession of the firm. The notes were protested for non-payment and, A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action some of the books were still in the possession of R., and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm:—Held, that the action was not based upon the real contract between the parties, and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes. *Robertson* v. *Davis*, 27 S.C.R. 571.

III. Rights against Co-Surety.

—Recourse of sureties inter se—Ratable contribution—Action of Warranty—Discharge of co-surety—Reserve of recourse—Trust funds in possession of a surety—Arts. 1156, 1959 C.C.]—Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him.—Where a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such recourse reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties. *Macdonald* v. *Whitfield*. *Whitfield* v. *The Merchants' Bank of Canada*, 27 S.C.R. 94.

PRISONER.

Municipal Corporations—City Separated from County—Maintenance of Court House and Gaol —Care and Maintenance of Prisoners — 55 V. (Ont.) c. 42, ss. 469, 473.]

See Municipal Corporations, XVI.

— Wrongful Arrest — Habeas Corpus — Civil Action.]—See Action, VI.

PRIVILEGES AND HYPOTHECS.

Unpaid Vendor — Conditional Sale — Movables incorporated with the Freehold—Immovables by Destination—C. C. Arts. 375 et seq.]

See Movables.

—**Collocation and Distribution—Art. 761 C.C.P. —Hypothecary Claims — Assignment—Notice—Prête-nom—Arts. 20 and 144 C.C.P.—Nullity of Deed—Incidental Proceedings—Appeal.**]

See JUDGMENT OF DISTRIBUTION.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROBATE COURT.

Judge acting as Arbitrator in settling matters dehors his Jurisdiction — Appeal.]— In the settlement of an estate of a deceased person the Judge of Probate, with the concurrence of the parties, acted as an arbitrator in settling certain matters in difference between the heirs and the administrator in respect of which he had no jurisdiction:—Held, that as his conclusion, while not strictly correct in law, accorded to the parties at variance a fair measure of justice, the Court would not disturb his finding. *Re Estate E. Scott*, 29 N.S R. 92.

— **Administrator cum testamento annexo — Agreement to treat two Estates as one in Probate Court—Commissions—Estoppel.**]

See EXECUTORS AND ADMINISTRATORS, VIII.

And see SURROGATE COURTS.

PROCEDENDO.

Prohibition—Manitoba Liquor License Act—Certiorari—Procedendo.]—See LIQUOR LICENSE.

PROCEDURE.

See PRACTICE AND PROCEDURE.

PROCESS.

Service of.]

See PRACTICE AND PROCEDURE, XL. AND L.

PROHIBITION.

Division Court—Interest—Splitting Demand—R.S.O. c. 51, s. 77.]—Where the plaintiff sued in a Division Court for $100 interest upon moneys deposited with the defendants, and it appeared that she had treated the deposit receipt in her hands as one upon which the whole sum was past due and collectible:—Held, that the action came within section 77 of the Division Courts Act, R.S.O. c. 51, whereby the splitting of causes of action is forbidden; and prohibition was granted: *In re Clark* v. *Barber*, 26 Ont.R. 47, followed, but commented on as irreconcilable with such cases as *Dickenson* v. *Harrison*, 4 Price 282, approved in *Attwood* v. *Taylor*, 1 Man. & G., 307; *Re McDonald* v. *Dowdall*, 28 Ont. R., 212.

—**Transfer—Division Courts Act—Action against Bailiff for wrongful Seizure—Joinder of Execution Creditor—R.S.O. c. 51 ss. 81, 87, 89, 290.**]—Action brought against a Division Court bailiff in an adjoining county, pursuant to R.S.O. c. 51, s. 89, for wrongful seizure of a mare of the plaintiff's; the party however, on whose execution the seizure was made, being joined as a co-defendant. Neither of the defendants resided in the division where action was brought:—Held, on motion for prohibition, that the Court had no jurisdiction to entertain the action, notwithstanding R.S.O. c. 51, s. 81, although if the bailiff had been sued alone, the proceedings would have been regular:—Held, on appeal, that whether sustainable against both the defendants in the division where brought or not, the action could have been so brought in the county where the cause of action arose, and therefore a motion to transfer should have been made before moving to prohibit. *In re Hill* v. *Hicks and Thompson*, 28 Ont. R. 390.

— **Division Court — Procedure — Jurisdiction — Issue of blank Summons,—R.S.O. c. 51, s. 44.**]—The issue by the clerk of a Division Court of a summons with a blank for the name of a party, which is afterwards filled up by the bailiff pursuant to the clerk's instructions, though contrary to the provisions of section 44 of the Division Courts Act, R.S.O. c. 51, does not affect the jurisdiction of the Division Court, nor afford ground for prohibition, but is a matter of practice or procedure to be dealt with by the judge in the Division Court. *Re Gerow* v. *Hogle*, 28 Ont. R. 405.

—**Conditional Order—Board of Revisers of Electoral Lists—Prohibition to whom addressed—Appeal—Irregular proceedings.**]—A writ of prohibition ordering a tribunal to suspend all proceedings unless cause to the contrary be shown upon a day named does not constitute an absolute order of suspension but only a conditional order.—In a case where the defendants were, under 60 Vict. c. 21 (P.Q.), a body called "The Board of Revisors of the City of Montreal," the writ of prohibition should have been directed against the board and not against the individual members.—As the statute gives an appeal from the decisions of the revisers to a Judge of a Superior Court, prohibition would not lie for irregularities of procedure such as want of notice to the persons in respect of whom cancellation (*radiation*) of the electoral list was demanded. *Beaupre* v. *Desnoyers*, Q.R. 11 S.C. 541.

—**Edmonton Court of Revision—Reducing Assessment—Judicial Powers—Prohibition.**]—On the ground of excess, the Edmonton Court of Revision reduced the whole assessment valuations twenty per cent., thus affecting not only the assessments of the persons appealing but those of persons who had not appealed, or whose assessments were not appealed against by other persons. Rouleau, J., in Chambers,

directed the issue of a writ of prohibition to the Court of Revision. On appeal from his order:—Held, that the Court of Revision had no power to act as they did, because they were not required to do so, inasmuch as no statement by the assessor was attached to the roll as required by section 30 of Part IV. of the N.W.T. Municipal Ordinance:—Held, also that prohibition lay to the Court of Revision. It was to be assumed that that court was not acting as a revising board under section 30, but as a court under section 31 *et seq.*, and the powers conferred by such sections were judicial and not merely ministerial. The Court being clothed with judicial functions was attempting to exercise them in respect of persons who were not before it at all, and was therefore acting without jurisdiction: *The Queen* v. *The Local Government Board*, 10 Q.B.D. 309, followed:—Held, further, that a resolution of the Council confirming the decision of the Court of Revision was without authority and of no effect. *In re Hickson and Wilson*, 17 C.L.T. (Occ. N.) 303. (Sup. Ct. N.W.T.)

—Certiorari—Jurisdiction of County Court Judges to issue.]—See COUNTY COURTS.

—Division Courts—Prohibition—Court nearest Defendant's residence—Jurisdiction—R.S.O. c. 51, s. 82.]—See DIVISION COURTS.

—Liquor License Act, s. 174—Certiorari—Procedendo—Second summons on original information after conviction quashed—Return of Information to Justices—Justice of the Peace.]

See LIQUOR LICENSE.

—Municipal Taxes—Suspension of Sale—Mode of Proceeding.]

See MUNICIPAL CORPORATIONS, XII.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROSTITUTION.

Loose, Idle or Disorderly Person, or Vagrant—Criminal Code, s. 207 (l).]

See CRIMINAL LAW, XIII.

PUBLIC MEETING.

Meeting of Parishioners—Wrongful expulsion.]—Police constables in the employ of the city, who are present for the purpose of preserving order at a meeting of parishioners, are not justified, at the mere request of the chairman, in expelling a person present at such meeting, who is conducting himself peaceably, and who claims that he is lawfully entitled to be present, and has an apparent right; and for such illegal expulsion the city as well as the chairman who gave the order therefor, is responsible in damages. *Walsh* v. *The City of Montreal*, Q.R. 10 S.C. 49. Affirming 8 S.C 123.

PUBLIC OFFICER.

Action against—Security for Costs—59 V. (Ont.) c. 18, s. 7.]—See COSTS, V.

—Acts of—Censure—Protection.]

See LIBEL AND SLANDER, V.

—Commissaire of Superior Court—Attorney ad litem—Authority to receive Affidavit—Opposition.]—See PRACTICE AND PROCEDURE, II.

PUBLIC SCHOOLS.

See SCHOOLS.

PUBLIC WORK.

—Injurious Affection from Construction—Damage peculiar to Property—Compensation.]—To entitle the owner of property alleged to be injuriously affected by the construction of public work to compensation, it must appear that there is an interference with some right incident to his property, such as a right of way by land or water, which differs in kind from that to which other of Her Majesty's subjects are exposed, it is not enough that such interference is greater in degree only than that which is suffered in common with the public. *Magee* v. *The Queen*, 5 Ex. C.R. 391.

See also MUNCIPAL CORPORATIONS, XIV.

QUEBEC HARBOUR.

Interference with Navigation in Quebec Harbour.]

See NAVIGATION.

" TRESPASS.

QUEEN'S COUNSEL.

Constitutional Law—Appointment of Queen's Counsel.]—The Lieutenant-Governor-in-Council has the right to appoint members of the Bar of Ontario to be Her Majesty's counsel, and to give such members the right of pre-audience in the courts of the province. *In re Queen's Counsel*, 23 Ont. A.R. p. 792, affirmed on appeal to the Judicial Committee of the Privy Council (1898), A.C. 247.

—Authority to conduct Criminal Cases.]

See CRIMINAL LAW, XII.

QUO WARRANTO.

Municipal Office—Nullity of Election—Jurisdiction—Arts. 346, 347, 348 M.C.]

See MUNICIPAL CORPORATIONS, XI.

—Relator—Withdrawal—Intervention—Substitution—Ontario Consol—Municipal Act, 1892.]

See MUNICIPAL CORPORATIONS, XI.
See PRACTICE AND PROCEDURE, XVIII.

RAILWAYS AND RAILWAY COMPANIES.

I.—CARRIAGE OF GOODS.

Carrier—Bill of Lading—Condition—Notice of Loss.]—The condition on the back of a railway bill of lading that "no claim for damage, for loss of, or detention of any goods for which the company is accountable shall be allowed unless notice in writing and the particulars of the claim for said loss, damage or detention are given to the station freight agent at or nearest to the place of delivery within 36 hours after the arrival of the goods in respect of which said claim is made or delivered," is a reasonable condition, and if the terms be not complied with, the value of goods lost on the railway cannot be recovered. *Gélinas v. Canadian Pacific Railway Co.*, Q.R. 11 S.C. 253.

II. EXPROPRIATION OF LAND.

—Arbitration—Fixing Time for Award—Death of Arbitrator pending—Right to new Appointment—Injunction—51 V. c. 29 (D).]—The arbitrators appointed under the authority of the Dominion Railway Act, 51 Vict., c. 29 (D.), to value land expropriated by a railway company had appointed a day of giving their award. Before this day arrived the arbitrator of the owner of the expropriated land died, and the other arbitrators met at the appointed time and declared that, in consequence of his death, they were unable to extend the time for giving the award and adjourned *sine die*. Subsequently the owner of the land named a new arbitrator, but the railway company proceeded by writ of injunction to prevent the arbitrators from proceeding, claiming that the delay for giving the award had expired, and that the two arbitrators were *functi officio*:—Held, that after the date fixed for rendering the award there was no power to proceed with the arbitration, and the railway company was entitled to the injunction. *The Park and Island Railway Co. v. Shannon*, Q.R. 6 Q.B. 295. An appeal to Supreme Court of Canada now stands for judgment.

—Railway—Expropriation—Right of way—R.S.Q. Art, 5164—Indemnity—Petitory action by unpaid Proprietor.]—Where a railway company has taken possession of land for its right of way, under R.S.Q. Art. 5164, and the proprietor has not been indemnified therefor, by reason of the annulling of the first award and the failure of the company to proceed with a new arbitration, he may bring a petitory action to recover possession of his land.—Per Andrews, J. If a railway company takes possession, *proprio motu*, without any formality, of a piece of land for its track, the owner is not bound to resort to arbitration proceedings, but may bring a possessory or petitory action to be re-instated; but where the defendants are in lawful possession under a judge's order, and have built their railway under the protection of that order, they can only be expelled if they have been placed *en demeure* to pay the indemnity; and, in the present case, the only mode in which the plaintiff could have put the defendants *in mord* to pay, was to take up the arbitration proceedings himself and push them to an award.—Special damage, *e.g.*, the destruction of underground drains laid by plaintiff on his farm in the neighbourhood of the line of railway, if not mentioned in the declaration, cannot, though established in evidence, be taken into consideration in a judgment assessing the amount of the indemnity. *Huot v. Quebec, Montmorency and Charlevoix Railway Co.*, Q.R. 10 S.C. 373.

—Expropriation by Two Companies—Precedence—Federal and Provincial Railways—Delays—51 V. c. 29 s. 108 (D.)—R.S.Q. Art. 5164, par. 11.]—When two railway companies have taken proceedings to expropriate the same land, the one which has first deposited its plan and book of reference and given its notice will take precedence, although it may be a provincial and the other a federal company, and although—because of the difference in the delay for the demand and expropriation prescribed by the federal and provincial Railway Acts respectively, which is ten days in the former and a month in the latter—the federal company, which has made its deposits and given notice after the other, has been first able to make its demand for expropriation. *The Pontiac Pacific Railway Co. v. The Hull Electric Railway Co.*, Q.R. 11 S.C. 140.

—Arbitration—Setting aside Award—Misconduct of Arbitrators.]

See ARBITRATION AND AWARD, III.

III. FIRE FROM ENGINES.

—Action for damages—Evidence for Jury—Property set on fire by sparks—Negligence.]

See NEGLIGENCE, X.

IV.—GOVERNMENT RAILWAYS.

—Taxation of Dominion Officials—Highway Labour Act—(R.S.N.S. 5th Ser. c. 47)—Employee on Government Railway.]—A penalty for the non-performance of labour in clearing a highway after a snow-storm, as provided for by the Highway Labour Act (R.S.N.S. 5th ser. c. 4),

may be recovered against a person employed as a servant of the Crown upon the Intercolonial Railway: *Leprohon* v. *City of Ottawa*, (2 Ont. A.R. 522) referred to:—(Per Meagher, J.) *Semble, aliter* if it were the case of an assessment levied directly under a Provincial Act upon the salary payable to the defendant by the Dominion Government. *Filmore* v. *Colburn*, 28 N.S.R. 292.

And see PUBLIC WORKS.

V. INJURY TO PERSONS.

—**Negligence—Packing and Railway Frogs—Workmen's Compensation for Injuries Act—55 V. (Ont.), c. 30. s. 5, s.s. 2 and 3—Statutes—Construction—Division into sections—51 V. c. 29, ss. 262, 263 and 264 (D.).**]—Sub-section 3 of section 262 of the Railway Act, 51 Vict. c. 29 (D), provides that the spaces behind and in front of every railway frog shall be filled with packing. Sub-section 4 of the same section provides that the spaces between any wing rail and any railway frog, and between any guard rail and track rail, shall be filled with packing, and this sub-section ends with a proviso that the Railway Committee may allow "such filling" to be left out during the winter months:—Held, that this proviso applied to both sub-sections, and that permission having been given by the Railway Committee to frogs being left unpacked during the period in question, the defendants were not liable for an accident resulting from that cause—The provisions of sub-sections 2 and 3 of section 5 of the Workmen's Compensation for Injuries Act, 55 Vict. (Ont), c. 30, as to packing railway frogs, are not binding upon railways under the legislative control of the Dominion. *Washington* v. *The Grand Trunk Railway Company of Canada*, 24 Ont. A.R. 183, reversed 28 S.C.R. 184. Appeal now pending to Privy Council.

—**Evidence—Bodily Injuries—Exhibition to Jury—Surgical Testimony.**]—The plaintiff in an action against a railway company for bodily injuries may exhibit them to the jury for the purpose of having the nature and extent of the damage explained by a medical witness. Review of American authorities on this subject.—The exhibition of injuries which have happened to another person, for the purpose of contradicting evidence given on behalf of the plaintiff in such an action, is not permissible unless competent evidence is forthcoming to explain their nature; but even with such evidence:—*Quære. Sornberger* v. *Canadian Pacific Railway Co.*, 24 Ont. A.R. 263.

—**Municipal Corporations—Overhead bridge—Approaches thereto—Unlawful Incline—Accident—Liability to repair—Railway Act of 1888—51 V. c. 29, s. 186 (D)—55 V., c. 42, s. 531 (Ont.).**]—A railway company, with the sanction of a township municipality, erected an overhead bridge across a highway, and afterwards, without the consent of the municipality, raised the same so as to cause the approaches thereto to be at a greater incline than prescribed by the Railway Act, 1888, 51 Vict. c. 29 (D.). An accumulation of snow resulted from this, against which the plaintiff's cutter was upset, and she sustained injuries for which she brought this action:—Held, that the accumulation of snow amounted to a want of repair under section 531 of the Municipal Act, 55 Vict. c. 42 (Ont.), for which the municipality was liable:—Held, also, that the railway company was also liable for a misfeasance in raising the bridge and approaches so as to be at a greater incline than prescribed by section 186 of the Railway Act, 1888, thus causing the obstruction by means of which the accident happened. *Fairbanks* v. *The Township of Yarmouth*, 24 Ont. A.R. 273.

—**Railways—Municipal Corporations—Highways—Damages.**]—The plaintiff fell while attempting to cross a railway track which was lawfully, and without negligence or undue delay, being built across a street in a city:—Held, that neither the railway company nor the city was responsible in damages: *Keachie* v. *Toronto*, 22 Ont. A.R. 351, followed. *Atkin* v. *City of Hamilton*, 24 Ont. A.R., 389; reversing 28 Ont. R. 229.

—**Railway Collision—Claim by Mother of victim—Measure of damages—Prospective pecuniary loss—Art. 1056 C.C.**]—The plaintiff's son having lost his life in a railway collision, she brought an action of damages against the company.—The present plaintiff, deceased's mother, being entitled in the terms of that article, to "all damages occasioned by such death," and having had a reasonable expectation of receiving for the rest of her life a comfortable home with her said son, the damage she suffered by his death must be held to be the equivalent of that maintenance; and, estimating such maintenance at $100 per annum as a fair and moderate value, a sum sufficient to buy an annuity of that amount, (in this case $752), was the amount of pecuniary damage recoverable.—The fact that plaintiff had other surviving children (against whom, in any case, the proof showed her recourse to be doubtful and precarious), could not affect the amount which she had a right to recover from defendants, the legal recourse of a mother against her children for maintenance being *solidaire* for the whole against each. *Bernard* v. *The Grand Trunk Railway Co.*, Q.R. 11 S.C. 9.

—**Injury to Employee—Contract between two Companies—Stipulation for Immunity—Negligence—Onus probandi—Arts. 1028, 1029, 1676 C.C.—51 & 52 V. c. 29, s. 246 (D.).**]—A railway company upon whose line ran the coaches of a sleeping car company can invoke, in an action against it, on account of an accident to an employee of the sleeping car company, a contract by which the latter stipulated for immunity, for itself and for the railway company, from every accident happening to an employee in the discharge of his duties, when the contract was made by virtue of an agreement between the two companies. Arts. 1028, 1029 C.C.—But the contract will not free the railway company from liability for an accident due to its fault or gross negligence; but it is incumbent on the employee bound by the contract to prove such fault or negligence. Art. 1676, C.C.; 51 & 52 Vict c. 29, s. 246 (D.).—In this case two trains of the G.T.R. Co., or

rather two sections of the same train, were proceeding in the night towards Levis. The train despatcher ordered the first to meet at Craig's Road, a train coming from the opposite direction. This order was not given to the second train, which, however, only accompanied the first for the distance of one intervening station. The first train, which was supplied with the necessary lights in the rear, encountered at Craig's Road the train coming from Levis; but the latter could not proceed quickly on account of the waggons which encumbered it. Before the road was clear the second train arrived, going at great speed, collided with the first and B., an employee of the Sleeping Car Co., was injured. Under these circumstances the G.T.R. Co., which had no night telegraph service at Craig's Road, and therefore could not give the necessary orders to have the road cleared speedily, had become responsible by ordering the trains to meet at this station without knowing that the road was clear. *Brassell* v. *The Grand Trunk Railway Co.*, Q R. 11 S.C. 150.

VI. Injury to Property.

—**Legislative Authority—Alteration of Grade of Street — Arbitration and Award—Appeal — "Structural Damages" — "Personal Inconvenience."**] — Held, that the railway company, though incorporated by 47 Vict. (Ont.), c. 75, was by 54 & 55 Vict. (D.), c. 86, subject to the legislative authority of the Parliament of Canada, and its power to do the work of altering the grade of a street, in the doing of which the damages claimed by a landowner arose, was under section 90 of the Dominion Railway Act, 1888; and the rights of the parties in an arbitration to ascertain such damages were governed by the provisions of that Act. And where the arbitrator awarded that the land-owner had suffered no damage:—Held, that having regard to the provisions of section 161, sub-section 2, no appeal lay from the award:—Held, also, that the arbitrator had no power to allow the landowner "structural damages" caused to his buildings, or damages for "personal inconvenience" by reason of his means of access being interfered with: *Ford* v. *Metropolitan R. W. Co.*, 17 Q.B.D. 12, distinguished as to the former kind of damages, and followed as to the latter. *Re Toronto, Hamilton and Buffalo Railway Company and Kerner*, 28 Ont. R. 14.

—**Arbitration and Award—51 V. c. 29, ss. 90, 92, 144 (D.)—Compensation — Damages — Operation of Railway — Interest.**]—A claimant entitled under the Railway Act of Canada, 51 Vict. c. 29, to compensation for injury to lands by reason of a railway, owing to alterations in the grades of streets and other structural alterations, is also, having regard to sections 90, 92 and 144, entitled to an award of damages arising in respect of the operation of the railway, and to interest upon the amounts awarded, notwithstanding that no part of such lands has been taken for the railway: *Hammersmith, etc., Railway Co.*, v. *Brand*, L.R. 4 H.L. 171 distinguished. *Re Birely and Toronto, Hamilton, and Buffalo Railway Company*, 28 Ont. R. 468.

VII. Mortgaged Road.

—**Dominion Railway—Section capable of Sale—Jurisdiction of Provincial Court—Part of section Outside of Jurisdiction—Revenues.**]—In a suit by the appellants, being mortgagees of a division of 180 miles of the respondents' railway and of its revenue subject to working expenses, for a sale of the division and for a receiver and other relief;—Held, (1) that this division of 180 miles is by the law of Canada applicable to the railway, a section capable of sale in its entirety, but that the provincial court had no power to order a sale, part of the section being within and part without its jurisdiction; (2) that so long as the railway was worked as a whole the revenues of the division are subject along with other revenues to the working expenses of the whole line, and that the receiver was only entitled to the net earnings of the division so ascertained. *Grey* v. *Manitoba and Northwestern Railway Co.* [1897], A.C. 254, affirming 11 Man. R. 42, and C.A. Dig. (1896), col. 298.

VIII. Officers and Servants.

—**Master and Servant — Railway Company — Employee Drinking on Duty—Summary Dismissal—Railway Act, 51 V. (D.) c. 29.**]—It is good cause for the summary dismissal by a railway company of one of its employees that he was proved while on duty to have drunk intoxicating liquor; such conduct constitutes a participation in a criminal offence under section 293 of the Railway Act, 51 Vict. c. 29 (D.), which prohibits any one selling, giving or bartering spirits or intoxicating liquor while on duty. *Marshall* v. *The Central Ontario Railway Company*, 28 Ont. R. 241.

And see Master and Servant, III.

—**Discovery—Examination of Officer of Railway Company—Flagman.**]

See Practice and Procedure.

IX. Organization.

—**Organization—Irregularities in—Intervention of Attorney-General to protect Public Interests—Procedure.**]— Defendants were incorporators and provisional directors named in the Act of Incorporation of the South Shore Railway Co. passed 30th April, 1892 (Nova Scotia Acts of 1892, c. 138). The Attorney-General commenced proceedings, by way of information, asking for an injunction to restrain defendants from making use of the name or exercising the powers of the company, etc., on the grounds that the company was never legally organized, that the stock was subscribed or paid up, and that defendants, without any right to do so, were proceeding with the construction of the railway in the name of the company:—Held, that the public having an interest in the railway, and in the attainment of the objects sought by its construction, the Attorney-General had the right to maintain the action, and to succeed to the extent to which the public interests were involved:—Held, also, that the action brought by the Attorney-

General, in the interests of the public, could proceed independently of the person named as relator. *Attorney-General* v. *Bergen*, 29 N.S.R. 135.

X. Road-Bed.

—Wharf — Integral part of Line — Seizure for Taxes.]—A wharf made part of a railway, but from which the rails and sleepers have for several years been taken up, cannot, especially where the road has been carried to another route and the remains of the old road sold, be regarded as an integral part of the railway, and may be seized for municipal taxes. *Montreal, Portland and Boston Railway Co.* v. *The Town of Longueuil*. Q.R. 10 S.C. 182, reversing 9 S.C.; C A. Dig. (1896), col. 298.

RECEIVER.

—Equitable Execution—Share in Estate of which Execution Debtor is Administrator—Injunction.] —At the instance of execution creditors, a receiver was appointed to receive the debtor's share of his deceased wife's estate, of which he was the administrator; and an injunction was granted restraining him from transferring, incumbering, or dealing with his share. *Smith* v. *Egan*, 17 Ont. P.R. 330.

—Equitable Execution—Right to bring Action —Parties—Judgment Debtor.]—A receiver appointed by the Court to aid a judgment creditor in recovering his claim, by receiving the judgment debtor's share in an estate which could not be reached by execution, after the refusal of the judgment debtor to allow the use of his name, was authorized on giving security to him to take proceedings in his name for the administration of the estate, and if necessary for the removal of the executor. *Mones & Co.* v. *McCallum*, 17 Ont. P.R. 398, reversing 17 Ont. P.R. 356.

—Assignment for Benefit of Creditors—Assets —Payment by Debtor direct to Creditors — Assignee's liability— Equitable Execution—Receiver.]—See Debtor and Creditor, III (*a*).

—Municipal Corporation — Pension to Retired Official—Debts — Receiver where Defendant resides out of Jurisdiction—R.S. N.S. (5th series), c. 104—N.S. Acts 1889, c. 9, ss. 26-29.]

See Municipal Corporations, XV.

RECEIVER-GENERAL.

Insolvent Bank—Winding-up Act—Appeal—Special Circumstances—Terms.]

See Appeal, VII.

—Winding-up Act—R.S.C. c. 129. ss. 40, 41—55 & 56 Vict. (D.), c. 28, s. 2—Payment out of Court —Receiver-General — Compelling repayment — Court Funds—Jurisdiction.]

See Company, VII., (*b*).

RECOGNIZANCE

Of Bail—Criminal Law—Commitment for Trial —Delay in preferring Indictment—Vacation of Recognizance—C.S.L.C. c. 95.]

See Criminal Law, III.

RECORD.

Inherent Power of the Court to Amend its Record.]—See *Cousins* v. *Cronk*, 17 Ont. P.R. 348.

REDDITION DE COMPTE.

Testamentary Executors—Failure to account —Action for residue of succession.]

See Action, III.

REDEMPTION (DROIT DE RÉMÉRÉ.)

Title to land—Sale—Right of redemption— Effect as to Third Parties—Pledge—Delivery and possession of thing sold.]

See Sale of Land, VII.

REFEREE

Partnership—Sale—Referee.] — In an action against a partnership where several items of expenses connected with a sale of goods were not proved or were not justified by the evidence, particularly the solicitors' bill for costs and disbursements, these items were held to be a proper subject for the consideration of a referee. *Fisher* v. *McPhee*, 28 N.S.R. 523.

—Agreement respecting Lands — Boundaries— Referee's Decision — Bornage — Arbitration — Arts. 941-945 and 1341 et seq. C.C.P.]

See Arbitration and Award, IV.

REGISTRY LAWS.

North-West Territories Land Titles Act, 1894— Power of Attorney—Registry.] — A power of attorney, not in the form prescribed by the Act, authorized the agent, *inter alia*, to sell and absolutely dispose of the principal's real estate, land, and hereditaments, and to execute and do all such assurances, deeds, covenants and things as should be required for that purpose, but it did not contain a description of any lands in respect of which the authority might have been exercised:—Held, that the instrument did not comply with the requirements of section 87 of the Act, so as to entitle it to be registered. *Re Mewburn and Mewburn*, 33 C.L.J. 371.

—Mortgage of growing Crops—Equitable Security—Bills of Sale Act (Man.)—57 V. (Man.) c. 1, s. 2—Registration.]

See BILLS OF SALE AND CHATTEL MORTGAGES IV.

—Sale by Sheriff—Sheriff's Deed—Registration of—Absolute Nullity.]—See SALE OF LAND, X.

And see PRINCIPAL AND AGENT.

RELATOR.

Proceeding by Attorney-General in the interests of the Public—Relator.]—Actions brought in the interest of the public by the Attorney-General may be proceeded with independently of the person named as relator.—Absence of interest in the relator is no answer to a proceeding by the Attorney-General. *Attorney-General* v. *Bergen*, 29 N.S.R. 135.

See QUO WARRANTO.

REMAINDER.

Statute, construction of — Estates tail, Acts abolishing — R.S.N.S. (1 ser.) c. 112 — R.S.N.S. (2 ser.) c. 112—R.S.N.S. (3 ser.) c. 111—23 V. c. 2 (N.S.)—Will—Executory Devise over—Estate in Remainder Expectant—Statutory Title—R.S.N.S. (2 ser.) c. 114, ss. 23 and 24—Conveyance by Tenant in Tail.]—See WILL, I.

RENT.

See LANDLORD AND TENANT, XI.

REPLEVIN.

Sheriff's Inquisition—Writ de Proprietate probanda—Evidence of—Use at trial of Replevin Suit.]—See EVIDENCE, XII.

REQUÊTE CIVILE.

Petition in revocation of judgment—Concealment of evidence—Jurisdiction—C.P.Q. Art. 1177—R.S.C. c. 135, s. 67.]—Where judgment on a case in appeal has been rendered by the Supreme Court of Canada and certified to by the proper officer of the court of original jurisdiction, the Supreme Court has no jurisdiction to entertain a petition (*requête civile*) for revocation of its judgment on the ground that the opposite party succeeded by the fraudulent concealment of evidence. *Durocher* v. *Durocher*, 27 S.C.R. 634.

RES JUDICATA.

Parochial Law—Assessment—Homologation—Rejection of Opposition—Erection of Civil Parish—Judgment of Commissioners.]—Where the commissioners for the erection of civil parishes have homologated *un acte de repartition* and rejected the opposition of a commissioner to such *acte*, their judgment has not the authority of *chose jugée* between the *syndics* and the said parishioner. *Syndics de St. David de L'Auberivière* v. *Lemieux*, Q.R. 6 Q.B. 378.

RETAINER.

Nova Scotia Probate Act—Solicitor's Costs.—"Retainers."]—See COSTS, IV.

— Statute of Limitations — Solicitor's Costs—Settlement of Action—Retainer.]

See COSTS, VI.

RETURNING OFFICER.

—Parliamentary Election—Recount by County Court Judge — Returning Officer — Injunction—Jurisdiction of High Court.]—See INJUNCTION.

REVENDICATION.

Possession in good faith—Identity of Lot—Mistake — Possession under — Revendication — Reimbursement.]—B and L. had acquired at different dates, from the same vendor, two adjoining vacant lots. By error L., the first purchaser, was put in possession of the lot afterwards sold to B. and erected some buildings on it. He remained in peaceable and public possession of this lot for more than ten years, when B. having purchased, revendicated it as his property. L. met the action by a *défense en droit*, and by a special plea alleging that he was in possession of the lot in good faith, and with title, and demanding that he should only be dispossessed on being reimbursed what he had expended on it:—Held, that B. had a right to revendicate the lot which had been sold to him, but that as L. had always possessed, in virtue of his title, land which he believed belonged to him by the effect of such title, though in fact the title did not apply to it, he could be regarded as a possessor in good faith, and was entitled to be repaid his expenditure. *Beauvais* v. *Lepine*, Q.R. 10 S.C. 452

—Revendication by Husband—Property sold by Wife séparée de biens, without his consent.]—Where the wife separated as to property has sold part of her movable property without the consent of her husband, the latter cannot have recourse to a *saisie-revendication*. *Paquet* v. *Lejeune*, Q R. 11 S.C. 402.

—**Insolvent estate—Powers of Curator—Possession of property—Authorization by creditors—Art. 772 C.C.P.**]

See BANKRUPTCY AND INSOLVENCY, IV.

—**Community—Possession of Assets.**]

See COMMUNITY.

—**Of Movables—Value—Jurisdiction.**]

See JURISDICTION.

—**Action of—Omission to set forth Title to things seized—Exception to Form—Amendment.**]

See PLEADING, IX.

—**Sale of goods—Suspensive condition—Instalments—Revendication for Non-payment—Retention of sums paid—Illegal seizure—Art. 1088 C.C.**]

See SALE OF GOODS, I.

REVENUE.

Customs Duties — Drawback — Materials for Ships—Order in Council—Refusal of Minister to grant drawback—Remedy.] — By the Customs Act, 1877 (40 Vict., s. 10), section 125, clause 11, it was enacted, *inter alia*, that the Governor in Council might make regulations for granting a drawback of the whole or part of the duty paid on materials used in Canadian manufactures. In 1881, by an amendment made by the Act 44 Vict. c. 11, s. 11, the Governor in Council was further empowered to make regulations for granting a certain specific sum in lieu of any such drawback. (See also The Customs Act, 1883, s. 230, clause 12, and The Revised Statutes of Canada, c. 32, s. 245*m*.) By an order of the Governor-General in Council, dated the 15th day of May, 1880, it was provided as follows: "A drawback might be granted and paid by the Minister of Customs on materials used in the construction of ships or vessels built and registered in Canada, and built and exported from Canada under Governor's pass, for sale and registry in any other country, since the first day of January, 1880, at the rate of 70 cents per registered ton on iron kneed ships or vessels classed for nine years, at the rate of 65 cents per registered ton on iron kneed ships or vessels classed for seven years, and at the rate of 55 cents per registered ton on all ships or vessels not iron kneed." By an order in council of the 15th November, 1883, an addition was made to the rates stated "of ten cents. per net registered ton on said vessels when built and registered subsequent to July, 1893 :—Held, that a petition of right would not lie upon a refusal by the Controller of Customs to grant a drawback in any particular case :—Semble, that the provision in an order in council that the drawback "may be granted" should not be construed as an imperative direction, it not being a case in which the authority given by the use of the word "may" is coupled with a legal duty to exercise such authority. *Mation* v. *The Queen*, 5 Ex. C.R. 401.

— **Succession Duty Act, 55 V. (O.) c. 6—Capital—Final Distribution—Duty Payable.**]—Held, in addition to the findings reported in this case in 27 Ont. R. 380, that under the Succession Duty Act, 55 Vict. (Ont.) c. 6, the duty payable on the capital was deferred until the final distribution thereof, which was the time when the moneys under the directions of the will reached the hands of the persons who should become entitled thereto, and that the duty then payable would be on the amount then actually distributed, whether inreased by accumulations, or by the rise in value of lands or securities, or decreased by loss. *Attorney-General* v. *Cameron*, 28 Ont. R. 571.

—**Revenue—Customs duties—Imported goods—Importation into Canada—Tariff Act—Construction—Retrospective legislation—R.S.C. c. 32—56 & 57 V. c. 33 (D.)—58 & 59 V. c. 23 (D.).**]

See STATUTE, II.

REVERSION.

Mortgage—Leasehold premises — Terms of mortgage—Assignment or sub-lease.]

See MORTGAGE, VIII.

REVIVOR.

See JUDGMENT.

RIPARIAN RIGHTS.

See WATERS AND WATERCOURSES.

SAISIE-ARRÊT.

Personal Injuries—Compensation—Damages—Art. 558 C.C.P.] — The damages awarded for destruction of clothes (by the bite of a dog), medicine, medical attendance and loss of time by reason of personal injuries are seizable. *Poupart v. Miller*, Q.R. 10 S.C. 137.

—**After Judgment—Default by tiers saisi—Contestation by Defendant—Procedure.**] - D caused to be issued against M. and others, a writ of *saisie-arrêt* after judgment *entre les mains du tiers saisi*. The defendants appeared but the *tiers saisi* made default, and after he was regularly put in default (*mise en demeure*) the defendants produced a contestation claiming that their possession of the property seized was non-seizable by the terms of the will which gave them such possession, and concluding with a prayer that the seizure be set aside. The plaintiff, D., met this contestation by an exception to the form, alleging that, the *tiers saisi* having made no declaration, it did not appear that the possession had been seized; and that if the declaration had been made it might have stated that the *tiers saisi* owed to the defendants something else than this possession and that the contestation was premature:—Held, that the defendants had a right to contest the *saise arrêt* taken by D. *entre les mains du tiers saisi*, and

to maintain generally that what the latter owed them was non-seizable by the terms of the title establishing their debt; and that if D. could claim that something else was due by the *tiers saisi* to the defendants, which was not covered by the non-seizability invoked, he should allege it by a reply to the contestation. *David* v. *McDonald*, Q.R. 11 S.C. 73.

—**Pension for Support—Legal Fees for procuring — Attachment of Pension — Proceedings in formâ pauperis.**]—Solicitors had obtained for a client a pension for his support (*pension alimentaire*) of $3 per month, and for payment of their costs, had caused such allowance to be attached in the hands of the persons paying it by way of *saisie arrêt*. Permission to proceed *in formâ pauperis* had been obtained in the action claiming the pension:—Held, that the effect of such seizure being to deprive the creditor during many years of the alimentary allowance which had been judicially awarded to him on account of his necessities, it could not be permitted, and the solicitors could only effect it by proving that the creditor received from his children, beyond the pension, a sum more than sufficient for his needs, in which case the allowance would cease to be due. *Mathieu* v. *Beauchamp*, Q.R. 11 S.C. 307.

—**Louage—Privilege of Landlord — Removal of goods by third Person — Preventing seizure under writ of saisie-gagerie — Landlord's Remedy.**]—See LANDLORD AND TENANT, X.

SAISIE-GAGERIE.

Issue of Execution after—Effect of.]
See EXECUTION, V.

—**Lessor and Lessee—Judicial Abandonment by Lessee—Rights of Curator—Privilege of Lessor.**]
See LANDLORD AND TENANT, X.

—**Landlord and Tenant—Creation of Tenancy—Transfer of Revenues—Art. 1608 C.C.**]
See LANDLORD AND TENANT, III.

SALE OF GOODS.

I. CONDITIONAL SALE.

—**Vendor and Purchaser—Unpaid Vendor—Conditional Sale — Suspensive Condition — Movables incorporated with Freehold—Immovables by Destination — Hypothecary Charges — Arts. 375 et seq. C.C.**]—A suspensive condition in an agreement for the sale of movables, whereby until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor is a valid condition. *La Banque d'Hochelaga* v. *The Waterous Engine Works Co.*, 27 S.C.R. 406, affirming Q.R. 5 Q.B. 125.

—**Suspensive Condition—Default in Payment—Revendication — Return of Payments made—Illegal seizure — Art. 1088 C.C.**]—C. was in possession of a sewing machine of the W. M. Co. under a sale, with a suspensive condition that the company should have a right to take it back on failure by C. to make all the payments. The contract did not give the company the right, in case of revendication, to keep the payments made. C. owed a balance on the price and the company revendicated the machine by *saisie revendication*, but notwithstanding it was demanded by C. refused to reimburse him for the payments already made, and he having, because of this refusal, opposed the seizure, the bailiff used violence to effect it:—Held, that the company had no right to seize the machine without at the same time tendering to C. the sums which he had paid upon the price of sale, and was therefore responsible for the violence employed by the bailiff to effect the seizure which under the circumstances was illegal. *Cousineau* v. *The Williams Manufacturing Co.*, Q.R. 11 S.C. 389.

II. CONTRACT OF SALE.

—**Negotiations by Correspondence—Variations in Terms—Acceptance.**]—U., who had come from England to Canada to buy hay entered into negotiations with M., who on June 5th, 1893, wrote U. at Montreal from Quebec confirming the result of a previous conversation, and advising him that a sale was booked to his firm, the price to be drawn for at 30 days. U. wrote back that he understood only 90 per cent. was to be drawn for. On June 9th M. wrote adhering to his terms and the next day U. wrote accepting them, his letter crossing one from M. written on the same day, withdrawing his offer in consequence of the hay having been inadvertently sold to another person by his agent:—Held, that until U's letter accepting the terms had been received by M. the contract of sale was not complete, and M. had a right to withdraw his offer as he did by his letter of June 10th. *Underwood* v. *Maguire*, Q.R. 6 Q.B. 237.

III. DELIVERY.

—**Conditions of Sale—Refusal to Accept—Duty of Seller.**]—G. had sold his crop of hay to M., to be delivered in bales upon cars and paid for at a fixed price per ton. At the time for delivery G. loaded the bales on a car, but M. refused to accept the delivery on the ground that he had not been able to verify the weight and quality of the hay. The hay remained in the car, each party being unwilling to pay the cost of detention for fear of compromising his rights, until the railway company sold it for the charges:—Held, that there had not been a proper delivery of the hay to M.; that the consent of the seller that the buyer should take

possession of the thing sold, and the removal of obstacles to the taking of possession, though constituting the buyer *en demeure* and placing at his risk a subsequent loss by accident, did not effect a complete delivery; that delivery demands a mutual agreement of the parties, the offer by the seller and acceptance by the buyer; that upon a refusal, well or ill-founded, by the latter to accept delivery, the seller retains possession and should resort to the courts to have his offer pronounced valid on proof that the goods are such as he sold in weight and quality; that until judgment the seller is bound to retain the goods and take every care of them as *un bon père de famille;* and that he can, during the interval, place them at the risk of the creditor in respect to accidents *de force majeure*. *Maher* v. *Girard*, Q.R. 10 S.C. 304.

—**Commercial Contract—Unreasonable delay in Delivery.**]—In all contracts of a commercial nature, in which the time of performance is fixed, the debtor is put in default by the mere lapse of such time, and when no time is expressly fixed in the contract the law implies that the time should be a reasonable one. So, where a contract for the purchase of a car load of flour was made, by telegraph, between Stanfold and Quebec, on the 27th May, and the flour was not put on board the cars for conveyance to defendant until the 27th June, and only actually tendered for delivery at Stanfold on the 20th July (the sole reason or excuse offered by plaintiff for such delay being that it took seven days to communicate by mail between Quebec and Glenboro, in Manitoba, wherefrom said flour was shipped):—Held, that, in the absence of a fair explanation such delay could not be adjudged reasonable, nor the defendant condemned in damages for refusal to accept the flour. And defendant could so refuse, without having previously put plaintiff *in morâ* to deliver. *Mahaffy* v. *Baril*, Q.R. 11 S.C. 475.

IV. Illegality.

—**Company — Purchase of goods on Credit — Ultra Vires.**]—See Company, V.

—**Intoxicating Liquors — Action for Price of Goods Sold—Illegal Object of Sale—Sale of Liquor to unlicensed Dealer — Pleading — Illegality.**]—See Liquor License.

V. Possession.

— **Executory Contract — Possession —Non-payment of Price — Loss of Goods — Liability.**] — Where goods, the subject of an executory contract of sale, have passed into the possession of the vendee, without payment therefor being made, and have while in such possession been lost or destroyed, through no fault of the vendor, the vendee is liable for the price, notwithstanding that the property in the goods had not, by the terms of the contract, passed to the vendee, and notwithstanding that no negligence on his part is shown. *Hesselbacher* v. *Ballantyne*, 28 Ont. R. 182.

VI. Price.

—**Contract—Sale by Sample—Objections to Invoice — Reasonable Time—Acquiescence — Evidence.**]—If a merchant receives an invoice and retains it for a considerable time without any objection, there is a presumption against him that the price stated in the invoice was that agreed upon. *Kearney* v. *Letellier*, 27 S.C.R. 1.

VII. Rescission.

—**Misrepresentation—Waiver — Failure of Consideration — Amendment — Parties — Right of Action.**]—One W. F. Doll, having made an agreement for the sale of all of the shares of a jewelry company to M. and S. for $15,000, the par value being $25 000, the defendant was induced to join with M. and S. in the purchase, the price being represented to him as $25,000, and he gave his notes for $6,000 directly to Doll and accepted a transfer of $6,000 of stock, the rest of the shares being transferred to M. and S. for the balance of the real price. The plaintiff, to whom W. F. Doll had endorsed the notes given by defendant, sued in this action upon one of them which the defendant refused to pay, claiming that the payee of the note had been guilty of fraud and misrepresentation in the sale of the shares and that the plaintiff was not the holder of the note in due course or an indorsee for value The trial judge found as a fact that there had been material misrepresentations by W. F. Doll which induced the defendant to enter into the contract of purchase and sign the note in question, but also that defendant after he became aware of the misrepresentations did not repudiate the contract, but along with M. and S continued to carry on the business, and long afterwards paid two of the notes originally given, and renewed others with the idea, as he said, of putting off Doll until he could secure further evidence of the fraud, and that restitution could not be made if the sale were rescinded:—Held, following *Campbell* v. *Fleming*, 1 A. & E. 40; *Sharpley* v. *Louth and East Coast Ry. Co.*, 2 Ch. D. 663, and *Morrison* v. *The Universal Marine Ins. Co.*, L.R. 8 Ex. 197, that the defendant had waived his right to rescind the contract for misrepresentation, and that the plaintiff was entitled to a verdict for the amount of the note and interest:—Held, also, per Killam, J., the evidence before the Court standing by itself might seem to warrant the granting of relief to the defendant on the ground that W. F. Doll had fraudulently obtained a larger sum for the shares conveyed to the defendant than he was entitled to, and that the plaintiff was only the holder in trust for him, and on the ground of failure of consideration for a definite portion of the $6,000 of notes, following *Beck* v. *Kantorowicz*, 3 K. & J. 242, but as no case for relief on that ground had been set up in the statement of defence or at the trial, it would not be proper to give effect to it now, or to allow any amendment of the pleadings at this stage, as the plaintiff might have made her case stronger at the trial if she had been called upon to do so. The evidence showed that the sale impeached by defendant was a sale of the shares en bloc to

three parties for a single consideration and, following *Morrison* v. *Earls*, 5 Ont.R. 434, that the purchase could not be avoided by the defendant alone as to some of the shares, but if rescinded at all it must be so as between all of the purchasers on the one side and Doll on the other, and as to the whole subject of the sale, and for this no case had been made. *Doll* v. *Howard*, 11 Man. R. 577.

VIII. Sheriff's Sale.

—Attachment of Goods of Absent or Absconding Debtor — Sale of Horse before levy — Validity.]—Plaintiffs claimed a horse seized under a writ of attachment issued against the property of their vendor as an absent or absconding debtor. The evidence showed an agreement between plaintiffs and the execution debtor that a debt due by him to the plaintiffs should be extinguished by the transfer to the latter of a horse owned by the execution debtor. The horse was delivered to the plaintiffs and accepted by them under the agreement in satisfaction of their debt:—Held, that this was a good sale within the *dicta* of the judges in *Walker* v. *Nussey*, 16 M. & W. 302: Held, also, that the property having been taken out of the plaintiffs' possession by the sheriff (defendant) under the attachment, and the defendant having failed to prove his justification under the attachment, objections to the validity of the sale under the Statute of Frauds, and the Statute of Elizabeth would not avail defendant, as the plaintiffs' possession was of itself sufficient to enable them to sustain the action, and they were not required to prove the real ownership of the property. *Johnson* v. *Buchanan*, 29 N.S.R. 27.

IX. Warranty.

—Sale of Machine—Latent Defect—Measure of Damages—Art. 1527 C.C.]—The manufacturers and vendors of dairy machines sold to V., proprietor of a creamery, a machine for separating cream from milk. V. brought an action claiming that the machine had a defect in its construction and demanding damages up to the time when such defect was remedied by the vendors. The latter pleaded that they were not responsible for a latent defect which they were unable to discover on a trial of the machine in V.'s presence. A part of the damages claimed consisted of the value of the butter which would have been produced from the milk brought to the creamery if the machine had not left part of the cream in the milk. V.'s commission for separating the cream from the milk and making and selling the butter was four cents per pound:—Held, that under the terms of Art. 1527 of the Civil Code vendors are in law presumed to be aware of the latent defects in what they sell and are liable for all damages suffered by the purchaser therefor.—In this case the purchaser could only recover as damages the amount of his commission on each pound of butter lost, the butter itself not being his property but that of his clients. *Wilson* v. *Vanchestein*, Q.R. 6 Q.B. 217.

—Sale of lobsters for delivery in Europe—Warranty to keep, and against stains, smut, etc.—Acceptance after examination before defects have developed — Waiver of Warranty—Questions for Jury—General and Specific findings.]—Defendant contracted to deliver to plaintiff in Europe a number of cases of lobsters in flat cans, and agreed in respect to said lobsters that there should be no inky stains or black smut inside of said cans, around the edges, sides, along the seams, or on the meat, and further that the contents of said cans should keep in Europe for at least nine months from the date of delivery. Some of these cases were opened in Halifax shortly after being packed, and before being sent forward. The cans taken out, upon being opened, in some instances showed slight traces of stains, but not of smut. On the arrival of the goods in Europe, a large number of cases were rejected by different buyers on account of the defective condition of the contents, and in respect to others, plaintiff was obliged to make a deduction by way of compromise. The evidence was that the cans examined in Europe showed inky spots on the edges and seams, and that these had spread to the meat:—Held, that the stipulations as to keeping and as to freedom from smut, etc., were warranties, the proper remedy for which was an action for damages. That the word "keep," as used in the contract, must be so construed as to prohibit defects to which the attention of the parties had been called, and to which the goods in respect to which the contract was made are peculiarly liable. Also, that as smut is one of the defects to which canned lobsters are subject, the word "keep" was apt and applicable to warrant against its occurrence, and to require the article to retain its qualities and to remain unimpaired:—Held, also, that defendant's contention that the word meant only that the goods were to keep in a merchantable condition, was inadmissible, as qualifying or cutting down the ordinary meaning of the word, and reading words into the contract:—Held, also, that plaintiff could not be called upon to reject the goods after the examination at Halifax, where the defects had not fully developed, and where there was only an imperfect opportunity for forming an opinion as to their condition, and that his acceptance of the goods at that time was not a waiver by implication of the warranty for their future condition:—Held, also, that having made contracts for the sale of the goods, and in view of the uncertainty that existed, and the difficulty in judging as to their condition from samples, plaintiff was fully justified in taking the goods and notifying the defendant that he would claim damages:—Held, also, that the question put to the jury by the trial judge as to whether plaintiff, by his agent or partner, agreed to waive the terms of the contract as to smut and stains at the times when the goods were inspected and approved of at Halifax, was a proper one;—Held, also, that the failure to discover inky stains or smut on the examination of the goods in Halifax, was evidence for the jury that at that time none existed; while the fact that the defendant volunteered to make good any reasonable claims in connection with the first two shipments was some evidence that there were

defects:—Held, also, that the answer of the jury, that the goods were in substantial compliance with the contract at the time they were delivered at Halifax, was not necessarily a finding against the existence of incipient and hidden defects, which developed by the time that the goods reached the European market, and was controlled by other findings of a more specific character:—Held, also, that the warranty against smut, irrespective of the warranty to keep, was sufficient to cover the defects discovered in Europe. *Wurzburg* v. *Andrews*, 28 N.S.R. 387.

SALE OF LAND.

I. Conditional Sale.

—Condition—Perfecting Title—Registry—Taxation—Action for Price—Defence.]—An agreement for sale of land, subject to a condition for perfecting the title as soon as part of the purchase money has been paid, does not constitute a change (*mutation*) of the immovable calling for registration, or subjecting it to the taxes imposed upon such changes (*mutations*). —The purchaser sued for the purchase money cannot, on the ground that the property would be burdened by hypothecs, demand the dismissal pure and simple of the action; he can only ask for security from the vendor. *Richer* v. *Rochon*, Q.R. 10 S.C. 64.

—Suspensive Condition—Sale à reméré—Third Parties—Immovables by Destination.]

See Contract III (*a*).

II. Consideration.

—Donation in form of Sale—Gifts in Contemplation of Death—Mortal Illness of Donor—Presumption of Nullity—Validating Circumstances—Dation en paiement—Arts. 762, 989 C.C.]—During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee and the consideration acknowledged by the deed was never paid:—Held, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of article 762 of the Civil Code, as the circumstances tended to show that the transaction was actually for good consideration (*dation en paiement*) and consequently legal and valid. *Valade* v. *Lalonde*, 27 S.C.R. 551.

III. Contract of Sale.

—Covenant—Indemnity—Release—Sale of Land.]—A covenant by a purchaser with his vendor that he will pay the mortgage moneys and interest secured by a mortgage upon the land purchased, and will indemnify and save harmless the vendor from all loss, costs, charges and damages sustained by him by reason of any default, is a covenant of indemnity merely; and if before default the purchaser obtains a release from the only person who could in any way damnify the vendor, he has satisfied his liability. *Smith* v. *Pears*, 24 Ont. A.R. 82.

—Offer to sell—Time Limit—Commission—Putting in Default.]—Where the owner of real estate offered to sell the same, for a price named, to the plaintiff or to any one whom he might designate, and in the event of the plaintiff effecting a sale he was to receive a commission of $500—the offer to hold good until a day fixed—the plaintiff was not entitled to claim the commission unless the vendor was put *en demeure* before the day fixed, to complete his part of the obligation, by the tender of a deed with the purchase price; or unless there is proof that the plaintiff, before the expiry of the term, had obtained a purchaser able and willing to fulfil his obligation, and that the inexecution of the sale was due to the unwillingness or inability of the vendor to complete it. *Deschamps* v. *Goold*, Q.R. 6 Q.B. 367.

—Covenant—Action for Specific Performance—Description—Dower.]—In March, 1890, defendant conveyed certain land to J. T., who, in September, 1890, conveyed to the plaintiff. Plaintiff brought an action claiming specific performance, the execution of a quit-claim deed, etc., alleging that at the time defendant conveyed to J. T., he had no title to the land; but that he subsequently acquired title under a deed from L. T. and wife, dated August 22nd, 1894. On the trial, it appeared that a prior deed of the same lot from L. T. to the defendant was recorded March 21st, 1890, prior to the recording of the deed from defendant to J. T.:—Held, that the plaintiff was not entitled to the relief sought.—The earlier deed to defendant contained the following words descriptive of the land conveyed: "being one-half of my homestead on which I now reside." —Held, that these words being inaccurate and inconsistent with previous words in which the land conveyed was correctly described, must be rejected.—It appeared, incidentally, that the wife of L. T. did not join in the first deed of the lot in question:—Held, that any claim of plaintiff to a further conveyance on this ground of was answered, because it was not made part the plaintiff's case; and because assuming that the wife's dower was released when the second deed was given, this would not give defendant anything that could be conveyed, as the right of dower would merely become barred and

extinct, and the land to which it previously attached would be free from it forever. *Redden* v. *Tanner*, 29 N.S.R., 40.

—Agreement for Sale — Possession — Hypothecary Action—Art. 2058 C.C.]—See ACTION, V.

— Construction of Contract—Sale or Lease — Conditions.]—See CONTRACT, III (*a*).

IV. INFANTS' LANDS.

—Infants—R.S.O. c. 137, s. 3—Dispensing with Examination.]—An order was made under R.S.O. c. 137, s. 3, for the sale of infants' lands at a named price, such of the infants as were over fourteen having been examined before a referee and having given their consent, and the remaining infant, who was under fourteen, having been produced before a referee, who certified with regard to her in the manner directed by the Rules, but the sale was not carried out. A subsequent offer for the lands at a lower price having been received, an order was made for a sale at that price, the circumstances being such as to show that it was in the interest of the infants; and their further examination was dispensed with, upon its being shown that they were out of the province, and that they were satisfied to accept the price offered. *Re Bennett Infants*, 17 Ont. P.R. 498.

V. JUDICIAL SALE.

—Immovable under Lease — Lease not Registered—Sale of Leased Property—Opposition afin de Conserver by Lessee—Purchaser's Right to Possession.]—See LANDLORD AND TENANT, XIII.

VI. MORTGAGED LAND.

—Indemnity — Mortgage — Purchase Subject to Mortgage—Assignment of Right to Payment.]—The equitable obligation of a purchaser of land subject to a mortgage may be assigned by the vendor to the mortgagee, who may maintain an action thereon against the purchaser for recovery of the mortgage moneys. *Campbell* v. *Morrison*, 24 Ont. A.R. 224.

—Covenant against Incumbrances — Breach—Damages.]—Where the vendee of lands who had himself after purchasing mortgaged the property, brought action for breach of covenant against incumbrances, and the mortgage, constituting the breach, covered other lands as well as his, and was for an amount much greater than the present value of the land, and it was impossible to apportion it:—Held, that the measure of damages was the whole amount due on the mortgage, which should be paid into Court, to insure its reaching its proper destination. *McGillivray* v. *The Mimico Real Estate Security Company*, 28 Ont. R. 265.

VII. REDEMPTION.

—Title to Land—Right of Redemption—Effect as to Third Parties—Pledge — Delivery and Possession of thing sold.]—Real estate was conveyed to S. as security for money advanced by him to the vendor, the deed of sale containing a provision that the vendor should have the right to a re-conveyance on paying to S. the amount of the purchase money, with interest and expenses disbursed, within a certain time. S. subsequently advanced the vendor a further sum and extended the time for redemption. The right of redemption was not exercised by the vendor within the time limited and S. took possession of the property, which was subsequently seized under an execution issued by V., a judgment creditor of the vendor. S. then filed an opposition claiming the property under the deed:—Held, reversing the judgmeut of the Court of Queen's Bench, that as it was shown that the parties were acting in good faith, and that they intended the contract to be, as it purported to be, *une vente à réméré*, it was valid as such, not only between themselves but also as respected third persons. *Salvas* v. *Vassal*, 27 S.C.R. 68, reversing Q.R. 5 Q.B. 349.

VIII. RESCISSION.

— Contract — Rescission — Purchase Money—Deposit—Forfeiture.]—The rescission of a contract for the sale of land by the vendor for default of payment of the purchase money operates as a discharge of a promissory note given by the vendee, before default, in part payment. Semble, moneys paid by vendee, after rescission, cannot be recovered by him from the vendor. *Fraser* v. *Ryan*, 24 Ont. A.R. 441.

—Misrepresentation as to value by Vendor.]—Where the vendor of land falsely represented that it could rent for $42 per month, whereas it could not be rented, under any circumstances, for more than $34, and thereby induced the purchaser to pay much more for the property than it was worth, the Court ordered the sale to be rescinded. *Roy* v. *Rastoul*, Q.R. 10 S.C. 44.

IX. SALE BY AGENT.

—Attorney for Sale of Land—Advance—Charge—Attorney Purchasing—Liability for Charge—Equitable Assignment — Acknowledgment — Registry Act—Notice.]

See PRINCIPAL AND AGENT, II.

X. SHERIFF'S SALE.

—Sale by Sheriff — Folle enchère—Resale for False Bidding — Arts. 688, 690 et seq. C.C.P. — Privileges and Hypothecs — Sheriff's Deed — Registration of — Absolute Nullity.]— Part of lands seized by the sheriff had been withdrawn before sale, but on proceedings for *folle enchère* it was ordered that the property described in the *procès verbal* of seizure should be resold, no reference being made to the part withdrawn. On appeal, the Court of Queen's Bench reversed the order on the ground that it directed a resale of property which had not been sold, and further because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for resale, or prior to the proceedings for *folle enchère*:—Held, that the

sheriff's deed having been issued improperly and without authority, should be treated as an absolute nullity notwithstanding that it had been registered and appeared upon its face to have been regularly issued, and it was not necessary to have it annulled before taking proceedings for *folle enchère*. *Lambe* v. *Armstrong*, 27 S.C.R. 309, reversing Q.R. 6 Q.B. 52.

—**Sheriff's Sale—Petition to set Aside—Articles 632, 714, C.C.P.—Sale super non domino.**]—Certain immovable property belonging to a community was hypothecated by the husband for security of a loan, and while the debt still existed the wife died intestate. No notice of her death, or declaration of transmission of her estate, was registered, as required by law. The lender instituted an action against the husband to enforce payment: but four days prior to the commencement of this suit, the surviving consort sold all his movable and immovable property to one of his sons, an absentee, and when the property was seized by the sheriff, oppositions *à fin de distraire* were filed on the part of the son; but the oppositions were dismissed because he made default to give security for costs. The immovable being sold by the sheriff, the same son with the other children petitioned to set aside the sale on the ground that the land belonged to the community of property which had existed between their father and mother, and after her death one-half devolved on the petitioners, and the other half belonged to the son to whom it had been sold as above stated:—Held (after declaring, on the evidence, that the sale by the father to his son immediately preceding the suit, was simulated and fraudulent), that as regards the claim of the petitioners to their mother's share, the sale was not *super non domino et non possidente*, the debtor being in physical possession of the mortgaged property, and the creditor having no notice of the wife's death. Moreover, the children having accepted the succession of their mother, were personally responsible for the mortgage debt.—Persons contesting the rights of an innocent third party, *adjudicataire* at a sheriff's sale, are in the position of plaintiffs in a petitory action, and are obliged to establish the validity of their title. Art. 714 of the Code of Procedure (C.C.P. 784 of the new text), which enacts that a sheriff's sale may be vacated "if the essential conditions and formalities prescribed for the sale have not been observed," refers to such an extreme and flagrant case of the violation of precedent formalities as would operate a denial of justice if not corrected, and this was not the case here, the petitioners being aware of the proceedings to enforce the judgment, and that the prevention of the sale could only be properly sought by an opposition filed more than fifteen days before the advertised date of sale. *Perrault* v. *Mousseau*, Q.R. 6 Q.B. 474.

—**Sale under Execution—Notice—Omission in Date—Frivolous Opposition.**]—In a notice of sale under execution issued the 26th of April, 1897, the bailiff had indicated as the day of sale "the 11th day of May next, *mil huit cent quatre-vingt*"—the word "*dix-sept*" being omitted:—Held, that the notice of sale was sufficient as the defendant could not be led into error as to the date, and an opposition invoking this informality was rejected as frivolous on its face even. *Cléroux* v. *Deslauriers*, Q.R. 11 S.C. 324.

—**Nullity of Decree—Substitution not open—Appelés not in cause nor represented—Remedy of Adjudicataire—Art. 959 C.C.**]—*Deschamps* v. *Bury*, Q.R. 11 S.C. 397, reversed on Review, 12 S.C. 155.

—**Sale of Land under Execution—Order for Writ of Possession—R.S. N.S 5th ser. c. 125 s. 23.**]

See PRACTICE AND PROCEDURE, XXXIII.

—**Order of Sursis—Disobedience of Sheriff—Contempt**].—See SHERIFF.

XI. VACANT LAND.

—**Vacant Land—Life Tenant—Income—Taxes—Infant—Maintenance.**]—The Settled Estates Act was intended to enable the Court to authorize such powers to be exercised as were ordinarily inserted in a well drawn settlement, and ought accordingly to receive a liberal construction. Where the widow of the settler was entitled to the whole income of the estate for her life, not charged with the support and maintenance of the children, who were the remaindermen, an order was made, upon the petition of the widow and adult children, and with the approval of the official guardian, authorizing the sale, in the widow's lifetime, of vacant and unproductive land forming part of the estate, notwithstanding that the effect would be to relieve the widow of the annual charge upon such land for taxes, to add to her income the profit to be derived from the investment of the proceeds of the sale, and to deprive the remaindermen of the benefit of any increase in the value of the land; the price offered being the best obtainable at the time or likely to be obtained in the near future; the Court deeming the sale in the best interests of all parties; and the widow agreeing to charge her income from the settled estates with the obligation of maintaining the infant remainderman. *Re Hooper*, 28 Ont. R. 179.

XII.—VENDOR AND PURCHASER.

—**Limitation of Actions—Vendor and Purchaser—Possession by Purchaser—Tenancy—R.S.O., c. 111, s. 5, s.-s. 7, 8.**]

See LIMITATION OF ACTIONS, I.

—**Hereditary Immovable—Purchase from Irregular Successor—Revendication by Heir—Good Faith.**]—See SUCCESSION.

SATISFACTION PIECE.

Judgment—Acceptance of Promissory Notes in Discharge of—Revivor—Evidence—Satisfaction Piece—Mistake—Estoppel.

See JUDGMENT, III.

SCHOOLS.

"Guardian"—Infant "Boarded Out"—Right to Compel Public School to Receive—54 V. c. 55, s. 40, s.s. 3 (Ont.).]—The word "guardian" in section 40 of sub-sec. 3 of 54 Vict. (Ont.) c. 55, the Public School Act, 1891, is used therein in its strict legal sense, and does not include a person resident in a school section, with whom and under whose care a boy under fourteen years of age has been placed by a benevolent association under a written "boarding-out undertaking" to clothe, maintain and educate him, and such person cannot compel the trustees of the school section to provide accommodation for and allow the boy to attend school as a pupil. *Hall* v. *the Board of Public School Trustees for the United School Section No. 2 of the Township of Stisted*, 28 Ont. R. 127, affirmed by 24 Ont. A.R. 476.

—Engagement of Teacher—Termination of Engagement—Two Months' Notice—Collective resolution—R.S.Q. Arts. 2028, 2029.]—A teacher engaged to finish the school year, without specifying any time, should be notified by the commissioners, two months before the expiration of the year, that her engagement would not be continued for the following year, otherwise she will be considered as engaged therefor; R.S.Q. Art. 2028.—A stipulation in an engagement that the teacher will leave at the end of the year, without notice, is void.—Engagements of teachers are subsisting contracts which can only be terminated by signification to the teachers of a two months' notice in writing that the commissioners do not intend to continue them for the year following.—A collective resolution of the commissioners to the effect that two or more teachers will not be continued in their engagements is illegal and null; R.S.Q. Art. 2029. *Larivière* v. *The School Trustees of St. Fulgence* Q.R. 11 S.C. 528.

SCIRE FACIAS.

Patent of Invention—Proceedings to Annul—Form of—R.S.C., c. 61, s. 34.]

See PATENT OF INVENTION, III.

SEAMAN'S WAGES.

See SHIPPING, III.

SECURITY.

Cheque Deposited as Security on Appeal—Ontario Surrogate Rule, 57.]

See APPEAL, III (*c*).

—Mortgage—Account—Speculative Securities—Bonuses and Commissions.]—See MORTGAGE, I.

SEDUCTION.

Right of Action—Service—Pregnancy.]—In an action for seduction, it appeared that the connection took place while the plaintiff's daughter resided at service with the defendant. There was no evidence of any possible loss of service by the father, and, although a slight illness occurred subsequent to the connection, there was neither birth of a child nor pregnancy:—Held, that the father had no right of action, either at common law or under the Act, respecting seduction, R.S.O. c. 58: *Kimball* v. *Smith*, 5 U.C.Q.B. 32, and *L'Esperance* v. *Duchene*, 7 U C.Q.B. 146, followed. *Harrison* v. *Prentice*, 28 Ont. R. 140.

SEIGNORIAL TENURE.

Title to Lands—Deed of Concession—Construction of Deed—Words of Limitation—Covenant by grantee—Charges running with the Title—Servitude—Condition, si voluero—Prescriptive Title—Edits et Ordonnances, (L.C.)—Municipal Regulations—23 V. (Can.) c. 85.]

See SERVITUDE.

SEIZIN.

Possessory Action—Vacant Lands—Boundary Marks—Delivery of Possession.]

See EVIDENCE, XII.

SEPARATE ESTATE.

See HUSBAND AND WIFE, V.

SERVICE OF PROCESS.

Service of Election Petition—Certified Copy—Bailiff's Return—Cross-examination—Production of Copy.]

See PARLIAMENTARY ELECTIONS.

—False return of service of Summons—Judgment by Default—Opposition to Judgment—Arts. 16, 89 et seq. 483, 489 C.C.P.]

See JUDGMENT, VII.

And see PRACTICE AND PROCEDURE, XL.

SERVITUDE.

Title to Lands—Seignorial Tenure—Deed of Concession—Construction of Deed—Words of Limitation—Covenant by Grantee—Charges running with the Title—Condition, si voluero—Prescriptive Title—Edits & Ordonnances (L.C.)—Municipal Regulations—23 V. (Can.) c. 85.]—In 1768 the Seigneur of Berthier granted an island called "l'île du Milieu," lying adjacent to the "Common of Berthier" to M., his heirs and assigns (*ses hoirs et ayants cause*), in consideration of certain fixed annual payments, and subject to the following stipulation:—

"en outre à condition qu'il fera à ses frais, *s'il le juge nécessaire*, une clôture bonne et valable, à l'épreuve des animaux de la Commune, sans aucun recours ni garantie à cet égard de la part de sieur seigneur lesquelles conditions ont été acceptées du dit sieur preneur, pour sureté de quoi il a hypothèqué tous ses biens présents et à venir, et spécialement la dite isle qui y demeure affectée par privilège, une obligation ne dérogeant à l'autre' : —Held, reversing the decision of the Court of Queen's Bench, dissenting, that the clause quoted did not impose merely a personal obligation on the grantee, but created a real charge or servitude upon l'île du Milieu for the benefit of the "Common of Berthier;" that the servitude consisted in suffering inroads from the cattle of the Common wherever and whenever the grantee did not exclude them from his island by the construction of a good and sufficient fence; this servitude results not only from the terms of the seignorial grant but also from the circumstances and the conduct of the parties from a time immemorial; that the two lots of land although not contiguous were sufficiently close to permit the creation of a servitude by one in favour of the other; that the stipulation as contained in the original grant of 1768 was not merely facultative; that the servitude in question is also sufficiently established by the laws in force in Canada at the time of the grant in 1768, respecting fencing and the maintenance of fences in front of habitations or settlements. *La Commune de Berthier* v. *Denis*, 27 S.C.R. 147.

—**Apparent Servitude—Servitude of Passage—Registry—Change of Condition—Art. 557 C.C.**]—An apparent servitude of passage does not require the registry of the title which constitutes it.—In a case of servitude of passage the owner of the servient lands who desires to alter the original condition of the passage is bound to maintain the former passage so far as no other has been substituted for it either by agreement of the parties or by authority of law.—*Destroismaisons dit Picard* v. *Gibault*, Q.R. 11 S.C. 279.

—**Party Wall—Demolition for benefit of one Owner—Cost of Reconstruction—Art. 513 C.C.**]—When the rebuilding of a party wall between two buildings has been made necessary by the demolition of one of the buildings, which was done for the sole benefit of one of the co-owners, the latter should bear the whole cost of rebuilding, and cannot relieve himself of the obligation by renouncing his ownership in the party wall (*mitoyenneté du mur*). *Atlantic and North-West Railway Co.* v. *Duchesneau*, Q.R. 11 S.C. 291.

— **Drainage — Public and Private Drains — Authority of Municipal Council—Art. 882 M.C.**]

See MUNICIPAL CORPORATIONS, IV.

—**Aggravation—Drainage—Surface Waters of Street—Reponsibility.**]

See MUNICIPAL CORPORATIONS, IV.

SET-OFF.

Set-off—Solicitor's Lien.—Ont. Rule, 1205.]—There can be no set-off of damages or costs between the same parties in different actions, to the prejudice of the solicitor's lien; that is the effect of Ont. Rule 1205. *Turner* v. *Drew*, 17 Ont. P. R. 475

—**Compensation—Pleading—Unliquidated Damages—Judgment Debt**]—A debt which is clear and liquidated and established by judgment, may be pleaded in compensation to a demand for unliquidated damages. *Banks* v. *Burroughs*, Q.R. 11 S.C. 439.

—**Trustee—Assignment—Notice of Assignment.**] A person whilst holding a sum of money in trust for A and B, pending the decision of a suit of A against B, may acquire an overdue promissory note of one of the parties and upon the settlement of the suit may then set off any balance found to be in his hands for such party against the amount of the note, whether he holds such note for his own benefit or that of another; provided he has no notice of any assignment of such balance by such party in favour of some third person: *Fair* v. *McIver*, 16 East, 130; *Lackington* v. *Combes*, 6 Bing. N.C. 71, and *Belcher* v. *Lloyd*, 10 Bing. 310, distinguished on the ground that they were decided under the set of clauses of the Bankruptcy Acts, which, as shown by Park, B., in *Forster* v. *Wilson*, 12 M. & W., are given a different construction from the statutes of set off: *Talbot* v *Frere*, 9 Ch. D. 563, also distinguished, on the ground that the set off there asked for would have prejudiced the creditors of the estate of the deceased mortgagor, which was insolvent. *Sifton* v. *Coldwell*, 11 Man. R. 653.

And see BILLS OF EXCHANGE AND PROMISSORY NOTES, III.

See also DEBTOR AND CREDITOR, XIV.

SETTLED ESTATES ACT (ONTARIO).

Settled Estates Act—Sale of Vacant Land—Life Tenant — Income — Taxes — Infant—Maintenance.] — The Settled Estates Act was intended to enable the Court to authorize such powers to be exercised as were ordinarily inserted in a well drawn settlement, and ought accordingly to receive a liberal construction.—Where the widow of the settler was entitled to the whole income of the estate for her life, not charged with the support and maintenance of the children, who were the remaindermen, an order was made, upon the petition of the widow and adult children and with the approval of the official guardian, authorizing the sale, in the widow's lifetime, of vacant and unproductive land forming part of the estate, notwithstanding that the effect would be to relieve the widow of the annual charge upon such land for taxes, to add to her income the profit to be derived from the investment of the proceeds of the sale, and to deprive the remaindermen of the benefit of any increase in the value of the land; the price offered being the best obtainable at the time or likely to be obtained in the near future; the Court deeming the sale in the best interests of all parties; and the widow agreeing to charge her income from the settled estates with the obligation of maintaining the infant remainderman. *Re Hooper*, 28 Ont. R. 179.

SHEEP.

Worrying Sheep on Indian Reserve—R.S.O. c. 214, s. 15—Scienter.]—See INDIAN RESERVE.

SHERIFF.

Execution—Opposition—Order of sursis disregarded by Sheriff—Contempt.]—The sheriff is bound to obey an order of *sursis* granted by a judge in one district to suspend a sale in another, even though irregularly granted; he is not competent to judge of the validity of such order, nor of an opposition filed, nor of the sufficiency of the notices; and if, in defiance of the order, he goes on with the sale, he may be proceeded against as for a contempt. In the present case, the sheriff so acting was declared in contempt, but merely condemned to pay costs of motion. *Roy* v. *Noel*, Q.R. 10 S.C. 528.

—Seizure of Immovable—Summons to Defendant—Mileage Fees—Art. 637, C.C.P.]—The sheriff of the district of Iberville having made, upon a defendant in an action residing at Trois Pistoles, in the district of Kamouraska, the seizure of an immovable situated at Ste. Blaise, in the district of Iberville, sent his deputy to Trois Pistoles to serve upon the defendant the demand (*interpellation*) required by Art. 637 C.C.P., and charged for the distance from St. Jean to Trois Pistoles, $86, and from Trois Pistoles to Ste. Blaise, $89. The defendant tendered to the sheriff the amount of the debt and costs, less the costs of mileage, and on his refusal to accept, took proceedings by *opposition afin d'annuler*.—Held, that the sheriff should have employed the bailiff (*huissier*) of the place nearest to the domicile of the defendant, and that he could not claim from the latter the fees for the distance his deputy had traveled. *Carreau* v. *Hébert*, Q.R. 11 S.C. 314.

—Building and Jury Fund—Action for Amounts Due.]—The sheriff having the right to recover from those detaining them the amounts due on the building and jury fund may take in law, in his capacity of sheriff, every action necessary to effect such recovery. *Thibeaudeau* v. *The City of St. Henry*, Q.R. 11 S C. 532.

—Poundage—Costs—Appeal.]—See COSTS, VII (*a*).

— Absent or Absconding Debtor — Attaching Creditor—Expenses of Sale delayed at instance of Creditor—Sheriff's right to recover.]

See DEBTOR AND CREDITOR, V.

—Replevin Suit—Writ de Proprietate Probanda—Hearing on—Evidence.]—See Evidence, XII.

—Deed by—Champerty—Maintenance.]

See EVIDENCE, XII.

—Deed by—Registration of—Absolute Nullity—Folle enchére—Re-sale for False Bidding.]

See SALE OF LAND, X.

And see EXECUTION.

SHIPPING.

I.—BILL OF LADING.

—Charter—Conditions—Liability of Owner—Control of Ship—Improper Stowage—Art. 2391 C.C.]—When a ship is chartered on condition that, when equipped, she will proceed to a port named to receive the cargo, the charterer to bear the expenses of the ship while in port, but his responsibility to cease as soon as the cargo is on board; that the owners shall have a lien on the freight and cargo; that the master shall sign the bills of lading, and that the owners shall not be liable for loss by perils of the seas, etc., nor for losses caused by explosion or defects in the machinery of the ship which do not result from their negligence or that of their servants; the charterer has no control over the ship, and the owners are liable for loss of goods from improper stowage,—Art. 2391 of the Civil Code not applying to this case.—Where a bill of lading for the carriage of glass contained a condition that "glass is carried only on condition that the ship and railway companies are not liable for any breakage that may occur, whether from negligence, rough handling or any other cause whatsoever," the owners were held liable for breakage that was caused by defective stowage. *Glengoil Steamship Co.* v. *Pilkington*, Q.R. 6 Q.B. 95, affirmed by 28 S.C.R. 146.

— Defective stowage of Cargo — Stipulation excluding Liability for Negligence—Art. 1676 C.C.—R.S.C. c. 82—Deviation by taking ship in Tow—Condition that Contract shall be governed by British Law—Proof of Foreign Law.]—A ship owner is responsible for the destruction of cargo during a storm, when such destruction results from improper stowage. Under the terms of Art. 1676 C.C. the ship owner cannot validly contract himself out of responsibility for his negligence. The delivery of a bill of lading by the shipping company with special conditions limiting its liability, was equivalent to a notice to plaintiff that it intended to limit its liability accordingly. And nothing in the Dominion Statute 37 Vict. cap. 25 re-enacted in R.S.C. cap. 82, conflicts with Art. 1676 of the Civil Code.—Where the damage done amounted to a general devastation, resulting in the complete destruction of 105 out of 200 puncheons of molasses shipped. this was not a case of "leakage or breakage" in the terms of the bill of lading.—The ship owners could not, in any event, rely on the exceptions of the bill of lading as to damage caused by "masters, mariners, etc., or other servants," when the negligence was that of the ship owners themselves.—Where the bill of lading provided for "liberty to tow and assist vessels in all situations," the taking of a ship in tow for hire voluntarily and without necessity was not justifiable, and such towage amounted to a deviation.—Where the evidence justifies the

conclusion that the towing of such a vessel may have hampered and impeded the vessel and prevented her from reaching a port of safety, the burden of proof is thrown on the ship-owner to show clearly that the damage would equally have happened had the deviation not taken place.—Where the bill of lading stipulates that "this contract shall be governed by British law, with regard to which this contract is made," the party desiring to avail himself of such law is bound to state in his pleadings what it means and to prove it by expert testimony, otherwise the Court will assume that there is no difference between our law and the foreign law. And *quære* whether "British law" means the law of England.—The parties cannot, by a consent that "British law" be proved by reference to the statutes and jurisprudence in the same way as if it were established by evidence in the case, cast upon the Court the duty of finding out what the law is from the books. It is a fact that ought to be proved.—Where the bill of lading provides that "no damage that can be insured against will be paid for," it is a good answer that the ship-owner vitiated the insurance by deviating from his course, as he cannot claim the benefit of a contract that he has himself violated. *Rendell* v. *Black Diamond Steamship Co.*, Q.R. 10 S.C. 257, affirming 8 S.C.R. 442.

II. Liability of Master to Owners.

—Responsibility — Master disobeying Orders—Discretionary Powers — Resulting Damages.]—In the absence of evidence to show that stress of weather, the safety of the vessel or crew, or other like circumstances, had justified the violation of express written instructions as to his course, the captain of a ship is responsible to the owners for the damages caused thereby.—As the resulting damages to defendants amounted to at least as much as plaintiff's claim for wages, and as these damages had been properly urged by a cross demand, the action was dismissed with costs. *Sylvain* v. *Canadian Forwarding and Export Co.*, Q.R. 10 S.C. 195, reversing 7 S.C. 256.

III.—Seamen's Wages.

— Disrating Seaman — Wages.]—The plaintiff shipped on board a vessel as an "A.B."; during the voyage it appeared that he could not perform the duties of an "A.B," and he was accordingly disrated: — Held (per Forbes, Co J.) that the disrating was not retroactive; that the plaintiff was entitled to the wages of an "A.B." from the time he shipped until the time he was disrated. *Fratter* v. *Andrews*, 17 C. L. T. (Occ. N.) 19.

IV.—Towage.

—Letting of Work—Non-execution — Vis major —Burden of Proof.]—When the lessee (*locataire*) of work to be done undertakes to furnish the lessor (*locateur*) with the necessary implements and articles for the undertaking, for example, a cable for towing, these articles should remain in good condition during the whole time the work continues; if broken in the course of the execution of the contract, without fault of the lessor, the lessee should replace them.—When a service of towage is forcibly interrupted by accidents of superior force (*force majeure*), such as tempestuous weather and the breaking of the cable, the owner of the ship should put the owner of the towing boat *en demeure* to continue the towage and give him time to resume the service when the obstacle of *force majeure* is removed, before completing it by other aid. If he does not, he is liable for the price of the services as if the contract had been completely executed, less, however, the expenses estimated for but not incurred, and less also the amount the lessee might have earned by performing other services of towage during the interval.—Under such circumstances the proof that it is by the fault of the *locataire* that the work was not performed falls upon the *locateur* who sues for the amount of the towage. *Jewell* v. *Connolly*, Q.R. 11 S.C. 265.

And see Behring Sea Award Act.
" Fisheries.
" Insurance.
" Lien.
" Master and Servant.
" Navigation.

SOLICITOR.

Security for Costs—Action brought without Authority—Applicants out of the Jurisdiction.]—When plaintiffs in an action repudiate the authority of the solicitor to take the proceedings, and move to set them aside, they cannot be compelled by the solicitor to give security for costs on the ground that they reside out of the jurisdiction: *Re Percy and Kelly Nickel Co.*, 2 Ch. D. 531, followed. Where a charge of improper conduct is made against a solicitor, who is an officer of the Court, by a person out of the jurisdiction, the Court ought not to order security for costs, and thus prevent such a charge being investigated. *Sample* v. *McLaughlin*, 17 Ont. P.R. 490.

—Attorney ad litem—Mandate—Retaining Counsel.]—The mandate of the attorney *ad litem* to appear for and represent his client in a suit does not imply any power on his part to retain counsel, and the client is not liable for the fees of counsel so retained without his authorization or knowledge. *Augé* v. *Filiatrault*, Q.R. 10 S.C. 157.

—Needy Client—Gratuitous Services.]—An advocate who acts for a person needy and unable to assert his rights without the gratuitous aid of officers of the law, is himself deemed to have furnished his services and the aid of his position without fee. *Mathieu* v. *Beauchamp*, Q.R. 11 S.C. 307.

—Malicious Prosecution—Reasonable and Probable Cause—Legal Advice—Solicitor joined as Defendant.]—An action for malicious prosecution was brought against a person who had preferred and prosecuted a constable for trespass *vi et armis*, and an indictable offence by wilfully misconducting himself in the execution of legal process. At the trial of these charges, the present defendant had abandoned the first charge, and the present plaintiff was

acquitted on the second. A solicitor who had been consulted by the present defendant and had advised the prosecution of the present plaintiff on the above charges, was joined as a defendant in this action. The trial judge dismissed the action as against the solicitor on the ground that there was no evidence to go to the jury.—Held, that the solicitor having had the same knowledge of the facts as the other defendant, his case should have been put to the jury.—The taking of legal advice, in the Province of Nova Scotia, before laying a charge, while it is not the same thing as taking counsel's opinion in England, is matter for the jury, and, with some limitations, tends to upset the idea of malice. *Seary* v. *Saxton*, 28 N.S.R. 278.

—**Solicitor — Expulsion from Court — False Imprisonment — Action against Police Officers — Directions to Jury — Damages.**]— Plaintiff, a solicitor, was removed from the court room of the Halifax City Civil Court by order of the stipendiary magistrate, for alleged misconduct while attending the court in the discharge of his professional duties. He returned in the course of a few minutes, and was directed by the police to leave. Having refused to do so, he was forcibly expelled and locked up in the cells or police detention rooms. The jury found at the trial, under the directions of the presiding judge, that the second removal and the imprisonment thereafter were unwarranted and unjustifiable, and they assessed damages against the police officers who took part in the removal in the sum of $700:—Held, that the propriety of the second removal of the plaintiff was a mixed question of law and fact, and the jury having found as they did, under the directions of the court, and no exception having been taken to such directions, defendants' appeal on this point must fail.—That plaintiff having been punished for the first offence by order of the court it could not be pleaded to justify the second assault and imprisonment.—That assuming defendants' conduct to have been illegal the amount of damages assessed was not excessive. *Bulmer* v. *O'Sullivan*, 28 N.S.R. 406.

— **Certificate of fees Paid—Barrister's Society—N. S. Acts of 1893, c. 27—Retroactivity.**]—The Acts of 1893, c. 27, required every practising solicitor to obtain from the treasurer of the Barrister's Society, before the first day of July, a certificate, under the seal of the society, stating that he had paid the required fees. Section 3 provided that no solicitor should be entitled to recover any charge in a court of law, or tax costs before any taxing master or judge, unless he held a certificate:—Held, that it was necessary for the defendants to aver and prove that when the defence was set up, plaintiff was then actually practising:— Held, also, that the statute was not retroactive in its effect, and did not apply to solicitors' bills incurred before its enactment. *Gourley* v. *McAloney*, 29 N.S.R. 319.

—**Loss of Note received for Collection—Damages — Burden of proof — Conflicting Evidence.**]— Defendant, a solicitor, received a number of accounts and promissory notes for collection on account of plaintiff. In an action by plaintiff for the amount of one of the notes which it was alleged had not been collected or returned:—Held, that defendant, having admitted the receipt of the note, was bound to collect or return it, or account for its loss on grounds relieving him from blame, and that, not having done so, he was accountable for the loss of the note, and from all damages resulting therefrom:—Held, also, that negligence on the part of defendant having been shown, the damages were rightly fixed at the face of the note and interest, that being *prima facie* the value of the note. In an action brought by plaintiff against C. it appeared that the amount claimed had been previously paid by C. to defendant, who was acting at the time as plaintiff's solicitor:—Held, that defendant was responsible to plaintiff for damages in connection with the unsuccessful result of the action against C., he having returned the note to plaintiff, but omitted to inform him of the fact that payment had been made. At the time of the payment made by C. to defendant the latter held a claim of M. against C. and the defence to plaintiff's action was that the amount paid by C. was appropriated towards payment of M.'s claim. Per Henry, J., dissenting:—Held, that the mere receipt of the money by defendant from C., under the circumstances stated, did not relieve plaintiff from the burden of showing that the payment was made on his account, and, the evidence being conflicting, that he had failed to do so. *Gould* v *Blanchard*, 29 N.S.R. 361.

—**Accord and Satisfaction—Solicitor—Right to proceed for Costs after settlement by Parties.**]— Defendant after service of a writ claiming $152.16 settled with plaintiff personally by payment of $60.00 taking a receipt in full. Plaintiff's solicitor, being unaware of the settlement, signed judgment for the full amount and costs. Upon motion by the defendant to set aside the judgment as a breach of the settlement:—Held, that as there was no release under seal of the balance of the debt, or consideration for the agreement to accept a part in full discharge, the plaintiff was entitled to maintain the judgment.—The plaintiff consenting to accept the amount of the settlement:—Held, that the plaintiff's solicitor had a right to maintain the judgment as to his costs, and *nem con.* the judgment was allowed to stand for the amount of the settlement and costs. *Soder* v. *Yorke*, 5 B.C.R. 133.

—**Striking off Rolls—Reinstatement—Jurisdiction—N.W.T. Ord. of 1895.**]—Where a solicitor (advocate) was struck off the roll of advocates for retaining trust funds of a client—Held, that the Supreme Court of the North-West Territories had no jurisdiction under the Legal Profession Ordinance of 1895, 10 reinstate the solicitor, to rescind the order striking him off, or to direct his re-enrolment.—*In re Forbes*, a Solicitor, 33 C.L.J. 629; 17 C.L.T. (Occ. N.) 302.

—**Counsel fee where counsel other than solicitor for Successful Party—Alimony.**]

See ALIMONY.

—**Contract with Client—Contract de quotâ litis—Undertaking to procure passage of Act—No fees if unsuccessful.**]—See CONTRACT, II.

—**Solicitor and Client—Distraction of Costs—Execution.**]—See COSTS, II.

—**Duty of—Effect of Neglect on Costs—Lien on Client's papers.**]—See COSTS, VI.

—**Costs—"Retainers"—Disallowance of in Probate Court.**]—See COSTS, IV.

—**Taxation of Costs between Solicitor and Client.**]
See COSTS, VI.

—**Lien for Costs—Set-off of Party Costs—Ont. Rule, 1205.**]—See LIEN, II.

—**Letters between Solicitor and Client—Production—Privilege.**]
See PRACTICE AND PROCEDURE, XII.

—**Attorney ad litem—Commissaire of Superior Court—Authority to receive affidavit prepared by himself as Attorney—Opposition.**]
See PRACTICE AND PROCEDURE, II.

SPECIFIC PERFORMANCE.

See CONTRACT.
" STREET RAILWAY.

STATEMENT OF CLAIM.

See PLEADING.

STATUTES.

I. APPLICATION.

Appeal from Court of Review—Appeal to Privy Council—Appealable amount—54 & 55 V. c. 25, (D.) s. 3, s.s. 3 and 4—C.S.L.C. c. 77, s. 25—Arts. 1115, 1178 C.C.P.—R.S.Q. Art. 2311.]—In appeals to the Supreme Court of Canada from the Court of Review (which, by 54 & 55 Vict. c. 25, s. 3, s.s. 3, must be appealable to the Judicial Committee of the Privy Council,) the amount by which the right of appeal is to be determined is that demanded, and not that recovered, if they are different: *Dufresne* v. *Guevremont*, 26 Can. S.C.R. 216 followed. *Citizens Light & Power Co.* v. *Parent*, 27 S.C.R. 316.

—**Revenue—Customs Duties—Imported Goods—Importation into Canada—Tariff Act—Construction—Retrospective Legislation—R.S.C. c. 32—57 & 58 V. c. 33 (D.)—58 & 59 V. c. 23 (D.).**]—By 57 & 58 Vict. c. 33, s. 4, duties are to be levied upon certain specified goods "when such goods are imported into Canada:"—Held, reversing the judgment of the Exchequer Court, that the importation as defined by s. 150 of the Customs Act. (R.S.C. c. 32) is not complete until the vessel containing the goods arrives at the port at which they are to be landed.—Section 4 of the Tariff Act, 1895 (58 & 59 Vict. c. 23) provided that "this Act shall be held to have come into force on the 3rd of May in the present year, 1895." It was not assented to until July.—Held, that goods imported into Canada on May 4th, 1895, were subject to duty under said Act. *The Queen* v. *The Canada Sugar Refining Co.*, 27 S.C.R. 395, reversing 5 Ex.C.R. 177.

—**Appeal—Jurisdiction—52 V. c. 37, s. 2 (D.)—Appointment of Presiding Officers—County Court Judges—55 V. c. 48 (Ont.)—58 V. c. 47 (Ont.)—Appeal from Assessment—Final Judgment.**]—By 52 Vict. c. 37, s. 2, amending "The Supreme and Exchequer Courts Act," an appeal lies in certain cases to the Supreme Court of Canada from courts "of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority." By the Ontario Act, 55 Vict. c. 48, as amended by 58 Vict. c. 47, an appeal lies from rulings of municipal courts of revision in matters of assessment to the county court judges of the county court district where the property has been assessed. On an appeal from the decision of the county court judges under the Ontario statutes:—Held, that if the county court judges constituted a "court of last resort" within the meaning of 52 Vict. c. 31, s. 2, the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act:—Held, per Gwynne J., that as no binding effect is given to the decision of the county court judges, under the Ontario Acts cited, the court appealed from was not a "court of last resort" within the meaning of 52 Vict. c. 37, s. 2:—Quære, is the decision of the county court judges a "final judgment" within the meaning of 52 Vict. c. 37, s. 2? *The City of Toronto* v. *The Toronto Railway Co.*, 27 S.C.R. 640.

—**51 V. c. 12, s. 51—Civil Service—Extra salary—Additional remuneration—Permanent Employees.**]—The Civil Service Amendment Act, 1888 (51 Vict. c. 12), by section 51 provides that "no extra salary or additional remuneration of any kind whatever shall be paid to any deputy head, officer or employee in the Civil Service of Canada, or to any other person permanently employed in the public service of Canada."—Held, that reporters employed on the Hansard staff of the House of Commons of Canada, are persons subject to the operation of the statute quoted:—Held, further, that in the section referred to, the words "no extra salary or additional remuneration" apply only to payments which, if made, would be extra or additional to the salary or remuneration payable to an officer for services which, at the time of his acceptance of the appointment, could legitimately have been intended or expected to be within the scope of the ordinary duties of his office, although additional to them. *The Queen* v. *Bradley*, 27 S.C.R. 657, affirming 5 Ex. C.R. 409.

—Railways—Negligence—Packing and Railway Frogs — Workmen's Compensation for Injuries Act—55 V. c. 30, s. 5, s.s. 2 & 3 (O.)—Statutes —Construction—Division into Sections—51 V. c. 29, s. 262, s.s. 3 & 4 (D.).]—Sub-section 3 of section 362 of the Railway Act, 51 Vict. (D.) c. 29, provides that the spaces behind and in front of every railway frog shall be filled with packing. Sub-section 4 of the same section provides that the spaces between any wing rail and any railway frog, and between any guard rail and track rail shall be filled with packing, and this subsection ends with a proviso that the Railway Committee may allow "such filling" to be left out during the winter months:—Held, that this proviso applied to both sub-sections and that permission having been given by the Railway Committee to frogs being left unpacked during the period in question the defendants were not liable for an accident resulting from that cause. The provisions of sub-sections 2 and 3 of section 5 of the Workmen's Compensation for Injuries Act, 55 Vict. (Ont.) c. 30, as to packing railway frogs, are not binding upon railways under the legislative control of the Dominion. *Washington* v. *The Grand Trunk Railway Company of Canada*. 24 Ont. A.R. 183. Reversed by 28 S.C.R. 184. Appeal to Privy Council is now pending.

—C.S.L.C. c. 95—Felony — Delay in preferring Indictment—Application of Act under Criminal Code.]—By C.S.L.C. c. 95, when a person has been committed for trial for a felony, and having prayed to be brought to trial is not indicted during the next term of the Court, he is entitled to be released on bail, and, if not indicted and tried at the second term after his commitment, to be discharged:—Held, that as the distinction between felonies and misdemeanours has been abolished by the Criminal Code, the said Act now applies in case of all indictable offences. *The Queen* v. *Cameron*, Q.R. 6 Q.B. 158.

—43 V. c. 8, s.s. 8, 10 (N.B.)—Issue of Execution.]—S. 8 of 43 Vict. c. 8 (N.B.) relating to practice in the Supreme Court, provides that "during the lives of the parties to a judgment . . . . an execution may be issued within the period of twenty years from the signing of such judgment without a revival of the judgment." By section 10, "The provisions of this Act shall apply to all suits now pending in which a plea or pleas have not been delivered: but shall not apply to any suit now pending in which a plea or pleas have been delivered, which last mentioned suit or suits shall be carried on to completion as if this Act had not been passed." Held, that section 10 only applied to matters of pleading, and not to the issue of execution under section 8. *Gleeson* v. *Domville*, 33 N.B.R. 548.

—58 V. c. 24, s. 18 (N.B.)—Suits commenced before coming into force.]—Sec. 18 of the Act. 58 Vict. c. 24 (N.B.) does not apply to suits commenced before the Act came into force. *Walsh* v. *Nugent*, 1 N.B. Eq. 335.

—Construction of—Convention of 1818—Fisheries—Three-Mile Limit—Foreign Fishing Vessels —"Fishing"—59 Geo. III. c. 38 (Imp.)—R.S.C. cc. 94 & 95.]—See FISHERIES.

—Municipal Elections—Deputy Returning Officer —Absence during Part of Polling Day—Irregularity — Saving Clause — Consolidated Municipal Act, 1892, s. 175.]

See MUNICIPAL CORPORATIONS, XI.

—Charter of Montreal, 52 V. c. 79—By-law Penalties—Early closing—57 V. c. 50 (P.Q.)]

See MUNICIPAL CORPORATIONS, I. (*f*).

—Snow and Ice on Sidewalks—By-law—55 V. c. 42, s. 531 (O.)—57 V. c. 50, s. 13 (O.)]

See NEGLIGENCE, VIII.

II. CONSTRUCTION.

—Quebec Act (55 & 56 V. c. 77), s. 5—Construction—Underground Wires—Power to lay wires underground for purpose of supplying Electricity and Gas—Right to excavate Streets.]—Section 5 of the respondent company's incorporating Act (55 & 56 Vict. c. 77) empowers it on certain conditions (which have been complied with) to lay its wires underground as the same may be necessary, and in so many streets, squares, highways, lanes and public places as may be deemed necessary for the purpose of supplying electricity and gas:—Held, that the power to open streets, that is, to break up their surface and excavate them, is plainly involved in this provision, and that an injunction obtained by the respondents to restrain the municipality from interfering therewith was properly granted. *City of Montreal* v. *Standard Light and Power Company*, [1897], A.C. 527, affirming Q.R. 5 Q.B. 558.

—Mines and Minerals—Lease of Mining Areas—Rental Agreement—Payment of Rent—Forfeitures—R.S.N.S (5 ser.) c. 7—52 V. c. 23 (N.S.)]—By R.S.N.S. (5 ser.) c. 7, the lessee of mining areas in Nova Scotia was obliged to perform a certain amount of work thereon each year on pain of forfeiture of his lease which, however, could only be effected through certain formalities. By an amendment in 1889 (52 Vict. c. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by sub-sec. (*c*) the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions of such annual payment and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By section 7 all leases are to contain the provisions of the Act respecting payment of rental and its refund in certain cases, and by section 8 said section 7 was to come into force in two months after the passing of the Act. Before the Act of 1889 was passed a lease was issued to E. dated June 10th, 1889, for twenty-one years from May 21st, 1889. On June 1st, 1891, a rental agreement under the amending Act was executed under which E. paid the rent for his mining areas for three years, the last payment being in May, 1893. On May 22nd, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year and issued a prospecting license to T. for the same areas. E. tendered the year's rent on June 9th, 1894, and an

action was afterwards taken by the Attorney-General, on relation of E., to set aside said license as having been illegally and improvidently granted;—Held, affirming the judgment of the Supreme Court of Nova Scotia in such action, that the phrase "nearest recurring anniversary of the date of the lease" in sub-sec. (*c*) of sec. 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on June 10th no rent for 1894 was due on May 22nd of that year, at which date the lease was declared forfeited, and E.'s tender on June 9th was in time: *Attorney-General* v. *Sheraton* (28 N. S. Rep. 492) approved and followed:—Held, further, that though the amending Act provided for forfeiture without prior formalities of the lease in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of the formalities prescribed by the original Act. *Temple* v. *The Attorney-General of Nova Scotia*, 27 S.C.R. 355 affirming 29 N.S.R. 279.

—Master and Servant—Hiring of Personal Services—Municipal Corporation—Appointment of officers—Summary Dismissal—Libellous Resolution—Difference in text of English and French Versions of Statute—52 V. c. 79, s. 79 (O.)—"A Discrétion"—"At Pleasure."]—The charter of the City of Montreal, 1889 (52 Vict. c. 79) section 79 gives power to the City Council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised "*à sa discrétion*," while the English version has the words "*at its pleasure*:"—Held, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment and the City Council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal. *Davis* v. *City of Montreal*, 27 S.C.R. 539.

—Estates tail, Acts abolishing—R.S.N.S. (1 ser.) c. 112; (2 ser.) c. 112; (3 ser.) c. 111—28 V. c. 2 (N.S.)—Will—Construction of—Executory devise over—Dying without Issue—"Lawful heirs"—"Heirs of the body"—Estate in remainder expectant—Statutory title—R.S. N.S. (2 ser.) c. 114, s.s. 23 & 24—Title by Will—Conveyance by Tenant in tail.]—The Revised Statutes of Nova Scotia, 1851, (1 ser.) c. 112, provided as follows: "All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple; and, if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." In the revision of 1858 (R.S.N.S. 2 ser. c. 112) the terms are identical. In 1864 (R.S.N.S. 3 ser. c. 111) the provision was changed to the following: "All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged to be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." This latter statute was repealed in 1865 (28 Vict. c. 2) when it was provided as follows: "All estates tail are abolished, and every estate which hitherto would have been adjudged a fee tail shall hereafter be adjudged a fee simple and may be conveyed or devised or descend as such." Z., who died in 1859, by his will, made in 1857, devised lands in Nova Scotia to his son, and in default of lawful heirs, with a devise over to other relatives, in the course of descent from the first donee. On the death of Z., the son took possession of the property as devisee under the will, and held it until 1891, when he sold the lands in question in this suit to the appellant:—Held, per Taschereau, Sedgewick and King, JJ., that notwithstanding the reference to "valid remainder" in the statute of 1851 all estates tail were thereby abolished, and further, that subsequent to that statute there could be no valid remainder expectant on an estate tail, as there could not be a valid estate tail to support such remainder:—Held, further, per Taschereau, Sedgewick and King, JJ., that in the devise over to persons in the course of descent from the first devisee, in default of lawful issue, the words "lawful heirs," in the limitation over, are to be read as if they were "heirs of his body"; and that the estate of the first devisee was thus restricted to an estate tail and was consequently, by the operation of the statute of 1851, converted into an estate in fee simple and could lawfully be conveyed by the first devisee:—Held, per Gwynne and Girouard, JJ., that estates tail having a remainder limited thereon were not abolished by the statutes of 1851 or 1864, but continued to exist until all estates tail were abolished by the statute of 1865; that the first devisee, in the case in question, took an estate tail in the lands devised and having held them as devisee in tail up to the time of the passing of the Act of 1865, the estate in his possession was then, by the operation of that statute, converted into an estate in fee simple which could be lawfully conveyed by him. *Ernst* v. *Zwicker*, 27 S.C.R. 594, reversing 29 N.S.R. 258.

—Maritime Law—Behring Sea Award Act, 1894—Infraction by Foreigner.]—The punitive provisions of the Behring Sea Award Act, 1894. operate against a ship guilty of an infraction of the Act, whether she is "employed" at the time of such infraction by a British subject or a foreigner. *The Queen* v. *The Ship* "*Viva*," 5 Ex. C.R. 360.

—Maritime Law—Behring Sea Award Act, 1894—Contravention—Ignorance of locality on part of Master—Effect of.]

See BEHRING SEA AWARD ACT.

—Custom Duties—Drawback—Material for Ships—Refusal of Minister to grant drawback—Remedy.]—See REVENUE.

—Arbitration and Award—Voluntary Submission—Motion to set aside Award—Time—52 V. c. 13 (O.).]—A motion to set aside the award made

under a voluntary submission must be made before the expiration of the term next after publication of the award, even if three months have not expired: *In re Prittie and Toronto*, 19 Ont.A R. 503, considered. Construction of 52 V. c. 13 (Ont.), discussed. Remarks as to the necessity of revision of the legislation as to arbitrations. *In re Caughell and Brower*, 24 Ont. A.R. 142.

—**Bankruptcy and Insolvency — R.S.O. c. 124, s. 7.**]—Section 7 of the Assignments Act, R.S.O. c. 124, applies only to transactions made or entered into by the insolvent; and a creditor of the insolvent had a right of action in his own name against the assignee, to set aside a sale by the latter of the estate, as fraudulent: *Reid* v. *Sharpe*, 28 Ont. R. 156, not followed. *Hargrave* v. *Elliot*, 28 Ont. R. 152.

—**Overholding Tenants' Act—R.S.O. c. 144—53 V. c. 13, s. 23 (Ont.).**)—Since the amendment of the Overholding Tenants' Act (R.S.O. c. 144), by 58 Vict. c. 13, s. 23, striking out of the Act the words "without colour of right," the Judge of the County Court tries the right and finds whether the tenant wrongfully holds. And where the dispute was in reference to the tenancy, the landlord claiming it to be a monthly holding, and the tenant a yearly tenancy:—Held, that the County Court Judge had jurisdiction. *Moore* v. *Gillies*, 28 Ont. R. 358.

—**Rule of Interpretation—Deviation of Legislation — Controlling Authority.**]—The Canadian law respecting trade marks being derived from English legislation, reference for its interpretation should be had to English decisions, and a court in Quebec should not follow French authorities which differ from the English decisions on the same matter. *The Queen* v. *Authier*, Q.R. 6 Q.B. 146.

—**34 V. c. 45 (P.Q.)—Street Railway Motive Power —Undiscovered modes of Operation.**]—A Street Railway Co. was authorized by statute of the Province of Quebec (34 Vict. c. 45) to run its street cars with "Motive power produced by steam, caloric, compressed air, or any other means or machinery whatever:—Held, that even if it were true that electricity was not at that time known nor used as a motive power for street railways, the words of the statute were broad enough to include undiscovered as well as the modes of operation then known, and, therefore, covered the use of electric power by the Street Railway Co. *Bell Telephone Co.* v. *The Montreal Street Railway Co.*, Q.R. 6 Q.B. 223, affirming 10 S.C. 162.

—**Criminal Code, s. 207 (*l*)—Vagrant Prostitution.**]—By section 207 of the Criminal Code, "everyone is a loose, idle or disorderly person, or vagrant who *(l)* having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution:"—Held, that a woman who prostitutes herself exclusively to one man for gain, but not publicly, is not a loose, idle or disorderly person, or vagrant, within the meaning of said section. *The Queen* v *Rehe*, Q.R. 6 Q.B. 274.

—**Art. 1178 C.C.P.—Appeal to Privy Council—Matter in Dispute — Amount Demanded or Recovered.**—The words "matter in dispute" in Art. 1178 of the Code of Civil Procedure, allowing an appeal to the Judicial Committee of the Privy Council where the matter in dispute exceeds £500 refer to the amount recovered by the judgment appealed from and not that claimed by the action: *Macfarlane* v. *Leclaire* (15 Moo. P.C. 181; 6 L.C.J. 170) and *Allan* v. *Pratt* (13 App. Cas. 780; 32 L.C.J. 278) followed. *Glengoil S. S. Co.* v. *Pilkington*, Q.R. 6 Q.B. 292.

— **Municipal Councillor — Quo warranto — De facto Officer—Art. 120, M.C.—Meaning of.**]—To constitute a *de facto* officer, the person holding the office must have the reputation of being the officer he assumes to be, though not a good officer in point of law.—The true meaning of Art. 120 of the Municipal Code, which enacts that "no vote given by a person filling illegally the office of member of the council, and no act in which he participates in such quality, can be set aside solely by reason of the illegal exercise of such office," is that, if the corporate body or the individual corporators,—the mandators of the municipal council,—allow a man to act as councillor who is not legally such, it is only right that they should be bound by his acts in so far as such acts affect persons who have in good faith thought him to be the rightful holder of the office. But the Article cannot be construed to validate, for all purposes and as respects every one, the official acts of a councillor whose nomination was publicly known to be illegal. *Lacasse* v. *Labonté*, Q.R. 10 S.C. 104, affirming 10 S.C. 97.

—**Procedure—Judicial Abandonment — Art. 764 C.C.P.**]—Art. 764 of the Code of Procedure is not to be interpreted as limiting the cases in which a judicial abandonment may be made in the district where the debtor is imprisoned, to cases where such imprisonment is under *capias*, but must be extended to cases where imprisonment is upon *contrainte par corps*. *Davidson* v. *Bouchard*, Q.R. 10 S.C. 148.

—**Statute, Interpretation of—57 V. (P.Q.) c. 57—Retro-activity.**]—The word "widening" in a statute, cannot be read to mean "opening" or "extension," in relation to street improvements; and even if the word "widening" was used by the Legislature by inadvertence, instead of "opening," the court cannot correct such error. The Act 57 Vict. (Que.) c. 57, s. 1, enacts that "notwithstanding any law to the contrary, the cost of widening (certain streets mentioned) shall be paid as follows," etc. And section 3 enacts that "the commissioners named for each of the said expropriations are hereby empowered to act in order to give effect to the present law." The preamble to the Act refers to a petition presented in 1892, asking for the establishment of a uniform rule:—Held, that the statute was retroactive as regards the apportionment of the cost of the improvement, for the streets named in the Act, even where an assessment roll had been completed under the law previously in force. *Joseph* v. *City of Montreal*, Q.R. 10 S.C. 531.

—**Appeal Court — Inferences of Fact — R.S.N.S. 5th ser. c. 104, s. 20, s.s. 8—Orders made thereunder.**]—As to the power of the Court to draw inferences of fact, and to dispose of facts not covered by questions framed by the trial judge, or suggested by counsel, R.S.N.S. (5th ser.) c. 104, s. 20, sub-sec. 8, and Order 38, Rule 10, must be read together. *Pudsey* v. *Manufacturers' Accident Insurance Company*, 29 N.S.R. 124.

—**Nova Scotia Mining Laws—"Preceding Section" — Statutory Rights — Forfeiture.**]—The Nova Scotia Acts of 1889, c. 23, s. 8 (Mines and Minerals), provided that the "preceding section" of this Act should come into force two months after the date of the passage of this Act:—Held, that the words "preceding section" must be read in the plural, "preceding sections," all of the sections referring to the same subject matter. Per Meagher, J., that the principle that there cannot be a forfeiture until after demand of payment of rent, applicable to rights arising out of leases or contracts between private individuals, is not applicable to rights created by statutory provisions. *The Attorney-General* v. *Temble*, 29 N.S.R. 279.

—**Provincial Taxation—"Assessment Act" s. 3, s.s. 16, (B.C.)—Income.**]—The "income" made liable to taxation *eo nomine* by the Assessment Act, C.S.B.C., 1888, c. 111, s. 3, means net income. *Re Biddle Cope*, 5 B.C.R. 37.

— **Homestead Act — Amendment — Retroactive Effect—Procedure.**]— Semble, The Homestead Act Amendment Act, 1890, c. 23, s. 2, directing the method of selecting the goods proposed to be exempted is retroactive in its effect, as regulating procedure, and applied to a claim under deed of assignments though passed after the date of the deed, and that the claim was also invalid for want of compliance with that statute. *In re Sharp*, 5 B.C.R. 117.

—**Municipal Act, 1892, Section 82—Contract—Seal.**]—Section 82 of the British Columbia Municipal Act, 1892, providing "each Municipal Corporation shall have a corporate seal, and the Council shall enter into contracts under the same seal, which shall be affixed to all contracts by virtue of an order of the Council," is imperative and applies to all contracts by Municipal Corporations subject to the Act. *United Trust* v. *Chilliwack*, 5 B.C.R. 128. *Paisley* v. *Chilliwack*, 5 B.C.R. 132.

—**Judgment Debtor—Commitment—Fraudulent transfer of Property—R.S.O. c. 51, s. 240, s.s. 4 (c.)—Real Estate—Intent—Constitutional Law—Intra vires.**]—A conveyance of real estate is a "gift, delivery or transfer of any property," within the meaning of section 240, sub-sec. 4 (c.), of the Division Courts Act, R.S.O., c. 51. Under the sub-section an express wrongful intent need not be shown; it is sufficient to show that the natural consequence of what was done was to defraud creditors. The sub-section is *intra vires* of the Ontario Legislature. (Robb, Co. J.). *Kitchen* v. *Saville*, 17 C.L.T. (Occ. N.) 88.

—**Civil Action—Wrongful Arrest—C.S.N.B. c. 41, s. 4.**] — Proceedings for the discharge of a prisoner arrested on civil process out of the Parish Civil Court of Lancaster may be taken under section 4, c. 41, C.S.N.B., and the section is not confined to criminal or quasi-criminal cases. (Per Forbes, Co. J.) *Kelly* v. *Burgess*, 33 C.L.J. 740.

—**Dominion Lands Act, s. 129—52 V. (D.) c. 27, s. 7—Survey—Re-survey—Ratification by Order-in-Council—Road Allowance.**]

See CONSTITUTIONAL LAW, III. (*b*).

—**Revised Ordinances N.W.T. c. 36. s. 4—Master and Servant—Fine—Ultra Vires.**]

See CONSTITUTIONAL LAW, III. (*b*)

—**59 V. (N.B.) c. 28, s. 36—Judgment Debtor—Examination.**]—See DEBTOR AND CREDITOR, IX.

—**N.W. Territories Real Property Act—"Instrument"—Execution.**]—See EXECUTIONS, I.

—**Monthly Tenancy—Exemptions—R.S.O. c. 143, s. 27—55 V. (Ont.) c. 31—Interpretation.**]

See LANDLORD AND TENANT, IV.

—**Ontario Settled Estates Act—Vacant Land—Life Tenant—Remainderman.**]

See SETTLED ESTATES ACT (ONTARIO).

—**N.W.T. Land Titles Act—Assurance—Fund—Transfer—Fee—Improvements.**]

See TITLE TO LAND.

III. OPERATION.

—**N.W.T. Homesteads 57 & 58 V. c. 29, s. 2—Retroactivity.**]—Section 2 of 57 & 58 Vict. c. 29, provides that "any provisions which have been heretofore enacted by the Legislative Assembly of the North-West Territories and are not repealed, purporting to exempt real property in the North-West Territories from seizure by virtue of writs of execution, and the validity of which has been questioned or may be open to question by reason of their repugnancy to the provisions of the Act hereby repealed [the Homestead Exemption Act] shall hereafter be deemed to be valid and shall have force and effect as law":—Held, that this enactment was not retroactive. *Massey* v. *McClelland*, *Baker* v. *McClelland*, 17 C.L.T. (Occ. N.) 293. (Sup. Ct. N.W.T.)

—**Workmen's Compensation for Injuries Act (Man.)—Amending Act, 58 & 59 V. c. 48.**]—The Act 58 & 59 Vict. (Man.) c. 48, amending The Workmen's Compensation for Injuries Act, 56 Vict. c. 39, is not retrospective in its operation, and section 2 does not restore a right of action which was gone before it became law. *Dixon* v. *Winnipeg Electric Street Railway Co.*, 11 Man. R. 528.

—**Instrument creating an Equitable Charge—Registration—Manitoba Bills of Sale Act (R.S. Man. c. 10) s. 3—57 V. (Man.) c. 1, s. 2.**]—Held, following *Clifford* v. *Logan*, 9 Man. R. 423, that an instrument creating only an equitable charge upon property not at the time in existence did not, before the Act 57 Vict. c. 1. s. 2, come within section 3 of the Bills of Sale Act so as

to require registration to make it operative as against an execution creditor, and the Act of 1894 repealing section 4 of the Bills of Sale Act and substituting a new sub-section, did not affect a prior existing instrument. *Bank of British North America* v. *McIntosh*, (*Massey-Harris Co., claimants*) 11 Man. R. 503.

STATUTE OF ELIZABETH.

Insolvency — Pressure — Assignment of Expected Profits—Fraudulent Preferences—Assets exigible in Execution.]—*Blakeley* v. *Gould*, 27 S.C.R. 687.

—Assignment for the benefit of Creditors—Preferred Creditors—Money paid under voidable Assignment—Liability of Assignee—Statute of Elizabeth—Hindering and delaying Creditors.]

See DEBTOR AND CREDITOR, III. *a*.)

STIPENDIARY MAGISTRATE.

Conviction by—Jurisdiction—Habeas Corpus—Burden of Proof—Judicial Notice.]

See MUNICIPAL CORPORATIONS, XVI.

STREET RAILWAY.

Contract—Enforcement of—Municipal Corporations—Running Cars—Specific Performance—Mandamus—Action—Injunction—Declaration of Right.]—The plaintiffs wished to force the defendants to keep their cars running over the whole of their line of railway during the whole of each year, in accordance with the terms of the agreement between them set out in the schedule to 56 Vict. (Ont.) c. 91:—Held, that the agreement was one of which the Court would not decree specific performance, because such a decree would necessarily direct and enforce the working of the defendants' railway under the agreement in question, in all its minutiæ, for all time to come: *Bickford* v. *Town of Chatham*, 16 S.C.R. 235, followed. *Fortescue* v. *Lostwithiel and Fowey R.W. Co.*, (1894) 3 Ch. 621, not followed.—Nor would it be expedient to grant a judgment of mandamus for the performance of a long series of continual acts involving personal service and extending over an indefinite period. The prerogative writ of mandamus is not obtainable by action, but only by motion: *Smith* v. *Chorley District Council*, (1897) 1 Q.B. 532, followed. To grant an injunction restraining the defendants from ceasing to operate part of their line in question would be to grant a judgment for specific performance in an indirect form: *Davis* v *Foreman*, [1894] 3 Ch. 654, followed. Nor was there any object in making a declaration of right under section 52, sub-section 5, of the Judicature Act, 1895, where the terms of the contract were plain and were confirmed by statute, and the only difficulty was that of enforcing them. *City of Kingston* v. *Kingston, Portsmouth, and Cataraqui Electric Railway Co.*, 28 Ont. R. 399.

—Electric Street Railway — Interference with operation of Telephone System—Use of Streets —34 V. c. 45 (P.Q.) — Interpretation of.]—The company respondent was authorized by statute (34 Vict. c. 45), to run its street cars with "motive power produced by steam, caloric, compressed air, or by any other means or machinery whatever." Held, that even if it were true that electricity was not at that time known or used as a motive power for street railways, the words of the statute were broad enough to include undiscovered as well as the modes of operation then known, and, therefore, covered the use of electric power by respondent.—The city council has power, by resolution, to authorize the construction, in the streets of the city, of a temporary electric railway intended to accommodate visitors to an exhibition, saving the recourse of persons who may be damaged by such construction; and, moreover, where a by-law was legally passed by the council subsequently authorizing the construction of such electric railway, such enactment is a sufficient ratification of the construction.—The dominant purpose of a street being for public passage, any appropriation of it by legislative authority to other objects will be deemed to be in subordination to this use, unless a contrary intent be clearly expressed. So, where the operation of a telephone service worked by the earth circuit system was interfered with by a street railway company's adoption of electricity as its motive power, it was held that the telephone company having no vested interest in, or exclusive right to the use of the ground circuit or earth system as against a street railway company incorporated by statute, the telephone company could not recover by way of damages from the street railway company the cost of converting its earth circuit system, a change which was rendered necessary by the street railway company's adoption of electricity as its motive power. *Bell Telephone Co.* v. *The Montreal Street Railway Co.*, Q.R. 6 Q.B. 223, affirming 10 S.C. 162.

—Assessment of Poles and Rails.]

See ASSESSMENT AND TAXES.
And see SUNDAY.

—Accident—Negligence of Motorman—Duty to stop Car—Damages.]

See NEGLIGENCE, III.

SUBPŒNA.

See PRACTICE AND PROCEDURE, XLII.

SUBSTITUTION.

Will—Construction—Degrees of Substitution——Art. 932 C.C.]—By Article 932 of the Civil Code of Lower Canada substitutions created by will "cannot extend to more than two degrees exclusive of the institute." Where a testator devised an estate for life to one, and after her death to her two daughters and niece conjointly and in equal shares for their lives,

and after their decease to their children, and provided that if two out of the three life tenants should die without children, which event happened, the whole property should belong to the child or children of the survivor:—Held, that the child of the survivor was entitled to the whole, as there was no declaration or necessary implication of cross remainders between the three life tenants, and therefore only two substitutions exclusive of the institute. *De Hertel* v. *Goddard*, 66 L.T. (P.C.) 90.

—Will—Construction of — Donation— Partition per stirpes or per capita— Usufruct—Alimentary Allowance — Accretion between Legatees.] —The late Joseph Rochon made his will in 1852 by which he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared:—"Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitéres, nommées dans mons dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament:"—Held, that the testamentary dispositions thus made did not create a substitution, but constituted merely a devise of the usufruct by the testator to his two sisters and of the estate. (subject to the usufruct), to their children, which took effect at the death of the testator:—Held, also, that the charge of preserving the estate—"conserver le fonds"—imposed upon the testamentary executor could not be construed as imposing the same obligation upon the sisters who were excluded from the administration, or as having, by that term. given them the property subject to the charge that they should hand it over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly, subject to the usufruct. Held further, that the property thus devised was subject to partition between the children *per capita* and not *per stirpes*. *Robin* v. *Duguay*, 27 S.C.R. 347, affirming Q.R. 5 Q.B. 277; C. A. Dig. (1896) col. 363.

—Degrees of—Interpretation of Deed.]—The *appelé* in the second degree becomes absolute owner of the property from the moment he receives it, and if a curator to the substitution has been appointed previously, his functions and duties are at an end from that date.—Where, by the terms of a deed of sale, the purchase price was not to become due until the opening of the substitution, and it was also stated in the deed that the substitution was to extend to four degrees, the proper interpretation of the contract, where it appears that the term was stipulated in the interest of the creditor (the substitution), is that the price is due when the property is received by the second *appelé*, that being the date when by law the substitution became open. *Langelier* v. *Perron*, Q.R. 10 S.C. 333.

SUCCESSION.

Irregular Successor — Formalities—Notice to possible Heirs—Hereditary Immovable— Third Party—Eviction—Arts. 638, 639, 640 C.C. — Art. 1329 C.C.P.]—Putting in possession (*l'envoi en possession*) an irregular successor without the formalities prescribed by Art. 1329 of the Code of Civil Procedure, that is, notice to the possible heirs, is a nullity, the tribunal, in the absence of these formalities, having no jurisdiction to grant *l'envoi en possession*.—A third party who has purchased an hereditary immovable from the irregular successor is not protected against revendication by the heir, except so far as he has acquired such immovable in good faith and has not been guilty of fault or negligence. He would be in fault if he did not assure himself of the regularity of his vendor's possession, or if, having acquired the property, he paid the purchase money with knowledge that such possession was irregular. The third party, purchaser, could set up the irregularity in an action for the purchase money.—Art. 640 of the Civil Code, which gives a recourse in damages to the true heir, is only intended to regulate the relations of the irregular successor with this heir who seeks to evict him, and not to determine upon the dealings between the irregular successor and third parties. *Bélanger* v. *Bessette*, Q.R. 10 S.C. 131, affirming 8 S.C. 95.

—Community—Action by Heirs — Form of.]—Where the succession, after the death of the husband, who had been in community with his wife, remains in possession of the latter without partition, the heirs at law are not entitled to bring an action to account,—the proper proceeding being an action in partition, in which all interested persons would be parties. *McClanaghan* v. *Mitchell*, Q.R. 10 S.C. 203.

—Death from Quasi-Offence—Claim for Damages —Art. 1056 C.C.]—The claim for damages for the death of a person from a quasi offence forms no part of his succession, the surviving consort, ascendants and descendants being alone entitled to claim under the provisions of Art. 1056 C.C. *Bernard* v. *The Grand Trunk Railway Co.*, Q.R. 11 S.C. 9.

—Testamentary Executors—Failure to Account —Action for residue — Reddition de Compte— Demand of Possession—Parties.]

See EXECUTORS AND ADMINISTRATORS, I.

SUCCESSION DUTY.

Revenue—Succession Duty Act, 55 V. c. 6 (Ont.)—Final Distribution—Duty Payable.]

See REVENUE.

SUCCESSION FUTURE.

Donation—Guarantee—Art. 658 C.C.]—M. F. had espoused, in her first marriage, under the law of community of goods, D. who died on Nov. 4th, 1879, leaving his wife *enciente* of a daughter who was born on Nov. 10th. On Nov. 8th, preferring to execute the last wishes of her husband who had died intestate, M. F., while declaring that she could not prejudice the rights of her unborn child, had given, with guarantee, to the father of her husband, in case the child of which she was *enciente* should not be born alive, or should die before coming of age, an immovable belonging to the community with the condition that she should have the usufruct of said immovable during her life. She afterwards married a second time, also under community of goods, with R. and a child was born of this marriage. Her child by the first marriage died shortly after the birth of the second child, and M. F. and R., the latter personally and as tutor of his own child, brought suit against the donee to annul the donation of Nov. 8th, 1879. The defendant in the suit admitted that the donation could not stand as to the undivided share of the immovable which reverted to the issue of the second marriage on the death of his sister and confessed judgment for that share, but he claimed that the donation was valid as to the portion which fell to M. F. as heir of her daughter's share, the donation having been made with guarantee, and also for the share which pertained to her as being in community of goods with her first husband:—Held, that the donation was void as to the share of the immovable falling to M.F. as heir of her daughter, she having no power to dispose of property which she would afterwards have to hold for the future succession of her child, and this, notwithstanding the clause of guarantee which was null as well as the agreement (*pacte*) upon the future succession itself: and that the donation was null also for the portion of the immovable which M.F. held as having been in community with her first husband, the defendant not being able, on account of the birth of a child to the first husband and of the rights of succession transmitted by that child, to maintain M.F. in the enjoyment of the whole immovable which was the consideration for the donation. Held, further, that to effect a sale of a future succession it is not necessary that there should be a charge upon the whole or any aliquot part of the succession; it is sufficient that the object of the contract be some identical thing to which one is entitled as heir presumptive of a third party, and the sale of such thing should not be regarded as falling under the rules governing the sale of what belongs to another, but as an agreement (*pacte*) upon a future succession. *Roy* v. *Desjardins*, Q.R. 10 S.C. 14.

SUMMARY PROCEEDINGS.

See PRACTICE AND PROCEDURE, XLIII.

SUNDAY.

Street Railway—Lord's Day Act.—R.S.O. c. 203, s. 1, "Conveying Travellers."]—A company incorporated for the purpose of operating street cars does not come within the Lord's Day Act, R.S.O. c. 203, s. 1.—Per Burton, J.A.: Taking persons in street cars from point to point in a city is not "conveying travellers" within the meaning of the Act: *Reg.* v. *Tinning*, 11 U.C.Q.B. 636, and *Reg.* v. *Daggett*, 1 Ont. R. 537, considered. *Attorney-General* v. *Hamilton Street Railway Company*, 24 Ont. A.R. 170, affirming 27 Ont. R. 49; C. A. Dig. (1896) col. 335.

—Judicial Proceedings — Habeas Corpus — Evidence.]—Judicial proceedings should not be conducted on Sunday, and where the prisoner was committed for trial at a preliminary investigation before a magistrate on a Sunday:—Held, that he was entitled to his discharge under a writ of habeas corpus, following *Mackalley's case*, 9 Co. 66, and *Waite* v. *Hundred of Stoke*, Cro. Jac. 496:—Held, also, following *Eggington's case*, 2 E. & B. 717, and *Re Bailey*, 3 E. & B. 607, that the affidavit of the prisoner was receivable in evidence to show that the investigation and commitment had taken place on a Sunday. *The Queen* v. *Cavelier*, 11 Man. R. 333.

SUPERIOR COURT.

Jurisdiction — Action for School Fees—Hypothecary Action.]—See JURISDICTION.

SURETYSHIP.

See PRINCIPAL AND SURETY.

SURROGATE COURTS.

Vacant Senior Judgeship — Junior Judge — Jurisdiction.]—A junior County Judge who has heard the evidence and trial in an issue in a Surrogate Court while the office of senior County Judge is vacant has the right to deliver judgment in such case after a new senior judge has been appointed. *Speers* v. *Speers*, 28 Ont. R. 188.

—Appeal from to Ontario Court of Appeal—Security by Cheque—Surrogate Rule, 57.]

See APPEAL, III. (*c*.)

SURSIS.

Execution—Sale of land under—Disobedience to—Contempt.]—See SHERIFF.

TAX SALE.

Executors and Administrators—Administrator ad litem—Tax Sale—Action to set Aside—Locus Standi of Plaintiff—Rule 311.]—The plaintiff was appointed under Rule 311 administrator *ad litem* of a deceased person's estate in a

summary administration matter more than twelve months after the death:—Held, that he had no *locus standi* to maintain an action to set aside a tax sale of land belonging at the time of death to the estate of the deceased. *Rodger* v. *Moran*, 28 Ont. R. 275.

—Limitations—R.S. Man. c. 89, s. 4—Mortgage—Foreclosure—Tax Sale—55 V. (Man.) c. 26, s. 8.]

See LIMITATION OF ACTIONS, III.

TAXES.

See ASSESSMENT AND TAXES.

TELEPHONE COMPANY.

Interference with Telephone System—Use of Streets—Street Railway—Damages.]

See STREET RAILWAY.

TENANT FOR LIFE.

Will—Construction of—Words of Futurity—Joint Lives—Time for ascertainment of Class—"Lawful Heirs"—Survivor dying without Issue.]

See WILL, II.

TENANT IN TAIL.

Statute, construction of—Estates tail, Acts abolishing—R.S.N.S. (1 ser.) c. 112—R.S.N.S. (2 ser.) c. 112—R.S.N.S. (3 ser.) c 111—28 V. c. 2 (N.S.)—Will—Executory devise over—"Dying without Issue"—Lawful Heirs—"Heirs of the Body"—Estate in remainder expectant—Statutory Title—R.S.N.S. (2 ser.) c. 114, ss. 23 and 24—Conveyance by Tenant in tail.]—See STATUTE, II.

TENANTS IN COMMON.

Partition—Protection of Grantee of one Tenant—Laches.]—Where one or more tenants in common has conveyed by metes and bounds a portion of the land held in common, and improvements have been made by the grantee upon the portion of land so conveyed, the Court in decreeing partition at the instance of other tenants, will protect the interests of the grantee by setting apart the land conveyed as of the share of the grantor, if such setting apart can be made without detriment to the interests of the other tenants in common. (Per Meagher, J.) the making of such a provision is justified where the tenant applying for partition has had knowledge of the deed, the possession of the grantee, and the making of the improvements, and has made no objection. *McNeil* v. *McDougall*, 28 N.S.R. 296.

TENDER.

Offres réelles—Costs—Art. 1163, C.C. 538 C.C.P.]—Held, a mere conversation, in which no money is shown, and to which it is not proved that the debtor had brought any money, cannot be taken as the equivalent of a legal tender, the non-acceptance of which is to throw the costs on the plaintiff. Although it is necessary to the validity of a tender that it be made in current coin or legal tender notes, yet *semble* that if bank bills or even a cheque be tendered, and the creditor refuse, giving solely for reason that the sum is insufficient he thereby waives his objection to such bills or cheque; but a tender cannot be held valid at which no money at all was shown, or was even then in the hands of the party tendering. *Clerk* v. *Wadleigh*, Q.R. 10 S.C. 456.

—Of payment—Offres réelles—Conditions.]

See PRACTICE AND PROCEDURE, XLV.

THIRD PARTY PROCEDURE.

See PARTIES, VI.

TITLE TO LAND.

Improvements under Mistake of Title—Mortgage—Enforcement thereof against True Owner—Interest—Rents and Profits—"Assigns"—R.S.O. c. 100, s. 30.]—A purchaser of land made lasting improvements thereon under the belief that he had acquired the fee and then made a mortgage in favour of a person who took in good faith under the same mistake as to title. Subsequently it was decided that the purchaser had acquired only the title of a life tenant. The mortgagee was never in possession:—Held, that the mortgagee was an "assign" of the person making the improvements within the meaning of section 30 of R.S.O. c. 100, and had a lien to the extent of his mortgage, which he was entitled to actively enforce:—Held, also, that the value of the improvements should be ascertained as at the date of the death of the tenant for life, and that there should be as against the mortgagee a set-off of rents and profits, or a charge of occupation rent only from that date till the date of the mortgage:—Held, also, that interest should be allowed, on the enhanced value from the date of the death of the tenant for life. *McKibbon* v. *Williams*, 24 Ont. A.R. 122.

—R.S.O. c. 116, s. 61, 131—Cautioner—"Interest"—Appointee of Purchaser—"Owner"—Implied Revocation of Appointment.—The provision of the Land Titles Act, R.S.O. c. 116, permitting registration of cautions against registered dealings with lands, section 61 applies to "any person interested in any way" in the lands:—Held, that, as the Land Titles Act relates mainly to conveyancing, whatever dealing gives a valid claim to call for or receive a conveyance of land is an "interest" within the scope of the statute; and an appointee or nominee in writing of the purchaser of an interest in lands

has a *locus standi* as cautioner; and where such an appointee registered a caution as "owner," and there was no doubt of the substantial nature of his claim, his caution was supportable as against any objection in point of form, by virtue of section 131:—Held, also, that an action brought by the original purchaser, after the registration of her appointee's caution, and pending proceedings to set aside, for specific performance of a contract to convey to her the interest in respect of which she had made the appointment, did not, under the circumstances in evidence, put an end to such appointment. *Re Clagstone and Hammond*, 28 Ont. R. 409.

—N.W.T. Land Titles Act—Transfer—Corporation—Seal—Affidavit of Execution.]—K. applied to the Registrar to bring certain lands under the Land Titles Act, and for the issue to him of a certificate of ownership. K. claimed title under an instrument of transfer in the form prescribed by section 61 of the Act, Form J., from a certain corporation, the patentees, purporting to be signed by the president and procurator of the corporation, with the corporate seal attached, verified by an affidavit of execution:—Held, (per Scott, J.) that under the circumstances, the Registrar should treat the document as having been executed by the patentee corporation; and it being signed and under seal was sufficient to pass the title to the transferee—an intention being indicated therein to convey all the title of the corporation in the lands to the transferee:—Quære, whether under section 10 of the Act the Registrar should not accept a document under the seal of a corporation, even where it does not bear the signature of any of the officers of the corporation? *In re Kettleson*, 17 C.L.T. (Occ. N.) 317.

—N.W.T. Land Titles Act—Assurance Fund—Transfer—Fee—Improvements.]—A railway company entered into an agreement with the H. B. Company for the purchase of certain lands, which at the time of the issue of the certificates of title to the latter were unincumbered. Prior to the execution of transfers from the vendors to the purchasers, the latter improved the lands by building road beds, erecting station houses, etc. On the purchasers presenting transfers from the vendors for registration, and applying for a certificate of title, the registrar demanded payment of the percentage of value fixed by s. 115 of the Land Titles Act, 1894, for the assurance fund, on the value of the improvements as well as on the soil. The railway company objected to this on the ground that as the improvements were made by and belonged to them, they should be charged only on the value of the lands as owned by their vendors:—Held (per Scott, J.), the value of all the improvements, by whomsoever made, existing at the time of the issue of the certificate of title to the transferee, should be taken into consideration in fixing the amount of the fee payable in respect of the assurance fund. The assurance fund is a fund applicable to all lands in respect of which certificates of title are issued, and the fee payable to it upon the issue of any certificate of title cannot be considered applicable to the particular lands comprised in the certiffcate, and therefore it cannot be considered an injustice that a transferee who makes improvements upon the land before he obtains his certificate of title, should he be called upon to pay the fee in respect of such improvements. The words "the value of the land transferred" in s. 115, are merely words of description, and are not intended to refer to the value of the interest transferred. In re *Calgary and Edmonton Ry. Co.*, 17 C.L.T. (Occ. N.) 353.

—N.W.T. Land Titles Act, 1894—Territories Real Property Act—Certificate of Title—Mortgage by Strangers—Registration.]—Held (per Scott, J., in Chambers), that under the Territories Real Property Act, ss. 3 (*f*), 60, 62, 76-81, after the issue of a certificate of title a mortgage can be made only by the registered owner, or some person having a registered interest.—The fact that the Registrar improperly received and entered upon the register certain documents purporting to be mortgages of the land, would not constitute them mortgages under the Act. Under section 112 of the Land Titles Act, 1894, the Registrar has power to cancel a memorandum or indorsement upon the certificate of title which has been made in error. *In re Angus*, 17 C.L.T. (Occ. N.) 386.

—Action to compel Conveyance of Land—Fraud on Creditors.]—See DEBTOR AND CREDITOR.

—Ambiguous description—Possession—Presumptions in favour of Occupant.]

See DEED.
" EJECTMENT.

—Seignorial tenure—Deed of Concession—Words of Limitation—Covenant—Condition si voluero.]

See SERVITUDE.

—Right of Redemption—Third Parties—Delivery and possession of thing sold.]

See SALE OF LAND, VII.

—Possession by Mistake—Identity of Lot—Revendication—Reimbursement.]

See REVENDICATION.

—Statute, construction of—Estates tail, Acts abolishing—R.S.N.S. (1 ser.) c. 112—R.S.N.S (2 ser.) c. 112—R.S.N.S. (3 ser.) c. 111—23 V. c. 2 (N.S.)—Will—Executory devise over—"Dying without Issue"—"Lawful Heirs"—"Heirs of the Body"—Estate in remainder expectant—Statutory Title—R.S.N.S. (2 ser.) c. 114, ss. 23 and 24—Title by Will—Conveyance by Tenant in tail.]

See STATUTE, II.
" also TRESPASS.

TRADE.

Workmen's Union—Rules of Association—Interference with non-union Workmen—Illegal Combination.]—A workmen's union, one of the rules of which prohibits members from working in any place where non-members are employed—without, however, imposing any penalty for breach of the rule, except the loss of beneficial rights in the society—is not an illegal association, and does not constitute a conspiracy

against workmen who are not members.—Workmen who, without threats, violence, intimidation or the use of other illegal means, quit work because a non-union workman is employed in the same establishment, incur no responsibility towards the latter. Where a non-union workman quits his work voluntarily notwithstanding an intimation from his employer that he is at liberty to continue thereat, he suffers no damage recoverable at law. *Gauthier* v. *Perrault*, Q.R. 6 Q.B. 65, reversing 10 S.C. 224 and restoring 6 S.C. 83. Affirmed by Supreme Court of Canada 16th Feb., 1898.

—Trade Licenses — Business Tax — Municipal Code.]—Trade licenses imposed by municipal councils must be proportioned to the extent of the business of each person bound to take a license.—Municipal councils cannot arbitrarily fix the extent of such business, but must have legal sources of information therefor.—Semble: The valuation roll should contain information on the extent of the trade carried on by each merchant. *Corporation of Lauzon* v. *Boutin*, Q.R. 11 S.C. 403.

—Injunction—Sale of Goodwill—Use of the name of the liquidated concern.]—Good-will means every positive advantage that has been acquired by the old concern in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the *name* of the late concern, or with any other matter carrying with it the benefit of business:—The good-will of a trade or business is a subject of value and price and may be sold as a valuable asset by a liquidator duly appointed to the winding up of a concern.—Courts of Justice will interfere and grant injunction for the purpose of protecting the owner of a business from the unjust or fraudulent invasion of that business by others.—The name "The Sabiston Lithographing and Publishing Company" or "The Sabiston Litho. and Publishing Company" is a colourable imitation of that of "The Sabiston Lithographic and Publishing Company." *Montreal Lithographing Company* v. *Sabiston*, 3 Rev. de Jur. 403. De Lorimier, J.

—Restrictions—Municipal By-law—Early Closing.]—See MUNICIPAL CORPORATIONS, I. (*f.*)

TRADE LIBEL.

Action on the Case—Particulars.]

See PRACTICE AND PROCEDURE, XXXIV.

TRADE-MARK.

Forgery—Criminal Code, s. 448—Extent of Resemblance—Interpretation of Statute—Jurisprudence.]—Where a trade-mark is complained of as being forged, and as infringing the rights of a proprietor of a duly registered trade-mark, any resemblance of a nature to mislead an incautious or unwary purchaser, or calculated to lead persons to believe that the goods marked are the manufacture of some person other than the actual manufacturer, is sufficient to bring the person using such trade-mark within the purview of Article 448 of the Criminal Code, which prohibits the sale of goods falsely marked. In such case it is not necessary that the resemblance should be such as to deceive persons who might see the two marks placed side by side, or who might examine them critically.—The Canadian law respecting trade marks being derived from English legislation reference for its interpretation should be had to English decisions, and a Quebec court should not follow French authorities differing from English decisions on the same matter, more especially as the law extends throughout the Dominion, and it is desirable that the jurisprudence should be uniform. *The Queen* v. *Authier*, Q.R. 6 Q.B. 146.

TRADE NAME.

Trade Name — Geographical Designation — "The Canadian Bookseller and Library Journal" — "The Canada Bookseller and Stationer."]—The use of a geographical name in a secondary sense as part of the title identifying a mercantile journal, and not as merely descriptive of the place where the journal is published will be protected.—The use of the name *The Canada Bookseller and Stationer* was restrained as conflicting with the name *The Canadian Bookseller and Library Journal*. *Rose* v. *McLean Publishing Co.*, 24 Ont. A.R. 240; reversing 27 Ont. R. 325.

—Colourable Imitation.]—The name "The Sabiston Lithographing and Publishing Company" or "The Sabiston Litho. and Publishing Company" is a colourable imitation of that of "The Sabiston Lithographic and Publishing Company." *Montreal Lithographing Company* v. *Sabiston*, 3 Rev. de Jur. 403; De Lorimier, J.

TRANSACTION.

Nullified instruments — Estoppel—C. C. Arts. 311 and 1243-1245.]—See EVIDENCE, II.

TREATY.

Construction of — Convention of 1818—Fisheries Statute—Construction of—59 Geo. III. c. 38 (Imp.)—R.S.C. cc. 94-95 — Three mile limit — Foreign Fishing Vessels—"Fishing."]

See FISHERIES.

TRESPASS.

Interference with Submarine Cable—Notice—Damages.]—By the regulation passed by the Quebec Harbour Commissioners in 1895 and subsequently approved by the Governor in Council and duly published, the Commissioners prohibited vessels from casting anchor

within a certain defined space of the waters of the harbour. Some time after this regulation had been made and published the Commissioners entered into a contract with the plaintiffs whereby the latter were empowered to lay their telephone cable along the bed of that part of the harbour which vessels had been so prohibited from casting anchor in. No marks or signs had been placed in the harbour to indicate the space in question. The defendant vessel in ignorance of the fact that the cable was there, entered upon the space in question and cast anchor. Her anchor caught in the cable and in the efforts to disengage it the cable was broken:—Held, that she was liable in damages therefor. *The Bell Telephone Company* v. *The Brigt. "Rapid,"* 5 Ex.C.R. 413.

—To Land—Title—Colour—Occupation.]—In an action for trespass to land plaintiff claimed under J. V., sr., who squatted on the land in question over fifty years ago, it appeared that J. V., sr., mortgaged the land to plaintiff and then conveyed the equity of redemption to his son, J. V., jr., who went into possession under his deed and paid interest to plaintiff for several years. J. V., jr., afterwards abandoned the property and plaintiff foreclosed the mortgage and purchased at the sheriff's sale:—Held, that the previous acts of occupation by J. V., sr., the mortgage to plaintiff, the deed to J. V., jr., and the acts of occupation by the latter constituted colour of title, and that the proceedings for foreclosure and sale, and the provincial statutes relating thereto, vested in plaintiff a title by possession sufficient to enable him to maintain trespass as against a wrong doer. *Payzant* v. *Hawbold*, 29 N.S R. 66.

TRIAL.

See CRIMINAL LAW, V and XII.
And see PRACTICE AND PROCEDURE, XLVI.

TRUSTEES.

I. CREATION OF TRUST.

—Life Insurance—Construction of Policy—Beneficiary—Designation—Assignment of Policy—Security for Advances—Trust—Evidence.]

See INSURANCE, III.

II. LIABILITY OF TRUSTEES.

—Church—Trustees—Mortgage—Covenant—Personal Liability—R.S.O. c. 237.]—The duly appointed trustees of a religious congregation, to whom by that description the site for a church has been conveyed, and who by that description give to the vendor to secure part of the purchase money a mortgage with the ordinary covenant for payment, are a corporation and are not personally liable upon the mortgage, although it is signed and sealed by them individually. *Beaty* v. *Gregory*, 24 Ont. A.R. 325; affirming 28 Ont. R. 60.

III. PARTICULAR TRUSTS.

—Set off—Assignment—Notice of Assignment.]—A person whilst holding a sum of money in trust for A and B, pending the decision of a suit of A against B, may acquire an overdue promissory note of one of the parties, and upon the settlement of the suit may then set off any balance found to be in his hands for such party against the amount of the note, whether he holds such note for his own benefit or that of another; provided he has no notice of any assignment of such balance by such party in favor of some third person: *Fair* v. *McIver*, 16 East, 130; *Lackington* v. *Combes*, 6 Bing. N.C. 71, and *Belcher* v. *Lloyd*, 10 Bing. 310, distinguished on the ground that they were decided under the set of clauses of the Bankruptcy Acts, which, as shown by Parke, B., in *Forster* v. *Wilson*, 12 M. & W. 191 are given a different construction from the statutes of set-off. *Talbot* v. *Frere*, 9 Ch. D. 568, also distinguished on the ground that the set-off there asked for would have prejudiced the creditors of the estate of the deceased mortgagor, which was insolvent. *Sifton* v. *Coldwell*, 11 Man. R. 653.

IV. REMUNERATION OF TRUSTEES.

—Trustee—Compensation—Lien—Municipal Debentures—R.S.O. c. 110, s. 38.]—A person to whom municipal debentures in aid of a railway company are delivered in trust to be handed over to the company upon the completion of the railway, is a trustee within section 38 of R.S.O. c. 110. and entitled to compensation, and is also entitled to a lien on the debentures until that compensation is paid. Judgment of Robertson, J., 28 Ont. R. 106 (*sub nom. In re Ermatinger*) affirmed, but the amount of compensation reduced. *In re Tilsonburgh, Lake Erie and Pacific Railway Company*, 24 Ont. A.R. 378.

V.—TRUST FUNDS.

—Account of Trust Funds—Abandonment by cestui que trust—Evidence.]—The holder of two insurance policies, one in the Providence Washington Ins. Co., and the other in the Delaware Mutual, on which actions were pending, assigned the same to M. as security for advances and authorized him to proceed with the said actions and collect the moneys paid by the insurance companies therein. By a subsequent assignment J. became entitled to the balance of said insurance moneys after M.'s claim was paid. The actions resulted in the policy of the Providence Washington being paid in full to the solicitor of M., and for a defect in the other policy the plaintiff in the action thereon

was nonsuited. In 1886 M. wrote to J. informing him that a suit in equity had been instituted against the Delaware Mutual Ins. Co. and its agent for reformation of the policy and payment 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 eventually compromised by the company paying somewhat less than half the amount of the policy. 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 were written, a decree was made in said suit referring it to a referee to take an account of 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 and by the Supreme Court of Canada. On the taking of said account M. contended that all claims on the Delaware policy had been abandoned by the above correspondence, and objected to any evidence relating thereto. The referee took the evidence and charged M. with the amount received, but on exceptions by M. to his report the same was disallowed:—Held, reversing the judgment of the Supreme Court of New Brunswick, that the sum paid by the Delaware Company was properly allowed by the referee; that the alleged abandonment took place before the making of the decree which it would have affected and should have been so urged; that M. not having taken steps to have it dealt with by the decree could not raise it on the taking of the account; and that, if open to him, the abandonment was not established as the proceedings against the Delaware Company were carried on after it exactly as before, and the money paid by the company must be held to have been received by the solicitor as solicitor of M. and not of the original holder:—Held, further, that the referee, in charging M. with interest on money received from the date of receipt of each sum to a fixed date before the suit began, and allowing him the like interest on each disbursement from date of payment to same fixed date, had not proceeded upon a wrong principle. *Jones* v. *McKean*, 27 S.C.R. 249.

—Settlement—Revocation—Power.]—A settlement in which the trustee was authorized to invest the funds in "Dominion, Provincial and Municipal bonds and debentures, or first mortgages upon real estate," contained a power of revocation by deed in favour of the settlor, with the consent of the trustee. The latter invested some of the trust moneys in the stock of a loan company, under instructions by letter from the settlor:—Held, that there was no breach of trust, and that what was done amounted to a defective execution of the power which the Court would aid. The principle on which *In re Mackenzie Trusts*, 23 Ch. D. 750, was decided, applied. *Re Mackenzie Trusts*, 28 Ont. R. 312.

And see BUILDING SOCIETY.

TUTOR.

Absent Minor with Property in Quebec Province—Representation of—Sale of Bank Stock—Subsequent Ratification.]—The court of the minor's domicile alone has jurisdiction to appoint a tutor and subrogate tutor, and the appointment in Montreal of a tutor *ad hoc aux biens* to a minor domiciled in the United States, but having property in Montreal, is irregular and illegal.—Notwithstanding the fact that the sale of shares of bank stock belonging to an absent minor was made while the minor was not properly represented, such sale, when subsequently ratified and approved by a person legally entitled to represent the minor, will not be set aside at the suit of the minor after becoming of age—more especially where it is proved that the proceeds of the sale of shares were applied for the benefit of the minor's estate, and were entered in the account rendered by the testamentary executors and duly accepted by the tutor. A previous invalid appointment of a tutor *ad hoc aux biens* to an absent minor, does not affect the validity of the appointment of a tutor regularly made subsequently:—By Loranger, J.—The testamentary executors being bound, under the terms of the will, to make necessary repairs to the immovables of the succession, were entitled, with the authorization of the court, to sell bank shares belonging to the succession to defray the cost of such repairs, and their account having been accepted by the tutor, the validity of the transfer, as far as the bank was concerned, could not be impeached. *Donohue* v. *La Banque Jacques Cartier*, Q.R. 11 S.C. 90, reversing on the second point, and affirming on the others 10 S.C. 110.

—Nullified Instruments—Compromise "Transaction"—Estoppel—C. C. Arts. 311 and 1243-1245.]

See DEED.

—Insurance Moneys—Payment into Court—Foreign Tutrix.]—See INSURANCE, III.

ULTRA VIRES.

See MUNICIPAL CORPORATIONS, I.

USUFRUCT.

Will—Construction of—Donation—Substitution—Partition, per stirpes or per capita—Alimentary Allowance—Accretion between Legatees.]—See SUBSTITUTION.

USURY.

Building Societies—Participating Borrowers—Shareholders—C.S.L.C. c. 58—42 & 43 V. (Q.) c. 32—Liquidation—Expiration of Classes—Assessments on Loans—Notice of—Interest and bonus—Usury Laws—C.S.C. c. 58—Art. 1785 C.C.—Administrators and Trustees, Sales to—Prête-nom—Art. 1484 C.C.]—See BUILDING SOCIETY.

VAGRANCY.

See CRIMINAL LAW, XIII.

VENDOR'S LIEN.

See LIEN, IV.

VENUE.

See PRACTICE AND PROCEDURE, XLVII.

VOTERS' LISTS.

Finality of—Qualification of Voter—Municipal Election.]—Voters lists are final as to the qualification to vote at a municipal election in the province of Ontario. *The Queen ex rel McKenzie* v. *Martin*, 28 Ont.R. 523.

WAIVER.

Sale of Goods—Misrepresentation—Rescission—Waiver—Right of Action.]

See SALE OF GOODS, VII.
And see PRACTICE AND PROCEDURE, XLVIII.

WARRANT.

See CANADA TEMPERANCE ACT, V.

WARRANTY.

Suretyship—Recourse of Sureties inter se—Ratable Contribution—Action of Warranty—Banking—Discharge of Co-surety—Reserve of Recourse—Trust Funds in possession of a Surety—Arts. 1156, 1959 C.C.]—Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him.—When a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such recourse reserved, the creditor has not rendered thereby himself liable in an action of warranty by the other sureties. *Macdonald* v. *Whitfield*. *Whitfield* v. *The Merchants Bank of Canada*, 27 S.C.R. 94.

—Contract—Lease of Machine—Capacity—Breach.]—The appellant leased to respondents a machine which he guaranteed would "properly fiberize and screen from 8 to 10 tons of No. 3 crude asbestos per day of 10 hours." The machine was set up in respondents' premises by men furnished by appellant:—Held, in an action of damages by respondents against appellant for breach of contract, that under the terms of the clause of warranty, even without proof that there was any defect in the construction of the machine, the respondents were entitled to recover, on evidence that the machine did not do, and was not capable of doing, the amount of work which it was guaranteed to do. *Costigan* v. *Johnson*, Q.R. 6 Q.B. 308.

—Transfer of Claim—"Promesse de garantir, fournir et faire valoir"—Insolvency of Debtor—Delay.]—A warranty, "promesse de garantir, fournir et faire valoir," in a transfer of a claim which is due and exigible, does not necessarily imply a warranty of anything more than the solvency of the debtor at the time of the transfer; and so, where the transferee, at the date of the transfer, was aware that payment had already been demanded by the transferor, who had refused to grant any extension, and the transferee nevertheless allowed more than a year to elapse without taking any steps to obtain payment, it was held that he could not recover from the transferor under the warranty without proving the insolvency of the debtor at the time of the transfer. *Cardinal* v. *Boileau*, Q.R. 11 S.C. 431.

—Accident—Action for Damages—Defence—Right to recourse in Warranty.]

See PRACTICE AND PROCEDURE, XLIX.
" also ACTION, X.
" SALE OF GOODS, IX.

WATCHING BRIEF.

See COSTS, IV.

WATER AND WATERCOURSES.

Surface Water—Easement—Lands of Different Levels.]—The doctrine of dominant and servient tenement does not apply between adjoining lands of different levels so as to give the owner of the land of higher level the legal right as an incident of his estate to have surface water falling on his land discharged over the land of lower level, although it would naturally find its way there. The owner of the land of lower level may fill up the low places on his

land or build walls thereon, although by so doing he keeps back the surface water to the injury of the owner of land of higher level. *Ostrom* v. *Sills*, 24 Ont. A.R. 526. Appeal to Supreme Court of Canada stands for judgment.

—**Water Privilege—Owner of—Riparian Proprietor—Use and Improvement of Privilege.**]—The owner of land abutting on the chain reserved by the crown for a public highway along the Kaministiquia river, who is also the licensee of the interest of the crown in such reserve, is a riparian proprietor; and, as such, he is the owner, within R.S.O. c. 119, of a water privilege which adjoins that part of the reserve lying between his land and the river:—Held, however, that, proposing to place a dam at the upper end of such water privilege, such a riparian proprietor, not being the owner or legal occupant of any water privilege above it, was not a person desiring to use or improve his water privilege, and was, therefore, not entitled to an order to exercise the powers mentioned in the Act. *Re Jenison*, 28 Ont. R. 136.

And See MUNICIPAL CORPORATIONS, III.

WATERS, CANADIAN.

Treaty of 1818—Construction of—Fisheries—Three-mile limit—Construction of Statutes—59 Geo. III. c. 38 (Imp.)—R.S.C. cc. 94 and 95—"Fishing"—Foreign Fishing Vessels.]

See FISHERIES.

WATERWORKS.

Municipal Corporation—Waterworks—Extension of Works—Repairs—By-law—Resolution—Agreement in Writing—Injunction—Highways and Streets—R.S.Q. Art. 4485—Art. 1033a C.C.P.]

See MUNICIPAL CORPORATIONS, II.

WAY.

Municipal Corporations — Negligence—Defect in Sidewalk beyond line of Highway.]—A city corporation is liable for injuries happening to a person while walking and resulting from the defective condition of a part of a sidewalk constructed by them, extending beyond the true line of the street over adjacent private property so as ostensibly to form a portion of the highway, such defect being caused through the owner of the property having placed on such part of the sidewalk a grating covering an area, and having allowed it, to the knowledge of the municipality, to fall into disrepair so close to the highway as to render travel unsafe. *Badams* v. *City of Toronto*, 24 Ont. A.R. 8.

—**Municipal Corporation—Local Improvements—Increase of Cost.**]—The extension of a street was petitioned for as a local improvement by the requisite number of owners, and the petition was acceded to by the council, and a by-law passed for the purpose, the cost being estimated at $14,500, an assessment for that sum being adopted by the Court of Revision after notice to the persons interested. After some delay the council purchased the land required at a price much greater than the estimate, and passed a by-law levying over $36,000 for the work. No work was done on the ground and no notice of the second assessment was given:—Held, that an opportunity of contesting the second assessment should have been given, and that the by-law was invalid. *Petman* v. *City of Toronto*, 24 Ont. A.R. 53.

—**Municipal Corporations — Highway — Negligence — Accident — Notice of—55 V. (Ont.) c. 42, s. 531 (1)—57 V. c. 50, s. 13—59 V. (Ont.) c. 51, s. 20.**]—See MUNICIPAL CORPORATIONS, VII.

—**Way—Public Road—Municipal Corporation—Power to Lease to Private Person.**]

See MUNICIPAL CORPORATIONS, VII.

WILLS.

I. CONSTRUCTION.

Donation — Substitution — Partition, per stirpes or per capita — Usufruct—Alimentary allowance — Accretion between Legatees.]—The late Joseph Rochon made his will in 1852 by which he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus á mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared:—"Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitères, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament:—Held, that the testamentary dispositions thus made did not create a substitution, but constituted merely adevise of the usufruct by the testator to his two sisters and of the estate (subject to the usufruct), to their children, which took effect at the death of the testator:—Held, also, that the charge of preserving the estate—"conserver le fonds"—imposed upon the testamentary executor could

not be construed as imposing the same obligation upon the sisters who were excluded from the administration, or as having by that term, given them the property subject to the charge that they should hand it over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly, subject to the usufruct:—Held, further, that the property thus devised was subject to partition between the children *per capita* and not *per stirpes*. *Robin* v. *Duguay*, 27 S.C.R. 347, affirming Q.R. 5 Q.B. 277; C.A. Dig. (1896), col. 363.

—"My Own Right Heirs"—Condition Precedent.]—A testator, who left surviving him his widow and one daughter, devised specifically described property to his daughter, and the residue of his estate to his executors upon trust for his widow and daughter in certain events with limited power to the daughter to dispose thereof by will. He then directed that "in case my daughter shall have died without leaving issue her surviving, and without having made a will as aforesaid, my trustees shall (after the death of my wife if she survive my said daughter) sell all my estate, real and personal, and divide the same equally amongst my own right heirs, who may prove to the satisfaction of my said trustees their relationship within six months from the death of my said wife or daughter, whichever may last take place." The daughter died unmarried in her mother's lifetime, having made a will assuming to dispose of the residue:—Held, that the daughter was entitled to take as the "right heir" of the testator. *Bullock* v. *Downes*, 9 H.L.C. 1; *Re Ford*, *Patten* v. *Sparks*, 72 L.T.N.S. 5; *Brabant* v. *Lalonde*, 26 Ont. R. 379; and *Thompson* v. *Smith*, 23 Ont. A.R. 29, referred to. Maclennan, J.A., held also that upon the language of the will, apart from the clause above set out, the daughter took in fee, subject to the widow's rights, and that failure to make a will was a condition precedent to this clause taking effect. Judgments of Boyd, C., in *Coatsworth* v. *Carson*, 24 Ont.R. 185, and *In re Ferguson*, *Bennett* v. *Coatsworth*, 25 Ont.R. 591, reversed upon grounds not argued before him. *In re Ferguson*, *Bennett* v. *Coatsworth*, 24 Ont. A.R. 61, affirmed by 28 S.C.R. 38 sub. nom. *Turner* v. *Bennett*.

—Falsa Demonstratio—Lot described by Wrong Number.]—A testator who was the owner of the south-west quarter of lot twelve in the fourth concession and of lot twelve in the fifth concession of a township and of no other real estate, after providing for payment of his debts and funeral expenses by his executors, declared that "the residue of my estate which shall not be required for such purposes I give, devise and bequeath as follows," and then devised "the southwesterly quarter of lot *eleven*, concession four" and lot twelve in the fifth concession:—Held that the word "eleven" might be rejected as *falsa demonstratio* and the devise read as if it were "the residue of my real estate in the fourth concession:" *Doe d. Lowry* v. *Grant*, 7 U.C.Q.B. 125, applied and considered. *Doyle* v. *Nagle*, 24 Ont. A.R. 162.

—"Equally Divided Between"—Shares—Division.]—A testator by his will directed his real estate to be sold and the proceeds to be "equally divided between" his wife and his brother and sister:—Held, that the wife took a one-half share, and his brother and sister the other half share between them. *Hutchinson* v. *LaFortune*, 28 Ont. R. 329.

—Estate—Defeasible Fee—"Die without Issue."]—*Van Tassell* v. *Frederick*, 24 Ont. A.R. 131, affirming 27 Ont. R. 646; C. A Dig. (1896), col. 360.

II. Devises and Legacies.

—Will—Construction—Degrees of Substitution—Art. 932 C.C.]—By Article 932 of the Civil Code of Lower Canada substitutions created by will "cannot extend to more than two degrees exclusive of the institute." Where a testator devised an estate for life to one, and after her death to her two daughters and niece conjointly and in equal shares for their lives, and after their decease to their children, and provided that if two out of the three life tenants should die without children, which event happened, the whole property should belong to the child or children of the survivor.—Held, that the child of the survivor was entitled to the whole, as there was no declaration or necessary implication of cross remainders between the three life tenants, and therefore only two substitutions exclusive of the institute. *De Hertel* v. *Goddard*, 66 L.J. (P.C.) 90.

—Statute—Construction of—Estates tail, acts abolishing—R.S.N.S. (1 ser.) c. 112; (2 ser.) c. 112; (3 ser.) c. 111—28 V. c. 2 (N.S.)—Executory devise over—Dying without Issue—"Lawful Heirs"—"Heirs of the Body"—Estate in remainder expectant—Statutory Title—R.S.N.S. (2 ser.) c. 114, ss. 23 & 24—Title by Will—Conveyance by Tenant in tail.]—The Revised Statutes of Nova Scotia, 1851 (1 ser.) c. 112, provided as follows: "All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple; and, if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." In the revision of 1858 (R.S.N.S. 2 ser. c. 112), the terms are identical. In 1864 (R.S.N.S. 3 ser. c. 111) the provision was changed to the following; "All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged to be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." This latter statute was repealed in 1865 (28 Vict. c. 2) when it was provided as follows; "All estates tail are abolished, and every estate which hitherto would have been adjudged a fee tail shall hereafter be adjudged a fee simple, and may be conveyed or devised or descend as such." Z., who died in 1859, by his will, made in 1857, devised lands in Nova Scotia to his son, and in default of lawful heirs, with a devise over to other relatives, in the course of descent from the first donee. On the death of Z., the son took possession of the property as

devisee under the will, and held it until 1891, when he sold the lands in question in this suit to the appellant:—Held, per Taschereau, Sedgewick and King, JJ., that notwithstanding the reference to "valid remainder" in the statute of 1851, all estates tail were thereby abolished, and further, that subsequent to that statute there could be no valid remainder expectant on an estate, as there could not be a valid estate tail to support such remainder:—Held further, per Taschereau, Sedgewick and King JJ., that in the devise over to persons in the course of descent from the first devisee, in default of lawful issue, the words "lawful heirs," in the limitation over, are to be read as if they were "heirs of his body;" and that the estate of the first devisee was thus restricted to an estate tail and was consequently, by the operation of the statute of 1851, converted into an estate in fee simple and could be conveyed by the first devisee:—Held, per Gwynne and Girouard JJ., that estates tail having a remainder limited thereon were not abolished by the statutes of 1851 or 1864, but continued to exist until all estates tail were abolished by the statute of 1865; that the first devisee, in the case in question, took an estate tail in the lands devised and having held them as devisee in tail up to the time of the passing of the Act of 1865, the estate in his possession was then, by the operation of that statute, converted into an estate in fee simple which could be lawfully conveyed by him. *Ernst* v. *Zwicker*, 27 S.C.R. 594. Reversing 29 N.S.R. 258.

—Construction of — Words of Futurity—Life Estate—Joint Lives—Time for ascertainment of Class—Survivor Dying without Issue—"Lawful Heirs."]—A devise of real estate to the testator's wife and only child for their joint lives, with estate for life to the survivor and remainder in fee to his lawful heirs, is not evidence of intention upon the part of the testator to exclude the child from the class entitled to the fee, in case such child should survive the testator. *Thompson* v. *Smith*, 27 S.C.R. 628. Affirming 23 Ont. A.R. 29.

—Settlement—Mortgage—Exoneration — Will—Construction—Direction to Sell—Discretion as to Time—Legacy—Discretion as to Time of Payment.]—Certain land, subject with other lands to an overdue mortgage made by the settlor, was conveyed by him to trustees for his daughter by way of settlement to take effect on his death or her marriage. The conveyance to the trustees contained no covenants by the settlor and no reference to the mortgage, which remained unpaid at the time of the settlor's death:—Held, that the mortgage should be paid out of the settlor's general estate.—A testator devised all his estate, real and personal, to trustees upon trust so soon after his death as might be expedient to convert into cash so much of his estate as might not then consist of money or first-class mortgage securities, and to invest the proceeds and apply the corpus and income in a specified manner. A later part of the will contained the following provision: "In a sale of my real estate or any portion thereof I also give my said trustees full discretionary power as to the mode, time, terms and conditions of sale, the amount of purchase money to be paid down, the security to be taken for the balance, and the rate of interest to be charged thereon, with full power to withdraw said property from sale and to offer the same for resale from time to time as they may deem best":—Held, that the latter clause merely gave a discretion as to the details and conditions of the sale, and did not qualify or override the specific direction to sell as soon after the testator's death as might be expedient.—The testator gave certain shares of his estate to two sons, the provision for payment being as follows:—"To each of my sons as they arrive at the age of twenty-three years, or so soon thereafter as my said trustees shall deem it prudent or advisable so to do, they shall pay over one moiety of his share of the corpus of said estate, and the accumulated income on said moiety, if any, and the remaining moiety upon his attaining the age of twenty-seven years, or so soon thereafter as they shall deem it advisable so to do":—Held, that this direction did not give the trustees an absolute discretion as to the time of payment, but that the general rule, that every person of full age to whom a legacy is given, is entitled to payment the moment it becomes vested, applied. *Lewis* v. *Moore*, 24 Ont. A.R. 393.

—County Court—Jurisdiction — Legacy under $200 charged on Land—59 V. c. 19, s. 3, s.s. 13 [Ont.).]—A County Court has jurisdiction under sub-section 13 of section 3 of 59 Vict. (Ont.) c. 19, in an action brought by the legatee against the devisee of land, to recover a legacy of $5 charged on the land, as involving equitable relief in respect of a matter under $200. The subject matter involved in such an action is the amount of the legacy and not the value of the land. *Rustin* v. *Bradley*, 28 Ont. R. 119.

—Validity of—Lands in Ontario—Foreign Lands—Debts and Testamentary expenses—Liability for.]—A testator, domiciled in a foreign country, died in 1891, possessed of certain lands and personal estate in that country, and also of lands in Ontario. His personal estate was insufficient to pay his debts. By his will, after specific bequests and devises, he gave the residue of his estate, real, personal and mixed, wherever situated, to his trustees, to promote, aid and protect citizens of the United States of African descent in the enjoyment of their civil rights, or, in case of such trust becoming inoperative, to his heirs at-law:—Held, that the devise of lands, as far as Ontario was concerned, was void and inoperative; that the trustees held the lands to the use of the heir-at-law until satisfaction should be made thereout for the charges thereon of debts and testamentary expenses, and the heir-at-law was entitled to a conveyance thereafter; that the Ontario lands were liable to contribute *pari passu* with the other lands for the payment of debts and testamentary expenses; and that the proportion chargeable on Ontario lands might be raised by sale of an adequate part, or their rents might be applied therefor. *Lewis* v. *Doerle*, 28 Ont. R. 412.

—Vested Interest—Period of Payment.]—Where a testator gives a legatee an absolute vested interest in a defined fund, the Court will order payment on his attaining twenty-one, notwith-

standing that by the terms of the will payment is postponed to a subsequent period: *Rocke* v. *Rocke*, 9 Beav. 66 followed. *Goff* v. *Strohm*, 28 Ont. R. 553.

—**Legacy — Abatement of, on deficiency of Assets—Intention — Burden of Proof.**]—Where there is a deficiency of assets of an estate to pay all the bequests in full, the *onus* is on parties claiming priority to show conclusively from the will an intention that in case of abatement of legacies a distinction should be made in their favour.—Where the testator directed the sum of $5,000 to be invested, and the income only expended in paying for the board, clothing and necessary maintenance of his son C., during his life, with a direction that the executors were not to pay C. any money, and that they were not to pay for liquor supplied to him, but only for the necessary articles of his living:—Held, that there was no substantial reason for departing from the general rule. *Re Estate D. Waddell*, 29 N.S.R. 19.

—**Devise of Residue—Construction.**]—Testatrix, after making certain specific bequests in the sixth clause of her will, used these words: "As to all the rest, residue and remainder of my estate, real as well as personal, and wherever situate, I dispose of the same as follows," etc.:—Held, that the whole estate was disposed of, and there was no intestacy as to any part of it.—Testatrix directed her executors to convert her estate into money, and invest and keep the same invested, and, out of the income, first, to pay to her sister C. the annual sum of $300 during her natural life, and as to the balance, to pay one-half to the wife and children of her son R., and the other half to the wife and children of her son J. W. She added: "It is my will that the whole of the principal fund of the residue of my estate, subject only to the annuity of my sister C. * * shall be paid and applied, and the income thereof shall be paid and applied to and for the use and benefit of the present wife and of the child or children of the survivor of my two sons:"—Held, that the portion of the estate out of which testatrix directed the annuity to be paid to her sister, since deceased, should be applied for the benefit of the families of both sons in equal moieties, as provided in the sixth clause. *Re Estate Mary Watt*, 29 N.S.R. 100.

—**Construction — Legacies — Words Postponing Time of Payment—Vested Interest—Residue—Executors—Partner's Remuneration for Closing up Business.**]—Testator devised to his executors and trustees the sum of $20,000 to be invested in good securities, and the income applied for the sole use and benefit of his son A. until he should have arrived at the age of twenty-eight years, at which time said sum and its accumulations, and unapplied income, if any, or the securities representing the same, were to be paid over, but enabling A. to make a will disposing of the fund when he became twenty-one years of age:—Held, that A. took a present vested interest in the legacy bequeathed to him, and that the direction postponing payment until he attained the age of twenty-eight years was repugnant and void.—As to the rest and residue of his estate (including lapsed legacies) testator directed his executors and trustees to hold the same, and to keep it invested in safe securities until his youngest surviving child should attain the full age of twenty-one years, and, thereupon to divide such residue and its accumulations and unapplied income, if any, share and share alike, among those of his children named, and the issue of any one or more of said children who should have died before such division or distribution was actually made:—Held, that there was an immediate gift to the children named, but that the time for distribution was postponed until the youngest surviving child attained the full age of twenty-one years; that the share of one of the testator's daughters in the residue, she having died unmarried and without leaving issue, vested in the executors, and did not on her death vest in the other residuary legatees; that a bequest to testator's son J. in similar terms to the bequest to A. was not divested by the death of J. under the age of twenty-one; that the legacy having vested, and the testator having merely given directions as to the expenditure of the interest during the minority of J., the legal representative of J. was now entitled to receive payment from the executors; that a provision, that if J. should die "before he has actually received into his possession said sum, etc., was repugnant and void; that the legacy having vested at testator's death, the law would not permit him to control its subsequent disposition; and that W. J. B., one of testator's sons, and a partner in the firm of which testator was the head, was not entitled to remuneration for his services in winding up the business of the firm. *Butler* v. *Butler*, 29 N.S.R. 145.

—**Testamentary Succession — Balance due by Tutor—Executors—Account, action for—Action for Provisional Possession—Parties to Action.**]—*Cream* v. *Davidson*, 27 S.C.R. 362.

—**Evidence—Nullified Instruments.**]

See EVIDENCE, II.

—**Bequest to Charities—Next of Kin—Advertisement for—Payment into Court—Executor's petition for Advice.**]

See EXECUTORS AND ADMINISTRATORS, III.

III. EXECUTION.

—**Testator in Extremis—Indication of Wishes by Signs—Art. 847 C.C.**]—A testator being at the point of death and unable to speak, his son acted as the medium through whom his wishes were made known in the preparation of his will. The will was prepared by means of questions propounded by the notary and signs of assent or dissent by the testator, who did not otherwise express his wishes nor sign the will, being incapable of doing so:—Held, that the will was a nullity, being prepared in contravention of Art. 847 of the Civil Code, which prohibits a will in authentic form to be dictated by signs. *Lenoir dit Rolland* v. *Lenoir dit Rolland*, Q.R. 10 S.C. 126.

IV. UNDUE INFLUENCE.

—**Undue Influence—Evidence.**]—In order to set aside a will on the ground that its execution

was obtained by undue influence on the mind of the testator, it is not sufficient to show that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shown that they are inconsistent with a contrary hypothesis. *Adams* v. *McBeath*, 27 S.C.R. 13, affirming 3 B C.R. 513, C.A. Dig. (1896), col. 366.

V. Validity.

— Will — Sheriff's Deed — Evidence— Proof of Heirship—Rejection of Evidence—New Trial—Champerty—Maintenance.]—A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator and through conveyances from them to persons abroad. The courts below held that the will was valid;—Held, affirming such decisions, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay, and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father and it was not established and the court would not presume that his father had died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed and the appeal should be dismissed. *May* v. *Logie*, 27 S.C.R. 443, affirming 23 Ont. A.R. 785.

—Restraint on Alienation.]—A testator after devising two parcels of land respectively to his two sons, provided as follows: "I will that the aforesaid parcels of land shall not be at their disposal at any time until the end of twenty-five years from the date of my decease. And, further, I will that the same parcels of land shall remain free from all encumbrances, and that no debts contracted by my sons W. C. & H. C., shall by any means encumber the same during twenty-five years from the date of my decease." One of the sons died about two years after his father, having devised his lot to his brother, the plaintiff, who within the period limited by his father's will, sought to mortgage it:—Held, a valid restriction, so far as it was a restriction against the plaintiff selling and conveying the lands or encumbering them by way of mortgage within the period mentioned. *Chisholm* v. *The London and Western Trusts Company*, 28 Ont. R. 347.

—Restraint on Alienation.]—Devise of real estate to two grandchildren in fee, with a condition as follows: "and I further will and direct, and it is an express condition of this my will and testament, that none of the devisees herein * * * that is to say, neither of my said grandchildren * * * shall either sell or mortgage the lands devised to them:"—Held, an absolute and unqualified restraint on alienation, and so invalid:—Semble, had the condition been valid, the grandchildren being the testators' heirs-at-law, could have made title as such. *Re Shanacy and Quinlan*, 28 Ont R. 372.

—Rule against Perpetuity—Thellusson Act—52 V. c. 10, s. 2 (Ont.).]—A testator directed his executors to lease and rent and invest his lands, money and mortgages for the term of 60 years, after which the property was to be divided as in his will provided:—Held, that this infringed the rule against perpetuity, and 52 Vict. (Ont.) c. 10, s. 2, and was invalid. *Baker* v. *Stuart*, 28 Ont.R. 439.

—Appeal—Executors and Legatees—Costs out of Estate—Watching Brief.]—The costs of opposing an unsuccessful appeal to the Court of Appeal from a judgment establishing a will and codicil were ordered to be paid to the respondents, who were the executors, and certain legatees, out of the estate, in the event of their not being able to make them out of the appellant; the costs of the executors to be only as on a watching brief. *Re Cassie*, *Toronto General Trusts Co.* v. *Allen*, 17 Ont. P.R. 402.

—Will—Capacity of Testatrix.]—Mere eccentricity of conduct not indicative of serious or permanent mental disorder, will not suffice to invalidate a will which is reasonable in its terms, and is made by a person who, though suffering at the time from impaired memory caused by local paralysis, and from other infirmities usual in advanced age, nevertheless displayed considerable intelligence in looking after her personal affairs, and to whose sanity the notary who drew the will, as well as the physician in attendance, and others, bear witness. *Demers* v. *Beaudin*, Q.R. 11 S.C. 465.

WINDING-UP ACT.

See Company, VII.

WITNESS.

New Trial—Jury—Misconduct of Juror—Tampering with Witness.]—Attempting to dissuade a witness from giving evidence is such misconduct on the part of a juror as would justify the granting of a new trial. *Laughlin* v. *Harvey*, 24 Ont. A.R. 438.

—Contempt of Court—Witness—Reference—Subpœna—Ont. Rule 484—Local Manager of Bank—Principal Officers resident Outside the Province—Production of Bank Books—Disclosure of Bank Accounts.]—Upon a motion by the plaintiff to commit the local manager of a chartered bank, who was subpœnaed to attend before a master upon a reference, and there to produce the books of the bank and give evidence, for his contempt in not complying with the subpœna:—Held, that a subpœna may properly be issued to compel the attendance of a witness before a master, who has jurisdiction by Ont. Rule 484; that it was unreasonable to expect the witness to take from the bank the books that were in use and attend during banking hours for the

purpose of an examination in a matter in which he had no interest except as a witness; and it would therefore be proper for the master to take the evidence at the banking offices after banking hours; that where the head office of the bank is outside of the Province, the local manager is the person in charge and custody of the books, and is the proper person to subpœna to produce them, and should be ordered to do so, more especially where it does not appear that in so doing he will be contravening any rule or regulation of the bank: *Re Dwight and Macklam*, 15 Ont. R. 148, followed; *Crowther* v. *Appleby*, L.R. 9 C.P. 23, and *Attorney-General* v. *Wilson*, 9 Sim. 526, distinguished; that the witness's objection to produce the books, because the bank was precluded by law from exhibiting to any one or permitting anyone to inspect the account of any person dealing with the bank, was untenable, the evidence sought being as to entries made of financial transactions in which a deceased person was engaged, his representatives desiring to know what moneys the bank received and what disposition was made of them, and all parties interested being willing that the evidence should be given. *Hannum* v. *McRae*, 17 Ont. P.R. 567.

—**Privilege from Arrest.**]—The privilege from arrest of a witness residing in one district and cited to appear before a court sitting in another will not protect him from arrest for a criminal offence committed while he was absent from his residence in obedience to said summons. *Ex parte Ewan*, Q.R. 6 Q.B. 465.

—**Commercial Matter—Letting of Real Estate—Art. 1232 C.C.**]—A lease of real estate, even when made to a merchant, and for the purpose of carrying on business, is not a commercial contract; therefore, one of the parties, in an action relating to the lease, cannot be heard as a witness in his own favour. *Corbeil* v. *Marleau*, Q.R. 10 S.C. 6.

—**Deposition of Witness examined abroad—Irregularity.**]—The deposition of one of the witnesses examined abroad appeared to have been sworn to when it was signed, or immediately afterwards, and the objection was taken that the witness should have been sworn before the examination commenced:—Held, that if there was anything at variance with the instructions in this, it was irregularity of which there should have been notice, and which should have been moved against in chambers. *Wurzburg* v. *Andrews*, 28 N.S.R. 387.

—**Evidence—Addition to notes of Stenographer.**]
See EVIDENCE, I.

—**Credibility—Evidence—Judgment based on.**]
See EVIDENCE, XII.

—**Order for Examination—Order pending Appeal—Absence of Record—Examination of Prisoner leaving Province—Art. 240 C.C.P.**]
See PRACTICE AND PROCEDURE, XIV.

—**Libel—Production of Documents—Criminating Answers—R.S.O. c. 61 s. 5—Incorporated Company—Indictment.**]
See PRACTICE AND PROCEDURE, XII.

WORDS AND TERMS.

"**Action.**"]—See *Hill* v. *Hearn*, 29 N.S.R. 25, ante, col. 10.

"**Actual Occupation.**"]—See *The Queen ex rel. Joanisse* v. *Mason*, 28 Ont. R. 495, ante, col. 235.

"**À Discretion.**"]—See *Davis* v. *City of Montreal*, 27 S.C.R. 539, ante, col. 206.

"**All the Rest, Residue and Remainder of my Estate.**"]—*Re Estate Mary Watt*, 29 N.S.R. 100, ante, col. 389.

"**Amount in Dispute.**"]—See *Glengoil S.S. Co.* v. *Pilkington*, Q.R. 6 Q.B. 292, ante, col. 13.

"**Amount in Question.**"]—See *Aitken* v. *Doherty*, 11 Man. R. 624, ante, col. 17.

"**Any Person.**"]—See *Munro* v. *Waller*, 28 Ont. R. 29, ante, col. 182.

"**As Nearly as May Be.**"]—See *Lantz* v. *Morse*, 28 N.S.R 535, ante. col. 42.

"**Assigns.**"]—See *McKibbon* v. *Williams*, 24 Ont. A.R. 122, ante, col. 215.

"**At Pleasure.**"]—See *Davis* v. *City of Montreal*, 27 S.C.R. 539, ante, col. 206.

"**At Present.**"]—See *The Queen* v. *Ballard*, 28 Ont. R. 489, ante, col. 101.

"**Attorney.**"]—See *Hamilton* v. *Jones*, Q.R. 10 S.C. 496. ante, col. 40.

"**Bad and Quarrelsome.**"]—See *Paladino* v. *Gustin*, 17 Ont. P.R. 553, ante, col. 190.

"**Before he has actually Received into his Possession.**"]—See *Butler* v. *Butler*, 29 N.S.R. 145, ante, col. 389.

"**Being One-half of my Homestead.**"]—See *Redden* v. *Tanner*, 29 N.S.R. 40, ante, col. 340.

"**Boarding-out Agreement.**"]—See *Hall* v. *Stisted School Trustees*, 24 Ont. A.R. 476, ante, col. 345.

"**British Law**"]—See *Rendell* v. *Black Diamond S.S. Company*, Q.R. 10 S.C. 257, ante, col. 133.

"**Buildings and Erections.**"]—See *Re Brantford Electric and Power Co. and Draper*, 28 Ont. R. 40, ante, col. 184.

"**Charitable Institution**"]—See *City of Montreal* v. *Montreal Bible Society*, Q.R. 6 Q.B. 251, ante, col. 29.

"**Common Employment.**"]—See *Dupont* v. *Quebec Steamship Co.* Q.R. 11 S.C. 188, ante, col. 7.

"**Complained of.**"]—See *Paterson* v. *Brown*, 11 Man. R. 612, ante, col. 236.

"**Conveying Travellers.**"]—See *Attorney-General* v. *Hamilton Street Railway Company*, 24 Ont. A.R. 170, ante, col. 369.

"**Court of Last Resort.**"]—See *City of Toronto* v. *Toronto Railway Co.* 27 S.C.R. 640, ante, col. 18.

"**Creditor.**"]—See *Gurofski* v. *Harris*, 23 Ont. A.R. 717; affirming 27 Ont. R. 201; C. A. Dig. 145, 340, ante, col. 114.

"**Decision.**"]—See *Naas v. Backman*, 28 N.S.R. 504, ante, col. 12.

"**Die without Issue.**"]—See *VanTassell* v. *Frederick*, 24 Ont. A.R. 131, ante, col. 386; *Ernst* v. *Zwicker*, 27 S.C.R. 594, ante, col. 386.

"**Different Things or Classes of Things.**"]—See *Singer Manufacturing Co.* v. *Western Assurance Co.*, Q R. 10 S.C. 379, ante, col. 169.

"**Documents.**"]—See *Fox* v. *Sleeman*, 17 Ont. P.R. 492, ante, col. 287.

"**Doing Business.**"—See *City of Halifax* v. *Jones*, 28 N.S.R. 452, ante, col. 58.

"**Doing Business by Agent within the Province.**"]—*Salter* v. *St. Lawrence Lumber Co.*, 28 N.S.R. 335, ante, col. 62.

"**Double Value.**"]—See *Brillinger* v. *Ambler*, 28 Ont. R. 368, ante, col. 183.

"**Duly Presented for Payment.**"]—*Crowell* v. *Longard*, 28 N.S.R. 257, ante, col. 267.

"**Earnings.**"]—See *Slaughenwhite* v. *Archibald*, 28 N.S.R. 359, ante, col. 158.

"**Effectually Prosecute.**"]—See *McSweeney* v. *Reeves*, 28 N.S.R. 422, ante, col. 24.

"**Employed.**"]—See *The Queen* v. *The Ship "Viva,"* 5 Ex. C.R. 360, ante, col. 35.

"**Equally Divided Between.**"]—See *Hutchinson* v. *LaFortune*, 28 Ont. R. 329, ante, col. 385.

"**Executed.**"]—See *Hazley* v. *McArthur*, 11 Man. R. 602, ante, col. 141.

"**Extradictable Offence.**"]—See *re F. H. Martin*, 33 C.L.J. 253, ante, col. 99.

"**Final Judgment.**"] — See *O'Donohoe* v. *Bourne*, 27 S.C.R. 654, ante, col. 20.

"**Fishing.**"]—See *The Ship Frederick Gerring, Jr.* v. *The Queen*, 27 S.C.R. 271, ante, col. 171.

"**Furniture.**"]—See *Newsome* v. *County of Oxford*, 28 Ont. R. 442, ante, col. 226.

"**Gift, Delivery or Transfer.**"—See *Kitchen* v. *Saville*, 17 C.L.T. (Occ. N.) 88, ante, col. 109.

"**Good Cause.**"]—See *Re Clement and Dixon*, 17 Ont. P. R. 455, ante, col. 26.

"**Goods Sold but not Delivered.**"]—See *Darling* v. *Insurance Companies*, 33 C.L.J. 439, ante, col. 169.

"**Guarantee.**"]—See *Johnson* v. *Fitzgerald*, 29 N.S.R. 330, ante, col. 271.

"**In any Year.**"]—See *Re Goulden* v. *Corporation of Ottawa*, 28 Ont. R. 387, ante, col. 198.

"**In its Nature Final.**"]—See *O'Donnell* v. *Guinane*, 28 Ont. R. 389, ante, col. 15.

"**Income.**"]—See *Re Biddle Cope* 5 B.C.R. 37, ante, col. 29.

"**Indirectly or Secondarily Liable.**"]—See *Bell* v. *Ottawa Trust and Deposit Co.*, 28 Ont. R. 519, ante, col. 39.

"**Instrument.**"]—See *Limoges* v. *Campbell*, 17 C.L.T. (Occ. N.) 296, ante, col. 139.

"**Interest.**"]—See *Re Clagstone and Hammond* 28 Ont. R. 409, ante, col. 372.

"**Interrupt.**"]—See *Price* v. *Leblanc*, Q.R. 11 S.C. 30, ante col. 106.

"**Judicial Determination.**"]—See *Naas* v. *Backman*, 28 N.S.R. 504, ante, col. 12.

"**Keep.**"]—See *Wurzburg* v. *Andrews*, 28 N.S. R. 387, ante, col. 338.

"**Land.**"]—See *In re Calgary Gas and Waterworks Co.*, 17 C.L.T. (Occ. N.) 309, ante, col. 29.

"**May be Granted.**"] — See *Matton* v. *The Queen*, 5 Ex. C.R. 401, ante, col. 331.

"**Member in Good Standing.**"]—See *Dale* v. *Weston Lodge*, 24 Ont. A.R. 351, ante, col. 167.

"**My Own Right Heirs.**"]—See *In re Ferguson, Bennett* v. *Coatsworth*, 24 Ont. A.R. 61, col. 385.

"**Nearest Recurring Anniversary.**"] — See *Attorney-General* v. *Sheraton*, 28 N.S.R. 492, ante, col. 210.

"**Not Negotiable and given as Security.**"]—See *Robertson* v. *Davis*, 27 S.C.R. 571, ante col. 38.

"**Not Transferable.**"]—See *In re Commercial Bank of Manitoba, Barkwell's Claim*, 11 Man. R. 494, ante, col. 53.

"**Owner.**"]—See *Re Clagstone and Hammond*, 28 Ont. R. 409, ante, col. 372.

"**Perils of the Sea.**"]—See *Morrison* v. *Nova Scotia Marine Ins. Co.*, 28 N.S.R. 346, ante, col. 170.

"**Personal Inconvenience.**"—See *Re Toronto, Hamilton and Buffalo Ry. Co. and Kerner*, 28 Ont. R 14, ante, col. 325.

"**Petitioned Against.**"]—See *Paterson* v. *Brown*, 11 Man. R. 612, ante, col. 236.

"**Preceding Section.**"]—See *Attorney-General* v. *Temple*, 29 N.S.R. 279, ante, col. 363.

"**Proceeding.**"]—See *Caughell* v. *Brower*, 17 Ont. P.R. 438 ante, col. 85.

"**Promesse De Garantir, Fournir et Faire Valoir.**"]—Se *Cardinal* v. *Boileau*, Q.R. 11 S.C. 431, ante, col. 115.

"**Property.**"]—See *The Queen* v. *Lorrain*, 28 Ont. R. 123, ante, col. 149.

"**School Rate.**"]—See *Foster* v. *The Village of Hintonburg*, 28 Ont. R. 221, ante, col. 238.

"**Short Delivery.**"]—See *Stairs* v. *Allan*, 28 N.S R. 410, ante, col. 41.

"**Special Circumstances.**"]—See *Morton* v. *Bank of Montreal*, 33 C.L.J. 629; 17 C.L.T. (Occ. N.) 308, ante, col. 23.

"**Structural Damages.**"] — See *Re Toronto, Hamilton and Buffalo Railway Co. and Kerner*, 28 Ont. R. 14, ante, col. 325.

"**Sum in Dispute.**"]—See *Petrie* v. *Machan*, 28 Ont. R. 504, ante, col. 15.

"**Trade.**"]—See *Demers* v. *O'Connor*, Q.R. 10, S.C. 371, ante, col. 140.

"**Transfer.**"]—See *Croft* v. *Croft*, 17 Ont. P.R. 452, ante, col. 117.

"**True Bill.**"—See *The Queen* v. *Townsend and Whiting*, 28 N.S.R. 468, ante, col. 103.

"**Unless he be Arrested.**"] — See *Spain* v. *Manning*, 28 N.S.R. 437, ante, col. 110.

"**Valuable Security.**]—See *Beattie* v. *Wenger*, 24 Ont. A.R. 72, ante, col. 113.

"**Which Has Not Accrued Due.**"]—See *Mail Printing Company* v. *Clarkson*, 28 Ont. R. 326, ante, col. 32.

"**Widening.**"]—See *Joseph* v. *The City of Montreal*, Q.R. 10 S.C. 531, ante, col. 233.

"**Without Colour or Right**"]—See *Moore* v. *Gillies*, 28 Ont. R. 358, ante, col. 185.

"**Year.**"]—See *Crothers* v. *Monteith*, 11 Man. R. 373, ante, col. 199.

WORKMEN'S UNION.

Rules of Association—Interference with Non-union Workmen — Illegal Combination.] — A workmen's union, one of the rules of which prohibits members from working in any place where non-members are employed—without, however, imposing any penalty for breach of the rule except the loss of beneficial rights in the society—is not an illegal association, and does not constitute a conspiracy against workmen who are not members.—Workmen who, without threats, violence, intimidation, or the use of other illegal means, quit work because a non-union workman is employed in the same establishment, incur no responsibility towards the latter.—Where a non-union workman quits his work voluntarily, notwithstanding an intimation from his employer that he is at liberty to continue thereat, he suffers no damage recoverable at law. *Gauthier* v. *Perrault*, Q.R. 6 Q.B. 65, reversing 10 S.C. 224 and restoring C. 6 S.C. 83. Affirmed by Supreme Court of Canada, February 16th, 1898.

WRIT.

Alteration—Return Day—Nullity.]—Changing the return day of a writ before it is signified is not a cause of nullity. *Mignier* v. *Laurin*, Q.R. 10 S.C. 254.

And see PRACTICE AND PROCEDURE, L.